

JUSTICE AS FETISH

Marx, Pashukanis, and the Form of Justice

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This article considers the relevance of the ideas of Soviet jurist Evgeny Pashukanis for debates about the relationship between Marxism and justice. In particular, it employs these ideas as a criticism of those who seek to supplement Marx's critique of capitalism with liberal theories of justice, paradigmatically those of John Rawls. Pashukanis's analysis of the legal form as a kind of fetish, arising on the basis of capitalist relations of production, opens up the possibility of a similar criticism of theories of justice. This involves more than just the familiar critique that such theories are ideological; Pashukanis suggests an approach that recognises the practical effectiveness of theories of justice while also recognising their limits from the perspective of radical critique. This new approach allows for a better understanding of how theories of justice might form part of radical theory and practice today.

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Introduction

In 1847 Karl Marx and Friedrich Engels won positions and achieved influence with a small propaganda group known as the League of the Just. One of their first acts was to change this name to the Communist League, with the reasoning that “we are not distinguished by wanting justice in general – anyone can claim that for himself – but

by our attack on the existing social order and on private property.”¹ Almost 30 years later, Marx expresses similar ideas in the *Critique of the Gotha Programme*, re-asserting his suspicions of justice and those who claim to act in its name. Yet Marx fought for a better world, and inspired generations after him to do the same, and many have done it precisely in the idioms of social justice – condemning the existing state of affairs as unjust, and insisting on the possibility of an alternative. This has given rise to a complex, and often fraught, debate about the role of ideas of justice within Marxism.

This article presents the case for a particular understanding of notions of justice from a Marxist perspective. In part, this is intended as a critique of those who suggest a dialogue or fusion between a Marxist analysis of capitalism as an economic form and liberal theories of justice, paradigmatically those developed by John Rawls in *A Theory of Justice* and *Justice as Fairness*.² These thinkers, for good reason, see it as being an urgent task to complement Marx’s insights into capitalism as a system of economic domination and exploitation with the principles of justice that would govern a just alternative. Without ideas of justice, it is argued, any attack on the existing social order rings hollow – leaving only an economic analysis, without normative force. Even more importantly, it is argued that in failing to articulate principles by which capitalism could be condemned as unjust, Marx also failed to articulate what would make communism *just*, and thus left his alternative horribly unspecified. If that was ever justified, the argument goes, after the events of the 20th century it cannot be any longer.

As an alternative to these positions, I offer an argument rooted in the work of the Soviet legal theorist Evgeny Pashukanis, who developed a critique of the legal form. In a sense, this can be seen as re-asserting some of Marx’s own arguments, but I argue Pashukanis’s approach grants a richer perspective from which to consider both the theoretical and practical value of the language of justice. Understanding the form of justice as analogous to the legal form helps recognise both its significance and its limits. While this may not necessitate an abandonment of the language of justice tout court, it does require a recognition of its roots in commodity producing society and a deep awareness of its limits.

The Marx and Justice Debate

The debate about Marx’s attitude to justice is longstanding and wide-ranging, with clearly defined views on all sides.³ Although often conflated with it,⁴ this is a subset of a broader debate about Marx and morality, sparked by Marx’s famous hostility towards

¹ Karl Marx and Friedrich Engels, “Circular of First Congress to Members, June 9, 1847,” in *Marx/Engels Collected Works*, Vol. 6 (London: Lawrence & Wishart, 1976), p. 589.

² Two recent examples of such thinkers are Alex Callinicos, *Resources of Critique* (London: Polity, 2006); and Jeffrey Reiman, *As Free and as Just as Possible: The Theory of Marxian Liberalism* (London: Wiley Blackwell, 2012).

³ The two canonical texts on either side are probably Allen W. Wood, “The Marxian Critique

the language of ethics and morality in favour of systemic or “scientific” criticisms. While there are various reasons for this reluctance to employ the language of ethics, on the question of justice and rights Marx is quite specific. He sees such questions as tied closely to the economic structure of society, asserting famously that “right can never be higher than the economic structure of society and its cultural development conditioned thereby.”⁵ The core of this view is summarised in the following passage from *Capital Vol. III*:

The justice of transactions between agents of production consists in the fact that these transactions arise from the relations of production as their natural consequence. The legal forms in which these economic transactions appear as voluntary actions of the participants, as the expressions of their common will and as contracts that can be enforced on the parties concerned by the power of the state are mere forms that cannot themselves determine this content. They simply express it. The content is just so long as it corresponds to the mode of production and is adequate to it, it is unjust as soon as it contradicts it.⁶

Thus, according to Marx, “slavery, on the basis of the capitalist mode of production, is unjust; so is cheating on the quality of commodities,” but capitalism itself is not. The point here seems to be that while certain kinds of activities that happen to take place within capitalism can be denounced as unjust because they violate its norms, capitalist production relations themselves are immune to such criticism.

This rejection of justice-based criticisms of capitalism can be construed in a stronger and a weaker sense. In the weaker sense, it says that *capitalist* standards of justice are inadequate to criticising capitalism, that from the point of view of capitalist relations of production it makes no sense to denounce capitalism. This leaves open the possibility that from the point of view of an alternative (not yet existing) economic system capitalism can be considered as unjust, just as slavery is unjust from the point of view of capitalism. On this reading, however, Marx does not really give us any reason to not criticise capitalism as unjust, so long as we are clear by which standards and from which standpoint we are

of Justice,” *Philosophy and Public Affairs* 1 (1972), no. 3, pp. 244–282; and Norman Geras, “The Controversy About Marx and Justice,” *New Left Review* I, no. 150 (1985), pp. 47–85.

⁴ Kai Nielsen, for example, suggests that anyone who condemns capitalism as exploitative or unequal “must agree [...] that capitalism is indeed, in the plain untechnical sense of the term, an unjust social system.” Kai Nielsen, *Marxism and the Moral Point of View* (Boulder: Westview Press, 1989), p. 170. I am doubtful that there is any “plain, untechnical” sense of justice, but in any case this misses the distinctive form of the theories under discussion here.

⁵ Karl Marx, “Critique of the Gotha Programme,” in *Marx/Engels Selected Works*, Vol. 3 (Moscow: Progress Publishers, 1970), pp. 13–30 (online at https://www.marxists.org/archive/marx/works/download/Marx_Critique_of_the_Gotha_Programme.pdf [accessed Oct. 25, 2018]).

⁶ Karl Marx, *Capital*, Vol. 3 (London: Penguin, 1993), p. 460.

criticising, namely that of an envisaged higher form of social organisation.⁷ Note here that this seems to rule out a strategy of “immanent critique,” according to which capitalism can be criticised for failing to live up to *its own* standards of justice. Such forms of argument are often seen as part of a Marxist or critical theory tradition, and there are certainly some reasons to think Marx thought in this way about certain aspects of capitalism – that it, for example, created needs in the working class that it was structurally unable to fulfil. However, when it comes to the language of *justice* specifically he seems to reject such a strategy, holding not just that such ideas are produced by capitalism, but that they can do nothing but uncritically reflect it. Defending this, however, requires demonstrating not just that they are produced by capitalism, but that they are formally constrained in certain ways that make them ill-suited to criticise it.

Thus, a stronger sense pursues the notion of form and content alluded to in the quotation above, suggesting that the problem is not merely specific standards of justice, but the form of justice itself. Communism will not merely just have different standards of justice, but it will be *beyond* justice. This position, however, is often seen as depending on one or another utopian commitment, either sufficient abundance to overcome the “conditions of justice” or a radical transformation of individuals that overcomes competing individual interests. For many, these commitments are unrealistic or unpalatable (a point I will return to below).

This leads to two broad interpretive positions: The first accepts Marx’s claims that capitalism is, in fact, perfectly just, and thus looks to develop other idioms and concepts with which to criticise capitalism (and perhaps to articulate alternatives).⁸ The second, which became dominant in Analytical Marxism and by extension much of Anglo-American political theory, follows G. A. Cohen’s famous suggestion that, “while Marx believed that capitalism was unjust, and that communism was just, he did not always realize that he had those beliefs.”⁹ This naturally leads to the conclusion that any rejection of the language of justice rests on a misunderstanding, and thus that there should be no barrier to developing a Marxist or Marxian account of justice in order to criticise capitalist society.

With this task in mind, it made sense to turn from an intellectual tradition that had expended little energy discussing the precise configuration of a just society to one that

⁷ This, however, raises the question of how we know what such higher standards are prior to living in such a society. It might be argued that since we cannot yet know the standards of a higher (communist) justice, we cannot use them to criticise capitalism. I think this position has merit both as an interpretation of Marx and in its own right, but it is not directly relevant to my purpose and I will not defend it here.

⁸ See, e.g., Allen W. Wood, *Karl Marx* (London: Routledge, 2004).

⁹ G. A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995).

had done little else. Rawls's theory, first published in 1971, provides the framework for a vast and interminable debate about the precise principles that would govern a just society. While many disagree with both his specific principles and the methodology by which they are derived, his work provides the touchstone and form for a great deal of this discussion. In particular, Rawls can be seen as the initiator of a broad paradigm in which discussions of justice took a specific and narrow form. Speaking of a broad paradigm in this sense inevitably invites objections and risks failing to do justice to the various specificities and debates within it. Indeed, while Rawls can be seen as its initiator, many such theories have moved some distance from his original intent. Some of these differences matter, and will be addressed further below, but there remain some importantly shared features that make it possible to talk of a shared structure or form. In particular, such theories are distributive – representing subjects as recipients of their fair share of social goods (whether broadly or narrowly defined)¹⁰ – and tend to rely on a more or less ideal conception of a just alternative which is used to both guide political action and to assess existing societies.¹¹

It is a feature of many such theories that, were they fully realised in contemporary society, they would result in something very different from what we have today. Nonetheless, this article will argue that these formal features remain, as Marx put it, constrained by the narrow horizon of the bourgeois right. In order to do that, I will turn to the ideas of Pashukanis, who attempted to develop and understand those limits through an analysis and critique of the legal form.

The Form of Justice

Evgeny Pashukanis was a Bolshevik activist and legal theorist in the early days of the Soviet Union.¹² In 1924 he published his *General Theory of Law and Marxism*, which formed the basis of an ambitious attempt to develop a general theory of law, against what he took to be various one-sided accounts both in and outside of the Soviet Union. Initially playing a significant role in the new Soviet state, he rose to the position of Vice-President of the Communist Academy and compiled the *Encyclopedia of State and Law* alongside long-time collaborator Pyotr Stuchka. However, he gradually found

¹⁰ Norman Geras, for example, suggests extending it to “cover the generality of social advantages, especially the relative availability of free time, time, that is, for autonomous individual development.” Geras, “The Controversy About Marx,” p. 74.

¹¹ For various positions on the relationship, see Laura Valentini, “On the Apparent Paradox of Ideal Theory,” *The Journal of Political Philosophy* 17 (2009), no. 3, pp. 332–355; Zofia Stemplowska, “What’s Ideal About Ideal Theory,” *Social Theory and Practice* 34 (2008), no. 3, pp. 319–340; A. John Simmons, “Ideal and Non-Ideal Theory,” *Philosophy & Public Affairs* 38 (2010), no. 1, pp. 5–36.

¹² See Michael Head, “The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism,” *Canadian Journal of Law and Jurisprudence* 17 (2004), no. 2, pp. 269–294.

himself on the wrong side of the Stalinist orthodoxy, eventually being executed as a Trotskyite saboteur in 1937. The specific reasons for his decline and demise are not entirely irrelevant to this discussion, and I will return to them later.

In the General Theory, Pashukanis's intention was to do for the law what Marx had done for economics.¹³ In particular, his intention was to "to analyse the fundamental definitions of the legal form in the same way that political economy analyses the basic, most general definitions of the commodity-form or the value form."¹⁴ Just as the commodity was the cell-form of capitalist society, according to Pashukanis, the legal subject was the cell-form of law in general. Indeed, he went deeper than this. At the heart of his theory is the idea that "*the logic of the commodity is the logic of the legal form.*"¹⁵

For him, law as such arises on the basis of the isolation and opposition of interests in society. If there were no such conflicts, there would merely be technical regulation, not legal regulation. He gives the example of a doctor, for whom there exists a set of rules and regulations of treatment which should be applied and respected. These regulations, however, are not legal, and the lawyer has no place in them. "His role begins at the point where we are forced to leave this realm of unity of purpose and to take up another standpoint, that of mutually opposed separate subjects." From this point onwards, the doctor and patient appear as subjects with rights and duties, and the question is no longer a practical technical question of what works in treatment, but a formal, legal question of permissibility. This subject, possessing rights and enabled to make claims on the basis of these rights, is the basic form of law itself. Moreover, in a society whose organising principle is commodity exchange – that is, where all commodities are produced for exchange and human beings are recognised primarily as bearers of commodities – this form becomes fundamental:

The subject as representative and addressee of every possible claim, the succession of subjects linked together by claims on each other, is the fundamental legal fabric

¹³ I do not intend to defend Pashukanis' analysis of law here, merely to elaborate it in order to draw out its relevance for theories of justice. For a thorough defence see China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill, 2005), Chapters 3 and 4. It is worth noting that Miéville cautions against identifying law with justice, both in Pashukanis' work and in general. However, this is partly because he has in mind a broader sense of justice than those at stake in this discussion, and is concerned with showing that Pashukanis's anticipated withering away of law does not therefore entail a rejection of the norms of justice. However, given the content of the chapter on law and morality, which I discuss later, such a clear demarcation of Pashukanis's themes seems to me untenable. Even if this were not the case, the structural similarities between the heavily juridical notion of the subject at stake in such theories and the subject in Pashukanis's work are too strong to ignore.

¹⁴ Evgeny B. Pashukanis, *Law and Marxism: A General Theory* (London: Pluto, 1983), pp. 49–50.

¹⁵ Miéville, *Between Equal Rights*, p. 78.

which corresponds to the economic fabric, that is, to the production relations of a society based on division of labour and exchange.¹⁶

Thus, capitalism instantiates the fullest realisation of the legal form, generalising and completing it.¹⁷

In arguing this, Pashukanis draws clear connections with Marx's account of commodity fetishism. According to Marx, in a society where productive activity is governed by commodity exchange, the commodities themselves come to take on a particular significance, a life of their own. Production is organised not according to a particular plan or set of purposes, but on the basis of values determined by exchange on the market. Decisions about what, when, and how to produce become dictated purely by the value of commodities themselves. A concept of value arises as an attempt to equalise diverse human products and activities, to make possible exchange according to equivalent standards. This in turn gives rise to a concept of value as located in the commodities themselves. As I. I. Rubin puts it, "the fact that production relations are not established only *for* things, but *through* things [is] what gives production relations among people a 'materialised,' 'reified' form, and gives birth to commodity fetishism, the confusion between the material-technical and the social-economic aspect of the production process."¹⁸ Instead of appearing as co-operative individuals, we appear as individual possessors of commodities, and it appears to be the commodities themselves that motivate and animate the activity. And, in a sense, they do – these ideas are a reflection of the way the economy itself is organised.

However, while a real reflection of the exchange process, this commodity fetishism also serves to conceal the true nature of production relations. By making the economy appear as a collection of interacting things rather than human relationships, it masks the character of these relationships. Thus fetishism arises from the nature of commodity production and exchange, and simultaneously conceals the true nature of that production. Crucially, fetishism itself takes on a sort of objective reality. It is not mere illusion. Marx corrects the Italian economist Galiani by pointing out that when he said "'value is a relation between persons' he ought to have added: a relation concealed beneath a material shell."¹⁹

Since fetishism takes on this objective reality, it cannot be dispelled merely through *demonstrating* the social nature of value. Marx insists that the theoretical analysis of

¹⁶ Pashukanis, *Law and Marxism*, p. 99.

¹⁷ Pashukanis presents his theory as partly a historical one, but Miéville is right to suggest that it should first and foremost be understood as "a dialectical-logical theory of the legal form, and [that] any implications for a historical narrative or theory are inchoate." Miéville, *Between Equal Rights*, p. 97.

¹⁸ Isaak I. Rubin, *Essays on Marx's Theory of Value* (Montreal: Black Rose Books, 1973), p. 29.

¹⁹ Karl Marx, *Capital*, Vol. 1 (London: Penguin, 1992), p. 167.

value “marks an epoch in the history of mankind’s development, but by no means banishes the semblance of objectivity possessed by the social characteristics of labour.”²⁰ It follows from this that ideas ought to be examined in their connection to material life and never assumed to have objectivity independent of it. But it also follows that such ideas will persist until there is a change in the material conditions of human life.

Pashukanis believes that the legal form can be seen as arising on substantially the same basis and possessing the same basic structure and function. Just as society organised on the basis of commodity exchange requires a standard of value by which diverse human beings, their activities, and their products can be compared and measured, it also requires a concept that relates human beings, as willing agents, to those products and to each other. For Pashukanis, this concept is the legal subject, which arises co-extensively with the concept of value:

Just as in the commodity, the multiplicity of use-values natural to a product appears simply as the shell of value, and the concrete types of human labour are dissolved into abstract human labour as the creator of value, so also the concrete multiplicity of the relations between man and objects manifests itself as the abstract will of the owner. All concrete peculiarities which distinguish one representative of the *genus homo sapiens* from one another dissolve in the abstraction of man in general, man as legal subject.²¹

Thus, for Pashukanis, commodity production results in the highest development of the legal form as such – the completely abstract legal subject who “acquires the significance of a mathematical point, a centre in which a certain number of rights is concentrated.” The formal equality of these “distinct and different individuals is in exact homology with the equalisation of qualitatively different commodities in commodity exchange, through the medium of abstract labour (the stuff of value).”²²

Chris Arthur summarises this argument as follows:

While things rule people through the ‘fetishism of commodities,’ a person is juridically dominant over things because, as an owner, he is posited as an abstract impersonal subject of rights in things. Social life in the present epoch has two distinctive and complementary features: on the one hand human relationships are mediated by the cash nexus in all its forms, prices, profits, credit-worthiness and so on, in short all those relationships where people are related in terms of

²⁰ *Ibid.*

²¹ Pashukanis, *Law and Marxism*, p. 113.

²² Miéville, *Between Equal Rights*, p. 88.

things; on the other hand we have relationships where a person is defined only in contrast to a thing – that is to say as a subject freely disposing of what is his. The social bond appears simultaneously in two incoherent forms: as the abstract equivalence of commodity values, and as a person's capacity to be the abstract subject of rights.²³

This structure also, according to Pashukanis, necessitates the growth of an external, third party authority to mediate between individual legal subjects, namely a state:

Effective power takes on a marked juridical, public character, as soon as relations arise in addition to and independently of it, in connection with the act of exchange, that is to say, private relations par excellence. By appearing as a guarantor, authority becomes social and public, an authority representing the impersonal interest of the system.²⁴

Commodity producing society requires people represented as autonomous wills, capable of freely disposing of what they produce and own. Therefore, “coercion as the imperative addressed by one person to another, and backed up by force, contradicts the fundamental precondition for dealings between the owners of commodities.” This is because within the act of exchange itself coercion can only appear as the act of one or other parties to the exchange, and thus “subjection to one person, as a concrete individual, implies subjection to an arbitrary force.”

That is also why coercion cannot appear here in undisguised form as a simple act of expediency. It has to appear rather as coercion emanating from an abstract collective person, exercised not in the interest of the individual from whom it emanates... but in the interest of all parties to legal transactions.²⁵

Thus while accepting that a state of some kind is a crucial part of the legal form, Pashukanis rejects the idea that the state itself gives rise to law. Rather, the state issues from the development of the legal form.

In the most challenging, and least complete, chapter of the *General Theory*, Pashukanis attempts to extend this analysis to a criticism of morality in general. Here he extends the notion of abstractly identical bearers of rights before the law to the idea of equal moral worth more generally: “Man as a moral subject, that is as a personality of equal worth, is indeed no more than a necessary condition for exchange according to the

²³ Chris J. Arthur, “Editor’s Introduction,” in Pashukanis, *Law and Marxism*, pp. 9–32, here 14.

²⁴ Pashukanis, *Law and Marxism*, p. 137.

²⁵ *Ibid.*, p. 150.

law of value.”²⁶ This “moral personality” is, alongside the egoistic subject and the legal subject, one of the “three most important character masks assumed by people in commodity-producing society.”²⁷ Corresponding to this conception of moral personality is a conception of moral law which both stands above individuals in order to regulate them and “penetrate the soul of every commodity owner.” This Pashukanis locates in Kant, suggesting that “the Kantian ethic typifies commodity-producing society, yet at the same time it is the purest and most consummate form of ethic there is.”²⁸ Yet the fact that Kant’s theory is the most consummate form only shows the deficiencies of the form itself, since Kant’s various antinomies presuppose, rather than resolve, isolation and social tension. Rather, just as the commodity form possesses a twin in the legal form, it also correlates with a particular ethical or moral form, and “the abolition of moral fetishes can only be accomplished in practice simultaneously with the abolition of commodity fetishism and legal fetishism.”²⁹

Illusion Beneath a Material Shell

Pashukanis’s analysis of law develops Marx’s idea that notions of “right” are bound up with specific forms of the organisation of economic life. He offers an account of how the legal subject and the form that builds around it can be seen as resting on a specific economic form of life. This is thus an argument about ideology in a classical sense: an analysis of a form of thought that emerges from and is intimately linked to a particular social practice, serving to systematically reinforce it and mask the real relations of domination that operate within it. Pashukanis only explicitly mentions justice in passing, in order to endorse Marx’s criticism of Proudhon,³⁰ but his belief that there can be moral fetishes alongside legal fetishes opens up the possibility of applying his ideas to a broader moral theory. In particular, the ideas associated with theories of justice seem particularly apt to be analysed in this way. Just as Pashukanis identifies strong structural similarities between the legal form and the commodity form, it is possible to do something similar with the form taken by theories of justice. Such an analysis is by its nature speculative and operates at a high level of generality, made even more challenging by the familiar challenges of saying anything very general and critical about Rawls’s intricate and complex theoretical architecture.³¹ Nonetheless, I will try

²⁶ *Ibid.*, p. 151.

²⁷ *Ibid.*, p. 152.

²⁸ *Ibid.*, p. 154.

²⁹ *Ibid.*, p. 158.

³⁰ “Basically, the concept of justice does not contain anything substantively new, apart from the concept of equal worth of all men which we have already analysed. Consequently it is ludicrous to see some autonomous and absolute criterion in the idea of justice.” *Ibid.*, p. 161.

³¹ Lorna Finlayson, *The Political is Political: Conformity and the Illusion of Dissent in Contemporary Political Philosophy* (London: Rowman & Littlefield, 2015), Chapter 2.

in this section to motivate the claim that ideas of justice are tightly bound up with the commodity form and to consider some of its consequences.

Rawls assumes a model of society as being made up of necessary social cooperation between people within a society that they can only enter by birth and leave by death, yet in which people have diverse and different goals and conceptions of the good life.³² Thus, people are in a sense thrown together and forced to agree on basic rules of social cooperation, and society therefore appears as a tissue of connected individuals, each pursuing their own individual goals (based on their own individual conception of the good life). While these subjects are real people, with specific powers, capacities, desires, and social locations, it is possible to represent them *abstractly*. Indeed, this is part of the function of Rawls's famous "veil of ignorance," which invites us to consciously set aside our particular characteristics in order to determine fair rules of social cooperation.³³ Although Rawls is clear that the veil of ignorance must operate alongside our considered intuitions about justice in a reflective equilibrium, not as a substitute for them, he also insists that this plays an important role in determining their fairness overall. His theory is thus a form of social contract (again, something he is explicit about), through which rules of social cooperation are *agreed* by rational agents operating within society.³⁴ These rules specify a set of rights, claims, and entitlements that regulate relationships between subjects and specify their share of particular social advantages and goods.

Here we already see the outlines of certain shared features with the legal form emerging. First, the subjects appearing as abstract bearers of claims, similar to Pashukanis's identification of the legal subject as a fixed, mathematical point, on which rights are overlain. Moreover, social cooperation is represented as arising on the basis of different and incommensurable goals, which must thus be mediated between by political institutions. Rawls insists that his theory is *political*, designed to apply only to what he calls the "basic structure" of society and not to operate in every specific interaction between subjects. There is an expectation that if the various institutional features are already designed in a way that instantiates justice then individual agents need not *themselves* consider the justice of their interaction.

Alongside the notion of subjects as bearers of rights and claims is a particular approach to the various goods over which they exercise these claims. Rawls calls these primary goods, including material wealth but also a wide variety of human powers, capacities, and relational features. These amount to "what free and equal persons (as defined by the political conception) need as citizens," and include basic rights and

³² John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), pp. 39–40.

³³ John Rawls, *A Theory of Justice: Revised Second Edition* (Oxford: Oxford University Press, 1999), pp. 15–9; Rawls, *Justice as Fairness*, pp. 80–96.

³⁴ Rawls, *A Theory of Justice*, p. 10–11; Rawls, *Justice as Fairness*, pp. 16–17.

liberties, freedom of movement, and the “social bases of self-respect.”³⁵ The principles of justice agreed to in the social contract “assess the basic structure according to how it regulates citizens’ share of primary goods, these shares being specified in terms of an appropriate index.”³⁶ These principles of justice first guarantee an equal set of basic liberties and fair opportunity, and then that any inequalities in other goods that do exist are arranged to the benefit of the worst off (the so-called difference principle). Primary goods, while diverse and social, have an objective character – their value does not depend on any specific goal, but are seen as necessary for all (or at least all rational) plans of life. Indeed, it is precisely this objective character that allows them to be measured in such a way that establishes who counts as “worst off” and the extent to which inequalities generate some benefit for them.

Moreover, Rawls’s theory involves a distinctive approach to subjects’ “natural” assets or endowments. Rawls assumes that there will be to a certain extent an uneven distribution of such natural abilities, and that some of these will be the result of greater opportunity to develop these abilities through education and so forth. The difference principle, however, involves treating the distribution of such endowments as “a common asset.”³⁷ Rawls insists that this should not be confused with treating the endowments *themselves* as a common asset (this is because his principle of basic liberty protects the integrity of the person as owner of their assets). Rather, the fact that some people have greater natural endowments should be approached in a way that encourages people to develop those endowments for the good of the worst off in society (including by giving them a greater share of goods to help them do so). This leads to probably the most substantive disagreement between Rawls and other theorists of justice (so called luck egalitarians), who suggest that those with lesser opportunities due to natural endowments should be directly compensated rather than those with greater being rewarded.

This approach to diverse human goods can be seen to map on to Arthur’s schema presented above: an abstract subject with no particular distinguishing features, which stands over a bundle of properties to which it relates to mainly as possessor. Indeed, within the subject-object schema, the more the subject is reduced to a narrow abstract point, the more its particular features and specificities appear on the object side of the schema. This seems to be a feature of Rawls’s account of primary goods – people appear as the possessors of a share of primary goods, which are both recognised as complexly social, the result of social cooperation, but also as potentially individually allocated and possessed. There is thus a movement here between representing human capacities as part of a social stock while also insisting they can be individually appropriated by subjects. This movement can be seen as reflecting the reality that under capitalism social

³⁵ *Ibid.*, pp. 58–59.

³⁶ *Ibid.*, p. 59.

³⁷ *Ibid.*, pp. 75–76; Rawls, *A Theory of Justice*, pp. 88–89.

activity can and does appear as individually owned, as a commodity, while simultaneously having an irreducibly social aspect. This, in turn, evokes the logic of commodity fetishism: First, people's social activity appears as something objectively measurable, to be parcelled up, distributed, and possessed by individual subjects. Second, that the relationships between people are represented and judged as quantitative relationships between things. As Iris Young puts it: "individuals are externally related to the goods they possess, and their only relation to one another that matters from the point of view of the paradigm is a comparison of the amount of goods they possess."³⁸

This way of representing human goods involves various potential ideological distortions, many of which should be familiar. Firstly, it seems to represent the relationship between subjects and their personal endowment as one primarily of possession, suggesting a model of self-ownership which is both contestable and historically intimately linked to notions of property of other people's bodies.³⁹ Second, it risks representing inherently social goods and capacities as individually possessable and quantifiable in a way that ignores their social and relational character. In particular, it risks drawing attention away from the specific social relations that help produce and sustain these goods. This calls to mind Marx's insistence in *Capital* that we descend from the sphere of freely contracting individuals, where "either in accordance with the pre-established harmony of things, or under the auspices of an omniscient providence, they all work together for their mutual advantage" to specific relations of exploitation and domination in the workplace.⁴⁰

The criticism that Rawls's ideas reflect the presuppositions of capitalist society are not new ones. Young charges that such theories "help forestall criticism of relations of power and culture in welfare capitalist society... reinforce domination and oppression, and block the political imagination from envisioning more emancipatory institutions and practices."⁴¹ Alasdair MacIntyre suggests that "Rawls equates the human self with the liberal self in a way which is atypical of the liberal tradition only in its clarity of conception and statement,"⁴² while G.A. Cohen suggests that in Rawls "the politics of liberal (in the American sense) democracy and social (in the European sense) democracy rises to consciousness of itself."⁴³ Indeed, Rawls does not really deny this. He is quite explicit that he sees his principles as arising based on reasoned reflection on the considered

³⁸ Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), p. 18.

³⁹ See Anne Phillips, *Our Bodies, Whose Property?* (Princeton: Princeton University Press, 2013).

⁴⁰ Marx, *Capital*, Vol. 1, p. 280.

⁴¹ Young, *Justice*, p. 75.

⁴² Alasdair MacIntyre, *Whose Justice, Which Rationality?* (London: Bloomsbury Academic, 1988), p. 337.

⁴³ G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), p. 11.

intuitions of those living within modern democratic states, not that they should be seen as universal principles applied to any and all societies. Thus, there is a sense in which the ideology criticism is uncontroversial: The principles of justice are what emerge from considered reflection on a liberal constitutional order, dominated by notions of subject, property, and right. They are precisely the abstracted and idealised form of existing property relations, and we should thus be unsurprised they are ill-suited to criticising them.

Nonetheless, Rawls does suggest that his principles are compatible with both a property-owning democracy and a planned socialist economy, insisting that they merely offer a “conception of justice in the light of which, given the particular circumstances of a country, those questions can be reasonably decided.” It is possible to question how deep this commitment is and, as Lorna Finlayson does, to highlight the potentially ideological role of this attempt to efface potentially deep ideological differences.⁴⁴ Moreover, it also pays to examine precisely what Rawls means by “socialism” in this context, since Rawls is also quite clear that his approach is incompatible with Marx’s communism.⁴⁵ In *Theory of Justice*, socialism is distinguished by the scope and size of the “public sector” as it is “measured by the fraction of total output produced by state-owned firms and managed either by state officials or by workers’ councils.”⁴⁶ Moreover, while Rawls sees the importance of certain public goods that cannot be privately possessed, he also sees their very existence as depending on the existence and authority of state coercion, something which is “a normal condition of human life in this case.”⁴⁷ This mirrors the pattern that Pashukanis identifies, which invokes the state as a third element that both arbitrates between competing claims and possesses claims of its own. This focus on state ownership, however, can be seen as having two ideological effects: First, a focus on ownership alone appears subject to a classically Marxist critique about drawing our eyes away from specific relations of domination within the workplace and industry; the apparent neutrality between management by state officials and workers’ councils seems instructive here. Second, it rules out entirely the idea that certain goods might be subject to other potential models of use and ownership – appearing perhaps as collective or common property – without the regulation of a coercive agency.

In this context, it is worth noting that Cohen’s own approach to questions of justice is presented precisely in terms of a Marxist challenge to Rawls on the question of the state.⁴⁸ Cohen wants to take seriously the idea that the state might wither away and that there might be no special separation between state and society; as a result, he calls for

⁴⁴ Finlayson, *The Political is Political*, Chapter 2.

⁴⁵ Rawls, *Justice as Fairness*, pp. 176–178.

⁴⁶ Rawls, *A Theory of Justice*, p. 235.

⁴⁷ *Ibid.*, p. 237.

⁴⁸ Cohen, *Rescuing Justice*, pp. 1–2.

deeper egalitarian principles. In particular, he rejects the idea that justice itself should be sensitive to particular facts about current society: “the principles at the summit of our convictions are grounded in no facts whatsoever.”⁴⁹ While Rawls believes justice should be sensitive to the constraints of what is possible, Cohen sees what is just and what is possible as two distinct questions. The task is thus to elaborate what is just, independent of what appears possible in the here and now. However, while Cohen intends this to be liberating and to enable deeper criticism, his conception of justice still rests on distributive principles (albeit more deeply egalitarian ones) that see people as bearers of claims over goods. Moreover, as Elizabeth Anderson has argued (in defending Rawls), Cohen’s approach tends to present justice as a particular kind of end state pattern to be aimed at rather than as something that exists between individuals, and thus to invoke a third person standard for justification.⁵⁰ To this extent, it seems even less sensitive to concrete social relationships between people and even more dependent on a regulating agency that aims at achieving this end state.

Pashukanis’s work pushes us in the opposite direction to Cohen. He suggests identifying the problem not with the particular content of the principles, but with their form. If this is the case, however, then simply developing more idealised, less “fact sensitive” principles is unlikely to provide an adequate alternative. However, Pashukanis also suggests another important point. If such ideas are represented as *fetishes*, then they cannot merely be abandoned or wished away. Rather, they are “concretely effective principles” that are capable of motivating and regulating social action.⁵¹ If law were merely ideas generated by the powerful to justify the existing state of things, it would be impossible to explain either why it takes the particular form it does (that is, as law, rather than some other bundle of concepts and practices), and why it is *effective* at managing social relations. Thus while law is ideology, it is not *mere* ideology, and understanding this is crucial in understanding how to approach it.

Grasping Fetishes by the Root

In the quotation from *Capital Vol. 3* that I referred to above, Marx stresses that the form of justice renders us unable in some crucial ways to criticise the actual content of capitalism. If the Pashukanis inspired argument I have developed here is correct, then he is right, but this remains only half the story. For it is also the case that the form is not something we can simply abandon or see through. It is a fetish that has to be both grasped and uprooted. It is useful here to return to the context in which Pashukanis was writing. The main target of his argument is those who sought to paint bourgeois

⁴⁹ *Ibid.*, p. 229.

⁵⁰ Elizabeth Anderson, “The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians,” *Canadian Journal of Philosophy*, Supplementary Volume 36 (2010), pp. 1–23.

⁵¹ Pashukanis, *Law and Marxism*, p. 40.

law as “purely” ideological, as a set of ideas whose role was to legitimise capitalist production relations but which reflected nothing in reality. This was part of a polemic with those who believed that, after the revolution, it was possible and necessary to replace bourgeois law with a higher, proletarian law. For Pashukanis, while such a demand appeared to be “revolutionary par excellence,” it in fact “proclaims the immortality of the legal form, in that it strives to wrench this form from the particular historical conditions which had helped bring it to full fruition, and to present it as capable of permanent renewal.”⁵² Rather, just as under communism the form of value, and the state, will wither away, so will the legal form. It follows, then, that to the extent that law persists, it is bourgeois law, not proletarian law.

It is important to be clear about what this argument is saying. While it *is* saying that the legal form will wither away, it is *not* saying that it ought to, or even could, be abandoned instantly. Indeed, what Pashukanis is calling for is recognition and acknowledgement that these forms are historically specific. They will persist so long as the conditions that give rise to them persist, and under these conditions “the proletariat may well have to utilise these forms, but that in no way implies that they could be developed further, or permeated by a socialist content.” However, in order to do this,

the proletariat must above all have an absolutely clear idea – freed of all ideological haziness – of the historical origin of these forms. The proletariat must take a soberly critical attitude, not only towards the bourgeois state and bourgeois morality, but also towards their own state and their own morality. Phrased differently, they must be aware that both the existence and the disappearance of these forms are historically necessary.⁵³

It is positions such as this one that put him on a collision course with Stalinism.

We are, of course, a long way from where Pashukanis was when he wrote these words. We exist not in a society consciously attempting to transcend capitalism and replace it with an alternative, but in societies dominated by stuttering, but still rampant, forms of capitalism. The idea of either the value form or the legal form withering away seems remote. Nonetheless, Pashukanis’s approach might inform radical movements today. In particular, we might approach ideas of justice the way that Pashukanis approached law – to use them where appropriate but also to grasp their historically specific character and to confront them with a “soberly critical attitude.” Recognising their fetish character does not involve dismissing them all together, but it does mean seeing them in their specific context as reflecting and potentially reinforcing elements of existing society. One important way to do this is to present proposals that adopt the language and form

⁵² *Ibid.*

⁵³ *Ibid.*, p. 160.

of justice not as part of generalised theories of justice, but as specific proposals and demands. These might play the role that Marx suggests for the various proposals offered in *The Communist Manifesto* for progressive taxation, free education, nationalisation, etc. These clearly fall short of the kinds of principles that would actually be necessary to regulate a communist (or even socialist) society, but they nonetheless “in the course of the movement, outstrip themselves, necessitate further inroads upon the old social order, and are unavoidable as a means of entirely revolutionising the mode of production.”⁵⁴ These proposals have, as it were, a foot in both camps: they adopt and accept to a certain extent the form and logic of contemporary property relations, while at the same time pointing beyond them, creating the conditions for a broader transformation.

Two examples might help flesh this out. First, in the face of precarious employment and growing inequality, there have been growing demands for a minimum basic income, guaranteed by the state. This demand appears clearly rooted in the terms and language of distributive justice, based on alleviating inequality and securing conditions for the worst off. Moreover, it might be criticised as depending upon and empowering a state – and indeed, many of the concrete proposals for such incomes also include mechanisms of control and discipline for its recipients. Yet this demand is also clearly capable of inspiring many. A more critical approach might be capable of supporting such demands, but also recognising their limited character: What agency will actually enforce this income? How will the amount be determined? Under what controls of democratic accountability can it be placed? In this way both its radical potential and its limits might be better unmasked. A second example might be the recent revival of ideas of “the right to the city.” Such a demand might appear as a narrow, individualistic right, exercised by individual subjects, and if it were merely this, it would be of limited value. However, in posing fundamental questions of power, democracy, and people’s relationship to their built environment, it also can appear as something more expansive which, in turn, presents a deeper challenge to existing structures of ownership and governance, forming, as David Harvey puts it, “a way station” on the road to something else.⁵⁵

Once concern might be that such proposals, if presented as merely provisional or artificial, might be weakly motivating. If people are encouraged to see principles of justice as temporary, why would they campaign for them? Far from being “concretely effective” such principles will fail to inspire support. There are two responses to this. Firstly, if the analysis offered here is correct, then this is the *only* appropriate attitude to take – anything else is to reinforce illusions in a way that is at best dishonest and at worst counterproductive. Secondly, however, it is far from clear that partial and temporary proposals or demands cannot motivate, given the right circumstances. In-

⁵⁴ Marx, *The Communist Manifesto* (London: Penguin, 1985), p. 104.

⁵⁵ David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (London: Verso, 2012), p. xviii.

deed, in responding to specific grievances and ills, such proposals are often capable of mobilising broader bases of support than abstract claims of justice. History contains plenty of examples of movements where people were capable of mobilising behind a specific proposal or reform while simultaneously recognising it as a mere step in a broader project of emancipation.

What broader emancipation? Here it is important to stress a difference between Pashukanis's treatment of the legal form and his treatment of the moral form. While Pashukanis is clear that his critique of the legal form is a critique of law as such that will later be replaced by something analogous to technical regulation in the context of shared social goals, he is more guarded when it comes to ethics. In a footnote, he says:

Does this mean, then, that "there will be no morality in the society of the future"? Not at all, if one understands morality in the wider sense as the development of higher forms of humanity, as the transformation of man into a species-being (to use Marx's expression). In the given case, however, we are talking about something different, about specific forms of moral consciousness and conduct which, once they have played out their historical role, will have to make way for different forms of the relationship between the individual and the collective.⁵⁶

In talking in such vague terms about a changing relationship between the individual and the collective, Pashukanis leaves himself open to the charge that he depends on a utopian ideal of a fully social individual whose interests never conflict with either other members of society or society itself.⁵⁷ Indeed, his contemporary Karl Korsch suggests that he would be more consistent suggesting the disappearance of ethics entirely.⁵⁸ Given Pashukanis's (over)enthusiasm for planning and technical regulation, it is possible that this is what he thought. However, these remarks leave open another strategy, namely an attempt to develop morality in a different form, perhaps presupposing social co-operation rather than social division. These forms will only become meaningful when they reflect real alternative forms of life that emerge within and beyond the existing system.

This can thus be seen as operating a kind of two-track strategy. As well as adopting demands and proposals that take the form of justice, it is necessary to develop and show awareness of alternative approaches to morality that might emerge that are not constrained by this form. Pashukanis's criticism of Kant and gestures towards an alternative are strikingly similar to those offered by MacIntyre in his early attempts at a Marxist treatment of morality, which have more recently been developed by Paul

⁵⁶ Pashukanis, *Law and Marxism*, p. 161.

⁵⁷ See in particular Cohen, *Self-Ownership*, for criticisms of this type.

⁵⁸ Karl Korsch, "Appendix: An Assessment," in Pashukanis, *Law and Marxism*, pp. 189–195, here 190–191.

Blackledge.⁵⁹ In these works, MacIntyre suggests that the experience of “human equality and unity” that develops through working class solidarity and struggle makes it possible to “acquire a new moral standpoint.” This is a standpoint from which people come to recognise the ways in which individual and collective desires coincide, in which people “discover above all that what they want most is what they want in common with others.”⁶⁰ For MacIntyre, as it seems to be for Pashukanis, this is not a perspective beyond morality but a new form of morality. Whether or not the norms that arise from this are ultimately labelled “justice,” they are likely to have very different formal features from the theories discussed above where justice appeared as a form inseparable from juridical norms. Moreover, this is not a perspective that can be adopted through introspection – it is one which emerges with a given form of life. It follows, therefore, that it is easier to say what it is not than what it is, to outline its form negatively rather than specify its content.

Is this aspiration utopian? Returning to Rawls, we can consider this question in light of his notion of the circumstances of justice, which have an objective and subjective form. The objective circumstances concern the fact of “moderate scarcity and the necessity of social cooperation for us all to have a decent standard of life.”⁶¹ While it likely depends on a high level of social development and a broad availability of material resources (such as actually exists in the modern world), it is not so clear that it requires an absolute overcoming of scarcity. Even limited goods might still be held and used according to social relationships other than individual appropriation. However, this does involve transcending what Rawls calls the “subjective circumstances” of justice, that “citizens affirm different, and indeed incommensurable and irreconcilable... comprehensive doctrines in the light of which they understand their conception of the good.”⁶² If the analysis presented here is correct, this is not a natural constraint but a specific product of a society based on commodity production and exchange. What Pashukanis points to is the historical specificity of certain key forms of thought, and the possibility that they might be displaced by (and only by) the developments of alternative forms of social cooperation. Moreover, as MacIntyre and Blackledge both argue in different ways, historical examples exist of people who have, through shared experiences of struggle and solidarity, come to shared, or at least reconcilable, conceptions of the good. That such experiences are not fleeting or utopian but rather might form the basis of an alternative form of life seems in my opinion to be a vital part of the Marxist wager on the future.

⁵⁹ See Paul Blackledge, *Marxism and Ethics: Freedom, Desire, and Revolution* (New York: SUNY, 2012); and Alasdair MacIntyre, “Notes from the Moral Wilderness,” in Paul Blackledge and Neil Davidson (eds.), *Alasdair MacIntyre’s Engagement with Marxism* (Chicago: Haymarket, 2009), pp. 45–68.

⁶⁰ *Ibid.*, p. 65.

⁶¹ Rawls, *Justice as Fairness*, p. 84.

⁶² *Ibid.*