

JNH..WSR..87(PERSONAL-NO COPIES)

Moscow, USSR,
February 17, 1937.

Dear Mr. Rogers;

The notes you have dropped here and there are providing me with a hint of where you have been going, and Mr. Brodie and Prof. Harper have inadvertently added a few details in writing about other matters. I should like to be along with you, as a motor trip through the Southwest sounds very inviting.

You are good to be so enthusiastic about my first article. As a matter of fact it is very far from the type of thing I hope eventually to be able to prepare, but it has done what I wanted--it has acted as a test balloon which many persons here have read and to which many have suggested changes in form and even in content. So when eventually the first part is Chap. I of the general review which we planned last summer, it should be in a more understandable and more precise form.

Although it is still some months ahead of the problem, it is not too early to raise the question of June. You are aware that usually the Institute closes in May, and with that in mind I had hoped to be able to take the trip home through Siberia. This year for the first time there are to be given Government exams, one each Soviet week for the five weeks in June, the last being June 29th. ~~Although~~ It is not clear at the present time, and will probably not be clear for months to come whether a foreigner would be permitted to take these exams. The issue has already been raised with my Director, but he does not yet seem to wish to express an opinion either way.

It is expected that the exams will be extremely comprehensive, covering material we have and have not covered during the past three years. Whether I could pass them is a question, although not decisive for me, as if I have to pass, well then somehow I can try, anyway. The Institute is giving me a ctf. anyway of the exams I have passed with them. These additional exams would only be repetitions (at least in titles) of courses already passed, ~~and~~ they would have the added prestige of being Government exams. Weighing these considerations, my immediate reaction is to try them, and with that in mind I have gone ahead and started raising the issue of taking them.

Departure from Moscow by June 29th obviously rules out a trip home through the Far East. The Besses suggest that summer travel out there is anything but pleasant. In addition I must think of next year. Should this be the last year, it

would be worth while to make the trip anyway in spite of dust and heat and fleas. But if I am to return I would no more reach San Francisco than I would have to rush across the continent for a week with my family and sail back again. That is not to my liking as I am not the hardy missionary type who goes off to the wilds and can close his mind to any memory or thought of home. Career is terribly important to me, but I never want to get like a wizened up Professor who has no friends but his books and his laboratory. I feel sure that you would not suggest such a program either, as the very usefulness of a man doing my type of work is to maintain his contactability so that he can spread by word of mouth what he has been learning. Few people ever read a printed article, and about all they do is cause people to think you are worth listening to when later you meet them in conversation.

When it comes to the question of another year, there are several elements involved. First is as to the permission to come back. Our original letter to Consul General Tolokonsky asked for three years. It was everywhere announced that this was a three-year study. In view of that fact permission must be raised as a new question when this extension is asked. I have already written a memorandum to the Comm. of Foreign Affairs, suggesting that there might be a fourth year and asking for their reactions. I shall know them probably in a month or so.

Assuming permission could be gotten, my relations to the Institute arise as the next question. As you know we spoke of three years from the very start. Last summer you hinted at a fourth year, and in your last letter you mention it definitely. You are undoubtedly aware that I am anxious not to be a perpetual student, as many persons now laughingly call me. Some opportunities of practice have cropped up which would offer a pleasing variation in the work. Most of all I should like to work on in a line which could lead to teaching as well, but I am fully aware that I know nothing of teaching and might be a huge failure at it. In any event this could be worked out if the occasion demanded. They are items to be balanced against a fourth year, and the best route will have to be chosen with these factors in mind.

Not least of all I must refer to my resolution of celibacy taken at your suggestion during my work with the Institute. Originally it was easy for a comparatively short period of three years. But as the Marxist says, "Quantity changes quality", and this is particularly true when a fourth and perhaps more years are added. For a good many reasons marriage is the only relation of this nature I care to contract. You have been very much of a Father to me, and I feel sure that you can be certain that any marriage of mine would not be permitted to interfere with work. Those who know me know that that always comes first. Whereas I might stave off marriage for another year if I were to come back and start in in America, it is highly questionable whether I could possibly do it when returning here. The novelty and tremendous difficulties of the first two years

are almost gone. There is plenty of time now to think of other things. You know how I hate to think even of becoming a crotchety old batchelor like many I know and some we know in common. My value so far has been, I feel, that I am the most normal American boy. People don't want to listen to a man who has an axe to grind or who gives the impression of being wholly lost in his work. He grows old and dull before his time. With all these things in mind, I have come to the conclusion after, not months but a year of thinking over the problem that when my original promise of three years are up, I should ^{like} at least ^{to} be free. Whether I should immediately marry is another thing, but I want to know I can look around. Now I never dare do ~~so~~.

I recall most vividly of all our conversations, that concerning Mr. Bowman, and the discussion he had with the American Geographical Society as to being appointed for life and guaranteed an income. Let there never be a time when I feel that any one owes me a job! I should not want our Institute to keep me a moment longer than I am useful. I go when I am told, and I ask for nothing except your statement that I have not disappointed the Institute in the work I have already done. I want you and your advisers to consider the matter in the light of all that has been raised. You will know that I am only too willing to go on if that seems advisable, and will plan for that if nothing is forthcoming from the Institute as to a change. But if the good of the Institute demands that younger single men fill my place, I am ready tomorrow to step down, although I never could give up my interest in the future of the Institute and the men whom it chooses for its tasks.

Unfortunately the Ass't Director of VOKs with whom you talked last spring has retired to look after his health. I presume that it does not affect the policy of accepting further students from the Institute, but it means that one who knows all about it will be withdrawn from the group who do.

The warmest greetings to the Cranes with whom you no doubt now are, and may your trip bear good fruit.

Greetings and good wishes,



W.H.

Feb. 24, 1937

Dear John:

Here in California I have visited the University of California, Leland Stanford, California Institute of Technology, University of Southern California, University of California, Los Angeles Branch, and Pomona College. I seem to have located one or two men of the caliber we want for the Institute.

At several of the institutions I talked with Law School officials. In each instance the man wanted to know how the Law Institute is organized, how the students are selected, about the relation of the Institute to the courts, etc. Such questions are, of course, clear beyond my competency to answer. No doubt a detailed monograph on the subject would not only be welcome, but would have considerable influence on thought here concerning legal education.

A distinguished Chinese whom I met the other day said that the way to understand the present China is through a study of the newly developing law and through a study of the sciences. According to him, all the major sciences are developing rapidly in his country.

At the University of Southern California, I met an amazingly interesting person - Boris D. Morkovin. He was born near St. Petersburg; taken to Prague when young; studied under Masaryk; became a professor in the University there. For 12 years he usually walked home from the University with Benes. Morkovin knew John Crane in Prague. Now Morkovin teaches Cinema Art, etc. A good sort. Apparently friendly to U.S.S.R.

Had two visits, each of three or four days with Mr. and Mrs. Crane, who are very well and seem to be fully enjoying their winter at Palm Springs.

I am here in San Diego for a little visit with "Bob" Scripps. After one day in San Francisco, I start east but will not reach the New York office for three or four weeks as I plan to visit several more educational emporiums en route.

Cordial greetings,

Mosców, U.S.S.R.,
March 1, 1937.

Dear Mr. Rogers;

Of all Articles in the Bill of Rights in the new Constitution that granting the right to rest and leisure draws most comment in the daily press. New as it is in world Constitutions it attracts attention, which is increased by still another innovation in Constitutional drafting--the statement of the method by which the right is to be made a reality. In this case the section calls attention to the seven-hour day, the rest homes, and vacation with pay.

For any one who has travelled in the Crimea and the Caucasus the whole program of rest homes cannot be merely a mass of statistics in Pravda. But that is only to look at the buildings and see the places as a tourist. I had to go to one before I felt that I had really seen what it all meant. Only a short time ago the opportunity knocked when a friend included me on his ticket calling for a day in one of the many rest homes in the pine woods near Moscow.

Out of bed here in the city when it was still dark, off on the subway to catch the eight o'clock electric commuters' train, forty minutes ride in a car crowded with skiers and skaters, and we came to the little station near the end of the line. Most of our fellow passengers had dropped off at stops nearer town, so that we were nearly alone.

A brisk walk on the rutted road through the heavily laden giant pine trees brought us in fifteen minutes to the little huddle of houses which was to be our center for the day. Other huddles had been passed along the road into which fellow car mates had turned. A loud speaker tuned in on the Comintern station blared forth the reading of the morning's editorials in the city papers. It added the one touch of the city we had left behind. Following the welcoming sign pointing to the administration building we filed in to be met by the most cordial secretary, much like those who preside over gatherings up at Northfield conferences. Presenting our passes for which we had paid ten rubles we were given a day card with four slips to be torn off for the three meals and tea.

Back again across the yard to the dining hall building, nestling low in the pines with the smoke pouring from its kitchen pipe we burst in upon another secretary who announced us to the people who had already arrived or who had been staying at the home as a reward for superior work on their factory brigade. Breakfast of bright red salted salmon, kasha cakes, and coffee filled us up before we rushed out into the yard and across the yard to the recreation building to get acquainted. People were already pouring into the ski hut to find a pair of boots and some skis. Feeling that we had better share in the distribution before it might be too late we joined them, but were told with a grin that here at least there would be enough for every one.

By the time heavy clothes were on a young ski instructor swung up and asked who was ready for the day's run. Although every one is supposed to go as part of the program, one could stay behind. We were out to be put on our feet physically, so we took our place in the line and started off over the familiar flat Moscow countryside. Moscow's environs have few hills which is a blessing for me who find cross-country running enough for my occasional winter jaunts.

Through narrow little trails, up and over fallen logs and under branches hanging low with snow we hurried, until not a few began to hope for a halt. Five minutes was all we got, and then on down toward a little village far in the distance. The eight kilometer sign brought protest, and the nine rebellion, so that we persuaded the iron man out front to turn back. Luckily he did, as it was lunch time and two o'clock before we panted into our home stretch. What appetites we had! The borsch soup and boiled potatoes, stew, and the inevitable pink kiselle filled us up until sleep alone was possible.

Lucky it was that we did want to sleep for that was the next thing on the program. By that time my friends had become acquainted with the most charming girls and we were all off to the recreation house to be given a beach chair and the opportunity to sleep. I did succeed in dropping off in spite of the banter in our room, but soon the gramophone was going, and the girls pulled us out for a dance. Of course they thought all Americans were Arthur Murrays. Letters tell me that most of my former American classmates are regular members of his dancing school now, but my conservative Glee Club one-step of the late twenties hardly matches the precise counted steps the Russians have been learning.

The bell for tea broke it all up, and we scrambled for table places in the dining hall to sip our glass of clear Russian tea and crackers, but that was only an interim, for back we went afterwards for more dancing and some community singing. Soon it was seven and time to gobble supper of cutlets, potatoes, pudding and tea before slipping along the road to catch the electric train. To the tune of an accordian off in the woods we caught the train and were soon back in the subway joggling home with that comfortable feeling of having enjoyed a really first class day. Life in a rest home was no longer a mystery.

Greetings to you all,

JNH

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March 2, 1937

JOHN HAZARD
AMCONSULATE
MOSCOW (USSR)

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Hoyland

New Orleans, La

March 8, 1937.

Dear John:

During the past ten days I have been at Rice Institute, Houston; Louisiana State University at Baton Rouge and Tulane University here. At the two latter institutions I visited with law school officials. Everyone I talked with were interested with what you were doing and concerned with modernizing law school training. At both universities, I found men who appeared to be forward looking and eager to learn about what is going on in your "Law Institute".

Under separate cover I am sending you the reprint of an article which contains certain ideas that would not be frowned upon in Moscow.

One of the professors, who had read your Columbia Law Review article, said that what pleased him particularly was that you were so well informed that you wrote from an inside and not from an outside point of view.

Miss Condon writes from New York that Professor Knight of the University of Chicago, has asked for several copies of your article for use in one of his classes.

Cordial greetings,

Moscow, USSR.,
March 13, 1937.

Dear Mr. Rogers;

Democracy is one of the key words of the new Constitution. Few articles or talks fail to compare the democracy of the Soviet Union with that in bourgeois countries. Comparisons range from descriptions of Tammany Hall methods in America to explanations of a more subtle influence in the impregnating of English workers with bourgeois conceptions and ideals. Soviet writers point out that this pressure, whether it be open or disguised, makes possible the continuing in power of policies and officials representative of the bourgeoisie alone. Statistics are given to show that the factually unrepresented workers outnumber these bourgeois elements. Soviet orators explain that democracy in fact exists only within this dictatorial bourgeois minority who rule the majority composed of working and peasant masses.

In contrast to such a state of affairs, Soviet pamphlets point to the dictatorship of the proletariat as a dictatorship of the majority over the minority. During the early revolutionary stage the minority cannot hope for a democracy which will include them even juridically if not factually. The only democracy can be that within the working and peasant masses, and within the party which leads these masses as their teacher.

Even this democracy within the Party is not always observed as is explained by this week's directive from the Plenum of the Party. Although Party Rules have always called for election of Secretaries and Committees, the new directive calls attention to the fact that this rule has been very generally ignored. Zhdanov, Secretary of the Leningrad Party Committee, goes further in his speech at the Plenum to give scores of specific instances of this violation of democracy. The Party now demands that the rules be obeyed, and that democracy be reinstated in its highest form--the secret ballot. The directive calls for this correction of procedure as an essential forerunner to true democracy as provided for under the new Constitution.

This Constitution introduces throughout the country the principle of secret voting and equal electoral rights for all citizens. There were sceptics who read these provisions in the draft of last June who have been waiting to see what would be done to make these rights realities.

This week they begin to see an answer to their queries. The directive of the Party now makes the first step by reaching back to the heart of the whole electoral system, into the organs which under the Constitution alone have the right to nominate candidates for general elections to the Supreme Soviet and other governmental bodies.

Article 141 of the new Constitution provides that candidates be put forward by various organizations, including the Party, the Lenin Young Communist League, the Trade Union, and other public organizations. Elections of delegates to governmental bodies will take place on the basis of these lists of nominees. The method in which these organs might choose their nominees was left wholly unmentioned in the Constitution. Sceptics suggested that in the method of nomination lay the key to control and in consequence the test of the measure of real democracy which would exist. If voting on the organization's nominee were to be by show of hands, it did not seem improbable that candidates could be favorite sons. A review of the recent Party directive may throw light on this vital point.

As has been pointed out the Plenum of the Party now directs all Party groups to return to the observance of Party rules from which many groups are reported to have strayed. Except for elections to the Central Committee no elections have been secret within the Party, and in many cases there have not been even open elections for long periods of time. As men and women were withdrawn from Party Committees to be transferred to other regions for special work, their places were not filled by by-elections, but by appointment from above (cooption). This went so far that many secretaries of Party Committees were never elected, or if elected it amounted to little more than the ratification of an appointment from above.

The directive points out that such a system permitted the growth of intrigue in that deviationists could "pack" lower committees without giving the run-of-the-line Party members in these lower groups any chance to express their own opinion. It was found out later that the brake which might well have served to keep out deviationist appointees had been abolished. Previously the rank and file had proved good judges of sincerity and orthodoxy of persons whom they elected. Recent trials showed the extent of danger lurking in the appointive system, when high officials may fill responsible positions with friends and in some cases accomplices.

In an extensive revelation of abuses the order emphasizes the need for reinstating frequent secret elections within the Party. But it goes further in demanding that the

same principles be introduced in other organizations, the Lenin Young Communist League, and the Trade Unions. In this instruction lies a clue to the measure of democracy to come. If other elective positions are filled by the secret ballot method, it seems most probable that nominees for general elections will also be chosen in this way. Extensive democracy becomes more apparent as the choice of candidates is put on the basis of the secret ballot.

Not without preliminary preparation has this order come. After the assassination of Kirov in December, 1934, the great Party cleaning began which was destined to eliminate a goodly percentage of the membership. After the trial of the first Trotsky center of last August further checking of documents was carried out. In each case new revelations were made. Some disclosed persons who had fraudulently acquired papers and Party cards of members killed years ago in the civil wars. A change of domicile had served to cover up the whole false identity, and only a rechecking with friends of the deceased made possible the disclosure. Now that the ranks are cleaned and only trusted members remain the secret ballot may not be used as a tool of class enemies.

Party members tell of the changed feeling already apparent as secretaries realize that they are now wholly accountable to the members of their cell. Democracy means democracy, and the secretary who has lorded it over his comrades or who has fallen down on his job now knows what will be his lot some time between now and the end of May when all Party elections must be completed. Even the sceptics as to the future of democracy begin to say, "This is going farther than we expected."

After all that has been in other letters I hardly need remark that no Russian would ever suggest that this move opens the way for a potential return to capitalism. Democracy means democracy of the toilers. There is a major premise. Marxists believe that no class revolution can be brought about within limits of the ballot box. Democracy in any state can be no more than democracy within the confines of the class society represented by the ruling class. Marxists do not look for the evolution of a workers' state by means of the ballot box in bourgeois countries. That is why they ridicule the Socialist Party as crying fruitlessly in the dark. If evolution to another form of class society is not possible in bourgeois states, the Marxist sees no reason why one should expect to see in the toilers' state an evolution back to bourgeois capitalism by the route of the ballot box.

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JOHN HAZARD
AMCONSULATE
MOSCOW (USSR)

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STATE EXAMINATIONS IF PERMISSION OBTAINABLE STOP QUITE WILLING
MODIFY OR EVEN WAIVE RESTRICTION WILL WRITE SOON GREETINGS

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March 15. 1937 -

Dear Ben;

Your New Years Card was a pleasant reminder of home. Many thanks. And may I once again apologize for making so many requests of you for diaries etc. You certainly do fulfill the orders well, for this five year diary with the key was a beauty and just did the trick for me.

I am going to soon start sending home some books which I no longer need here, but which I want on that side. It is very inconvenient to carry them through Europe, and the mail seems the best. I shall send them by Registered Book post, and each package will be numbered. Please if you can put them in some corner where no one can borrow them or lose them as they are now mostly out of print and irreplaceable and invaluable to me. Let me know if any package fails to come so that I can check at this end.

I have another request for some of my letters. Would you be good enough to send a set starting from the beginning in Sept 1934 to Miss Ruth Hardy, 15 West 67th St., NYC, together with a reprint of the Columbia Law Review article. Also include her on the list for new letters. While I am on the subject of letters I begin to worry lest some of the copies of the first year run out. Would you be good enough to get one copy of each letter I have written, including the typewritten copies of the first three letters and put them aside for me. If you can, I should appreciate your taking them out to a bindery and getting them bound up-- one volume for each year here, and then I won't lose them. Blue fabricoid is my favorite color binding. They can label them on the back just LETTERS, J.N.H., and the years--1934-1935, and 1935-1936.

Sorry to bother you again. Goodness knows when this will stop. Greetings to you and many good wishes for a pleasant spring.

Yours sincerely



Mar. 18, 1937

CORRECTING MISINTERPRETATIONS OF
SOVIET LAW

As early as November 1, 1936¹ the first attack was aimed at E. B. Pashukanis, Director of the Institute of Soviet Organization and Law of the Academy of Sciences, Editor of the magazine, Sovetskoe Gosudarstvo, representative of the Soviet Union at the International Conference on Criminal Law, author of basic textbooks on Soviet law, and generally accepted as one of the most authoritative writers on principles of Soviet law.

Although at no point mentioning the association of Pashukanis with the theory attacked, P. Yudin quoted many Marxian theoreticians to show a theory which all knew to be Pashukanis's to be wholly wrong. Yudin criticized the theory that the state as an organ of compulsion had started to die immediately after the revolution on November 7, 1917 and would continue to progressively become less important until it had wholly withered away. In his attack Yudin restated principles frequently reiterated in Lenin's State and Revolution² defining the true method in which the state would wither away. Yudin criticized in general those who did not understand that the state apparatus must be strengthened constantly during the preliminary stage of socialism. No withering away can occur until people have developed habits of order, and distribution has reached such a stage that wants are satisfied.

Yudin needed to do little more than quote the oft-cited words of Stalin at the XVII Party Congress³ pointing out that the dialectic process of development of the state called for strengthening rather than dying during the transitional period of socialism. Strengthening must now take place until the state finds itself unnecessary like a hollow shell without any further functions to perform.

Yudin's attack apparently had little effect upon Pashukanis's career, for he continued to publish. In the same journal⁴ as that in which Yudin had made the original exposure Pashukanis wrote in a manner which has since been characterized as showing that he had forgotten nothing and had not learned from corrections previously levelled at him.

1. See P. Yudin, Sotsializm i Gosudarstvo (Socialism and the State) (1936) Bolshevik, No. 21, Nov. 1, 1936, at p. 26

2. "The state may die completely when society has put into practice the rule: 'from each according to his ability, to each according to his needs', i.e. when people are so accustomed to observing the basic rules of living together, and when their work is so productive, that they will voluntarily toil according to their ability." See V.I. Lenin, State and Revolution, VII Selected Works (Moscow, Eng. ed., 1935-36) 88

3. "We are in favor of the state dying out and at the same time we stand for the strengthening of the dictatorship of the proletariat, which represents the most powerful and mighty authority of all forms of state which have existed up to the present day. The highest possible development of the power of the state, with the object of preparing the conditions

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for the dying out of the state; that is the Marxist formula. Is it 'contradictory'? Yes, it is 'contradictory'. But this contradiction is a living thing and completely reflects Marxist dialectics." See J. Stalin, Leninism (Moscow, eng.ed., 1934) 342.

4. See E. Pashukanis, Sovetskoe Sotsialisticheskoe Pravo (Soviet Socialist Law) (1936) Bolshevik, No.22, Nov. 25, 1936, at p. 20

Pashukanis was appointed on November 16, 1936 as Vice Commissar of Justice of the U.S.S.R.⁵ and delegated to the division which was to draft a wholly new set of codes in accordance with the mandate of the Stalin Constitution⁶ He had become a candidate for election to the Academy of Sciences and was rumored to have had much to do in the preliminary work connected with the draft of the new Constitution.

January 20th marked the first open attack on Pashukanis because of his harmful theories, when Pravda⁷ published Yudin's commentary on the magazine Sovetskoe Gosudarstvo. This time most of the attacks were directed against Pashukanis by name. He was openly criticized for his theory of the progressive dying away of the state. He was also criticized for the errors of those who wrote articles in his magazine. Some of these articles had suggested that an exact time might be set for this dying away of the state, namely at the end of the Second Five Year Plan, i.e. 1938. Back in November Yudin had ridiculed any such attempt at prophesy, pointing out that Lenin had said that the process must be lengthy and that no date could be set.⁸

Pashukanis was even attacked for a theory which he had discarded back in 1930 under pressure. In the '20's he had expressed the idea that all law arose from the relations of the market place, as an outgrowth of the need for control of exchange and trade.⁹ His critics had asked how such a position could be tenable unless one were to deny that slaveholding society and feudalism had law, for exchange and the market place achieved their greatest development only later under capitalism. Only when was trade and exchange the chief characteristic of society. Such a restricted interpretation of the source of law was pointed out as harmful to the further development of law in the Soviet Union, for what future could there be for law in a socialist state where capitalist trade relations no longer were to continue?

The basic assumption of Pashukanis as to the source of law in the market place had led to his other theory that law started to wither away from the date of the revolution and would probably disappear at the end of the Second Five Year Plan which had been announced as being the date for the arrival of socialism. The logic was clear; once law is a tool to regulate private trade of a capitalist nature, it will no longer be needed when socialist methods of trade and exchange replace the old types.

To withdraw from this theory which was so severely attacked in 1930 Pashukanis published another pamphlet¹⁰ in which he admitted his error and renounced his theory. This retraction does not seem sincere to critics of today who find Pashukanis even today clinging to the theory of the dying out of the state starting from the first day of the revolution. These critics find that no one could hold to this theory if he had really discarded the one in which it has its root.

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5. Order of the Presidium of the Central Executive Committee of the U.S.S.R., see (1936) Izvestiya, No. 266 (6123), Nov. 17, 1936 at p. 1

6. This new provision first appeared in the law of July 20, 1936, Sobr. Zak. i Rasp. S.S.S.R., 1936, I, No. 40, Art. 338, Sec. 3. It appears as Art. 14 (u) of the Stalin Constitution.

7. See P. Yudin, Protiv Putanitsy, Poshlosti i Revizionizma (Against Confusion, Platitudes, and Revisionism), (1937) Pravda, No. 20 (6986), Jan. 20, 1937 at p. 4

8. See V. I. Lenin, op.cit.supra, note 2 at 88

9. See E. Pashukanis, Obshchaya Teoriya Gosudarstva i Prava (Moskva, 1929) (The General Theory of the State and of Law)

10. Za Markso -Leninskuyu Teoriyu Gosudarstva i Prava (Moskva, 1931) (For a Marxist-Leninist Theory of the State and Law)

Still another error was found in Pashukanis's method of thinking. He was found not to be a dialectic-materialist. Yudin went to the root of the evil in laying Pashukanis's inability to think correctly to the poor philosophical training which had been going on in the Soviet Union. Pravda¹¹ published his demand that philosophy and its highest form, dialectic materialism, be taught in a more efficient way.

This error of Pashukanis amounted to the following. He had overlooked the principle of Marxian dialectics that "quantity changes quality". These words are only a tag to label a whole process of thought, basic in the philosophy of dialectic materialism. To explain them I use the classic example of the dollar bill. When a dollar bill is in the hands of a single person it serves only as a means of satisfying the property demand of that person in a very limited form. But increase the quantity to five million. They are not merely the means of satisfying a property demand five million times as large as in the first situation. They are much more since they are now the source of control and power out of all relation to the mere numerical increase represented. Increase in quantity has changed the very quality or nature of the thing involved. To be sure the form is in a restricted sense that of dollar bills in large multiples, but in a broader sense the form of the whole has changed with the increase in numbers because the five million now amount to a method of control of society, a tool by which power to govern may be grasped or manipulated.

Pashukanis saw that many features of Soviet Law were the same as those in bourgeois systems. He compared the 1923 Civil Code of the R.S.F.S.R. with the Swiss Civil Code and found them in many articles identical. He explained the use of these outwardly similar forms by saying that the "substance" was all-important and that the "form" was ~~imm~~material.

As early as the Fourteenth Party Congress (1925) Stalin had criticized Sokolnikov for a similar misunderstanding of the concept of "form". He pointed out that "form" itself changes after it is taken over by the proletariat and used in the struggle for socialism.¹² Stalin quoted Lenin¹³ who had compared the State Bank with the old Tsarist Imperial State Bank and showed how different they were, even in form, although each was called a State Bank.

11. See M. Mitin and P. Yudin, O Filisofskom Obrazovanii v S.S.S.R. (Philosophical Education in the U.S.S.R.) (1937) Pravda, No. 55 (7021), Feb. 25, 1937, at pp. 2-3

12. "The point is not that trade and the money system are methods of 'capitalist economy'. The point is that the socialist elements of our economy, struggling with capitalist elements seize these methods and tools of the bourgeoisie for the purpose of overcoming the capitalist elements; that these socialist elements use them with success against capitalism, use them with success for building the socialist foundation of our economics. The point is, therefore, that thanks to the dialectics of our development, the functions and the designation of these instruments of the bourgeoisie are changed fundamentally, in principle; they are changed for the use of socialism to the damage of capitalism." See J. Stalin, Politicheskii Otchet Ts. K. XIV S'ezdu V.K.P.(b) (Moskva, 1933) 71 (The Political Report of the Central Committee to the Congress of the All-Union Communist Party(bolsheviks))

13. See V.I. Lenin, Sochinenye, Vol. XXI p. 260 Works to be sure both were banks, but only in name. Substance had changed in that one served capitalism, while the new one served socialism; but form also had changed since the new had not only the function of safeguarding funds and giving credits, but these credits had to be given in accordance with the requirements of the plan. The new State bank even had a function never before known in serving as a central accounting control organ for the whole of socialized economy. Lenin criticized any one who could not see that here even the form had changed.

Pashukanis has made the same error in the field of law. He has failed to understand dialectically that form must change as law is taken over by the proletariat and turned to its uses. His critics point out that this is not mere danger in theory but a very real danger, for given a continuation of bourgeois forms, there must be a continuation of bourgeois substance as well. A socialist state administering bourgeois law is like a Parisian merchant keeping an aristocrat in his home as a servant. Any day this servant may provide one of the links by which a Louis XVIII may sweep back into power.

Should one smile at this tempest over theories Soviet jurists will point to the harmful practical effect Pashukanis's theories have had on the development of Soviet law.

Civil Law

In the field of Civil Law his influence was marked. Believing that the state was slowly withering away as socialism became predominant, he advocated the departure from the teaching of civil law. He thought it was only a law regulating relations of men under the trading conditions of capitalism, and as such no longer of importance as the last remnants of capitalism disappeared. His influence was felt in that the course in civil law given in the then Legal Faculty of the Moscow University was abolished, and in its place was substituted a course delegated to the study of Economic-administrative Law (Khozyaist-vennoe Pravo). This was a field of law needed to regulate the formation, operation, and liquidation of government corporations, the Glavka which directed them, and the Commissariats of which they all were a part. It was a law defining the machinery of government. Regulation of the relations

between individuals were relegated to a few hours at the end of the course and given apologetically as a survival still necessary because capitalist relationships had not as yet been wholly liquidated.

The chief text book¹⁴ in the subject replacing I.P.Stuchka's classic three-volume work¹⁵ on Soviet Civil Law was named Soviet Economic-administrative Law. It appeared under the joint names of Pashukanis and L. Gintsberg, who was soon after appointed Soviet Trade Representative in Paris. A shorter course for use in outlying law schools was similarly labelled.¹⁶

14. Kurs Sovetskogo Khozyaistvennogo Prava (pod.red. L. Gintsberga i E. Pashukanisa, Moskva, 1935- Vol. 1) Vol. 2 of this same course appeared later in 1935 under the editorship of Mikhail Dotsenko, former member of the Institute of Red Professors and criticized in the same breath as Pashukanis by Yudin in his article, cit. supra, note 1. Both books have now been withdrawn from circulation.

15. P. I. Stuchka, Kurs Sovetskogo Grazhdanskogo Prava, (3 vols.-- 2nd ed. Moskva, 1931) Stuchka was second Commissar of Justice following the left Socialist Revolutionary Steinberg, who was withdrawn from the position very shortly after taking

These books had not long appeared when the Stakhanov movement swept into being. Property of a new type, the result of earnings and not of trade and speculation became a pressing reality. The people who were acquiring it proved to be those on whom the government looked most hopefully to raise the level of production to the point needed for socialism and eventual communism. They were the heroes of the country, and the success of the movement demanded that their property relations be regulated and their property interests be protected. The result was an attack upon the theories expressed in the Gintsberg-Pashukanis book. Interestingly enough the attack was levelled only at Gintsberg, and no mention was made of Pashukanis. The attack was led by Professor Gregory Amfiteatrov who pointed out that now civil law was of the utmost importance.¹⁷

Amfiteatrov had been the Professor who, together with Stuchka, had given the old course in civil law in the Moscow University. Since then he had continued to lecture in the course on Economic-administrative Law as given in the Moscow Law Institute, which in the interim had become the successor to the Legal Faculty of the Moscow University. He called for a reappraisal of civil law in the light of new conditions. His demands were soon to be well supported, for with the appearance of the draft Constitution in June 1936, there were found many sections dealing with rights to personal property, to savings, and to the protection of personal interests.¹⁸

16. See B.M.Rubinshtein, Sovetskoe Khozyaistvennoe Pravo (Moskva, 1935)

17. Prof. Amfiteatrov's first attack was in his Review Lecture in Economic-Administrative Law given Jan. 10, 1936 at the Moscow Law Institute. Nothing was printed until Amfiteatrov's article on the same subject in (1936) Sovetskoe Gosudarstvo, No. 4 p. 84 at 90.

18. Art. 7 (second part) --"Every collective farm household, in addition to its basic income from public collective enterprise, has for its own use a plot of land attached to the house and, as personal property, an auxiliary establishment on the plot, a house, produce animals and poultry, and minor agricultural implements --in accordance with the statutes of the agricultural artel."

Art.10 --"The right of personal property of citizens in their income from work and in their savings, in their dwelling houses and auxiliary household economy, their domestic furniture and utensils and objects of personal use and comfort, as well as the right of inheritance of personal property of citizens, are protected by law."

That civil law has come back was evidenced in the renaming of the law course "Civil and Economic-Administrative Law". Text books have come out in new editions bearing this name.¹⁹ It has been emphasized that civil law and the rights of individuals must take precedence in the teaching of the course and the writing of future texts. Pashukanis was now blamed for the former error, since he headed and controlled the Institute of Soviet Organization and Law in which the various faculties of the Law Institute held their discussions and received their inspiration.

Criminal Law

Pashukanis's theory of the progressive dying of the state was reflected in the projects for a new criminal code. These appeared annually from 1930 to 1935, and although not adopted, their influence was large on the teaching of criminal law and on the application by the courts of an old code which they thought destined soon to be changed. These projects called for the elimination of the so-called "dosage" system, by which each section of the 1926 Criminal Code had provided for a certain upper and lower limit of punishment within which the court might use its discretion. Pashukanis's projects called for a code which did no more than define types of dangerous acts and left punishment wholly to the discretion of the court in each case. No more upper limits should be declared since they were relics of the old 'eye for an eye' principle of revenge which he thought not in keeping with a theory of criminal law based upon social defense. He failed to see that countless variations in the punishment for the same type of act would result in confusion and lack of confidence in the courts. Social defense demanded similarity of application, and that was possible only when the various crimes were not only defined, but definite punishments prescribed.

Pashukanis's projects even went so far as to leave out any discussion of the difference between acts committed with criminal intent, with criminal negligence, and without negligence at all. This elimination of the danger of these different types led to weird decisions in People's Courts. One in Leningrad even missed the point entirely of an act. Two actors were engaged in a stage duel. The pistol with its blank exploded nearer the head of one of them than was usual. His skull was blown in on the brain and death resulted. Without any examination of the state of the skull, the court found the crime of "causing death through negligence" (Art.139 Crim.Code). The court did not even apparently know that there was a difference in the degree of negligence depending on whether it amounted to criminal negligence or not. On appeal the case was reversed and the appellant released, since expert evidence showed that the deceased's skull was ten times thinner than was usual and that no one could have known that it would collapse when subjected to such a minor explosion. The case is pointed to as evidence of the harmful practical results of the mistaken emphasis of Pashukanis on the task of necessity of teaching the various elements of crime.

19. See B.M. Rubinshtein, Sovetskoe i Khozyaistvennoe i Grazhdanskoe Pravo (Moskva, 1936) and Uchebnoe Posobie (Zadachnik) Dlya Prakticheskikh Zanyatii po Sovetskomu Khozyaistvennomu i Grazhdanskomu Pravu (pdd. red. G.N. Amfiteatrov i Z.Z. Grishin, Moskva, 1936)

20. For summary of projects, see N. Krylenko, Proekt Ugolovnogo Kodeksa Soyuzo S.S.R., 1 Problemy Ogolovnoi Politik (Moskva, 1935) 3-25 (Problems of Criminal Law Policy)

Labor Law

Pashukanis's subordinate, Professor Zin Grishin, had published the authoritative text book on Labor Law,²¹ expressing the view that Labor Law applied only to workers and clerks, but not to collective farmers,²² who were in fact not employed laborers but part owners in the cooperative agricultural artel. He failed to distinguish between Labor Law and the Labor Code. He should have said that Labor Law applied to workers, clerks, ~~individual~~ peasants, and collective farmers, but that for convenience of administration the Code of Labor Laws applied only to workers and clerks, while peasants and collective farmers were governed by the Land Code and the model charter of the Agricultural Artel. The error might have seemed only academic, had it not led to the article of Prof. N. Alexandrov, writing in Sovetskoe Gosudarstvo for December, 1936 (No. 6).

Alexandrov drew the conclusion that if we assume that Labor Law applies only to workers and clerks, then Chap. X of the new Constitution which contains many provisions on Labor Law should apply only to workers and clerks. Such an interpretation would have deprived peasants and collective farmers of the benefits of the Constitution's guarantees of work, of leisure and of rest. Both Grishin's major assumption and Alexandrov's resulting conclusion have been roundly attacked.²³

International Law

Pashukanis had come to be the chief spokesman for the Soviet Union in the field of International Law. His book, "Outline of International Law"²⁴ was a vigorous attack on Professor Eugene A. Korovine whose books had made him since the revolution the best known international jurist in the Soviet Union.

Professor Korovine's books²⁵ had formed the basis for the only review of Soviet principles and practice of Soviet International Law yet to appear in English²⁶. His books had been translated into German and Japanese and published in the respective countries. Korovine had expressed the theory that form changed with substance and in consequence the International Law used by the Soviet Union in its relations with bourgeois states was a new 'International Law of the Transitional Period'. He pointed to the innovations introduced by Soviet practice: the abolition of ranks in the diplomatic service as between Ambassadors and Ministers; the accrediting abroad of Trade Delegations with full rights of diplomatic immunity; the refusal to recognize capitulations as subject to protection in International Law; espousal of a definition of aggression and anti-aggression pacts.

Korovine found that although the forms had been taken from practice of bourgeois states, when used by the proletariat and the proletarian state in the struggle with bourgeois states, the resulting law was in essence a wholly new form of International Law.

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Pashukanis in attacking these theories of Korovine denied any such development of a new form of International Law. He saw only the old forms used now as a tool of the proletariat. The Trade Delegation and the Soviet 'Polpred' he considered as little more than new appendages on a great body of law which remained unchanged.

On this point Pashukanis is now attacked for failing to grasp the essence of dialectical change in the form. It is a change resulting from the person who is now using the law, who had himself been changed from a bourgeois ruler to the proletarian class.

The Future

Up to the present time the approach has been one of criticism of Pashukanis's theories. No attempt has as yet been made to outline what the future course will be, and of necessity the change will not be swift. Undoubtedly it will not be fully known until the new Codes are published, and at present that is not believed to be possible before the end of the year if then.

21. See Zin Grishin, Sovetskoe Trudovoe Pravo (Moskva, 1936) (Soviet Labor Law).

22. Idem, p.30

23. Grishin was attacked by Leontev, Ob Odnol Vrednoi Teorii (One Dangerous Theory) (1937) Pravda, No. 57 (7023), Feb. 27, 1937 at p. 4. Alexandrov was attacked by Yudin in op. cit. supra note 1.

24. E. Pashukanis, Ocherki po Mezhdunarodnomy Pravu (Moskva 1935)

25. Mezhdunarodnoe Pravo Perekhodnogo Vremeni (Moskva, 1924) (International Law of the Transitional Period) and Sovremennoe Mezhdunarodnoe Publichnoe Pravo (Moskva-Leningrad, 1926 (Contemporary International Public Law). Recently he wrote a review of Taracouzio's book which amounts to a restatement of Soviet theories. See XLIX Harvard Law Review (1936) 1392

26. T. A. Taracouzio, The Soviet Union and International Law (N.Y. Macmillan, 1935).

March 18, 1937.

JNH...WSR..90 (Personal)

Moscow, USSR.,
March 25, 1937.

Dear Mr. Rogers;

Professor Mitchell Franklin's article on Edward Livingston came as a pleasant surprise for two reasons; it is evidence of the fact that in some American Law Schools there is appearing a liberal analysis of the character and functions of law, and it shows that our own American tradition has turned out men who were willing and capable to put liberal ideas into practice.

I was most pleased to read the quotation from Mr. Justice Holmes's Common Law in which the Justice analyzes the interrelation between "form" and "substance". Way back in 1881 he apparently pointed out how a new society takes forms from the old, fills them with a new substance, and in so doing in fact creates a wholly new form. It is this very point which Pashukanis failed to grasp and for which he is now being criticized. But I have written fully of that in another place and will not expand at this point. I should like to know whether Mr. Justice Holmes was a dialectician because he studied Hegel and Marx or merely because he was observant and able to analyze what was going on around him.

Of particular interest to one who works in a code country are the remarks on the use of codes instead of precedent, and the advantages of the application of codes analogically. This latter process is constantly observable here, and it does differ from our own method of elaboration of codes by court decisions, which then take on all the sacredness of the principles of stare decisis. The Supreme Courts of the USSR and RSFSR from time to time issue instructions on the method in which the code should be applied, many of these instructions amounting to writing in a new section of the code for nearly analogous cases. A case in point is the expansion of Art. 59² of the Criminal Code on banditism to cover any murder committed in a particularly violent way even though committed by only one person. But these are only instructions, based undoubtedly on practice and specific cases, but nevertheless issued not as a court decision but as an instruction. Perhaps by doing this there is avoided any possibility of a resurgence of principles of stare decisis, for an administrative order can never be credited with sacredness, and in consequence is more easily changed when needs require.

Professor Franklin's treatment of practice and theory raises some questions in connection with my own paper on Soviet Law. I there said that theories are changed as

practice shows them inadequate. This is essentially what Prof. Franklin also says. I am criticized for belittling theories of socialism and communism, which are pointed out as unchanging. Only minor theories change, and then wholly in keeping with the major theory of which they are only a temporary offshoot. Thus inheritance during the NEP and up to the Stalin Constitution was explained on the theory of temporary social insurance to exist only so long as government social insurance benefits were not adequate to care for widows and orphans. With the Stalin Constitution (Art. 10) inheritance is declared a right of personal property. In consequence inheritance can no longer be considered as a temporary means of social insurance. The theory on which it is explained has changed from social insurance to a right inherent in the right to own personal property.

Some people might say that the whole theory had changed. To be sure the explanation of the retention of inheritance under socialism has changed, but this is entirely in keeping with the original theory of the development of the state through socialism to communism. During the first stage when capitalist property still existed as represented by private ownership in the means of production, no inheritance could be permitted as a right inherent in private property, for that would permit the continuing of capitalist elements and the continuing of support for these elements. In consequence the right was at first abolished and then reinstated temporarily to provide for a need not yet met by social insurance. But now all capitalist property is liquidated. No one but the craftsman owns means of production, and his are of a nature too small to matter. In contrast workers have in many cases amassed large amounts of property as a result of their own toil. It is personal property entirely in keeping with the principles of socialism, and it must be protected since those who earn it are the ones on whom the further development of socialism rests. They are the ones increasing production to such a level that communism can be more than a utopia. Protection of these rights while the worker lives is not enough. He must be certain that property he earns will benefit his children, for only then can the incentive to work and earn continue beyond the point where immediate personal needs are satisfied. Thus inheritance of personal property becomes a right guaranteed in the Constitution, and any idea of inheritance as social insurance is unnecessary.

Here is the problem--how to explain this change of theory within the confines of a theory which never changes, the theory on which the Marxian guides his program for the development of the state through socialism to communism. We may have to coin a new word for theories withⁿa theory, so that the big basic theory is not belittled when we talk of theory changing with practice.

I am very anxious to hear about the men you found to come over next year. May I suggest that you take them down to Washington at your and their earliest convenience to talk it over with the people in the Soviet Embassy. Visas have been coming slower this year according to all reports, and I think it would be very wise to get the whole affair in the hopper as soon as possible if they are not to be held in New York next fall.

I have talked informally with Habicht about finding rooms for them. We are agreed that it is going to be practically impossible to duplicate my luck. The reconstruction of Moscow has resulted in the tearing down of many buildings and the temporary crowding of those that remain. I do not know of any rooms around now at all. Habicht feels that Intourist is not interested in caring for students except in special cases. You would be wise to talk over the matter of student's quarters in hotels or elsewhere when you are in Washington. Prof. Harper thought there might be a sort of dormitory, but I have never heard a word about it since.

Mr. Davies tells me that Mr. Crane is coming over in June. Is that so, or only a possibility? I did not realize that you and Mr. Crane both knew Mr. Davies. I only found it out just shortly before he sailed back to the States. He was indeed cordial in talking with me and showed unusual interest in Soviet law.

Spring should be here as Easter is around the corner. But we still have cold wet weather and dark skies. The only one who bemoans the passing of winter is Prof. Robinson who came too late to enjoy it. He and his wife seem to be enjoying their visit. Joe Barnes is a great addition to the colony, for he is a very charming fellow, and one who is well informed on all the issues involved in this picture. Duranty leaves tomorrow as Denny has come back. No doubt you will see him soon again yourself.

All good wishes for the spring, and may you have time to write me about the new men and their plans.

Yours sincerely,

JNH