

On the Lithuanian Question: Contextualising Pashukanis's Critique of the Legal Form

Abstract

When contemplating Evgeny Pashukanis's immense contributions to the materialist theory of law via his positing of the 'legal form', there is much insight to be gained by connecting Pashukanis's efforts to the material composition of his formative context. Towards this end, this chapter focuses on Pashukanis's Lithuanian heritage in relation to how the 'Lithuanian Question' of his day invoked deep histories that spoke to numerous contemporary issues concerning law, rights, and identity. To uncover these histories is to engage in the type of historical sociological inquiry into 'the juridical' that Pashukanis advocated in his *General Theory of Law and Marxism*. On this point, approaching Pashukanis through his background provides immense insights into his theoretical disagreement with his fellow Soviet jurist Pēteris Stučka, the leader of the short-lived Latvian Soviet Socialist Republic, on the nature of law. While Stučka disagreed with Pashukanis that 'law' was reducible to the commodity-exchange facilitating bourgeois legal form, I argue that diverging historical sociological consciousnesses as a result of their differing Latvian versus Lithuanian backgrounds can, at least partially, explain their jurisprudential disagreement.

Where Does the Legal Form Theorist Write From?

When accounting for the 'legal form' and the links it forges between material and juridical realities, an understandable entry point is Karl Marx's 1843 text 'On the Jewish Question.'¹ Here, Marx famously exposed the false dichotomy that shaped contemporary debates on cultural autonomy versus 'emancipation' via liberal citizenship as the appropriate path for European Jews.² Regarding the latter option, despite celebratory affirmations to the contrary, promises of 'emancipation' were premised on an empty view of the individual as an abstract rights-holder – a consciousness limiting one's ability to comprehend the indispensable

¹ Karl Marx, 'On the Jewish Question' in Robert C Tucker (ed), *The Marx-Engels Reader* (2nd ed, Norton 1978) 26.

² *ibid* 27.

materialist foundations of social relations.³ While this assertion has set the stage for much Marxian engagement with questions of law, rights, and the legal form,⁴ others have focused on what this text means in relation to Jewish identity/destiny, antisemitism, Marx's own Jewish heritage, and the many connections between these matters.⁵ The many embedded roles performed by ideas of Jewishness leave no shortage of interpretive possibilities.⁶ Moreover, these issues, as they pertained to Marx's time, only became exponentially more complex by the subsequent advent of the Holocaust, the rise of international human rights law, and the seemingly intractable Palestinian-Israeli Conflict.⁷ In taking these matters seriously, what would it mean to theorise Marx's ideas, through Marx's own methods, in relation to how the material force of ethnic categorisation (Marx's and beyond) shapes the production of ideas that in turn justify material realities?

Posing this multi-layered question invites numerous subsequent questions on the many interplays between positionality, materiality, and temporality – especially as it challenges the Marxist quest to expose social contradictions in the name of achieving true human emancipation. Regardless of how grand one's formulation might be, the formulator always articulates ideas from a very specific place and time that is seamlessly embedded within the totality they seek to depict.⁸ On this point, how is the scholar to consider truth-destabilising 'genealogical anxiety' and truth-affirming 'genealogical luck' as it relates to both the specifics of their subject of inquiry and how they might filter their knowledge of said subject through

³ *ibid* 43–45.

⁴ See e.g., Andrew Vincent, 'Marx and Law' (1993) 20 *J Law & Soc'y* 371; Brad Roth, 'Marxian Insights for the Human Rights Project' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008) 220.

⁵ Shlomo Avineri, 'Marx and Jewish Emancipation' (1964) 25 *J Hist of Ideas* 445; Joel Kovel, 'Marx on the Jewish Question' (1983) 8 *Dialectical Anthropology* 31; Michael Maidan, 'Marx on the Jewish Question: A Meta-Critical Analysis' (1987) 33 *Stud Soviet Thought* 27; Robert Fine, 'Rereading Marx on the 'Jewish Question': Marx as a Critic of Antisemitism?' in Marcel Stoetzler (ed), *Antisemitism and the Constitution of Sociology* (University of Nebraska Press 2014) 137; Chad Alan Goldberg, 'The Two Marxes: From Jewish Domination to Supersession of the Jews' (2015) 15 *J Classical Sociology* 415.

⁶ Adam Sutcliffe, *What Are Jews For? History, Peoplehood, and Purpose* (Princeton University Press 2020).

⁷ Tony Kushner, *The Holocaust and the Liberal Imagination: A Social and Cultural History* (Wiley-Blackwell 1994); Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press 2011); Stephen Friedman, *Good Jew, Bad Jew: Racism, Anti-Semitism and the Assault on Meaning* (Wits University Press 2023).

⁸ Richard Drayton, 'Where Does the World Historian Write From? Objectivity, Moral Conscience and the Past and Present of Imperialism' (2011) 46 *J Contemp Hist* 671; Richard Drayton and David Motadel, 'Discussion: The Futures of Global History' (2018) 13 *J Global Hist* 1.

their own lens of genealogical inheritance?⁹ This notion of particularity in relation to broader categories only becomes more complex when questions of law and legal form are brought to bear on this task. After all, law, through its construction of ‘personality’, is an active component in the social processes that animate the meaning of perceived human difference on a deep material level.¹⁰ How then should this inquiry confront the way in which law’s resilience, resurgence, and reproduction across varied spatial and temporal contexts requires a suitably appropriate method of historicization.¹¹ This issue of juridical persistence is especially pertinent if the basis of ‘law’ is understood to be the ‘legal form.’¹²

As a means of uncovering the varied manifestations of material context that might enable more thorough approaches to these questions, my focus on this chapter is on Evgeny Pashukanis and how his theory of the legal form might be interpreted through his Lithuanian heritage. While it certainly occupies a less prominent place than the ‘Jewish Question’ within present consciousness, the ‘Lithuanian Question’ nevertheless raised many interesting issues of history, identity, and rights emblematic of the greater late-nineteenth and early-twentieth century ‘Age of Questions.’¹³ Although there is minimal direct evidence of Pashukanis’s thoughts on Lithuanian nationalism (a highly indeterminate designation in and of itself), it is reasonable to assume he would have been familiar with the many discourses on nationality that defined his contexts of engagement. Beyond his own discrete identity, Pashukanis’s time was one of intensive debate within Marxist circles on whether independent statehood via the ‘right of nations to self-determination’ was or was not a demand of revolutionary praxis.¹⁴ As these debates deeply implicated questions of legal form – whether individual, collective, or in relational conjunction – Pashukanis had much to consider. It is highly unlikely he was able to conclusively exclude the immanent reality of his own identity from this process. As such, Pashukanis’s Lithuanian heritage, and the depths of its context in relation to his legal form

⁹ Amia Srinivasan, ‘Genealogy, Epistemology and Worldmaking’ (2019) 119 *Proc Aristotelian Soc’y* 127.

¹⁰ Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton University Press 2013).

¹¹ Edward Cavanagh, ‘Legal Thought and Empires: Analogies, Principles, and Authorities from the Ancients to the Moderns’ (2019) 10 *Jurisprudence* 463.

¹² Rafał Mańko, ‘Legal Survivals and the Resilience of Juridical Form’ (2023) *L Critq* 1.

¹³ Holly Case, *The Age of Questions: Or, A First Attempt at an Aggregate History of the Eastern, Social, Woman, American, Jewish, Polish, Bullion, Tuberculosis, and Many Other Questions over the Nineteenth Century, and Beyond* (Princeton University Press 2018).

¹⁴ Michael V Kryukov, ‘Self-Determination from Marx to Mao’ (1996) 19 *Ethnic and Racial Stud* 352.

theory, provide a profound opportunity for exploring how the materiality of the region deemed ‘Eastern Europe’ contributed to the production of grand (but under-theorised) jurisprudential innovations, an analysis made exceptionally fitting by Pashukanis’s tireless commitment to materialist critique.

In this effort to theorise Pashukanis through Lithuania and Lithuania through Pashukanis, it is vital from the onset to realise that ‘Lithuania’ as it is currently understood is not what it was in Pashukanis’s formative contexts of influence. Today Lithuania is typically conceptualised as a small nation of approximately two million inhabitants in northeastern Europe that, alongside Latvia and Estonia, is one of the three Baltic states. However, given the immense historical and cultural differences between these three nations, the term ‘state’ performs a tremendous degree of work in affirming the ‘Baltic states’ as a coherent unifying category. As Anatol Lieven noted in his seminal study of Lithuanian, Latvian, and Estonian independence through their broad historical and international contexts, there is nothing that can be called a common identity-based ‘Baltic region.’¹⁵ Lithuanian and Latvian are the only two remaining members of the Baltic branch of the Indo-European language family, while Estonian is a non-Indo-European Finno-Ugric language. Lithuania is predominantly Roman Catholic whereas Latvia and Estonia are predominantly Lutheran. The lands of present-day Latvia and Estonia were long the domains of German and Scandinavian lords whereas Lithuania was a part of the vast Polish-Lithuanian Commonwealth that, even when distinguished from the Polish Crownlands, was many times its current size.¹⁶ Yet despite Lithuania’s greater historical connections to present-day Belarus, Ukraine, and Poland,¹⁷ the great unifying facet of Lithuania, Latvia, and Estonia as the three ‘Baltic states’ are shared issues relating to their international legal personality via independence in 1919, long-term Soviet occupation beginning in 1940, and restored statehood in 1990.¹⁸ In this sense, the common grouping of Lithuania, Latvia, and Estonia despite their

¹⁵ Anatol Lieven, *The Baltic Revolution Estonia, Latvia, Lithuania, and the Path to Independence* (2nd ed, Yale University Press 1994) xxxv.

¹⁶ Darius Staliūnas, *Spatial Concepts of Lithuania in the Long Nineteenth Century* (Academic Studies Press 2016).

¹⁷ Timothy Snyder, *The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus 1569-1999* (Yale University Press 2003).

¹⁸ See Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia - Past, Present and Future as Defined by International Law* (Brill 2005); Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (2nd ed, Brill 2022); Evgeny Tikhonravov, ‘The International Community’s Reaction to the Soviet Annexation of the Baltic Republics: The Recognition Dilemma’ (2023) 70 *Neth Intl L Rev* 251.

great differences is a testament to the substance-evading qualities of the very legal form theorised by Pashukanis.¹⁹

Part I of this chapter explores how Pashukanis's *General Theory* can be interpreted as a call for historical sociology-focused accounts of law. While there are many options for this undertaking, I argue that an especially productive exploration can be made regarding Pashukanis's Lithuanian background in relation to his efforts to materially theorise law at the level of form. Part II then explores this background through a high-altitude overview of the origins, functions, and legacies of the unique juridical entity deemed the Polish-Lithuanian Commonwealth that defined Pashukanis's formative context. From here, Part III turns to the debate on the nature of law between Pashukanis and his fellow Soviet jurist Pēteris Stučka and how this can be understood in relation to their respective Lithuanian and Latvian backgrounds – identities whose connections were increasingly forged by nationalist activists in the late-nineteenth and early-twentieth centuries. Finally, Part IV shows how, in light of Stučka's critique, Lithuanian history – especially as it was inseparably connected to Poland *and* fundamentally distinct from Latvia – might explain why Pashukanis was so dedicated to a totalising critique of law that defied Stučka's comprehension.

What Does the *General Theory* Demand of Our Analysis?

In devising his theory of law as the 'legal form' that only arises through capitalism's dominance, Pashukanis lambasts the specific way in which the field of jurisprudence, unique amongst disciplines, cannot but abstract its analysis from its primary subject matter.²⁰ While he proffered the theory of legal form as the specific configuration of commodity-exchange enabling abstracted personality (and ideological acceptance thereof) as a means of transcending this distortion,²¹ this led him to confront a secondary barrier in the form of the substantively empty 'state' that grants an illusory coherence to positivist jurisprudence.²² Building on his

¹⁹ While this chapter focuses on Lithuania and Latvia, this should not discount Estonia's incredibly rich tradition of legal thought, see Lauri Mälksoo, 'The Science of International Law and the Concept of Politics: The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur'ev/Tartu 1855–1985' (2005) 76 *Brit Yb Intl L* 383.

²⁰ Evgeny Pashukanis, *Law and Marxism: A General Theory*, Barbara Einhorn, trans; Chris Arthur, ed (Pluto Press 1989) 49.

²¹ *ibid* 59.

²² *ibid* 146-148.

observation that positivism represented an even greater coherence regression than the natural law it sought to supersede, the positivist jurist, '[f]or, so long as he remains a jurist, ...starts from the concept of the state as an autonomous force, set apart from all other individual and social forces.'²³ When confronted with this problem of the abstracted autonomous state as the perpetual concealer of consciousness surrounding the legal form and its constitutive effect on material reality, Pashukanis's *General Theory* can be read as a call for extensive research on the historical sociology of law/the legal form and its constitutive effects on concrete social relations. This necessarily entails a materialist account of the abstracted state and how its multiplicity in the international realm is ordered according to a specific logic of sovereignty/sovereign equality that proclaims a general duty of substantive ignorance in the name of 'non-intervention.'²⁴ Through such an account, according to Pashukanis, the theorist can directly confront the ways in which legal positivism inevitably and perpetually reproduces '[a] certain discrepancy between legal truth and the truth to which historical and sociological research aspires...'²⁵

However, despite the clarity of his overall theoretical thrust and numerous historical illustrations (particularly on the contrast between feudal authority and modern legality), using Pashukanis to craft a historical sociology of the legal form raises many questions of method. This is especially true when the application of Pashukanis is viewed in conjunction with efforts to merge Marxian historical sociologies of the transition to capitalism with insights from the fields of International Relations ('IR') and international law.²⁶ While such endeavours are concerned with the origins of the modern state in relation to the origins of the modern states-system, Pashukanis's commodity-form theory of law has generated much controversy on this front. Famously, China Mieville applied Pashukanis's frame to international law to show how this regime's lack of centralised authority illustrates law's operation at the level of form in that sovereign states are akin the individual private law subjects – i.e. formally equal units in a

²³ *ibid* 147

²⁴ Anthony Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 2019) 137-140.

²⁵ Pashukanis, *General Theory* (n 20) 147.

²⁶ Only recently have there been concerted efforts to merge Marxian IR theory with Marxian international legal theory, see Eric Loefflad, 'Unpartitionable: C.H. Alexandrowicz, Sovereign Divisibility, and the Longue Durée of the Polish-Lithuanian Commonwealth' (2023) 24 *German LJ* 912, 916-920.

system defined by substantive inequality.²⁷ However, for Anthony Carty, reifying the absolute character of the sovereign state acts as a Hegelian path for reproducing the presumptions of nineteenth-century positivists and their exclusion of premodern and non-Western thought.²⁸ For Susan Marks, the commodity-form theory's all-encompassing logic does not sufficiently account for the 'public cultural dimensions' of base-level social change that ultimately manifests as international legality.²⁹ More recently, Maia Pal argued that the commodity-form theory 'fails to account for pre- and non-capitalist legal agency or for legal relations occurring during the process of transition as autonomous from or contesting the process of capitalist transition.'³⁰ Additionally, Robert Knox, though a proponent of legal form analysis, claims that Miesse's framing does not adequately account for the constitutive relationship between racialisation and capital accumulation on a broad world-historical scale.³¹

Compounding these many debates on the present value of Pashukanis, there is also the way in which broader contested debates on the transition to capitalism can shape which histories and/or legal traditions one looks to when accounting for the origins of the legal form. If one adheres to Immanuel Wallerstein's location of capitalist origins in the increasing volume and scale of sixteenth-century commerce,³² then one is apt to study the Roman law traditions and its formative provision of juridical linkages that proved more than capable of surviving and adapting long after the fall of the Roman Empire.³³ The power of Roman law as a widely recognised medium of commercial transaction unmoored from state authority was certainly not lost on Pashukanis.³⁴ Conversely, if one adheres to the narrative of 'Political Marxism' that capitalism resulted from contingent class configurations purely internal to England,³⁵ then the

²⁷ China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Haymarket Books 2005) 117-151.

²⁸ Anthony Carty, 'Marxist International Law Theory as Hegelianism' (2008) 10 Intl Stud Rev 122, 124.

²⁹ Susan Marks, 'International Judicial Activism and the Commodity-Form Theory of International Law' (2007) 18 EJIL 199, 207.

³⁰ Maia Pal, *Jurisdictional Accumulation: An Early Modern History of Law, Empires, and Capital* (CUP 2020) 81.

³¹ Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 Lond Rev Intl L 81, 100-101.

³² Immanuel Wallerstein, *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (University of California Press 2011).

³³ On Roman Law and the legal form, see the contribution of Fusco in this volume.

³⁴ Evgeny Pashukanis, 'Appendix: Pashukanis on International Law' in Mieville (n 27) 321, 326.

³⁵ Benno Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (Verso 2003); Ellen Wood, *The Pristine Culture of Capitalism: A Historical Essay on Old*

particularities of English Common Law and Constitutional history must be of indispensable importance.³⁶ Here, the view of Hobbesian absolutism as the grounding of universal rights – via its transcending of the substantive particularities of tradition-based medieval constitutionalism impeccably resonates with Pashukanis’s view that the abstraction of the ‘legal person’ from their substantive material conditions is vital to enabling commodity-exchange via the legal form.³⁷ If one takes a more integrative approach, such as Alexander Anievas and Kerem Nişancioğlu’s application of ‘uneven and combined development’,³⁸ then world legal systems, and how their deep interactions paradoxically shaped their proclaimed particularities, must be of great importance.³⁹ This can easily bring matters of comparative law, and its many complications (especially from a critical perspective), into the analytical matrix.⁴⁰

Given the risks of entropy in this outward radiation of analytical complexity, approaching these issues through Pashukanis’s own material contexts in relation to his materialist theory provides something of an anchor in this vast sea of possibility. Fortunately, as a prelude to this exploration, recent scholarship enables an array of new insights into how the ideas of leading jurists might be understood through their meta-contexts. Rather providentially, Natasha Wheatley has masterfully performed this task in relation to Pashukanis’s central foil – Hans Kelsen.⁴¹ Through his ‘pure theory of law’, Kelsen positivistically framed the task of the jurist to thoroughly detail the normative structure of an idealised legal configuration existing above and beyond material reality.⁴² According to Pashukanis: ‘[u]nquestionably one must give Kelsen credit for one great service. As a result of his undaunted consistency, he reduced Neo-

Regimes and Modern States (Verso 2015); Spencer Dimmock, *Origins of Capitalism in England 1400-1600* (Haymarket Books 2015).

³⁶ This especially pertinent given Frederick Maitland’s observation that the true constitutional law of England is its land law. Anne Orford, *International Law and the Politics of History* (CUP 2021) 117; see Pashukanis, *General Theory* (n 20) 126-127

³⁷ *ibid* 123-124; Kinch Hoekstra, ‘Early Modern Absolutism and Constitutionalism’ (2013) 34 *Cardozo L Rev* 1079. Importantly, Hobbes’s grand abstractions were closely linked to his reading of the customs and traditions of his formative context, see Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, Joseph Cropsey, ed (University of Chicago Press 1997).

³⁸ Alexander Anievas and Kerem Nişancioğlu, *How the West Came to Rule: The Geopolitical Origins of Capitalism* (Pluto Press 2015).

³⁹ Fernanda Pirie, *The Rule of Laws: How 4,000 Years of Law Shaped the World as We Know It* (Profile Books 2021).

⁴⁰ Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar 2019).

⁴¹ Natasha Wheatley, *The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty* (Princeton University Press 2023).

⁴² Hans Kelsen, *Pure Theory of Law*, Max Knight, trans (Lawbook Exchange 2009).

Kantian methodology, with its two categories to absurdity. For it turns out that the ‘pure’ category of *Ought*, cleansed of all impurities from the *Is*...neither has, nor possibly can have, any rational definition whatsoever.’⁴³

However, as Wheatley’s *The Life and Death of States* shows, an interpretation of Kelsen through the meta-contexts of his intellectual origins and influences reveals why he viewed his pure theory as anything but absurd. In centring the Habsburg Empire, Wheatley shows that Kelsen, as part of the Neo-Kantian revival of the philosophical tradition in an increasingly mechanised age, sought to bring order to a land whose juridical structure rendered it renown as an object of curiosity and ridicule.⁴⁴ From the time the Empire set out to reform its constitutional structure following the Revolutions of 1848 there emerged much defining debate between historically rooted custom versus ethnic/national identity as the supreme basis for rights.⁴⁵ However, in attempting to resolve such matters domestically, the Empire created a new legal controversy at the international level. This notably occurred through the 1867 *Ausgleich* where the Empire became the Dual-Monarchy of Austria-Hungary, an entity that generated ceaseless debate as to whether it was one or two sovereigns in relation to a prevailing international legal positivism that viewed the sovereign state as an indivisible entity.⁴⁶ Against these backdrops, Kelsen’s pure theory can be read as an attempt to transcend contradictions by liberating law from its materiality through converting it into a quest for gapless normative structure.⁴⁷ This is to say nothing of how Kelsen’s particular relationship to his Jewish heritage cultivated fantasies of an ‘assimilation through law’ whereby ‘scientific’ identification of pure norms could alleviate the burdens of particularity in a context of embedded antisemitism.⁴⁸

If such meta-contexts can provide insights into a jurist seeking to escape from the material contradictions spawned by multiple pressure points in a world of empires, might a similar analysis also explain a very different jurist consciously dedicated to exposing those same

⁴³ Pashukanis, *General Theory* (n 20) 52

⁴⁴ Wheatley (n 41) 153-154.

⁴⁵ *ibid* 107-110.

⁴⁶ *ibid* 81.

⁴⁷ *ibid* 168-172.

⁴⁸ Eliav Lieblich, ‘Assimilation through Law: Hans Kelsen and the Jewish Experience’ in James Loeffler and Moira Paz (eds), *The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century* (CUP 2019) 51.

material contradictions? To provide any such explanations is to make some broad statements on Pashukanis's lifepath, a task made even more difficult by the limited knowledge of his early life. While born of Lithuanian heritage in Russia (and to a Russian mother) in 1891, Pashukanis's Lithuanian identity was that of a minority at most.⁴⁹ As such, without a 'thick' communal environment to provide him with formative meaning, Pashukanis's relation to his own identity in this regard could easily have been a 'thin' matter of distanced observation as opposed to any all-encompassing sphere of meaning. Leaving Russia for Germany in 1909, Pashukanis developed as an intellectual at Munich's Ludwig Maximilian University before returning to Russia in the context of the Revolution in 1918 where he worked in a number of capacities, including the negotiation of friendly relations between the Soviet Union and Germany via the Treaty of Rapallo in 1922.⁵⁰ That same year, he joined forces with Pēteris Stučka to organise the law division of the Communist Academy, produced the *General Theory* in 1924, and was eventually executed during Stalin's Great Purge in 1937.⁵¹ In light of the dearth of evidence regarding his connection to Lithuania, on what basis could it be said that his Lithuanian background had anything to do with any aspect of his work and/or life? In approaching this question through a materialist lens, we must examine the vast contexts of 'Lithuania' as a groundwork for theorising what it might have meant to Pashukanis.

Lithuania Between Medieval and Modern Empires

While today a small nation in northeastern Europe where the majority of the population are Roman Catholic speakers of the Baltic language of Lithuanian, 'Lithuania' in Pashukanis's time was something altogether different. Consciousness of this entails a basic knowledge of the life, death, and legacy of the early modern divided-sovereignty form known as the Polish-Lithuanian Commonwealth. In 1775 it ceased to exist on the map of Europe. Between that moment and the end of the First World War, contestation over the ultimate fate of these lands arguably entrenched the right of nations to self-determination as a foundational pillar of international society.⁵² According to Victor Kattan, the continued national assertions in these

⁴⁹ Bjarne Melkevik, 'Pashukanis, Evgeny Bronislavovich' in Gianfrancesco Zanetti, Mortimer Sellers, and Stephan Kirste (eds), *Handbook of the History of the Philosophy of Law and Social Philosophy – Volume 3: From Ross to Dworkin and Beyond* (Springer 2023) 233, 233.

⁵⁰ Bill Bowring, 'Yevgeniy Pashukanis, His *Law and Marxism: A General Theory*, and the 1922 Treaty of Rapallo between Soviet Russia and Germany' (2017) 19 J Hist Intl L 274.

⁵¹ Melkevik (n 49) 235.

⁵² Tadeusz Kamusella, 'Germanization, Polonization, and Russification in the Partitioned Lands of Poland-Lithuania' (2013) 41 Nationalities Papers 815.

lands of the former Commonwealth against the partition perpetrating Russian, Prussian, and Austrian empires is the umbilicus of self-determination that connects the American and French Revolutions to the proclamations of Woodrow Wilson and Vladimir Lenin.⁵³ Within the two partitioning empires Pashukanis was most connected to, Russia and Prussia-spawned Germany, debates on the possible fates of the lands of the former Commonwealth were never far from consciousness – especially for those of Lithuanian heritage (itself a rather indeterminate concept).⁵⁴ Locating possible factors on how Pashukanis's identity might have influenced his juridical theory necessitates a deep delve into the broad histories that, especially in their resurrection for turn-of-the-century political projects, animated consciousness in Pashukanis's world.⁵⁵

Home to Europe's last remaining Pagans, beginning in the twelfth century, the various Slavic, Baltic, and Finno-Ugric peoples of the Eastern Baltic found themselves on the receiving end of imposition from various Scandinavian and Germanic princes, as well as military religious – most infamously the knights of the Teutonic Order forged in the Middle Eastern Holy Land Crusades.⁵⁶ While a multitude of pagan peoples fell to the conquerors, the most powerful amongst them, the Lithuanians, not only mounted a successful resistance, but organised as the Grand Duchy, established dominion over vast swaths of the Orthodox Christian lands to the east and south that had been devastated by the Mongol invasions.⁵⁷ Also involved was the Slavic Kingdom of Poland whose close ties to the Roman Catholic Church following

⁵³ Victor Kattan, 'To Consent or Revolt? European Public Law, the Three Partitions of Poland (1772, 1793, and 1795) and the Birth of National Self-Determination' (2015) 17 J Hist Intl L 247, 251.

⁵⁴ Vytautas Petronis, *Constructing Lithuania: Ethnic Mapping in Tsarist Russia, Ca. 1800-1914* (Stockholm Universitet 2007).

⁵⁵ Lithuanian identity was even expounded upon in the leading publication of the nascent field of 'International Relations', *Foreign Affairs*, or, as it was it was named at the time, the *Journal of Race Development*. Thomas Shamis, 'Lithuanians' (1918) 9 J Race Dev 157. On International Relations as originally a study of a 'world of races' prior to its present study of a 'world of states', see Robert Vitalis, *White World Order, Black Power Politics: The Birth of American International Relations* (Cornell University Press 2015).

⁵⁶ Erik Christensen, *The Northern Crusades* (Penguin 1997).

⁵⁷ SC Rowell, *Lithuania Ascending: A Pagan Empire within East-Central Europe, 1295–1345* (CUP 1994). There remains much controversy over whether the Grand Duchy was an 'empire.' Zenonas Norkus, *An Unproclaimed Empire: The Grand Duchy of Lithuania: From the Viewpoint of Comparative Historical Sociology of Empires* (Routledge 2017). On the predominant subjects of the Grand Duchy, see Serhii Plokhyy, *The Origins of the Slavic Nations: Premodern Identities in Russia, Ukraine, and Belarus* (CUP 2006).

conversion in the 900s largely shielded it from the Germanic Holy Roman Empire.⁵⁸ Initially aligned with the Teutonic Order, the ultimate betrayal of the Poles by these knights led to a new alliance with the Grand Duchy of Lithuania who joined with the Poles to decisively rout the Order at the Battle of Grunwald in 1410.⁵⁹ While the Polish-pagan alliance prompted no shortage of controversy despite the Lithuanian's conversion promise,⁶⁰ including the question of whether Christians aligned with infidels against other Christians could ever possess just cause in a just war under natural law,⁶¹ the very nature of Lithuanian paganism allowed it to act as of something of a mediation zone amidst the contentious fault-line of Catholic and Orthodox Christian worlds.⁶² Given these geopolitical circumstances, from the initial alliance grew increasing interdependence in the following centuries, and in 1569 the Lublin Union merged the Kingdom of Poland and the Grand Duchy of Lithuania as a singular Commonwealth.⁶³

Following the Union, the Commonwealth continued its unique evolutionary trajectory as a unique divided sovereignty-based entity ruled by a non-hereditary elected monarchy and an extensive parliamentary authority known as the *Sejm* where, via the infamous *Liberum veto*, any member of the nobility had the power to unilaterally block legislation.⁶⁴ While its neighbours in all directions evolved along the lines of absolutist centralisation, the divergent Commonwealth viewed itself as a bastion of republican liberty against this backdrop.⁶⁵ Though Lithuania continued to exist as a geographic designation, and Lithuanian remained as a folk language along the Baltic coast, the widely dispersed Lithuanian elites, in adopting the culture

⁵⁸ Roman Michałowski, 'Christianisation of the Piast Monarchy in the 10th and 11th Centuries' (2010) 101 *Acta Poloniae Historica* 5.

⁵⁹ Christensen (n 56) 227-231.

⁶⁰ Darius Baronas and SC Rowell, *The Conversion of Lithuania: From Pagan Barbarians to Late Medieval Christians* (Institute of Lithuanian Literature and Folklore 2015).

⁶¹ James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250-1550* (University of Pennsylvania Press 1979) 107-119.

⁶² SC Rowell, 'Pagans, Peace and the Pope 1322-1324: Lithuania in the Centre of European Diplomacy' (1990) 28 *Archivum Historiae Pontificiae* 63; Jūratė Kiaupienė, *Between Rome and Byzantium. The Golden Age of the Grand Duchy of Lithuania's Political Culture. Second Half of the Fifteenth Century to First Half of the Seventeenth Century*, J Will, trans (Academic Studies Press 2019).

⁶³ Snyder, (n 17) 19-20. On pre-Union integration, see Robert Frost, *The Oxford History of Poland-Lithuania: The Making of the Polish-Lithuanian Union, 1385-1569* (OUP 2015).

⁶⁴ Dalibor Roháč, 'The Unanimity Rule and Religious Fractionalisation in the Polish-Lithuanian Republic' (2008) 19 *Const Pol Econ* 111; "It Is by Unrule That Poland Stands": Institutions and Political Thought in the Polish-Lithuanian Republic' (2008) 13 *Independent Rev* 209

⁶⁵ Anna Grześkowiak-Krwawicz, *Queen Liberty: The Concept of Freedom in the Polish-Lithuanian Commonwealth* (Brill 2012).

of the greater Polish nobility, largely became Polish speakers who ruled over large estates of Eastern Slavic Orthodox subjects.⁶⁶ Yet despite the Commonwealth's affirmation of a unique identity, this divergence with its absolutist neighbours, especially as its lack of a hereditary monarchy limited the prospects of influence accumulation via dynastic marriage/inheritance, did not bode well for the Commonwealth's long-term survival.⁶⁷ In 1772, in pursuit of a more direct mode of accumulation, Russia, Prussia, and Austria initiated the first partition of the Commonwealth.⁶⁸ While this imposition prompted the Commonwealth to embrace Enlightenment era ideals that were ultimately embedded in the 1791 Polish Constitution – the first written constitution in Europe.⁶⁹ However, within a broader political sphere defined by the 1789 outbreak of the French Revolution, the prospect of such anti-absolutist sentiments within their immediate proximity prompted the partitioning powers to end the Commonwealth's existence through two additional partitions in 1793 and 1795.⁷⁰ While the Polish cause lived on, especially through the championing of figures such as Jean-Jacque Rousseau,⁷¹ what this meant for the Lithuanians largely depended on which partitioning empire they now found themselves to be the subjects of.

Most of historic Lithuania was absorbed by the Russian Empire and, in the early decades, resistance against Tsarist rule was typically cast as a quest to restore the republican institutions of the partitioned Commonwealth – a cause that many Lithuanian elites prominently championed.⁷² However, the defeated 1863 Polish uprising and ensuing Russian suppression changed everything. With this event came a general abandonment of Commonwealth restoration efforts and a turn to Polish nationalism.⁷³ For the Lithuanians who blamed the Poles for this failure – and felt excluded by this new Polish nationalism – their new goal became

⁶⁶ Snyder (n 17) 22-24. Conforming with these patterns, Lithuanian peasants largely began speaking Belarussian. *ibid* 32.

⁶⁷ Teschke, (n 35) 236-237.

⁶⁸ Herbert Kaplan, *The First Partition of Poland* (Columbia University Press 2020).

⁶⁹ Richard Butterwick, *The Polish-Lithuanian Commonwealth: Light and Flame* (Yale University Press 2020).

⁷⁰ Robert Lord, *The Second Partition of Poland: A Study in Diplomatic History* (Harvard University Press 1915); 'The Third Partition of Poland' (1925) 3 *Slavonic Rev* 481.

⁷¹ Jean-Jacque Rousseau, 'Considerations on the Government of Poland' in *Of the Social Contract and Other Political Writings*, Quintin Hoare, trans; Christopher Bertram, ed (Penguin 2012) 241.

⁷² Jerzy Ochmański, 'The National Idea in Lithuania from the 16th to the First Half of the 19th Century: The Problem of Cultural-Linguistic Difference' (1986) 10 *Harv Ukrainian Stud* 301, 309-310.

⁷³ On this turn in the context of Polish scepticism towards 'the West', see Jerzy Jedlicki, *A Suburb of Europe: Nineteenth-century Polish Approaches to Western Civilization* (Central European University Press 1998).

building their own nationalist movement and, as a vital means to this end, abandoning Polish and reviving Lithuanian as a language of literary and political culture.⁷⁴ As a Baltic language distinct from the surrounding Slavic languages, despite the narrow geographic scale in which it was still spoken in the mid-nineteenth century, Lithuanian provided a means of foundational distinction from both Russians and Poles.⁷⁵ Intimately related to linguistic revival, newfound national consciousness prompted great interest in Lithuania's pre-Union era that, in depicting centuries of Polish influence as undue imposition, sought to bypass the early modern institutions of the Commonwealth and depict the medieval past as the maligned, yet inextinguishable, basis of Lithuanian national identity.⁷⁶ From Russia's perspective, the situation was complex. On the one hand, encouraging Lithuanian nationalism provided a means of undermining the more pressing threats of Polish nationalism and/or Commonwealth revival.⁷⁷ On the other hand, in these same lands, the Empire was engaging in an intensive process of 'Russification' that could privilege no national expression beyond Russian nationalism.⁷⁸ This tension was emblematic of Russia's unique status as both a multi-ethnic empire and a distinct nationalist/pan-nationalist project during a time of great institutional/ideological/juridical transformation on a global scale.⁷⁹

As important as these contentions within the Russian Empire may have been, to fully understand the sources of this modern Lithuanian nationalism, and its corresponding disavowal of the Commonwealth and turn to deeper medieval histories, we must account for the Lithuanians who became subjects of another partitioning empire in the form of Prussia.⁸⁰ In the decades following the Napoleonic wars, this region was the leading site of Romantic nationalist conceptualisations positing that the essence of a 'people' could be determined

⁷⁴ Snyder (n 17) 32.

⁷⁵ As such, Lithuanian nationalism proved far more success than Belarussian nationalism – the latter's language being largely between Polish and Russian. *ibid* 40-42, 46-47.

⁷⁶ *Ibid* 35; Rimantas Miknys and Darius Staliūnas, 'The 'Old' and 'New' Lithuanians: Collective Identity Types in Lithuania at the Turn of the Nineteenth and Twentieth Centuries' in Martyn Housden and David J Smith (eds), *Forgotten Pages in Baltic History: Diversity and Inclusion* (Brill 2011) 35; Moreno Bonda, *History of Lithuanian Historiography: Didactical Guidelines* (Vytautas Magnus University 2013).

⁷⁷ Alfred Erich Senn, 'Tsarist Authorities and Lithuanian Book-Smuggling' (1980) 11 *J Baltic Stud* 334.

⁷⁸ Darius Staliūnas, 'Between Russification and Divide and Rule: Russian Nationality Policy in the Western Borderlands in Mid-19th Century' (2007) 55 *Jahrbücher für Geschichte Osteuropas* 357.

⁷⁹ See Eric Loefflad, 'Blood of Nations, Blood of Empire: Pan-Slavism as a Critique of International Law in Late Imperial Russia and Beyond' (forthcoming) *German Ybk Intl L*.

⁸⁰ Vasilijus Safronovas, *The Creation of National Spaces in a Pluricultural Region: The Case of Prussian Lithuania* (Academic Studies Press 2016).

through their unique histories and traditions.⁸¹ This mode of thinking also very much implicated German legal sciences as ‘law’ became viewed by many as the organic expression of fundamentally unique peoples.⁸² In this milieu, Lithuanian, as an ancient language with almost no surviving relatives, became viewed by many scholars as the very key to unlocking the fabled origins of the newly identified Indo-European language family.⁸³ Relatedly, the status of the Lithuanians as Europe’s last pagans, a source of much fascination in the early modern era,⁸⁴ gained renewed emphasis in this nineteenth-century moment as Romantic thinkers sought to uncover the pagan origins of discrete European nations.⁸⁵ Interestingly, in a manner that effectively inverted Lithuanian views of Polish-orchestrated marginalisation, this German fetishisation of Lithuanians occurred in roughly the same context as new German theories of Slavic inferiority justified increasingly harsh practices in the partitioned territories ultimately manifesting in concerted ‘Germanisation’ efforts.⁸⁶ Additionally, as the century progressed, medieval histories of the Teutonic Order and Northern Crusades so important to new Polish and Lithuanian national identities were ascribed with new meaning in the German cultural imagination.⁸⁷ While these events were long viewed by many as an embarrassment to be transcended by Enlightenment sensibilities, in the latter half of the nineteenth century, prominent thinkers began to celebrate Crusader violence as a pure expression of the German character.⁸⁸

Given these compounded backdrops, how might we gauge Pashukanis’s consciousness of these politics of medieval history in connection to the emergent Lithuanian national consciousness

⁸¹ Johann Gottfried von Herder, *Outlines of a Philosophy of the History of Man*, TO Churchill, trans (Bergman Publishers 1966).

⁸² Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Fordham University Press 2010) 109-136.

⁸³ Scott Spires, ‘Lithuanian Linguistic Nationalism and the Cult of Antiquity’ (1999) 5 *Nations and Nationalism* 485, 490-493.

⁸⁴ Francis Young (ed), *Pagans in the Early Modern Baltic: Sixteenth-Century Ethnographic Accounts of Baltic Paganism* (Arc Humanities Press 2022).

⁸⁵ Joep Leerssen, ‘Gods, Heroes, and Mythologists: Romantic Scholars and the Pagan Roots of Europe’s Nations’ (2016) 1 *Hist Humanities* 71.

⁸⁶ Lithuanians existed outside the particular German-Pole-Jew triad that defined this context, see William Hagen, *Germans, Poles and Jews: Nationality Conflict in the Prussian East, 1772-1914* (University of Chicago Press 1980).

⁸⁷ Micheal Burleigh, ‘The Knights, Nationalists and the Historians: Images of Medieval Prussia from the Enlightenment to 1945’ (1987) 17 *Eur Hist Q* 35

⁸⁸ Vejas Gabriel Liulevicius, *The German Myth of the East: 1800 to the Present* (OUP 2009) 76. For an illustration, see Heinrich von Treitschke, *Treitschke's Origins of Prussianism: The Teutonic Knights*, Eden Paul and Cedar Paul, trans (Routledge 2014).

of his era? One fascinating quote here related to his point that the 'order' international law creates is order between a common capitalist upper class maintaining relations across sovereign borders.⁸⁹ Analogously, he stated that: 'in the feudal period the knights of every European country had their codes of military honour and accordingly, their class law, which they applied in wars with one another; but they did not apply in inter-class wars, for example the suppression of burghers and the peasantry.'⁹⁰ Given the general lack of medieval knights as a cultural image in Pashukanis's Russia,⁹¹ it is likely that his insight here can be linked to his background where images of knighthood symbolically connected medieval, early modern, and modern Lithuanian identity.⁹²

It is revealing that Pashukanis characterises victims of the knights on the universal basis of class given the more standard invocations of victimhood by the Teutonic Order as a tool of parochial nationalist assertion – especially in narratives of Polish nationalism.⁹³ In this way, Pashukanis's Lithuanian background rendered him well-positioned to show how universality-invoking narratives of bourgeois nationalism amongst Poles were contradicted by their embedded marginalisation of the other national groups that inhabited the former Polish-Lithuanian Commonwealth. Here, an interesting parallel to Pashukanis's context was the Austrian portion of the Commonwealth where an emergent Ukrainian nationalism ascended within a similar timeframe and context to that of the Lithuanians.⁹⁴ Serving a dual function as the site of both the greatest post-partition Polish autonomy and the Ukrainian effort to distinguish itself from Russian identity, this common region of Galicia forced very different

⁸⁹ Pashukanis, 'International Law' (n 34) 324.

⁹⁰ *ibid.*

⁹¹ In Russian/Ukrainian cultural consciousness, the Cossack plays a far greater role as the romanticised figure on horseback, see Anna Kovalchuk, 'Narrating the National Future: The Cossacks in Ukrainian and Russian Literature' PhD Thesis, University of Oregon (2017).

⁹² Rimvydas Petrauskas, 'Knighthood in the Grand Duchy of Lithuania from the Late Fourteenth to the Early Sixteenth Centuries' (2006) 11 *Lithuanian Hist Stud* 39; Agnė Railaitė-Bardė, 'The Triumphant Genealogical Awareness of the Nobility in the Grand Duchy of Lithuania in the 17th and 18th Centuries' (2018) 22 *Lithuanian Hist Stud* 29; Giedrė Jankevičiūtė, 'Constructing National Identity: The Image of the Medieval Grand Duchy of Lithuania in Lithuanian Art from the 1920s to the 1990s' (2010) 8 *Central Eur* 158.

⁹³ Adam Koźuchowski, 'The Devil Wears White: Teutonic Knights and the Problem of Evil in Polish Historiography' (2019) 46 *E Cen Eur* 133. Condemning the Teutonic Order is coupled with veneration of Poland's own knights, see Norman Davies, 'Polish National Mythologies' in Geoffrey Hosking and George Schopflin (eds), *Myths and Nationhood* (Hurst 1997) 141.

⁹⁴ Piotr S Wandycz, *The Lands of Partitioned Poland, 1795-1918* (University of Washington Press 1974) 239-259.

nationalist projects to confront one-another.⁹⁵ According to Rosa Luxemburg's synthesis of these issues as informed by her broader materialist critique of the right of nations to self-determination: 'Polish bourgeois nationalism is directed as much against the Ruthenians [Ukrainians] as against the Lithuanians. The very nationality which had to endure the bitter policy of extermination by the partitioning powers...now refuses the right of independent existence to other nationalities.'⁹⁶ Yet how precisely did these historic questions of nationality, empire, constitutionalism, and statehood – quintessential issues of public law – shape Pashukanis's theory of the legal form that, in depicting juridified individuals as base-level capitalist subjects, was largely focused on matters of private law?

The Pashukanis-Stučka Debate as Lithuanian-Latvian Difference

When analysing Pashukanis's theory through these vast inter-connected histories, there are numerous options. Much can be said in relation to Lenin's particular endorsement of the 'right of nations to self-determination' as a revolutionary imperative within the inter-imperial rivalry defined international system – an analysis with a clear entry point given Pashukanis's application of Lenin's imperialism framework to international law.⁹⁷ Much can also be said about the intense contestation between the restored post-First World War Polish and Lithuanian states, particularly in their struggle over Vilnius (the old capital of the Lithuanian Grand Duchy that since became predominantly Polish/Jewish ⁹⁸), that were occurring roughly contemporaneously with Pashukanis's diplomatic mission in Germany.⁹⁹ However, in raising the question of 'legal form' within this analysis, I centre a narrow, yet significant, point of disagreement between Pashukanis and his fellow Soviet jurist Pēteris Stučka. Famously, for Pashukanis, to recognise law as the 'legal form', one must conclude that technical administrative matters cannot, contrary to common perception, be deemed 'law' properly understood.¹⁰⁰ He illustrated this through his point that train schedules, surgical procedures,

⁹⁵ Larry Wolff, *The Idea of Galicia: History and Fantasy in Habsburg Political Culture* (Stanford University Press 2010).

⁹⁶ Rosa Luxemburg, 'The National Question and Autonomy' in *The National Question: Selected Writings*, Horace Davis, ed (Monthly Review Press 1976) 101, 164.

⁹⁷ Pashukanis, 'International Law' (n 34) 322-323.

⁹⁸ Snyder (n 17) 53-57.

⁹⁹ Post-imperial property redistribution questions here were deeply connected to assertions of national identity, see Klaus Richter, "An Orgy of Licence?" Democracy and Property Redistribution in Poland and the Baltics in their International Context, 1918–1926' (2018) 46 Nationalities Papers 791.

¹⁰⁰ Pashukanis, *General Theory* (n 20) 78-84.

and beehives, though functioning according to distinct administrative procedures, are too far removed from the abstracted structure of individualised rights/obligation holders (i.e. legal forms) to be ‘law.’¹⁰¹ However, as Anna Lukina has shown, for Stučka (contra Pashukanis), technical administrations could in fact be law.¹⁰² This premise was well-suited to his view that ‘law’ was that which was determined to be law by the dominant class and, on that basis, was not necessarily bourgeois; proletarian law could in fact exist should workers become the dominant class.¹⁰³ In Pashukanis’s critical assessment, Stučka’s ‘...definition uncovers the class content concealed within legal forms, but does not explain why this content assumes that particular form.’¹⁰⁴

In interpreting this divergence in light of the broader patterns of history and identity detailed above, I argue that, in short, the divergence between Pashukanis and Stučka on whether administration was ‘law’ can be explained at least in part by the fact that, while Pashukanis was Lithuanian, Stučka was Latvian. Making this claim necessarily invites much inquiry on the nature of the relationship between Latvians and Lithuanians, especially as they are speakers of the only two surviving Baltic languages. Yet despite this commonality, immense historical difference renders comparison of pre-statehood Latvians and Lithuanians rather difficult. However, in an important intervention, Saulius Pivoras shows that the emergence of Latvian national consciousness played a profound role in the Lithuanian transition from a civic nationalism to an ethnic nationalism after the failed 1863 Polish uprising.¹⁰⁵ While the legacies of the Commonwealth bequeathed the Lithuanians with numerous challenges when it came to constitutionalism, republicanism, and the reality of partition, the Latvians had no experience of any such structures and could thus bypass such issues when defining themselves in purely ethnic terms.¹⁰⁶ In addition to providing an ethnic emulation model, identifying Latvians as ethnolinguistic kin despite religious differences, allowed Lithuanians to escape the grasp of Roman Catholicism as an identity medium that bound them to the Poles.¹⁰⁷ In the context of

¹⁰¹ *ibid* 79.

¹⁰² Anna Lukina in this volume.

¹⁰³ *ibid*; Pēteris Stučka, ‘Proletarian Law’ in *Selected Writings on Soviet Law and Marxism*, Robert Sharlet, Peter B Maggs, and Piers Beirne, eds (ME Sharpe 1988) 9.

¹⁰⁴ Pashukanis (n 20) 84.

¹⁰⁵ Saulius Pivoras, ‘The Role of Latvian Nationalism in the Transformation of Lithuanian Nationalism during the Long 19th Century’ (2021) 27 *Nations and Nationalism* 566

¹⁰⁶ *ibid* 570.

¹⁰⁷ *ibid* 575.

Russian rule, this distinction was all more important given that Russians were apt to conflate ‘Polishness’ with Catholicism.¹⁰⁸

Important as these interactions may be, to understand how Latvian-Lithuanian difference might explain the difference between Stučka and Pashukanis’s jurisprudence demands a deeper historical exploration. In once again revisiting the medieval Northern Crusades, the lands inhabited by the Latvians’ ancestors were thoroughly subjugated and converted by Germanic invaders.¹⁰⁹ In stark contrast to the Lithuanians, these peoples were unable to organise into a resistance-capable polity to anything near the extent of the Lithuanian Grand Duchy. Following these conquests, the initial invaders and later waves of Germanic migrants established feudal lordships that imposed regimes of serfdom upon the indigenous Baltic inhabitants while also developing lucrative commercial ports, namely Riga, that connected the Baltic Sea to the network of rivers in Eastern Europe that extended to the Black Sea in the south.¹¹⁰ The strategic importance of this region brought about much great power competition in the early modern era between the Polish-Lithuanian Commonwealth, the Kingdom of Sweden and the newly westward expanding Russian Tsardom who waged a long series of wars that were only conclusively ended in 1721 when the Treaty of Nystad formalised Russia as the region’s dominant power.¹¹¹ For the Baltic peasants, foreign powers were typically looked upon with favour as they provided a counterbalance to the local Baltic German lords in a manner that helped to preserve local languages and cultures.¹¹² In situating this material meta-context as Stučka’s formative backdrop, we gain many insights into why it was that he theorised ‘law’ as the command of the dominant class in a manner that could not exclude technical administration.

¹⁰⁸ Darius Staliūnas, ‘The Pole’ in the Policy of the Russian Government: Semantics and Praxis in the Mid-Nineteenth Century’ (2000) 5 *Lithuanian Hist Stud* 45, 53-54.

¹⁰⁹ Christensen (n 56) 93-104. For the defining first person account, see Henricus Lettus, *The Chronicle of Henry of Livonia*, James Brundage, trans (Columbia University Press 2004).

¹¹⁰ Michael North, *The Baltic: A History*, Kenneth Kronenberg, trans (Harvard University Press) 35-37; see also Kevin O’Conner, *The House of Hemp and Butter: A History of Old Riga* (Northern Illinois University 2019).

¹¹¹ Robert Frost, *The Northern Wars: War, State and Society in Northeastern Europe, 1558-1721* (Routledge 2014).

¹¹² Rein Taagepera, ‘Albert, Martin, and Peter too: Their Roles in Creating the Estonian and Latvian Nations’ (2011) 42 *J Baltic Stud* 125, 132-135

Stučka's approach towards this end is well depicted in his text on 'The State' where, as a prelude to discussing 'bourgeois revolution and the state', he details a variety of historical state formations that are quite easy to connect to the modes of rule endured by Latvians and their forebears.¹¹³ In beginning with 'the primitive state' whereby '[t]he direct successor of the clan is the so-called *patriarchal* state', he then goes to describe 'the patrimonial and feudal state' that, while phrased in general terms, nevertheless depicts the Germanic feudal colonisation of the eastern Baltic very well.¹¹⁴ Here Stučka claims that the feudal state entails a union of owners under the common banner of class which in turn sets the stage for a division between countryside and city-based modes of production.¹¹⁵ In the history of Stučka's formative context, this occurred in the long unravelling of the Northern Crusades where, following the Polish-Lithuanian victory at Grunwald, the various conquerors of today's Latvia and Estonia formed the 'Livonian Confederation' which provided a foundation for enhanced Baltic commerce.¹¹⁶ The next stage for Stučka is 'absolutism' whereby the decentralised configuration of feudalism is replaced by centralisation around a singular monarchical figure.¹¹⁷ This could easily be related to the Latvian experience of rule by Swedish Kings and Russian Tsars who represented something very different from the rule of the old Baltic German lords who came to question their belonging under these new authorities, particularly under Russian rule.¹¹⁸ Interestingly, he names the 'police state' as a sub-category of absolutism but only lists Prussia as an illustration – a designation that is perhaps intended to exclude the Swedes and Russians who alleviated the Latvian burdens of Germanic tyranny.¹¹⁹ Throughout these various iterations of authority, command and administration would be easy to characterise as 'law.' Given this framing, it is easy to understand his exasperated claim '...that Comrade Pashukanis's conception encompasses only bourgeois law and, by declaring it to be *law in general*, he blurs the *class nature* of law, i.e., he denies the existence of feudal law and now the law of the transition period, Soviet law, as well.'¹²⁰

¹¹³ Pēteris Stučka, 'The State' in Sharlet et al (n 103) 108.

¹¹⁴ *ibid* 114.

¹¹⁵ *ibid* 114-115.

¹¹⁶ Muntis Auns, 'Acquisition of the Acquired: The Establishing of a Real Administration in Livonia' in Nils Blomkvist (ed), *Culture Clash or Compromise: The Europeanisation of the Baltic Sea Area, 1100-1400 AD* (Gotland Centre for Baltic Studies 1998) 259.

¹¹⁷ Stučka, 'The State' (n 113) 115.

¹¹⁸ Ulrike Plath, 'Heimat: Rethinking Baltic German Spaces of Belonging' (2014) 3/4 *Kunstiteaduslikke Urimusi* 55, 60, 64

¹¹⁹ Stučka, 'The State' (n 113) 115-116.

¹²⁰ Pēteris Stučka, 'My Journey and My Mistakes' in Sharlet et al (n 103) 219, 223.

The Lithuanian ‘Secret’ of Pashukanis’s Critique of Legal Form

In light of Stučka’s admonishment, when drawing upon the multilayered backdrops detailed above, we are well-positioned to theorise why Pashukanis’s Lithuanian background might have led him to critique law as bourgeois law in a manner that confounded his Latvian interlocutor. As a preliminary matter, while Pashukanis occasion to consider his Lithuanian heritage as a minority in Russian and German-dominated worlds, in stark contrast, Stučka was not only deeply enmeshed within Latvian culture and politics but was the leader of the short-lived Latvian Socialist Soviet Republic (1918-1920).¹²¹ On this basis, Stučka’s task of justifying revolutionary order as law in relation to a discrete political community was far more immanent relative to Pashukanis.¹²² However, this biographical consideration must not conceal the deeper materiality that shaped defining differences between the Latvian and Lithuanian experiences. This is especially important in light of how nationalist proclamations of affinities between Latvians and Lithuanians, however powerful they were rhetorically, were prone to reproducing grave material distortions. To provide a profound illustration, by the late nineteenth century, nationalists of both groups claimed that the Baltic German repression of the Latvians was analogous to the Polish repression of Lithuanians.¹²³ Such a parallel, though certainly validating to Lithuanians wishing to disavow their historical connections to Poles, is difficult to sustain at any material level. As detailed above, while Baltic Germans long defined themselves as incontestably distinct and superior to local populations,¹²⁴ designations of ‘Polish’ and ‘Lithuanian’ were historically far more fluid and intertwined.¹²⁵ On this basis, even after the rise of ethnonationalism, Polish attitude towards Lithuanians was far more multifaceted in their temporal and emphatically variable measures of admiration, assimilation, and ultimate consternation at the prospect of disunion.¹²⁶ These differing attitudes reflected differing material histories and social relations as they existed between Baltic Germans/Latvians and Poles/Lithuanians. Unifying these animosities on a nationalist basis –

¹²¹ Marina Germane, ‘Pēteris Stučka and the National Question’ (2013) 44 J Baltic Stud 375.

¹²² Pashukanis certainly recognised Stučka professional need for a more pragmatic approach to law. Pashukanis, *General Theory* (n 20) 84.

¹²³ Pivoras (n 105) 573.

¹²⁴ Liina Lukas, ‘“Who Holds the Right to the Land?” Narratives of Colonization in Baltic-German and Estonian Literatures’ in Andreas Beer and Gesa Mackenthun (eds), *Fugitive Knowledge: The Loss and Preservation of Knowledge in Cultural Contact Zones* (Waxmann 2015) 65.

¹²⁵ Snyder (n 17) 15-51.

¹²⁶ Wandycz (n 94) 239

especially as they might affirm the sovereign state as an object of desire – exemplified the type of juridical abstraction that Pashukanis condemned as a grave barrier to uncovering historical sociological truth.¹²⁷

What then might the *longue durée* of the Lithuanian Question have meant for Pashukanis as a materialist theorist of the legal form whose heritage connected him to this history? Drawing upon the pasts detailed above, it can be argued that, since the rise of global capitalism, Lithuania and Poland – both together and apart – had been defined by one legal fetishisation after another. This being the case, such fetishisation was understandable for it was in the precapitalist moment of the early 1400s the allied Poles and Lithuanians triumphed over a despised invader and, through novel assertions of reason via natural law, justified their Catholic-pagan union against existing religious dogmas.¹²⁸ In the ensuing ‘Golden Age’ that was the sixteenth century, the nascent Polish-Lithuanian Commonwealth was the recipient of no small amount of luck, namely the fact that it was only minimally effected by the Black Death, and this momentary strength formed the groundings of its unique institutions.¹²⁹

However, as new capitalist rationalities and effects began to proliferate from the seventeenth century onwards, adherence to identity-defining pre-capitalist legacies became a liability as Commonwealth elites maintained debilitating institutional forms and failed to adopt advantageous ones.¹³⁰ This included continued adherence to a *Liberum veto* that made legislation virtually impossible via its ability to be rejected by any individual member of a large social class, and (in an intimately related capacity) a disavowal of the Roman Law that was rapidly increasing as a medium of interaction and exchange throughout Europe.¹³¹ The Commonwealth thus deployed the core private law concept of individual consent to uphold a fetishised conception of public law/constitutional heritage in a feudal manner that undermined

¹²⁷ Pashukanis, *General Theory* (n 20) 146. On this point, he was highly critical of the Austro-Marxists who placed much faith in international law. Pashukanis, ‘International Law’ (n 34) 322.

¹²⁸ On the contingent non-reception of this history into international legal origin narratives, see Eric Loefflad, ‘In Search of Paulus Vladimiri: Canon, Reception, and the (In)Conceivability of an Eastern European ‘Founding Father’ of International Law’ (2023) 36 *Leiden J Intl L* 833.

¹²⁹ Loefflad, ‘Unpartitionable’ (n 26) 926.

¹³⁰ Jacek Kochanowicz, ‘The Polish Economy and the Evolution of Dependency’ in Daniel Chirot (ed), *The Origins of Backwardness in Eastern Europe: Economics and Politics from the Middle Ages Until the Early Twentieth Century* (University of California Press 1989) 92.

¹³¹ Tomasz Giaro, ‘Legal Tradition of Eastern Europe: Its Rise and Demise’ (2011) 2 *Comp L Rev* 1, 6-7.

consciousness of how the true core of legal power was private law. This all occurred at a time when the public law/private law divide was entrenching as capitalism was expanding – something Pashukanis was very much aware of.¹³²

However, even when the Commonwealth nobility sought to reform their system (including the abandonment of the *Liberum veto*¹³³), in embracing liberal constitutionalist conceptions following the first partition, they replaced one legal fetishisation with another. This proved exceptionally perilous as the Enlightenment mirage of ‘universal liberty’ created a false sense of commonality between the feudal Commonwealth and increasingly capitalist Western societies in a manner that, by sparking anxiety in its neighbours, hastened the Commonwealth’s death by two more partitions.¹³⁴ Relatedly, in adhering to the continued truth of lost juridical realities, the post-partition efforts to restore the Commonwealth proved a means of marginalising early nineteenth-century resistance efforts much more grounded in the material conditions of primary producers.¹³⁵ However, these restoration efforts paled in comparison to the rise of post-1863 rival Polish and Lithuanian ethno-nationalism when it came to destructive potential. Seeking independence from empire, these nationalists affirmed the premises of the hopelessly abstracted mode of nineteenth-century positivist statehood that certain German Volk theories imbued with the pathologically delusional hope that a nation’s true organic substance could be achieved through this empty truth-concealing juridical vessel.¹³⁶

It was this basic belief structure that, in the aftermath of the First World War, fuelled intense armed clashes between Lithuanians and Poles over the city of Vilnius/Wilno, a space that both sides viewed as integral to their identity according to mutually excluding nationalist ideologies.¹³⁷ Freed from the old bounds of Commonwealth and empire, and armed with arguments on the legal form of sovereignty, both sides were now capable of deploying the type

¹³² Pashukanis, *General Theory* (n 20) 58-59, 95-97.

¹³³ Jerzy Lukowski, ‘Machines of Government’: Replacing the *Liberum Veto* in the Eighteenth-Century Polish-Lithuanian Commonwealth’ (2012) 90 *Slavonic and Eastern Eur Rev* 65.

¹³⁴ Loefflad, ‘Unpartitionable’ (n 26) 930-932.

¹³⁵ Peter Brock, *Polish Revolutionary Populism: A Study in Agrarian Socialist Thought From the 1830s to the 1850s* (University of Toronto Press 1977).

¹³⁶ On the entrenchment of this presumption in international legal thought via its under-theorisation of ‘customary international law’ and its organicist premise of state ‘consent’, see Carty (n 24) 74-74.

¹³⁷ Dangiras Mačiulis and Darius Staliūnas, *Lithuanian Nationalism and the Vilnius Question, 1883-1940* (Verlag Herder-Institut 2015).

of violence that only a nation-state could.¹³⁸ It is not difficult to see how Pashukanis, akin to Walter Benjamin's latter observations, might have viewed this Polish-Lithuanian violence as just the tip of a massive rubble pile assembled by the belief that an idealised concept of 'law' could transcend social contradictions and social domination.¹³⁹ Given the Polish-Lithuanian saga of tragedy upon tragedy, and the perpetual rise of false juridical messiahs in their wake, law needed to be exposed for what it actually was as opposed to what it purported itself to be and was understood to be in light of its popular disseminations as such. For Pashukanis, this actuality of law was the legal form that only becomes universalised upon the triumph of capitalist social relations. To misunderstand this truth of the legal form was to repeat endless cycles of dashed hope giving rise to naïve redemption arcs that could never succeed on their own terms. This provides an important insight into why Pashukanis was so adamant that under communism law would 'wither away' and that the Soviet law of the Transition Period should strive to be something other than 'law' – a position that Stučka could not abide.

In contrast to the critical Lithuanian view Pashukanis possibly possessed, from Stučka's materialist Latvian perspective, it was far more possible to merge a belief in progress through law with a materialist analysis of history and society. After all, it was under Russian rule that Latvian peasants were emancipated from Germanic-imposed feudal serfdom in the early nineteenth century.¹⁴⁰ Here, a new regime of law imposed by a new ruler meant progress as it contributed, in conjoined measure, to both freedom for the Latvians and a more enlightened re-invention of Baltic German identity.¹⁴¹ From Stučka's perspective, there was no reason why this improvement could not continue into the new era that bore witness to the near simultaneous Russian Revolution and rise of an independent Latvia. Even when his socialist government was overthrown with aide from the proto-Nazi Freikorps, German First World War veterans that

¹³⁸ Tomas Balkelis, 'The Logic of Violence in the Polish-Lithuanian Conflict, 1920–1923' (2021) 49 *Nationalities Papers* 911.

¹³⁹ Walter Benjamin, 'Theses on the Philosophy of History' in Stephen Eric Bronner, Douglas MacKay Kellner (eds), *Critical Theory and Society: A Reader* (Routledge 1990) 255.

¹⁴⁰ Marju Luts-Sootak and Hesi Siimets-Gross, 'Baltic Peasants After Emancipation – Free and Equal People or a New Social Estate in the Estate-Based Society' in *Legal Science: Functions, Significance and Future in Legal Systems II* (University of Latvia Press 2020) 158.

¹⁴¹ Andrew James Blumbergs, *The Nationalization of Latvians and the Issue of Serfdom: The Baltic German Literary Contribution in the 1780s and 1790s* (Cambria Press 2008); Ivars Ijabs 'Another Baltic Postcolonialism: Young Latvians, Baltic Germans, and the emergence of Latvian National Movement' (2014) 42 *Nationalities Papers* 88.

continued to fight communists in the Baltic,¹⁴² the presence of the newly established Soviet Union provided a barrier to reactionary politics and an opportunity to merge Latvian national identity with the ends of the Bolshevik Revolution.¹⁴³ This meant placing a great deal of trust in the belief that new class configurations would bring new emancipatory legal realities, and, on this basis, bourgeois law should not be the totality of ‘law.’ Passing away in 1932, Stučka did not live to see the Soviet purge of the Latvian National Communists that occurred after the Second World War.¹⁴⁴

Yet this was not the only Latvian-related disjuncture that Stučka did not live to see. Against the backdrop of the Russian Revolution, much discourse on the nationality question was deeply connected to Lenin’s influential dichotomy between ‘oppressed’ and ‘oppressor’ nations that underpinned his theory of national self-determination.¹⁴⁵ In Stučka’s Latvia, violence conformed to this model, especially as the Freikorps-backed overthrow of his government fit seamlessly within a narrative of centuries long German oppression of the Latvian nation. What then was to be made of violence between two different oppressed nations, as was the case with Poles and Lithuanians? The answer depended in great measure on the faith one was willing to place in the medium of law. While post-Stučka Latvia may have been the site of a Polish-Lithuanian ceasefire via the 1921 Treaty of Riga, Pashukanis, himself no stranger to treaty negotiations, may have had much reason to believe that building durable peace through such legalistic means was grossly insufficient at best.¹⁴⁶ Though his 1937 execution prevented him from seeing it, the legal form – especially as it was applied to the prospect of ethnic peace – could not prevent, and arguably accelerated, the ethnic violence of the Second World War.¹⁴⁷ While of course the greatest acts of destruction were those of the Nazis,¹⁴⁸ under such

¹⁴² Charles Sullivan, ‘German Freecorps in the Baltic, 1918–1919’ (1976) 7 J Baltic Stud 124, 126-128.

¹⁴³ Germane (n 121) 387-388.

¹⁴⁴ William D Prigge, *Bearslayers: The Rise and Fall of the Latvian National Communists* (Peter Lang 2015).

¹⁴⁵ Vladimir Lenin, ‘The Revolutionary Proletariat and the Right of Nations to Self-Determination’ in *Collected Works, Volume XXI* (Foreign Languages Publishing House 1964) 407, 409; see also Stanely Page, ‘Lenin, the National Question and the Baltic States, 1917-19’ (1948) 7 Am Slavic and East Eur Rev 15

¹⁴⁶ On this settlement, see Stanisław Dąbrowski, ‘The Peace Treaty of Riga’ (1960) 5 Polish Rev 3.

¹⁴⁷ Hitler iconically manipulated the minority rights protection system by demanding territorial concessions to protect externally located German-speakers. Mark Mazower, ‘The Strange Triumph of Human Rights, 1933–1950’ (2004) 47 Hist J 379, 384-385.

¹⁴⁸ Often divided by victim identity, integrated studies of Nazi mass violence are relatively recent, see Alex Kay, *Empire of Destruction: A History of Nazi Mass Killing* (Yale University Press 2021).

conditions of total rupture, Leninist distinctions between ‘oppressed’ and ‘oppressor’ nations provided little meaningful indication of who would commit grave acts of violence against whom – this included Latvia where numerous local factions participated in the Holocaust.¹⁴⁹ Framed this way, Pashukanis’s legal scepticism proves darkly prophetic in retrospect. The grave limits of faith in law derived from an analysis of Pashukanis’s theory in relation to Lithuania (and its dismal record of dashed juridified hope) thus provides much opportunity to theorise the violence endemic to the legal form he identified.¹⁵⁰ Owing to perceptions made possible by his unique material-cum-juridical contexts, for Pashukanis, in a manner far more acute than Stučka, the bloody and chaotic world around him *was the rule of law*.¹⁵¹

¹⁴⁹ Timothy Snyder, *Black Earth: The Holocaust as History and Warning* (Vintage 2015) 169-172.

¹⁵⁰ This is especially true regarding Lithuania where the wartime transformation of demographics created new realities in the Soviet era, see Violeta Davoliūtė, *The Making and Breaking of Soviet Lithuania: Memory and Modernity in the Wake of War* (Routledge 2014).

¹⁵¹ Mieville (n 27) 319.