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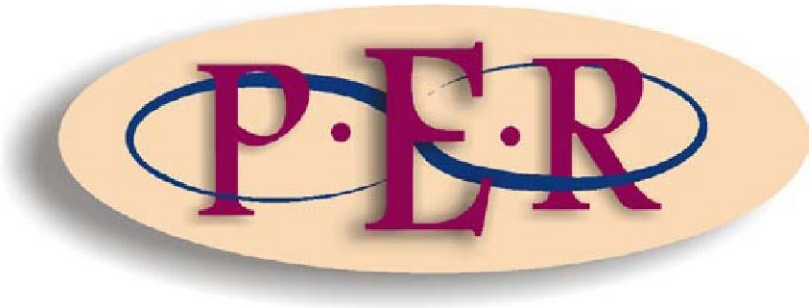


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# ALL ROADS LEAD TO PROPERTY: PASHUKANIS, CHRISTIE AND THE THEORY OF RESTORATIVE JUSTICE

**R Koen***

## 1 Introduction

The name of Evgeny Pashukanis, the Bolshevik jurisprudent, is linked umbilically to the so-called commodity form theory of law. In his *Law and Marxism* Pashukanis develops a general theory of law which turns upon the relationship between the commodity form and the legal form. The fundamental postulates of the general theory are, firstly, that the legal form is the analytical fulcrum of the general theory of law, and secondly, that the commodity form is the key to the analysis of the legal form. *Law and Marxism*, which first appeared almost ninety years ago, continues to occupy pride of place in the Marxist analysis of the law. Indeed, if there is a classical Marxist theory of law it is the so-called commodity form theory of law.[1]

The name of Nils Christie, the Norwegian criminologist, features foremost in any consideration of the theoretical foundations of the restorative justice movement. In his seminal *Conflicts as Property* he proposed a theory of criminal justice which since has come to be identified constitutionally with restorative justice. Despite the fact that it makes no express reference to restorative justice, *Conflicts as Property* is easily the most quoted single piece in the extensive *corpus* of restorative literature. It is considered to be "classic" and "paradigmatic"[2] and its arguments have achieved the status of "a modern orthodoxy amongst RJ[3] supporters".[4] Before any other work,

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1 See Balbus "Commodity Form and Legal Form" 88, who submits that: "Almost all subsequent Marxist work on the law is, unfortunately, a regression from the standard established by Pashukanis's pioneering effort."

2 Hudson "Victims and Offenders" 177.

3 Restorative justice.

4 Ashworth "Is Restorative Justice the Way Forward" 171. See Wright *Justice for Victims and Offenders* 54: "Few contributions have been as widely quoted in the literature on mediation as the Norwegian Professor Christie's lecture in Sheffield in 1976, *Conflicts as Property*." See also Johnstone "Introduction to Part A" 24: "Christie's paper is rightly regarded as essential reading for anybody wishing to understand the restorative justice perspective." Bottoms "Some Sociological Reflections on Restorative Justice" 82, 80 fn 2 refers to "this key foundational text"

it may be considered to contain the fundamental theoretical premises of restorative justice.[5]

This contribution constitutes a hypothetical engagement of sorts between Pashukanis and Christie. It proceeds from the two-handed premise that Pashukanis is the premier Marxist theoretician of law and that Christie is the doyen of restorative justice theory. The primary objective of the essay is to develop a Pashukanist perspective on the theory of restorative justice, and it seeks to achieve this objective by reading Christie's theoretical insights against the core propositions of the commodity form theory of law.

## 2 Pashukanism in brief

For Pashukanis, the Marxist general theory of law had to be a theory of the legal form. Of course, he was alive to the class content of law. However, he warned about the inadequacy of a content-driven theory of law and was concerned to comprehend why legal relations take the form they do.[6] In other words, his project was to analyse law *qua* law. Thus he provides a form-based delineation of the Marxist general theory:

> The general theory of law may be defined as the development of the most fundamental and abstract juridical concepts, such as 'legal norm', 'legal relation', 'legal subject' and so on.[7]

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and concludes that: "The subsequent major influence of Christie's paper would have been predicted by very few of those who first heard it. It was initially regarded as an extremely interesting intellectual argument, but one that was unlikely to have much subsequent practical impact. How wrong first impressions can be!" Even Braithwaite *Restorative Justice and Responsive Regulation* 11, the most prolific writer on restorative justice, considers Christie's to be "the most influential text of the restorative tradition".

5 Christie's is a theory of comprehensive, as opposed to partial, restorative justice. Partial restorative justice is a pale fraction of comprehensive restorative justice. Whereas the latter was conceptualised as an alternative to criminal justice, the former has been fashioned as an adjunct thereto. Comprehensive restorative justice represents a radical departure from and a decisive theoretical rupture with the established presumptions and practices of criminal justice. Throughout this essay, any unqualified reference to restorative justice should be understood as a reference to the comprehensive version.

6 Pashukanis *Law and Marxism* 55.

7 Pashukanis *Law and Marxism* 47.

The Marxist general theory of law had to take the legal form seriously. Indeed, it had to be constructed in terms of the legal form, for without recourse to the morphology of law, the nature of law itself remains a mystery.[8]

Pashukanis discerned that the elaboration of the general theory of law had to be derived from the fundamental categories of Marxist political economy, and in particular the commodity.[9] He proposed that the attributes of the commodity held the key to the materialist analysis of the legal form, declaring his "basic thesis" to be that "the legal subject of juridical theories is very closely related to the commodity owner".[10]

Both the commodity and the commodity owner make their appearance with the world-historic transition from production for use to production for exchange. Both are born of the triumph of exchange value over use value as the motif of human production. They come into existence when the *raison d'être* of human labour shifts from its aboriginal concern with use and sustenance to the historical artifice of exchange and market transactions. Pashukanis understood, as did Marx before him, that law was the necessary concomitant of the development of the commodity economy. Custom had been adequate to regulate social relations within the natural economy; law was required to deal with the social relations of the exchange economy.

> At the same time, therefore, that the product of labour becomes a commodity and a bearer of value, man acquires the capacity to be a legal subject and a bearer of rights.[11]

In other words, the legal form was the homologue of the commodity form, both emerging from the break-up of the natural economy. The historical process whereby production for exchange superseded production for use was simultaneously the process whereby legal relations supplanted customary relations.

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8 See Miéville *Between Equal Rights* 2.
9 Pashukanis *Law and Marxism* 64.
10 Pashukanis *Law and Marxism* 39.
11 Pashukanis *Law and Marxism* 112.

It was Marx who had originated the notion of a symbiosis between commodity and legal forms and of the process of commodity exchange presupposing the transfiguration of commodity owners into legal subjects, each invested with the same bundle of rights:

> It is plain that commodities cannot go to market and make exchanges of their own account. We must, therefore, have recourse to their guardians, who are also their owners … In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another, as persons whose will resides in these objects, and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must therefore recognise in each other the rights of private proprietors. This juridical relation … is but the reflex of the real economic relation between the two. It is this economic relation that determines the subject-matter comprised in each such juridical act.[12]

Miéville[13] is right to identify this passage by Marx as crucial to the general theory of law formulated by Pashukanis. In it Marx demarcates precisely the material conditions of the evolution of the legal subject as bearer of rights. Importantly, the exchange economy is predicated upon the principle of equivalence. In other words, it is structured in terms of relations of equality between commodity owners, and such equality is achieved when the commodity owner is endowed with legal subjectivity. Thus, the development of exchange relations depends upon the juridification of human relations. Juridification is the dividing line between exchange and appropriation. Marx[14] explains:

> Although individual A feels a need for the commodity of individual B, he does not appropriate it by force, nor vice versa, but rather they recognise one another reciprocally as proprietors, as persons whose will penetrates their commodities. Accordingly, the juridical moment of the Person enters here … No one seizes hold of another's property by force. Each divests himself of his property voluntarily.

Thus, in the exchange economy the legal subject is the *alter ego* of the commodity

12 Marx *Capital* 88.
13 See Miéville *Between Equal Rights* 87.
14 Marx *Grundrisse* 243.

owner, and the legal form is the necessary *copula* of the commodity form.[15]

In world-historic terms, juridification, or the transformation of human relations into legal relations, is synchronised with commodification, or the transformation of the products of human labour from use values into exchange values. In this regard, rights in law are homologous to value in political economy. Both pivot upon equalisation and both are central to the demise of the natural economy and the development of the commodity economy. Thus, Pashukanis[16] concludes that:

> The legal relation between subjects is simply the reverse side of the relation between products of labour which have become commodities.

In terms of the Marxist general theory of law, then, the nature of the commodity holds the key to the nature of law, and the juridical as the site of equality is indispensable to the smooth operation of the market as the site of commodity exchange. In a word, the legal subject is the juridical correlate of the commodity owner, and the legal form is the commodity form juridified.

The capitalist mode of production, as a mode of generalised commodity production and exchange, is the apogee of the commodity economy. Indeed, the commodity is the elemental cell of the market economy, and concentrates in itself all the elements of capitalist social relations of production. Unsurprisingly, then, the legal form attains the apex of its development and the legal subject comes of age under capitalism. And whereas law began its evolution in the pre-capitalist epoch, mature law is categorically bourgeois law.[17] The bourgeoisie is the only ruling class in history which has embraced a juridical worldview, comprehending law to be the organisational axis of human relations.[18] The juridical world outlook is the ideological expression of the political economy of the commodity and is the most appropriate ideational expression of the class interests of the bourgeoisie. It was, according to Engels, the

15 Pashukanis *Law and Marxism* 38-39 readily acknowledged his debt to Marx.
16 Pashukanis *Law and Marxism* 85.
17 See Pashukanis *Law and Marxism* 40-45.
18 See Engels "Lawyers' Socialism" 598.

theological worldview secularised.[19] It enabled the bourgeoisie to present the commodification and sale of labour-power as transactions between legal equals. The economic exploitation and political oppression of the proletariat were secreted behind their juridical forms of equality and right.

In sum, the Pashukanist general theory of law is a theory of law as form. It derives the legal form from the commodity form and comprehends legal subjectivity as the crucial juridical criterion of the commodity economy. It identifies the juridification of social relations with the development of capitalism and considers bourgeois law to be the apotheosis of the evolution of law as form. True to his Marxist convictions, Pashukanis produced a general theory of law founded in a "materialist interpretation of legal regulation as a specific historical form".[20]

## 3 Pashukanism and criminal justice

Although Pashukanis acknowledged readily that his theory of law was rooted historically in private law, specifically the law of contract,[21] he always conceived of and presented it as a general theory, applicable across the various fields of law.[22] He posited that even criminal law, which has no *prima facie* links to the commodity form, is governed also by the principle of equivalence.[23] Indeed, Pashukanis[24] classified this principle as the "juridical soul" of criminal proceedings,[25] and considered that:

> the characterisation 'criminal law' becomes utterly meaningless if this principle of the equivalent relation disappears from it.

He locates the principle in the notion that a crime is a particular form of contract. It is a retrospective contract:

19 Engels "Lawyers' Socialism" 598.
20 Pashukanis *Law and Marxism* 54.
21 See Pashukanis *Law and Marxism* 121.
22 See Lipson "Is there a Marxist Theory of Law?" 192; Norrie 1982 *Int'l J Soc L* 434.
23 Pashukanis *Law and Marxism* 168 classifies the principle of equivalence as the "first truly juridical idea".
24 Pashukanis *Law and Marxism* 168.
25 Pashukanis *Law and Marxism* 177.

> Felony can be seen as a particular variant of circulation, in which the exchange relation, that is the contractual relation, is determined retrospectively, after arbitrary action by one of the parties.[26]

A crime is a unilateral rejection of the principle of equivalence. It is not an act of exchange but of appropriation in which the offender strong-arms the victim into a relation which is completely one-sided. In this sense, a crime may be comprehended as an attack upon the legal form itself.

The offender wishes to operate outside the parameters of the legal form. The criminal law exists to ensure that the offender does not enjoy the fruits of his violation of the principle of equivalence. It deploys the power of the state to negate the power which the offender enjoys in relation to the victim, and to secure reciprocation for the victim from the offender. To this end, the offender is put to terms *ex post facto*. He has had his satisfaction. Now, in the face of the power of the state, he is constrained to perform his side of a bargain which he has imposed arbitrarily upon his victim. The crime has desecrated the principle of equivalence. The criminal law operates to rescue the principle by construing the crime as a contractual obligation which the offender has to meet retrospectively.

For Pashukanis, punishment is the means by which the offender's infringement of the principle of equivalence is countermanded. The criminal sanction is the performance due by the offender under the enforced contract which he has concluded with the victim. If crime is the violation of the principle of equivalence then punishment is its vindication. The offender has to pay for the harm he has caused, and the payment must be commensurate with the degree of harm suffered by the victim. In this context, the criminal sanction becomes "a form of exchange, a peculiar form of circulation, which has its place alongside 'normal' commercial circulation".[27]

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[26] Pashukanis *Law and Marxism* 168. Melossi and Pavarini *Prison and the Factory* 2 refer to this formulation as "the famous thesis of Pashukanis".

[27] Pashukanis *Law and Marxism* 176.

Historically, the form of punishment in which criminal justice has summated is imprisonment, that is, the exchange of a determinate portion of the offender's freedom, measured in time, for the harm his crime has caused the victim.[28] The prison sentence is the embodiment of equivalence in punishment and is an extrapolation of that attribute which is at the heart of the value of every commodity, namely, labour time. In the same way as the value of a commodity is determined by abstract human labour time, so the criminal sanction in the commodity economy is delineated in terms of deprivation of abstract freedom for a designated period of time.[29] The prison term is the penal materialisation of the principle of equivalent requital.[30] It is the paradigmatic means by which the state is able to recover the juridical relation which the crime has infracted, and to secure the preservation of the legal form. The other forms of punishment (from the suspended sentence and periodical imprisonment, through the fine and property forfeiture, to correctional supervision and community service) are themselves also different expressions of the principle of equivalence. All are exchange transactions of one form or another, their principal differences relating to the extent to which they make patent the nexus between the penal regime and the commodity. The form of the criminal sanction is thus of little consequence. The essence of each form, whether custodial or non-custodial, is given by the principle of equivalent requital.[31]

From a Pashukanist perspective, both crime and punishment are thus as much subject to the principle of equivalence as is contract law or any other branch of private law. Such is the intended reach of the general theory of law. The rule of equivalence percolates throughout the law[32] and governs criminal justice in

28 Pashukanis *Law and Marxism* 181. See also Melossi and Pavarini *Prison and the Factory* 184-185: "The idea of the deprivation of an abstractly determined quantity of liberty, as the dominant form of penal sanction can in fact only be realised with the advent of the capitalist system of production, that is, in that economic process which reduces all forms of social wealth to that most simple and abstract form of human labour measured in time."

29 Pashukanis *Law and Marxism* 180-181.

30 Pashukanis *Law and Marxism* 179.

31 Pashukanis *Law and Marxism* 180.

32 Jakubowski *Ideology and Superstructure* 49, who adheres to Pashukanis's central arguments, holds that: "Public law regulates the relations between the state and public institutions, and between these and the citizens; it serves to execute and protect private or civil law by means of the power of the state. The foundation of all these relations is still legal subjectivity and the recognition of the legal capacity of man, which give the relations of domination a general form."

substantially the same way as it governs contract.[33] In other words, crime and punishment are subject to exactly the same juridical imperative as any legal transaction, namely, the principle of equivalence.

## 4 The Christie thesis

The notion that conflicts are forms of property is, needless to say, the centrepiece of Christie's argument.[34] He constructs an aboriginal state of ownership in relation to conflicts, positing that every conflict begins its existence as the property of the parties who are directly involved in its creation. It belongs to them. However, precisely because they are forms of property, conflicts are capable of being stolen. Theft of conflicts is widespread in our "industrialised large-scale society".[35] The original owners are dispossessed routinely of their conflicts, mainly by professional thieves but also by structural thieves.[36]

Crimes fall within the purview of the Christie thesis in the sense that the conflict generated by the criminal conduct of the offender is valuable as property. Offender and victim are co-owners of the crime in which they are involved. It is their natural property and thus valuable to them. But it is also under constant threat of being appropriated. The main threat is posed by professional thieves in the form of lawyers and agents of the state who intervene to take or define criminal conflicts away from the original owners. The conflicts are either appropriated by lawyers or transformed into non-conflicts by treatment personnel.[37] The point is that valuable property is either stolen or destroyed, and in both cases lost to its rightful owners. The result is an insoluble crisis of criminality, because the parties best equipped to solve it are disregarded as parties. Christie is concerned to return the stolen property

33 See Arthur "Editor's Introduction" 15; Stone 1985 *Law and Society Review* 44; Jakubowski *Ideology and Superstructure* 49.

34 The reading of Christie which follows differs from most others in two ways: it is considerably more detailed and it relies upon a classical Marxist epistemology.

35 Christie 1977 *British Journal of Criminology* 1.

36 Professional thieves are lawyers, prosecutors and other criminal justice professionals, such as treatment personnel. Structural thieves are attributes of the social structure. Both these types of thieves are discussed below.

37 Christie 1977 *British Journal of Criminology* 5.

to its rightful owners or, rather, to halt its theft, so that the owners are able to deal with it as they see fit. He wishes to see the direct parties being restored their proprietary rights to and interests in their conflicts, thereby acquiring the opportunity to benefit from them.[38]

In addition to the professional theft of criminal conflicts, Christie identifies a category of structural theft. Such theft arises from the "changes in the basic social structure" which have promoted the dispossession of the owners of the conflicts.[39] These social changes are expressed in a bifurcated process of social segmentation. Segmentation according to space refers to the fact that in modern society we relate to one another as "roles, not as total persons".[40] We migrate from role to role, in one-dimensional relationships, isolated from our fellows. This kind of segmentation is exacerbated by the "extreme degree of division of labour" characteristic of our societies.[41] Segmentation according to caste attributes refers to the segregation of people according to "biological attributes such as sex, colour, physical handicaps or the number of winters that have passed since birth".[42] Of these biological attributes, age is the most important.

Christie postulates that segmentation leads to three consequences in respect of conflicts: firstly, social life is depersonalised, reducing our ability to cope with conflicts and encouraging us to give them away; secondly, certain conflicts are destroyed prematurely, before they can develop properly;[43] thirdly, certain conflicts are rendered invisible, concealed from public view and engagement.[44] Social segmentation thus entails the theft of criminal conflicts, as they are disowned, destroyed or disguised under the impact of the structural organisation of modern

38 Christie 1977 *British Journal of Criminology* 7.
39 Christie 1977 *British Journal of Criminology* 5.
40 Christie 1977 *British Journal of Criminology* 5.
41 Christie 1977 *British Journal of Criminology* 5.
42 Christie 1977 *British Journal of Criminology* 5.
43 This applies especially to crimes against people's honour, which are highly personal, but which have decreased significantly in contemporary societies.
44 This applies to crimes by the powerful against the weak, for example, wife- and child-abuse, and crimes by large organisations against individual victims.

society.[45]

Thus, Christie constructs a theory of restorative justice which pivots upon the idea that the criminal episode entails non-material proprietary configurations which are fundamental to its resolution. It is a theory of restorative justice in which property features as an archetype. Christie's thesis is both remarkable and subversive. It is remarkable for intruding the idea of property into the question of crime and punishment. It is subversive in its implications for the traditionally public character of the criminal justice system. It amounts to a frontal assault upon the legitimacy of that system. Christie is arguing, essentially, that the criminal justice system, supposedly designed to resolve and prevent crime, itself has been constructed on the basis of the crime of theft. In other words, the criminal justice system is a product of the crisis of criminality it purports to solve. It is implicated in the crisis. The answer to this crisis, according to Christie, is to put an end to the theft, both professional and structural, of criminal conflicts and to restore them to the possession of their true owners, who, as owners, have the capacity to resolve them in a way in which no surrogate can.

## 5 A different kind of justice

Christie contrasts the modern western pathology of criminality to the way in which pre-modern, non-industrialised societies perceive and resolve their internal conflicts. He chooses Tanzania as an example, and proposes to "approach our problem from the sunny hillside of the Arusha province".[46] He suggests that such societies are not plagued by the theft of criminal conflicts. They are structured in such a way as to

[45] Most commentators focus upon the professional theft of conflicts in Christie's argument. The structural theft of these conflicts, which he analyses in some detail, is seldom if ever even acknowledged. This is unfortunate, because the structural thieves are as integral to his argument as are the professional thieves. Unlike so many of his followers, Christie appreciates the fact that human action invariably takes place within a determinate structural context. Structural theft is the milieu of professional theft. It is an analytical truism that the "industrialised large-scale society" which supplies the context of the Christie thesis is in fact contemporary capitalist society. And it is the structural theft of the property constituted by criminal conflicts which serves to locate his argument historically, in the socio-economic constitution of modern capitalism. Commentators who ignore or belittle the question of structural theft do Christie an injustice and can hardly claim to represent his position adequately.

[46] Christie 1977 *British Journal of Criminology* 2.

allow the immediate parties to participate directly in resolving all conflicts that arise. In other words, the segmentation which encourages the dispossession of the parties in modern societies does not exist in these societies. Also, there are no professionals to poach conflicts or to transform them into non-conflicts. All conflicts stay where they originated, with the parties who matter, to be resolved by them, with help from their fellows as and when necessary.

Christie offers us the Tanzanian example as proof of the existence of an alternative way of doing justice, which does not involve the arrogation of conflicts either by legal professionals or by the structure of society. He goes further. He sees in the Tanzanian case an argument for the abandonment of the concept of criminal justice as we know it, that is, as a statist system, in favour of a civil law approach to criminal conflict resolution.[47] He intimates that the solution to the crisis of criminality must involve a move away from the "modern criminal trial".[48] The criminal justice system is biased structurally against the parties to a criminal conflict, especially the victim. He suggests that the interests of the parties would be served best if, instead of having to endure the indignities of the "modern criminal trial", they were able to enlist the resources and norms of the civil law in the resolution of their conflict. Such a system would have to be anti-statist, in the sense that the state would have no role as agent and party or, at best, a minor role.[49]

The Tanzanian model, then, is offered as the key to the resolution of the contemporary crisis of criminality which plagues capitalist society. However, Christie no doubt realised that the simplistic transposition of a model from one material environment to another was a recipe for failure, even disaster. Any transposition had to be grounded theoretically, and had to be justifiable in relation to the structure of the recipient society. He thus needed a concept which would make the adoption of the Tanzanian model comprehensible in the context of contemporary capitalist societies and which rendered it adaptable to their structures. It is this consideration,

47 Christie 1977 *British Journal of Criminology* 3.
48 Christie 1977 *British Journal of Criminology* 3.
49 Like the structural theft of criminal conflicts, anti-statism is a crucial but hardly admitted aspect of Christie's theory of restorative justice.

it is submitted, which underlies his construction of conflicts as property. The credo of property is the ruling orthodoxy of capitalist society. Its reach is extensive and colours virtually every transaction and relation of any significance. Under capitalism, to quote Macpherson's epigram, "all roads lead to property".[50] Christie's conception of crime in proprietary terms comprehends this capitalist imperative, and provides the theoretical *ratio* which he required to endorse the Tanzanian model as an alternative to our statist criminal justice system. Re-defining criminal conflicts as forms of property was his chosen way of modernising the Tanzanian model, to meet the conditions of the contemporary world.

Christie does not argue that the Tanzanians conceive of their conflicts as property. However, he does argue that the Tanzanian case constitutes a participatory "happy happening" compared with the dull, tedious and peripheral nature of the "non-happening" that is the criminal trial in the western criminal justice system.[51] In other words, he does not posit, expressly at any rate, any necessary historical connection between conflicts as property and courts as happenings. His construction of conflicts as property is bounded by the structural specificities of capitalism. It appears that Christie considers that in order to transform capitalist criminal justice into a happening, perhaps even a "happy happening", it is necessary to transform criminal conflicts into property.

In capitalist society participation is a scarcity.[52] The notion of criminal conflicts as property is, according to Christie, the key to resurrecting participation and reconstructing criminal justice as the "happy happening" it ought to be. For him, ownership is the route to participation, and all of us ought to have a proprietary stake in the criminal justice regime of modern society.[53] Conflicts constitute valuable property because they afford their owners the opportunity to become directly involved in their resolution. For the purposes of their resolution, the natural proprietors of criminal conflicts are the victims, the offenders, and the affected

50 MacPherson *Democratic Theory* 121.
51 Christie 1977 *British Journal of Criminology* 2.
52 Christie 1977 *British Journal of Criminology* 7.
53 Christie 1977 *British Journal of Criminology* 7.

community, all of whom are side-lined habitually by the professional and structural theft of their conflicts.

Victims of crime become victims of the criminal justice system when they are dispossessed of their conflicts by lawyers in the form of state prosecutors and are prevented from participating meaningfully in their own cases.[54] Victims thus need to be reinstated as parties proper in the criminal justice system. But, according to Christie, the victim as owner is a precondition for the victim as agent. In other words, victims will return to the centre of the criminal justice process only if the conflicts into which they have been drawn involuntarily are treated as their property, at least in part, to dispose of according to an arrangement which is negotiated by them, and not on their behalf by the state or its functionaries.[55]

Christie reckons that the conquest of victimhood requires that victims be guaranteed substantive proprietary rights in the conflicts which have rendered them victims. Ultimately, he wants to see the establishment of a system of neighbourhood courts which are victim-oriented. The neighbourhood court would be a site:

> where the victim's situation was considered, where every detail regarding what had happened - legally relevant or not - was brought to the court's attention. Particularly important here would be detailed consideration regarding what could be done for him, first and foremost by the offender, secondly by the local neighbourhood, thirdly by the state.[56]

All of this would be possible if the crime victim were transformed, via his ownership of his conflict, from an object into a subject of the criminal justice process.

Christie[57] argues that for offenders, also, the recognition of criminal conflicts as property entails opportunities to participate directly in reparative and healing endeavours:

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54 Christie 1977 *British Journal of Criminology* 7-8.
55 Christie 1977 *British Journal of Criminology* 11.
56 Christie 1977 *British Journal of Criminology* 10.
57 Christie 1977 *British Journal of Criminology* 9.

> The offender gets a possibility to change his position from being a listener to a discussion - often a highly unintelligible one - of how much pain he ought to receive, into a participant in a discussion of how he could make it good again. The offender has lost the opportunity to explain himself to a person whose evaluation of him might have mattered. He has thereby also lost one of the most important possibilities for being forgiven.

The offender, as begetter of the conflict, is given a stake in its resolution. He is invited to possess it as his own so that he can make a material contribution to righting that which he has disturbed. The offender is offered the chance to demonstrate the resolutive value of his proprietary rights in the conflict by applying them to the construction of a restorative response. The proprietary theory of criminal conflict thus is offered as the salvation of both the victim and offender.

However, whereas victims are presumed to be willing proprietors, Christie accepts that offenders may be reluctant owners who "are perfectly willing to give away their property right to the conflict".[58] However, he believes that an offender does not have the right to give away, deny, abandon or abrogate his proprietorship of his conflict.[59] It is his, permanently and indissolubly. It is inalienable. If needs be, the offender must be compelled to act as the owner and to participate in the resolution of his conflict, "quite independently of his wishes".[60] He will be an active owner, whether he likes it or not. He has no choice in the matter. He will be impressed into the making of a happening.

For Christie, criminal law as practised in the western world has "reduced the victim to a nonentity and the offender to a thing".[61] He seeks a criminal justice which is structured in terms of agency for both victims and offenders. To this end he refers us to the pre-industrial legal culture of village Tanzania as the representative of a system of conflict resolution which takes seriously the cares and concerns of the immediate parties. In such a system, both victim and offender come into their own. They are at the centre of the process of conflict resolution. It is their process. Others

58 Christie 1977 *British Journal of Criminology* 9.
59 Christie 1977 *British Journal of Criminology* 9 fn 2 derives his position from John Locke's postulate that one possesses a proprietary right in one's own life which cannot be alienated.
60 Christie 1977 *British Journal of Criminology* 9.
61 Christie 1977 *British Journal of Criminology* 5.

are allowed to participate only as "resource-persons",[62] to facilitate the process, but never to commandeer it.

Christie takes his argument beyond victim and offender. He contends, further, that the appropriation of criminal conflicts by the state entails a significant loss also for society as a whole:

> But the big loser is us - to the extent that society is us. This loss is first and foremost a loss in *opportunities for norm-clarification*. It is a loss of pedagogical possibilities. It is a loss of opportunities for continuous discussion of what represents the law of the land.[63]

Christie objects to the foreclosed nature of contemporary western legal systems, where parties typically are gridlocked into subservience to legal norms and legal arguments which may have little bearing on their real interests and which may show little comprehension of their real concerns. Once more he refers us to a "non-western" system which is not as normatively exclusionary and hence not as affectively impervious to the immediate parties as ours.

> Maybe Barotse law ... is a better instrument of norm-clarification, allowing the conflicting parties to bring in the whole chain of old complaints and arguments each time. Maybe decisions on relevance and on the weight of what is found relevant ought to be taken away from legal scholars, the chief ideologists of crime control systems, and brought back for free decisions in the court-rooms.[64]

He identifies a "further general loss". He suggests that the loss of "possibilities for personalised encounters" between victim and offender reinforces the misconceptions which each entertains of the other.[65] The answer is to keep the state and its functionaries away from criminal conflicts. According to Christie, as civil society we are capable of dealing with criminal conflicts, treated as our property, without the interventionist assistance of criminal justice professionals.

When all is said and done, Christie is petitioning for a criminal justice system that is

62 Christie 1977 *British Journal of Criminology* 12.
63 Christie 1977 *British Journal of Criminology* 8, original emphasis.
64 Christie 1977 *British Journal of Criminology* 8.
65 Christie 1977 *British Journal of Criminology* 9.

radically different from that which we have in contemporary capitalist society. He is urging a system which is structured in terms of the concerns and expectations of the parties who are directly involved in the criminal episode, namely, the victim, the offender and the community. As already intimated, Christie champions a system of neighbourhood courts. In addition to being victim-oriented, these courts should also be lay-oriented.

> The ideal is clear; it ought to be a court of equals representing themselves. When they are able to find a solution between themselves, no judges are needed. When they are not, the judges ought also to be their equals.[66]

This latter proposition necessarily entails the expulsion of the state and its functionaries from the larger part of the criminal justice process. Whenever professionals are involved, they should function only as resource persons. "They might help to stage conflicts, not take them over."[67] Christie considers that we have much to learn from the legal systems of pre-modern, non-industrialised countries, where justice is fully participatory for those directly involved in conflict, and where access to justice is not stymied by the dominance of legal norms. He is eager to see that the criminal justice systems of contemporary industrialised societies be reconstructed along such participatory, non-juridical lines.

Surprisingly, despite his theorising criminal conflicts in proprietary terms, nowhere does Christie provide a unitary definition of property. Sometimes he appears to understand property as private property. Thus he talks about the victim being dispossessed of "something that belonged to him";[68] and of offenders giving away "their property right to the conflict".[69] At other times, however, he expressly rejects the idea of conflicts as private property:

> One of the major ideas behind the formulation 'Conflicts as Property' is that it is neighbourhood-property. It is not private. It belongs to the system.[70]

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66 Christie 1977 *British Journal of Criminology* 11.
67 Christie 1977 *British Journal of Criminology* 12.
68 Christie 1977 *British Journal of Criminology* 8.
69 Christie 1977 *British Journal of Criminology* 9.
70 Christie 1977 *British Journal of Criminology* 12. See also Christie 1977 *British Journal of Criminology* 11, where he speaks of conflicts as "property that ought to be shared". Crawford

It seems, then, that Christie subscribes to a hybrid notion of conflicts as property. The nature of the conflict as property is dependent upon the relevant owner. Christie identifies three co-owners: the victim, the offender and the community. A criminal conflict is private property insofar as it belongs to the victim and offender. It is not private insofar as it is community property, belonging to the system of neighbourhood courts which Christie proposes.

On the face of it, the notion that a criminal conflict, as property, is simultaneously private and not private appears contradictory, even illogical. The conventional notion of property in the capitalist world is that it is private and that its private nature entails the exclusion of all non-owners from asserting proprietary rights over it or deriving advantage from it without the consent of the owner. Christie's property postulate certainly does not accord with this conventional wisdom, and deliberately so. His thesis is founded upon a proprietary form which is non-standard in the capitalist context, namely, common property. The notion that a criminal conflict is both community property and that it is the property of the victim and offender refers to a species of property which goes beyond the classic capitalist concept of property as private.[71] Christie's apparent vacillation between conflicts as private property and neighbourhood property is an expression of the view that, under capitalism, common property too is an individual right. In other words, the common property which Christie envisages continues to be governed by the credo of capitalist individualism, in the sense that individuals have enforceable rights in it. Thus, whereas a criminal conflict may be the common property of the community, the victim and offender each stands as individual proprietor in relation to it.

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"The State, Community and Restorative Justice" 104-105 relies upon this aspect of Christie's notion of property to contend that "a careful reading" of Christie shows that "he is not advocating a privatisation of disputes" and that "the state retains a vital role balancing the interests of the different parties". However, despite purporting to have read him carefully, Crawford has misread Christie. It seems that Crawford's "reading" has much more to do with his own support of partial restorative justice than with what Christie actually says.

[71] There is here a concurrence between Christie's position and the work of MacPherson *Democratic Theory* 133-136 who, at the time, was making similar submissions about capitalist property in general, arguing, *inter alia*, that it is not to be conceived solely as rights in material things and that it is not to be equated exclusively with private property. Christie acknowledges MacPherson in one of the three footnotes in *Conflicts as Property* and includes MacPherson's *The Political Theory of Possessive Individualism* in his list of references.

Such, then, is the Christie thesis, in which all roads lead to property. The solution to the capitalist crisis of criminality consists in a re-definition of criminal conflicts as property in the context of a localised criminal justice system which is structured according to the participatory *desiderata* characteristic of agrarian communities which, if not pre-capitalist, are located on the capitalist periphery.

## 6 Christie *pro* Pashukanis

Despite the mushrooming of restorative justice literature, very little of it is overtly theoretical, and Christie's notion of conflicts as property remains paramount in the theoretical domain of the restorative justice project. Certainly, there has been no other major theoretical advance since Christie's.[72] The remainder of this essay will be concerned, therefore, to assess Christie's proprietary theory, as the prime epistemological precept of restorative justice, in relation to the basic tenets of Pashukanis's general theory of law.

It will be recalled that Christie identifies two forms of the theft of criminal conflicts, namely the professional and the structural. The appropriation of criminal conflicts by prosecutors and other justice professionals is an index of the unavoidably statist character of criminal justice within the capitalist context. The professional thieves in question are functionaries of the capitalist state for which criminal justice resides within its exclusive bailiwick. Ironically, the professional theft of criminal conflicts to which Christie objects is the mode by which the state restores the principle of equivalence which the crime has sundered. When victims, offenders and the community are neglected in the modern criminal trial it is because the state is acting to vouchsafe the principle of equivalence as the central imperative of the criminal justice system. In other words, the process which Christie decries as the professional theft of criminal conflicts is an attribute of capitalist criminal justice. The deployment of the juridical apparatus of the state is necessary to ensure that the crime in

[72] Braithwaite and Pettit *Not Just Deserts* did formulate a republican theory of restorative justice but its impact has been negligible in comparison to the influence which Christie's proprietary theory continues to command.

question does not remain a site of appropriation and inequality. The rule of equivalence by which the commodity economy lives and dies must be the existential leitmotif of its system of criminal justice also.

However, Christie's condemnation of the professional theft of criminal conflicts is really a prologue to his theorising restorative justice in terms of a market in criminality, operating according to the laws which govern the market in commodities. Such a market is, archetypally, a private sphere, where participants meet as and are recognised *inter se* as equals. In other words, the principle of equivalence is not imposed, as it is by the state in the arena of criminal justice. Here it is an attribute of the restorative process. That process summates in the restorative sanction, which is supposed to express the principle of equivalence upon which restorative justice rests. Unlike the criminal sanction, it is not decided or fashioned by one party.[73] It is a solution devised by victim and offender, facing each other as equals in the community. It is they, not the state, who decide what the offender should offer as *quid pro quo* for the harm suffered by the victim. The restorative process is conceived as a process of equalisation which repudiates the offender's assertion of priority. And the restorative sanction is the outcome of a transaction which the parties negotiate as equals according to market principles. Unlike the criminal sanction, the restorative sanction emerges naturally from an exchange between parties whose relationship is structured by the principle of equivalence. The criminal sanction is a compelled implementation of the ethos of the commodity economy whereas the restorative sanction is a celebration of that ethos.[74]

Much of what Christie canvasses in his analysis of structural theft may be subsumed under the Marxist concept of alienation. Marxism holds that capitalist social relations

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73 The criminal sanction amounts to an imposed equivalence, backed by the power of the state. As Pashukanis *Law and Marxism* 176-177 shows, it is the power of the state which stands behind the construction of the crime as a contract made by the offender, whether he intended it or not, and whether he wants it or not. It is in the face of the might of the state that the offender has no choice but to uphold his part of the bargain which he has thrust upon the victim unilaterally.

74 The regular resort in many jurisdictions to negotiated criminal justice in the form of the so-called plea bargain does not undermine this proposition. Contrariwise, the plea bargain, in name and process and content, is a dispositive device which endorses the Pashukanist notion of a crime as a retrospective contract and which renders visible the homologous relation between the legal form and the commodity form under capitalist conditions.

of production have the effect of robbing people of crucial components of their human potentialities. People are estranged from one another, from the products of their labour and from themselves. The conditions of capitalist production and reproduction require that we be atomised psychologically, and that our relations with our fellow human beings be constructed according to our place in the division of labour, as determined by the exigencies of the world of generalised commodity production. In practice, this entails that we live our lives at an emotional distance from our fellows, in a one-dimensional universe, and that our social connections are denuded of human content. We are each of us reduced to an estranged abstraction of our potential selves.[75]

When Christie describes the social segmentation which underlies the structural theft of conflicts, he is in effect describing the alienated social relations of the capitalist mode of production. He is not a Marxist and does not rely upon the concept of the mode of production as an analytical tool. Also, he prefers to comprehend the modern capitalist social divisions in caste rather than class terms, and within the caste system he foregrounds biological age over socio-economic factors. But he consciously links the theft of criminal conflicts to the structure of contemporary society. He tells us that it is the (capitalist) social structure which is responsible, in part at least, for the theft of criminal conflicts. This is a crucial insight, for it implies a crucial question: can halting the theft of criminal conflicts and hence solving the crisis of criminality occur within the structural parameters of our society? We shall return to this issue later.

For Pashukanis, the legal form is the materialisation of the relations of commodity production, specifically of generalised commodity production. In other words, law proper is an attribute of the capitalist mode of production; the pre-capitalist modes of production were all pre-legal societies in the sense that none of them evinced a juridical worldview. Every legal system proper is founded upon the fundamental idea of the legal subject, as bearer of legal rights and duties, who is the motor force of the legal relation. The legal subject begins as a commodity owner and acquires his

[75] See Ollman *Alienation* 131-135.

status as a subject in order to trigger the circulation of commodities. In other words, every legal subject is simultaneously a proprietor, at least of that unique value-producing commodity, labour power. Legal subjectivity, then, comes into existence as the correlative of commodity exchange. It is, in this connection, an eminently private-law concept, structuring the circulation process according to the specificities, especially, of the law of contract and the law of property. The legal form is, in Pashukanis's terms, the conjunct of the commodity form, and the legal subject the conjugate of the commodity owner. Juridification and commodification are complements, both diachronic and synchronic, of each other.

Christie does not make any reference to Pashukanis and his general theory of law. Yet, the theory of restorative justice which Christie propounds is, in many respects, remarkably affined to Pashukanis's position. Christie does not share Pashukanis's critique of the legal form. But he does show a strong intuitive grasp of the place occupied by the process of commodification in the constitution of the legal form. Christie, it will be recalled, is concerned with criminal justice in "industrialised large-scale society" which, as already noted, amounts to a concern with capitalist criminal justice. And he argues for crimes in capitalist society to be redefined as non-material forms of property. However, given that capitalist society is a society of generalised commodity production governed by the legal regime of private property, it follows that Christie's argument for criminal conflicts to be comprehended as property forms may be taken as an argument for their commodification.[76] Certainly, in the context of capitalism, the process of commodification is the key to the transformation, literal or metaphorical, of criminal conflicts into forms of property.

Christie's conception of a comprehensive restorative justice which is free of the strictures and structures of the state is a revolutionary one in the context of the capitalist mode of production and its political exigencies. In this connection, his construction of criminal conflicts as property is an inspired piece of theorising. The nature of capitalist production requires a property regime which is not overly

[76] See Pashukanis *Law and Marxism* 126: "Private property first becomes perfected and universal with the transition to commodity production, or more accurately, to capitalist commodity production."

encumbered by statist constraints. Hence, while capitalist property is sacrosanct and always under the overall protective aegis of the capitalist state, the rights of the owner to transact with his property as he sees fit are largely immune from state intervention or control. The owner enjoys more or less absolute dominion.[77] It is this freedom of property, as an attribute of ownership, which is central to Christie's thesis. For it implies that the owners of a criminal conflict are legally entitled, *qua* owners, to dispose of it as they see fit, without reference to or without the oversight of the state.

In the context of restorative justice it is the community to which the offender and victim, as owners, are accountable for the disposition of their criminal conflict. Its resolution is subject to community participation and supervision. However, it must be observed here that Christie does not conceive of the restorative community as a "mere" replacement for the state. His theory is properly anti-statist and allows no ready room for a sovereign public authority. It is true that community involvement imbues the restorative process with a public aspect, in the sense that it is open to public scrutiny and moderation. But that is not the same as having criminal dispositions decided by a public authority. Indeed, community participation in the restorative process is supposed to be an expression of the radically *private* character of that process. The community is able to become involved precisely because the state, as public power, has been ejected. If crime and punishment are to be dealt with in the concourse of the market, then the community is the market-place of restorative justice. It is the site where victim and offender, as men or women of property, as commodity owners, enter into an exchange transaction governed by the principle of equivalence according to which the market is structured. In this regard, the community is, to misquote Marx, a very Eden of equality.[78]

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77 See MacPherson *Democratic Theory* 126: "Modern private property is indeed subject to certain limits on the uses to which one can put it: the law commonly forbids using one's land or buildings to create a nuisance, using one's goods to endanger lives, and so on. But the modern right, in comparison with the feudal right which preceded it, may be called an absolute right in two senses: it is a right to dispose of, or alienate, as well as to use; and it is a right which is not conditional on the owner's performance of any social function."

78 The original statement by Marx *Capital* 172 reads as follows: "This sphere that we are deserting, within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man."

From a Pashukanist perspective, Christie's position, even if encompassing a somewhat idiosyncratic notion of capitalist property, implies adherence to the process of commodification as its basic theoretical premise. The Christie thesis requires that restorative justice be theorised in terms of the extension of the process of commodification to criminal behaviour itself. Crime is, or must become, a commodity, albeit an intangible commodity. Of course, it is not being suggested here that Christie's advocating for crime to be treated as property implies that he consciously has embraced a Pashukanist position. What is indubitable, however, is that Christie's theoretical submissions confer credence upon Pashukanis's general theory of law, and place restorative justice squarely within the purview of that theory. Christie's work is primarily about grounding restorative justice theoretically. However, in elaborating his proprietary theory of restorative justice he grasps the truth of Pashukanis's basic argument that legal relations are a superstructural manifestation of commodity relations, and that the legal form is, at bottom, a proprietary form which is suffused with the ethos of the market.[79]

Indeed, and despite their quite contrary origins and conclusions, Christie's idea of criminal conflict as property is a quite stunning vindication of Pashukanis's analysis of the legal form.[80] In Christie we see a prominent and respected member of the non-Marxist criminological community proffering an analysis of crime which is spontaneously but uncannily Pashukanist in its essentials. And it is an analysis which has been validated by a significant proportion of the restorative justice community.[81] After Christie, the coin of Pashukanis's overall approach to the analysis of law has increased appreciably in value. Christie's achievement is that he discerned that the contemporary crisis of criminality had its material basis in the crisis of capitalism and fashioned a theory which comprehended the pivotal position occupied by proprietary relations in the political economy of capitalism. His achievement is all the more

79 The organic relationship between law and property seems to have been patent to most earlier political philosophers. Thus, for example, Bentham *Theory of Legislation* 113 says: "Property and law are born together and die together. Before laws were made there was no property; take away laws, and property ceases." The arguments of both Christie and Pashukanis thus are well-grounded in the history of political philosophy.

80 There are, of course, major differences between Pashukanis and Christie, which will be discussed below.

81 See notes 2 and 4 above.

impressive in that he reached his conclusions, which are demonstrably Pashukanist in so many respects, without any overt reliance upon the analytical resources of Marxism.

Christie's accord with the Pashukanist perspective encompasses not only the concept of crime but also that of punishment. Although *Conflicts as Property* contains nothing of substance in respect of the analysis of punishment, Christie's subsequent *Limits to Pain* makes it clear that he understands fully the principle of equivalent requital which founds the capitalist penal regime. Thus, he says:

> In penal law, values are clarified through a gradation of inflicting pain. The state establishes its scale, the rank-order of values, through variation in the number of blows administered to the criminal, or through the number of months or years taken away from him.[82]

He understands also the connection between punishment and the commodity economy as an economy of labour time:

> It is correct that our prisons are by and large filled with poor people. We let the poor pay with the only commodity that is close to being equally distributed in society: time.[83]

Christie clearly appreciates the true meaning of the notion of "doing time". And again, as with his analysis of crime, his pronouncements on state punishment have about them a palpably Pashukanist tenor.

Of course, Christie would have state punishment emanating from the criminal trial be replaced by the restorative sanction fashioned in the restorative process. His trifurcated notion of property governs the restorative process. As proprietors, the offender and the victim are charged with negotiating an exchange according to which the offender will offer and the victim will accept such reparation as will allow them to relinquish ownership of the crime. They are equal participants in an exchange relation which consumes the crime. The community is the site of the

82 Christie *Limits to Pain* 94.
83 Christie *Limits to Pain* 95.

transaction between victim and offender. They must face each other in the community. They must make their dealings subject to inspection by and involvement of the community. The community is, in this regard, the guardian of the principle of equivalence in the restorative process. Its participation ensures that the exchange between offender and victim is an equal one. The restorative process needs a milieu in which the parties will respect each other as equals. The community provides that milieu. The concerted tripartite transaction has the effect of using up the criminal episode. Things can then return to normal. And the principle of equivalence stands vindicated.

The restorative sanction is the high-water mark of the restorative process. It is non-punitive, aimed at effacing the crime and its consequences and restoring the *status quo ante*. Its construction and implementation determine the success or otherwise of the restorative process. In other words, the restorative sanction is concerned primarily to heal and repair what the crime has fractured and, as such, may be taken as the measure of restorative justice in practice. Christie's thesis makes apparent the way in which the credo of the commodity is inveigled in the formulation of the restorative sanction and the way in which the restorative process is configured in terms of the principle of equivalence. In relation to the restorative sanction, too, we see Christie importing an unequivocally if inadvertently Pashukanist flavour into the elaboration of his theory of restorative justice.

It is well known that in their studies of the constitution of the primitive commune, Marx and Engels relied heavily upon the anthropological discoveries of Morgan.[84] Similarly, Lenin, in his analysis and critique of imperialism, made extensive use of the work of Hobson.[85] Pashukanis was murdered by agents of Stalin some forty

[84] See Morgan *Ancient Society*. Engels *Origin of the Family* 1 tells us that Morgan "in his own way had discovered afresh in America the materialistic conception of history discovered by Marx forty years ago". Also, Engels "Letter to Karl Kautsky" 347 records that: "Morgan has quite independently discovered the Marxian materialist conception of history within the limits prescribed by his subject and he concludes with directly communist propositions in relation to present day society."

[85] See Hobson *Imperialism*. Lenin "Imperialism" 176, 235 and 240 often praises "the non-Marxist Hobson", whose work he accepted as presenting "a very good and comprehensive description of the principal specific economic and political features of imperialism". The Bolshevik leader put

years before Christie's iconic 1976 lecture. However, it is arguable that Christie occupies a position in relation to Pashukanis which is comparable in many respects to that occupied by Morgan in relation to Marx and Engels, and Hobson in relation to Lenin. Certainly, it would not be remiss to say of Christie that in his analysis of the proprietary character of conflicts, he rediscovered the core elements of Pashukanis's materialist theory of law. Also, it would be entirely legitimate to say that the non-Marxist Christie's comprehension of the constitutive features of the legal form has resulted in his fashioning a theory of restorative justice which is closely related to the commodity form.

Pashukanis discerned virtually the same thing more than 50 years earlier, in his classification of a crime as a retrospective contract. For, inscribed in such a classification is the notion of an exchange relation which lies at the heart of the juridical idea of a contract. In other words, Pashukanis realised that, in the capitalist context, a crime is as much about commodity exchange as any other private-law transaction. Given that the commodity is the elemental form of capitalist property, it becomes evident that Pashukanis adhered to a decidedly proprietary notion of crime. More than half a century had to elapse before this Marxist postulate was affirmed publicly by an "independent" source in the shape of Christie's theory of restorative justice. It would appear that all roads indeed do lead to property. That is the capitalist way. Christie has proved Pashukanis. When Christie decided to theorise crimes as forms of property he was, needless to say, unaware of how close this would take him to Pashukanis. It took him as close as a non-Marxist can approach a Marxist position without actually embracing it. The proximity is such that the spirit of Pashukanis's general theory of law is embedded in the soul of Christie's proprietary theory of restorative justice. In a word, Christie has produced a commodity form theory of restorative justice.

Christie appreciates the proprietary bias of contemporary bourgeois society and celebrates it as the cornerstone of the theory of restorative justice. As a Marxist,

greater store by Hobson's analysis of imperialism than that of Marxists such as Kautsky and Hilferding.

Pashukanis comprehends fully the centrality of property in the political economy of capitalism, and theorises it, in its unadulterated commodity form, as the key to the analysis of the legal form. There can, in this regard, be no gainsaying the likelihood that, had Pashukanis been required to analyse restorative justice in his day, he would have done so in terms not unlike Christie's. Of course, he would have given the analysis an expressly materialist flavour, but almost certainly he would have left Christie's fundamental theoretical insights largely intact. The focus would have been upon incorporating, extending and deepening the Christie thesis in terms of the Marxist method rather than upon dismissing it for its non-Marxist genesis. The Marxist theory of law takes the commodity as its premise and comprehends legal relations as the form necessarily taken by commodity relations, and the legal subject as the necessary *alter ego* of the commodity owner. It is, in this connection, indisputable that Pashukanis would have comprehended restorative justice in proprietary terms. He understood crime and punishment as exchange transactions and invariably would have applied this insight to the analysis of restorative justice. Of course, the commodity is at the heart of every exchange relation and would have had to be central to the Pashukanist comprehension of restorative justice also.

## 7 Pashukanis *contra* Christie

Despite their mutualities, there remains a series of cardinal differences between Pashukanis and Christie. The divergences stem directly and inevitably from the fact that the former proceeds from a Marxist perspective and the latter not. This section considers three major issues in relation to which Pashukanism is opposed resolutely to the stance taken by Christie in the construction of his proprietary theory of restorative justice.

The first issue concerns the legal form itself. Notwithstanding its centrality to his general theory, Pashukanis is an unrelenting critic of the legal form and theorises its eventual disappearance from human relations, along with the commodity form. For him, the key to the comprehension of both forms and of the relationship between them lies in their historicity. The lives of both are connected intimately with the life

of the capitalist mode of production, and their demise is expected to follow the demise of capitalism. Pashukanis considers that law proper is a capitalist relation and he looks forward to the installation, in the wake of the emergence of a post-capitalist social order, of a world in which the legal form has no purchase, one in which human relations are not structured by the juridical perspective. He comprehends the legal form in historically specific terms, as an attribute of capitalist society, and anticipates that the next historical era in the evolution of human society will be a post-legal one.[86]

Christie, by contrast, displays no discomfort with or antipathy to the notion of the juridical, and takes the legal form for granted as an aspect of human relations. What is more, his position entails the re-conceptualisation of criminal law as a direct materialisation of the commodity form, from which is derived the legal form. As noted above, his submission that criminal conflicts are forms of property amounts to an argument for the commodification of crime and punishment. Indeed, it is an argument for intensifying the process of commodification, with a view to transforming the criminal law landscape so that the interrelation between the legal form and the commodity form is manifest. This is the juridical approach *par excellence*. However radical Christie may be in relation to the conventional notion of criminal justice, such radicality does not extend to the legal form itself. He presumes its permanent existence and embraces it as a natural and inevitable dimension of human social organisation, past, present and future. The question of the historicity of the juridical falls outside the ambit of his theory. The future of the legal form does not feature in his theoretical formulations. This is a crucial omission which, as will become clear later, imports into the restorative justice project a quite disabling contradiction.

The second significant divergence between Pashukanis and Christie concerns their approaches to the fundamental juridical notion of legal subjectivity. It will be recalled that Pashukanis seeks the genesis of legal subjectivity in the commodity economy,

[86] For Pashukanis *Law and Marxism* 133, "the legal form only encompasses us within its narrow horizon for the time being. It exists for the sole purpose of being utterly spent."

and specifically in the imperatives of commodity exchange. For him, the legal form is a homologue of the commodity form, with the former being the ideal superstructural expression of the latter. Legal subjectivity is derivative. Its existence is stipulated by the perquisites of the commodity economy. The legal subject emerges as the actualisation of the commodity owner. They are similar in form but remain conceptually distinct, with the latter taking analytical precedence over the former. Besides being historically given, the contingent character of legal subjectivity is prescribed also by the philosophical materialism which informs Pashukanis's general theory of law. Since the Marxist epistemology stipulates the juridical concepts to be superstructural categories, it follows that their analysis ought to proceed from the material conditions of their genesis and development.

Christie inverts Pashukanis, and hence the materialist premise. He begins with the legal subject and ends with the commodity owner. For him, legal subjectivity, if not a natural condition, is certainly a prior condition. Pashukanis derives legal subjectivity from the structure of the commodity economy, and hence the legal subject from the commodity owner, whereas Christie presumes the timeless legal subject and, in the conditions of "industrialised large-scale society", seeks to re-make him as a proprietor, that is, as a commodity owner. In other words, the legal subject becomes a commodity owner by virtue of the commodification of the crime to which he is a party. The former determines while the latter is determined. Both victim and offender become owners because they are legal subjects. Christie thus proceeds from a presumption of legal subjectivity. Such a presumption associates the Christie thesis with philosophical idealism. Proponents of restorative justice are quick to proffer historical justifications for their project. Yet they make but little effort to uncover the historical origins of the foundational juridical concept of legal subjectivity. Christie, too, avoids this avenue of investigation and embraces the legal subject as a suprahistorical universal. Thereby he adopts a variant of the idealist postulate.[87]

[87] Christie comprehends the relationship between the legal subject and the commodity owner as an identity and not as a homology. He transforms the crime itself into property, collapsing the conceptual distinction between the legal subject and the commodity owner. This theoretical fabrication entails the most complete unity of the legal subject and the commodity owner.

The role of the state, as a public power, is the source of the third major item of contention between Pashukanis and Christie. Pashukanis analyses the criminal law as a branch of public law which is premised as securely, if not as obviously, as private law upon the exchange transactions of the commodity economy. He seeks to explain criminal justice on the basis of his general theory of law. He attempts to theorise the criminal law, as a public law phenomenon, in terms of the relationship between the legal form and the commodity form. As a Marxist, Pashukanis comprehends the necessity for the state to administer criminal justice in class society in general and capitalist society in particular. The public nature of crime and criminality is thus an issue for him only insofar as it needs to be harmonised with a theory of law which presumes the genesis of the legal form to be essentially "private". Pashukanis therefore takes as given the fact that the criminal law is public law, to which the state is necessarily a party. He accepts that in a commodity economy, criminal justice is perforce state justice. His concern is to develop his theory from its origins in private law to encompass also those branches of the law which are generally accepted to be public, foremost amongst which is criminal law. In a word, Pashukanis's project in respect of crime and punishment is to discover and clarify the nature of the legal form, *qua* public law form, in the context of an economy of generalised commodity production. The capitalist state is an indispensable feature of this project.

Christie's theory of restorative justice is anti-statist. He advocates a radical reconstruction of the criminal justice system at the expense of the capitalist state, which is the prime protagonist in the current system. However, the capitalist state is the pre-eminent institution of the political organisation and social cohesion of the bourgeoisie as the ruling class. Its proposed eviction from the criminal justice system cannot be summary. Such a campaign has to be justified either in terms which affirm the social relations of production for which the capitalist state stands as

Commodification of the crime melds the subjectivity and proprietorship of each party. These attributes become definitively fused in the restorative process, to spawn the perfect subject-owner, for whom legal subjectivity and ownership are conterminous. The ambit of the idealist postulate is thus extended, to include the immortality of the commodity.

guarantor or in terms which anticipate the transcendence of these relations.

Christie opts for the former road. He never takes issue with the legitimacy of the capitalist mode of production or its structural attributes. He accepts as uncontroversial the existence and persistence of capitalist social relations of production. For him, one may say, capitalism is a given. It is a constant. When he postulates the transformation of criminal conflicts into property he means capitalist property. He is concerned only to question the legitimacy of the criminal justice system within the parameters of the capitalist system. He knows, as do most, that the state-centred criminal justice system has lost the bulk of whatever legitimacy it once may have enjoyed. He proposes to rekindle that legitimacy by shifting its locus from the state to property, from the public to the private.

Christie's ambition to privatise the criminal episode is premised upon an acknowledgement of an ontological connection between the criminal law and the commodity form. Such privatisation would make clear the commodified character of crime and punishment as exchange interactions between property owners in the community. The crime becomes a commodity to be disposed of in the community marketplace. And state punishment gives way to the restorative sanction, representing the outcome of the exchange transaction between the victim and the offender, according to the principle of equivalence.[88] If restorative justice is to be the key to solving the crisis of criminality, then the key to restorative justice is the complete privatisation of crime and punishment, in the sense that the state has no

[88] Like all proponents of restorative justice, Christie rejects retributionism. Indeed, antipathy to retributionism has acquired the status of an article of faith in the lore of restorative justice. Yet retributionism is the only conventional theory of punishment which embraces overtly the principle of equivalence, the self-same principle to which restorative justice is wedded theoretically. The restorative process and sanction are about restoring the *status quo ante*. Supporters of restorative justice accept that, prior to the crime, the relationship between the offender and the victim was one as between two equal legal subjects. In other words, equivalence is the norm which the crime has disturbed and which the restorative process must reinstate. If retributionism is about equivalent requital, then restorative justice is about equivalent recompense. Thus, despite their supposed contradictions, there is much more that restorative justice shares with retributionism than the proponents of the former would care to admit.

say in the disposition of criminal matters.[89] This, of course, implies a radical break with criminal justice. It is his unambiguous anti-statism which separates Christie's restorative justice from conventional criminal justice (and from partial restorative justice). However, as will be argued later, it is this self-same anti-statism which constitutes perhaps the biggest obstacle to the success of the comprehensive restorative justice project.

Of course, as a Marxist, Pashukanis too is anti-statist. But whereas Christie objects to the state as a party to the criminal justice system and theorises restorative justice as privatised justice, Pashukanis understands the state to be a necessary party to capitalist criminal justice and hence that such justice is necessarily public justice. Pashukanis's anti-statism is of a different order to Christie's in that he objects to the very existence of the state as a public authority in society. Christie advocates the demise of the capitalist state as a "stakeholder" in the criminal justice system; Pashukanis advocates the demise of the state as a social institution. The one wants to restrict the ambit of state power; the other wants to destroy it. The one accepts capitalist society but seeks to replace its criminal justice system; the other accepts the criminal justice system as a necessary aspect of capitalist society but seeks replace that society.[90]

It may be concluded, then, that Pashukanism is decisively anti-Christie in its attitude towards the three critical matters of the legal form, legal subjectivity and the role of

89 Advocates of restorative justice appear to embrace the privatised notion of crime in the same way that Thompson *Whigs and Hunters* 266 embraces the public notion of human rights, that is, as an "unqualified human good".

90 It is well known that Marxism is opposed not only to the capitalist state but to the state as an institutional dimension of human social relations. Marxism teaches that every state is a class state which is dedicated to the defence and reproduction of extant social relations of production. The capitalist state, whatever its form, is comprehended primarily as a bourgeois institution which is complicit in and is routinely in the van of the oppression and exploitation of the dominated classes, especially the working class. The classical Marxist attitude towards the capitalist state is that it must be destroyed by way of a working class revolution. Marxists anticipate that socialism will succeed capitalism and that the capitalist state will be replaced by a proletarian state, that is, the dictatorship of the bourgeoisie will yield to the dictatorship of the proletariat. However, the latter is conceived to be transitional in the sense that it is expected to wither away as society makes its world-historic transition to classlessness. See generally Lenin *State and Revolution*; Mandel *Marxist Theory of the State*; Miliband *The State in Capitalist Society*.

the state. Collectively, these contradictions apprehend the fundamentals of the Pashukanist critique of the proprietary theory of restorative justice.

## 8 An impossible dream

Christie's theory entails a radical rejection of the formal statist criminal justice system which hitherto had been emblematic of capitalism. If a criminal conflict is a form of common capitalist property, then the state has no legitimate interest in its resolution. The disposition of a criminal conflict is then within the competence of its joint owners, all of whom enjoy proprietorship in the conflict as an individual right. The Christie thesis implies that property brings justice. The construction of the criminal conflict as property is posited as the key to satisfying the claims of the direct parties to a responsive criminal justice system. The proprietary route to justice is important enough to impose upon unwilling offenders. When it comes to crime and punishment, we shall be property owners one and all, and our transformation into property owners will be an enforced one, if necessary.

From a Marxist perspective, the Christie postulate is a sophisticated attempt to devise a solution to the capitalist crisis of criminality in terms which proceed from an acceptance of capitalist social relations of production as legitimate. It is, in other words, an exercise in capitalist reconstruction, considered necessary to deal with a problem which has overrun the extant regulatory arrangements. In this regard Christie's thesis may be comprehended as an expression of that central ideal of petit bourgeois political philosophy, namely, the ideal of a society of property owners. For the petit bourgeois, property is both his gateway to the bourgeois world and his bulwark against the threat of being condemned to a proletarian existence. Christie raises this middle-class neurosis to the level of a theory. He would replace the state with that which the state exists to warrant. He would substitute the central juridical feature of capitalism for its central political feature in the constitution of the criminal justice system. While reducing the sway of the latter he would extend significantly that of the former, to include criminal conflicts. Christie is offering a solution to the capitalist crisis of criminality which, to be sure, spurns all conventional assumptions

about the composition of the criminal justice system but which, as surely, embraces all the conventional assumptions about the composition of the social system.

If all roads lead to property then, in Pashukanist terms, all property leads to the commodity. In the capitalist mode of production, the commodity is the elemental cell of production, and property relations are the juridical form taken by commodity relations. To widen the ambit of capitalist property is to widen the sphere of influence of the commodity. Thus, when Christie construes justice in terms of property he is performing an act of commodification in respect of legal relations. The process of commodification is an exercise in internal colonisation which extends and deepens the proprietary content and culture of the capitalist mode of production at every step. When Christie presents capitalist property as a catholicon in his theory of restorative justice, objectively he is succumbing to the hegemony of the juridical worldview of the bourgeoisie. His theory displays an obeisance to the ubiquity and perceived omnipotence of capitalist property. It is true that he expresses some form of dissatisfaction with the limitations encoded in the idea of private property. But he is concerned to liberate capitalist property from these limitations, to broaden its reach beyond the exclusively material and private, and thereby to ratify the kingdom of property. However, there is no logical link, not even in formal logical terms, between the supreme prestige enjoyed by property in the capitalist world and according property the supreme status of a theoretical panacea. Such a link can be made only on the assumption, which would be an ontological choice, that capitalism and its worldview, even if they are not desirable, are certainly not impugnable.

Ideologically, Christie's notion of conflicts as property and his ambition to see us all become proprietors, at least of our criminal conflicts, anticipated the precepts of so-called popular capitalism which gained currency in the 1980s.[91] Indeed, his thesis may be comprehended as a juridical representation of popular capitalist doctrine. In

[91] Popular capitalism, *inter alia*, promotes the idea of a stakeholder society in which everybody, regardless of class affiliation, enjoys ready access to the benefits of the free market. It foregrounds privatisation and deregulation as routes to financial prosperity for all who would have it. In a word, it offers everybody a stake in capitalism as a means of defusing class conflict and of guaranteeing the orderly reproduction of the mode of production. For a detailed exposition of the tenets of popular capitalism see Redwood *Popular Capitalism* 24-45.

the same way as the ideologues of this doctrine promise that capitalism can be a people's mode of production, so Christie promises that criminal justice can be a people's mode of justice. The solution to the capitalist economic crisis, according to the popular capitalists, is to invite all of us to participate in the magic of the free market. The solution to the capitalist crisis of criminality, according to Christie, is to offer all of us title in a populist proprietary regime of criminal conflicts.

What is more, it appears that Christie perceives that the remedial attributes of capitalist property go beyond the problem of crime and in fact may rank as a crucial factor in solving the problem of capitalist alienation.[92] From his discussion of the structural theft of criminal conflicts it is evident that Christie is fully cognisant of the alienated and alienating nature of capitalist social relations of production. Following MacPherson's faith in the liberating and humanising potentialities of capitalist property, he suggests that his own proprietary theory of conflict may contain the ingredients for vanquishing alienation. He posits that "much of our trouble stems from killed neighbourhoods or killed local communities", and considers that the transformation of criminal conflicts into property "is intended as a vitaliser for neighbourhoods".[93] For Christie, then, his proprietary thesis not only holds the key to solving the capitalist crisis of criminality but also constitutes a way out of the structural sources of capitalist alienation. This is a large claim. Of course, it sidesteps the larger prior question: why are our communities and local neighbourhoods "killed"? The answer is painfully obvious: they are the victims of the exploitation, oppression and alienation inscribed in the social relations of the capitalist mode of production. Yet Christie would rely upon an expanded notion of capitalist property, the juridical heart and ideational soul of the capitalist mode of production, as their salvation. He proffers his conceptual transformation as the begetter of a social transformation.

Marxism considers that capitalism is a decadent mode of production which does not and cannot possess the resources required to solve its own structural crises. Indeed,

92 Here Christie appears to concur with the argument of MacPherson *Democratic Theory* 138-140 that property, ultimately, ought to entail the right to a fully human life.

93 Christie 1977 *British Journal of Criminology* 12.

it became necessary long ago to dismantle capitalism as a mode of production to prevent it from eventually plunging all humanity into social anarchy, economic bedlam and cultural barbarism. Christie demurs. Despite his concerns about the inequities which it has produced, he continues to believe that capitalism can offer equal opportunities to all. Despite his attack upon the role of the capitalist state in the criminal justice system, he continues to believe that the capitalist system is able to provide a justice which is properly responsive to human needs and concerns. Despite his radicality, he shares the juridical worldview and continues to believe that capitalism is able to solve its own crises. In the end, Christie remains a true believer in the reformability of capitalism.

Needless to say, Marxism condemns such an attachment to the notion of a good capitalism on both political and philosophical grounds. It is a basic Marxist postulate that capitalism is class-riven and that every social change of any significance, including that which Christie would like to see, is rooted ultimately in the material conditions of class struggle. Christie takes a supra-class position and asks us to accept a conceptual transformation in the nature of criminal conflicts as the well-spring of a New Jerusalem of criminal justice. However, in the capitalist context, a general appeal which seeks to avoid class distinctions invariably becomes an appeal to the good sense of the ruling class.

Unfortunately, Christie reckons without the class sensibilities of the bourgeoisie. As a ruling class, the bourgeoisie does not care for schemes which make inroads into its power and prerogatives, as Christie's would. It has no patience for plans which would have it relinquish one of its most significant power bases in the hope of not losing society further "opportunities for norm-clarification". The bourgeoisie supports and promotes popular capitalism because it offers a method of implicating all classes directly in the affirmation of capitalist social relations of production and in the defence of the valorisation of capital. It will not do the same for restorative justice because it has little interest in creating "pedagogical possibilities". As the ruling class, it is concerned with prescribing norms for the dominated classes rather than with engaging them in a process of "norm-clarification".

Christie makes the capital mistake of assuming that what is good for capitalism in the economic sphere is good for it in other spheres also. It never has been part of the agenda of the capitalist class to transform everybody into property owners. That has been the dream of the middle classes. The bourgeoisie is *the* capitalist proprietor and knows that the middle-class aspiration of universal proprietorship is a pipe-dream. Popular capitalism is really about increasing the property holdings of the bourgeoisie, not about making capitalist property accessible to the other classes. The popular capitalist advocacy of privatisation is really about extending bourgeois ownership of the means of production, not about sharing such ownership with the proletariat or the petite bourgeoisie. Deregulation is really about opening more avenues for extracting surplus value from the proletariat, not about opening the economy to proletarian or popular control. Christie believes, idealistically, that the bourgeoisie will take seriously the petit bourgeois project and create a society of property owners in relation to criminal conflicts. He supposes, hopefully, that the bourgeoisie will consent to the privatisation and deregulation of the criminal justice system as easily and enthusiastically as it has consented to the privatisation and deregulation of the economy. He presumes, optimistically, that the bourgeoisie can transcend its class limitations and agree to make its justice as popular as it has sought to make the idea of capitalism itself.

Property is a social relation for the appropriation of material values. Invariably, the property relation is expressed and lived juridically, as proprietary rights in the object of appropriation.[94] The bourgeoisie understands property in terms of entitlements to appropriate value: its ownership of the means of production confers upon it the legal right to appropriate the surplus-value produced by the proletariat. Privatisation of state assets is a means of increasing such rights of appropriation. Commodification of relations traditionally outside the commodity circuit is a means of extending property as appropriation. However, the transformation of criminal conflicts into property has nothing to do with the appropriation of value. This is the basic reason why the bourgeoisie will not embrace Christie's thesis, given that it also entails the

[94] See Suvorova and Romanov *What is Property?* 35.

expulsion of its state. Christie misunderstands what property means for capital. It enjoys so much prestige because it is the key to capital accumulation, not because it is a cure-all for social problems. Christie wants capitalist property to be what it is not or, rather, what capitalism will not have it be. That, in the end, is the practical undoing of his theory.[95]

## 9 Conclusion

If comprehensive restorative justice, as conceived by Christie, has a theoretical watchword, it is privatisation.[96] This notion is at the root of the confrontation between restorative and criminal justice.[97] It is the theoretical postulate which imbues restorative justice with its anti-statism. A crime cannot be a private affair unless it is conceptualised as a form of property. Privatisation entails property. It is an inherently proprietary notion which summates in private property.[98] Only that which may be owned can be privatised. Privatisation reduces public assets and resources to private ownership and presumes property to be an aboriginal and natural human relation. Privatisation which does not produce private property is a conceptual non-starter. It is therefore necessary that the notion of privatised criminal justice, to which the restorative justice project is committed, be founded theoretically upon a proprietary conception of criminality. Absent privatisation, restorative justice is emasculated; and absent private property, privatisation is

95 As a theory of comprehensive restorative justice (which it intends to be), Christie's is thus a practical non-starter. However, it is arguable that all partial restorative justice programmes amount to the partial implementation of Christie's thesis. In other words, it is possible to comprehend the conflicts which are resolved by these programmes in proprietary terms. Since they are mostly minor conflicts, they may be seen as forms of personal property which are not pivotal to the capitalist property regime, and thus may be removed without ado to the jurisdiction of restorative justice. I am indebted to Dirk van Zyl Smit for this insight.

96 Of course, partial restorative justice also posits a privatised justice within its sphere of operation. Although it accepts the overall supremacy of public criminal justice, it does expect the state to withdraw from those areas of criminality which are designated for restoration. This partial privatisation is subsumed theoretically within the complete privatisation required by comprehensive restorative justice.

97 The first target of restorative justice is retribution. However, this is a strategic manoeuvre which derives from the theoretical commitment to privatisation. Retribution exemplifies the penal philosophy of statist justice. It is the natural target of choice for restorative justice.

98 Here the concept of private property must be understood in its extended version to include non-material common property in which the co-owners enjoy individual rights. The same applies to private ownership.

incomprehensible. Once again, all roads lead to property.

In this connection, Christie's thesis is primordial. And its deficiencies notwithstanding, this thesis contains the key to a materialist understanding of the theoretical precepts of restorative justice. From the Marxist perspective, Christie's achievement has been to pierce the veil of appearance and reveal the material core of the doctrine of restorative justice to be a proprietary one. Justice can never be higher than right, and right, in the final analysis, as Marx reminds us, "can never be higher than the economic structure of society and its cultural development conditioned thereby".[99] Despite his acquiescence in idealism, Christie comprehends this fundamental materialist postulate.

The proprietary theory of restorative justice elaborated by the non-Marxist Christie affirms the general theory of law mapped out by the Marxist Pashukanis. The relationship is, however, not a reciprocal one, for Christie never engages, in any sustained way, either the material roots of the juridical moment or the historical specificity of the idea of legal subjectivity. His remarkable insight into the fundamentally proprietary nature of bourgeois political economy notwithstanding, Christie has not comprehended the real relationship between the commodity form and the legal form, and the implications of this relationship for the restorative justice project. From the Marxist perspective this is an omission which impoverishes the theory thus produced and leads it into a *cul-de-sac* of contradiction. The practical result is the somewhat optimistic but decidedly utopian belief that capitalism's crisis of criminality may be solved by privatising its criminal justice system. It is a belief which evidences a signal failure to grasp the unavoidably statist nature of capitalist criminal justice.

Despite the intersections between the proprietary theory of restorative justice and the Marxist general theory of law, there remains an unbridgeable chasm between the two. Restorative justice is about harnessing the legal form to its cause to supersede the criminal justice system. Marxism is about confronting the legal form in

99 Marx "Critique of the Gotha Programme" 531.

order to supersede it. Restorative justice is about removing the state from its supervisory role in the criminal justice process. The Marxist analysis of law is about the total destruction of the bourgeois state (and the withering away of its proletarian successor). Restorative justice is about turning all of us into men and women of property. Marxism is about waging unrelenting struggle against the regime of bourgeois property. Restorative justice is about commodification. Marxism is the mortal enemy of the commodity economy.

Be that as it may, there is a revolutionary core to the comprehensive restorative justice project which Christie theorises. The contradictions between partial restorative justice and criminal justice are non-antagonistic and concern primarily the delineation of the sphere of operation of each. By contrast, the contradictions between comprehensive restorative justice and criminal justice are antagonistic, in the sense that the one becomes or remains viable to the extent that the other remains undeveloped or degenerates. They are mortal enemies. The new kind of justice which is envisaged by the Christie thesis may well be the kind which accords with the legal morality of socialism. The idea of neighbourhood courts which are run by ordinary people and in which argument and evidence are not straitjacketed by juridical contrivances is not inconsistent with the socialist perspective.[100] Capitalism can accommodate and co-opt partial restorative justice with ease. It cannot countenance the idea and possibility of comprehensive restorative justice. It seems, then, that the realisation of the revolutionary potentialities of restorative justice in its comprehensive aspect will require a socialist revolution against the hegemony of

[100] When the Bolsheviks came to power in the Soviet Union they quickly initiated a revolution in law which included a profound transformation of the criminal justice system. The first step of the revolutionary regime was to dismantle the pre-revolutionary courts and replace them with revolutionary People's Courts. The constitution and operation of the revolutionary courts evinced a discernible restorative flavour. Elements such as significant lay participation and powers, the rejection of retribution as the purpose of punishment and the ready reliance upon extra-legal factors in the resolution of legal disputes all may be comprehended as prefigurations of restorative justice. To be sure, Bolshevik criminal justice, as the criminal justice of the dictatorship of the proletariat, was eminently statist. But it also presaged the justice of a future communist society in which the state, as an institution of class rule, had withered into insignificance. The Bolshevik innovations in criminal justice portended a restorative justice which transcended the commodity form and its attendant principle of equivalence. For further discussion of the institutions of Bolshevik revolutionary justice see Berman *Justice in the USSR* 31; Stuchka "The Old and New Court" 187-189; Butler *Russian Law* 149-150, 577-588; Schlesinger *Soviet Legal Theory* 60-73.

capitalism and the dictatorship of the bourgeoisie. In other words, if our future justice is to be restorative, our future society would probably have to be socialist.

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## List of abbreviations

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| Int'l J Soc L | International Journal of the Sociology of Law |