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Cornelius Murphy

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IDEOLOGICAL INTERPRETATIONS OF HUMAN RIGHTS

CORNELIUS MURPHY*

INTRODUCTION

BEFORE A general criminal law can be established, there must first exist a community whose values are to be protected. There must be a certain *concordia*—the prevalence of fundamental principles to which all are loyal. Such a consensus, often difficult to obtain within a national community, has never been attained at the level of international society. Corbett, in summarizing his study *Law in Diplomacy*, gave the opinion that “What is principally missing is the measure of agreement on supreme values, the sense of community, loyalty, and mutual toleration which within the State make compulsory institutions bearable.”¹

The absence of an authentic community on the plane of international relations is a failure due, in large measure, to the competitive antagonisms of sovereign states. As each is anxious to attain or enhance a position of power, potentials of universal accord become subordinated to the exigencies of power politics. But state sovereignty is not, of itself, a complete explanation of disunity. The failure to agree upon basic norms of behavior also reflects ideological differences among the peoples of the world.

Governments are bearers of philosophic conceptions of human destiny which are often irreconcilable. Professor Hans Morganthau, an expert on power politics, has acknowledged the reality of ideological influence upon state practice. In spite of the polycentric tendencies of the Communist world, he believes that the continuing presence of ideology is unmistakable:

[T]he Communist world appears to have reverted to the traditional pluralistic pattern in which individual nations cooperate or compete with each other for the protec-

* MR. MURPHY is a Professor of Law at the Duquesne University School of Law; J.D. Boston College; LL.M. University of Virginia.

1. CORBETT, *LAW IN DIPLOMACY* 273 (1959).

tion and promotion of their respective interests. This is the accepted meaning of polycentrism. The observation is correct as far as it goes. But it does not go far enough; for it does not take into account the fact that this polycentric world is composed of nations whose Communist character qualifies the polycentric orientation of their foreign policies. Because this polycentric world is also a Communist world, the foreign policies of its members cannot be explained by exclusive reference to their traditional national interests. . . .²

Comparable observations could be made of nations within the orbit of Western democracy. And in confrontations between the two blocs, the ideological differences will also have an operative influence. A nation's conviction that it possesses a true vision of human nature may not determine its foreign policy, but it will be a real influence upon the conduct of its international affairs. The effects are substantial enough to warrant an intellectual inquiry into the reasons for ideological conflict, as well as the possibilities of reconciliation. From such an effort we may hopefully move closer to that universe of shared values which is a precondition to the creation of an effective international criminal law.

THE NATURE OF IDEOLOGY

The existence of ideologies arises from the necessity of man to gain a coherent understanding of the world and of his actions. This urge towards understanding is built upon a number of pre-eminent ideas and value judgments which are used to interpret events consistently. Ideologies are possessive; those who adhere to basic convictions are expected to transform their lives in accordance with the doctrinal principles. This, in turn, leads to a certain dogmatism. The proponents of a particular ideology are hostile to revision because change challenges that aspiration to completeness which is the psychological condition for ideological thought.³

In international history, the prevalence of ideologies is a twentieth century phenomenon. Earlier, the influence of ideology upon foreign policy was more fragmentary; moral and intellectual insights also influenced international activity. In the contemporary world, ideologies, to the degree that they are influential, are projected as virtually complete views about man, society and universal destiny. Wherever a nation, or group of nations, professes an ideology, they

2. MORGANTHAU, *A NEW FOREIGN POLICY FOR THE UNITED STATES* 56 (1969).

3. See the discussion in Vol. 7 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES*.

purport to be carriers of truths about every phase of human life, whether it be economic, political or even spiritual.

In the present world, it is difficult to discuss ideologies with any amount of consistency. Any effort at general statement demands a variety of qualifications. Socialism has a wide range of meanings, depending upon its Marxist or non-Marxist character; even within orthodox circles there are important divergencies, as evidenced by the Sino-Soviet split. Within the range of democracy there is a bewildering array of differences. Nevertheless, ideological pluralism can be reduced to intellectually manageable proportions. Let us first consider socialism. In this essay, we shall use the term as embodied in Marxist-Leninist philosophy rather than in the less militant philosophies which exist in parts of Western Europe and Africa. The orthodox view is selected for present purposes because it constitutes a comprehensive intellectual and moral system which is charged with universal ambitions.⁴ Its embodiment in the political theories of the Soviet Union and the Peoples Republic of China makes it a major theoretical force at the present stage of history. Within the Marxist camp there are, of course, differences as well as significant defections. Moreover, the exact form of emerging socialist states such as Algeria and Cuba is a matter of speculation. Yet, with these qualifications, it is possible to identify Marxist-Leninist thought as one force involved in the major ideological confrontation of our time.

The other principal force is Western democracy. This is the predominant ideological disposition discoverable within the foreign policies of the countries of Western Europe and North America. It is also the prevailing philosophy of much of the Hispanic world as well as parts of Asia and Africa. Again, there are significant variations which are assumed; nevertheless, there is a specific cognitive and moral viewpoint which the ideology encompasses, especially as it has developed under the leadership of the United States. In speak-

4. For Twentieth Century expressions of the ideology, see LENIN, *THE THREE SOURCES AND COMPONENTS OF MARXISM*; STALIN, *DIALECTIC AND HISTORICAL MATERIALISM*, and *SELECTED READINGS FROM THE WORKS OF MAO TSE-TUNG* (Foreign Languages Press, Peking, 1967). There is a good critical study of Marxist thought in MARITAIN, *MORAL PHILOSOPHY* 220 *et. seq.* (1962). For a study of the new forms of African socialism see ONOHA, *THE ELEMENTS OF AFRICAN SOCIALISM* (1965). The ideas of Julius Nyerere are examined in *An Ideology for Africa*, FOREIGN AFFAIRS, April, 1969.

ing of Western democracy we mean to include economic, as well as political values within the description. Certain fundamental principles of property and human initiative are, as we shall see, an integral part of this point of view.

The ideological framework being developed can be illustrated by some comparisons. At the economic level, the Marxist sees private property as an alienating element to be overcome by the community of workers who, by destroying their exploiters, shall become the resurgent force of a true humanism. In the Western democracies, the accumulation of private wealth is still generally viewed as a social good, and individual business activity as a desirable mode of conduct. At the political level, democracy insists that sovereignty rests with the whole populace (the generic "people"), and also postulates specific individual rights which can be pleaded against the state. In Marxist theory, the Messianic role of the working classes means the gradual transfer to them of political, as well as economic power. Moreover, the state is the source of rights because it reflects the outcome of the inevitable struggle for power.⁵

We have suggested that ideological differences prevent that agreement on values which is essential to the development of an international criminal law. Whenever ideological motives seriously influence the foreign policies of different states, antagonism is inevitable. Ideologies tend to be impervious to objective truth because those who adhere are committed to the view that their ideas have universal validity. The resulting inflexibility is sustained by fear, cultural conditioning, or selfish interests which lie behind a theoretical veneer. In any event, the process is not conducive to concord. Ideologies lead to power struggles rather than to the value sharing which is indispensable to law.

BRIDGING THE IDEOLOGICAL GAP: THE IDEAL OF HUMAN RIGHTS

One way of narrowing differences arising from ideological conflict is to make humanistic aspirations the measure of criminal responsibility. At Nuremberg, the categorization of offenses within the phrase "crimes against humanity" made it possible for the victor-

5. See Szabo, *The Theoretical Foundations of Human Rights*, in INTERNATIONAL SYMPOSIUM OF HUMAN RIGHTS (Nobel Foundation, Oslo, 1968).

ious powers to apply mutually acceptable standards to the delicts of Nazi criminals. Since the Second World War, there has been an increasing awareness that a concern for the human person is the only satisfactory basis upon which to build an enduring world order. If we wish

[t]o break through the massive prejudices and irreconcilable interests that block the road to a lasting peace and just world order, we must look to a scheme of international relations which would operate outside the web of national histories, traditions and interests. The first step in that direction is the emancipation of the human individual from the shackles of nationality. Without international recognition of man's distinctly personal character, it is impossible to alter the pattern of the nation-state, which for so long has remained a fixed and static feature in international life. Second, . . . the fate of the human person, whoever and wherever he may be, must become the direct concern of the international community and its immediate responsibility. Nothing short of the internationalization of man can bring about the great compromise between the prerogatives of national sovereignty and the requirements of international solidarity, and the reconciliation between the nationalist creed and the idea of the community of man.⁶

Continuing this line of thought, it is arguable that within the Universal Declaration of Human Rights there exists that concern for man which is indispensable to world order. For the Declaration can be viewed as the expression of a common secular faith in the worth of the human person.

As operative precepts, the contents of the Declaration seem to provide an adequate practical accord upon which we can build a universal code of conduct. The eminent philosopher, Jacques Maritain, probably had such possibility in mind when he distinguished the *practical points of convergence* expressed in a humanistic statement of principles from the *theoretical perspectives* by which the participants ultimately justify the expressed values:

The secular faith . . . deals with *practical* tenets which the human mind can try to justify—more or less successfully, that's another affair—from quite different philosophical outlooks, probably because they depend basically on simple, "natural" apperceptions, of which the human heart becomes capable with the progress of moral conscience. . . . Thus it is that men possessing quite different, even opposite metaphysical or religious outlooks, can converge, not by virtue of any identity of doctrine, but by virtue of an analogical similitude in practical principles, toward the same practical conclusions, and can share in the same practical secular faith, provided that they similarly revere, perhaps for quite diverse reasons, truth and intelligence, human dignity, freedom, brotherly love, and the absolute value of moral good.⁷

6. MOSKOWITZ, *THE POLITICS AND DYNAMICS OF HUMAN RIGHTS* 71-72 (1968).

7. MARITAIN, *MAN AND THE STATE* 111 (1951).

The distinction is intellectually persuasive, but the real difficulty lies with concrete implementation. The ideals of the Declaration may reflect the practical convergence of which Maritain speaks (discounting the abstentions⁸ and the elements of political compromise); yet efforts at more specific statements are obstructed by the very theoretical considerations which are supposed to be irrelevant. As statesmen have tried to transform the Declaration into concrete rules, ideological interpretations of human rights have often impeded specific agreement. Preferences survive as we move deeper into the practical realm, thus making it difficult to develop specific codes of behavior which can be used to protect human rights and to punish those who would deny them.

These differences have been especially acute in the field of economics. Although the Universal Declaration of Human Rights recognized the right of private property, it has been impossible to translate the abstract acknowledgment into the web of positive international law. While the Commission on Human Rights was developing the Draft Covenants on Human Rights, the United States delegate submitted a draft proposal designed to protect the right of private property. It was impossible to obtain agreement upon either the proposal or alternative formulations and the divergences clearly had ideological overtones. The approach of the United States (which was never put to a vote) reflected a conviction that private ownership is a paramount value which can rarely be subject to jural limitations. This individualistic emphasis contrasted sharply with the viewpoint of other delegates who insisted that private property should be limited by laws enacted for reasons of social progress including expropriation when required by the public interest.⁹

While the ideology of Western capitalism accentuates private property, Marxist theory is alert to its harmful consequences. These differences of approach are particularly evident in efforts to define

8. The U.S.S.R., The Ukraine, Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa and Yugoslavia abstained. The socialist bloc's major reason was the expressed conviction that civil and political rights must be limited to prohibit a resurgence of facism. GANJI, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 149 (1962); *THE UNITED NATIONS AND THE PROMOTION OF THE GENERAL WELFARE* 672 (Asher ed. 1957).

9. Commission on Human Rights, Report, 18 U.N. E.C.O.S.O.C., Supp. 7, at 40-70, U.N. Doc. E/2573, E/CN4/705 (1954).

the nature of "aggression." At a 1954 meeting of a United Nations Committee established for that purpose, the Soviet delegate argued that the concept should include unlawful applications of economic force which were injurious to human values:

[There would be] an act of economic aggression wherever a State taking the initiative, adopted measures of economic pressure infringing the sovereignty of another State and its economic independence and threatening the foundations of the economic life of that State; adopted measures in regard to another State impeding the exploitation by that State of its own natural resources or the nationalization of those resources; imposed on another State an economic blockade.¹⁰

Ideological differences have also been barriers to accord on non-economic aspects of human freedom. Freedom of speech is instructive. Agreement has never been attained on the content of free speech. The Marxist bloc has generally demanded that it be restricted when used to promote "facist" ideas, the West tending to permit unlimited expression.¹¹ The liberal position has, on some occasions, been a source of difficulty. For example, Article 4(A) of the Convention On Outlawing Racial Discrimination obliges the signatories to make the dissemination of ideas based on racial hatred or racial superiority a punishable offense under their national criminal laws. Ambassador Goldberg felt obliged to state that the position of free speech in America required a restricted interpretation of the Article:

. . . We believe that a government should only act where speech is associated with, or threatens imminently to lead to, action against which the public has a right to be protected. Our Supreme Court, in *Yates v. United States*, emphasizes "the distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action." In our view, therefore, a state should act under the terms of article 4 only if the dissemination of obnoxious ideas is accompanied by, or threatens imminently to promote, the illegal act of racial discrimination. . . .

. . . In accordance with the right to freedom of speech and freedom of association, it is our view that organizations cannot be declared illegal if they merely attempt to win acceptance of their beliefs by speech alone. However, if such organizations go beyond advocacy of their views and engaged, or attempt to engage, in the illegal act of racial discrimination itself, they come within the purview of the convention.¹²

10. 9 U.N. G.A.O.R., Comm. to Define Aggression, Supp. 11, at 9, U.N. Doc. A/2638 (1954).

11. See *International Control of Propaganda*, 31 LAW AND CONTEMP. PROB. 437-635 (1966).

12. 55 DEPT. STATE BULL. 214 (1966). These views still prevail in American constitutional law and have been applied to the arena of radio licensing. In *Anti-Defamation League of B'Nai B'rith v. F.C.C.*, 403 F.2d 169 (1968), the Federal Communications Commission refused to censor a broadcaster accused of making

It is fruitless to expect agreement on the content of human rights to emerge solely through the repetition of practical proposals. Desirable as such efforts are, there is too much evidence of concrete disagreement to justify optimism. Rather there is a need to stand back, as it were, and reappraise ideological conflicts in the light of the entire human rights program. Calm analysis should reveal that each major ideology reflects important partial insights into the total meaning of man in society, even though standing alone they fail as efforts at comprehensive definition.

If we consider the Universal Declaration of Human Rights as a whole, we can view it as encompassing different aspects of a general humanism. Beyond its introductory articles, the Declaration addresses itself (Articles 3-21) to the rights of the individual—his personal freedoms as well as his civil and political rights. Another important segment of the Declaration refers to the economic, social, and cultural rights of man (Articles 22-27). Considering these separate sections as complementary parts of an overall commitment to Human Rights, it is possible to trace a corresponding emphasis in the major ideologies of democracy and socialism.

With respect to individual freedoms, a considerable part of the values enumerated in the Declaration are substantially identical with

bigoted appeals to Anti-Semitic prejudice but required the licensee to afford free time for response. In upholding the order, the then Circuit Judge Burger wrote: "[Ideas concerning religious and racial matters] cannot be freely discussed if there is to be an official ban on the utterance of 'falsehood' or an 'appeal to prejudice' as officially defined. All that government can properly do, consistently with the right of free speech, is to demand that the opportunity be kept open for the presentation of all viewpoints." In *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367 (1969), the Supreme Court upheld an F.C.C. regulation (the "fairness doctrine") requiring the licensee to offer time for reply if an attack upon a personage occurs through its facilities. For a critical analysis of the nature of free speech see the quotation in *infra* note 25. This development suggests that there are some important areas of comparative studies which should be examined to discover the diverse ways that different ideologies realize values within their domestic legal orders. The evolution of the "fairness doctrine" may demonstrate that the liberal tradition has developed an effective means of meeting the dangers of free speech. Socialist thinkers may also be interested in the way the collective bargaining process is used to promote the freedom of workers and give them an effective role in the management of enterprises. *E.g.*, *Local 189 Amalgamated Meat Cutters v. Jewel Tea Company*, 381 U.S. 676 (1965) (collective bargaining over marketing hours is within national labor policy). Similarly, thinkers from capitalist countries could profit from a study of the ways in which socialist countries balance creative property with the needs of a national economy. See, *e.g.*, *Vida, The Law of Industrial Property in the Peoples Democracies and the Soviet Union*, 12 INT. & COMP. L.Q. 898 (1963).

the theory of individual liberty which constitutes the distinctive *ethos* of Western democracy. Freedom from arbitrary arrest, equal protection under the law, rights of free expression and opinion—these and related rights are bound up with the historical struggles associated with the French and American Revolutions. Rights of self-government acknowledged by the Declaration have their roots in the constitutional democracy identified with Western, especially Anglo-American humanism. Even the economic aspects of Western ideology are reflected in the recognition of the right of each, singly and in association, to own private property.

When considering the ideological basis for the economic, social and cultural rights enumerated in the Declaration, one should acknowledge that they have derived their major impetus from Marxist-Leninist thought and the spirit of the October Revolution. This is not to suggest that the protected values are exclusively dependent upon such inspiration. Present protection of the rights of workers are the result of universal efforts, but it is within socialist countries that their advancement has been the dominant purpose of political activity and governmental policy.¹³ Within this ideology the dignity

13. 90 CONG. REC. 57 (1944) (remarks of President Roosevelt). "This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty. As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not freemen.' People who are hungry and out of a job are the stuff of which dictatorships are made. In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed. Among these are: The right to a useful and remunerative job in the industries, or shops or farms or mines of the Nation; the right to earn enough to provide adequate food and clothing and recreation; the right of every farmer to raise and sell his products at a return which will give him and his family a decent living; the right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; the right of every family to a decent home; the right to adequate medical care and the opportunity to achieve and enjoy good health; the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; the right to a good education. All of these rights spell security. And after this war is won, we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being." This address by President Roosevelt to the Congress of the United States and the failure of that body to implement this "economic bill of rights" illustrates the fact that while there have

of the working class, their emancipation from all forms of oppression, is of central significance. The same may be said, in general, of the social and cultural rights of man which are consecrated by the Declaration of Human Rights. Again, these values have been promoted in all civilized societies, but it is the socialist countries which have made their realization the overriding objective of government. East Germany for example, relates its new constitution to the economic, social, and cultural phases of the Universal Declaration of Human Rights.

A sense of relationship between separate ideological convictions and total humanism proclaimed by the Universal Declaration can reduce the antithesis which is presumed to exist between Western democracy and Marxist socialism and which has impeded the development of a consensus on the content of human rights. Hostility is moderated if we consider each philosophic view as a part of whole humanism rather than as a self-sufficient, complete explanation of man in society. But we can go further. The authentic agreement on supreme common values which is the essential precondition of a universal criminal code can be approximated if ideological advocates understand that the human values associated with their particular philosophy and tradition are becoming part of their adversaries' political life.

"[I]ntellectual freedom is essential to human society—freedom to obtain and distribute information, freedom for open-minded and unfeeling debate. . . ."¹⁴ One would assume that these lines were written by a person nurtured in the libertarian tradition of Western democracy. Yet they are the impassioned voice of Andrei Sakharov, the Soviet scientist who made important contributions to the development of the hydrogen bomb. The same writer not only champions intellectual freedom but also vigorously denounces the inhuman treatment of political prisoners during the Stalinist era.

In the West, there is an increasing awareness of inequities the perception of which has been traditionally considered a Marxist pre-

been particular creative efforts, and some notable accomplishments in the field of labor, the welfare of workers has never been the overriding policy of Western capitalism. The observations about America are also true of Great Britain even though socialist policies are an integral part of its national life.

14. SAKHAROV, PROGRESS, CO-EXISTENCE, AND INTELLECTUAL FREEDOM 29 (1966).

rogative. Outrage at economic exploitation, a sense of injustice aroused by evidence of economic hegemony, can no longer be considered a socialist copyright. Within the United States, there is a widespread reaction against the consequences of unequal bargaining power. And the dissent is too broadly based to permit its reduction to categories of class struggle. Provisions against the enforcement of "unconscionable" agreements in the Uniform Commercial Code, for example,¹⁵ refute any assumptions that the American ethic can be understood solely as a "capitalistic" thesis. A growing concern for the economic rights of man is becoming an integral part of Western life. President Roosevelt's call for an economic bill of rights at the close of World War II,¹⁶ and the expansion of the right of property to encompass fundamental needs¹⁷ are evidence of this trend.

These emerging patterns of conduct suggest that values once thought of as part of exclusive ideologies have in fact a general human quality. But the transideological nature of contemporary life is perhaps best revealed in the emerging critiques of technology. It is becoming increasingly clear that all advanced industrial societies, whether they arise in the West or under socialist inspiration, carry in their train common dangers to human life. Problems such as pollution, environmental control, transportation, and the dehumanizing effects of mass culture are indifferent to ideology. And, as they have global consequences, they expose the common plight of man. Indeed, it is probable that technology rather than capitalism is the major cause of modern man's alienation. The concept of alienation has a general significance in Marxist thought, and is capable of application to any situation in which man is separated from his true essence. Yet socialist as well as capitalist countries are finding that contradictions between economic growth and human happiness are a part of any industrial *milieu* of abundant productivity and efficiency. All developed societies suffer that *affluent alienation* equally unknown to Marx or Adam Smith.¹⁸

15. U.C.C. 2-302. There is extensive commentary on the new code, e.g., Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969).

16. See text, *supra* note 13.

17. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

18. The best general critique is MARCUSE, *ONE DIMENSIONAL MAN* (1964). Although he has socialist sympathies, Marcuse applies his insights to all advanced

PHILOSOPHIC ISSUES

The definition and protection of human rights have become the major purpose of an international criminal code. But such an achievement has not been forthcoming. The practical failure to obtain such a consensus is the result of many geo-political causes of which ideological division is an important factor. Some of this division can be reduced if values considered to be the prerogatives of particular ideologies are seen as emerging within the social fabric of the presumably alien system. We move closer to a sense of community when we see that the problems of modern society transcend ideologies. But we must probe further. Beyond a phenomenological awareness of common humanity we must examine the philosophic premises of the ideologies in question. What conceptions of human nature, what views of man in society lie behind Western democracy and socialist humanism?

Western theories of man are radically individualistic. Abstract rights proclaimed by the French and American Revolutions gained concrete expression in the individualism and self-sufficient ethic which has characterized Western experience. Particularly man has been placed at the center of political and social existence. The evolution of constitutional liberties, the advent of the industrial revolution, and an introspective tradition of philosophy and psychology contributed to this growth.¹⁹ From it there emerged three paramount conceptions of man in society which are important to the present study, all of which involve the relationship between the individual and the state. The first concerns the basis of social organization. In the view of Western democracy, government depends upon the consent of the governed. This idea has its roots in British constitutionalism and gained particular force in the creation of the Constitution of the United States which, as historians have noted, was the first concrete expression of the autonomy of the peo-

industrial societies and is conscious of the limits of orthodox Marxism in the present epoch. See, e.g., Marcuse, *Socialist Humanism* in *SOCIALIST HUMANISM* 107 (Fromm ed. 1966). The phrase *affluent alienation* is taken from the introduction to that volume. Cf. Stanmeyer, *The Jurisprudence of Radical Change: Herbert Marcuse's "Great Refusal" v. Political Due Process*, 45 ST. JOHN'S L. REV. 1 (1970).

19. There is a good overview of this culture in NORTHRUP, *THE MEETING OF EAST AND WEST, AN INQUIRY CONCERNING WORLD UNDERSTANDING* (1950).

ple as a constitutive power.²⁰ Upon these premises the government has been conceived as an agent of the public. Yet democracy has generally maintained a negative view of the state. The sense of individual freedom expressed in a Bill of Rights which the individual could plead *against* the state was the strongest expression of this hostility. In the economic sphere the purpose of government is to facilitate the pursuit and protection of wealth.

These conceptions of man and government make up the core of Western democratic ideology. Expressed as an ideology, they offer in the mind of their advocates a comprehensive moral view of the human condition. In some form, they reflect the minimal order of human values which must be part of a common international value system.

We have already observed how some of these values of this ideology, such as intellectual freedom and the concept of due process, are viewed by prominent individuals in socialist countries as indispensable to civilized existence. But the individual liberty expressed in rights of private property is more difficult for persons outside the Western orbit to accept. Marxism, particularly, has uncovered the connection between capitalism and human alienation; socialism is determined to remove harmful capitalist influence from the new human community. Western leaders are equally adamant in insisting upon jural protection of private acquisitions. The general development of a human rights program is obstructed by this issue and some adjustment of these differences is essential to the establishment of an international criminal law. The concept of "economic aggression" is still an important part of the thinking of developing countries with respect to universal crimes.

Marxist thought has mercilessly exposed the inhuman consequences of private property: its immense potentialities for exploitation as well as its radical tendency towards an anti-social selfishness. But it would be erroneous to conclude that the institution of private property is devoid of human significance. The tenacity with which Western thought (particularly in the United States) clings to private modes of economic activity cannot be explained purely in

20. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION*; E. MORGAN, *THE BIRTH OF THE REPUBLIC* (1956).

dialectic terms. Beneath the ideological rhetoric lie convictions of human value which deserve closer examination than they have previously received.

From a socialist perspective, private property is a negative force in the economy. It deprives others of what rightfully belongs to them and directly contributes to social disorder. This viewpoint reflects insights of great value, but is incomplete. There is another aspect to "private enterprise" which deserves to be considered: the significance attached to the term in the evolution of Western thought.

In Anglo-American experience, property was conceived in more positive terms. Particularly in America, where the development of a vast continent called for enormous expenditures of capital and human effort, the economic activity of free men was of special importance. Private property was honored for the public good which resulted from its use.²¹ More deeply, philosophic convictions about the quality of individual life placed the institution of property upon a firm foundation. The external role of property grew, in part, from internal qualities of personal dignity. The legal historian Willard Hurst summed up this attitude in the opening chapter of his study of *Law and the Conditions of Freedom in the Nineteenth Century United States*:

The base lines of . . . public policy . . . are three: (I) Human nature is creative, and its meaning lies largely in the expression of its creative capacity; hence it is socially desirable that there be broad opportunity for the release of creative human energy. (II) Corollary to the creative competence which characterizes human nature, the meaning of life for men rests also in their possessing liberty, which means basically possessing a wide practical range of options as to what they do and how they are affected by circumstances. (III) These propositions have special significance for the future of mankind as they apply in the place and time of the adventure of the United States; here unclaimed natural abundance together with the promise of new technical command of nature dictates that men should realize their creative energy and exercise their liberty peculiarly in the realm of the economy to the enhancement of other human values.²²

There have been important modifications in this conception of nature as the American and international economies have passed far into the twentieth century. Domestically, the optimism which underlies the quotation had, by 1900, been cooled by revelations of capi-

21. See the comparative observations of BROGAN, *AMERICA IN THE MODERN WORLD* ch. 3 (1960).

22. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 5 (1956).

talist rapacity. The human conscience is now aware of the public character of the natural resources which an earlier age was willing to commit to the private domain.²³ Yet there remains a positive element of truth in the Western view of enterprise. The "right" of private property surely does not encompass unjust enrichment or profiteering, nor is the right proposed as an alternative to communal control of economic development. But, in proper proportions, the recognition of private property finds its justification in that human dignity which a world order should promote. Material prosperity is an integral part of modern life; economic goods and the intangible values they generate reflect, in large measure, forms of individual creativity which are not reducible to Marxist-Leninist categories of labor. Not only do they evidence a wide range of sophistication, but many of the financial, industrial, and technological improvements needed in modern life can arise only in an atmosphere of economic liberty. The necessary community of values can only arise in international society when the creative dimension of private ownership is acknowledged and where protection against its *arbitrary* deprivation is assured.²⁴

Within the tradition of Western democracy there is a strong sense of personal dignity. In the realm of socio-political life, as well as in the field of economic activity, a conviction that each person has inherent values which are beyond the power of the state is an essential part of this ideology. This experience has given great impetus to the rise of human rights in universal moral experience, but the development has not been perfect. We have acknowledged the limits within which creative economic freedom can be considered as a positive human value; qualifications also surround the personal civic and political liberties which are cherished by the West. Freedom of expression, for example, which is projected by the ideology as an absolute value, has limits which are being acknowledged within democratic countries.²⁵ The same may be said of some of

23. *E.g.*, Declaration on Permanent Sovereignty Over Natural Resources G.A. Res. 1803, 17 U.N. G.A.O.R. Supp. 17, U.N. Doc. A/5217 (1962). The text is published in 57 AM. J. INT'L 710 (1963).

24. For an analysis of the standard of arbitrariness *see*, Murphy, *State Responsibility for Injuries to Aliens*, 41 N.Y.U. L. REV. 125 (1966).

25. Compare the thoughts of a Bar Association President on the limits of free speech with the libertarian expression of Ambassador Goldberg, quoted *supra* note 12. "It is, I suppose, still good Constitutional doctrine that it is time for

the nuances of due process, especially as they apply in the field of criminal procedure.²⁶ The continued vitality of these values is not being denied but their *absolute* characterization is being questioned.

The tendency to place unlimited or excessive interpretations upon human rights is an inevitable danger whenever the individual is placed at the center of jurisprudential interest. There is an inclination to treat the particular man in isolation from the society in which he is a part. This tendency stands in sharp contrast to Marxist humanism. For the Marxist knows only social man; the ideology has no integral conception of the singular person.²⁷ With Marxist

Government to step in to regulate people when they *do* something, not when they *say* something. . . . The undeniable fact, of course, is that one may be as effectively assaulted and battered by words as by physical contact and that words and deeds are increasingly indistinguishable parts of the same continuum of behavior. It is part of the genius of our judicial system that we do reinterpret constitutional mandates in the light of tremendous technological change and new social conditions. Is it time to ask ourselves whether the classic dichotomy between words and acts has meaning in the context of our present society? Ought we take cognizance of a revolution in communications that has given us an infinite capacity for transforming, by a kind of geometric progression of repetition, inflammatory words into action and counteraction? We live in a time when dissent is no longer expressed in pamphleteering. The preferred method of communication is by demonstrations, mass picketing, physical confrontations. We have seen, by some strange semantic alchemy, the right of *peaceable* assembly turned into the 'right' to mass in the streets, to disrupt traffic, to keep other citizens from going about their lawful occasions, to kidnap the facilities of our cities, to seize the buildings of colleges and universities, to occupy the halls of government, and to wreak physical harm upon those who do not agree with us. I find it difficult to accept extortion and blackmail as methods of peaceful persuasion or a brick through a window as a constitutionally protected petition." 51 CHICAGO B.R. 262, 263-64 (1970).

26. See the report on criminal justice in Vol. I No. 7 THE CENTER MAGAZINE 69 (*Fund for the Republic* 1968).

27. See the analysis in MARITAIN, MORAL PHILOSOPHY (1964). The different emphasis: individualism and social solidarity is also reflected in the diverse approaches towards political involvement. Socialist countries stress participation in political affairs as the ideal mode of temporal existence; in the West, political activity tends to be looked upon as a provisional necessity, engaged in as a means of preserving singular life. A study of Jeffersonian attitudes is enlightening: "The pursuit of happiness had to be postponed until the political world was set aright. Jefferson nowhere indicates that happiness is to be sought or found in political action. The whole thrust of his thought leads, not to the conclusion that men pursue happiness in the political realm, but that political action is unfortunately necessary from time to time in order to arrange the public affairs so that it will be possible for individuals to pursue happiness in the private realm. It is possible to justify political involvement in Epicurean terms, as Jefferson did, but only at the expense of making public life entirely secondary and instrumental of private life." Schaar, *And the Pursuit of Happiness*, 46 VIRG. QUART. REV. 1 (1970).

notions of human freedom, man is liberated and finds his true destiny by absorbing himself in the needs of the community.

This emphasis upon community and social solidarity explains the fervor with which the bloc nations support the economic, social, and cultural phases of the human rights programs as well as their special advocacy of anti-colonial movements. In themselves, these are important values, especially in the manner that they accentuate the dignity of labor and the priority of national community in matters of economic development. Of particular importance to the present study is the role which is accorded the state in the implementation of these values.

To guarantee the realization of economic, social, and cultural rights, socialist theory assigns an important role to the active intervention of government. As its conception of man is social, it considers "rights" as emanating from the state which represents the whole. To the degree that the theory emphasizes positive government it has much to commend it. The negative view of the state which has prevailed in Western democracies has been overstated; the reassertion of the state as a creative force is in some measure desirable. The stress upon the social character of existence is also worthwhile, especially since it highlights the importance of the *public* domain, a dimension which is all too frequently ignored in Western countries. Furthermore, the importance which socialist countries place upon culture as a fund of historic goods which all are entitled to share is a perspective which deserves widespread consideration.

But the ideology has some questionable assumptions, particularly in the manner in which it conceives the individual's position *vis a vis* the State. One major drawback is the Hegelian mode in which the state is conceptualized. The state in socialist thought is the personification of an abstract humanism which absorbs into its generality the particular persons which make up the body politic. This approach to, or rather solution of, the problem of the individual was clearly expressed by the Soviet delegate during the debates over the proposed Universal Declaration of Human Rights. Replying to suggestions that the Soviet state did not give proper respect to the individual, the Russian representative replied by reducing the problem of individualism to the Marxist dialectic. Contradictions between the

individual and the state existed when society was divided into rival classes with capitalist exploiters as the dominant class. In the new communist state the problem was solved because

the government was in fact the collective individual. That contradiction was eliminated when a society reached a stage when it was no longer divided into classes conflicting with each other, the class of the exploiter and the class of the exploited.²⁸

Such a synthesis misses the essential meaning of Western individualism, which, in spite of its faults, brings to the problem a much deeper understanding of human personality.

The approach of democracy to the question of the individual and the state possesses, in a sense, a degree of illogic. Its insight is such that it postulates individual rights in a way which appear to contradict democratic theory. The idea that the individual has rights which he can plead against the state is sustained by a conviction that the single person is of such intrinsic worth that he deserves to be protected from the harmful consequences of a majority or abstract will.²⁹ Such an approach may have dangers of excessive isolation of the individual from the social whole, but it nevertheless expresses a fundamental truth about human dignity.

The importance of this Western ideal can be best illustrated in an area which is of particular concern to socialist theory: the field of economic rights. To assure that everyone has the necessary essentials of life the state must play an active role. All forms of unemployment compensation, welfare, old age assistance, etc. depend upon the operations of many government agencies. From a Marxist perspective, it could be argued that this modern phenomenon proves the ideological thesis that all rights flow from the state, that the state has "become" the individual. But what if a state agency denies assistance to a person in need? The realization of individual economic rights can be fully guaranteed only if the individual is accorded rights which he can exercise *over against* state power.³⁰ Some

28. 3 U.N. G.A.O.R. 333 (1948).

29. For the application of the idea to the institution of judicial review, see BLACK, OCCASIONS OF JUSTICE 17 (1963).

30. See the recent decision of the Supreme Court of the United States *Goldberg v. Kelly*, 397 U.S. 254 (1970) in which it was held that the due process clause of the Fourteenth Amendment requires that a public assistance recipient must be given an evidentiary hearing *prior* to the termination of benefits.

sense of a separate relationship between the individual and government by which the state can be called to account seems indispensable to humanistic progress.

The scope of international crimes includes considerations of political authority. The problem of civil war and intervention raises issues of aggression whose resolutions are conditioned by concepts of legitimate rule. If internal strife is seen as a phase of the struggle between the exploiters and the exploited, such an interpretation colors one's judgment as to the propriety of a foreign power's interest. It becomes important therefore to understand what is meant by the ideologies of socialism and Western democracy when they invoke the human right of self-government.

In Marxist-Leninist ideology, a regime of the rule of workers is projected as a political ideal. It is as the representative of the working class (industrial and/or rural) that the ruling elites in socialist countries justify their political power. It is demonstrable that such a hypothesis can be a facade for tyranny,³¹ but, in philosophic terms, the weakness of the theory runs deeper.

The flaw lies in the assumption that political authority is vested in *one part* of the body politic. It is probably true that some of the major transformations of social existence will, in the foreseeable future, result from the political action of alienated groups.³² But it is important to distinguish between a *political movement* and *political authority*. The energies of a limited number may provide the impetus for change, but their leadership does not divest others of their right to participate in political processes and to demand an accountability from whomever may govern.

It is in this respect that the concept of "the people" has a deeper significance in Western democratic theory. Anglo-American political experience reveals a continuing effort to make the franchise responsive to an ideal of the *whole populace* as the source of sovereign authority. The removal of property qualifications, woman's suffrage, realization of voting power for racial minorities, the reapportionment phenomenon, and related historical events suggest

31. *E.g.*, DJILAS, *THE NEW CLASS; CONVERSATIONS WITH STALIN* (1962).

32. *See*, the work of Michael Harrington, a member of the American Socialist Party, *TOWARDS A DEMOCRATIC LEFT* (1969).

an orientation pointed towards the full realization of self-government.³³

The Western experience is filled with imperfections, and in practice the socialist countries have, in some respects, surpassed the West. The level of *actual* participation in the affairs of government is probably higher in those countries where Marxist ideology prevails. But there is, in the Western view, an essential point about the nature of political authority which is of fundamental importance to the protection of human rights.

The importance of this question can be better understood where its implications are drawn to mind. The possession of political authority by all the people includes the corollary that all have a right to call government to account. Accountability is assured not only through periodic elections, but also by the voice of criticism. Liberty of expression is essential to a free people, especially as it may be directed towards those in power. Criticism, as well as sovereignty, belongs to all; human rights cannot flourish unless everyone, and not just members of a particular class, have a right to speak on public issues.

CONCLUSION

A criminal law will be created by the people of the world when they co-exist in a universe of shared values. At the present stage of

33. Consider the remarks of George F. Kennen, former ambassador to the U.S.S.R., made at the Pacem In Terris Conference in reply to a call for peaceful coexistence by Dr. Adam Schaff, a member of the Central Committee of the United Workers Party of Poland: ". . . You, Dr. Schaff, talk about coexistence as something that stops at the point of ideology, and about a policy, really, of a non-coexistence in the ideological field. The ideological contest, as you Communists see it, is not only an intellectual competition but a political competition. It is a political competition that involves not only the minds of men, as you say, but also, I am sorry to say, their fears—a competition that does not entirely respect what is in men's minds because it does not fully recognize the organized expression of the popular will. There would be no one quicker than I to admit that all parliamentary systems, all systems of elections, are imperfect. There are many abuses. What comes out of them is a very rough justice and a very rough expression of the popular will, often much rougher than I would like to see in our own country. But it is this which lies at the heart of our disagreement with you. We feel that until there exists on the Communist side a disposition to accept expressions of the popular will, however imperfect, as the ultimate basis of political action and of the determination of political authority, there will remain a contradiction between the concept of ideological competition that you have put forward here and the concept of coexistence about which we are speaking." ON COEXISTENCE 26 (Occasional Paper, Center For the Study of Democratic Institutions 1965).

history the development of man is retarded by conflicting ideologies. But we stand on the threshold of a humanistic age. International rules to protect human dignity will come to be when nations realize that their idea of man is part of a larger vision of human rights.

To realize the rule of law we must renounce our obsession with practical proposals and reflectively examine the reasons for ideological conflict and the potentials of reconciliation. A certain humility is required, because progress depends upon the general acknowledgment that no particular ideology constitutes a monopoly of truth. But the loss of pride is of little consequence; as our vistas enlarge, we shall gain that community of shared values which is the *sine qua non* of effective law.