

# the SIMON GREENLEAF



## LAW REVIEW

A Scholarly Forum of Opinion Interrelating  
Law, Theology, & Human Rights

featuring  
in this number

*The Marxist Approach to Human Rights  
Analysis & Critique*

By

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Dean of  
The Simon Greenleaf School of Law

Editorial Introduction by  
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**THE SIMON GREENLEAF LAW REVIEW**  
**A Scholarly Forum of Opinion Interrelating**  
**Law, Theology & Human Rights**

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**EDITOR'S  
INTRODUCTION**



## EDITOR'S INTRODUCTION

by

HAROLD LINDSELL, Ph.D., D.D.

The question of human rights has been in the forefront of the thinking of multitudes of people during the past decade. The Helsinki Accords, signed by many nations of the world including the United States of America and the Union of Soviet Socialist Republics, has opened the door wide to inquiry into the conduct of certain nations as to whether their actions have been in keeping with their profession. This, in turn, has raised the issue of the relationship between human rights theory and practice in general. Helsinki has made abundantly clear that substantial disagreement exists between the Marxist-Leninist understanding of human rights and that of the free world.

Dr. Montgomery enters into the thorny thicket of Marxism's theoretical understanding of human rights, and he seeks to determine how its practitioners function in what they actually allow and disallow their people to do. In order to accomplish his purpose from the legal perspective, the author has had to examine the presuppositions which undergird Marxism. This is vital because Marxist state practices, with respect to human rights, can only be comprehended in terms of the underlying Marxist *Weltanschauung*. Since Marxism begins with matter as the only ultimate reality, the inevitable jurisprudential and ethical question arises as to whether there is any adequate basis for absolutes in conduct. For the Marxist, sociology under the command of economics gives rise to a very different understanding of human rights from that of the classical legal tradition. Dr. Montgomery critiques the Marxist foundational principle of dialectical materialism and takes a hard look at the actual human rights practices of the Marxist world. His conclusions shake the

thinking man's confidence in either the adequacy of Marxist presuppositions or the manner in which Marxist regimes can seriously make and uphold commitments to fundamental human rights as are set forth in the Helsinki Accords.

In a strong and compelling fashion Dr. Montgomery advocates the acceptance of a *Weltanschauung* built on Judeo-Christian foundations which stand the scrutiny of the best evidential standards of the law, and, at the same time, are philosophically sound and fully in keeping with common sense. His appeal to some of the finest legal minds of the past and of our present day reinforces the case he makes and adds lustre to the classical Western understanding of human rights and to the jurisprudential foundation on which it rests. Lawyers working within the field of human rights will find this statement by Dr. Montgomery of great help to them as they tackle the issue in courts, before tribunals, and in international colloquia dealing with human rights.

Dr. Montgomery is the founding Dean of the Simon Greenleaf School of Law — a unique academic institution which seeks to integrate the Judeo-Christian tradition with that of the legal profession. Simon Greenleaf emphasizes and offers work in the area of human rights and has a summer program in Strasbourg, France, held conjointly with the International Institute of Human Rights. The Juris Doctor degree is offered at the Orange, California campus, as is a Master of Arts degree in apologetics on which faculty I am honored to serve as a professor.

## THE MARXIST APPROACH TO HUMAN RIGHTS ANALYSIS & CRITIQUE

**John Warwick Montgomery**

Of the Middle Temple  
Ph.D. (Chicago)  
Docteur de l'Université (Strasbourg)

A Thesis Submitted to the Dean and Faculty of  
The School of Law of the University of Essex  
In Fulfillment of the Requirements of the Degree of  
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**SUMMARY OF  
"THE MARXIST APPROACH TO HUMAN RIGHTS:  
ANALYSIS & CRITIQUE"**

by  
**John Warwick Montgomery**

This study moves from the general to the specific, following in many respects the architectonic structure of classical Marxism itself. After surveying the root principles of the Marxist-Leninist philosophy, we proceed to a discussion of Socialist legal theory. The Marxist understanding of human rights is then set forth, followed by a brief but representative overview of Socialist human rights practice. Finally, critique is offered.

In the course of exposition and critique, the following basic Marxist themes, among others, receive treatment: materialism as root principle; the dialectic; the economic interpretation of history; class-war and the dictatorship of the proletariat; the withering away of the state and law, and the establishment of the classless society; law as superstructure; the critique of bourgeois legality; the state as creator of all rights; domestic sovereignty and the non-interference principle; international human rights protection possible only for gross and massive violations; the individual not a proper subject of international law; national self-determination and control over natural resources; and the right to peace.

Positive criticism focuses on the Socialist contribution to the development of socio-economic rights. Negative criticism emphasizes the fallacies in Marxism's view of human nature, its epistemological apriorism, and the incapacity of its immanentist world-view to provide an unchangeable foundation for human dignity. A transcendental corrective to Socialist human rights

theory and practice is presented and justified in conclusion. Appended is a bibliography of some 200 key books and articles.

The originality of the work lies in two directions. First, this study benefits from personal contact and discussion with the leading contemporary advocates of Soviet human rights theory (Professor Movchan and Dr. Vladimir Kartashkin). Secondly, the approach and critical methodology of this book draws on a wider than average range of intellectual disciplines (not only juridical scholarship but also contemporary analytical philosophy and theology).

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## INTRODUCTION

In his comprehensive survey of international law from the perspective of classical Marxism, G. I. Tunkin underscores the importance of Socialist human rights theory and practice. He writes:

The emergence in international law of principles and norms affecting human rights was part of the process of progressive change in international law. Here the influence of the ideas of the Great October Socialist Revolution and of socialist democracy as a new, higher type of democracy has had a very distinct effect.<sup>1</sup>

A. P. Movchan, associate director of the Institute of State and Law, Moscow, and author of the first book-length treatise on human rights published in the Soviet Union, makes the same point even more strongly:

It is only with the emergence of the Soviet state that the principles concerning universal respect for the fundamental human rights really appeared and established itself.<sup>2</sup>

Few would deny Tunkin's asseveration as to the "very distinct effect" of Marxist theory and practice on the international and comparative law of human rights. The time would appear ripe for a depth analysis of the interrelations between Socialist philosophy and legal theory on the one hand and the Marxist-Leninist understanding of human rights on the other. Not the least of the

1. G. Tunkin, *Theory of International Law* 79 (W. Butler trans. 1974).
2. A. Movchan, "The Human Rights Problem in Present-Day International Law," in *Contemporary International Law* 233-34 (G. Tunkin ed., G. Ivanov-Mumjiev trans. 1969).

advantages to be derived from such an analysis would be the laying of a proper foundation for an evaluation of Movchan's high claims in behalf of Socialist human rights theory and practice.

The plan of the present work is to move from the general to the specific, following in many respects the architectonic structure of classical Marxism itself. After surveying the root principles of the Marxist-Leninist philosophy (Chapter I), we shall proceed to a discussion of Socialist legal theory (Chapter II). The Marxist understanding of human rights will then be set forth, followed by a brief but representative overview of Socialist human rights practice (Chapter III). Finally, critique will be offered: a point-by-point criticism of the several elements of the system, and an attempt at depth analysis of fundamentals, leading to a positive suggestion for more effective human rights theory and practice (Chapter IV).

The originality of the work in hand lies in two directions. First, though a respectable number of scholarly journal articles and portions of books have concerned themselves with evaluating the Marxist approach to human rights, no thorough monographic treatment of the subject appears yet to have been undertaken — and certainly none which benefits from personal contact and discussion with the leading contemporary advocates of Soviet human rights theory. In my capacity as Directeur d'Etudes of the Institut International des Droits de l'Homme (1979-1981), I was privileged to become intimately acquainted not only with Professor Movchan but also with Dr. Vladimir Kartashkin, special legal counsel to the United Nations, whose publications on Socialist human rights have had seminal influence in the West as well as the East. Dr. Kartashkin has twice held guest lectureships at the law faculty of which I am dean (the Simon Greenleaf School of Law, Orange, California), and his latest thinking in the field is analyzed and critiqued in the course of the present study.

Secondly, the approach and critical methodology of this book draws on a wider than average range of intellectual disciplines. As a thesis submitted to a faculty of law, it employs juridical scholarship, to be sure; but it also seeks to intergrate critical perceptions from the relevant fields of contemporary analytical philosophy and theology (seldom found as bedfellows with legal scholarship). The result, it is hoped, will be a more comprehensive and helpful understanding of one of the most influential human rights approaches of the twentieth century.

My thanks go to the faculty and staff of the International Institute of Human Rights, and particularly to my good friend and its former secretary-general, Professor A. H. Robertson, for the stimulation afforded me at the most prestigious center of human rights teaching in the world; to Mario Einaudi, professor of government, Cornell University, who read a portion of this book and offered valuable criticisms; to Dr. Rosalyn Higgins of the London School of Economics, my external examiner; and to Dr. Malcolm Shaw and his colleagues at the School of Law of the University of Essex, who approved the work for the degree of Master of Philosophy in Law from that distinguished institution. It should go without saying that any residual errors or infelicities are the author's sole responsibility.

Bibliographical style follows current American practice, as set forth generally in the latest edition of the Harvard Law Review Association's *Uniform System of Citation* and D. M. Bieber's *Dictionary of Current American Legal Citations*. English citations follow Sweet and Maxwell's *Guide to Law Reports and Statutes*, 4th edition; and the Modern Humanities Research Association (London) *Style Book*, 3d edition, has frequently been helpful. Foreign-language periodicals and journals are cited in accord with local practice.

I.

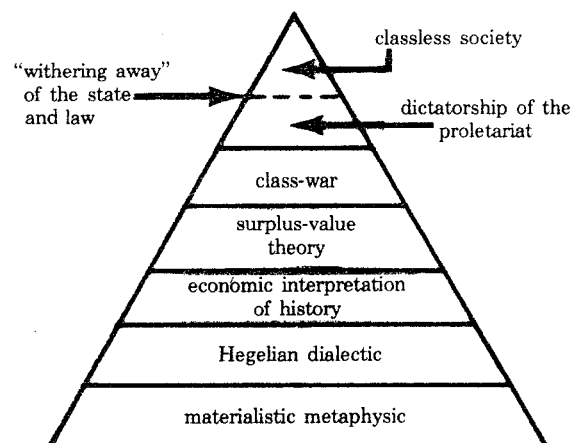
MARXISM AS A WORLD-VIEW



## CHAPTER I. MARXISM AS A WORLD VIEW

To understand Socialist human rights theory and practice, it is essential to comprehend Marxist-Leninist legal philosophy. But since Socialist jurisprudence is itself a particular application of the overall Marxist *Weltanschauung*, one must begin with that general world-view as expressed in its classical formulations.

The Socialist view of reality, in spite of certain technical complexities (e.g., aspects of the surplus-value theory), is not difficult to describe, for it has the great merits of architectonic coherence. The system is an integrated whole; indeed, it is monolithic, its premisses providing support much in the fashion of the successive layers of a great pyramid.



We shall first endeavor to comprehend the nature of the underlying, basic premise of the entire Marxist world-view, viz., its metaphysic of materialism. Then we shall discuss the other elements of the system as they build upon this materialistic foundation, reserving our treatment of Socialist jurisprudence to

the next chapter. No space will be devoted to critique at this juncture: that luxury will only be permitted at the end of the monograph, after a full analytical picture of Marxist human rights theory and practice is before us.

## THE MATERIALISTIC SUBSTRUCTURE OF MARXIST THEORY

### *Materialism Defined*

"The principles of materialism were first formulated by the Greek philosophers Leucippus and Democritus in the late fifth and early fourth century B.C."<sup>1</sup> These early philosophers believed that all existing things had ultimate constituents (atoms), and that all things could be reduced by scientific analysis into their material constituents. To them, although the universe appeared to contain more than what was physical or material, in reality it did not. Democritus said:

By convention sweet is sweet, by convention bitter is bitter, by convention hot is hot, by convention cold is cold, by convention color is color. But in reality there are only atoms and the void. That is, the objects of sense are supposed to be real and it is customary to regard them as such, but in truth they are not. Only the atoms and the void are real.<sup>2</sup>

In the late fourth and early third century Epicurus followed in the philosophical footsteps of Democritus. Epicurus' materialism was given an elaborate exposition by his disciple of the first century B.C., the Roman poet Lucretius. Lucretius wrote:

The nature of mind and soul is bodily. For when it is seen to push on the limbs, to pluck the body from sleep, to change the

1. J. Randall & J. Buchler, *Philosophy: An Introduction* 183 (1947).

2. Quoted *id.* at 184.

countenance, and to guide and turn the whole man – none of which things we see can come to pass without touch, nor touch in its turn without body – must we not allow that mind and soul are formed of bodily nature? Moreover, you see that our mind suffers along with the body. If the shuddering shock of a weapon, driven within and laying bare bones and sinews, does not reach the life, yet faintness follows, and a pleasant swooning to the ground, and from time to time, as it were, a hesitating will to rise. Therefore it must needs be that the nature of the mind is bodily, since it is distressed by the blow of bodily weapons.<sup>3</sup>

Although Democritus and Epicurus are the materialist philosophers who interest us most here – since they intellectually stimulated Karl Marx<sup>4</sup> – we should note the statements of two more recent thinkers, Thomas Hobbes and Ludwig Buchner. In the *Leviathan* we read:

The World, (I mean not the Earth onely, that denominates the Lovers of it Worldly men, but the Universe, that is the whole masse of all things that are) is Corporeall, that is to say, Body; and hath the dimensions of Magnitude, namely, Length, Breadth, and Depth: also every part of Body, is likewise Body, and hath the like dimensions; and consequently every part of the Universe is Body; and that which is not Body, is no part of the Universe: And because the Universe is All, that which is not part of it, is Nothing; and consequently no where.<sup>5</sup>

In his *Force and Matter* Buchner says:

3. Lucretius, *De Rerum Natura*, III 161-76 (Bailey trans.).

4. "Marx's doctoral thesis at Jena, in 1841, was *On the Difference between the Natural Philosophy of Democritus and Epicurus*. He liked the materialist in Epicurus but disliked his doctrine of chance, its undogmatic probabilism, its untidiness.... He began as he ended, materialist but anti-empiric" (G. Catlin, *The Story of the Political Philosophers* 563 [1939]).

5. *Leviathan*, Pt. IV, Ch. 46 (Everyman edition, intro. A. D. Lindsay, at 367-68).

Thinking can and must be regarded as a special mode of general natural motion, which is as characteristic of the substance of the central nervous elements as the motion of contraction is of the muscle-substance, or the motion of light is of the universal ether. . . . The words *mind, thought, sensibility, volition, life*, designate no entities and no things real, but only properties, capacities, actions, of the living substance, or results of entities, which are based upon the material form of existence.<sup>6</sup>

Materialism, as defined by the above philosophers and others assumes two forms. The strict materialists believe that "all that exists is body, all that occurs is motion," while the more liberal materialists say that although extra-material things may exist, the material universe is by far the most significant reality, and an understanding of it gives one the necessary *data* for an intelligent world-view.

With this brief philosophical discussion of materialism as a background, let us turn to the metaphysic of Marxism, as outlined by Marx and Engels.

### *Materialism and Marxism*

The following statements of Marx and Engels, quoted from their various works, point out with clarity the metaphysical views of these two thinkers.

My own dialectical method is not only different from the Hegelian, but is its direct opposite. For Hegel . . . the thinking process is the demiurge (creator) of the real world, and the real world is only the outward manifestation of "the Idea." With me, on the other hand, the ideal is nothing other than the material world reflected by the human mind.<sup>7</sup>

6. L. Buchner, *Force and Matter* 242-43.

7. K. Marx, *Capital* (quoted in V. Venable, *Human Nature: The Marxian View* 7 [1946]).

In the social production of their means of existence men enter into definite necessary relations which are independent of their will, productive relationships which correspond to a definite stage of development of their material productive forces. The aggregate of these productive relationships constitutes the economic structure of society, the real basis on which a juridical and political superstructure arises, and to which definite forms of social consciousness correspond. The mode of production of the material means of existence conditions the whole process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but, on the contrary, it is their social existence that determines their consciousness.<sup>8</sup>

Upon the different forms of property, upon the social conditions of existence, as foundation, there is built a superstructure of diversified and characteristic sentiments, illusions, habits of thought, and outlooks on life in general. The class as a whole creates and shapes them out of its material foundation, and out of the corresponding social relationships.<sup>9</sup>

Life involves before everything else eating and drinking, a habitation, clothing and many other things. The first historical act is thus the production of the means to satisfy these needs, the production of material life itself. And indeed this is an historical act, a fundamental condition of all history, which today, as thousands of years ago, must daily and hourly be fulfilled merely in order to sustain human life. Even when the sensuous world is reduced to a minimum, to a stick as with Saint Bruno, it presupposes the action of producing the stick. The first necessity therefore in any theory of history is to observe this fundamental fact in all its significance and all its implications and to accord it its due importance.<sup>10</sup>

8. K. Marx, *Preface to Critique of Political Economy* (quoted in A. Gray, *The Socialist Tradition* 302-303 [1946]).

9. K. Marx, *The Eighteenth Brumaire of Louis Bonaparte* (in 2 K. Marx, *Selected Works*).

10. K. Marx & F. Engels, *The German Ideology, Parts I and III* 16. (See also *id.* at 7, 14-15.)

Just as Darwin discovered the law of evolution in organic nature, so Marx discovered the law of evolution in human history; he discovered the simple fact, hitherto concealed by an overgrowth of ideology, that mankind must first of all eat and drink, have shelter and clothing, before it can pursue politics, science, religion, art, etc.; and that therefore the production of the immediate material means of subsistence and consequently the degree of economic development attained by a given people or during a given epoch, form the foundation upon which the state institutions, the legal conceptions, the art and even the religious ideas of the people concerned have been evolved, and in the light of which these things must therefore be explained, instead of *vice versa* as had hitherto been the case.<sup>11</sup>

According to the materialistic conception, the determining factor in history is, in the final instance, the production and reproduction of the immediate essentials of life. This, again, is of a twofold character. On the one side, the production of the means of existence, of articles of food and clothing, dwellings, and of the tools necessary for that production; on the other side, the production of human beings themselves, the propagation of the species.<sup>12</sup>

Has God made the world or is the world from eternity? As this question was answered this way or that the philosophers were divided into two great camps. The one party which placed the origin of the spirit before that of nature, and therefore in the last instance accepted creation in some form or other – and this creation, is often according to the philosophers, according to Hegel for example, still more odd and impossible than in Christianity – made the camp of idealism. The others, who recognized nature as the source, belong to the various schools of materialism. Then came Feuerbach's "Wesen des Christenthums." With one blow it cut the contradiction, in that it placed materialism on the throne again without any circumlocution.

11. F. Engels, *Speech at the Graveside of Karl Marx* (in 1 *Selected Works* 16).

12. F. Engels, *The Origin of the Family, Private Property, and the State* 5 (Preface to the 1st ed.).

Nature exists independently of all philosophies. It is the foundation upon which we, ourselves products of nature, are built. Outside man and nature nothing exists, and the higher beings which our religious phantasies have created are only the fantastic reflections of our individuality.<sup>13</sup>

Chemistry leads to organic life, and it has gone far enough to assure us that it alone will explain to us the dialectical transition of the organism. What Helmholtz says of the sterility of attempts to produce life artificially is pure childishness. Life is the mode of existence of protein bodies, the essential element of which consists of continual, metabolic interchange with the natural environment outside them, and which ceases with the cessation of this metabolism, bringing about the decomposition of the protein.<sup>14</sup>

Let us now see what the commentators say concerning the Marxian metaphysic and its importance to Marx's system as a whole.

The Metaphysic of Marxism is Materialism — is a Physic. That is, Marxism can be stated by the controversialist to be a denial of metaphysic in the sense of a study of that which is *other* than the

13. F. Engels, *Feuerbach, The Roots of the Socialist Philosophy* 58, 53. Catlin writes (*The Story of the Political Philosophers* 563): "In 1841 Ludwig Feuerbach published a book that was to do much to 'fix' Marx's thought, his *Esence of Christianity* — in which he maintained *inter alia* that the substance of the right religion was a nutritious diet, chiefly beans . . . . Feuerbach in fact is maintaining the entirely intelligible proposition [!] that hunger determined religion, not religion hunger; that the essence of Christianity is brotherly love; and that this becomes thin on an empty stomach."

14. F. Engels, *Dialectics of Nature* 157, 193-96. Cf., F. Engels, *Anti-Duehring* 113-14. Venable says (*Human Nature: The Marxian View* 58): "Marx and Engels . . . take their stand unequivocally against all doctrines of divine creation of the first organisms on the one hand, and the panvitalistic alternative that was proposed by even such people as Liebig and Helmholtz on the other."

material universe. There is nothing other; and that which is other is no thing, nothing. But, if by metaphysic we mean the logical discussion of the nature of being, then there is most definitely a Marxist metaphysic which affirms that this nature can dogmatically be stated to be material. Materialism is chosen because it seems to place man firmly in the arms of Nature, his mother. Marx asserts that there is a "necessary connection of materialism and communism." It offers man an explanation of his own nature and bids him look to his origins if he would consider how he should develop, instead of looking away to some other world of gods and spirits.<sup>15</sup>

It is the economic factor – so it is argued – above all, as that is embodied in the conditions of production, that ultimately determines all things. It governs the structure of the society in which men live. It fashions their religion; it determines their laws; it shapes their literature and their art. The spiritual is determined by the material; things are in the saddle and ride mankind.<sup>16</sup>

It is clear from the above array of quotations that Marx and Engels were avowed – vehemently avowed – materialists, and that both they and their commentators believe materialism to be integrally connected to the Marxian system. As to *why* there is this necessary connection or *what* precisely its nature is, we have not yet been informed; below I shall attempt to give an answer to this question. Furthermore, it is well to note that from the above quotations – and, I believe, from all of early Marxist literature – one cannot determine whether Marx and Engels were strict or liberal materialists: some statements in their writings seem to imply the former, others the latter. In order to give them the benefit of the doubt, and in order to increase the applicability of my criticism, I shall take the liberal or "mild" interpretation of Marxist materialism.

15. *Id.* at 570, 572.

16. A. Gray, *The Socialist Tradition* 305.

## THE BUILDING-BLOCKS OF THE MARXIST WORLD-VIEW

### *The Essential Elements in Marxist Theory*

In order to see the relationship between materialism and the Marxian system as a whole, it is necessary to understand the nature of the chief elements in the system. George Catlin has summarized these elements in his *Story of the Political Philosophers*, and it is his order of discussion which I shall employ here:

Together Marx and Engels, by a combination of Jewish rabbinic subtlety and German industry, built up a philosophy which in its involved consistency has no compeer since St. Thomas laid down his pen. For it the Communist Manifesto provided the Prophecy and *Das Kapital* provided the Torah, the Law. Here is "the Book" . . . This Marxian philosophy is a coherent whole. It is massive because revolutionary action is built upon class-war theory; the class war upon the economic theory of surplus value; this economic theory upon the economic interpretation of history; this interpretation upon the Marxo-Hegelian logic or dialectic; and this upon a materialistic metaphysic.<sup>17</sup>

Marxian materialism is not static — not mechanistic as was the materialism of the ancients, of Hobbes, and of Condillac. Marx condemned such materialism as not taking into account free will and dynamic energy, and adopted Hegel's *dialectic interpretation of history* "with considerable changes, to be sure, in its supposed metaphysical implications but with no important change in the conception of it as a logical method."<sup>18</sup> What, then, is the dialectic interpretation of history? Essentially this: Every tendency when carried to the full (thesis) breeds an opposite

17. G. Catlin, *The Story of the Political Philosophers* 569.

18. G. Sabine, *A History of Political Theory* 637 (1937).

tendency (antithesis), which combines with the thesis to form a new tendency (synthesis). The synthesis then becomes a new thesis, and the dynamic process begins anew. The conflict of two opposites never results in the complete annihilation of either; out of the conflict always emerges the synthesis which, while leaving elements of both thesis and antithesis behind, yet embodies the truth contained in each. Obviously, two different interpretations of these dialectic processes are possible: the emphasis may be on continuity — the impossibility of making radical and voluntary departures from the past; or it may be upon discontinuity — the necessity of continual break with the past. Whereas Hegel emphasized continuity in this historical “spiral that mounts as it turns,” Marx emphasized discontinuity and revolution — “the continual swing of social theory between revolutionism and revisionism.”<sup>19</sup> A further difference between the Hegelian and Marxian dialectic lay in metaphysical assumption: Hegel’s essentially idealistic belief that history was the progressive realization and materialization of the World Spirit in time, was vehemently rejected by Marx. Marx and Engels were dialectic materialists, not “bourgeois” idealists:

“In Hegel’s hands,” claims Marx, “dialectic underwent a mystification.” The laws which Hegel “first developed in all embracing but mystical form,” Engels explains, “we made it our aim to strip off this mystic form and to bring clearly before the mind in their complete simplicity and universality.” Putting the matter somewhat more picturesquely, Marx asserts that “In Hegel’s writings dialectic stands on its head.” It “is upside down,” Engels elucidates, “because it is supposed to be the ‘self-development of thought,’ of which the dialectic of facts is therefore only a reflection, whereas really the dialectic in our heads is only the reflection of the actual development which is

19. *Id.* at 642. See the excellent discussion of Hegelian and Marxian dialectic in Sabine, Chs. XXX (“Hegel: Dialectic and Nationalism”) and XXXIII (“Marx and Dialectic Materialism”).

fulfilled in the world of nature and of human history . . . .” “You must turn it right way up again,” admonishes Marx, “if you want to discover the rational kernel within the mystical shell.”<sup>20</sup>

Despite their materialism, Marx and Engels, like Hegel, saw a truly moral necessity in the development of civilization through the dialectic process. To Hegel, the expansion of the inner forces of civilization meant a powerful and united German state; to Marx it meant the inevitable success of the proletarian revolution. Marxism has always seen the dialectic process as more than a working hypothesis; were it not a method of historical interpretation which makes prediction possible, the proletarian revolution would lose its essential inevitability.

Marx’s *economic interpretation of history*, the third essential element in his system, may be stated very simply: the economic factor is the key to the dialectic process. To Marx and Engels, an analysis of economic trends and movements rewards the student with an understanding of the course which history will take; for the thesis, antithesis, and synthesis which create the upward spiral of civilization are economic in nature. Some writers have claimed, it is true, that Marx did not make the course of history completely dependent upon economics, but such interpretation is refuted both by the logic of Marxism (Marx derived his messianic view of the proletarian revolution solely from an economic interpretation of the dialectic process), and by a consideration of innumerable statements from the writings of both Marx and Engels:

Our conception of history depends on our ability to expound the real process of production, starting out from the simple material

20. V. Venable, *Human Nature: The Marxian View* 37. See the quotation corresponding to n. 7.

production of life, and comprehend the form of intercourse connected with this and created by this (i.e., civil society in its various stages), as the basis of all history; further, to show it in its action as State; and so, from this starting-point, to explain the whole mass of different theoretical products and forms of consciousness, religion, philosophy, ethics, etc., etc., and trace their origins and growth, by which means, of course, the whole thing can be shown in its totality (and therefore, too, the reciprocal action of these various ideas on one another). . . . It does not explain practice from the idea but explains the formation of ideas from material practice; and accordingly it comes to the conclusion that . . . not criticism but revolution is the driving force of history, also of religion, of philosophy and all other types of theory. It shows that . . . at each stage there is found a material result: a sum of productive forces, a historically created relation of individuals to nature and to one another, which is handed down to each generation from its predecessor; a mass of productive forces, different forms of capital, and conditions, which, indeed, is modified by the new generation on the one hand, but also on the other prescribes for it its special character.<sup>21</sup>

The materialistic concept of history starts from the proposition that the production of the means to support human life and, next to production, the exchange of things produced, is the basis of all social structure; that in every society that has appeared in history, the manner in which wealth is distributed and society divided into classes or orders, is dependent upon what is produced, how it is produced, and how the products are exchanged. From this point of view the final causes of all social changes and political revolutions are to be sought, not in men's brains, *not in man's better insight into eternal truth and justice, but in changes in the modes of production and exchange.* They are to be sought, not in the philosophy, but in the economics of each particular epoch.<sup>22</sup>

21. K. Marx & F. Engels, *The German Ideology* 28-29.

22. Engels, at the annual conference of the German Socialists (quoted in G. Catlin, *The Story of the Political Philosophers* 578-79). See the quotations corresponding to nn. 8-12.

The complex and highly technical *theory of surplus value* shows *how* the distribution of wealth determines the course of history. The capitalist, according to Marx, continually drives the wages of his employees down to subsistence level in order to cut his labor costs and obtain the cheapest labor. Capital, by its inherent desire for economic domination, becomes more and more concentrated: organized trusts replace small businesses, and more and more efficient machines come to be employed. Thus the worker is continually paid less for running his machine, while at the same time his machine becomes more and more productive through improvement and replacement. Since, according to Marx, in a perfect competitive system the real value of a product is the value of the labor put into it, a vast discrepancy arises between the wages which the worker receives and the real labor value of the commodities which he produces. This difference — which is appropriated or stolen by the capitalist — is what Marx termed “surplus value.” Yet the capitalist is little better off than his employees: since the capital — “constant capital” — produced by his machines is only sufficient for their own repair and replacement, the capitalist experiences a falling rather than a rising profit rate as his machines increase in number and his workers decrease in number. Only surplus value is profit for the capitalist, and surplus value cannot be exorted without workers; yet the capitalist must decrease rather than increase wages in order to have money for fixed capital, without which he will fall behind in the production race. The lumbering capitalistic monster advances to its own destruction — a destruction preceded by many workers unemployed and the rest working for practically nothing; few capitalists owning tremendous factories filled with machines which yield practically no profit.

The intolerable situation described here obviously means a violent change in the existing structure of society. The dialectic process grinds to a stop with the *class-war* between proletariat

and capitalist — a struggle which results in the final overthrow of capitalism both economically and politically. The State itself with its legal machinery — the instrument of capitalism — “withers away,” and the proletariat ceases to exist once the means of production falls into the hands of the workers.<sup>23</sup> After a literal “dictatorship of the proletariat” of indefinite length,<sup>24</sup> during which time the final vestiges of capitalism are destroyed, the golden era of the classless, socialist society is ushered in.<sup>25</sup> Marx asserted that the active and revolutionary opposition of the proletariat would be required in bringing the capitalistic era to a close; thus the evangelistic emphasis in the concluding section of the Communist Manifesto:

In short, the Communists everywhere support every revolutionary movement against the existing social and political order of things . . . The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution. The

23. “Proletariat and wealth are opposites. As such they form a whole. . . Private property as private property, as wealth, is compelled to maintain its own existence, and therewith the existence of its opposite, the proletariat. It is the positive side of the contrast, private property satisfied with itself. The proletariat, on the other hand, is compelled as proletariat to abolish itself, and therewith to abolish private property, the opposite that has determined its own existence, that has made it into a proletariat” (K. Marx, *The Holy Family*; quoted in G. Catlin, *The Story of the Political Philosophers* 593).

24. See section IV of Marx’s *Critique of the Gotha Programme* (in 2 *Selected Works* 576-80). Cf. with the text all footnotes.

25. On this aspect of Marxian theory, see Keith McDonald’s excellent article, “Marxism: An Analysis and Criticism,” *HIS*, December, 1947, at 6-13.

proletarians have nothing to lose but their chains. They have a world to win. Workingmen of all countries, unite!<sup>26</sup>

### *The Relation of Materialism to the Marxist Philosophy As a Whole*

I have shown above through quotations that Marx, Engels, and their commentators believe materialism to have an integral connection with all of Marxist thought. Here I shall attempt precisely and rigorously to state the nature of this connection.

Two truth-functions (concepts capable of being true or false) may be related in a number of ways, the most well-known relations being equivalence and contradiction. When we say that A is equivalent to B, we mean that whenever A is true, B is true, and whenever A is false, B is false. When we say that C is contradictory to D, we mean exactly the opposite. We can set up these relations in tabular form, viz.:

A equiv. B		C contrac. D	
T	T	T	F
F	F	F	T

Other logical relations or “dependencies” between truth-functions are superimplication, subcontrariety, contrariety, and subalternation.<sup>27</sup> It is with the latter of these that we are concerned here. Assuming that M and X are subalternates, the following table can be set up:

26. K. Marx & F. Engels, *The Communist Manifesto* 44 (authorized English trans. 1948). See all of section IV.

27. For a fuller discussion of the problem of logical dependencies between truth-functions, see A. Ambrose & M. Lazerowitz, *Fundamentals of Symbolic Logic* 84-91 (1950).



M subalt. X

T U

F F

where U = undecided (may be either true or false). Expressed in words, this means that if M and X are subalternates, then X is false when M is false, but X may be either true or false when M is true. Why this discussion? Because it is my contention that if M = materialism and X = Marxian philosophy, M will be related to X as one subalternate to another.

Let us first consider what truth-value the basic elements of Marxism would have if materialism were *true*. Could the Marxian dialectic, the economic interpretation of history, the theory of surplus value, and the class-war theory, as outlined above, then be *true*? Definitely yes, for no logical contradiction exists in the relation between the various elements of the system. Could these elements be *false* if materialism were *true*? Again the answer is yes, for (1) materialism could be true, and yet it be the static materialism of Democritus, Epicurus, *et al.* (i.e., the dialectic could be false), (2) materialism could be true and yet materialistic factors other than the economic could be most important for the understanding of historical developments (i.e., the economic interpretation of history could be false), (3) materialism could be true and yet the theory of surplus value be invalid because of a failure to take into account government intervention in the affairs of capital, (4) materialism could be true and yet a classless society never come into being because of a fundamental antagonism in human nature.<sup>28</sup> Thus we see that the first condition of a subalternate relationship between M and X is fulfilled, i.e.,

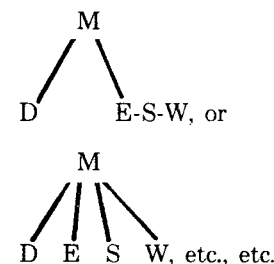
28. One should take care to notice that it is unimportant for our argument whether the essential elements of Marxism depend upon each other in

M X  
T U

Now let us consider what truth-value the Marxian philosophy must have if materialism is false, i.e., if – taking the weak interpretation of Marxian materialism – some extra-material considerations are more important than material things in determining the course of history. Here there is a danger of jumping to a quick but false conclusion: one might maintain that, even though the economic interpretation of history would be necessarily false if materialism were false, the dialectic process, theory of surplus value, and class-war could have meaning. “After all,” it might be argued, “I am certainly not materialist, but I see thesis, antithesis, and synthesis in history; I see capital striving to

transitivity relationships or not. The important thing is that these elements are *each* the consequents of a subalternation relation of which materialism is the antecedent. I.e., we are not concerned whether

(D=Dialectic ) M-D-E-S-W, or  
(E=the econ. interpret.)  
( of history )  
(S=surplus value )  
( theory )  
(W=class-war theory )



Rather, we are concerned whether

M subalt. D  
M subalt. E  
M subalt. S  
M subalt. W.

reduce the wages of labor and workers striking to obtain higher wages; I can believe that a classless society will be the ultimate result of this conflict." The fallacies in this argument are (i) a lack of recognition of the pervasiveness of the materialistic metaphysic throughout the whole conceptual structure of Marxian philosophy, (ii) a lack of recognition that Marxism is a *system* to be believed in, a system which requires a particular action on the part of its adherents. With regard to the first point, one must see that were *any* extra-material thing or idealistic factor more important than the material in determining the course of history, although a dialectic process of some sort could still exist, it would no longer be a dialectic of *predominantly materialistic* thesis, antithesis, and synthesis — that not only the economic, but also any materialistically operated dialectic could no longer be depended upon to reveal the future; that although a surplus value theory of some sort could still exist, it would no longer be significant enough to direct the course of history; that a class-war, proletarian revolution, dictatorship of the proletariat, or classless society *brought about solely by materialistic causes* would be rendered impossible. Secondly, one must recognize the truth of Catlin's assertion:

It is not, however, enough to say that Marx is right on many points, that "there is much good in Marx." So there is in most writers of eminence from Mahomet to Swedenborg, including Machiavelli. The issue is whether there is enough good to justify men following him.<sup>29</sup>

The invalidity of the materialistic metaphysic in Marxism would be sufficient to undermine the theory as a whole — would be sufficient to render it untenable as a systematic philosophy of life.<sup>30</sup> Elements of the doctrine could still be believed in a

29. G. Catlin, *The Story of the Political Philosophers* 587.

30. For additional discussion of this point, see J. Montgomery, *The Shape of the Past* 74-75, 80-81, 217-56 (2d ed. 1975).

modified form were materialism false, but this would be far different from placing faith in the Marxian *system* as a world-view — as an object of faith — as a first principle upon which one's actions are to be predicated. Without the truth of materialism, Marxism could not demand that the "workingmen of all countries unite," because intellectual justification for a materialistically grounded and determined proletarian revolt and classless society would be nonexistent. Thus the second condition of a subaltern relation between materialism and the Marxist doctrine is fulfilled, i.e.,

M	X
F	F

and we may assert the proposition

M subalt. X.

### *The Importance of the Foregoing Logical Analysis*

The subaltern relationship between materialistic metaphysics and the totality of Marxist theory is of the greatest consequence for our subsequent analysis and critique of Socialist legal philosophy in general and Marxist-Leninist human rights theory in particular. Specifically, from the proposition

M subalt. X

it follows *analytically* that all Marxist jurisprudential doctrines and human rights techniques inherently flowing from the system are *immanentist* in character, i.e., must be interpreted as arising from purely materialistic sources, naturally present in a closed cosmos. From the same subaltern relation, it follows *critically* that (1) even if the materialistic metaphysic of Marxism be true, its legal and human rights doctrines may be false, thus requiring

independent evaluation; but (2) were immanentist materialism to be rejected – supposing that an idealistic, transcendent factor proved itself essential to metaphysics, legal philosophy or human rights theory – the total Socialist world-view would perforce fail. The significance of such analytical and critical possibilities will become evident in the later portions of this book.

## II.

### MARXIST LEGAL PHILOSOPHY

## CHAPTER II. MARXIST LEGAL PHILOSOPHY

The object before us in this chapter is to set forth, against the background of the Marxist world-view, a clear statement of Socialist legal philosophy.

Our purpose, it should be emphasized, is not to describe the Marxist legal system — in general or in terms of any particular Socialist state. The jurisprudence of particular Marxist countries is beyond the scope of this study,<sup>1</sup> and we are not concerned with the changes in party line relative to the internal legal structures of Socialist states.<sup>2</sup> Nor do we intend to provide an overview of comparative Socialist jurisprudence. Rather, our goal is to clarify what Hazard has felicitously termed “the common core” of Marxist legal philosophy.<sup>3</sup>

Since the overall *raison d'être* of the present work is to understand and critique Marxist human rights theory, we are more concerned with the main lines of classical Marxist legal theory than with its details or with schools of thought within Marxism. Indeed, the schools are important to us only as they either assist in connecting the Marxist world-view with its human rights theory and practice or provide helpful background for understanding the Socialist approach to human rights.

1. A fine example of such a work is H. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* (rev. ed. 1963) [hereinafter cited as H. Berman, *Justice in the U.S.S.R.*]. Cf. Lloyd of Hampstead, *Introduction to Jurisprudence* 645-49 (3d ed. 1972).
2. As discussed, for example, in R. Schlesinger, “Recent Developments in Soviet Legal Theory,” 6 *Modern L. Rev.* 21 (1942).
3. J. Hazard, *Communists and Their Law: A Search for the Common Core of the Legal Systems of the Marxian Socialist States* (1969).

As in the preceding chapter, we again focus on exposition, leaving critique to a later point in this work, when the entire Socialist human rights picture is before us.

### CLASSICAL MARXIST LEGAL THEORY: ITS CONSTITUTIVE ELEMENTS

Socialist legal philosophy may be best understood by comprehending the fundamental axioms of the system: here, as in the case of the Marxist world-view in general, the integrative elegance of the system shines forth. After discussing each of five basic elements that characterize Marxist legal theory, we shall briefly see how they are applied in the Socialist critique of other legal systems (the so-called "critique of bourgeois legality") and in the sphere of international law. A word concerning the paradoxical qualities of Marxist legal philosophy will conclude the chapter and lead directly to our treatment of Socialist human rights theory.

#### 1. Base and Superstructure

In a recent essay, Marxist legal scholar Radomir Lukic of Belgrade asserted: "The most important contribution Marxism has made to juridical science is its sociological explanation of law, based on the principles of historical materialism."<sup>4</sup> Marxist legal philosophy, in other words, is expressly founded on and derivative from the materialistic world-view of Marxism in general — as we have set it forth in the preceding chapter.

The most fundamental application of historical materialism to

4. R. Lukic, *La théorie marxiste du droit — en quoi consiste son originalité?* 18 (1979).

Socialist legal theory lies in the distinction between "base" and "superstructure". A straightforward and authoritative statement of this doctrine is provided in the Soviet Academy of Sciences' publication *Osnovy marksistskoi filosofii* (1958), rightly described by its German editor as "a precise catechism of Soviet dogma":

The base [of society] contains the totality of the economic relations between men, which come to be in the course of material production.

To the superstructure belong all social ideas and the institutions connected with them: state, justice, political parties, political ideas, morality, art, philosophy, religion, church, etc.

Every part of this superstructure has its own specific laws of development. Nonetheless, they all reflect the economic constitution (*stroj*) of the society and change under its determining influence.

.....

The state and the law cannot determine the economy and direct it as they will: they can only limit certain economic tendencies and further others.<sup>5</sup>

The base-superstructure doctrine is plainly to be found in Marx's own writings; it cannot be regarded as a later or alien importation to Socialist thought. In *The Poverty of Philosophy*, Marx flatly declared: "Legislation, whether political or civil, never does more than proclaim, express in words, the will of economic relations."<sup>6</sup> In commenting on this passage, Professor Duncan

5. J. Bochenski, *The Dogmatic Principles of Soviet Philosophy* 30-40 (T. Blakeley trans. 1963). Bochenski, the editor of the German synopsis of the original Russian work, notes that the latter "was prepared by eleven eminent Soviet philosophers, . . . was read in manuscript form by numerous scholars and professors of philosophy and then thoroughly discussed in three separate sessions (in the Academy of Sciences, and the Universities of Leningrad and Moscow)" (p. v.).

6. K. Marx, *The Poverty of Philosophy* 93.

notes that Marx "had strong doubts about even good laws, e.g. the Factory Acts — in that case because the interpretation of an increasingly complex body of law was a skilled task beyond the competence or resources of ordinary men, because interpretation offered escape routes which were picked out by 'the lynx eye of capital', and because the masters sat in judgment on themselves."<sup>7</sup> René David observes that in Marx and Engels, "as with Saint-Simon, the superiority of the principles of political economy over those of private law is admitted. All else is *superstructure*, closely dependent on the economic infrastructure; and it is in this way that all men's ideas, social habits, morality and religion are envisaged."<sup>8</sup>

To be sure, sophisticated Marxists are quick to assert that the base-superstructure model is not intended to turn the law into a mere epiphenomenon of economics.<sup>9</sup> Collins correctly observes that "in recent years . . . Marxists have noticeably tempered their enthusiasm for the base and superstructure model."<sup>10</sup> Thus Mihály Samu of Budapest University has recently characterized as "a *vulgar* materialistic standpoint" the notion that "the law is the direct product of economic development and a simple reflex of economy"; in his view, "the elements of superstructure are in a manifold of correlations with each other and with the economy. The elements of the superstructure have an effect on each other and react mainly to economic life by virtue of their separate social

destinations and roles, of their relative independence and of their own movement."<sup>11</sup> Cain and Hunt's anthology, *Marx and Engels on Law*, has the avowed aim of showing "that many of Marx' and Engels' comments on and discussions of law are not capable of an economic determinist reading . . . . They considered political action to be effective and important, and the achieving of legal change to be an appropriate, indeed a crucial, political objective."<sup>12</sup>

But Friedmann is quite correct in asserting that when the great Austrian social democratic Marxist Karl Renner, in his *Institutions of Private Law*,<sup>13</sup> maintained that legal institutions are not unidirectionally determined by economic substrata, Renner was "correcting the orthodox Marxist position" — i.e., was in fact deviating from it.<sup>14</sup> Though an orthodox Marxist can certainly go so far as to say that superstructural elements, such as law, can act and react upon each other, and can even influence the economic base of society, he cannot consistently claim that the superstructure ever ultimately determines the base or decides the course of history. Were that to occur, "superstructure" and "base" would reverse roles and the materialistic and economic presuppositions of the entire Marxist world-view would fall.<sup>15</sup> Expressed in

7. G. Duncan, "The Marxist Theory of the State," in G. Parkinson, *Marx and Marxisms* 138 (1982).

8. R. David & J. Brierley, *Major Legal Systems in the World Today* 124 (1968) [hereinafter cited as R. David & J. Brierley].

9. Cf. V. Peschka, *Wider die missverstandene marxistische Rechtstheorie* (1979).

10. H. Collins, *Marxism and Law* 77 (1982) [hereinafter cited as H. Collins].

11. M. Samu, *The Correlation of Society and Law from the . . . Marxist Viewpoint* 1-2 (1979) (Samu's italics) [hereinafter cited as M. Samu].

12. Preface to K. Marx & F. Engels, *Marx and Engels on Law* xiii (M. Cain & A. Hunt ed. 1979) [hereinafter cited as M. Cain & A. Hunt].

13. K. Renner, *The Institutions of Private Law and Their Social Functions* (O. Kahn-Freund ed. 1949) [hereinafter cited as K. Renner].

14. W. Friedmann, *Legal Theory* 368-69 (5th ed. 1967).

15. See above, chapter one, our demonstration of the subalternate relationship between materialistic metaphysics and the totality of Marxist theory.

another way, though superstructure can *influence* the economic base, its very ability to do so must depend upon economic considerations. Even Jakubowski, while trying to humanize Marxism as a Trotskyite, has to admit this. "The reality of law," he tells us, "is not merely the reality of human ideas: legal ideas are only the expression of material relations reflected in the forms of law."<sup>16</sup>

The significance of the base-superstructure doctrine for Marxist human rights theory and practice cannot be overemphasized. We shall discuss its implications at length later in this work; for the moment, we do no more than quote Berman's trenchant observation: "Since [for the Marxist] law originates in economics, it is necessary to change the whole economy before any fundamental reform of law can be achieved."<sup>17</sup>

## 2. Dialectic Development

Since in the Marxist view law is ultimately explained by reference to materialistic-economic factors, and since (as we saw in chapter one) material-economic conditions operate dialectically, it inexorably follows that the law is itself a dialectic phenomenon. The search for an abstract, idealistic, Hegelian legal perfection is by definition chimerical; law changes as the economic fabric undergoes dialectic alteration. David quite properly notes that for the Marxist-Leninist "law and the state have not always existed. The moment at which they appeared represents a 'dialectical leap' in society's development; the greatest social revolution humanity has ever known was the

transition of a society without either law or state to a society possessing these institutions."<sup>18</sup>

And once the inevitable course of dialectic action, by the agency of class-war, has brought about a socialistic revolution, the law gradually alters in phase with the transition from capitalism to communism. Adam Łopatka of the law faculty of the University of Warsaw (who, interestingly enough, has just been appointed minister of religious affairs by the new military government of Poland) identifies three stages of legal development in the Socialist state: "The state of strengthening the popular power and construction of bases of socialism; the stage of building a developed socialist community; and the state of mature socialism."<sup>19</sup> The first two stages correspond to the dictatorship of the proletariat, while the third is a foretaste of the millennial classless society. Łopatka's discussion is worthy of being quoted *in extenso*:

The stage of construction of bases of socialism is that of formation of the socialist law. This is achieved either in the way of replacing the wholly discarded, bourgeois law by a socialist legal system or by retention of some norms in force in the old law if its particular law-created acts and norms are not contradictory to the character of new authority and its current tasks. As the same time there goes on an intensive process of creating new legal norms, new as to their content and form.

[In the second phase] the socialist law, in its essence, is contrasted to the bourgeois law. This concerns particularly the class contents of the law, of the recognized system of values and aims to which the law serves. In view of, however, the course of

16. F. Jakubowski, *Ideology and Superstructure in Historical Materialism* 50 (A. Booth trans. 1976).

17. H. Berman, *Justice in the U.S.S.R.*, *supra* note 1, at 17.

18. R. David & J. Brierley, *supra* note 8, at 125-26.

19. A. Łopatka, *The Concept of Socialist Law* 12 (1979) [hereinafter cited as A. Łopatka].

scientific and technical revolution both in the socialist and capitalistic countries there may be observed a growing concurrence of legal regulations concerning the domain of technics, health protection, natural environmental protection, transportation, tourism and also partially protection of some personal values. The latter takes place as a result of progress in international regulations concerning the rights of men.

In the process of building a developed socialist community there disappear gradually the elements of working class domination over classes and strata living on exploitation of somebody else's work. This concerns both political or economic life, and ideology. On the other hand, the leading role of the workers' class grows in regard to the remaining part of the nation. Also its contribution to the political life increases, similarly as in productive and cultural activity of the nation. The same processes occur in the law. In connection with this, the law, while remaining the law of the working people, becomes in a growing degree the all-national law, uniformly benevolently treating all the classes and social strata and all the citizens.

The socialist law in the stage of mature socialism is already fully an all-national law, having ceased being the means of domination of the working class in regard to classes and strata living on exploitation of somebody else's work, because they have disappeared long ago. During that period the basic principles of the socialist law are fully pronounced. There occurs a further approximation between law and morality. The stabilizing and organizing role of law is ever increasing, while its coercion role is diminished. The law ceases being a means in the class struggle, remaining only a means of struggle against anti-social conducts.<sup>20</sup>

Łopatka speaks in this discussion of "progress in international regulations concerning the rights of men." One must not forget, however, that even human rights law is governed by the materialistic dialectic and is therefore subject to continual change. Professor Wood rightly notes that "if, as Marx believes,

20. *Id.* at 12-16.

there is an inherent tendency in each mode of production itself toward mounting instability, increasing social antagonism and conflict, and ultimately toward its own eventual overthrow and abolition, then in the long run those very transactions which are most just, which are most intimately a part of a specific mode of production, must also contribute in an essential way to its instability and eventual destruction."<sup>21</sup>

### 3. Law Withers Away But Is a Tool for Social Steering

In the immediately preceding discussion, a tension is implicit between law as a negative reflection of materialistic conditions (for example, in bourgeois society) and law as a means of social betterment. We must now observe this problem-area in Marxist legal theory at closer range, and in doing so a brief discussion of major Marxist schools of legal thought is unavoidable.<sup>22</sup>

The dialectic development of law leads finally, in strict Marxist theory, to its abolition. We have already seen that the withering away of the state is an essential element of Marxist eschatology. Engels, who first spoke of the withering away of the state (in his *Anti-Dühring*), does not specifically refer to a corresponding withering away of law.<sup>23</sup> But the logic is irresistible:

21. A. Wood, "The Marxian Critique of Justice," in M. Cohen, *Marx, Justice, and History* 18 (1980) [hereinafter cited as M. Cohen].
22. On schools of Marxist jurisprudence in general, see M. Lesage, *Le droit soviétique* 9-17 (1975) [hereinafter cited as M. Lesage]; R. Schlesinger, *Soviet Legal Theory* (2d ed. 1951) [hereinafter cited as R. Schlesinger, *Soviet Legal Theory*]; H. Kelsen, *The Communist Theory of Law* (1955) [hereinafter cited as H. Kelsen]; and the excellent anthology, V. Lenin *et al.*, *Soviet Legal Philosophy* (J. Hazard ed. 1951) [hereinafter cited as *Soviet Legal Philosophy*].
23. Indeed, it has been said that the thought of Marx and Engels represents



if the structures of the state are the product of inequities in the means of production, a genuine communist revolution will have no more need for law than for the repressive state which utilizes it. Thus Lenin, in his work, *The State and Revolution*, explicitly sets forth the doctrine that in a communist society the law will wither away. Manai terms Lenin's approach "voluntaristic and instrumentalist": voluntaristic, because it calls on the party actively to employ the legal system to accelerate the demise of the state and law; and instrumentalist, since it views the law at best as no more than a provisional means by which to hasten the day when repressive state power permanently disappears.<sup>24</sup>

To be sure, the withering away of law cannot mean the disappearance of all rules of social conduct. Collins properly observes that it is "law defined as an instrument of class oppression [which] will disappear with the demise of the class system" and that "both Engels and Lenin recognized that some norms will remain. There will be both rules for the administration of a planned economy and elementary rules of social life. They cannot be law, however, because they do not support a system of class oppression. The whole thesis of the withering away of law rests upon the dubious definitional fiat that rules which serve any other purpose than class oppression cannot be law."<sup>25</sup>

Prior to the Stalinist era, major Socialist legal theorists vied with each other in emphasizing the provisional nature of legal institutions. Among the major advocates of this instrumentalist,

an "epistemological vacuum where law is concerned": D. Manai, *Le droit au miroir du marxisme soviétique* 2-6 (1979) [hereinafter cited as D. Manai]. Such a judgment must not be taken too literally; see P. Phillips *Marx and Engels on Law and Laws* (1980).

24. D. Manai, *supra* note 23, at 6-8.

25. H. Collins, *supra* note 10, at 106.

"law as coercion" approach (in spite of important differences among them in other respects) should be mentioned Stuchka, Reisner, and Pashukanis. P. I. Stuchka, who served as first president of the Supreme Court of the U.S.S.R., flatly asserted: "Communism means not the victory of socialist law, but the victory of socialism over any law, since with the abolition of classes with their antagonistic interests, law will die out altogether."<sup>26</sup> M. A. Reisner, recognizing the negative and repressive character of formal legal systems, attempted to develop a doctrine of intuitive law, along the lines of the earliest Soviet decrees which called for tribunals to rely on "revolutionary legal consciousness."<sup>27</sup> The great Soviet legal philosopher E. B. Pashukanis set forth an original "commodity-exchange theory," arguing that law is the product of the bourgeois marketplace; from this theory it followed that law will disappear with merchant economy.<sup>28</sup>

After the abandonment of the N.E.P. and the full establishment of the U.S.S.R. as a Socialist state, law could not help but assume a more positive role in both Marxist theory and practice. The so-called "principle of Socialist legality" came to be recognized as obligatory for all tribunals and agencies (excepting the Supreme Soviet and its Praesidium), thus diminishing – at least theoretically – subjectivistic reliance on "revolutionary legal consciousness." In 1930, Stalin declared that the withering away of the state was in fact compatible with the reinforcement of the dictatorship of the proletariat — and that this paradox was justifiable as a true reflection of the Marxian dialectic.<sup>29</sup> With

26. Quoted in H. Berman *Justice in the U.S.S.R.*, *supra* note 1, at 26.

27. *Soviet Legal Philosophy*, *supra* note 22, at xxv-xxvi.

28. E. Pashukanis, *Law and Marxism: A General Theory* (C. Arthur ed. 1978).

29. Cf. M. Lesage, *supra* note 22, at 14.

Stalin's unbending effort to strengthen the Soviet state came a corresponding rehabilitation of legal structures. Pashukanis fell from grace, to be replaced in the Soviet jurisprudential pantheon by A. Y. Vyshinsky, a thoroughgoing Stalinist who supported a strong Socialist state and regarded the law as a positive means of furthering its interests at home and abroad.

For Vyshinsky, law represented the "totality of norms" which the dominant class employs to its profit<sup>30</sup> — but this does not mean, as it did to his predecessors, the law is per se to be condemned. For if (as in the U.S.S.R., to be sure) the interests of the ruling class — here, the party — actually coincide with those of the people as a whole, why then the legal totality of norms will become the positive instrument of the people!

Our law is the will of our people elevated to the rank of a statute. In capitalist society, allusions to the will of the people served as a screen which veiled the exploiting nature of the bourgeois state. In the conditions of our country, the matter is different in principle: there has been formulated among us, a single and indestructible will of the soviet people — manifested in the unparalleled unanimity with which the people vote at the elections to the Supreme Soviet of the U.S.S.R. and the Supreme Soviets of the union and autonomous republics for the bloc of communist and non-party candidates. Our soviet people consist of the worker class, the peasant class, and the toiling intellectuals. Our statutes express the will of our people which is ruling, and which is creating new history under the guidance of the worker class. Among us, the will of the worker class merges with the will of the entire people. This provides the basis for speaking of our soviet socialist law as an expression of the will of the whole people.<sup>31</sup>

30. See I. Lapenna, *Conceptions soviétiques du droit international public* 57 (1954).

31. Vyshinsky, "The Fundamental Tasks of the Science of Soviet Socialist Law," in *Soviet Legal Philosophy*, *supra* note 22, at 339.

Following the demission of Khrushchev, Vyshinsky was himself subjected to criticisms related to his support of Stalinism (he allegedly placed too little stress on juridical rule making, thereby opening the door to arbitrary legislative acts, and overestimated the coercive, while underestimating the moral and educative aspects, of the law). However, post-Stalinist modification, readers are informed that "the legal awareness of the current period is marked by a deep understanding of the role law and legality have to play in Soviet society, and their active support destalinization has not occurred."<sup>32</sup> In the important composite volume, *The Soviet State and the Law*, published in 1969 with the imprimatur of the Institute of State and Law, the U.S.S.R. Academy of Sciences, and the Soviet Political Science Association, readers are informed that "the legal awareness of the current period is marked by a deep understanding of the role law and legality have to play in Soviet society, and their active support and improvement by all the means open to public opinion. The authority of law and legality is becoming greater than ever before, and this means that the educational role of Soviet law is gaining in importance."<sup>33</sup> The author of this section of the volume — apparently the distinguished Soviet legal scholar Vladimir Tumanov — goes so far as to claim that "socialist law makes use of juridical forms and techniques elaborated in the course of historical development, starting from the Roman law, but there is a decisive qualitative change in socio-economic and class-political fundamentals" — so that in reality "the old law gives way to socialist law, a new type of law."<sup>34</sup>

32. D. Manai, *supra* note 23, at 19.

33. "Soviet Socialist Law," in V. Chkhikvadze, *The Soviet State and Law* 218 (Y. Sdobnikov trans. 1969). Dominique Manai attributes this chapter of the composite work to V. Tumanov.

34. *Id.* at 214.

Contemporary Marxist legal theorists have clearly shifted their emphasis from the withering away of the law to the law as a prime tool for social steering. Henryk Rot of the University of Wrocław puts it succinctly when he writes: "In a socialist country the legal norms are established not only to formulate standards of solving contentions and of eliminating deviating behaviours, but also – and in some domains paramountly – with a thought of using these legal rules as a tool of social steering, of organizing certain spheres of man's activity and shaping the requested social attitudes."<sup>35</sup> A recently published *Harvard Law Review* article reinforces the point by concrete, empirical example; in it "Professor Ioffe draws on his personal experience of the Soviet legal and economic systems to argue that the Soviet state pursues a consistent and successful policy of manipulating the legal structure and legal regulation of the economy to secure the regime's political position."<sup>36</sup>

It is vital to note, however, that – in spite of the strong rhetoric and ideological purges employed by Marxists themselves – the opposition between the "social steering" and "withering away" approaches to law is more apparent than real. Both emphases have in common a thoroughgoing instrumentalism – as fully demonstrable in Stalin as in Lenin, in Vyshinsky as in Pashukanis. René David contrasts this instrumentalist philosophy of law with its "bourgeois" competitors, and in doing so suggests the important bearing such a jurisprudence will have upon the theory and practice of human rights. "For the Marxists," he

writes, "law is nothing more than an instrument of policy for those who rule. This concept robs law of its aura, constitutes a danger to its prestige and, consequently, to that of the principle of legality . . . . In the U.S.S.R. the principle of legality inevitably suffers from the fact that law is no longer regarded as an absolute value in itself, nor as linked to absolute values."<sup>37</sup>

#### 4. *The End Justifies the Means*

Legal instrumentalism follows naturally from the most fundamental ethical postulate of the Marxist world-view: the so-called "logic of the end." Lenin never tired of stressing the essentiality of justifying means by ends and by nothing else. Marxist thinkers, whatever may be the extent of their orthodoxy in other respects, have uniformly adhered to this ethical postulate.

Thus Trotsky, in his famous dialogue with John Dewey, asserted:

A means can be justified only by its end. But the end in its turn needs to be justified. From the Marxist point of view, which expresses the historical interests of the proletariat, the end is justified if it leads to increasing the power of man over nature and to the abolition of the power of man over man . . . . That is permissible . . . which *really* leads to the liberation of mankind. Since this end can be achieved only through revolution, the liberating morality of the proletariat of necessity is endowed with a revolutionary character. It irreconcilably counteracts not

35. H. Rot, "A Tentative Formulation of [the] Concept of Socialist Law," in Polish Academy of Sciences, *Contemporary Conceptions of Law* 87 (A. Łopatka ed. 1979) [hereinafter cited as H. Rot].

36. O. Ioffe, "Law and Economy in the U.S.S.R.," 95 *Harvard L. Rev.* 1591 (1982).

37. R. David & J. Brierley, *supra* note 8, at 158. To be sure, the same criticism can be directed at policy-orientated relativizations of law in the West since the onset of legal positivism or realism in the 19th century.

only religious dogma but all kinds of idealistic fetishes, these philosophic gendarmes of the ruling class.<sup>38</sup>

Georg Lukács, in his influential work, *History and Class Consciousness*, applied this revolutionary moral philosophy to the question of legal obedience. In a seminal passage he declares:

Where the total, communist fearlessness with regard to the state and law is present, the law and its calculable consequences are of no greater (if also of no smaller) importance than any other external fact of life with which it is necessary to reckon when deciding upon any definite course of action. The risk of breaking the law should not be regarded any differently than the risk of missing a train connection when on an important journey.<sup>39</sup>

And even where one is not operating vis-à-vis a repressive, bourgeois society, but in the context of a presumably enlightened Socialist state, the law is always to be viewed as a means to the proper societal end, not as a fixed, absolute end in itself. Chaldize, a fair critic of the Marxist system, accurately describes the "logic of the end" as it is practically applied today in Eastern-bloc jurisprudence:

As the Soviet regime grew stronger, there was a movement away from purely revolutionary methods in the law. After a time a reference to revolutionary legal consciousness alone was no longer considered adequate grounds for court decisions, for formulating legal doctrine, or for interpreting the statements of jurists. *Reasoning* made its appearance in the works of jurists

and in the sentences of courts . . . . Whereas previously the law had been primarily an instrument of class oppression – or, more accurately, of the annihilation of certain classes and of changing the class make-up of society – it was gradually changing into an instrument of state policy with complex goals. It would be a mistake, however, to think that the transition from purely revolutionary methods – appeals to revolutionary legal consciousness or simply the use of force – to basing their actions on *reasoning* means a concession by Soviet jurists to the traditional methods of bourgeois law.

On the contrary, it had turned out that the traditional logic used in bourgeois law is not only imperfect but even harmful, because sometimes reasoning in conformity with this logic leads to undesirable results. Since the law is an instrument of policy, and since the goals of policy are considered definite, the practical application of legal norms and the development of the law must use a kind of reasoning that leads to a previously known result. Classic logic, however, is defective in that, starting from definite premises and reasoning according to definite rules, one may possibly arrive at an unforeseen result. As it has turned out, it is undoubtedly more convenient not to use definite, fixed premises and fixed rules of reasoning but, on the contrary, knowing the result, each time to construct rules of reasoning so that from the given premises, by reasoning according to those rules, one can reach the required result.<sup>40</sup>

What such a process of legal reasoning has meant for human rights – and what must necessarily follow as ethical consequences of the logic of the end – will be a prime focus of our attention in later chapters of this book.

## 5. A Presuppositional System

Marxists regard law as economically determinable, dialecti-

38. L. Trotsky, in *Their Morals and Ours: Marxist versus Liberal Views on Moralists* 15 (4th ed. 1979).

39. G. Lukács, *History and Class Consciousness* 263 (R. Livingstone trans. 1971). Cf. C. Varga, Lukács' "History and Class Consciousness" and Its Dramatized Conception of Law: A Contribution to the Development of Marxist Legal Thinking (1979).

40. V. Chaldize, *To Defend These Rights: Human Rights and the Soviet Union* 31-32 (G. Daniels trans. 1974).

cally variable, ultimately dispensable — but for the foreseeable future a key instrument in directing society to its proper end. But how is that jurisprudential *telos* to be justified over against false societal goals? And who rightly sets the goal? An important, frequently overlooked, characteristic of Marxist legal philosophy relates to this basic epistemological issue.

Professor Łopatka, in his essay on “The Concept of Socialist Law,” argues that Marxist law is by definition the expression of “the interests and will of the people.”

The essential feature of socialist law is that it always expresses the interests and will of working people in cities and villages, that is to say: workers, peasants, artisans and intelligentsia. It does not, on the other hand, express the interests or will of those classes and social strata (as long as they exist in the given country) which live on exploitation of somebody else's work. In this respect the socialist law is decidedly antagonistic to the bourgeois law.

The socialist law expresses national interests in a higher degree than any law based on exploitation. Socialism brings about liberation from natural oppression, from exploitation of some nations by others. Under its effect the liquidation of colonialism takes place. In this connection the law of countries liberated from colonial supremacy, particularly countries which choose the socialist path of their development, is a truly national law, their own, not imposed upon by other nations. The national character of the socialist law is ensured just because it is a law expressing the interests and will of the people.<sup>41</sup>

This passage, however, begs the question, for it excludes from the category of “the people” those who “live on exploitation.” By what standard is “exploitation” to be determined and who is to make that determination?

41. A. Łopatka, *supra* note 19, at 2.

An answer is suggested by Henryk Rot:

For the system of socialist law the following principles are most characteristic: the principle of government by the people and principles specifying it, that is to say: superiority of representative organs over all other State organs; direct democracy (referendum national consultation, asking opinions of definite groups of population); *the leading role of the communist party*; the principle of planning the law-creating activities; the principle of rule of law (in its material formulation consisting in correspondence between legal regulations and the will and interests of working people and *other components of officially accepted system of values*).<sup>42</sup>

Here “the will and interests of working people” are more clearly specified: we are told that government is by the people, that representative organs are preferred, and that direct democracy is encouraged — all of which, however, takes place against the background of the “officially accepted system of values” and under the leadership of the communist party.

In point of fact, Marxist legal democracy is democracy in a very special sense; it constitutes government *for* the people rather than *by* the people. Those who are classified as “exploiters” because, in the judgement of the party, they deviate from orthodox Socialist beliefs or practices, are non-persons vis-à-vis representative government or direct democracy. Thus in the Polish People's Republic of Professors Łopatka and Rot, the Solidarity labor union and its supporters have not “counted” in recent legal decision-making; and in the neighboring German Democratic Republic no referenda concerning a citizen's right to freedom of movement outside the country take place — for “true democracy” would not be served by any such deviations or

42. H. Rot, *supra* note 35, at 78 (italics ours).

potential deviations from party policy as expressing the "officially accepted system of values."

Marxist jurisprudence is thus a closed system, the legitimacy of which is established *a priori*. The goals of this presuppositionalist philosophy of law – the ends by which alone its instrumentalist juridical operations can be justified – are subject to definition (and redefinition) by the party. While condemning religion as the "opiate of the people," the Marxist philosopher of law has much in common with sociologist Eric Hotter's "true believer": his epistemological base is an aprioristic conviction the truth and justice may be found only along the path which he and his fellow believers have chosen to follow.

## MARXIST LEGAL PHILOSOPHY AND THE WORLD OUTSIDE

Having set forth in some detail the essential elements of Marxist legal theory, we shall now briefly discuss the application of that theory to the non-Marxian world. This will involve an explanation of what Marxist jurists term their "critique of bourgeois legality," as well as an overview of the Marxist perspective on international law.

### *Bourgeois Legality*

Professor Samu of Budapest University well summarizes the judgment of classical Marxism on non-Marxist legal systems: "Legal ideology expresses social interests. The scholars of bourgeois legal science argued that its principal requirements served the general interest of all people. But on the contrary, we can see that these arguments are wrong because legal ideology serves first of all the interests of the given ruling class."<sup>43</sup> Thus

43. M. Samu, *supra* note 11, at 8. For a more nuanced discussion of the point, see R. Weyl, *Le marxisme, théorie vivante et créatrice dans le domaine du droit* 3-9 (1979).

arises the critique of what Marxists sarcastically term "bourgeois legality." "Marxist writers cite with relish Anatole France's scornful reference to the 'majestic equality of the law' which forbids rich and poor alike to beg in the streets and to sleep under the bridges."<sup>44</sup>

A striking illustration of this critical posture is set forth in French Marxist attorney Bernard Edelman's book, *Le droit saisi par la photographie* (1973).<sup>45</sup> Edelman begins with Pashukanis' commodity-exchange theory of law and deepens it: law for him is "an active force in the constitution of subjects and not merely a formal recognition of subjects already constituted at the level of the economic."<sup>46</sup> Applied to the proletariat in a bourgeois society, this means that "the worker is a specific entity taking himself on to the market, in a juridical form which allows him to sell himself in the name of freedom and equality."<sup>47</sup> Thus bourgeois law literally puts man into circulation as a commodity.

For us Marxists that means the putting into circulation of labour power. And that putting into circulation is made in the name of property and its determinations, freedom and equality. The contract will permit the exploitation of man by man in the name of these determinations. The contract is the mode of existence of the law, the means by which it exists. Need I repeat it? The subject in law "allowed" the "real" itself to enter into exchange; it has "allowed" the photographic and cinema industries to

44. H. Berman, *Justice in the U.S.S.R.*, *supra* note 1, at 20.

45. For convenience of reference, we cite the 1979 English edition: B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (E. Kingdom trans. 1979).

46. *Id.* at 9 (P. Hirst's Introduction).

47. *Id.* at 102.

exploit artistic workers in the name of their very contracts; it has "allowed" man to be the object of contracts.<sup>48</sup>

Such dehumanizing of man by bourgeois legality calls for unremitting revolutionary opposition.

Criticism of this perspective – either positive or negative – would be premature at this point, but it is noteworthy that the edge of the Marxist argument has been appreciably blunted by the evolution of legal structures in Socialist countries since Stalin came to power. We have already seen Marxist philosophers of law shift their emphasis from the withering away of law to law as a prime instrument of social steering as legal structures have become more all-embracing in Marxist lands. Manai has trenchantly argued that the "primitive epistemological vacuum" represented by early Marxist condemnations of law has now been filled, not by sophisticated and developed Marxist-Leninist analysis of juridical phenomena, "but by the pure and simple adoption of the 'normative bourgeois system'."<sup>49</sup> To be sure, the more "bourgeois" Socialist legality becomes, the more difficult it is for Marxist jurists to engage in wholesale condemnations of the western juridical structure.

### International Law

Since World War II, Socialist bloc countries have been drawn – or have willingly entered – into ever increasing international relationships, many of which bear directly on the area of human rights. How does Marxist legal theory view international law, particularly as it puts socialist and bourgeois nations into common alignments?

48. *Id.* at 107.

49. D. Manai, *supra* note 23, at 19.

Karl Marx's advocacy of internationalism has been termed "the hallmark of his political activity."<sup>50</sup> However, not a few prominent Socialist legal theorists have looked at international law with a jaundiced eye.<sup>51</sup> Stuchka and Pashukanis, in line with their emphasis on the withering away of law in general, viewed international law at worst as a bourgeois nullity and at best as a utilitarian phenomenon destined to perish with the merchant economy of which it is a direct reflexion.

But even during the N.E.P. period, a less negative approach to international law appeared on the scene. E. A. Korovin, in his influential textbook, *International Law of the Transitional Period*, while denying the existence of a general international law binding on all states, and limiting agreements between socialist and bourgeois nations to non-ideological, technical areas, "considered that the entry of the Soviet State into the society of nations gave rise to a completely new legal system with the same validity as the continuing traditional system of international law."<sup>52</sup> Consistent with this viewpoint, he regarded respect for state sovereignty as "the highest principle of this new international law of the transitional period."<sup>53</sup> Korovin was forced into a self-critical renunciation by Pashukanis, but Korovin's guardedly positive

50. A. Gilbert, "Marx on Internationalism and War," in M. Cohen, *Marx, Justice, and History* 185 (1980).

51. On the development of Marxist international law theory, see R. Schlesinger, *Soviet Legal Theory*, *supra* note 22, at 273-93; and H. Kelsen, *supra* note 22, at 148-92.

52. H. Bracht, "The Soviet Conception of International Law," in 4 *Marxism, Communism and Western Society: A Comparative Encyclopedia* 346 (C. Kernig ed. 1972) [hereinafter cited as *Marxism, Communism and Western Society*].

53. *Id.*

attitude toward international law pointed forward to the Stalinist emphasis on law as a means to strengthen Socialist state interests domestically and internationally. Vyshinsky's famed "Theses on International Law" took into account the problem of the capitalist encirclement of Socialist states by stressing the centrality of treaties — which could genuinely function as weapons in the international class struggle. For him, only the norms expressly recognized by the Socialist state would bind it, but in the succeeding years of "peaceful coexistence" and "détente" politics Marxist jurists have conceded binding force to the generally recognized norms of international law (while insisting that the *jus cogens* does not derive from absolute principles of natural law, but arises from economic and social realities and thus "may be modified by the agreement of states, by means of treaty or custom"<sup>54</sup>).

In brief, the Marxist "theory of international law is part of the framework of Marxist thinking."<sup>55</sup> There is no independent Socialist philosophy of international law: Marxist theory in this realm has consistently reflected the peregrinations of Marxist legal theory in general. The practical consequence of this fact is that all the fundamental elements of the Marxist philosophy of law to which we have given attention in this chapter apply when Marxism turns its face from domestic to international concerns. International law, no less than municipal law, will be regarded as a

54. G. Tunkin, *Theory of International Law* 159 (W. Butler trans. 1974). Noteworthy here is a reinterpretation of *jus cogens* analogous to Dr. Kartashkin's effort to redefine the concept of "inalienable rights" to make it compatible with Marxist theory (*infra*, chapter three, the text at notes 13-16).

55. J. Touscoz, "Comparison of Recent Trends in the Western and Soviet Theories of International Law," in 4 *Marxism, Communism and Western Society*, *supra* note 52, at 352.

superstructure dialectically reflecting social reality defined in materialistic-economic terms; and it will be understood and interpreted instrumentally in line with accepted Socialist policy and in accord with the principle that means, legal or extralegal, are justified by the proper, party-defined social goals to which they contribute. In respect to human rights questions, this will mean, *inter alia*, no essential difference between domestic and international human rights theory and practice in the Socialist context. Expressed otherwise, consistent Marxist legal theorists and human rights proponents are neither nationalists nor internationalists: they are — first and last — Marxists.

## TWO PARADOXES

In concluding our discussion of Marxist legal philosophy, we shall point up two interesting paradoxes of Socialist jurisprudence. One arises from the essential elements of the legal philosophy itself; the other becomes apparent from its application in the international sphere. Both will be useful to us in our subsequent analysis of Marxist human rights theory and practice.

The Marxist philosophy of law appears *simultaneously* *positivist* and *jusnaturalist*. Berman has observed that Lenin's thinking was "in the tradition of European legal positivism which considers all laws as 'commands of the sovereign.'"<sup>56</sup> Professor John C. H. Wu has adjudged Marxist legal philosophy as

56. H. Berman, *Justice in the U.S.S.R.*, *supra* note 1, at 25. Cf. A. Michalska, "The Positive Element in the Marxist Definition of Law and Its Evaluation," in Polish Academy of Sciences, *Contemporary Conceptions of Law* 93-107 (A. Zoparka ed. 1979). Karl Renner, the celebrated Austrian social-democratic Marxist, has been classified as a positivist by his English editor O. Kahn-Freund: K. Renner, *supra* note 13, at 2, 37.



"positivism pushed to its logical end. The will of the dominant class becomes the essence of law, and reason becomes the handmaiden of will."<sup>57</sup> Wood, in his careful essay on "The Marxian Critique of Justice," offers an illustrative example of more than passing significance for human rights: If "a historical analysis of the role of slavery in the ancient world would show that this institution corresponded to, and played a necessary role in, the prevailing mode of production, then in the Marxian view the holding of slaves by the ancients would be a *just* practice; and the claim that ancient slavery was unjust, whether it is made by contemporaries of the institution or by modern men reading about it in history books, would simply be wrong."<sup>58</sup>

Yet this is only one side of the picture. Clearly Marxists employ a concept of justice by which existing injustices (e.g., the exploitation of man in bourgeois society) are condemned. Charles Taylor argues the point perceptively:

Thus, if "morality" means the Kantian morality, whose foundation is the moral quality of the will, and which issues in injunctions binding without regard to time or circumstances, then clearly Marx is bound to reject "morality." But if we use the term in a less restricted way, if we mean by "morality" a doctrine touching the fundamental human good and the way to realize it, where "fundamental good" is taken to mean a good which is inescapably and universally the good of man, then there can be no objection to speaking of Marxist morality.<sup>59</sup>

57. Quoted in J. Hazard *et al.*, *The Soviet Legal System* xv (3d ed. 1977).

58. A. Wood, "The Marxian Critique of Justice," in M. Cohen, *supra* note 21, at 18-19.

59. C. Taylor, "Marxism and Empiricism," in *British Analytical Philosophy* 244-45 (B. Williams and A. Montefiore ed. 1966). Wood himself admits this point, paralleling Marx's ethic with Nietzsche's critical morality: A. Wood, "Marx on Right and Justice," in M. Cohen, *supra* note 21, at 124-

In this sense the Marxist philosophy of law has powerful affinities with the natural law tradition.<sup>60</sup>

How is this paradox to be resolved? Is Marxist legal philosophy, with its positivistic overtones, a species of natural law thinking after all? Tumanov rejects the *jusnaturalist* interpretation by observing that

Marxism . . . readily acknowledges the substantial significance of ideal and value principles, but the principles themselves are explained from the standpoint of materialism, thus depriving them of any title to be a transcendental original source of law.

Natural-law teaching regards as an absolute a particular system of rights (behind which stands man as a property-owner and the citizen entrepreneur). Marxism advocates the constant development of man's rights and freedoms, based on the social and economic development of society and on the transition from the capitalist formation to a formation of a higher order.<sup>61</sup>

In other words, Marxism shares with natural law theory a critical stance over against unjust laws and unjust legal structures, but its standard of criticism – its "ideal" – is determined by the materialistic presuppositions of the Marxian system itself. Again, Marx turns Hegel on his head. The ideal is not idealistic, but materialistic. And since, as we have already seen, the definition and identification of evils (such as "exploitation") rest aprioristically with the true representatives of the proletariat (the party),

25. And *cf.* G. Brenkert, "Freedom and Private Property in Marx," *id.* at 80-105.

60. Kelsen pejoratively characterized Marxist legal theory as a species of *jusnaturalism*: H. Kelsen, *supra* note 22, at 120.

61. V. Tumanov, *Contemporary Bourgeois Legal Thought: A Marxist Evaluation of the Basic Concepts* 266, 288 (J. Gibbons trans. 1974).

there is the strongest tendency to accept as good laws and policies whatever the Socialist state is in fact doing. Thus Marxist legal philosophy, with its materialistic ideal, often appears indistinguishable from juridical positivism in actual practice. As we shall see, such de facto positivism severely blunts the edge of Marxist human rights theory and practice.

A further and related paradox in Marxist legal philosophy is its *simultaneously radical and conservative* character, as seen especially in its approach to international law. On the one hand, Marxist jurists continually raise the banner of revolution (*contra* reactionary colonial exploitation of third world peoples and in favor of self-determination); yet on the other hand they curiously maintain with almost religious veneration some of the most conservative (one is tempted to say outmoded) dogmas of older jurisprudence — for example, that individual persons cannot be subjects of international law and that national sovereignty precludes interference (even humanitarian intervention) in the international affairs of states.<sup>62</sup>

Again, as with the positivist-jusnaturalist paradox, the explanatory key is to recognize that for Marxist philosophy of law — indeed, for Marxism in general — everything turns on *a priori* acceptance of the materialistic goals of the system, as defined by its party leadership. Conservative international law principles are not employed because Marxism is conservative, nor are nascent third-world peoples supported because Marxism is per se radical. In both cases, these policies support the prevailing understanding of proper Socialist goals. Marxist philosophy of law transcends conservatism and radicalism; indeed, conservative and radical strategies are little more than means — justified, as we have seen,

only by the ends which they serve. On the human rights scene, therefore, Marxism will now appear in radical dress, then suddenly and bewilderingly change its attire to conservative hues, and back again; the consistent underlying factor will be the materialistic, immanentist metaphysic that insists, to use Professor Tumanov's previously quoted words, on "the constant development of man's rights" in accord with that metaphysic and the resultant "formation of a higher order."

62. G. Tunkin's classic *Theory of International Law*, *supra* note 54, displays throughout this curious blend of the avant garde and the antiquarian.

III.  
HUMAN RIGHTS IN MARXIST  
THEORY & PRACTICE

### III. HUMAN RIGHTS IN MARXIST THEORY & PRACTICE

In our Introduction we quoted Socialist human rights specialist A. P. Movchan's claim that "it was only with the emergence of the Soviet state that the principle concerning universal respect for the fundamental human rights really appeared and established itself."<sup>1</sup> Dr. Janos Toth of the International Commission of Jurists gives a more detailed summary of Movchan's position:

The first (and only) Soviet treatise dealing with the international protection of human rights was written by A. P. Movchan and published in 1958 . . . . The author casts the Soviet Union in the role of the active and persevering supporter of the rights of man, whose proposals decisively shaped the United Nations Charter, the Universal Declaration and the draft Covenants. According to him, the Soviet delegation, led in the post-war period by Andrei Vyshinsky, played a major role in securing the incorporation of the protection of human rights among the basic tasks of the United Nations. It succeeded in getting social, economic and cultural rights and the right of nations to self-determination included in the Universal Declaration on an equal footing with the classical political and civil rights. The Soviet delegation, the author continues, proposed to give immediate binding effect to all these rights and met with the opposition of many capitalist States. These States tried first to obstruct the proclamation of the right of self-determination, for fear of losing their colonies. When the majority of the General Assembly proclaimed this right, they resisted the detailed elaboration of social, economic and cultural rights. In this field, too, the developing countries led by the Soviet Union pushed the proposals through. These achievements were credited by Tunkin, in his Preface to the work in question, to "the superiority of socialist democracy" embodied in the 1936 Soviet Constitution. At the same time, the stalemate which developed in the United

1. *Supra* Introduction at note 2.

Nations in the debates on the draft Covenants was also attributed to the reluctant attitude of Western countries, which, according to Tunkin, cooled down towards the international protection of human rights and utilised the idea only "to launch ideological attacks against the Soviet Union and the People's democracies."<sup>2</sup>

Similar lofty claims are made concerning Marxist human rights theory and practice at the domestic level. Thus the late President Brezhnev, in his speech to the Sixteenth Trade Union Council in 1977, declared:

Our opponents would like to find the forces to oppose socialism from within our countries. Since there are no such forces, however, as there are no oppressed, exploited classes within socialist society, and no repressed nationalities, false publicity is being used to create the appearance of "internal opposition." It is exactly for this reason that a clamor is being raised about the so-called "dissidents" and about "the violation of human rights" in socialist countries.<sup>3</sup>

Having obtained a perspective on the Marxist world-view in general and its philosophy of law in particular, we are now in a position to examine and evaluate these typical Socialist human rights claims. In the present chapter, we shall first set out the Marxist theory of human rights, and then proceed to an analysis of corresponding Socialist human rights practice. The latter discus-

2. J. Tóth, "The Recognition of Human Rights in Eastern Europe," in A. Robertson, *Human Rights in National and International Law* 303-304 (1968). Professor Movchan's (untranslated) work to which reference is made here is: *Mezhunarodnaya zaschita prav cheloveka (International Protection of the Rights of Man)*, Gosyurizdat, Moscow, 1958, prefaced by Professor G. I. Tunkin.
3. L. Brezhnev, "Speech to the Sixteenth Trade Union Council," in W. Laqueur & B. Rubin, *The Human Rights Reader* 308-309 (1979) [hereinafter cited as W. Laqueur & B. Rubin].

sion will serve as a bridge to our final chapter, devoted to critique, for neutrality ceases to be an available option when confronted by the pragmatics of human misery.

## SOCIALIST HUMAN RIGHTS THEORY

Though Marxist human rights theory, solidly grounded in Socialist legal philosophy and in the Marxist *Weltanschauung*, is as monolithic and unified as the structural concepts supporting it, we can perhaps best understand it by separating *domestic* human rights theory from the theory as it applies in the *international* sphere. After discussing four basic principles of Marxist human rights theory applicable to the domestic realm, we shall move to the international human rights theory that grows out of it, and finally observe a vital millennial characteristic of all Marxist thinking where human rights are concerned.

But first — as ideal linkage between our discussion of instrumentalist Marxist legal philosophy in the last chapter and the human rights analysis to follow — we would do well to reflect on Professor Markovits' trenchant comparison between the Socialist and non-Socialist understanding of legal "rights" as such:

Bourgeois law sees rights as individual entitlements, focuses on the end result of a right's realization (if necessary in court), insists on exact definitions (in order to know how much a rightholder is entitled to), and basically perceives the realization of a right as a private affair. Socialist law sees rights primarily as policy pronouncements; focuses on the process of realizing the policy more than on the eventual realization of the right itself; is interested in ambiguity (which facilitates the manipulation of a right for policy purposes); and basically perceives the realization of a right as a social affair.

The bourgeois and socialist approaches to law thus seem to differ primarily in their understanding of the relationship between the concepts of "law" and "right" — that is, between

the body of rules sanctioned by a particular political system, and the benefits that an individual derives from these rules. A bourgeois jurist tends to approach law in terms of the rights it protects: faced with the task of solving a legal conflict, he will dissect the issue into the rights of the parties involved and then weigh those rights against each other. He will apply this technique not only to conflicts between parties of equal position and power (as in contract or property disputes), but also to conflicts involving greatly disparate opponents (for instance, the battle between prosecution and defense counsel, or the conflict between the unborn's right to life and the mother's right to determine what happens to her body). We expect from law the protection of what is our due. Hence the bourgeois fascination with procedure: since we understand a legal conflict as a match of right pitted against right, with both potentially of equal weight, we have to see to it that the rules of the match are impartial. Bourgeois law is basically a horizontal affair: it coordinates purposes, balances interests. Our figure of justice is blindfolded and holds a scale — a neutral arbiter of rights.

In the socialist view, the bourgeois preoccupation with individual benefits veils and distorts the political character of all law. Law is important not because it confers rights but because it prescribes the behavior necessary to progress on the path to socialism. Rights as policy pronouncements are individualized means of conveying the commands of the law. To a socialist, our relationship between law and rights thus should be reversed. He does not look at law as the container of rights, but at rights as the embodiment of law. He is less interested in procedure (to him, our insistence on neutrality reeks of social agnosticism) than in substance. Rather than balancing right against right, a socialist will look for the policies embedded in particular rights, then rank them according to their importance and urgency. We try, or pretend to be, neutral; socialists try, or pretend to be, partial — not to the parties to a dispute, but to the Party as the authoritative guide towards social progress. We want to be fair; socialists want to be correct. Law under socialism is a vertical affair: order, direction, discipline, command. A socialist figure of

justice would not be blindfolded, but seeing, and she would show the way with outstretched arm and pointed finger.<sup>4</sup>

The profound truth of this characterization of the Marxist understanding of rights as politicized, intentionally ambiguous, and goal-orientated will be reinforced in all of our subsequent discussion.<sup>4a</sup>

### The Domestic Perspective

Fundamental to the Marxist world-view and to its legal philosophy is the conviction that materialistic-economic conditions determine the course of human history; we have seen this in the subalternate relationship between materialistic metaphysics and the totality of Marxist theory, and also in the base-superstructure relation allegedly subsisting between economic conditions and law. It should therefore come as no surprise that at the root of Socialist human rights theory lies the principle that "the realization of human rights and fundamental freedoms depends primarily on the social and economic structure of society."<sup>5</sup> Professor Tunkin puts it in characteristically bold terms:

4. I. Markovits, "Socialist vs. Bourgeois Rights — An East-West German Comparison," 45 *U. Chi. L. Rev.* 625-26 (1978).

4a. See especially *infra*, chapter four, the text at note 39.

5. F. Przetacznik, "The Socialist Concept of Protection of Human Rights," 38 *Social Research* 350 (1971) [hereinafter cited as F. Przetacznik]. On p. 338 the author provides a short, but excellent, bibliography of important materials in Russian and East European languages; for additional Russian and East European human rights literature, see 4 *Marxism, Communism and Western Society: A Comparative Encyclopedia* 64-65 (C. Kernig ed. 1972) [hereinafter cited as *Marxism, Communism and Western Society*].

The extent and character of human rights within a specific state (they do not exist outside a state) are defined in the final analysis by the nature of the state, and this nature is itself a product of the economic system of a given society. And both the extent of rights and their substance are different in states with different social systems.<sup>6</sup>

Imre Szabó, the most prominent contemporary Hungarian human rights specialist, informs us that

The property relations — being the fundamental institution of the society — ultimately determine even the rights called human rights.... We merely wish to refer to the tenet — one of the foundations of the Marxist theory — according to which social pretensions to human rights, and the evolution and formation of citizens' rights are ultimately determined by the material living conditions of the society. The types of prevailing forms of the latter will, ultimately, fill the contents of the human rights, respectively of the citizens' rights of a given system or of a given age.<sup>7</sup>

Dr. Kartashkin makes the same point in the following way:

The attainment of real freedom is related, first of all, to the liberation of labour from the domination of capital and the elimination of exploitation of the working people. The socialist concept of human rights proceeds from the premise that a genuine manifestation of freedom in society is possible only under the conditions of the liberation of man from all forms of exploitation.<sup>8</sup>

6. G. Tunkin, *Theory of International Law* 82 (W. Butler trans. 1974) [hereinafter cited as G. Tunkin].

7. I. Szabó, "The Theoretical Foundations of Human Rights," in A. Eide & A. Schou, *International Protection of Human Rights* 40 (1968) [hereinafter cited as I. Szabó, "The Theoretical Foundations of Human Rights"].

8. V. Kartashkin, "The Socialist Countries and Human Rights," in K. Vasak, *The International Dimensions of Human Rights* 631 (1979)

Since exploitation will only cease to the extent that the distinction is obliterated between a property-owning class and those who do not own the means of production, the Marxist philosophy of human rights insists that *private property is per se a detriment to human rights*. "The abolition of private ownership of the means of production and elimination of exploitation of man by man, the radical transformation of political and public life created the necessary conditions for ensuring a broad complex of rights and freedoms under socialism."<sup>9</sup> It follows inexorably that Capitalist states, with their unsound and exploitative economic base, will be incapable of providing citizens with the human dignity which Socialist states, having abolished private ownership of the means of production, make available as a matter of course.

Indeed (and this constitutes a third vital defining element of Marxist human rights theory), human rights do not exist in man by virtue of his abstract humanity or constitute some kind of inalienable "given"; rather, *the State creates whatever human rights in fact exist*. Vyshinsky gave classic expression to this viewpoint when, as the representative of the Soviet Union at the 183rd meeting of the UN General Assembly, in the course of discussion concerning the Universal Declaration of Human Rights (10 December 1948) he asserted that "human rights could not be conceived outside the state; the very concept of right and law was connected with that of the state. Human rights meant nothing unless they were guaranteed and protected by the state; otherwise they became a mere abstraction, an empty illusion

[hereinafter cited as V. Kartashkin, "The Socialist Countries and Human Rights"]. Dr. Kartashkin made the same point in his lecture titled, "A Marxist-Humanist Speaks Out on Human Rights," delivered 12 November 1982 at the Simon Greenleaf School of Law, Orange, California.

9. *Id.*

easily created but just as easily dispelled."<sup>10</sup>

Professor Szabó of Budapest has developed this point most fully in contemporary Socialist human rights thinking. He notes that the traditional, Western understanding of human rights "separates those rights which – allegedly – derive from man's quality as such, and those deriving from man's quality as citizen," whereas "the socialist theory denies the double origin of human rights"; in brief, "the socialist standpoint declares that there is no difference between the origins of the said two types of rights, because all right is derived from the state — at most their social preconditions may differ."<sup>11</sup> In his work, *Cultural Rights*, Szabó expands this basic argument:

We shall not dwell on the view, according to which human rights are rooted in human nature, originate in the essence of man and are, as a consequence, inalienable and valid forever. Such a conception of human rights, insofar as it is not simply a rhetorical phrase, goes back to *natural law* doctrines; there trace back fundamental rights, which are allegedly pre-State rights, to natural law, as a system of eternal rights, which is outside and above positive law; it derives the *natural rights of man from natural law*. Incidentally, the young Marx gave a brilliant explanation of how the demand for the freedom of *private property* has assumed the demand for *freedom in general* as an eternal human right. Freedom was placed before or above political society and its members, the citizens, because it had been based on private property and had emerged prior to *political society*, the State and consequently man as a citizen. To the rights of "man" were later added the rights of "citizen" (the only cultural right thought to be existing at the time, the right to instruction was considered to come obviously within this

10. Quoted from the UN *Official Records* by H. Kelsen, *The Communist Theory of Law* 180 (1955) [hereinafter cited as H. Kelsen].

11. I. Szabó, "The Theoretical Foundations of Human Rights," *supra* note 7, at 39-40. Cf. *id.* at 266.

category), which were rights regarded to be connected with political society, with the mode of society's political organization. These two components became combined later as "eternal" rights termed alternatively *human* or *civic*.

But the "eternal" rights are, in effect, not eternal but *pertinacious*: they usually run through *several social* systems, developing through these; they seem to be eternal while they are, in effect, only *permanent*. Has the right to life as a "human" right always existed? Has it been recognized and not only in positive law, but in a kind of natural law, supposed to be existing above that? Clearly this right, too, has a history of growth of its own, like other rights regarded mistakenly as eternal....

Otherwise this distinction in qualities was mistaken as soon as it was born: man in modern society is always a "*zoon politikon*", a member of a political society, of a State; he has rights — *any kind of rights* — and duties (social-State duties) only in this status of his.<sup>12</sup>

While Socialist human rights theorists emphasize the presumed merits of such an approach (e.g., no fixed catalog of human rights, so one is open to evolutionary development of the so-called "third generation" rights),<sup>13</sup> the alienable character of all Marxist rights has troubled some sensitive thinkers in their camp. Thus in the summer of 1982 Vladimir Kartashkin told the present writer that he was endeavoring to combine the positive values of Western inalienable rights with the advantages of Socialist civic (i.e., state-derived) rights. Indeed, in lectures delivered that

12. I. Szabó, *Cultural Rights* 93-94 (1974) (Szabó's italics). For a Western, non-Marxist approach to cultural rights, see Yoram Dinstein, "Cultural Rights," 9 *Israel Yearbook on Human Rights* 58-81 (1979).

13. See, e.g., M. Borucka-Arctowa, "The Concept of Legal Consciousness As a New Approach to the Problems of Natural Law," in Polish Academy of Sciences, *Contemporary Conceptions of Law* 167-69 (A. Zoparka ed. 1979).



summer at the International Institute of Human Rights, Strasbourg, France, Dr. Kartashkin employed the expression "inalienable rights" in a most positive way:

Scientists of socialist countries subdivide law into objective law — the existing legislation of a country; and subjective law — specific rights, obligations and opportunities which emerge within the limits of the legislation concerning the participants in legal relations. The socialist theory of State and law recognizes that all citizens' rights are subjective, that is, personal and inalienable rights guaranteed by the conditions of the society's life.<sup>14</sup>

However, one must be clear on Dr. Kartashkin's use of terminology. By asserting that rights are "inalienable" he means only what he has literally said — that they are "guaranteed by the conditions of the society's life." He makes this clear in another passage on the same subject:

The socialist concept of human rights does not reject the idea of inalienable natural human and citizens' rights. But the Marxist-Leninist theory deducts human rights not from the "nature" of man but from the position of an individual in the society and, above all, the process of public production. It proceeds from the premise that social opportunities and rights are not inherent in the nature of man and do not constitute some sort of natural attributes. Rights and freedoms of individuals in any State are materially stipulated and depend on socio-economic, political and other conditions of the development of society, its achievements and progress.<sup>15</sup>

14. V. Kartashkin, *Socialist Approach to Human Rights (Summary of Lectures)* 2 (1982). The same passage appears in Kartashkin's "The Socialist Countries and Human Rights," *supra* note 8, at 630.
15. *Id.* at 629. A slightly abbreviated version of this paragraph is repeated in Kartashkin's *Socialist Approach to Human Rights (Summary of Lectures)* 2 (1982).

Thus what is being given with one hand (inalienability of rights) is being taken away with the other (rights are still the product of variable economic and political conditions). Indeed, a Marxist cannot remain a consistent Marxist while holding that human rights are in fact inalienable, for true inalienability of rights would necessarily entail belief in absolute human worth, transcending economic change, and would offer the possibility of using such a standard to criticize the state for "legalized injustice" in violating the human rights of its citizens. Georg Brunner of Cologne is quite correct when he says of Marxist human rights theory:

If one approves the possibility of legalized injustice, the thesis of the preeminence of objective law is undermined and the obligatoriness of the state power comprehended as natural law is defended. But it is not yet admissible to draw such a conclusion . . . From their historical nature it follows that fundamental rights cannot be founded in natural law, in the essence of man or in any other extra-material source. They are neither immanent nor innate to, nor inalienable from, man.<sup>16</sup>

If the State is regarded as the sole source of human rights, it follows — as underscored by Brunner — that one cannot logically criticize the state for human rights violations. Without the state, human rights would be non-existent, so to criticize her is tantamount to biting the hand that feeds you! A concrete illustration of what this means in practice is the contrast between freedom of expression as guaranteed by the First Amendment to the U.S. Constitution and freedom of expression as limited to socially desirable goals in Marxist lands.

The freedom of expression recognized in the constitutions of socialist countries, for example, does not mean an unlimited freedom of statements harmful both to individuals and the

16. G. Brunner, "Communist Analysis of Fundamental Rights," in 4 *Marxism, Communism and Western Society*, *supra* note 5, at 61.

society as a whole. Under socialism, law prohibits the spread of slanderous information, which smears individual citizens, and legislatively prohibits propaganda of war, spread of ideas based on racism and provoking racial discrimination, etc. In a general form the notion of freedom of personality is expressed, for example, in Article 38 of the Constitution of the Democratic Republic of Viet Nam which states that no one may use democratic rights and freedoms to the detriment of the interests of the State and the people.<sup>17</sup>

Professor Cornelius Murphy has rightly noted that this basic difference between Marxist and non-Marxist human rights theories has created sensitive problems in the realm of international agreement:

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. 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.<sup>18</sup>

17. V. Kartashkin, "The Socialist Countries and Human Rights," *supra* note 8, at 632. It is perhaps worth emphasizing that the First Amendment does not protect *all* speech; thus, for example, obscenity, defamation, and the publication of state secrets do not fall within the ambit of constitutionally protected speech. For a classic (but grossly overextended) Marxist argument that bourgeois society in fact crushes all radical dissent, see H. Marcuse's essay, "Repressive Tolerance," in R. Wolff, *A Critique of Pure Tolerance* 81-117 (1965); and cf. J. Montgomery, "Marcuse," in his *The Suicide of Christian Theology* 209-12 (1971).

18. C. Murphy, "Ideological Interpretations of Human Rights," 21 *DePaul L. Rev.* 292 (1971).

Finally, the Socialist philosophy of human rights places great stress on *the need to interlock rights and duties*. Citizens of bourgeois nations are criticized for their irresponsible, individualistic concern with their own personal rights and freedoms, without a corresponding sense of duty toward the body politic and their neighbor's social good. Marxist human rights theory endeavors to provide a solid corrective.

The socialist concept of human rights proceeds from the unity and insolubility of rights and obligations of citizens. The constitutions of socialist countries recognize the rights and freedoms of citizens, as a rule, in one chapter under the title of "Fundamental rights and freedoms of citizens". The constitutional obligations are established not only in the interests of the society and State but above all, in the interests of every citizen individually. For example, the eight-grade primary education in most of the socialist countries is not only a right but also an obligation of everyone. Accordingly, the sending of children to school is not only a moral right but an obligation of the parents and failure to comply with it may entail measures of public censure or even administrative responsibility. Similarly, the right to work includes an obligation for everyone to work and to maintain the discipline of work. This right and obligation pursues the aim of ensuring the constant growth of production and the improvement of the well-being of every citizen.<sup>19</sup>

In sum, basic Marxist human rights theory, as applied in the domestic realm, is characterized by (1) economic determinism, (2) opposition to private property, (3) derivation of all rights from the state, and (4) an effort to balance rights and duties. Since these

19. V. Kartashkin, "The Socialist Countries and Human Rights," *supra* note 8, at 631. See also I. Szabó, "The Socialist Theory of Citizens' Rights and Duties," in his *Socialist Concept of Human Rights* 53-81 (1966) [hereinafter cited as I. Szabó, *Socialist Concept of Human Rights*].

elements define a philosophy of human rights operative within Marxist lands, and since (as we have seen) Socialist theorists are at pains to stress that only in a thoroughgoing Marxist state can genuine human rights prevail, one might well wonder if any cooperative human rights activity could extend from East to West. But as with any presuppositionalistic, aprioristic *Weltanschauung*, Marxism must establish common ground with the ideological world outside to function at all.<sup>20</sup> Thus Professor Tunkin concedes that "notwithstanding the completely different essence of socialist and bourgeois democracy, there is a general concept of democracy and a general democratic concept of human rights."<sup>21</sup> This pragmatically necessary concession opens the door to a consideration of the Socialist theory of international human rights.

### *The International Perspective*

As we observed in our discussion of Marxist international law theory in the preceding chapter, there is no independent Socialist philosophy of international law: internationally, no less than domestically, the Marxist operates from the fundamental axioms of his world-view. The same is true in the realm of Socialist human rights theory, so we should not expect any quantum leap as we move from civil rights domestically to human rights internationally. Szabó expresses the dogma succinctly:

The catalogue of the human rights already recognized (or approaching recognition) has been developed on the model of

20. Cf. J. Montgomery, *Faith Founded on Fact* (1978).

21. G. Tunkin, *supra* note 6, at 82. See also R. Bystrický, "The Universality of Human Rights in a World of Conflicting Ideologies," in A. Eide & A. Schou, *International Protection of Human Rights* 83-93 (1968) [hereinafter cited as R. Bystrický].

the citizens' rights recognized (or postulated) within the state. They are no more than a projection of municipal legal institutions of citizens' rights, on the international plane....

Now if the more or less accepted types of human rights in international law are no more than a classification – international standardization – of the various types of citizens' rights known in various countries – then the question, what is the international significance of these rights, types, or groups, will obviously depend on the social system of the individual groups of states....

The conditions for the international declaration of human rights and the creation of their safeguards are, generally, given and determined by international political conditions.<sup>22</sup>

At the same time, there are several recurrent themes in Marxist international human rights thinking which warrant our careful attention, and we shall take them up one by one at this point.

First, as one might well suppose from the Marxist belief that the State is the sole source of human rights, Socialist human rights theory insists on *the principle of state sovereignty and non-interference in domestic affairs* as a fundament of international human rights activity. The sovereign activity of the national state is the focal center of all proper human rights endeavor.

One proposition of cardinal importance should not be forgotten: securing human rights remains and will remain basically the domestic affair of states. Therefore, the principal field of struggle for human rights is the internal system of a state, and especially its socioeconomic system. The international protection of human rights, effectuated primarily by international legal means, is, although important, merely an auxiliary means of securing such rights.<sup>23</sup>

22. I. Szabó, "The Theoretical Foundations of Human Rights," *supra* note 7, at 41-42.

23. G. Tunkin, *supra* note 6, at 83.

However, one should not conclude that this philosophy of sovereignty excludes international treaty relations in the human rights area. As we saw in the last chapter, Soviet legal theorists formerly had difficulties reconciling the national sovereignty of Socialist states with bourgeois treaty alignments, but today that conceptual difficulty has been circumvented. Calvez, in his thorough study of *Droit international et souveraineté en U.R.S.S.*, perceptively observes that today Socialist jurists do not maintain a theory of "absolute sovereignty" (by which the state must be able at each moment arbitrarily to change its course of action) but rather hold to that milder conception of sovereignty which, while not permitting any *external* power to determine the state's policies or actions, does allow the state to *limit itself* through treaty commitments.<sup>24</sup> Thus

According to the socialist view, international bodies can be established for purposes of supervising implementation [of human rights] provided they observe such general principles of international law as respect for state sovereignty and non-interference in domestic affairs, and concentrate strictly on serving and facilitating the execution of the parent instruments.<sup>25</sup>

The Socialist proviso of non-interference is, however, far-reaching in its consequences, and virtually swallows up realistic international implementation of human rights through treaties or otherwise. Socialists have consistently opposed the establishment of a UN High Commissioner for Human Rights and the inclusion in the international human rights conventions of provisions sanctioning the compulsory jurisdiction of the International Court of Justice — for these measures would increase international supervisory activity over domestic human rights

24. J. Calvez, *Droit international et souveraineté en U.R.S.S.* 212-13 (1953).

25. F. Przetachnik, *supra* note 5, at 356.

practice.<sup>26</sup> And even where significant human rights agreements are entered into by Marxist states (one thinks of the Helsinki Final Act), those states follow the hermeneutic principle of "Soviet jurisprudence that the problem of a conflict between domestic law and international law must be decided by the internal legislation of the State concerned."<sup>27</sup> To the extent that such a rule of treaty construction is put into operation, what Calvez terms "absolute" state sovereignty does become the determinant of Marxist human rights practice, whatever the literal or natural meaning of the treaty text. But this hardly disturbs the believing Marxist: "since socialism is a preliminary stage to communism, the state of complete freedom and equality, fundamental rights in a socialist society are superior to those of a capitalist society even if the socialist society takes the form of a dictatorship."<sup>28</sup>

Once Socialist commitment to the domestic sovereignty principle is fully appreciated, there is no difficulty in understanding the Marxist view of the proper function of the United Nations

26. *Id.* at 356-59. On the issue of a High Commissioner for Human Rights, see J. Fawcett, "The Protection of Human Rights on a Universal Basis: Recent Experience and Proposals," in A. Robertson, *Human Rights in National and International Law* 297-99 (1968).

27. K. Nagy, "Problems of the Relationship between International and Domestic Law," in G. Haraszti, *Questions of International Law* 150-51 (1977).

28. G. Brunner, "Communist Analysis of Fundamental Rights," in 4 *Marxism, Communism and Western Society*, *supra* note 5, at 60. I. Szabó presents the Socialist philosophy of state sovereignty in relation to international human rights with particular sophistication in his essay, "The Legal Importance of the Declaration," 15 *Rev. Contemporary L.* 50-53 (1968) [hereinafter cited as I. Szabó, "The Legal Importance of the Declaration"].

in the sphere of international human rights. In brief, that international organization must be held to the narrowest and most stringent limits where it infringes on the domestic affairs of states; thus, for the Marxist, *the UN system of human rights organs and covenants exists merely to "promote" rather than to "protect" human rights — except in certain special cases such as "gross and massive violations" of human rights and fundamental freedoms.* Bokor declares that "on the pretext of the protection of human rights UNO cannot interfere in the domestic affairs of the member states, consequently it cannot even bring pressure to bear on the member states."<sup>29</sup> An attempt textually to justify this viewpoint is made by Dr. Kartashkin in the following terms:

The report of the Subcommittee I/1/A of the San Francisco Conference which discussed Paragraph 3 of Article I of the UN Charter, pointed out that the ensurance and direct protection of human rights and fundamental freedoms is the internal affair of every state. For this reason the Subcommittee did not accept proposals to the effect that Paragraph 3 of Art. I should speak not of "promoting and encouraging respect for human rights and for fundamental freedoms", but of "protecting" them....

The UN Charter, as well as the post-war agreements in the field of human rights refer the direct provision and protection of human rights and freedoms exclusively to the domestic jurisdiction of the states. They speak not about "international protection" of human rights but of promotion of international cooperation with the aim of encouraging universal respect for, and observance of, human rights and freedoms.<sup>30</sup>

29. H. Bokor, "Human Rights and International Law," in I. Szabó, *Socialist Concept of Human Rights*, *supra* note 19, at 287.

30. V. Kartashkin, "Human Rights and Peaceful Coexistence," 9 *Human Rights J.* 7-8 (1976) [hereinafter cited as V. Kartashkin, "Human Rights and Peaceful Coexistence"]. The same passages appear in Kartashkin's "The Socialist Countries and Human Rights," *supra* note 8, at 635.

Exceptions are narrowly limited. In his Simon Greenleaf School of Law lecture (12 November 1982), Kartashkin set forth the single acceptable qualification:

On the other hand, international law takes a different approach to these problems in cases where States commit international crimes and international offences involving gross violations of human rights and fundamental freedoms on a mass scale. This is precisely when the United Nations is authorized to intervene and to take actions to ensure international protection of human rights....

Cooperation of States in eliminating mass and gross violations of human rights and fundamental freedoms rests on a firm base of international law. The international law documents adopted within the framework of the United Nations refer to international crimes such as crimes against peace, war crimes, crimes against humanity, crimes of genocide and apartheid and the policy and practice of racial segregation and discrimination similar to it.<sup>31</sup>

He goes into more detail in the following passage:

The report of the Subcommittee I 1/A at the San Francisco Conference pointed out that if "rights and freedoms were grievously outraged so as to create conditions which threaten peace or to obstruct the application of provisions of the Charter, they cease to be the sole concern of each state". In this case the UN can apply enforcement measures against the state which by its actions is jeopardizing peace and international security. The UN has repeatedly discussed the question of enforcement measures against countries where flagrant violations of human rights and freedoms created a threat to peace and international security. The UN General Assembly qualified the apartheid policy pursued by the Republic of South Africa as a crime

31. These remarks are also contained in Kartashkin's *Socialist Approach to Human Rights (Summary of Lectures)* 3-4 (1982).

against humanity and recommended the use of sanctions against this country. The Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948 provides for a whole complex of international measures to cut short this crime. The Convention on the Suppression and Punishment of the Crime of Apartheid adopted by the XXVIII session of the UN General Assembly qualifies apartheid as a crime and provides for international criminal responsibility for it.

Consequently, violation of human rights perpetrated on a mass scale and endangering peace and international security or representing gross negation of the aims and principles of the UN Charter is not the exclusive concern of the state pursuing such policy and gives the UN the right to apply enforcement measures. It is equally clear that if the state perpetrates actions qualified by international law as international crime, such actions are not the internal affair of the state concerned.<sup>32</sup>

Consistent with its collectivistic focus and suspicion of individualism, Marxist human rights theory would shift attention away from individual violations toward mass and gross violations of human rights. Professor Szabó argues the case persuasively:

It also follows that however serious the individual violation of human rights, the socialist countries consider even more serious the situations in which the rights of whole groups of people are violated. This is the case for the racial discrimination practiced in certain states and of which no one can seriously accuse the socialist countries. This brings us back to our initial idea, and leads us also to the end of our explanations: we believe that the international protection of human rights can take a better course if, instead of seeking international means of complaint and judgment in the case of individual violation of these rights, it would try and improve the proceedings likely to establish in a

32. V. Kartashkin, "Human Rights and Peaceful Coexistence," *supra* note 30, at 9-10. See also Kartashkin's "The Socialist Countries and Human Rights," *supra* note 8, at 636-37.

firmer way the international legal responsibility of the governments who violate human rights systematically and on a mass scale.<sup>33</sup>

It will be observed that Szabó feels uncomfortable with "individual complaints and judgments" in the international human rights sphere. In point of fact, the Socialists have consistently opposed a right of individual petition to and individual standing before international human rights organs and agencies. Bokor, following Haraszti, claims that such a right "loosens the ties of allegiance of the individual to his own country, moreover it is apt to juxtapose him to it, and offers an opportunity to the individual to mar relations between sovereign states by submitting his claims directly to an international forum."<sup>34</sup> Przetacznik expands the point with appropriate references to Soviet delegation position statements before the UN:

According to socialist doctrine, permitting individuals to make complaints against states – as A. P. Pavlov (U.S.S.R.) explained – would conflict with the whole system of international public law regulating the relations between states. It was emphasized that all "disputes between people and their governments should be settled by their respective governments," whereas, Pavlov warned, the proposal to set up a special body to deal with petitions, if it were adopted, "will have the effect of transforming a dispute between a private individual or group of individuals and their State or Government into an international dispute, thereby substantially enlarging the area of international differences, frictions and incidents, unnecessarily

33. I. Szabó, "The Legal Importance of the Declaration," *supra* note 28, at 53.

34. H. Bokor, "Human Rights and International Law," in I. Szabó, *Socialist Concept of Human Rights*, *supra* note 19, at 294.

burdening and aggravating international relations and undermining the foundations of peace."<sup>35</sup>

Socialist objection to complaints by individuals against states is, however, only the tip of the iceberg. Because of the fundamental role of the national sovereignty principle in Marxist thinking, *the very idea of the individual as a proper subject of international law is anathema*. Nørgaard finds three views on the subject in the international legal community: "only states are subjects of international law"; "both states and individuals are subjects of international law"; and "only individuals are subjects of international law."<sup>36</sup> Granted that the question has been raised as to whether Soviet legal scholarship today in fact allows for some expansion of the category of subjects of international law, so as to include non-governmental organizations such as the World Trade Union Federation that play a significant role in international relations; the answer is certainly yes for such influential jurisprudents as Korovin, Krylov, and Tunkin, and this view seems to prevail at the moment. "The major bone of contention," writes Okeke, "is that while some authors regard only States as subjects of international law, as well as peoples and nations fighting for liberation, others consider that some international (inter-state) organizations are also subjects of international law."<sup>37</sup> But there is no bone of contention over the status of individual physical persons. Professor Movchan sums up the matter:

International agreements dealing in one way or another with the protection of human rights and regulating these rights (for instance, conventions on slavery and slave trade, International Labour Organization conventions on the defence of man's working rights and struggle against forced labour, U.N. conventions on women's political rights and married women's citizenship) create international rights and obligations only for the contracting parties. They refer to the human rights and freedoms which the states concerned pledge themselves to respect and observe under their national laws. Speaking of such international treaties, British jurist Oppenheim wrote that "although such treaties generally speak of rights which individuals shall have as derived from the treaties themselves, this is, as a rule, nothing more than an inaccuracy of language. In fact, such treaties do not normally create these rights, but they impose the duty upon the contracting states of calling these rights into existence by their municipal laws."

The Soviet science of international law is unequivocal in its claim that the "legal position of individuals is determined by national and not international law". Professor S. B. Krylov, for instance, writes in his work on the U.N. history that the "individual is protected not directly by international law but only with the aid of national law".

International law proceeds from the recognition of the individual as a subject of national law and does not admit the direct protection of his rights by any international organ in circumvention of the state and disregard of the jurisdiction of the state organs in this sphere since this would be tantamount to interference in the domestic affairs of states and to impingement upon their sovereignty.<sup>38</sup>

35. F. Przetacznik *supra* note 5, at 357. Cf. H. Kelsen, *supra* note 10, at 179-81.

36. C. Nørgaard, *The Position of the Individual in International Law* (1962).

37. C. Okeke, *Controversial Subjects of Contemporary International Law* 12-16 (1974).

38. A. Movchan, "The Human Rights Problem in Present-Day International Law," in *Contemporary International Law* 239-40 (G. Tunkin ed., G. Ivanov-Mumjiev trans. 1969) [hereinafter cited as A. Movchan, "The Human Rights Problem in Present-Day International Law"]. Cf. L. Boim, "The Soviet Law of Nationality and Its Application to Jews," 3 *Israel Yearbook on Human Rights* 193-94 (1973).

Besides the three cardinal interlocking themes of Socialist international human rights philosophy (state sovereignty and non-interference in domestic affairs; the UN merely "promotes" but does not "protect" human rights except in the face of gross violations; the individual person is not a subject of international law or a proper complainant in his own right against state violations of human rights), there are several particular Marxist emphases in the international human rights area which need to be mentioned to obtain a complete picture.

In line with Marxist preoccupation with the national state as the sole source and guarantor of human rights, there is a *jaundiced view of regional systems of human rights protection*, such as the European system, with its European Convention, Commission, and Court of Human Rights. Socialist writers are at pains to emphasize the real or imagined weaknesses of regional organs of human rights protection, the point presumably being that national sovereignty ultimately prevails over regional ideas. Thus Dr. Kartashkin and Professor Movchan, in their guest lectureships and discussion sessions at the International Institute of Human Rights, have regularly reminded their audiences of the small number of petitions declared admissible by the European Commission on Human Rights.<sup>39</sup> At the same time, Marxist writers in the field do not neglect to point up efforts at regional human rights cooperation among Socialist states.<sup>40</sup>

Marxist human rights specialists in the international realm

39. Dr. Kartashkin made the same point in his recent lecture at the Simon Greenleaf School of Law (12 November 1982).

40. V. Kartashkin, "The Socialist Countries and Human Rights," *supra* note 8, at 642-46.

have the same *primary interest* as their domestic counterparts in *social, economic, and cultural rights* — as compared with civil and political liberties. They pride themselves on having been midwives of the UN Covenant on Economic, Social, and Cultural Rights, and for continually placing these rights before the international community.

Socio-economic rights . . . come first in the order of priorities. Their paramount importance follows from the thesis that man's socio-economic situation determines the extent and nature of his freedom. This group of rights indirectly constitutes the material guarantees for the remaining fundamental rights. This explains why the incorporation of socio-economic rights in the constitutions of communist countries forms the most striking contrast to the catalogue of fundamental rights in bourgeois states. Essentially these rights comprise the right to work, the right to recreation, the right to financial support and the right to education. The constitutions of some people's democracies grant a claim to government protection of public health, state care for the young, and safeguards for the institutions of marriage and family linked to equal status for illegitimate and legitimate children.<sup>41</sup>

Socialist scholars concerned with international human rights have laid *great stress on the right to peace*. Bystrický makes the strong point that "human rights and freedoms can be protected and guaranteed only in time of peace (*inter arma silent leges*) and on the basis of international cooperation. Hence it follows that the right to peace and the right to claim politics of peaceful coexistence are to be considered as fundamental human rights."<sup>42</sup> Similarly, Przetacznik argues that "pursuant to the

41. G. Brunner, "Communist Analysis of Fundamental Rights," in 4 *Marxism, Communism and Western Society*, *supra* note 5, at 62.

42. R. Bystrický, *supra* note 21, at 84.



socialist concept of the protection of human rights, the struggle for the protection of human rights must proceed side by side with the struggle for peace and the security of peoples, since peace favors and war hinders the protection of human rights."<sup>43</sup>

Marxists argue that *national self-determination is a human right*, and claim that Western capitalist colonial powers have shown little or no interest in promoting it because of their policies of economically dominating third-world peoples. Writes Professor Movchan:

Although the right to national self-determination was not included in the Universal Declaration, the United Nations recognized despite the opposition of the colonial powers that it was one of the most important rights and that unless it was respected the peoples and nations, and the individuals forming them, could not be free. This authoritative opinion, voiced during the discussion and elaboration of the Pacts on Human Rights, was secured and concretised in the General Assembly resolutions of February 5 and December 16, 1952, and in Article I of the Pacts.<sup>44</sup>

A correlative right in Marxist eyes is that of *sovereignty over natural resources*.

Sovereignty over natural resources is a problem which is directly tied to the abolition of colonialism. State sovereignty over natural resources stems from territorial supremacy, which

43. F. Przetachnik, *supra* note 5, at 341.

44. A. Movchan, "The Human Rights Problem in Present-Day International Law," *supra* note 38, at 248. See also F. Przetachnik, *supra* note 5, at 343-45, where heavy emphasis is placed on "the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was adopted by the General Assembly at its fifteenth session on the initiative of the Soviet Union under the title of Resolution 1514 (XV)."

is an organic component of state sovereignty. According to the socialist doctrine, by virtue of territorial supremacy a state has the exclusive right to regulate questions connected with title to ownership of natural wealth, irrespective of whether the owners are its own citizens or foreigners, to determine the conditions for the exploitation of these resources, to introduce conservation measures, etc. . . .

The socialist states have consistently taken the position that the independence which most of the former colonies received from the metropolitan states was independence in name only. In their view, the former imperial powers retained many important economic privileges in the former colonies. According to this theory, it became necessary for the colonial powers to make formal concessions in order to save the substance of their economic privileges. As proof thereof, the exploitative character of their economic policies and profit-oriented production systems was likewise underscored.<sup>45</sup>

Finally, for Socialist human rights theory, state sovereignty plus national self-determination equal *the necessity of opening international human rights organizations to all states and of permitting all nations to ratify international human rights conventions*. Przetachnik makes the point effectively:

These conventions govern questions of great humanitarian importance to all states. Therefore, all states should not only be allowed to participate in these conventions but should also have a right to take part in all forms of free and equal international cooperation regardless of their political or social order, their level of economic development, or their membership in particular international organizations, and irrespective of the recognition of one state by other states. . . .

The principle of the sovereign equality of states includes the right of every state to participate in the creation of rules, the

45. *Id.* at 345-47.

implementation of which affects the interests of all states. The sense here of the principle of sovereign equality is further determined by the requirements of universal international cooperation.<sup>46</sup>

### *A New World Peopled by New Men*

All Marxist human rights thinking – domestic and international – looks forward to a secular “new heaven and new earth, wherein, dwelleth righteousness.” Writes Lenin in a classic passage:

Only in Communist society, when the resistance of the capitalists has been completely broken, when the capitalists have disappeared, when there are no classes (i.e., there is no difference between the members of society in their relation to the social means of production), *only then* “the state ceases to exist,” and “*it becomes possible to speak of freedom.*” Only then a really full democracy, a democracy without any exceptions, will be possible and will be realized. And only then will democracy itself begin to *wither away* due to the simple fact that, freed from capitalist slavery, from the untold horrors, savagery, absurdities, and infamies of capitalist exploitation, people will gradually become accustomed to the observance of the elementary rules of social life that have been known for centuries and repeated for thousands of years in all school books; they will become accustomed to observing them without force, without compulsion, without subordination, without the *special apparatus* for compulsion which is called the state.<sup>47</sup>

Human rights – as an element in the societal “superstructure” along with law itself – must undergo continual dialectic change, and finally “wither away” with the disappearance of the state.

46. *Id.* at 359-60.

47. V. Lenin, *The State and Revolution* (1917), quoted in W. Laqueur & B. Rubin, *supra* note 3, at 181 (italics Lenin's).

Fundamental rights appear at a particular stage of historical development in connection with the bourgeois revolution, and having fulfilled their historical task they similarly disappear in communism. This task consists of furthering the dialectical process of history. First they assist the bourgeois in overthrowing feudal society and in establishing capitalism. Subsequently, and with a different substance, they form an instrument in the class struggle of the proletariat against the capitalists. Finally they serve the interests of the working people under socialism and cancel themselves out for the sake of the complete freedom and equality of communism.<sup>48</sup>

In Marxist states today, where by definition government has reached the penultimate stage of the dictatorship of the proletariat, efforts are being made to hasten the day when subjective rights wither away: “from the program of the Communist Party of the Soviet Union it seems that in the future we can expect to see all distinctions between man's rights and duties vanish in the Communist society.”<sup>49</sup>

Chalidze perceptively observes that this millennial – and frightening – fusion of rights and duties could only result from a

48. G. Brunner, “Communist Analysis of Fundamental Rights,” in 4 *Marxism, Communism and Western Society*, *supra* note 5, at 61. Plainly, the Marxist understands human rights as an aspect of “becoming” rather than “being”. In the Western tradition, human rights have been viewed as a reflection of man's inherent dignity *qua* man, particularly over against the encroachments of state power or the tyranny of some men over others: “they are conceived of as rights inherent in individuals as rational, free-willing creatures, not conferred by mere positive law, nor capable of being abridged or abrogated by positive law” (D. Walker, *The Oxford Companion to Law* 591 [1980]).

49. V. Chalidze, *To Defend These Rights: Human Rights and the Soviet Union* 21 (G. Daniels trans. 1974) [hereinafter cited as V. Chalidze].

"more highly developed consciousness of citizens."<sup>50</sup> But such a transformation of man is indisputable if one grants the premisses of the Marxist world-view: all human ills stem from economic inequities; eliminate these inequities through communist society and man will no longer maltreat his neighbor; human rights will then no longer need to be protected, for transformed people will naturally see rights as duties and duties as rights.

"We have in our hands a truly miraculous method of transformation, our 'philosopher's stone' — the philosophy of Marxism-Leninism," wrote two Soviet ideologues in 1965. "Soviet society is rearing a man whose spiritual and moral qualities are worth more than any treasures in the world."<sup>51</sup> This is the theme of Georgi Smirnov's *Soviet Man: The Making of a Socialist Type of Personality*, where the author declares in his concluding chapter:

The main thing is that, despite all the difficulties, socialism has created conditions, stimuli, norms and goals that have brought about a new type of mass human behaviour, a new type of individual. Its essence lies in an active attitude towards social life, in its deeply rooted interest in the establishment of socialism and communism.

The new man has appeared and is developing, and it is he, his views, his beliefs and ideals, his deeds that determine the future of the Land of Soviets, the future of socialism and communism.<sup>52</sup>

With our theoretical analysis behind us and these remarkable

50. *Id.* at 22.

51. Quoted in D. Powell, *Anti-Religious Propaganda in the Soviet Union 2* (1975) [hereinafter cited as D. Powell].

52. G. Smirnov, *Soviet Man: The Making of a Socialist Type of Personality* 301 (R. Daglish trans. 1973).

claims as a backdrop, let us now turn to the realities of Marxist human rights practice, to see in action the "spiritual and moral qualities" of this "new type of mass human behaviour."

## THE SOCIALIST HUMAN RIGHTS SCENE

### *The Official Picture: Rights Guaranteed Constitutionally*

Marxist writers are not the least bashful in maintaining that their regimes hold high the torch of true democracy and superior human rights protections. In 1962, the New Program of the Communist Party of the Soviet Union declared:

The entire life of Socialist society is based on the principle of broad democracy. Working people take an active part, through the Soviets, trade unions and other mass organizations, in managing the affairs of the state and in solving problems of economic and cultural advancement. Socialist democracy includes both political freedoms — freedom of speech, of the press and of assembly, the right to elect and to be elected, and also social rights — the right to work, to rest and leisure, to education, to material security in old age and in case of illness or disability; equality of citizens of all races and nationalities; equal rights for women and men in all spheres of political, economic and cultural activity. Socialist democracy, unlike bourgeois democracy, does not merely proclaim the rights of the people, but makes it really possible for the people to exercise them. Soviet society insures the real liberty of the individual. The highest manifestation of this liberty is man's emancipation from exploitation, which is what primarily constitutes genuine social justice.<sup>53</sup>

The prime evidence adduced to demonstrate Socialist superiority in practical human rights lies in the formal constitu-

53. Reproduced in W. Laqueur & B. Rubin, *supra* note 3, at 188-89.

tional protections afforded to the citizenry of Marxist lands. "The constitutions of all the socialist states specifically incorporate all economic and social rights as well as civil and political rights to their fullest extent and thus accord them the status of constitutional norms."<sup>54</sup> True,

The formal enunciation of fundamental rights is equally characteristic of bourgeois and of socialist constitutions. Material guarantees are, however, only provided by socialism. This special feature of the socialist constitutional system results in the typical structure of the individual articles dealing with fundamental rights. The particular right is proclaimed in the first paragraph, while the second paragraph sets out the actual institutions through which the socialist state safeguards this right....

According to communist jurisprudence rights without duties are conceptually impossible. Consequently the constitutions of socialist countries do not only guarantee their citizens fundamental rights but also impose upon them basic duties. The maxim "He who does not work shall not eat" commands that the citizen who wants to avail himself of the rights open to him must also take an active part in society. The material preconditions for the implementation of fundamental rights can only be created if the citizen participates in the work of building the socialist society. That is why it is in his own interest to fulfil the basic duties; this alone permits the full exercise of his fundamental rights.<sup>55</sup>

This unique structure of Socialist constitutions can be seen with

54. F. Przetacznik, *supra* note 5, at 349.

55. G. Brunner, "Communist Analysis of Fundamental Rights," in 4 *Marxism, Communism and Western Society*, *supra* note 5, at 61-62. For detailed analysis of Socialist constitutional guarantees, see I. Szabó, *Socialist Concept of Human Rights*, *supra* note 19, at 190-95, 203-225, 234-65. On Bulgaria in particular, see 5 *Human Rights J.* 491-93.

particular clarity in the new Constitution (Fundamental Law) of the U.S.S.R. (1977). Writing of it, Dr. Kartashkin asserts:

The Soviet Union has ensured to its citizens a high level of protection of rights and freedoms through the liquidation of exploitation of man by man and development of socialist democracy. These rights have not only been proclaimed in the Constitution of the USSR and other legislative acts but have also been ensured and guaranteed by establishing for the citizens certain material conditions and concrete means necessary for their realization. Therefore, the ratification by the Soviet Union of the Covenants on Human Rights does not entail any considerable changes in its legislation. A large number of rights and freedoms laid down in these international treaties had been realized in the USSR long ago.<sup>56</sup>

A not dissimilar picture is obtained when one studies the constitutional provisions of the People's Republic of China.<sup>57</sup>

However, the Socialist argument from constitutional guarantees leaves much to be desired. First, the constitutions of Marxist states, in spite of their laudable reinforcement of rights with institutional specifics, display serious inadequacies even in purely formal terms. As an example, Art. 52 of the new Soviet Constitution defines the freedom of conscience as "the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda," and separates "the school from the church." This carefully worded article thus eliminates the right to a religious education and also the right to propagandize (i.e., evangelize) religious beliefs — while guaranteeing atheism

56. V. Kartashkin, "Covenants on Human Rights and Soviet Legislation," 10 *Human Rights J.* 101 (1977).

57. See T. Tsien, *La République Populaire de Chine: Droit constitutionnel et institutions* 47-68 (1970). Cf. also W. Butler, *The Mongolian Legal System* (1982).

those rights.<sup>58</sup> Furthermore, the right to strike (which would appear *prima facie* to be a fundamental economic-social "worker's" right) is conspicuous by its absence from the new Soviet Constitution. Such rights are clearly regarded as threatening state authority — and in the conflict, real or imagined, between state interests and human rights (even those seemingly consistent with Marxist principle), it is the State which prevails.

Secondly, as René David has emphasized:

In the Soviet Union, law and the principle of legality are not binding on the Supreme Soviet. This is explicitly stated; and how could it be otherwise when the law is a mere instrument of policy for the rulers? But such a position has its dangers. Soviet leaders are placed above law by Marxist doctrine itself, for law is considered simply as a means at their disposal, not as an absolute value dictating their conduct.<sup>59</sup>

On the surface this Socialist legal phenomenon may appear to have something in common with certain Western constitutional regimes: one thinks of Parliamentary sovereignty in English law and the rejection of Lord Coke's position in *Dr. Bonham's Case* (1610) that Acts of Parliament can be voided if contrary to the common law.<sup>60</sup> But in spite of the genuine problem this poses for creating an entrenched Bill of Rights,<sup>61</sup> it in no way reaches the

58. See D. Powell *supra* note 51; and *cf.* in general P. Maggs, "Soviet Constitution: In Order to Form a More Perfect Dictatorship," 10 *Human Rights* [ABA] 34-39, 55-56 (Spring, 1982).

59. R. David & J. Brierley, *Major Legal Systems in the World Today* 158 (1968). See also L. Henkin, "Socialist-Communist Constitutions and Human Rights," in his *The Rights of Man Today* 55-78 (1979).

60. "When an Act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control, and adjudge such act to be void" (8 Co. Rep. 1136).

61. *Cf.* L. Scarman, *English Law — The New Dimension* 9-21 (1974).

level of practical constitutional difficulty existing in Marxist lands. For Western democracies such as the United Kingdom have centuries of respect for civil liberties behind them (the Magna Charta, etc.), whereas the brief history of Marxist legal theory and government in the last one hundred and fifty years has been characterized, as we saw in our last chapter, by a voluntaristic and instrumentalist view of legality, hardly conducive to unwavering, strict constitutionalism in the realm of human rights.

The recent Chinese experience is particularly unsettling juridically: in Maoist China the Ministry of Justice was closed down in 1959 and did not reopen for two decades, during which time defendants did not even have the right to counsel; even today, after the ouster of the Gang of Four and the reestablishment of the legal system, a Shanghai attorney emphasizes that adversary tactics are alien to the Chinese Socialist model, there is no presumption of innocence, and "the lawyer's regulations stipulate that our task is first to protect the rights of the state."<sup>62</sup>

Moreover, the extent of governmental and bureaucratic corruption in Marxist lands makes painfully clear that the rule of law sits lightly upon Socialist society. Berman speaks of "the pervasive corruption of Communist society — the widespread bribery, black-marketeering, stealing of state property, drunkenness, and improper use of 'influence' (*blat*)."<sup>63</sup> Such charges have

62. Dai Hanming, quoted in C. Wren, "Revival of Legal Justice in China Moves Beyond 'Rights and Duties,'" *Los Angeles Daily J.*, Dec. 24, 1982, at 3.

63. H. Berman, "Atheism and Christianity in the Soviet Union," in *Freedom and Faith: The Impact of Law on Religious Liberty* 142 (L. Buzzard ed. 1982) [hereinafter cited as H. Berman, "Atheism and Christianity in the Soviet Union"].

been documented *in extenso* and at first hand by Dr. Konstantin Simis, formerly a senior staff member of the Institute of Soviet Legislation and for seventeen years a practicing member of the Moscow Bar Association, who thus concludes his just-published appraisal of the Soviet legal atmosphere:

The Soviet Union is infected from top to bottom with corruption — from the worker, who gives the foreman a bottle of vodka to get the best job, to Politburo candidate Mzhavanadze, who takes hundreds of thousands of rubles for protecting underground millionaires; from the street prostitute, who pays the policeman ten rubles so that he won't prevent her from soliciting clients, to the former member of the Politburo, Minister of Culture Ekaterina Furtseva, who built a luxurious suburban villa at the government's expense — each and every one is afflicted with corruption.

I was born in that country and lived there for almost sixty years. Year after year since childhood and throughout my whole conscious life I watched as corruption ate more deeply into society until it turned the Soviet regime in the sixties and seventies into a land of corrupt rulers, ruling over a corrupted people.... The Soviet citizen rarely comprehends the totalitarian character of the Soviet regime, rarely recognizes his negative relationship to it. He instinctively responds to material deprivations, to lack of freedom, to the complete corruption of those who rule him, to the immorality of the regime by excluding everything connected with the state and the economics of the state from the sphere of moral values.<sup>64</sup>

Official publications such as Zaitsev and Poltorak's *The Soviet Bar*, describing the civil and criminal work of the ordinary Socialist attorney, are true as far as they go, but they present only half the picture.<sup>65</sup> After a painstaking study of "Due Process of

64. K. Simis, *USSR: The Corrupt Society* 297-99 (J. Edwards & M. Schneider trans. 1982).

65. Y. Zaitsev & A. Poltorak, *The Soviet Bar* (I. Lasker trans. 1959).

Law and Civil Rights Cases in the Soviet Union," Christopher Osakwe declares:

The purpose of this study is a very simple one — to establish the existence of certain irrefutable facts, i.e., that in the Soviet Union there are two unacknowledged categories of crimes: political and ordinary; that the process of law that is duly accorded to the handling of these two classes of crimes is essentially different; that in the case of ordinary crimes, a good faith effort is made on the part of the Soviet policy makers to see to it that the applicable laws are evenhandedly applied even though certain violations of the procedural guarantees may be noticed at the operational level of government; that when it comes to the handling of political crimes, the rule of law gives way to unbridled arbitrariness both at the operational and planning levels of government.<sup>66</sup>

And even where Socialist constitutional protections are allegedly the strongest — in the realm of economic and social rights — the record is hardly encouraging. Western capitalist nations have loaned the Socialist bloc four times as much money as the United States ever loaned to European countries under the Marshall plan, thus in effect subsidizing regimes in which the citizenry must tolerate a standard of living vastly below that of the West.<sup>67</sup>

In short, the constitutions and official statements of Marxist governments — however attractive they may be — are no necessary

66. C. Osakwe, "Due Process of Law and Civil Rights Cases in the Soviet Union," in D. Barry, *et al.*, *Soviet Law after Stalin. Part I: The Citizen and the State in Contemporary Soviet Law* 214 (1977). See also A. Kreigel, *Les grands procès dans les systèmes communistes* (1972).

67. Cf. T. Wolton, "Pays de l'Est: inventaire d'une faillite," *Le Point*, Aug. 2, 1982, at 23-29.

guide to actual human rights practice by those states domestically or internationally. Jeanne Hersch perceptively commences her Unesco anthology of lofty human rights affirmations with Mariano Moreno's classic line, written in 1810: "Any tyrant can compel his slaves to sing hymns in praise of liberty."<sup>68</sup> We must go beyond the official picture to the actual practice of human rights in Marxist lands.

### *Marxist Reality: Rights without Remedies*

Much has been written about human rights practice behind the Iron Curtain and elsewhere in the Socialist world. We can do no more here than to catalog the results of competent, primary-source, non-hearsay investigations, while at the same time providing ample bibliographical references to the literature of the subject. Those who doubt our conclusions are welcome to check the data for themselves. As a sidelight, it may be of interest to mention that this writer has extensive personal knowledge of the German Democratic Republic, having travelled there yearly over the last two decades. On my first visit, I asked the late director of the Lutherhalle in Wittenberg, Dr. Oskar Thulin, about the red propaganda signs everywhere proclaiming "Freiheit." "Yes," he replied, "and that's the only place you'll see freedom here."<sup>69</sup> My subsequent experiences have amply confirmed that judgment.

We employ a geographical classification (by state), concentrating particularly on the Soviet Union, and then briefly comment on Socialist international relations vis-à-vis human rights. Some concluding remarks on the contradiction between profession and practice in the Marxist human rights sphere will

68. J. Hersch, *Birthright of Man* (1969).

69. J. Montgomery, "A Day in East German Luther Country," in his *In Defense of Martin Luther* 155-56 (1970).

bring us to our last chapter, focusing on critique.

*The U.S.S.R.* It is a matter of common knowledge that, regardless of official pronouncements to the contrary, severe human rights problems exist in the most powerful Marxist nation in the world. Human rights violations are endemic in the following areas: (1) *Freedom of expression*. One need only read the testimonies of such writers as Sakharov, Medvedev, and Sparre to see how great is the intolerance toward dissent – even when it is constructive and based on Socialist principles – and how severe are the punishments for expressing it.<sup>70</sup> (2) *Freedom of religion*. John Glad, in his review of Boiter's *Religion in the Soviet Union*, summarizes the government policies which he terms "frankly draconian in nature" – policies implemented by the Council on Religious Activity, "a secretive regulatory bureaucracy whose ultimate goal is the total elimination of all religions."

It is a crime in the Soviet Union to conduct religious instruction for minors, to refuse to work on religious holidays, to hold religious services outdoors, to maintain a religious library or reading room, to arrange concerts of sacred music or literary evenings of a religious nature, to organize church sewing circles or playgrounds and recreational activities for children, to undertake pilgrimages to holy places, to baptize in rivers or lakes, to render charitable aid for sick or aged church members, or to produce religious artifacts.<sup>71</sup>

The miseries of those whose consciences force them to disregard

70. A. Sakharov, *Sakharov Speaks* (H. Salisbury ed. 1974); R. Medvedev, *On Soviet Dissent* (1980); V. Sparre, *The Flame in the Darkness: The Russian Human Rights Struggle* (A. & D. McKay trans. 1979).

71. 3 *Human Rights Q.* 156-57 (Fall, 1981). Cf. H. Berman, "Atheism and Christianity in the Soviet Union," *supra* note 63 at 127-43; and D. Powell, *supra* note 51.

such crushing regulations have been accurately described by Michael Bourdeaux in a Keston College staff study.<sup>72</sup>

(3) *Class discrimination and the persecution of minorities.* Chalidze has effectively argued that "since the very inception of the Soviet state, Soviet law has been characterized by class discrimination" — for the state and the law are regarded as a machine for the oppression of one class (the alleged exploiters) by another (the proletariat, as "represented" by the Communist Party).<sup>73</sup> And Milovan Djilas has perceptively observed that this new class system can be at least as unjust and cruel as the system it replaced by revolutionary action.<sup>74</sup> Moreover, apart from such built-in discrimination, the Soviet Union has treated its ethnic minorities with appalling harshness. The victimized people of the Ukraine constitute a particularly sad example.<sup>75</sup> And in spite of glowing claims that the Socialist woman is truly liberated from exploitation, a recent study, not limited to the U.S.S.R. but focusing on it, has shown that the Marxist political structure has kept women in a subordinate role according to the needs of the

72. M. Bourdeaux, "The Persecution of Christians in the U.S.S.R.," in 4 W. Veenhoven, *Case Studies on Human Rights and Fundamental Freedoms: A World Survey* 535-68 (1975-1976) [hereinafter cited as *Case Studies on Human Rights*]. See also, as a touching individual instance, A. Skripnikova, *Aida of Leningrad* (X. Howard-Johnston & M. Bourdeaux ed. 1972).

73. V. Chalidze, *supra* note 49, at 9-14.

74. M. Djilas, *The New Class: An Analysis of the Communist System* (1957).

75. See the following model studies: G. Panczuk, "Human Rights and the Soviet Union," 10 *World Justice* 224-55 (1968); W. Dushnyck, "Discrimination and Abuse of Power in the USSR," in 2 *Case Studies on Human Rights*, *supra* note 72, at 445-555; E. Rozek, "The Problem of National Minorities in the Soviet Union," in 4 *Case Studies on Human Rights*, *supra* note 72, at 461-96.

state; the author concludes: "Marxism as an ideology of economic revolution has proved wanting as a conceptual vehicle for feminism."<sup>76</sup>

(4) *Inhuman punishment.* Solzhenitsyn's firsthand descriptions of the Gulag are too well known to require commentary here. Suffice it to say that such camps — as well as Soviet techniques of psychiatric "rehabilitation" — can by no means be relegated to the Stalinist era. Erickson, on the basis of data from the *Samizdat Bulletin*, thus describes conditions in the some forty-one extermination camps in operation in the U.S.S.R. in 1980:

There are three categories of "extermination camps" in the USSR: 1) camps where work requires lethal exposure while mining and processing uranium ore; 2) camps where prisoners are exposed and often get leukemia (i.e., changing exhaust nozzles of military nuclear submarines); 3) camps where workers develop tuberculosis, blindness, etc. from exposure to acetone or mica. Prisoners get five to ten year terms in such camps for believing in God; desiring to emigrate; reading forbidden books; signing petitions advocating democracy; fighting for one's national rights and independence.<sup>77</sup>

The foregoing categories of human rights violations (religious and minority persecution, inhuman treatment) come specially to focus when one considers (5) *the plight of the Soviet Jew, especially in reference to emigration.* Anti-Semitism has characterized Marxist theory and practice from the time of Marx's own writings

76. B. Jancar, *Women under Communism* (1978); critically reviewed by S. Pritchard in 4 *Human Rights Q.* 302-304 (Spring, 1982).

77. N. Erickson, *Theory and Practice in Contemporary Marxism: A Christian Response* 15, 22-23 (1982); cf. "Extermination Camps in the Soviet Union," *Samizdat Bull.*, Aug. 1980, at 1-4. For the general picture, see S. Possony, "From Gulag to Guitk: Political Prisons in the USSR Today," in 1 *Case Studies on Human Rights*, *supra* note 72, at 1-38.



(where the Jew is ridiculed and castigated as the archetypal greedy capitalist)<sup>78</sup> to the 1973 Paris trial of the *USSR Bulletin*<sup>79</sup> and current miseries of Russian Jews who have had the temerity to want to leave the Motherland.<sup>80</sup> A particularly revealing example is the trial of Jewish physician Mikhail Stern, whose desire to emigrate resulted in absurd charges against him and the most blatant trumped-up evidence defaming him.<sup>81</sup> After carefully studying "the right to leave and to return in the USSR," Louis Pettiti concluded: "The Soviet Union is not the only country in the world which does not implement the right of every person to emigrate. But nowhere else, perhaps, is the problem so glaring. And nowhere else is there such a gap between official statements and actual practice."<sup>82</sup>

78. K. Marx, *A World without Jews* (D. Runes ed. 1960).

79. E. Litvinoff, *Soviet Anti-Semitism: The Paris Trial* (1974).

80. See, *inter alia*, S. Possony, "Anti-Semitism in the Russian Orbit," in 2 *Case Studies on Human Rights*, *supra* note 72, at 405-44; L. Boim, "The Soviet Law of Nationality and Its Application to Jews," 3 *Israel Yearbook on Human Rights* 173-201 (1973); "International Legal Colloquium: Soviet Jewry and the Rule of Law (London, September 1974)," 4 *Israel Yearbook on Human Rights* 245-332 (1974); L. Boim, "The Passport System in the USSR and Its Effect upon the Status of Jews," 5 *Israel Yearbook on Human Rights* 141-68 (1975); W. Korey, "Legitimizing Anti-Semitism: The Role of the Soviet Academy of Sciences," 9 *Israel Yearbook on Human Rights* 140-59 (1979); L. Boim, "The Russian-Pravoslav Roots of Soviet Anti-Semitism," *id.* at 160-80; "Soviet Jewry and the Rule of Law: Second International Legal Colloquium (London, October 1979)," *id.* at 278-333 (includes the case of Ida Nudel).

81. M. Stern, *The USSR versus Dr Mikhail Stern: An 'Ordinary' Trial in the Soviet Union* (A. Stern ed. 1978). Cf. B. Kochubiyevsky, *A Hero for Our Time: The Trial and Fate of Boris Kochubiyevsky* (M. Decter ed. 1970).

82. L. Pettiti, "The Right to Leave and to Return in the USSR," 5 *Israel Yearbook on Human Rights* 275 (1975). Cf. "One Year after Helsinki: A

Pettiti has touched the heart of the matter. The same point was made with even greater force by Lord Lloyd of Hampstead in a 1980 lecture at the Tel Aviv University Faculty of Law:

If you take . . . the Soviet Union, there are all kinds of ghost-like guarantees contained in its so-called constitution. In fact, the Soviet Union has produced a new constitution as recently as 1977, instead of the earlier one which incidentally came to light under Stalin (and we all know what human rights were like under that gentleman's regime — anybody who doesn't should study the *Gulag Archipelago* by Solzhenitsyn). In this new constitution, instead of a mere twelve articles conferring a series of human rights on the happy Soviet citizen, there are now twenty-five articles conferring rights, all, of course, subject to an omnibus qualification that the exercise of any such rights must not harm the interests of the State which, you might all agree, is a rather considerable qualification. And we know, of course, that notwithstanding the Helsinki agreement and notwithstanding this Bill of Rights in the Soviet Constitution, little or no attention is paid to such matters.

Your Dean was kind enough to refer to my role in those conferences about Soviet Jewry and, of course, we explored in considerable depth appalling instances of the way that the Soviet Union harasses dissidents, and in particular Jews, who desire to do no more than exercise their rights as seemingly granted under the Soviet Constitution and under the Helsinki agreement — in particular, the right to leave their own country if they so wish. And we have, of course, and they are sadly well-known enough, cases such as those of Yosef Begun and Ida Nudel, who have suffered, and are at this very moment suffering, appalling persecution at the hands of the Soviet authorities, sent to Siberia under dreadful conditions, for committing imaginary offences which simply were the result of their asking to leave the country so that they could go to Israel.

Group of Soviet Citizens' Reports (1976)," in W. Laqueur & B. Rubin, *supra* note 3, at 296-97.

And therefore, as I say, I am not concerned with Bills of Rights in relation to countries of that sort, because I think we will all agree that in that situation they are not worth the paper they are written on.<sup>83</sup>

*Other Socialist Countries.* Human rights violations already met with in the U.S.S.R. recapitulate themselves in other Socialist lands, both because of the pervasive influence of the Soviet model and because of common adherence to the Marxist-Leninist worldview. Thus, to take but one example, the problem of emigration from East European countries parallels that in the U.S.S.R. — and is even more agonizing in one of them, viz., the German Democratic Republic.<sup>84</sup> In the DDR, there was a common saying — at least before the recent events in Poland — to the effect that “Poland has much freedom and no bread; we have much bread and no freedom.” The religious situation in East Germany gives more than a little support to this aphorism.

The SED [Socialist Unity Party] continues to regard religious belief as an anachronism which must either be demythologized and subsumed under a materialistic socialism or tolerated merely as ritualistic formula having no relevance to

83. Lloyd of Hampstead, “The Controversy regarding a Bill of Rights,” 10 *Israel Yearbook on Human Rights* 248-49 (1980). Cf. “Où vit-on libre dans le monde?,” *Le Point*, Sept. 27, 1982, at 71-86.

84. J. Toman, “The Right to Leave and to Return to Eastern Europe,” 5 *Israel Yearbook on Human Rights* 276-365 (1975). Cf. International Commission of Jurists, *The Berlin Wall: A Defiance of Human Rights* (1962). On human rights in general in Eastern Europe, see W. Dushnyck, “Human Rights in Communist Ruled East-Central Europe,” in 1 *Case Studies on Human Rights*, *supra* note 72, at 377-443; and the exceedingly useful bibliographic essay by R. Greenfield, “The Human Rights Literature of Eastern Europe,” 3 *Human Rights Q.* 136-48 (Spring, 1981).

everyday life. Freedom of conscience is interpreted narrowly. Individuals may persist in religious belief, if they must, but they may neither proselytize nor interfere with the government's efforts to promote Marxism-Leninism. Although a member of the West German Communist Party, Robert Steigerwald undoubtedly reflects the orthodox Marxist-Leninist perspective which informs the SED's policy toward believers. He rejects the suggestion that Marxists ought to facilitate dialogue with Christians by guaranteeing the continued existence of Christianity in communist states. The only thing that can be guaranteed is that the struggle against religion will be carried out “only by ideological means in light of general legal provisions on freedom of conscience and performance of religious cults.” Steigerwald makes clear his assumption that under socialism religion will wither away. Given this perspective, the state's monopoly of control over all important aspects of social life, and the regime's intolerance of ideological challenge, believers will always be under pressure in the GDR, particularly in the schools.<sup>85</sup>

Since the military takeover in Poland on 13 December 1981, civil liberties have been ruthlessly repressed, in defiance of clear and requisite legalities; and it is particularly ironic that the most troubling element to the regime (which allegedly represents the will of the working classes) has been the activity of Solidarity, a free labor union movement.<sup>86</sup>

85. S. Hoffmann, *Christian-Marxist Dialogue in a Communist State: 'Critical Solidarity' in the German Democratic Republic* 23 (1982). From the Socialist standpoint, see H. Klenner, *Freiheit, Gleichheit und so weiter: Dreizehn Streiflichter über die Menschenrechte* (1978); W. Weichelt, “Bemerkungen zum Begriff der Menschenrechte,” in W. Grahn, et al., *Zur marxistischen Rechtskonzeption* 93-104 (1979); and the valuable *Spezialbibliographie über die in der DDR zu Problemen der Menschenrechte und der Verfassungsmässigen Grundrechte erschienene Literatur (Auswahl), Zeitraum 1945-1975* (1975).

86. See G. Soulier & J. Ziller, “Les obligations internationales de la Pologne en matière de droits de l'homme,” in A. Fenet, et al., *Droits de l'homme, droits des peuples* 131-47 (1982).

Hungary has rightly been praised among Socialist lands for her academic reputation in the human rights field.

The attempts initiated in Hungary to draft a comprehensive theory of fundamental socialist rights are most noteworthy. Here a conflict of interests between the state and the citizens is not excluded from the outset. It is recognized that even under socialism defensive rights of the citizen as against the state are necessary to a certain extent. Fundamental rights are intended to be expressive of the relationship between the state and the citizen in its legal universality, while they assume concrete form in the principles governing specific branches of law.<sup>87</sup>

At the same time, practical juridical protections are at least as low an ebb in Hungary as in other Eastern bloc countries. Dr. Lajos Kálmán, an eminent Hungarian attorney, has detailed the jettisoning of due process through the use of so-called "zero lawyers" (counsel that sell themselves to the ruling party) and the insertion of "procurators" – supposedly ombudsmen but in fact protectors of state interests – not only into criminal but also into civil cases.<sup>88</sup> Even in Yugoslavia, the politicization of the courts is rampant; after personally observing the trial of Yugoslav poet and literary critic Valdo Gotovac, Charles E. M. Kolb wrote:

My conclusion is that the Gotovac trial was a travesty of justice. Insofar as Vlado Gotovac's human rights inside Yugoslavia are concerned, they must be deemed to be nonexistent. Had Vlado Gotovac been a terrorist, or perhaps a violent extremist of separatist, then perhaps my observations and conclusions would have been otherwise. But he clearly is not.<sup>89</sup>

As for Cuba and China, even after generously recognizing the many and varied evils of their pre-revolutionary governments, one can only conclude that in these now regimented Marxist societies human rights are trampled upon at least as much if not more so today.<sup>90</sup>

*International Intervention.* Earlier in the present chapter we observed the great stress Socialist human rights theorists place upon the principle of domestic sovereignty, and their revulsion at any interference in the domestic affairs of a sovereign state. However, in line with Marxist instrumentalism, this principle is applied very selectively: Western capitalist nations are condemned for "interventionist activity" (e.g., the U.S. in Vietnam), while the Warsaw pact nations are justified in crushing by military means the Prague springtime,<sup>91</sup> Castro has every right to send

87. G. Brunner, "Communist Analysis of Fundamental Rights," in 4 *Marxism, Communism and Western Society*, *supra* note 5, at 61.

88. L. Kálmán, *The Lawyer in Communism: Memoirs of a Lawyer behind the Iron Curtain* 57-58, 77 (1960); the appropriate nickname "zero lawyer" came about because the file numbers of political cases began with the figure 0. The system of Prokuratura exists in most Socialist states; L. Boim and G. Morgan, in their work, *The Soviet Procuracy Protests: 1937-1973* (1978), after studying 826 cases to see if the interventions of the procurator occurred to protect the freedoms of the litigants or to support state interests, found that his role is far more that of defender of the Socialist regime than advocate of justice and human rights.

89. C. Kolb, "The Criminal Trial of Yugoslav Poet Vlado Gotovac: An Eyewitness Account," 4 *Human Rights Q.* 210 (Spring, 1982).

90. See H. Portell-vilá, "Cuba: The New Dominant Caste," in 3 *Case Studies on Human Rights*, *supra* note 72, at 369-95; W. Kuo, "Oppression and Persecution in Communist China," *id.* at 303-328; S. Jagchid, "Discrimination against Minorities in China," 2 *Case Studies on Human Rights*, *supra* note 72, at 389-403; P. Hyer, "The Mongolian Nation within the People's Republic of China," in 1 *Case Studies on Human Rights*, *supra* note 72, at 471-507.

91. On the 1968 invasion of Czechoslovakia and human rights, see M. Moskowitz, *International Concern with Human Rights* 56-63 (1974). Cf.

military aid and "observers" to the African continent, and the U.S.S.R. is merely responding to a cry for help from the legitimate government when she invades Afghanistan.<sup>92</sup> Writes Professor Tedin: "Our analysis indicates human rights remain, to a large extent, a cold war issue. It is difficult to point to even one case where Soviet support for implementation has not also been an attempt to embarrass the West."<sup>93</sup>

### *The Contradiction between Profession and Practice*

Laqueur and Rubin place much emphasis upon the fact that

There are profound contradictions in Marxist thinking on human rights. In theory, communism's aim is to improve the lot of the vast majority. Its analysis, however, claims that the human rights most commonly enumerated are only "bourgeois" rights, benefiting one class exclusively. A "proletarian dictatorship" would spread fundamental rights, foremost among them being economic rights.

In rhetoric, Marxist states spend much time proclaiming their adherence to free speech, freedom of religion, and so forth. In practice, they restrict individual rights to a minimum with an efficiency hitherto little seen. While "class" ideology, on the one hand, is used to justify this behavior, on the other hand, there is an explicit legal acceptance of the basic human rights so important in the West. The conflict between theory and practice and

also "Czechoslovakian Charter 77 Declaration (1976)," reprinted in W. Laqueur & B. Rubin, *supra* note 3, at 292-96.

92. "The Soviet Union . . . does not interfere in the internal affairs of other countries" — L. Brezhnev, "Speech to the Sixteenth Trade Union Council," *id.* at 309.
93. K. Tedin, "The Development of the Soviet Attitude toward Implementing Human Rights under the UN Charter," 5 *Human Rights J.* 418 (1972).

the contradiction between state law and actual procedures are very sharp.<sup>94</sup>

Just how acute the contradiction is between Marxist profession and practice can be seen from the following passages — the first from a prominent Hungarian human rights scholar, the second from an eminent critic of Marxism.

When now the attitude of socialist countries to international conventions on human rights is scrutinized, the following conclusions appear to be justified:

The socialist countries were in general among the first to participate in every international convention which in reality served the protection of human rights.

In many cases it was the signature of a convention by the socialist states that helped it to become operative. So the USSR first acceded on the 12th April 1957 to the convention on the prohibition of slavery signed in Geneva on the 7th September 1956; thus on the 30th April 1957, when a second state signed it, the convention became operative.

The socialist countries promoted the signature of conventions purposing the protection of human rights not only by becoming signatories to them, but also by making efforts to take up truly progressive provisions in them.<sup>95</sup>

Whatever the material achievements [of Socialism], the price paid has been high. Estimates of the cost in human lives vary, but tens of millions certainly perished prematurely for political reasons. Stalin is credibly held accountable for about 20 million victims in a single decade, 1929-1939, most of them casualties of the labor camps. As the Soviet dissident Roy Medvedev commented, what the last tsars' political police accomplished in

94. W. Laqueur & B. Rubin, *supra* note 3, at 179.

95. H. Bokor, "Human Rights and International Law," in I. Szabó, *Socialist Concept of Human Rights*, *supra* note 19, at 307.

a year, Stalin did in a day. Under the banner of Marxism, Stalin caused suffering on a scale without historical precedent.

On the debit side must also be entered the loss of political and cultural freedom. Compared to the Soviet Union of Stalin's time or even our own, tsarist Russia in its last decade was a free country, with competing political parties and a press which, though checked by censorship, spoke out fairly freely....

The Russian mind has been shrunken and compressed for half a century.... Soviet science has been much more productive than have the arts, but it too has suffered from the ideological straitjacket. Not only have semi-Marxist strictures played havoc with Soviet genetics (Lysenkoism), but other sciences, such as psychology and anthropology, have been cramped by the need to adhere to Marxist views, especially those of Engels. For example, Soviet psychologists have been tied to the Pavlovian conditioned reflex, a means of analyzing the personality strictly as a product of environment. Sociology has been narrowly limited to studies useful to the state, while philosophic thought has been prostituted. The only sensible course for Soviet citizens is to avoid unnecessary thinking, submitting to the categories and absolutes of Marxism as interpreted by the superior wisdom of the party....

A weighing of other Marxist-Leninist countries would yield similar results: some material benefits from centralization, against the material costs of overcontrol and the psychological or spiritual costs of nonfreedom. The Soviet-controlled countries of Eastern Europe, starting from a higher level, had more to lose than the Soviet Union, and there the balance may be more negative. On the other hand, Westerners are more leniently disposed toward Maoism and the Chinese experiment, because the Chinese had less to lose. If the people have become more strictly disciplined and conformist than the Russians, the well-nourished and fairly neatly dressed masses of today are a happy contrast to the hungry and tattered people of yesteryear. Intellectually, however, China has been even more straitjacketed than Russia. Not much is left, for better or worse, of the cultural heritage of the Middle Kingdom. When a would-be industrialized country can go through such aberrations as the

Great Leap Forward and the Great Proletarian Cultural Revolution and shut down its secondary and higher education for many years, or can reserve its presses for the turgid works of Chairman Mao, the outlook for its long-term development is not bright. China, moreover, like the Soviet Union and other Marxist-Leninist states, seems totally unable to come to grips with the biggest problem of its future, the allocation of political power.<sup>96</sup>

If the contradiction between profession and practice displayed in such stark focus by these quotations – as well as by the detailed discussion preceding them in this chapter – is admitted in fact to exist, the vital question becomes: how to explain it? Specifically, is the profession-practice dichotomy in Marxism simply a reflection of the common phenomenon that no world-view lives up to its ideals? Can we merely attribute the consistent violations of human rights and fundamental freedoms by Socialists to the misguided activities of “fellow travellers” rather than to the labors of the true saints? Or are there basic problems inherent in Marxist philosophy, jurisprudence, and human rights theory which necessarily lead to the practical miasma we have encountered? Our final chapter seeks to provide the answer.

96. R. Wesson, *Why Marxism? The Continuing Success of a Failed Theory* 192-94 (1976).

IV.

**CRITIQUE OF THE MARXIST APPROACH  
TO HUMAN RIGHTS**

#### IV. CRITIQUE OF THE MARXIST APPROACH TO HUMAN RIGHTS

Of Socialist dissident Roy Medvedev's book, *On Soviet Dissent*, a reviewer has written:

Ideologically Medvedev belongs to that large group of disenchanted Marxists who do not accept the idea that communism does not work just because it is an outdated political theory; they think the explanation does not lie in the theory itself but in the ways it was put into practice. There is nothing wrong with communism itself—goes this theory—if we could just make it function properly; if we, the true Marxists, would have the power.<sup>1</sup>

Our preceding chapters, though devoted almost entirely to exposition and not critique of the Marxist intellectual construct, have nonetheless strongly suggested that the Socialist problem lies deeply embedded in the Marxist view of reality.

We are now in a position to determine if this is in fact the case, and we shall proceed in the order of our prior discussion: first we shall critique the fundamental tenets of the general Marxist world-view (cf. chapter one); then the validity of the Socialist philosophy of law will be examined point-by-point (cf. chapter two); and finally we shall draw all aspects of our study together by offering detailed criticism of the Marxist human rights theory *per se* (cf. chapter three). The monolithic nature of the Socialist position lends itself to this architectonic style of critique: we shall quickly discover that difficulties appearing in the Marxist system at early stages of our analysis will have the gravest consequences for Socialist human rights theory as that becomes the focus of our criticism.

1. V. Georgescu, in 3 *Human Rights Q.* 149 (Spring, 1981).

## AN EVALUATION OF THE MARXIST WORLD-VIEW

It would go beyond the scope of the present work to attempt a comprehensive critique of Marxist philosophy. Our aim here is more modest: to determine the truth-value of those basic tenets of the Socialist *Weltanschauung* which bear directly on its jurisprudence and human rights theory. Five cardinal Marxist principles will draw our critical attention, and we shall briefly treat them in the order in which they were presented as successive layers of the Marxist pyramidal model in chapter one (the materialistic metaphysic; the Hegelian dialectic; the economic interpretation of history and the surplus-value theory: class-war and the dictatorship of the proletariat; and the ultimate classless society).

*Materialism*

As we have seen, materialism is the linchpin of the entire Marxist world-view: the subalternate logical relationship between materialistic metaphysics and all other elements of the system means that a falsification of materialism would at the same time constitute a falsification of the system as a whole, including its legal philosophy and human rights theory. Elsewhere I have endeavored to provide just such a refutation. Since "in a materialist theory there are no necessary beings and no supernatural interventions in the course of nature" and since "materialists must show there is no reason to believe in survival of bodily death,"<sup>2</sup> my approach has been to offer primary-source, historical, non-hearsay, eyewitness evidence — at the level of the legal test of "moral certainty, beyond reasonable doubt" — in

2. K. Campbell, "Materialism," in 5 P. Edwards, *The Encyclopedia of Philosophy* 184 (1967) [hereinafter cited as *Encyclopedia of Philosophy*].

support of the miraculous intervention of God in Jesus Christ into human history and his proof of life after death through his resurrection from the dead.<sup>3</sup> The importance of this reasoning for human rights *per se* will become plain at the very end of this chapter, where we will see that a transcendent source of human dignity is a logical *sine qua non* for any meaningful doctrine of human rights.

Moreover, from a purely methodological standpoint, as McDougal, Lasswell, and Chen observe,

It has become increasingly clumsy to divide all factors in psychological and social processes into the "material" and the "nonmaterial." A two-term system can, of course, be made to serve some purposes of investigation. However, its utility is modest in any case, and the hazards of rigidifying an entire approach into empty verbal dialectic are greatly increased in such a limited system.<sup>4</sup>

And "rigidity" and "emptiness" are by no means the worst of the deleterious consequences of the materialistic interpretation of human affairs. The Marxist has an overwhelming tendency to relate all human conduct to material considerations, thus trivializing human activity and the actors in the human drama. We are told that "great composers like Bach could not even have expressed their genius if they had had nothing to eat." Such arguments miss the point that though eating is a *necessary*

3. J. Montgomery, *The Shape of the Past* (2d ed. 1975); *Where Is History Going? Essays in Support of the Historical Truth of Christian Revelation* (1972); *The Law Above the Law* (1975); *Faith Founded on Fact* (1978). On the case for God's existence, see J. Montgomery, "Is Man His Own God?," in his *Christianity for the Toughminded* 21-34 (1973).

4. M. McDougal, H. Lasswell & L. Chen, *Human Rights and World Public Order* 79 (1980) [hereinafter cited as M. McDougal, H. Lasswell & L. Chen].



condition to explain human conduct, it is by no means a *sufficient* explanatory factor.

Materialism so skews the overall picture of human life that it cannot avoid diminishing the importance of the ideological and spiritual dimensions of man's existence. Nothing could be more serious where human rights are concerned, for the neglect of civil liberties and the transcendent will assuredly dehumanize the citizens of any nation. It is still an empirical truth that "man does not live by bread alone."

### *The Dialectic Process*

Marx, in turning Hegel's idealistic dialectic on its head, nevertheless retained one of Hegel's most fundamental conceptual errors: the assumption that a dialectic process (whether idealistic or materialistic in nature) must move onward and upward to a positive goal. In reality, the dialectic is no more than a formal principle of interacting opposites which neither discloses the goal of the process nor places any value judgment upon it. The dialectic can describe a continual refinement of evil as well as a continual refinement of good. Nothing about the dialectic itself necessitates the attainment of a classless society (or, for that matter, Hegel's idealistic goal of freedom).

Why did Hegel and Marx gratuitously assume that progress was built into the dialectic and thus into human history? For the simple and understandable reason that they uncritically absorbed the progressivistic, optimistic, evolutionary mind-set of the 19th century — which in turn had secularized the biblical promise of a divine goal to history and was living off its inherited capital.<sup>5</sup> But

5. J. Montgomery, "Progressivistic Mirage," in his *The Shaping of America* 69-87 (1976).

today's Marxist, enmeshed in the 20th century world of global wars, genocidal death camps, and potential nuclear holocaust, no longer has any sociological justification for holding to Marx's unverifiable dialectic hope. Absent any transcendent, divine word to the contrary, the interaction of secular opposites can as readily lead to a hell on earth as to utopian bliss. If one is oblivious of this fact, one can grossly neglect the preservation and promotion of those human rights which spell the difference between Milton's *Paradise Regained* and Orwell's 1984.

### *Economic Reductionism*

No intelligent person doubts the importance of economic factors in life, and Marxism deserves much praise for redirecting the attention of modern man to the pervasive effect of economics on all aspects of societal activity. Nonetheless, "the adequate performance of the scientific task is thwarted by exaggerated deference to the weight of the economic variable. Explanations that stress the predominating significance of a single causal factor are in a peculiarly vulnerable position as knowledge advances."<sup>6</sup>

In point of fact, the economic aspect of life is but one way of looking at the total human condition — one of many spotlights (such as the political, the educational, the cultural, the religious) in the light of which man's experience can be better understood and hopefully ameliorated. Trouble arises the moment any one of these factors is elevated to the status of the necessary explanation or source of all the rest. Such reductionism warps the nature of human experience and often results in superficial solutions to profound problems. To take a homely example: economic difficulties are probably a fruitful source of marital discord; but it does not follow that once a couple's budgetary problems are

6. M. McDougal, H. Lasswell & L. Chen, *supra* note 4, at 79.

solved they cannot find other sources of conflict (nor does it follow that only the marriages of the poor and the exploited break up).

The particular danger of economic reductionism in the human rights field lies precisely at this point. If one believes that the ownership of the means of production in society ultimately determines the character of all rights, one will concentrate almost exclusively on economic solutions to human rights problems and one will neglect other equally important avenues of preserving and promoting human dignity. One will also acquire a most dangerous blindspot: the tendency to assume that all is well for human rights where one's accepted economic policies prevail, and that human rights are automatically trampled upon where an unacceptable economic system dominates.

### *Class-War*

Karl Löwith makes the related point that "even if we assume that all history is history of class struggles, no scientific analysis could ever infer from this that class struggle is *the* essential factor that 'determines' all the rest."<sup>7</sup> Historical events since Marx's day have belied his prophecy that only revolution against capitalism will satisfy the proletariat. Labor unions and governmental anti-trust and antimonopolistic legislation have given workers such a high standard of living in the West that good television reception is closer to their hearts than a forceful overthrow of society!

Here, again, Marx was a victim of the limited historical perspective afforded by his 19th century society. But when late 20th century Marxists continue to insist on the inevitability of

class-war they belie their insistence that the right to peace is a fundamental human right, without which other human rights and fundamental freedoms do not even exist. One cannot have it both ways: if the Marxist program regards class conflict and class-war as positive dialectical phenomena, then Marxists cannot put themselves in the vanguard of the peacemakers.

Class-war, we are told, will inevitably usher in the dictatorship of the proletariat, and then that final form of the state will in turn "wither away." It should not be necessary to point out that to date no Socialist state has withered away, or indeed shows any tendencies toward doing so. The U.S.S.R., for example, offers excellent evidence that human nature requires the continuing restraint of government, and that a Marxist state, far from withering away, shows great rigidity and a powerful inclination to fall under the control of a new class — not a temporary dictatorship of the proletariat but a permanent dictatorship of bureaucratic totalitarians.<sup>8</sup> And the mere fact that orthodox Marxism places a positive value on dictatorship, however temporary it is supposed to be, leaves one with feelings of deep disquiet as to the seriousness or practical significance of its verbal crusades against tyranny and human rights violations.

### *The Classless Society*

The eschatological hope of Marxism displays Socialism's ambiguous, confused view of human nature — a subject of such importance that we shall return to it at the very end of this critique. For the moment one need only note that for Marx and his followers human beings are evil exploiters of one another (they manipulate unjust economic systems of their own creation to the

7. K. Löwith, *Meaning in History* 43 (1957).

8. Cf. M. Djilas, *The New Class: An Analysis of the Communist System* (1957), and K. Popper, *The Open Society and Its Enemies* (4th ed. 1963.)

detriment of their fellows and for personal gain), and yet they are capable of an idyllic, classless existence once a suitable economic environment is provided.

Plainly a new human nature is required for such a goal to be realized. But, as G. W. Smith of the University of Lancaster argues, "once the thesis as to the largely social nature of personal identity is annexed to the idea that involuntary social relations are abolished in communism, the possibility of accounting for the enduring individual seems to evaporate." He continues:

Liberals often accuse Marx of suppressing the individual in the name of communal solidarity, and they typically see this suppression as taking the form of forcibly subordinating the individual to the general will. Those Marxists who do not profess to disdain individual liberty usually reply by maintaining that, on the contrary, individual liberty is fully and completely realized only in communism. Both parties in fact badly under-rate the conceptual revolution implied for our inherited ways of looking at ourselves and others in Marx's metaphysics of freedom. To claim that the individual is neither suppressed nor liberated in communism because he cannot conceivably exist there in the first place is perhaps excessive, but the exaggeration might at least serve to raise a question rarely asked with seriousness, namely: In what way is the 'new man' of communism recognizable as a man!<sup>9</sup>

The only answer appears to be that he is *unrecognizable*, for he represents a qualitative transformation for which we lack any historical example. Moreover, though he is analogous to a religiously reborn person, no divine grace operates as the effective agent in re-creation and no divine Savior serves as a model of

9. G. Smith, "Marxian Metaphysics and Individual Freedom," in G. Parkinson, *Marx and Marxisms* 241-42 (1982) [hereinafter cited as G. Parkinson].

what this rebirth would practically signify. Once again, Marxism displays itself as a secular religion, trying to have the benefits of a new creation without the presumed disadvantages of a transcendent Redeemer.<sup>10</sup>

For political scientist Eric Voegelin, that Marxist effort at "immanentizing the eschaton" is the unpardonable historical sin. He terms it *metastatic gnosis*: the idea that "the Christian idea of supernatural perfection through Grace in death [should be] immanentized to become the idea of perfection of mankind in history through individual and collective human action."<sup>11</sup> And he

10. Cf. F. Lee, *Communist Eschatology* (1974). Erickson, following Clark Williamson, identifies "sixteen points on which the Marxist and biblical prophetic interpretations of history coincide. These are: 1) history has a meaning of its own; 2) history has an aim, an end, a beginning and a center; 3) the content of history is the fight between the forces of good and evil; 4) each is characterized by an eschatological mood; 5) each arises as an attack on an existing order; 6) each believes that the transition to a new order will occur only by the medium of a catastrophic event of events; 7) each seeks the establishment of a kingdom of peace and justice; 8) each thinks the kingdom is at hand; 9) each regards certain minority groups as the bearers of historical destiny (poor, slaves, etc); 10) each posits that man is not what he ought to be but is fallen and estranged; 11) each regards man as an historical social being; 12) each defines truth in terms of the union of theory and practice, i.e. truth must be done; 13) each holds that only the elect can know the truth; 14) each mounts a protest against idols or ideology; 15) each thinks salvation is possible and inevitable; 16) each looks for the coming of a new man or a new creature" — N. Erickson, *Theory and Practice in Contemporary Marxism: A Christian Response* 23 (1982) [hereinafter cited as N. Erickson].

11. 3 E. Voegelin, *Order and History* 278; cf. his *The New Science of Politics* (1952). It should be noted that Voegelin also condemns the West for equal but opposite *metastatic gnosis* in believing that the individualistic "American way of life" is the route to utopia.

illustrates how natural it is for men who play God to do it badly — to tyrannize over their fellows and lose all respect for human dignity. Utopianism is a dangerous plaything, especially where human rights are concerned.<sup>12</sup>

## MARXIST LEGAL PHILOSOPHY DISSECTED

Now we move to the narrower area of Socialist jurisprudence in an effort to determine the truth-value of the basic principles of the Marxist philosophy of law. As in the preceding section, our critique will follow the order of original exposition (*v.* chapter two). Again we shall be dealing with five conceptual elements: law as superstructure; the dialectical withering away of law; law as means to an end; law and the party; and the issue of bourgeois legality.

### Law As Superstructure

The materialist root principle of Socialist legal philosophy, that all law is a superstructural reflection of the basic economic constitution of society, suffers from crippling logical and conceptual difficulties. Philosopher H. B. Acton, in a paper presented to a joint meeting of the Aristotelian Society and Mind Association, noted the circularity of the base-superstructure model: "Marx says that legal relationships belong to the superstructure of society and yet has to describe the basis or foundation in terms that include legal concepts." And Acton concludes: "The various social elements, as I called them, distinguished by Marx, i.e.,

12. See T. Molnar, *Utopia, the Perennial Heresy* (1972); and cf. J. Montgomery, "The Millennium," in C. Armerding & W. Gasque, *Dreams, Visions & Oracles* 175-85 (1977).

productive forces, productive relationships, political and legal superstructure, the ideologies, are factually and conceptually so closely implicated with one another that the attempt to show that the basic ones can explain or bring into existence the superstructural ones is hopeless from the very beginning."<sup>13</sup>

But even if the base-superstructure distinction were to pass formal, philosophical muster, its consequences for law and human rights would remain serious in the extreme. The relegation of law to superstructure, no matter in how nuanced a manner this is done, necessarily reduces the significance of the principle of legality itself and relativizes human rights. Professor René David observes that the principle of legality in Socialist countries

compared to that in the bourgeois countries suffers from a certain inferiority. In the latter countries the law is linked to principles of justice and has a moral basis; it shares the eminent dignity and prestige attached to these notions and is looked upon with a feeling that amounts almost to religiosity. Marxist doctrine denounces such superstition and teaches that the law is simply a superstructure serving economic interests....

And for the people at large, too, the principle of legality may also be weakened by the fact that the subordination of law to political and economic interests is openly proclaimed. Such statements inevitably harm the prestige of the law, which is then no longer considered an absolute value.<sup>14</sup>

13. H. Acton, "On Some Criticisms of Historical Materialism," 44 *Aristotelian Society Supplementary Volume* 143-44 (1970). In our judgment, the attempts by P. Moran (*Marx's Conception of Property Relations As the 'Legal Expression' of Production Relations* [1979]) and H. Collins (*Marxism and Law* 77-93 [1982], hereinafter cited as H. Collins) to rehabilitate the base-superstructure model from such criticisms have not been successful.

14. R. David & J. Brierley, *Major Legal Systems in the World Today* 158-59 (1968) [hereinafter cited as R. David & J. Brierley].

How pertinent this evaluation is for human rights becomes plain as one meditates on the stark words of Professor Hermann Klenner, widely acknowledged as the foremost human rights scholar of the German Democratic Republic:

What I am therefore concerned about is the de-mystification of human rights in the interest of man since human rights are neither eternal truths nor supreme values. Whatever one might say about them, they are not valid everywhere nor for an unlimited time. They are rooted neither in the conscience of the individual nor in God's plan of creation. They are of earthly origin – to tell the truth, a comparatively late product of history of human society – and their implementation does not lie in everybody's interest: In their essentials man's interests are not the same everywhere and they cannot be even the same in any particular country under the conditions of the system of private ownership of the means of production.<sup>15</sup>

### *The Dialectic Withering Away of Law*

According to orthodox Marxism, as we have seen, law is an historical counterpart of the state, sharing its dialectical destiny: once the economic contradictions of capitalism have been eliminated, law accompanies the state into oblivion. But even critics who place themselves within the Socialist camp have difficulties with this doctrine. While endeavoring to remain faithful to Marx, Colin Sumner must admit that

In socialist societies, technically anchored inequalities, political hierarchy and ideological differences can congeal to produce a system which is as much in need of a ruling class hegemony and developed legal system as is a capitalist economy. As Mao might have put it, not all contradictions are

15. H. Klenner, "Human Rights: A Battle Cry for Social Changes or a Challenge to Philosophy of Law?" 64 *Archiv für Rechts- und Sozialphilosophie* 470-71 (1978) [hereinafter cited as H. Klenner].

explained by capitalism. There are always going to be technical economic divisions, political hierarchies and ideological differences at the onset of any socialist society. As Marx suggested in *Capital*, co-operation itself will also raise problems. Taking all these things together, it is clear that even a mode of production founded on social ownership, co-operation and rational planning does not remove all forms of inequality, nor does it remove the need for a state, or dissolve ideological differences overnight. How any form of socialism survives must therefore, logically, depend a great deal on how it deals with its power relations and ideological differences.<sup>16</sup>

The notion that once economic inequities are removed, human beings will spontaneously act lawfully – and deal naturally and communally with the rare instances of antisocial conduct without the need of legal structures – is another evidence of the incredibly naive and onesided view of human nature which follows from Marxist economic reductionism.

"In one sphere, however, the withering away of law in Soviet society has gone rather far. I mean in the interpretation and observance of procedural guarantees."<sup>17</sup> Since law is on its way to oblivion and any given form of it is dialectically transitory, nothing legal can be absolutized; its value is pragmatic, as a tool for social steering. "Written constitutions may prove to be useful or even necessary as an instrument of government, but since the proletarian State itself represents a passing phase, no constitution can have more than ephemeral importance."<sup>18</sup> Socialist governments have been particularly impatient with procedural law and due

16. C. Sumner, *Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law* 296 (1979) [hereinafter cited as C. Sumner].

17. V. Chalidze, *To Defend These Rights: Human Rights and the Soviet Union* 5-6 (G. Daniels trans. 1974) [hereinafter cited as V. Chalidze].

18. J. Jones, *Historical Introduction to the Theory of Law* 277-78 (1940).

process guarantees (they tend to get in the way of a rapid and efficient carrying out of state policy). Professor Berman, after noting that Plekhanov, following Engels, had difficulty fitting the "form" (as compared with the "content") of law into his system, wisely comments: "But in law, 'form' is of the essence."<sup>19</sup> Mr. Justice Douglas of the United States Supreme Court made the point with telling force in *Joint Anti-Fascist Refugee Committee v. McGrath*:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.<sup>20</sup>

But it is precisely such "strict procedural safeguards" that are conspicuous by their absence in Marxist states: a transitory view of law and human rights has encouraged equal justice under law to wither away, leaving a jurisprudential vacuum into which the assorted terrors discussed in our last chapter have rushed to take up residence.

The problem of the withering away of law cuts even deeper

Moreover, it must not be forgotten that Soviet constitutional rights cannot be enforced in court: arguments on the basis of "unconstitutionality" or "vagueness" are unavailable, and defense attorneys cannot appeal to the Constitution because there is no judicial review or statutory interpretation (see D. Kaminskaya, *Final Judgement* [M. Glenny trans. 1982]).

19. H. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law* 19 (rev. ed. 1963).

20. 341 U.S. 123, 179 (1951).

into human rights, however. In *The German Ideology* Marx and Engels said of *Recht* (law as rightness or justice — the sphere of legally or morally justifiable rules) that "we with many others have stressed the opposition of communism to *Recht*, both political and private, as also in its most general form as the rights of man." After quoting this key passage and noting that "Marx's critical attitude to *Recht* was consistent throughout his life,"<sup>21</sup> Steven Lukes of Balliol College makes the following significant observations:

Marxism holds that, broadly, all major conflicts of interests are to be traced back to class divisions and that to reconcile them is to promote class compromise and delay the revolutionary change that will make possible a form of social life that has no need of morality, because the conditions of morality, or what John Rawls calls the 'circumstances of justice' will no longer obtain. Marx wrote of religion that "The abolition of religion as the illusory happiness of the people is a demand for their true happiness. The call to abandon illusions about their condition is the call to abandon a condition which requires illusions." It seems that Marx held a parallel view about morality as part of *Recht*. Morality (as the fundamental human good) requires abandoning a condition which requires morality (as part of *Recht*). The good consists in eliminating the conditions of morality and the circumstances of justice.

I hope to have shown that Marxism's traditional view of morality is not self-contradictory. But is it plausible? To attempt to answer this would require at least another paper, but it may be worth concluding this one by pointing to a number of reasons for thinking that it is not. First, Marxism has always neglected all other bases than class for social antagonism, whether they be social or psychological, or else it has tried to root them in class divisions. This has always rendered Marxism at best insensitive to both the depth and the complexity of social conflict, both at

21. S. Lukes, "Marxism, Morality and Justice," in G. Parkinson, *supra* note 9, at 199.

the level of everyday life and of social movements, above all where questions of culture and of identity are at stake. Second, there is no reason to suppose that any feasible form of post-class social unity could eliminate the most deep-rooted conflicts of interest in a society. Indeed, third, many such conflicts are inherent in any complex form of social life, and many of these derive neither from selfishness nor from scarcity but from the nature of the ends that are pursued, not all of which can be realized simultaneously. Fourth, the Marxist tradition has never satisfactorily explained, practically rather than philosophically, just how *gemeinschaftlich* social unity is to be reconciled with a rich and many-sided individuality for all.<sup>22</sup>

To which we add: if one is going to abolish existing religion to make room for "the true religion," one had better be able to show that the new faith is indeed the truth. Likewise, if one wants to abolish the existing rights of man to provide the human race with a surpassingly higher morality and justice, one had better be able to demonstrate the quality of the new product. Two thousand years ago the Founder of a religion with demonstrable merits far exceeding those of Marxism remarked that if one rids himself of one alleged devil he had better be exceedingly careful: seven genuine devils are waiting at the threshold, and the last state of that man may turn out to be infinitely worse than the first.

### Law As Means to an End

In our exposition of Marxist legal philosophy in chapter two, we noted the shift in contemporary Socialist jurisprudence from an emphasis on the withering away of the law to a stress on the instrumental function of law as a tool for social steering. Does such a change of focus rehabilitate legal structures and remove the force from our argument that Marxism lacks a sufficient commitment to the rule of law and to objective human values?

22. *Id.* at 203-204.

Unhappily, what is given by the one hand – a refocusing on the positive utility of law in society – is taken away by the other, for in Marxist theory law is regarded only as a means to an end; and as we have shown earlier, Socialist thinking universally holds that the end, and only the end, justifies the means employed to attain it. In practice, therefore, legal structures and legal means are only as good as their pragmatic effectiveness in achieving the ends set by Marxist policy. If extralegal means are superior to the legal in reaching the paramount goals of world Communism, then no theoretical restraints prohibit their use.

The belief that the end justifies the means is one of the most insidious of moral errors. It refuses to recognize the truth so well expressed by Ferdinand Lassalle and quoted by Arthur Koestler: "Ends and means on earth are so entangled / that changing one you change the other too." Thus analytical philosopher Antony Flew shrewdly observes that "the reluctant inquisitor, Ivanov, of Koestler's *Darkness at Noon* may be transformed by the processes of habituation into the exultant O'Brien of George Orwell's appalling nightmare, *1984*."<sup>23</sup> A real-life example is provided by Lev Kopelev (portrayed as Rubin by Solzhenitsyn in *The First Circle*); Kopelev tells us that as a convinced Russian Marxist in the 1930s, together with

the rest of my generation I firmly believed that the ends justified the means. Our great goal was the universal triumph of communism, and for the sake of that goal everything was possible — to lie, to steal, to destroy hundreds of thousands and even millions of people, all those who were hindering our work or could hinder it, everyone who stood in the way.

23. A. Flew, "Ends and Means," 2 *Encyclopedia of Philosophy*, *supra* note 2, at 508-511. See also J. Fletcher & J. Montgomery, *Situation Ethics: True or False? A Dialogue* 31-35 (1972), where in public debate with the father of "situation ethics" I dealt with the fallacies of Fletcher's view that the end justifies the means. Interestingly enough, Professor Fletcher acknowledges his debt to Lenin for the principle.

Subsequently Kopelev recognized the true situation:

I had already begun to wonder, and had decided that what we lacked was a set of absolute moral norms. Relativist morality – whatever helps us is good, whatever helps the enemy is bad, the creed we proselytized under the name of the ‘materialistic dialectic’ – would debase us in the end, and would debase the cause of socialism, raising a species of immoral craftsmen of death. Today they apply themselves to killing enemies, real or imaginary; tomorrow they will turn just as willingly against their own.<sup>24</sup>

Illustrations of the juridical operation of the “logic of the end” need not detain us here. Chalidze and others have provided firsthand accounts *ad nauseam* of such typical phenomena as the “loss” of Socialist court records, police reports, etc., when their existence would prove an embarrassment. And in our last chapter we noted instances – as in the trial of Dr. Mikhail Stern – where the authorities did not hesitate to manufacture testimonial evidence to obtain a conviction.

The point we do wish to underscore is that Marxist faith in the principle that the end justifies the means casts a thick pall over the never ending Socialist self-praise at their record of ratifications of international human rights conventions (particularly when, as we have seen, they insist that any conflict between domestic and international law must be decided by the internal jurisprudence of the state involved). How easy to sign and ratify agreements if you are the final interpreter of their meaning, and if the end (your policy) can justify any means to achieve it (the “proper” interpretation of the agreement)! The very same criticism can equally be directed at the glories of Socialist Constitutions: their meaning in practice is as variable as the winds of

24. L. Kopelev, *No Jail for Thought* 31-34 (1979).

party doctrine and the protections they afford to the citizenry as devoid of dependable substance. Now we perhaps begin to understand why Marxism displays such an appalling divergence between its human rights profession and its actual practice.

### Law and the Party

In Jack Higgins’ novel *Solo*, the following exchange takes place between a revolutionary activist and her nemesis, a SAS officer:

Lieselott Hoffmann turned on Morgan and raised a clenched fist. “Power to the people.”

“Which people, you silly little bitch!”

She lowered her hand, a strange uncertainty on her face...<sup>25</sup>

Lieselott’s uncertainty could well have a basis in what Chalidze refers to as Socialist legal dualism — “dualism in the sense that the state is governed both on the basis of procedures regulated by laws and by the Constitution, and on the basis of procedures regulated by Party law and not by state legislation.... The withering away of the state is characterized by a shift from the former ‘bourgeois’ state to the present Party-state dualism in law, with a subsequent shift to a purely Party direction of society without any state apparatus.”<sup>26</sup> The clear direction of Socialist government in the period of the dictatorship of the proletariat (and this is the only empirical stage practical Marxism has ever reached) is to place the interests of the people in the hands of Party leadership, which best insures their true welfare. Ironically, a revolutionary movement holding high the banner of

25. J. Higgins, *Solo* 116 (1981).

26. V. Chalidze, *supra* note 17, at 7-8.



"the people" leaves the populace with fewer legal protections and less say in the conduct of their lives than did the allegedly repressive system it replaces.

The consequences for human rights are not difficult to see. Thus under Marxism the implementation of fundamental Socialist rights

is permitted only in the interests of the workers. This thesis results from the task to be performed by fundamental rights, namely to further social development, which in socialism serves the interests of the workers. To refer to fundamental rights in any other context would be unconstitutional. The socialist interests of the working people constitute the inherent limitation on all fundamental rights. The communist party decides what is in the interest of the workers, because it is composed of the most progressive and responsible representatives of the working population and is therefore able to comprehend best their interests as well as the objective laws of social development. . . . According to the Eastern concept the substance of fundamental rights changes in the course of the dialectical process of history in conformity with the prevailing economic conditions. In a socialist society they are subject to the constitutional proviso relating to the interests of the working population. These interests are crystallized in the consciousness of a small minority, the communist party. The day-to-day political objectives of the party constitute the inherent limitations of fundamental rights, which on this basis may be restricted at will or even completely abolished.<sup>27</sup>

Philosopher Cornelius Murphy makes the powerful point that the absence of legal and political accountability in such a system

27. G. Brunner, "Communist Analysis of Fundamental Rights," in 4 *Marxism, Communism and Western Society: A Comparative Encyclopedia* 62, 64 (C. Kernig ed. 1972) [hereinafter cited as G. Brunner].

constitutes an irremediable affront to human rights and fundamental freedoms.

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, 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. 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. . . .

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.<sup>28</sup>

### *Bourgeois Legality*

But it is a rare Marxist who is interested in self-criticism along the foregoing lines. The presuppositional correctness of the

28. C. Murphy, "Ideological Interpretations of Human Rights," 21 *DePaul L. Rev.* 304-305 (1971) [hereinafter cited as C. Murphy].

Socialist position requires that criticism be directed elsewhere — specifically against bourgeois society, where allegedly the legal system is but an ideological lid on the garbage can of capitalistic oppression.

To label the views of one's opponents as "ideology" (while refusing the designation for one's own beliefs — which are certainly formulated as ideas) and to give the neutral term ideology a pejorative sense, is certainly a "sin of overstatement."<sup>29</sup> Even Sumner, whose criticisms of Marxism are motivated by the desire to rehabilitate the Socialist belief-system of which he counts himself a faithful acolyte, maintains that "the old notion of ideology as a gaseous effect of the economic structure is inadequate and must be replaced by a concept of ideology as an integral and substantive element of all social practice." He concludes:

Ideological differences will never disappear — hopefully — because socialism, and then communism, is precisely about the development of cultural capacities and forms. No, rather than discussing blueprints we should see that the state and law will continue for a long while yet and begin studying important topics such as the economic effects of political hierarchy and ideological divisions within a successful revolutionary movement. We must continue to study law, even in socialist societies, as a political expression of the ideologies prevalent amongst the class fractions combined in the hegemonic bloc; a political expression geared to the resolution of a whole range of social problems. And lastly, but not by any means least, we must look at socialist versions of the ideology of Law — the mysterious doctrines of "proletarian law" and "socialist legality". Even socialist societies

29. M. Seliger, *The Marxist Conception of Ideology: A Critical Essay* 10-11 (1977).

need the mystique, ritual and legitimacy of legal control.<sup>30</sup>

If in fact Socialist legality itself constitutes a necessary ideology, then the juridical distinction between East and West becomes so blurred that the Marxist "critique of bourgeois legality" loses its force. Any legal system (Socialist or capitalist) can be perverted to cloak injustice by those in power; and instead of pointing out the mote in the eye of Western jurisprudence, the Marxist would do well to take seriously the beam in his own.

Yet the critique of bourgeois legality is too fundamental a theme in orthodox Marxist legal philosophy to be jettisoned. The result is that the radical lawyer or Socialist human rights advocate finds himself in the unenviable position of being incapable of supporting (without agonizing *arrière-pensées*) the cause of justice in a non-Marxist world — for any help he gives to the down trodden may in fact reinforce the bourgeois system which he is duty bound to undermine. Collins develops the point with great cogency:

We are now in a position to understand the radical's predicament in defining revolutionary practice with regard to law. Different strands of Marxism advocate contradictory instructions: one indicates that maximum resistance should be mounted to law as it is an instrument of class oppression, and the other urges support for legislation which benefits the working class. . . .

The experience of radical lawyers reveals the antinomies in the reformist approach with peculiar intensity. On the one hand lawyers assume the role of defenders of the fairness and equality of the legal process, so they strive to ensure that poor people have legal advice and representation, and they are quick to

30. C. Sumner, *supra* note 16, at 290, 297.

criticize the police and the bureaucracy when they ignore a person's liberties by making arrests without cause or by searching homes without reasonable grounds for suspecting the presence of incriminating evidence. At the same time, by participating in the machinery of legal justice, the radical lawyer assists the propagation of the ideologies composing the ideal of the Rule of Law. Concern for equal treatment and the preservation of legality are the virtues of liberal society which Marxists are bound to expose as mechanisms which obscure the reality of class domination. Whichever way the lawyer turns, therefore, he is confronted by unsatisfactory choices. Indeed, to be a Marxist and a lawyer promises to be a contradictory or schizoid existence....

It is the principle of the Rule of Law itself which is the chief obstacle in the path of the development of class-consciousness. As long as such a theory of the system of power remains the dominant interpretation of political practice any counter-ideology which intimates that the liberal state is fundamentally a structure of class domination will be ignored. The broad direction of correct practice for a radical lawyer must be to play a part in demystifying this preponderant ideology of the Rule of Law....

There is an unresolved contradiction in the Marxist position in so far as it includes a blanket concern for legality and liberty as well as an attack on the Rule of Law. Support for fundamental political liberties through legal mechanisms may be permitted because of the possible instrumental gains to the working-class movement. But any wider belief in the intrinsic merit of preserving the legality of government action and defending individual rights makes the mistake of taking the ideology of the Rule of Law at face value. The ideological function of the modern legal system in obscuring class domination renders an indiscriminating pursuit of the principle of legality inconsistent with Marxism.<sup>31</sup>

31. H. Collins, *supra* note 13, at 128, 138-39, 146.

In the last analysis, the committed Marxist must also be a committed opponent of the Rule of Law — and of existing human rights law as it is embedded in the ideology of Western democracy.

## MARXIST HUMAN RIGHTS THEORY IN THE BALANCE

Critical examination of the Marxist world-view and of its derivative philosophy of law has left no reasonable doubt whether the deficiencies of Socialist human rights practice are mere aberrations: the contradiction between profession and practice has a substantive relation to the *Weltanschauung* behind it. Our critique of the specific elements of Marxist human rights theory (following, in general, the order of presentation in chapter three) will powerfully reinforce this judgment. But first some deserved words of praise.

### *The Positive Side*

Professors McDougal, Lasswell, and Chen, though by no means sympathetic to Marxism as a world-view, give laudatory tribute to its genuine contributions in the human rights field:

The enduring contribution of the Marxist theory has been its initial intense concern for human dignity. The theory and the movement evolved in the nineteenth century in response to a sense of injustice brought into being by a highly exploitative, industrial society. Marxist sought to extend certain human rights to the vast numbers of a hitherto deprived group, the working class. The manifest content of the theory, whatever its covert uses, was directed toward the promotion of human dignity and the realization of free men. Irrespective of its limitations, the movement sought to relate human rights to causal constellation in social process and to confer operational meaning upon protected claims of right. Underscoring the interdetermination among empirical variables in social process, attention was drawn

to the importance of material values in the defense and fulfillment of human rights. By reiterating the crucial role of the sharing of material values (especially wealth, well-being and skill), Marxists have defined an indispensable agenda for the enlargement of human rights everywhere.<sup>32</sup>

What are the concrete merits of the Socialist approach to human rights — positive emphases which non-Socialists could well incorporate into or emphasize more in their own philosophies of human rights? At least five praiseworthy aspects of Socialist human rights theory deserve mention.

(1) *Stress on socioeconomic rights.* "It was under the influence of the Constitution of the U.S.S.R. and the constitutions of other socialist countries that such important socio-economic rights as the right to work, rest and leisure, social security and education were included in the [Universal] Declaration as fundamental human rights."<sup>33</sup> Western democracies could well benefit from constitutional safeguards of economic, social, and cultural rights — not as a substitute for, but in addition to, already protected civil and political liberties. And in a world where economic oppression and misery are daily destroying untold human lives, Western society needs to be continually reminded that human beings are not commodities and that civil liberties mean little to those who are starving.<sup>34</sup>

32. M. McDougal, H. Lasswell & L. Chen, *supra* note 4, at 77. Cf. also C. Friedrich, *The Philosophy of Law in Historical Perspective* 152-53 (2d ed. 1963); and Warren Beatty's epic film *Reds*, based on the life of American Communist John Reed, author of *Ten Days That Shook the World*.

33. A. Movchan, "The Human Rights Problem in Present-Day International Law," in *Contemporary International Law* 247 (G. Tunkin ed., G. Ivanov-Mumjiev trans. 1969).

34. To take but one horrifying example: child labor in Brazil. São Paulo

(2) *Concern to interlock rights and duties.* The individualistic Westerner is too prone to claim his rights without appreciating that rights entail correlative social duties.<sup>35</sup>

(3) *Regard for the educative function of law.* Though we may cringe at the notion of the "comrades' courts," particularly in light of the extremes to which such activity arrived in Maoist China, there is little doubt that the West, with its over-professionalized justice systems and its absence of legal education for the masses, could take a lesson from Socialism as to the importance of integrating law and pedagogy. Human rights education is sorely needed, as is education in the rule of law *per se*.<sup>36</sup>

(4) *Emphasis on the international redistribution of wealth.* Socialists, following Marx's own commendable internationalism, are deeply troubled by colonial exploitation and by the tremendous gulf separating the haves from the have-nots in the family of nations. "A Marxian argument can justify cooperation among working-class democratic or socialist movements of different nations regardless of the degree of economic interconnection of their respective ruling classes."<sup>37</sup> Socialist support of the

University sociologist Rosa Maria Fischer Ferreira, in her study, *Meninos da rua* (1979), informs us that Brazil has some 55 million marginalized children living in substandard conditions either alone or with families unable adequately to feed, clothe, or educate them; 80% of these children go into the streets to work by the time they are five years old.

35. Cf. D. Lasok, *et al.*, *Fundamental Duties* (1980), an appropriate companion volume to J. Bridge, *et al.*, *Fundamental Rights* (1973).

36. Cf. V. Chalidze, *supra* note 17, at 23-27 ("The Educational Role of Law").

37. A. Gilbert, "Marx on Internationalism and War," in M. Cohen, *Marx*,

International Labor Organization and similar cooperative efforts deserves to be imitated, not condemned.

(5) *Advocacy of opening membership in international human rights organizations to all states and permitting all nations to ratify international human rights instruments.* Though this principle has clearly been used in a self-serving way by Marxists (to obtain UN membership for small Socialist states, thereby increasing Marxist strength in that body), it is nonetheless a sound precept. Regional human rights organizations could strengthen their influence and in turn be strengthened by enlarging their perspective.<sup>38</sup> Human rights are properly a worldwide concern, and the experience of the more sophisticated nations should be put at the disposal of those less favored with long traditions of protecting fundamental rights and freedoms.

### *The Domestic Negative*

But having given credit where credit is due, we need only remind ourselves of the extent of human rights violations associated with Marxist activity (*v.* the preceding chapter) to look beyond the contributions just enumerated. Markovits has already noted for us how the Socialist approach to legal rights suffers from policy-orientation, intentional ambiguity, and partiality; and

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*Justice, and History* 206 (1980). See also R. Bystrický, "The Universality of Human Rights in a World of Conflicting Ideologies," in A. Eide & A. Schou, *International Protection of Human Rights* 90-91 (1968) [hereinafter cited as A. Eide & A. Schou].

38. Cf. L. Sohn, "Problems Involved in Opening the European Convention on Human Rights to Accession by the United States and Canada," in A. Robertson, *Human Rights in National and International Law* 353-62 (1968) [hereinafter cited as A. Robertson, *Human Rights in National and International Law*].

it takes little imagination to see how such characteristics reduce the significance of law as a protection against human rights violations.<sup>39</sup> But the issue cuts deeper: three of the most important axioms of Socialist human rights doctrine pose grave problems — problems focusing especially on the domestic area but also extending into the international sphere. These are the beliefs that all rights are economically determined, that private property is *per se* a detriment to human rights, and that in the last analysis the State is the source of all fundamental freedoms.

The claim that *all human rights are economically determined* suffers from grave logical, empirical, and pragmatic difficulties. *Logically*, the notion illustrates what ethicist G. E. Moore labeled the "naturalistic fallacy" (sometimes also termed the "sociologist's fallacy" because social scientists are so prone to commit it): the logical error of simplistically deriving the "ought" (values) from the "is" (descriptive data).<sup>40</sup> One cannot logically infer from an economic set of conditions how life *ought* to be lived or how people *ought* to treat one another. In reality, Marxists do not derive their human rights from economics; they (uncritically) superimpose values on their economic analysis. The legerdemain involved goes far to explain the arbitrary and changing character of their values and the ease with which the party can alter its policies and goals.

*Empirically*, all human rights simply do not as a matter of fact arise from economic conditions or are best explained in that deterministic way. Consider the exchange between Professor Francesco Capotorti of the Università degli Studi, Bari, Italy, and Hungarian Socialist Imre Szabo; Capotorti has empirical reality

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39. *Supra* Chapter Three, the text at note 4.

40. G. Moore, *Principia Ethica* ch. i (1903).

on his side, but Szabó does not alter his aprioristic stance:

*Capotorti*, referring to the paper presented by Szabó, accepted the view that economic and social conditions of a given society were of fundamental importance for the laws of the society. In his opinion, however, there were also other factors working rather independently of these and which also had great influence on the degree of protection of human rights. Among these, ethical attitudes and ideas play a prominent role. These ethical ideas had been developed through philosophical conceptions which only to a limited extent could be ascribed to social and economic conditions.

Szabó agreed that other factors were also operating. He was of the opinion, however, that the foundations of all those others were property relationships and other economic factors.<sup>41</sup>

Pragmatically, as Szabó so plainly illustrates here, the rigid interpretive structure imposed upon Marxist thinkers by their economic determinism gives them little flexibility to deal with the wide range of contemporary human rights issues; instead of being maximally open to a "third generation" of human rights, they are only open to those new insights into human worth and dignity which will fit into the procrustean bed of orthodox Marxian materialism. McDougal, Lasswell, and Chen put it this way: "In a world so fixed and certain there is little scope for the invention, evaluation, and recommendation of policy alternatives in the defense and fulfillment of human rights at national, much less transnational, levels."<sup>42</sup>

To assert that *private property is a detriment to human rights* may well express truth if applied in carefully defined instances

41. "Discussion: The Foundations of Human Rights," in A. Eide & A. Schou, *supra* note 37, at 263.

42. M. McDougal, H. Lasswell & L. Chen, *supra* note 4, at 79.

(e.g., the acquisition or use of private property for profiteering and in order to exploit what rightfully belongs to others); but as a universal generalization it simply does not hold true.<sup>43</sup> Not only are there numerous cases where property ownership by individuals is "neutral" (neither retarding nor advancing human rights), but one has little difficulty arguing that in many important respects the ownership of private property correlates positively with the promotion of human rights and fundamental freedoms.

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. 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. . . .

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

43. Cf. L. Becker, *Property Rights: Philosophic Foundations* 88-98 (1977).

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.<sup>44</sup>

The least attractive element in Marxist human rights theory may well be its dogmatic formula that *the State is the sole source of human rights*. Here the wolf (state power) is invested with the garb of Red Riding Hood's grandmother (the protector of the weak and downtrodden). On this theory, what is to be done if the state or its agencies deny help to the citizen? The question is not a theoretical one.

The effective protection of fundamental rights is . . . still out of the question in the communist countries. The citizens are only to a limited extent in a position to apply to independent courts for legal protection under the allegation that their rights have been violated by the state power. Juridical protection of the law takes very different forms in the individual countries. The two extremes are East Germany, where it does not exist at all, and Yugoslavia, where according to the rules of administrative procedure of 1956 the so-called "negative enumeration principle" is in operation, under which any administrative measure may be contested unless voidability is excluded by law. In the remaining countries, which in part have also enacted rules of

44. C. Murphy, *supra* note 28, at 299-300. A reminder is also perhaps in order concerning the devastating failures of the planned Socialist economies in our time — failures which have unquestionably reduced the socio-economic level of the citizenry and thus (by Socialist definition) their human dignity: *v. supra* Chapter Three, our text at note 67.

administrative procedure (e.g. Hungary 1957, Poland 1961, Czechoslovakia 1967, Rumania 1967). action for annulment can be taken in those instances for which it is especially provided by law. Not all these cases, however, involve protection of fundamental rights in the strict sense, because fundamental rights as such do not grant a claim worthy of protection, but rather they are protected only in so far as they find positive legal expression outside the provisions of the constitution.<sup>45</sup>

To be sure, the Marxist reply is that by definition "there cannot be a conflict between individual and community interests in a socialist society" — though, admittedly, one cannot preclude "incidental conflicts which originate in the shortcomings of the activity of the government machinery."<sup>46</sup>

Here our Marxist author is too modest. Governments are the most consistent (and because of the virtually unlimited power at their disposal) the most terrifying violators of human rights in the modern age. They have provided the perfect illustration of Lord Acton's biblically grounded axiom: "Power corrupts, and absolute power corrupts absolutely." Richard Falk, in his study of *Human Rights and State Sovereignty*, maintains that whether one is thinking domestically or internationally

Foremost among the impediments to the actualization of human rights is the inevitable oppression that is endemic to the modern state. The legitimacy of and priority granted to a statist world order by definition thwarts the expression of human rights to a

45. G. Brunner, *supra* note 27, at 63. Cf also note 18, *supra*.

46. I. Kovács, "General Problems of Rights," in I. Szabó, *Socialist Concept of Human Rights* 19 (1966) [hereinafter cited as I. Szabó, *Socialist Concept of Human Rights*].

greater or lesser degree while precluding intervention even in cases of gross violations.<sup>47</sup>

As we saw in chapter three, an important corollary of the principle that the State is the sole source of human rights is the view that the citizen ought not to be allowed the unlimited freedom to hurt the very social order that supplies him with his human dignity. Thus Marxists argue for the criminalization of "fascist propaganda" and the outlawing of speech imparting racist ideas. Even a sober jurisprudent like Lord Lloyd of Hampstead finds restrictions on fascist freedom of expression preferable to American free speech practices.<sup>48</sup> But in fact American constitutional law is not lax in these matters: it insists on the distinction between naked advocacy of an obnoxious viewpoint (such as racism) and advocacy that is "accompanied by, or threatens imminently to promote, the illegal act of racial discrimination."<sup>49</sup> The move from *speech* to *action* carries severe legal penalties. We have little patience with the DDR's Hermann Klenner when he argues that "if Justice Holmes stated concerning the right of speech that it did not include the right to cry 'fire' in an overcrowded theatre, why then should the right of speech actually include the right to propagate the superiority of a human race over another one (with the concomitant consequences)?"<sup>50</sup>

47. A. Pollis, Review of *Human Rights and State Sovereignty* by Richard Falk, 4 *Human Rights Q.* 540 (Fall, 1982).

48. Lloyd of Hampstead, "The Controversy regarding a Bill of Rights," 10 *Israel Yearbook on Human Rights* 356-57 (1980).

49. A. Goldberg, 55 *Dept. State Bull.* 214 (1966). Ambassador Goldberg here relies on the leading U.S. Supreme Court case of *Yates v. United States*, where the court stressed "the distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action."

50. H. Klenner, *supra* note 15, at 475.

The answer, of course, is that speculative, indirect consequences of the free expression of abstract ideas may be far less hazardous than the results of state interference with man's right to think for himself and express his ideas to others (even if these ideas are wrongheaded or perverse). Political authorities have proven themselves so readily threatened by ideas that, when given the opportunity, they jump to repress any and all dissent on the pretext that it is socially undesirable and dangerous for the masses. As I have written elsewhere: "We of the 20th century have – or should have – a perspective on totalitarianism. . .and we can now see how fragile a flower liberty is and how readily its abridgement in one respect can lead to its destruction in general."<sup>51</sup> Soviet physicist Andrei Sakharov put it in the form of a thesis: "Intellectual freedom is essential to human society – freedom to obtain and distribute information, freedom for open-minded and unfearing debate, and freedom from pressure by officialdom and prejudices."<sup>52</sup>

### *The International Negative*

The international human rights theory set forth by Marxism has no fewer drawbacks than its domestic counterpart. We shall devote our attention particularly to its three major themes (the non-interference principle, the gross violations principle, and the claim that individual persons are not subjects of international law); but having focused our critique on these issues, we shall briefly take up several lesser aspects of the international human

51. J. Montgomery, *The Shaping of America* 60 (1976). Cf. J. Montgomery, "Freedom and the Gospel," in his *The Suicide of Christian Theology* 213-16 (1971).

52. A. Sakharov, "Progress, Coexistence, and Intellectual Freedom," in his *Sakharov Speaks* 60 (H. Salisbury ed. 1974).



rights philosophy of Socialism to round out the picture. This will put us in an especially strong position for a concluding depth analysis of the root errors of the overall Marxist view.

János Tóth of the International Commission of Jurists offers a brief and to-the-mark evaluation of the Socialist dogma that *the domestic affairs of a sovereign state must not be interfered with even to preserve human rights*. "This concept," says he, "boils down in fact to the negation of an effective international protection of human rights."<sup>53</sup> Indeed, the Marxist position in this respect has come under the most severe opposition from distinguished scholars of international law — for example, Jessup, Lauterpacht, and Kelsen.<sup>54</sup> We shall not reiterate their arguments here; rather, we shall focus on a single key epistemological and a single fundamental juridical point which in our view undermine the non-interference principle.

Professor Draï of the University of Picardy, France, has recently demonstrated that the strict operation of the state sovereignty principle leads directly to solipsism.

The transcendent character of state sovereignty would be admissible if the given state were unique in the world. Now at the moment more than 150 states constitute the international community, underscoring the fundamental contradiction between statist ideology and political sociology. With 150 states invoking

their sovereignty, this means that each of them — severing itself from the realities of the political sociology of international relations — considers itself as the one and only state on the face of the earth: the Absolute State. But the logic of the Absolute is incompatible with the logic of plurality and of community. If state A regards itself as *the* State and state B likewise considers itself as *the* State, the result — logically paradoxical and fraught with potential conflict between incompatible entities — must lead to confrontation between A and B in order to eliminate or destroy one of them.<sup>55</sup>

Juridically, assertion of the non-interference principle ignores the venerable and established international law doctrines of humanitarian intervention and humanitarian intercession.<sup>56</sup> Even more important, the Marxist dogma of state sovereignty flies in the face of a leading Advisory Opinion of the Permanent Court of International Justice as to the nature of "domestic jurisdiction": the Court declared that when a national state ratifies an international treaty on a subject, that subject is perforce removed from the domestic jurisdiction of the ratifying state.<sup>57</sup> Henkin, in commenting on this Opinion, observes that in consequence "that which is governed by international law or agreement is *ipso facto* and by definition not a matter of domestic jurisdiction"; and he goes on to apply this truth to the claim that UN provisions on human rights do not create binding legal obligations:

53. J. Tóth, "The Recognition of Human Rights in Eastern Europe," in A. Robertson, *Human Rights in National and International Law*, *supra* note 38, at 303.

54. P. Jessup, *A Modern Law of Nations* 2 (1949) [hereinafter cited as P. Jessup]; H. Lauterpacht, *International Law and Human Rights* 166-220 (1950) [hereinafter cited as H. Lauterpacht]; H. Kelsen, *The Law of the United Nations* 774 (1951).

55. R. Draï, "Droits de l'homme et négociations internationales: l'obstacle du principe de souveraineté," in A. Fenet, *et al.*, *Droits de l'homme, droits des peuples* 58 (1982) (our translation) [hereinafter cited as R. Draï].

56. R. Lillich, "Humanitarian Intervention and Humanitarian Intercession," in International Institute of Human Rights, 8 *Résumés des Cours* (1977).

57. *Tunis-Morocco Nationality Decrees*, P.C.I.J., Ser. B, no. 4, 1.

Repeated resolutions accepted that apartheid in South Africa was contrary to the Charter. The conclusion was confirmed by the International Court of Justice in the Namibia case. In 1967, by overwhelming votes, ECOSOC extended the interpretation of the Charter to reach beyond racial discrimination, authorizing the Commission on Human Rights to study situations "which reveal a consistent pattern of violations of human rights as exemplified by the policy of apartheid . . ." In 1970, ECOSOC approved a procedure for considering private communications "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms . . ." And even states which opposed the procedure and the interpretation of the Charter it implied (e.g., the USSR) later joined in action by the Commission on Human Rights, approved by the General Assembly, to investigate human rights in Chile.<sup>58</sup>

Concludes Dr. Rosalyn Higgins: "The claim . . . that human rights questions cannot be essentially within the domestic jurisdiction seems justified, for Articles 55 and 56 impose specific legal obligations by which all states are bound, Article 2 (7) notwithstanding."<sup>59</sup>

As a matter of fact, Socialist states have displayed a most obnoxious hypocrisy in appealing to the non-interference principle when it would serve their interests (e.g. on the implementation of the Helsinki Final Act) and ignoring it when

58. L. Henkin, *Human Rights and "Domestic Jurisdiction"* 8-9 (1977).

59. R. Higgins, quoted by V. Leary, "When Does the Implementation of International Human Rights Constitute Interference into the Essentially Domestic Affairs of a State?," in J. Tuttle, *International Human Rights Law and Practice* 19 (rev. ed. 1978).

that would best serve the purpose of international Communism (e.g. in the matter of sanctions against racist imperialism in South Africa, and investigation into the fall of the Allende regime in Chile). Professor Capotorti's words should be taken to heart:

The competence of the United Nations to deal with the *apartheid* policies of South Africa was widely accepted because of the South African attitude to human rights. But one should not take completely different attitudes to the violations of human rights elsewhere. If one accepted the intervention of international organizations for the protection of human rights, one should accept it as a general principle.<sup>60</sup>

In light of Marx's own internationalism and the high value Socialism has consistently placed on the international labor movement, Marxists should be encouraged to recognize that the state sovereignty principle causes them more trouble than it is worth. In fact, one would think that they could jettison it as excess baggage even on the ground of their own best interests.

Socialists hold, as we have seen, that *the only appropriate sphere for international protection of human rights* (distinct from mere "promotion" of human dignity) *relates to gross and massive violations* and that individual complaints to international human rights organs should be discouraged. To which B. A. Wortley replies:

Is the Marxist King in his own country, and can he do no wrong? Small oppressions have a way of adding up to tyranny! Should not Marxists accept international machinery to deal with individual complaints against acts of tyranny, as is done in Western European states? . . . Why wait for a crisis caused by

60. "Discussion: Sovereignty, Domestic Jurisdiction, and International Protection of Human Rights," in A. Eide & A. Schou, *supra* note 37, at 282.

"mass grievances" with which the U.N. may be unable to deal effectively? Why not indeed nip small grievances in the bud, why let them blossom into mass rebellion before taking action through the U.N. or otherwise?...

No State, Marxist or other, is so perfect and just that it *always* acts for the common good of *all* its members: at most, it must be presumed to do so, and because of this, no individual petition may be brought before international organs until local remedies have been exhausted. But is it not to close one's eyes to reality to think that any State must always be right and that the right of individual petition is useless.<sup>61</sup>

From the strategic standpoint, granting that the political resources for protecting human rights on a global scale are not unlimited, one may reasonably argue for concentrating on the most egregious violations. But this hardly helps the Socialist case, for "estimates of the cost in human lives [of revolutionary Socialism] vary, but tens of millions certainly perished prematurely for political reasons."<sup>62</sup> Thus Marxist attempts to limit international involvement to instances of gross and massive violations would surely not prevent close scrutiny of their own operations (monitoring their conformity with the provisions of the Helsinki Final Act, etc.).

Moreover, the gross violations principle is a sad illustration of what we may term the "quantitative fallacy" of Socialism. Marxist preoccupation with the collective – with man as a social being – results in a loss of appreciation for the infinite, qualitative worth of individual members of the social group and in insensitivity to their particular sufferings. Perhaps the true test of one's

61. B. Wortley, Review of *Socialist Concept of Human Rights* by I. Szabó, *et al.*, 1 *Human Rights J.* 121-22 (1968).

62. R. Wesson, *Why Marxism? The Continuing Success of a Failed Theory* 192 (1976); *v. supra* our Chapter Three, the text at note 96.

philosophy of human rights is the extent of one's outrage at the indignities to which any one human being is subjected. Christian poet and preacher John Donne summed it up in his familiar lines: "... any mans death diminishes me, because I am involved in Mankind; And therefore never send to know for whom the bell tolls; It tolls for thee."

Consistent with the just-described quantitative fallacy, Marxists insist that *the individual person is not to be treated as a proper subject of international law*. True, this doctrine has had a respectable history, but the contrary position has been supported by distinguished advocates ever since Hugo Grotius, the father of international law (and of Protestant Christian apologetics, not so incidentally) maintained the legitimacy of internationally protecting an individual's human rights against his own state.<sup>63</sup> Among contemporary defenders of the individual's standing are Jessup, Kelsen, Kunz, and Lauterpacht.<sup>64</sup> These writers hold, *inter alia*,

that, under the Declaration, individuals are certainly to be viewed as subjects of international law, and that, as it is the design of the United Nations to require all States to safeguard human rights, the correct view is that the status of a subject of international law has been conferred upon each and every individual. Besides, they regard the Declaration as, in a manner,

63. See P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel* 49, 243-45 (1960).

64. P. Jessup, *supra* note 54, at 15-42 and 94-122; H. Kelsen, *The Communist Theory of Law* 179-82 (1955) [hereinafter cited as H. Kelsen, *The Communist Theory of Law*]; J. Kunz, "La crise et les transformations du droit des gens," 88 *The Hague Academy of International Law, Recueil des Cours* (1955); H. Lauterpacht, *supra* note 54, at 27-72, as well as his *An International Bill of the Rights of Man* (1945).

an authoritative interpretation of the Charter, and an affirmation of it, giving it preciser import.<sup>65</sup>

We must agree with Sean MacBride of the International Commission of Jurists that "the non-flexible attitude of the legal doctrine in the Socialist countries in this connection [is] the outcome of excessive statism and of a rather outworn conception of sovereignty."<sup>66</sup> And we would encourage Marxists to see that if, on their own principles, they can now find a place for non-governmental organizations among the legitimate subjects of international law, on the ground that like the Pope in earlier times they play a significant role in international relations,<sup>67</sup> there is good reason also to recognize individuals as having international significance and therefore as deserving effective human rights protection. Indeed, the protection of individual rights internationally may turn out to be an essential insurance policy for preserving peace among nations — and no Marxist consistently following the Socialist line should downplay that goal.

The Soviet argument that a treaty conferring rights directly upon individuals and offering them access to an international court would aggravate international relations and undermine the foundations of peace, may be to a certain extent correct. But the attempt to guarantee and protect certain interests of individuals by international law originates in the fact that real or alleged violations of these interests by the government of the individuals concerned are the cause of disturbances which endanger

65. L. Boim, "The Soviet Law of Nationality and Its Application to Jews," 3 *Israel Yearbook on Human Rights* 194 (1973).

66. "Discussion: Sovereignty, Domestic Jurisdiction, and International Protection of Human Rights," in A. Eide & A. Schou, *supra* note 37, at 280.

67. Cf. C. Okeke, *Controversial Subjects of Contemporary International Law* 15-16 (1974).

international peace, as, for instance, the treatment of the German minorities in Czechoslovakia or Poland.<sup>68</sup>

Among Marxists, *emphasis on the right to peace* is a special feature of international human rights doctrine. Promoters of the Socialist approach never tire of reiterating that without peace no other human rights are truly possible. We would be the last to denigrate peace efforts, but two points need to be made concerning the right to peace. First, Marxists appear to apply their doctrine selectively: U.S. involvement in the Vietnam war was an affront to international peace and order, while Russian military involvement in Afghanistan is a legitimate effort to crush rebellion. Is it too much to ask for evenhanded, non-hypocritical support of the right to peace? Secondly, though war is always evil, it may in certain circumstances be a lesser of evils,<sup>69</sup> and thus a positive tool in the promotion of human rights. Socialists themselves praise the "glorious struggle against fascism" during World War II, and presumably believe that the military defeat of the Third Reich contributed to human rights by eliminating the concentration camps in which Communist heroes were imprisoned, tortured, and killed.<sup>70</sup> The assertion that human rights always correlate positively with peace is naive; both peace and war can be instruments of human rights. War may always be an evil, but peace can sometimes also be an evil — as in cases where to refuse humanitarian intervention is to condone appalling violations of human rights and fundamental freedoms.

68. H. Kelsen, *The Communist Theory of Law*, *supra* note 64, at 182.

69. See my arguments in J. Fletcher & J. Montgomery, *Situation Ethics: True or False? A Dialogue*, cited *supra* note 23.

70. Characteristically, at the Buchenwald death camp, now located in the German Democratic Republic, much is made of the Communist victims and very little is said of the Jews who died there (personal observation). Cf. *supra* our Chapter Three, the text at notes 78-82.

As for the Marxist position that *national self-determination is a human right*, entailing the sovereignty of a people over its natural resources, we must again note (1) the hypocritical application of the principle only to peoples allegedly victimized by Western colonialism, and remarkable obtuseness (for example) to the Soviet domination of East European countries, whose degree of permissible self-determination has been agonizingly illustrated in Czechoslovakia and Poland; and (2) the overbroad nature of the principle itself, since human rights can actually be diminished through national independence movements (when they result in dictatorial local governments), as well as through statist control of natural resources (e.g., a nation or small group of nations holding the rest of the world hostage by manipulating their oil prices and thereby lowering everyone else's standards of living, thus crippling the socio-economic rights of others.)

To the Marxist who typically *denigrates the accomplishments of regional systems of human rights protection*, we need do no more than point to the sophisticated jurisprudence of the European Commission and Court of Human Rights, and observe with Professor A. H. Robertson that although "it is simply not possible in this imperfect world to devise any system which will be perfect and complete," nevertheless "the European system for the protection of human rights is the best yet established by any international organization."<sup>71</sup> Socialists owe it to themselves to analyze why this is in fact the case.

Finally, when Marxists *place social, economic, and cultural rights in prime position, while relegating civil and political liberties to the background*, we must remind them (1) that logically no guarantee exists that socio-economic improvement will produce

71. A. Robertson, *Human Rights in Europe* 278 (2d ed. 1977).

greater civil liberties (example: the German Democratic Republic), (2) that without freedom of thought and action the most adequate economic situation will be profoundly unsatisfying (even the pleasures of Party membership are to no small degree connected with the freedom of action available at least to those who sincerely believe the Party line), and (3) that, in the words of my esteemed colleague at the Simon Greenleaf School of Law, Dr. Harold Lindsell: "Human freedoms are cut out of one piece of cloth. Either they exist or they don't. The various freedoms are indivisible."<sup>72</sup>

### FUNDAMENTAL FALLACIES AND A TRANSCENDENTAL CORRECTIVE

Our examination of the truth-value of the Marxist world-view, philosophy of law, and human rights theory has left us with feelings of deep disquiet. The suspicions raised by the record of Socialist human rights practice have been amply confirmed: Marxism suffers from crippling inherent difficulties at every turn, and the gross disparity between profession and practice is a natural consequence of them. In the concluding section of this book, let us now endeavor to identify the roots of the Marxist problem and suggest a corrective.

#### *A Fallacious View of Human Nature*

One's approach to human rights will inevitably depend upon one's conception of human nature. Professor Hermann Klenner of the DDR recognizes this when he writes:

We jurists of bench and bar and professorship are, in general, accustomed to comprehend human rights as a yardstick for the

72. H. Lindsell, *Free Enterprise: A Judeo-Christian Defense* 144 (1982).

assessment and/or condemnation of human actions, and that is what they in fact are. Yet they themselves require also a yardstick, since they are not the highest value of man: the most sublime for man is man himself. And human rights, or what pretends to be human rights, deserve to be valued according to the extent to which they contribute toward the general self-realization of the individuals, toward the all-round development of their capabilities. For to become productive is, after all, the most human of all human qualities.<sup>73</sup>

Though written in apparently neutral terms, this passage in fact betrays the underlying Marxist understanding of man: his value depends on his "productivity", and his productivity is defined in materialistic (socio-economic) terms.<sup>74</sup> Moreover, as we have seen, man is believed to be capable of an idyllic existence once his economic problems are solved. Such a conception of human nature necessarily presupposes man's essential goodness.

A combination of alienation and class theory suggests, logically, that with an end to alienation and to classes, their issue — alienated social power and class institutions — will also come to an end, while Marxian optimism about human capacities implies a new basis to all human arrangements. Man's creativity and communality will underly social institutions, and external direction and control will be replaced by something intimate and ultimately spontaneous.<sup>75</sup>

For man's natural goodness to shine forth, all that is needed are the proper socio-economic conditions. Marx and Engels argued that "good states (the Paris Commune) produce fewer

73. H. Klenner, *supra* note 15, at 473-74.

74. Cf. V. Venable, *Human Nature: The Marxian View* (1946).

75. G. Duncan, "The Marxist Theory of the State," in G. Parkinson, *supra* note 9, at 142.

criminals because people in them are not driven to crime."<sup>76</sup> Erich Fromm, in his essay on *Marx's Concept of Man*, observes that "Socialism (in its Marxist and other forms) returned to the idea of the 'good society' as the condition for the realization of man's spiritual needs . . . For Marx, socialism meant the social order which permits the return of man to himself."<sup>77</sup>

Ironically, however, Marxism here falls into the lamentable error of Western "social gospel" liberalism (Walter Rauschenbusch, *et al.*) — as well as of the very "utopian socialism" which Engels dismissed as an "infantile disorder": the error of believing that man's difficulties are no more than the product of external social conditions; change those conditions, we are told, and man's problems will evaporate. But where did the socio-economic miseries come from in the first place? Surely they were not superimposed upon the human community by external forces! Man himself created the conditions of exploitation — and therefore what kind of logic justifies the belief that by removing those conditions man will suddenly be rendered incapable of recapitulating them? The root difficulty lies, not with the "economy" (or with any other impersonal factor): it lies in the heart of man himself.

Faced with this dilemma, sophisticated Marxists have claimed that the very process of realizing the classless society will literally transform human nature, so as to produce the required "new creature." We are told that "the materially determined content of the human psyche may be fundamentally transformed; under the Communist relations of production a novel type of personality will

76. Editors' Preface to K. Marx & F. Engels, *Marx and Engels on Law* xix (M. Cain & A. Hunt ed. 1979).

77. E. Fromm, *Marx's Concept of Man* 68-69 (1961).

emerge which will be exempt from egocentric lusts for power and wealth."<sup>78</sup> But such a claim — on which so much in the Marxist philosophy of human rights depends — is nothing more than whistling in the dark, since no classless society has ever come into existence.

The Marxist would produce a "new man" by changing social and economic institutions. In practice this program has often been a failure and it has taken violent and even barbaric forms because Marx misjudged man. He never sufficiently took into account the lust for power and the lust for possessions and he created a system which encouraged abuse....

It is in their very practice of the deification of mankind that communists have forgotten man.<sup>79</sup>

But even this is not the end of the story. Strictly speaking, if man's consciousness depends upon the changing conditions of material production, the Marxist goes beyond his own limits in stating anything definite and certain about human nature — including the assertion of man's selfless state in the classless society. Althusser, among other contemporary Marxist thinkers, has maintained that on discovering the principles of dialectical materialism Marx was forced to give up any fixed notion of human nature.<sup>80</sup> But if this is true, it simply illustrates that out of dialectical flux nothing but more flux shall come.

78. H. Collins, *supra* note 13, at 120.

79. N. Erickson, *supra* note 10, at 17-18. Cf. K. Bockmühl, "Marxist New Man," *Christianity Today*, Dec. 5, 1975, at 53-54.

80. L. Althusser, *For Marx* ch. vii (B. Brewster trans. 1977). On Althusser, see M. Kelly, *Modern French Marxism* 85-88, 118-43 (1982), and T. O'Hagan, "Althusser: How To Be a Marxist in Philosophy," in G. Parkinson, *supra* note 9, at 243-64. Collins endeavors (unsuccessfully, in our opinion) to rehabilitate Marx from Althusser's charge that there was an epistemological break between Marx's early writings (where he

### The Presuppositionalist Fallacy

With such conceptual difficulties attending the Socialist view of human nature, it is not strange to discover Marxists engaged in perfectly circular reasoning when they get on the subject. Smirnov writes:

The appearance of the socialist type of personality clearly confirms the viability and correctness of the Marxist-Leninist proposition that man's essence is the totality of social relations, that the problems of the individual can be solved along with the emancipation of all the working masses, that the way to change man's conditions of life and reeducate him lies through socialist revolution and the building of socialism and communism.<sup>81</sup>

Unhappily, no "confirmation of the viability and correctness of Marxist-Leninist propositions" is offered by "the appearance of the socialist type of personality," for, as we have seen, that personality type has not in fact appeared, and if it did, the dogma of historical materialism would logically prevent any fixed definition or accurate identification of it. So convinced Marxists like Smirnov are reduced to delivering aprioristic pronouncements on the subject.

Indeed, as we suggested in chapter two, Marxism in general is essentially a "presuppositional system," that is to say, a belief-system which appears self-evident to its adherents and whose validity stands beyond factual confirmation or disconfirmation.

It would indeed be vain to try to persuade Soviet jurists that they are mistaken, and that a just law may be sought by jurists

could hold to a fixed human nature) and the later development of his historical materialism (which no longer allowed for it) — H. Collins, *supra* note 13, at 118-19.

81. G. Smirnov, *Soviet Man: The Making of a Socialist Type of Personality* 302 (R. Daglish trans. 1973).

committed to the principle of private ownership. For a Soviet jurist to make this concession would amount to denying Marxist doctrine and undermine the very foundations upon which the Soviet regime is built. Western jurists have some difficulty in imagining that anyone might see an incontrovertible truth in a doctrine that does not purport to be a revelation, and one which as obviously belongs in the context of 19th century thought and which is, in their eyes, already outdated in the second half of the 20th century. But this view must, nevertheless, be taken into account. In the U.S.S.R. everything does take place as though the Marxist-Leninist doctrine were a revealed dogma: it does not occur to Soviet jurists to question its merits; for them it is beyond any possible discussion.<sup>82</sup>

Such apriorism is not limited to classical Marxist thinking. A contemporary enlightened reconstructionist in the Marxian camp, Colin Sumner, displays analogous indifference to the fallacy of *petitio principii*. After arguing at length that ideology cannot be divorced from Marxism or turned into a mere bourgeois shibboleth, he declares:

Objective phenomena always present themselves in a manner determined by their own social context and function. Ideology and appearance thus come face to face. In a static, consensual cultural context, appearance fits ideology and ideology maps appearance. Recognition ensues and the subject is at one with the world in an orderly, peaceful, undisturbing way. Thus, when questioned, the individual defies all doubt, being certain of the sensibility, truthfulness and obviousness of the belief and being able to provide empirical evidence for it. There is, therefore, a very real sense in which understanding produces its own social reality at the same time as social reality produces its own understanding: this is the circle of social reality....

Even when a new way of seeing is established, it needs its own socio-geographical vantage point in order to see the world from its point of view — and there are many social forces preventing

82. R. David & J. Brierley, *supra* note 14, at 131.

those vantage points being created. All in all, the nature of the dominant circle of social reality, the nature and number of sub-circles and the forms of social expression are founded within and limited by the mode of production and its corresponding political and cultural structures. The nature of a mode of production and the finitude and quality of its culture are totally bound up together.<sup>83</sup>

From Sumner's social variant on the existentialist's hermeneutical circle<sup>84</sup> there is no exit: if ideology is inextricably linked with modes of production, then the Marxist understanding of things is likewise so determined. For the true believer in Marxism as for the bourgeois he despises, appearance will fit ideology and ideology will map appearance; he, too, will defy all doubt, "being certain of the sensibility, truthfulness and obviousness of the belief."

Those who embrace presuppositionalism are generally unaware of its epistemological liabilities. Twentieth century analytical philosophy has categorized propositions as *analytic* (true or false solely by virtue of their logical form, e.g., "all husbands are married"), *synthetic* (true or false on the basis of investigation of the facts of the world, e.g., "Jesus died at Jerusalem"), and epistemologically *meaningless* or *non-sensical* (all affirmations which are neither analytic nor synthetic). Propositions of the third type are incapable of testing, for they neither express tautological judgments (they are not statements whose truth depends on their logical form) nor do they affirm anything about the real world which can be tested by investigating the world. Example: the

83. C. Sumner, *supra* note 16, at 288.

84. On the negative effects of the hermeneutical circle in historical interpretation, see J. Montgomery, "Toward a Christian Philosophy of History," in his *Where Is History Going? Essays in Support of the Historical Truth of Christian Revelation* 182-97 (1972).



idealist philosopher F. H. Bradley's claim that "the Absolute enters into, but is itself incapable of, evolution and progress." Such a statement is clearly not tautologous, for it is not definitional in character, nor is it capable of any test which could conceivably determine its truth or falsity. Thus it is "meaningless" in the technical sense of lacking verifiable sense. As analytical philosopher Paul Edwards puts it, in his critique of the thought of modern theologian Paul Tillich: "We normally regard as empty, as devoid of (cognitive) meaning or content a sentence which, while pretending to assert something, is on further examination found to be compatible with any state of affairs."<sup>85</sup>

This is precisely the case with presuppositional Marxism. What evidence could possibly confirm or disconfirm such metaphysical assertions of Marxist philosophy as: "All events are materialistically determined," "Dialectic action moves history to the inevitable goal of a classless society," "Socio-economic factors are the ultimate explanation of human rights," "The State is the sole source of human rights," etc., etc.? The non-demonstrable character of such claims may seem on the surface to offer a great advantage, for an opponent is at a loss to marshal any item of evidence capable of definitively refuting these Marxist assertions. But the victory is Pyrrhic, for a viewpoint incapable – even in principle – of disproof is likewise incapable of proof. To the Marxist world-view the comment could be applied that Wolfgang Pauli wrote on a paper submitted to him by a fellow physicist: "This isn't right. This isn't even wrong."

All of which might not be so serious if we were dealing merely

85. P. Edwards, "Professor Tillich's Confusions," 74 *Mind* (April, 1965). Cf. J. Montgomery, *The Suicide of Christian Theology* 325-34, 368-70 (1971).

with an academic option in the history of ideas, such as Bradley's neo-Hegelianism. Here, however, the issue is a practical political philosophy influencing countless millions of people – with a concomitant human rights theory that touches men's lives in every corner of the globe. In such a context, epistemological meaninglessness – the intellectual sin of invincible ignorance – is a luxury the world can ill afford.<sup>86</sup>

### *The Immanentist Fallacy*

Marxists, though they have a genuine concern for human fulfillment, categorically reject an absolute standard of justice unconditioned by socio-economic factors. Professor Wood describes in the following terms several interrelated aspects of Marx's theory of justice:

First, as we should expect, Marx views the concept of justice in terms of its function within a given mode of production. The employment of this concept by human thought and its application to social practice are always dependent moments of the process of production. The rational validity of any such employment is, for Marx, always measured in terms of the prevailing mode of production. . . .

Secondly, then, justice is not a standard by which human reason in the abstract measures human actions, institutions, or other social facts. It is rather a standard by which each mode of production measures *itself*. It is a standard present to human

86. It is worthwhile noting that Marxists are by no means the only contemporary jurists to think presuppositionally. Western legal positivists/realists have likewise put the fundamental principles of legal systems beyond all testability. Thus Kelsen's *Grundnorm* and H. L. A. Hart's ultimate "rule of recognition" can no more be validated or invalidated than – to use Hart's analogy – the metre bar in Paris can be measured for accuracy. See J. Montgomery, *The Law Above the Law* 31-33 (1975).

thought only in the context of a specific mode of production. Hence there are no general rules or precepts of "natural justice" applicable to any and all forms of society. The ownership of one man by another, for example, or the charging of interest on borrowed money are not in themselves just or unjust. Under the ancient mode of production, the holding of slaves was, as Aristotle argues, both right and expedient. Usury, on the other hand, was essentially foreign for the most part to this mode of production, and where it involved simply making a profit on the momentary distress of another, it was certainly unjust. Under capitalist production, however, direct slavery is unjust; while the charging of interest on borrowed capital is perfectly just.

Thirdly, it is clear that Marx followed Hegel in rejecting a formal conception of justice. For Marx, the justice or injustice of an action or institution does not consist in its exemplification of a juridical form or its conformity to a universal principle. Justice is not determined by the universal compatibility of human acts and interests, but by the concrete requirements of a historically conditioned mode of production.<sup>87</sup>

But if justice and human worth are conditioned by modes of production, how can one ever unqualifiedly condemn as wrong any particular treatment of human beings by their fellows? Yet the need to do so is imperative, as the Nuremberg War Crimes Trials so well illustrated.<sup>88</sup> Without an unconditional standard of human worth, an absolutizing of state power enters the picture as a substitute: Hobbes' "Mortall God" of political absolutism swal-

87. A. Wood, "The Marxian Critique of Justice," in M. Cohen, *Marx, Justice, and History* 14-16 (1980).

88. See in particular Robert H. Jackson's summing up for the prosecution at Nuremberg: R. Jackson, "Closing Address in the Nuremberg Trial," 19 *Proceedings in the Trial of the Major War Criminals before the International Military Tribunal* 397 (1948); and cf. J. Montgomery, *The Law Above the Law* 24-26 (1975).

lows up the individuals who have agreed to yield all their rights to it.<sup>89</sup>

Sensitive Marxist human rights thinkers are well aware of this grave problem. We have already noted how Dr. Kartashkin would like to introduce the term "inalienable rights" into the Socialist vocabulary — though he takes away the meaning and significance of the term by continuing to tie human rights to the flux of dialectic materialism.<sup>90</sup> In a personal conversation with this writer, Professor Movchan told me in 1980 how troubled he was by declining sexual morality among young people in Moscow, and how difficult it is to get citizens to tell the truth in court when they do not believe that they will ever face a Last Judgment. But how can one justify absolute standards of morality or truthfulness on the basis of continually changing socio-economic patterns?<sup>91</sup>

This dilemma has attracted the attention of some of the very best minds in contemporary philosophy, and their conclusions on the matter are unambiguous. Wittgenstein, in his *Tractatus Logico-Philosophicus*, demonstrated logically that "the sense of the world must lie outside the world" (6.41), that is, man never has

89. T. Hobbes, *Leviathan*, especially ch. xvii, containing the text of that "Covenant of every man with every man" which is "the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*." Drai has already shown us the epistemological consequences of Marxism's absolutistic state sovereignty principle (R. Drai, *supra* note 55, and corresponding text).

90. *Supra* Chapter Three, our text at notes 14-15.

91. To be sure, Marxists are not the only ones facing this problem. Western sociological jurisprudence and legal realism of the variety popularized by Mr. Justice Holmes leaves a society equally bereft of unconditional standards of truth and morality. See J. Montgomery, *The Law Above the Law* 17-57 (1975).

sufficient perspective from within the world situation to build an absolute structure of truth and value: absolute truth and eternal value, if they exist at all, must take their origin from outside the flux of the human situation. More recently, Kurt Baier, one of the foremost ethical thinkers to benefit from Wittgensteinian insights, has admitted that from within the human situation ethical values can never rise above the societal level: "Outside society, the very distinction between right and wrong vanishes."<sup>92</sup> Human beings, in other words, are incapable of reaching absolute ethical norms by unaided reason: their ethic will always reflect their stance in society. As Wittgenstein put it in the *Tractatus*: "If there is any value that does have value, it must lie outside the whole sphere of what happens and is the case.... Ethics is transcendental" (6.41-6.421).<sup>93</sup>

#### A Transcendental Corrective

The plain consequence is that the only possible route to absolute ethical standards and inalienable rights would have to lie in a revelation from outside the world. If such a revelation does not exist, man will of logical (not merely practical) necessity remain forever bound to his cultural relativities, forever incapable of establishing a true standard of human worth.

In his Nobel lecture, Solzhenitsyn posed a series of questions that existentially display the acute need for revelational aid in the sphere of human rights.

Who is going to create for all mankind one single system of values for evil deeds and good deeds, for what is intolerable and

92. K. Baier, *The Moral Point of View* 157 (1965).

93. See also Wittgenstein's posthumously published "A Lecture on Ethics," 74 *Philosophical Rev.* (Jan., 1965); and cf. J. Montgomery, *The Suicide of Christian Theology* 364-66 (1971).

what is tolerable, and where the boundary between them lies today? Who will make clear for mankind what is really unbearable and heinous and what, because of its nearness to us, is only a scratch on the skin — and, thus, direct our wrath against what is really terrible, and not merely something close to us? Who might be capable of communicating such understanding across the barrier of personal human experience? Who might possibly be able to instill in the narrow, stubborn human essence the grief and joy of others who are far away, a perception of a range of facts and delusions which they have never experienced themselves?<sup>94</sup>

Clearly, the only meaningful answer to these questions would be a transcendent Deity — and not a mere philosophical Absolute, but a living, personal God who would revelationally impart His standards of human dignity to man and soteriologically enter human hearts to change indifference and hatred to concern and love.<sup>95</sup>

This, to be sure, is precisely the biblical claim: "God was in Christ, reconciling the world unto Himself." But, unlike Marxism, it is not an aprioristic metaphysic incapable of confirmation. The case depends on evidence, as lawyers who have considered it across the centuries have been well aware.<sup>96</sup> Simon Greenleaf,

94. For the text of Solzhenitsyn's 1970 Nobel Prize lecture, see the *New York Times*, Sept. 30, 1972. Cf. N. Nielsen, *Solzhenitsyn's Religion* (1975).

95. See F. Schaeffer, "Christian Faith and Human Rights," 2 *Simon Greenleaf L. Rev.* (1982-1983), and cf. E. Corwin, *The 'Higher Law' Background of American Constitutional Law* (1955), and C. Friedrich, *Transcendent Justice: The Religious Dimension of Constitutionalism* (1964).

96. A prominent early example is Hugo Grotius, the "father of international law," whose *De veritate religionis Christianae* (1627) is considered the first modern Protestant textbook of apologetics. Cf. also Thomas

Royall Professor of Law at Harvard and the greatest American authority on common law evidence in the 19th century, put it this way in his *Testimony of the Evangelists*:

All that Christianity asks of men on this subject, is, that they would be consistent with themselves; that they would treat its evidences as they treat the evidence of other things; and that they would try and judge its actors and witnesses, as they deal with their fellow men, when testifying to human affairs and actions, in human tribunals. Let the witnesses be compared with themselves, with each other, and with surrounding facts and circumstances; and let their testimony be sifted, as if it were given in a court of justice, on the side of the adverse party, the witness being subjected to a rigorous cross-examination. The result, it is confidently believed, will be an undoubting conviction of their integrity, ability, and truth.<sup>97</sup>

Professor J. N. D. Anderson, formerly Director of the Institute of Advanced Legal Studies in the University of London and a world-renowned specialist on Muslim law, has offered compelling arguments for the historical facticity of Jesus' resurrection from the dead, and with it the truth of his claim to be no less than God incarnate.<sup>98</sup>

One of the very greatest benefits from the personal revelation of God in Christ to mankind is that the problem of human nature—which as we have seen, so plagues Marxism – is clarified and resolved. Since man himself created the conditions of exploita-

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Sherlock, Master of the Temple, whose influential *Trial of the Witnesses of the Resurrection of Jesus* appeared in 1729, and is reprinted in J. Montgomery, *Jurisprudence: A Book of Readings* 339-448 (2d ed. 1980).

97. S. Greenleaf, *The Testimony of the Evangelists*, reprinted in J. Montgomery, *The Law Above the Law* 132-33 (1975).

98. J. Anderson, *Christianity: The Witness of History* (1969), and *The Evidence for the Resurrection* (1966).

tion, he is unable magically to make them disappear. The root difficulty lies, as Jesus said, in the heart of man. It is that heart which needs to be changed in order for human rights to become more than a political slogan.

The old bourgeois life of aspiration and consumer-cravings, rooted in rejection of the rebellion against God, can be turned on its head by Jesus Christ. The whole life – attitudes, words, actions and all – may be forgiven by the innocent victim who was crucified at Calvary in Palestine. For he died, as the Bible incredibly asserts, "the just for the unjust, in order that he might bring us to God." No titanic struggle to recreate oneself according to certain standards of ideal humanity. No commitment to completing the environmental transformation before new people can emerge. Authentic repentance, which was the core of his uncomfortable preaching, occurs when a person turns radically away from his or her old life in accordance with the firm but gentle dictates of the risen Jesus. The result is an alternative life-style in which God becomes utterly central and people begin to matter more than things.<sup>99</sup>

What we are suggesting here could not be more practical or meaningful in the human rights sphere. Marxist human rights theory and practice have been weighed in the balance and found wanting. Panczuk writes: "In view of the experience of those living in the Soviet Union, certain aspects of which we have tried to underline, we do not believe that respect for human rights, and their application, can be effective within the framework of a so-called socialist society of the Soviet type. This is due to the very nature of the Marxist-Leninist ideology."<sup>100</sup> Simis agrees: "The

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99. D. Lyon, *Karl Marx: A Christian Assessment of His Life & Thought* 185 (1979).

100. G. Panczuk, "Human Rights and the Soviet Union," 10 *World Justice* 254 (1968).

Soviet government, Soviet society, cannot rid itself of corruption as long as it remains Soviet. It is as simple as that."<sup>101</sup>

Professor Berman expresses the hope that someday "Christianity and respect for legality may help to overcome the pervasive corruption of Communist society . . . which neither law alone nor law and scientific materialism together can overcome."<sup>102</sup> A transcendental, personal, divine revelation of human dignity is indeed available for the liberation of society and individual experience. The Norwegian artist Victor Sparre, a close friend of both Solzhenitsyn and Sakharov, sums it up nicely.

In 1977, I received a commission to make 15 large stained-glass windows for a church in Tel Aviv. . . .

In Jaffa, the one-time Joppa, which is the old part of Tel Aviv, I sought out the house which is supposed to be the one where Simon the Tanner lived, and where, according to the New Testament, an even more famous Simon, Peter, stayed for some weeks as his guest.

In the maze of small streets, I lost my way. At length I was conscious that I was being watched by an elderly man dressed in a goat-skin coat done up with wooden buttons, who was standing in a doorway. I went up to him. "You couldn't tell me where Peter stayed?"

"Couldn't I?" he answered brusquely. "It was there." He indicated a blue door a few yards down the street. But I was now interested in him. He turned out to be a third Simon and a

Russian. I therefore pulled from my pocket a picture of Solzhenitsyn in Norway. "Do you know who that fellow is?" I said. He looked as though he could hardly believe his eyes. "Sasha!" he exclaimed. And it came out that he had spent 15 years in prison camps in Siberia, some of them in company with Solzhenitsyn.

"When you see him again," he said, "remind him that he owes me five rubles."

This Simon was, like myself, a painter, and we talked for two hours. But in the end I turned my attention back to the house that was reputed to have belonged to the Simon who was a tanner.

If it is indeed the house, and if *Acts* tells true, its roof was the birthplace of the idea of universal human rights and respect for the individual. For the account says that it was there that Peter had the vision which led him to accept the idea that all men, and not only Jews, were fit receptacles for God's grace.

Therewith Christianity became the possession of all mankind, and Christians began to say that all men are of infinite worth. Hitherto, even the enlightened Jews had only thought of Jews in this way, and even enlightened Greeks only the upper class. Simon Peter brought to the world the first declaration of universal human rights.<sup>103</sup>

101. K. Simis, *USSR: The Corrupt Society* 300 (J. Edwards & M. Schneider trans. 1982).

102. H. Berman, "Atheism and Christianity in the Soviet Union," in *Freedom and Faith: The Impact of Law on Religious Liberty* 142 (L. Buzzard ed. 1982). Cf. J. Hazard, *Recollections of a Pioneering Sovietologist* III-13 ("The Church and Its People") (1984).

103. V. Sparre, *The Flame in the Darkness: The Russian Human Rights Struggle* 127-28 (A. & D. McKay trans. 1979). Sparre here refers to *Acts* 10. On the key significance for human rights of early Christian teaching on the dignity and worth of all men, see P. Rhodes, "A Graeco-Roman Perspective," in F. Dowrick, *Human Rights: Problems, Perspectives and Texts* 75 (1979).

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E. M. BLAIKLOCK (1903-1983):

TRIBUTE TO A 20TH CENTURY APOLOGIST

by  
Dr. Steve Kumar

EDITOR'S NOTE: Steve Kumar, Ph.D., is Executive Director of the Evangelical Apologetics Society of New Zealand, which has officially designated the Simon Greenleaf School of Law for the advanced training of its membership. Drs. Montgomery and Lindsell have recently lectured in New Zealand under the Society's auspices and were privileged to know the late Dr. Blaiklock personally.

E. M. BLAIKLOCK (1903-1983):

### TRIBUTE TO A 20TH CENTURY APOLOGIST

Contemporary Christianity lost one of its able defenders of the faith in the death of Emeritus Professor Edward Musgrave Blaiklock who passed away in his 80th year on October 25, 1983. Professor Blaiklock was known internationally as an eminent classical scholar for his works on Greek drama, Latin literature, the history of first-century Palestine and the historical geography of the Mediterranean. He was born in Birmingham, England, in 1903 but lived in New Zealand since he was six.

Professor Blaiklock held the chair of Classics at the University of Auckland for 21 years and for 42 years taught Latin, Greek and ancient Biblical history. Apart from his specialties he read widely in other languages including Italian, French, German and Hebrew. In 1970 Auckland and Oxford University Presses honoured him with a Festschrift for his academic influence and in 1974 the Queen awarded him the O.B.E. for services in scholarship and to the community. He was President of the New Zealand Baptist Union in 1970 and held high offices in other, interdenominational groups, including the presidency of the Bible College of New Zealand and the Scripture Union of New Zealand. He was appointed as the University's Orator, and as a lay preacher he was in constant demand to expound the unchanging message of Christ on radio and at many a gathering, both religious and nonsectarian. Students around the world benefited greatly from his profound insights and brilliant scholarship. Unlike many academics he moved freely with the layman and the common people heard him gladly.

A great admirer of C. S. Lewis, Dr. Blaiklock vigorously argued for "mere Christianity." He did not hesitate to meet atheists in public debates nor did he spare his pen when historic Christianity was attacked by liberal theologians. In his widely praised efforts to defend Christianity he wrote, *Why I Am Still a Christian*, *Layman's Answer*, *Who Was Jesus?*, *Is It or Is It Not?*, etc. His careful scholarship is evident in many of the

works which he edited or to which he contributed: *Atlas of Bible Lands*, *Dictionary of Biblical Archaeology*, and Zondervan's five volume *Encyclopedia of the Bible*. Evangelicals have benefited abundantly from his prodigious scholarship. His literary contribution totaled more than 78 volumes.

John Wesley's profound statement "my people die well" applied to E. M. Blaiklock. He once wrote: "I have had a happy life, friendship and fellowship untold, a perfect marriage, fulfillment of heart and mind, and I owe it all to my faith." In an age of materialism and intellectual confusion, Dr. Blaiklock faithfully served His Lord and passionately defended the faith that was once for all delivered to the saints.

— Steve Kumar, Ph.D.  
Executive Director  
New Zealand Apologetics Society



*Dr. Montgomery with Professor Blaiklock in Auckland, New Zealand, October 1980.*

## THE NEXT ISSUE



## COMING IN THE NEXT ISSUE

Volume Four (Academic Year 1984-85) of the *Simon Greenleaf Law Review* will feature — by special permission of the English Lord Chancellor himself — a reprint of Lord Hailsham's autobiographical account of his apologetic pilgrimage to faith in historic, orthodox Christianity. This testimony, reminiscent of C. S. Lewis, appeared in Lord Chancellor Hailsham's now out-of-print work, *The Door Wherein I Went*, and offers a superb defense of the deity of Christ by the highest ranking legal luminary in England. Dean Montgomery had personal contact with Lord Hailsham in England in May of 1983, and the Lord Chancellor's private secretary wrote to Dr. Montgomery on November 22, 1983, that Lord Hailsham was "entirely content" with the use of his material in the *Simon Greenleaf Law Review* and "he has asked me to thank you for your courtesy in approaching him in this way."

Other articles in Volume Four will include "The City of Babel: Ancient & Modern" by Professor Raymond B. Marcin of the Columbus School of Law of the Catholic University of America — a distinguished member of Simon Greenleaf's international Board of Reference; and a critical essay on the late Scandinavian legal realist Alf Ross, researched in the Simon Greenleaf Library's Ross collection (comprising numerous books which personally belonged to Ross, with his hand written annotations). And Volume Four will also contain an extensive review section, evaluating recent publications in law and theology, apologetics, and human rights. Subscribe today!