

LAW AND ECONOMIC SYSTEMS: CONTROL

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Economic systems exist to satisfy human wants. They do this by converting the resources at their disposal into goods and services which they divide to meet the individual and social needs of their peoples. The economist calls these processes production and distribution. It is through legal institutions that these processes are controlled and directed. Control is a function of ownership or property. Direction is either a matter of planning or the outcome of freedom of contract. Our immediate interest is in control.

As between economic systems, techniques vary greatly. Some are young and flexible. These welcome change. Some are old and rigid to the point that changes in them are resisted on moral grounds. But as between systems at or near the same level of development, differences in techniques are negligible. Russia and the United States furnish a good example.

The goals of capitalistic, socialistic and communistic economic systems are the same. They use the same productive techniques. In what then do they differ? The answer is simply with respect to the legal institutions upon which they are based and through which they function. Before enlarging upon this as it relates to control, which is our present concern, there are two ideas or beliefs which we find it desirable to examine. The first is that whereas in the United States the State exists for the individual and not the individual for the State, in Russia the individual exists for the State and not the State for the individual. The second is that public property is a concomitant of tyranny.

To say that in the United States the first concern of government is the welfare of the individual while in Russia it is the welfare of the State, is not to say that in the United States the rights of the individual are superior to those of government whereas in Russia, the rights of government are superior to the rights of the individual. The rights of government are superior in both. The difference lies in that, in the United States, government can exercise its superior rights only when the individuals whose rights are restricted share directly in the public benefits derived from government action. While in Russia, as we understand it, government ignores what are to us, the rights of the individual if the overall effect of a restriction is believed to be in the interest of the state.

May I put it this way: The governments of both the United States and Russia,

at least in so far as economics are involved, are concerned with the general welfare. They differ with respect to the manner in which it can be best served. Russians believe the welfare of individuals in general is derived from the welfare of the state: Americans believe the welfare of the state is derived from the welfare of individuals in general. This difference, we think, is basic to an understanding of the difference between Russian and American law pertaining to property.

In Russia property rights are vested mainly in the state. In the United States they are mainly in private hands. The difference, however, is not as great as the mere statement of it may lead the uninformed to think. If it were, I feel, communistic propaganda to the effect that the institution of private property here leaves the way open for the few to exploit the many to the disadvantage of the whole, would be justified and the economically underdeveloped peoples of the world, in seeking to improve their lot, would be well advised to shun the "American Way." That which follows is presented in the hope it will clarify as well as expand this statement.

The strength of a nation depends upon the strength of the belief of its citizens in its legal institutions. Americans believe firmly in their form of government and in their economic system which they are prone to regard as one and inseparable. Indeed Americans as a people, seem to think all the ills of the world economic and otherwise, are to be solved through the establishment of the "American Way" throughout the earth. From a purely domestic standpoint this belief may possess some merit. But it is a blind and fallacious belief which when expressed or implied by Americans in their dealings with other peoples, is generally resented.

This country is not alone in that its people in free elections choose those who make their laws. In fact, the United States has only representative government. There are countries with governments both representative and responsible. And in this they believe themselves to be more democratic than the United States. This is not meant as disparagement. It is said as a background for the statement that in Great Britain where government is both representative and responsible, the policy of public ownership and the socialization of essential services has been put into effect widely without interfering with democratic political processes. There are other instances but this should suffice to refute the idea that public ownership and political freedom are incompatible. There is no generic connection between them. In truth, private property played a greater part in the lives of the colonists who revolted against the tyranny of George the Third than it plays in the lives of Americans today.

In Russia there is some private property. In the United States there is much public property. Both are confronted, therefore, with the problem of what should be publicly and what should be privately owned. To understand but not to answer this problem (since the answer is contingent upon time and place), we must distinguish between goods essential to the survival of the owner and his dependents, and goods which are not essential to such survival. This distinction resembles but is to be distinguished from the distinction drawn by economists between consumers' and producers' goods or economic capital. A bow and arrow which is economic capital may be essential to the survival of the owner and his dependents, whereas a factory to produce bows and arrows would not be. We emphasize this distinction

because it takes into account both the natural or intuitional and the rational or conventional bases for private property.

With respect to things essential to individual survival, private property rights are asserted throughout the animal kingdom. Man, as an animal, doubtless has asserted such rights from his beginning. Man, as a rational being, acts on the basis of reason. Thus when he developed the capacity to visualize future needs and discovered he could provide for them through control over the factors of production, these factors were brought under individual control.

It is one thing to control things essential to one's existence. It is quite another to control the means of production and goods in excess of those necessary to satisfy one's own needs. Intuitional or natural rights may be said to justify legal recognition of the former. But something more is necessary to justify legal recognition of the latter. In other words, private property in things essential to the survival of the individual and his dependents may be justifiable on the ground of natural or inalienable right, but private property in other things must find its justification in objective benefits in which the members of a society in general share. Placing ownership of goods other than those essential to the survival of the owner in private hands is not recognizing an inalienable right, it is creating a public trust, the duration of which depends upon how faithfully those to whom it is committed discharge it.

The founders of the United States recognized the autocratic nature of government. They understood that even a government created through the direct exercise of the will of the governed would be free to exercise all the rights of sovereignty not denied to it by the source from which it derived its power. For this reason the Bill of Rights was incorporated into the Constitution. This bill relates to both personal and property rights, but only the latter now concerns us.

The question of the right of the state vs. the right of the individual can be dismissed by saying that inasmuch as the legal rights of the individual are those which the state recognizes, it is self-evident that the rights of the state are superior to those of the individual. I find nothing wrong with this statement, except that it applies to both the United States and Russia. In consequence, therefore, it throws no light upon the differences between the Russian and American economic systems. Something more is essential to understanding.

The Bill of Rights recognizes the right of the state to take private property under the power of eminent domain, when the public good, as opposed to the good of the individual, requires it. The right of the owner, however, is recognized in that he is constitutionally entitled to just compensation. But, be it noted, this is in no sense part of the right of eminent domain. It is a limitation placed upon the exercise of this right. Where the right exists without the limitation, the taking of private property without compensation may be immoral according to our code, but this does not make it illegal in the countries in which it is done.

The right of the state to take title to private property in the United States is superior to the right of the individual to hold it. But this is not all. The right of the state under the police power to regulate the use of property is superior to the right of the individual to use it. Zoning affords a good example. The police power, however, cannot be used to regulate unless the persons whose activities are regulated share directly in the benefits which flow from the regulation, to an ex-

tent which largely if not completely offsets the detriments occasioned them by the regulation.

Not only is property held subject to eminent domain and the police power. It is subject to taxation, the proceeds of which must be used for public purposes. Nor is this all. The law of nuisance applies everywhere. No property owner in the enjoyment of his property may use it so as to interfere unreasonably with others in the enjoyment of their properties.

I am aware there is nothing new in what has been said about eminent domain, the police power, taxation and nuisance. Why then have I said it? Simply because it is not widely enough realized that it is in these limitations we find the answer to the communistic claim that through the institution of private property the right of an economically powerful few to exploit the less fortunate many is recognized by American law. Truth demands we recognize there is exploitation. This, however, is not due to the failure of the law to recognize the rights of individuals; it is due rather to the failure of some individuals to recognize the law. But this is another subject.

Although there is a reciprocal relationship of great significance, we think it true to say beliefs beget policies rather than that policies beget beliefs. The belief of Russian communists in public property did not arise out of them having had experience with it. They have come to have it because of their belief in it. In like manner the inherited belief of Americans in private property did not arise from their ancestors enjoying the benefits of it. The right of the common man to own property was established as law, only after the controlling element in the then existing society came to believe in it.

How long and to what extent public property will continue in Russia and how long and to what extent private property will prevail in the United States depends upon how satisfactory the results achieved by these economic systems are to the masses of people they serve. The fact that the government of the United States, like that of Russia, was established through revolution, bears testimony to this. It is, therefore, pertinent for us to ask how control through public property is working out in Russia and how control through private property is working out in the United States.

As we understand it, the overall policy of public property in Russia has encountered such opposition that the scope of private property is being gradually widened there, while in the United States more and more people are coming to believe in the desirability of public ownership, not only in fields where adequate service cannot be supplied at a profit, but in other fields as well. Thus, starting from opposite extremes, the two countries are advancing from opposite directions toward a common economic meeting ground. The Russians are coming to recognize the inalienable right of the individual to control the things essential to his or her survival while Americans are coming to recognize more and more that private property in other things is in the nature of a public trust.

The extent to which private property will come to be recognized in countries which now have communistic economic systems, the degree to which public ownership will be expanded in countries which now describe their economic systems as free enterprise, and the decisions of the underdeveloped awakening countries as to

which system they will adopt, all depend upon the comparative accomplishments of the two systems. Both Russia and the United States are aware of this. National prestige is at stake, so each by emphasizing its material accomplishments seeks to intensify the nationalism of its people and win other people to its way of life.

In presenting their cases to the world, little distinction is shown by either the United States or Russia between that which is political and that which is economic. Russia creates the impression that those who would avoid being exploited through private property must adopt the Russian political system. Americans leave the impression "that government of the people, for the people, by the people" is possible only for those who base their economic system on private property. No one explains that the right to determine what shall be privately owned and what shall be publicly owned is of the essence of democratic government.

For reasons which are self-evident public ownership has a strong, direct, immediate appeal for the poverty stricken masses of the world. It is so great that these masses, if left in ignorance of the real nature of democratic government and private property, may join the communistic bloc in the mistaken belief that this is necessary in order to avoid having an economic system wholly motivated and controlled by the quest for profits.

Failure of the West to make clear to all peoples that economic systems are merely matters of law, and that peoples who make their own laws can have the type of economic system they wish, gives to the East a needless advantage in bidding for world favor. Reason dictates that the threat of world domination by the communists would be diminished if those whom communists seek to dominate were well enough informed to know that they do not have to adopt the form of government now characteristic of communistic countries in order to enjoy the benefits, if any, of communist economic experiments.