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BOOK REVIEWS

PHILOSOPHY OF DEMOCRATIC GOVERNMENT. By Yves R. Simon. Chicago: The University of Chicago Press, 1951. Pp. 324. $3.50.

This book is the second in a series of volumes sponsored by the Walgreen Foundation. Its author was for ten years professor of philosophy at the University of Notre Dame. He is now professor of philosophy of social thought, Committee on Social Thought, University of Chicago. The purpose of the book is described in the foreword as follows:

"Twice during the first half of the twentieth century, totalitarian systems have challenged the concept of democracy. These systems have put forward complete philosophies of man and the state, philosophies strong enough to inspire their followers with a crusading spirit.

"Democracy has been on the defensive; it has been defended more and more often with the pragmatic argument. But this argument has proved no match for the competing systems. Democracy works, it is true—but so did fascism, until it was destroyed from outside. The need for a philosophy that shows democracy to be grounded firmly on rational principles—this need is apparent."[1]

This, then, is primarily a philosophical work. It is in fact a complete treatise of political philosophy. Extensive consideration is given to the general theory of government and the nature and functions of authority. The subject of sovereignty is not only discussed objectively, but space is devoted to a discussion of those confusing factors in its interpretation arising out of the historical circumstances of its development as a political and juridical theory. In addition, such practical aspects of democracy as universal suffrage, classes, the role of parties and labor unions, the majority system versus proportional representation and the effects of technological development upon democratic society are discussed with unusual insight.

The author, in the opening chapter, observes that "the naturalistic optimism on which early liberalism thrived is a thing of the past"; that "we have come to recognize the jungle character of the wilderness which our fathers mistook for a land of harmony."[2] He believes the case is so plain as to be reflected, for example, in the meaning of the word "liberal." He contrasts the generally understood implications of the word today with its connotation in what he describes as "the golden age of liberalism" when it designated a supporter of the laissez faire system and an opponent of state intervention. "The most radical among liberals were hardly distinguishable from individualistic anarchists. Today, a systematic adversary of economic planning, price control, labor laws, etc., is what everybody calls a 'reactionary' and nobody is considered a liberal unless he is willing to support heavy programs of state intervention."[3]

Of course, this state of affairs reflects new patterns viewed in a new focus in an ever changing social continuum. Since government in a democratic society cannot be rigid and static in the face of social and economic changes and still retain its democratic character, it is to be expected that the number of governmental activities will multiply and become more varied as the state responds to popular demands. However, if liberty under law is to be preserved and true democratic progress attained, objectives should not only have a sound rational content but should be consistent with firmly established principles. While it is true that a higher cultural and

1. P. vii.
2. P. 5.
3. P. 6.

economic standard for all through social cooperation is a desirable goal, ill-considered and haphazard measures in pursuit of such an objective may fetter or virtually destroy individual liberty. In the apt language of Professor Edward S. Corwin in his excellent volume *Liberty against Government*: "It is easy to imagine in the light shed by current ideologies that the demands upon the legislative power, national and state, might so multiply the path of 'the common man' whose century this is said to be, that the notion of Liberty against Government and its implement, judicial review, would be gradually but inexorably crowded to the wall."[4]

In the chapter on Democratic Freedom, Professor Simon discusses the possibility of a democracy giving birth to a totalitarian state. He considers that it is not enough to incorporate into the structure of the state a system of checks, balances and constitutional guaranties. He holds that not even the ultimate check constituted by the control of the people over the governing personnel suffices, for this control may not be genuine and it may also become the accomplice of state absolutism, since the passions which make for absolutism may get hold of the people to their disadvantage. Hence in democracy, as in non-democratic polities, the absolutism of the state must be held in check by forces external to the state apparatus. First among these he places the freedom of the church and next the freedom of the press. He then enumerates the private school, the independent labor union, the autonomous cooperative, and finally, private ownership and free enterprise.

Although Chapter III is entitled Sovereignty in Democracy, it is by no means limited to a discussion of the theory of sovereignty in its relation to that particular form of polity. It is rather a general treatment of this difficult political concept, historically and philosophically, embracing well-chosen references to the views of such distinguished thinkers as Aristotle, Aquinas, Cajetan, Bellarmine, Suarez, Rousseau and Jefferson. The author has undertaken the task of interpreting in rational terms against the background of history the "great fact of political obedience." Upon what ground do some men claim a right to be obeyed? What are the reasons why they are not always disobeyed? The essence of the problem which the author examines is "the proposition that a man can bind the conscience of another man." He believes that this proposition, far from being obvious, is altogether devoid of verisimilitude. "On the one hand, it seems to be impossible to account for social life without assuming that man can bind the conscience of his neighbor; on the other hand, it is not easy to see how a man can ever enjoy such power."[5] The reviewer notes with satisfaction that the author presents the luminous pronouncement of Pope Leo XIII on this subject, in a footnote,[6] together with his own concurring comment.

The idea of sovereignty occupies a central position in the juridical theory of the

4. CORWIN, LIBERTY AGAINST GOVERNMENT 182 (1948). Reviewed by Godfrey P. Schmidt in 18 FORD. L. REV. 165 (1949).

5. P. 145.

6. P. 145 n. See LEO XIII, DIUTURNUM ("On Civil Government") (1881), translation by JOSEPH HUSSLEIN, S.J., in SOCIAL WELLSPRINGS: FOURTEEN EPOCHAL DOCUMENTS BY POPE LEO XIII (1940). "But now, a society can neither exist nor be conceived in which there is no one to govern the wills of individuals, in such a way as to make, as it were, one will out of many, and to impel them rightly and orderly to the common good; therefore God has willed that in a civil society there should be some to rule the multitude. . . . But no man has in himself or of himself the power of constraining the free will of others by fetters of authority of this kind. This power resides solely in God, the Creator and Legislator of all things; and it is necessary that those who exercise it should do it as having received it from God." *Id.* at 54.

state. As lawyers, particularly, are aware, other fundamental legal concepts spring from this initial hypothesis. Sovereignty is a legal fiction and a somewhat mystical concept. Nevertheless jurists have attached to it deeply rooted realistic connotations which furnish sound reasons for retaining it as an essential concept in legal and political science.

However that may be, much of the writing upon the subject in the past has been prompted by an effort to vindicate a political status quo or to create a new political condition. As the author of the present volume observes: "The writings of King James contain the ideology of British absolutism. More shockingly, Bossuet burdened posterity with a theory in which it is easy to recognize the ideology of the great historical movement which culminated in the monarchy of Louis XIV. Late eighteenth century theories of sovereignty express the struggles fought by the American people against the British Crown or by the French bourgeoisie against king, nobility and established church. The impression left by the literature on sovereignty is gloomy; distortion due to practical concerns can be feared almost everywhere."[7]

In the chapter on Democratic Equality, Professor Simon discusses, *inter alia,* the division of society into classes, calling attention to the fact that since socialism became fully class conscious, the socialist movement has been divided into two currents, one holding that democracy, which proved able to overcome the inequalities of the order system, will also, through gradual or abrupt change, overcome the inequalities of the class system, and the other holding democracy incapable of putting an end to the class structure of society and to the kind of inequality connected with it. These two currents have in common the theory that a sine qua non of the classless society is the abolition of private property. There is sound reason to agree with the author's statement that "the separation between the labor force and the ownership of the tools is such a necessary condition of the division of society into classes that, if private ownership is abolished, the class system, such as we know it, necessarily disappears."[8] However, as he points out, prior to the 1920's mankind had no conspicuous experience of what follows the suppression of the class system through the socialization of the instruments of production. The Russian revolutionary regime, ushered in by a very thorough abolition of private property, soon presented such an unhappy picture to civilized men everywhere that "socialistic optimism," based as it was upon theory, reached the vanishing point in a large part of the world.

Rapid social and economic changes in the life of our own country have not yet had time to reveal fully their effects upon the ethos of our people and the operation of their institutions. Without doubt we have reached a testing period in which our direction will be determined for, perhaps, generations to come. We, the people, must make the final decision upon what and how much we can reasonably expect from the state. Whatever our direction may be, it is certain that wise policies and judicious actions can come only from prudent and sagacious thinking based upon the principles of a sound democratic philosophy. This is precisey what Professor Simon has given us in the present volume.

The reviewer deems it fair to say, however, that this is a book which will be read by the uncommon rather than by the common man. It is a scholar's achievement, a systematically developed philosophical treatise which the average man, not given to abstraction, will be inclined to regard as academic. As to communism, the notion of physical containment appeals to the common man's pragmatic propensity toward the oversimplification of a problem of the true depth of which he is not fully conscious.

7. P. 144.
8. P. 256.

He is still a considerable distance from a realization that communism is not the Soviet Union or any particular state or regime, that it is not politically and geographically localized as Nazism was. The energy, power and crusading spirit of communism spring from the fact that it is a generic philosophy inspired by a faith with universal aspirations. It must be met by a demonstrably better philosophy and faith, positive and universal, whose apostles bear the crusader's torch of conviction and inspiration. Professor Simon has made a constructive contribution to this end. His book will be read by students of political philosophy with pleasure and profit.

RAPHAEL R. MURPHY†

FOREIGN CONFISCATIONS IN ANGLO-AMERICAN LAW. By Edward D. Re. New York: Oceana Publications, 1951. Pp. xi, 200. $5.00.

Legal problems of little consequence in the past at times assume great importance under present world conditions. This is particularly true in the field of international relations and international law. In this treatise on the extraterritorial effects of foreign confiscations in Anglo-American law, Professor Re of St. John's University School of Law, discusses a subject-matter which, some decades ago, would have been hardly a problem of considerable weight, but which, today, represents a question of far-reaching importance. It is not difficult to foresee that the problem, as well as its significance and its complexity, will be with us for many years to come.

The first step in a discussion of confiscations is necessarily a precise definition of the concept of confiscation and its careful distinction from neighboring concepts, such as expropriation. A clarification of this legal area is badly needed, especially in our times, when a variety of oftentimes cloudy terminology, such as socialization and nationalization, has been used in some countries with reference to measures which were frequently purely confiscatory. In the introductory chapters of his work Professor Re offers a comprehensive discussion of all the measures of this kind, howsoever denominated, and he is certainly correct in emphasizing that in considering these measures, the substance of the act and not the label given to it must be examined.

Will our courts grant extraterritorial recognition to foreign confiscations? The question is controversial. The underlying theory of a long line of court decisions is found in the principle that our courts will not sit in judgment upon the validity of acts of another government within its own territory. The greatest merit of this principle is doubtless its simplicity and clarity. Whenever an act of a foreign government forms part of the facts considered, or of the issue to be met by our courts, such act will not be subject to judicial review. Its legality is conclusively presumed and such act, however obnoxious, cannot be checked or set aside. The court's only remaining function is to apply the consequences of such foreign act without passing upon the merits of such act itself. This self-imposed restraint of the courts may have two-fold reasons: one, the general principle of international law that the validity of any act is to be considered in the light of its own domestic law; and two, that courts usually refrain from meddling in matters of foreign policy, especially in matters where their decisions could have far-reaching international repercussions. As a result, foreign governmental acts enjoy a kind of judicial immunity *ratione materiae* in our courts akin to the extraterritoriality *rationae personae* of foreign sovereigns.

It is obvious, however, that such a judicial abstention and self-limitation must have some boundaries. This is particularly true in the United States today. We cannot

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shut our eyes before a peculiar anomaly. Our courts are the ever vigilant and ardent defenders of the constitutional principle that nobody shall be deprived of property without due process of law and without just compensation. In order to enforce this basic principle of the United States Constitution, our courts are prepared to declare statutes invalid and to upset executive acts. On the other hand, should our courts take cognizance without objections, criticism, and judicial review of such foreign systems which take property without compensation as usual process of law? In the last analysis this would mean that our courts would yield to foreign principles which are anathematic in our public opinion and are diametrically opposed to the public policy and to the laws of our country. Moreover, in most of the cases such judicial treatment would mean not only recognition of, but assistance to, foreign confiscatory measures. And such assistance would be even more anomalous whenever American property interests abroad would be victimized by this well-known judicial self-limitation. Cases involving foreign confiscations dealt with by American courts include confiscations in connection with the frequent military revolutions of Latin-American countries, the Nazi German confiscations based on the Third Reich's political and racial theories, finally, the confiscations in the Soviet Union, and the Soviet Bloc of countries where confiscations are no longer directed against certain groups of people, but are rather impersonal confiscations, directed against any one who owns some type of property which the government deems worthy of confiscation.

Should our courts stick to the old rule of not reviewing acts of foreign governments in such cases? An answer in the affirmative would mean that at a time when our ideological fight against totalitarian governments is more emphasized than ever, our courts would render assistance to the aims of totalitarian systems. The question, therefore, is whether facts may arise, and if so what facts they must be which relieve our courts from their traditional self-restraint with regard to the acts of foreign governments.

Professor Re's treatise is a reliable and excellent guide with regard to all these problems. It covers practically the whole field of the questions involved, no matter how intricate and complex they may be. The first two chapters of the book serve to clarify the concept of confiscation as distinguished from kindred ideas. Thereafter the author proceeds to analyze the theory termed by him the "rule of decision" principle. The language of this denomination stems from *Ricaud v. American Metal Co.*,[1] in which the Supreme Court held that a foreign confiscatory action became ". . . a rule of decision for the courts of this country."[2] This rule embodying a respect of, and amounting to a yielding before, acts of a foreign sovereign, is by no means new, and the author develops its genesis and presents a series of cases illustrating the history of the rule, which was framed perhaps most concisely in the *Ricaud* decision. In consecutive chapters the author discusses and evaluates the leading decisions of the United States Supreme Court, as well, as state court, lower federal court, and English decisions. The survey concludes with the much disputed *Bernstein*[3] decision which is very close to the full application of what the author termed "the rule of decision" principle, at a time when the exponents of the German government, whose acts are upheld by the court, had already been defendants in the Nuremberg trials, partly because of similar acts. Finally, the author discusses the conclusive presumption of legality of the foreign act which flows from the "rule of decision" principle,

1. 246 U.S. 304 (1918).
2. *Id.* at 310.
3. Bernstein v. Van Heygher Frères Société Anonyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

and concludes after a thorough discussion of the implications of this principle, that, although it is a deeply entrenched principle in our law, it has earned a well-deserved rest and there is a positive need for its re-evaluation.

One can only fully agree with this conclusion of the discussion, and one can also agree that to such re-evaluation Professor Re's treatise is an important piece of work. The problem is by no means only academic. It would seem that the ever increasing trend of confiscations in the Soviet Bloc and some other countries will keep alive judicial consideration of their extraterritorial effect in our courts. In our days, when the confiscation of important English property interests in the Iranian oil-industry is a current headline topic, the foregoing statement hardly needs any further proof. Some uniform attitude, and unquestionably a uniform attitude of non-recognition, in countries to the legal and social standards of which such confiscations are abhorrent, would be highly desirable. It is indeed regrettable that in a case discussed by Professor Re, the Russian Princess Paley Olga, was denied legal relief and she was compelled passively to look on when her family portraits confiscated by the Soviet authorities were auctioned in England, whereas, as is evident from French decisions in similar situations, in France she would have obtained full relief. International oganizations (such as the Grotius Society, in 1947), have in recent years repeatedly discussed the international repercussions of the problem. A further clarification is, however, still needed. One can only hope that Professor Re will continue, amplify and pursue his research, thus rendering assistance in the work of courts, governmental authorities and international organizations in meeting the problem with increasing facility.

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