

# THE BILL OF RIGHTS IN AMERICA AND CENTRAL EAST EUROPE

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A number of Americans have recently gone to Czechoslovakia, Hungary, Poland, and other Eastern European countries to assist in the process of forming constitutions in these countries.<sup>1</sup> Americans, however, are outsiders, and have a very limited role. These countries are very strange to us. A perhaps apocryphal story has it that Winston Churchill once responded to Averill Harriman, when Harriman was talking about English politics, "My God, Averill, it takes a lifetime to learn one's own politics. How can you comment on mine?" We face language problems, different cultures, and different histories, of which we are usually quite ignorant. One Bulgarian said to me, "I don't know where you get off coming here! You probably don't even know where we are on the map!" In other areas, such as company law, commercial law, and banking law, Westerners can help a great deal. But constitutional law is different. Constitutional law grows out of a nation's history. It reflects the nation's culture and its aspirations, its tragedies and its miseries. Outsiders cannot share in that, and consequently, we have a limited role to play.

Our role is nevertheless a useful one. After World War II, the Communists took over these countries and forced them to face east. The Western constitutional revolution of the last fifty years is unknown to them. Americans are able to tell them what has happened elsewhere, what has worked, and what has not worked. Often we comment on their drafts. For example, Professor A. E. Dick Howard of the University of Virginia Law School and I spent three or four days in November 1990 working intensively on the proposed Czechoslovak Bill of Rights, following a conference that I chaired in Bratislava involving approximately twelve Americans and Europeans and fifty Czechs and Slovaks. In the final product, I can find traces of our influence. They knew what they wanted, but we helped alert them to

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1. See John H. Kennedy, *A New U.S. Export: Constitutional Advice to Eastern Europe*, *BOSTON GLOBE*, May 31, 1990, at 12; see also Henry J. Reske, *U.S. Constitution Unpopular*, 1991 *ABA J.* 28 (discussing American influence on new Eastern European constitutions).

potential problems, and may have influenced a few important provisions concerning speech, the right of access to information about the government, and economic and social rights.

One of the interesting things about this experience is that the question asked by this panel—how effective are bills of rights?—would never be asked in these new countries. They simply assume that bills of rights are useful. Concededly, free societies exist without bills of rights: The United Kingdom and Israel (at least within its pre-1967 borders) are two. There are also countries that have wonderful-sounding bills of rights, but very repressive societies: Iraq and the former Soviet Union are examples.<sup>2</sup> It is also fair to say that, except perhaps for the property provisions, there was not much enforcement of the Bill of Rights in the United States until the early part of this century.<sup>3</sup> Before the middle of this century, the Bill of Rights, the short list of protections of freedom that has received so much rhetorical attention, did not amount to much in the life of the country.

This reality may have reflected James Madison's initial skepticism about the value of such a charter. Madison was actually a good deal more ambivalent about a bill of rights than some have suggested.<sup>4</sup> His hostility to it, as I read the history, was because he saw the demand for a bill of rights as a diversionary tactic to derail the whole Constitution, or at least to delay ratification. For example, Patrick Henry and some of his fellow oppositionists called for another convention, which would have delayed ratification for two or three years.<sup>5</sup> Because adoption of the Constitution was such a difficult proposition anyway,<sup>6</sup>

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2. See IRAQ CONST., translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Fouad F. Shafik trans., Oceana Publications, Inc. Apr. 1990); U.S.S.R. CONST., translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., John N. Hazard trans., Oceana Publications, Inc. Oct. 1990).

3. The first modern case in which the First Amendment's provisions on speech were applied to annul official action did not come about until 1931. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

4. See, e.g., ROBERT J. MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS 132-37 (1988); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 at 540, 542-43 (Norton 1972); CLINTON ROSSITER, 1787: THE GRAND CONVENTION 302 (Norton 1987).

5. See Eugene M. Van Loan III, *Natural Rights and the Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 149, 157 & n.40 (Randy E. Barnett ed., 1989).

6. In Virginia the Constitution passed by only ten votes, and it was even closer elsewhere. See Letter from James Madison to Rufus King (June 25, 1788) in 11 THE PAPERS OF JAMES MADISON, 1788-1789, at 178 (Robert A. Rutland et al. eds., 1977) [hereinafter

Madison was fearful that a fight over a bill of rights would kill the chances of its adoption. Madison also recalled the impotence of bills of rights on the state level. He was very troubled that some state legislatures, such as Rhode Island's, were trampling on people's rights, particularly the rights of property.<sup>7</sup> He questioned, as he wrote to Thomas Jefferson, the usefulness of these "parchment barriers."<sup>8</sup> Even in Virginia, where there was a bill of rights that included religious freedom, Madison did not know if it would be possible to stem the tide of religious establishmentarianism.<sup>9</sup>

Madison did, however, acknowledge some virtues in such instruments. For example, he thought that they would become part of the "national sentiment,"<sup>10</sup> and that they would be seen as "fundamental maxims of a free Government."<sup>11</sup> This result he considered a very real asset in a country with a monarchy, but not in a country where the legislature was supreme. In a monarchy, bills of rights could serve as a rallying point, a way for the popular will to rise up against the monarchy.<sup>12</sup> But in a country in which the legislature was all-powerful, which he feared might happen in the United States, he did not think bills of rights would be very useful.<sup>13</sup> Jefferson responded by noting that Madison had omitted consideration of the courts; the rights in the bill of rights would become part of the law of the land for the courts to enforce, by means of an independent judiciary.<sup>14</sup>

Independent judicial enforcement of human rights is one of the great contributions of the United States Constitution and the American constitutional system to nations throughout the world. Although we still fuss about the legitimacy of judicial review in protecting our rights, despite the passage of 200

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PAPERS OF JAMES MADISON]. New York ratified it by only five votes. See Letter from James Madison to James Madison, Sr., (July 27, 1788) in 11 PAPERS OF JAMES MADISON, *supra*, at 208.

7. See FORREST McDONALD, *NOVUS ORDO SECLORUM* 175-76, 176 n.59 (1985) (citing Madison's letter of April 2, 1787 to Randolph); THE FEDERALIST No. 63, at 383 (James Madison) (Clinton Rossiter ed. 1961) ("the iniquitous measures" of Rhode Island).

8. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 PAPERS OF JAMES MADISON, *supra* note 6, at 297.

9. See *id.* at 298.

10. *Id.* at 299.

11. *Id.* at 298.

12. See *id.*

13. See *id.*

14. See Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 14 THE PAPERS OF THOMAS JEFFERSON, 1788-1789, at 659-63 (Julian P. Boyd ed., 1958).

years (or at least fifty to sixty years since the Bill of Rights began to be enforced), in Europe there is no concern about this issue. The new countries all recognize the need for judicial enforcement of a bill of rights by an independent judiciary.

The Czechoslovaks, for example, adopted a charter of fundamental freedoms in January 1991. I am informed that President Vaclav Havel wanted that to be the first order of business, and he wanted it to be adopted November 17, 1990, the anniversary of the start of the Velvet Revolution. (As it happened, it was adopted second; the first constitutional provision divided power between the central government and the two republics.)<sup>15</sup> The Czechoslovak Bill of Rights has two parts—the enacting Constitutional Amendment, and the Charter itself. The enacting Amendment provides that “Constitutional acts, other laws, and other legal regulations, their interpretation and application, must be in accord with the Charter of Fundamental Rights and Freedoms.”<sup>16</sup> The enacting Amendment thus establishes the supremacy of the Charter right at the beginning and certainly intends to establish the primacy of human rights. The fundamental rights and freedoms listed in the Charter of Fundamental Rights and Freedoms are to be protected by a Constitutional Court.<sup>17</sup> The Czechoslovaks have thus recognized the importance of both a bill of rights and judicial protection for it. Almost every other country does so as well.

The need for an independent judiciary has other implications. If it does its job, an independent judiciary will be unpopular; for the court to be willing to be unpopular, it must be strong and confident. The United States Constitution is built on a strong judiciary, regardless of whether we agree about how strong the judiciary should be. The United States had John Marshall to begin the 200-year development process. In Czechoslovakia, however, the judiciary has been compromised. Over one hundred judges have resigned, and another hundred have been fired.<sup>18</sup> The country was under a Communist regime that operated under what is called “telephone justice.” Whenever

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15. A copy of this provision is on file with the author.

16. CZECH. CONST. Amend. of Jan. 9, 1991, § 1, ¶ 1 (Ivo Dvorak, trans.). A copy of this document is on file with the author.

17. See CZECH. CONST. (Constitutional Act of Feb. 27, 1991). A copy of this document is on file with the author.

18. See Jan Obrman, *Rehabilitating Political Victims*, AMNESTY INTERNATIONAL REPORT ON EASTERN EUROPE 5, 7 (Dec. 14, 1990).

the KGB or the prosecutor was especially interested in a case, the judge was called and told what the judgment and sentence should be. Those of us who represented people in Communist countries knew that when a case was political, the outcome was determined in advance. In 1986-87, when I represented a Soviet Jew who was charged with slander in the Soviet Union, I was told that a three-year sentence was automatic for Jews who wanted to emigrate and whom the authorities had decided to imprison.

Given this history, these countries must create judicial legitimacy. To help establish legitimacy, it may be necessary to create a constitution much longer than that of the United States. Americans are inclined to say constitutions should be very short. But our Constitution is not really so short. Our Constitution consists of the 1789 document, the Bill of Rights, seventeen other amendments, and nearly 500 volumes of the U.S. Reports. It is impossible to know the contents of our constitutional law just by reading the Constitution without studying those cases. Developing that body of law, the law that really establishes our constitutional structure, took 200 years. The Central and Eastern European countries have neither 200 years nor our Supreme Court. They therefore need a different kind of constitution, one that is more detailed and gives more guidance, and perhaps creates a different kind of court.

This difference also affects judicial selection and judicial tenure. To create an independent judiciary, judicial tenure must be long and fixed, and there must be a high level of fairness in the selection process. For this reason, and in recognition of the policymaking nature of these courts, many countries choose their constitutional court members by agreement among the political parties.

As countries such as Czechoslovakia work to create enforceable and effective bills of rights, it is important to consider what functions these documents will serve in actual practice. A good way to see what a judicially-enforced bill of rights does is to consider what is lost in its absence. An English civil libertarian has commented that one of the problems with the English system is that because they have neither judicial review nor a bill of rights, they do not have lawsuits, and hence, no civil rights

lawyers or civil rights law.<sup>19</sup> The result is a very thin civil-liberties culture.

Consider also how different the United States would be today without the Supreme Court's enforcement of the Bill of Rights. Many important changes in our society can be attributed solely to the Court. *Mapp v. Ohio*<sup>20</sup> and *Miranda v. Arizona*<sup>21</sup>—*Miranda* perhaps less, but certainly *Mapp*—have transformed police work. *Brown v. Board of Education*<sup>22</sup> had enormous impact on education. The Civil Rights Act of 1964<sup>23</sup> was very helpful, but without *Green v. County School Board of New Kent County*<sup>24</sup> in 1968, we certainly would have had less desegregation, for freedom-of-choice plans would have left *de facto* segregation in place. Bills of rights enforced by an independent judiciary cannot be considered superfluous.

As Judge Learned Hand put it in his typical lapidary style, nobody expects a Supreme Court, or any judicial system, to save a society that is going to hell.<sup>25</sup> But that holds only for the extreme case. Many of us are indeed worried about the rise of fascism, or at least authoritarianism, in these countries, regardless of bills of rights and even judicial review, because the economic and social fabric is so fragile. But in a society that has "made it" to some extent, a society that has achieved some stability, a bill of rights and judicial review do help, and are indeed indispensable. Without them, we would truly be lost.

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19. See Lord Scarman, *Britain and the Protection of Human Rights*, 15 *CAMBRIAN L. REV.* 5, 9-11 (1984).

20. 367 U.S. 643 (1961).

21. 384 U.S. 436 (1966).

22. 347 U.S. 483 (1954).

23. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

24. 391 U.S. 430 (1968).

25. See LEARNED HAND, *THE CONTRIBUTION OF AN INDEPENDENT JUDICIARY TO CIVILIZATION* (1942), reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES BY LEARNED HAND* 181 (Irving Dillard ed. 1959) ("[A] society so riven that the spirit of moderation is gone, no court can save . . .").