# ESSAY

# A Bill of Rights for the Twenty-First Century

*By* RICHARD L. NYGAARD*

A little more than two years ago, I was invited to participate in Romania's first Constitutional Convention, and to develop charters of rights for the new democracies in Europe. As I prepared for my role, I began to wonder anew about the American constitutional experience. I decided that before I could advise anyone else, I must know more about our experience, and what about our experience would help another country begin its journey towards democracy.[1] I also concluded that I must develop a concept of our place and the place of these new governments in the evolution of democracy. I started from the point of view that, even from their historically pathogenic politics, each new order, as an offspring of democracy in the United States and

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Upon the invitation of the CEELI/ABA, I assisted in Romania's first constitutional convention. Since then, I have visited, met with, and/or made specific drafting recommendations for the Conventions and Bills of Rights in Albania, Lithuania, Ukraine, Russia, Kazakhstan, and Azerbaijan.

Little here is really original. I am thoroughly a product of what I read. To the extent I have said anything original, I take the blame. To the extent I have not, I give others (hopefully appropriately ascribed) the credit. To me, writing an essay is a bit like preparing a sandwich: most ingredients are supplied by others; I only hope I have added a little intellectual mustard to hold it all together and make it palatable.

1. I must note first of all that at the time this international democratic opportunity presented itself to the United States, we were unprepared for it. A cold war was politically, and perhaps economically, more comfortable for us. Moreover, we seemed dissolved in a centripetal spasm of greed. As a result, we nearly forfeited our call to greatness. Although as a free society and a liberal democracy we had both experience and theory on our side, we, as a people, were ignorant of both. First, by our enchantment with being "homespun" we became indifferent to the political philosophy that drove our constitutional forefathers to construct the foundation from which all else political has risen in the past 200 years. Second, our philosophy became embalmed by our selfish Hobbesian passion for peace and order over liberty.

the beneficiary of democracy's centuries of development, had the potential to become better than ours. With this in mind, I reexamined democracy's political roots and philosophy.

The Englishman, James Bryce, noted that "everything which has power to win the obedience and respect of [the people] must have its roots deep in the past. . . ." I took a new look at history through the essays of Lord Acton because the "revolutions" that conceived these fledgling democracies in Eastern Europe were less like ours and more like the French Revolution. France was heir to a longstanding civilization. It had a society. It had a government. In the French revolution, like the new revolutions in Eastern Europe, the establishment changed; the people simply threw out the old and started something new.

The French Revolution, however, left a bloody, spectral reminder that a revolution does not always end tyranny—it may in fact begin a Reign of Terror. The French Revolutionists' guiding philosophy was the Enlightenment philosophy of reason. As the revolution intensified, however, it fell under the control of the radical Jacobins. The voice of the people became the sole source of power. But it was mob-majority rule. Anyone who opposed the majority opposed the "will" of the people and became its enemy. Political power decayed from below, and the miasma swallowed its own leaders.[2]

As in Eastern Europe, the American Revolutionists were trying to throw off a colonial yoke and free themselves from the tyranny of an empire. Unlike the revolutions in Eastern Europe, however, Americans did not have a dictator to kill, or an existing establishment and deposed leaders who were liable to stick around and cause trouble. So what about the American experience would help the new democracies in Eastern Europe?

## I. The American Experience

The notion of a written constitution is one of the unique contributions the United States has made to politics and government. Although the concept is hardly new, *we* took the theories of Socrates, Aristotle, Plato[3] and his "footnoters,"[4] along with the philosophies of

2. Indeed, Marquis de Condorcet, whose only crime was to write and advocate a rejected constitution, cheated the guillotine only by dying. He was condemned by his own reason and desire for truth.

3. Plato was no friend of democracy; he charged that democracy would turn into a tyranny of the majority at the expense of the minority. He was, however, an advocate of constitutions and articulated rights.

Locke, Montesquieu, and Rousseau, and built a country upon them. The United States Constitution, which was ratified in 1789, is the oldest written national constitution currently in use.

Twelve states sent fifty-five delegates to attend the Philadelphia Constitutional Convention and all were from what is now a minor portion of the United States, the eastern seaboard. The United States encompassed an area of only about 350,000 square miles. Americans were a relatively homogenous group—the majority of us were of British ancestry—and we lived predominantly in rural areas and small towns. About seventy-five percent of us were farmers. The rest were craftsmen, merchants, professional men, seamen, and slaves.

The delegates were remarkable men, perhaps a more remarkable group than any that has met together before or since in the government of this country. They were merchants, planters, and professional men, but few were what we would consider today to be politicians; none of them were full-time. They were the social, economic, and intellectual aristocracy of their day. As a group they shared an extensive but very similar education. Although they were farmers and merchants, they were well read and must be considered the American political philosophers of their era.

Surely, some delegates came to Philadelphia intending to modify the Articles of Confederation.[5] It appears obvious in retrospect, however, that many others knew from the start that the Articles of Confederation could not and would not work, and that they had been merely a first step. These men knew that America needed a new constitution to produce a national government.

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4. Alfred North Whitehead wrote "the European philosophical tradition consists of a series of footnotes to Plato." ALFRED N. WHITEHEAD, PROCESS AND REALITY: AN ESSAY IN COSMOLOGY 63 (1929).

5. The Articles provided for a rather loosely knit confederation of the thirteen colonies in which the central government had little power. The Articles were "an agreement to agree" and they contained no Bill of Rights. Its drafters did not believe such guarantees were necessary because under the Articles the states were the most powerful political entities and guarantees of freedom of expression and many other rights were already a part of most state constitutions.

The system of government created by the Articles of Confederation did not work well. Indeed, at the time they were written, people did not believe they would work well. But there was still so much dissention among and between the states in 1781 that a constitution might not have been possible. A constitution prematurely presented might fail and present grave consequences for ever reaching agreement on a constitution, and even graver consequences for the United States. The meeting in Philadelphia was ostensibly to revise the Articles of Confederation. Those who convened, however, did something vastly different—they made fundamental changes to the structure of our government. *See* Wesberry v. Sanders, 376 U.S. 1, 9-10 (1964).

That our Constitution has survived this long is remarkable considering the great changes in the United States since the Philadelphia Constitutional Convention. Our government was conceived in a caldron of activity, and we have not been static since. The Framers assumed then that the primary purpose of law was to preserve our individual natural rights from governmental encroachment. Our early concept of government was that it should impose only restrictions that were absolutely necessary, and that enhancements were not for social programs, but to help business. Our emphasis on individual freedom was largely negative; we felt we had more to fear from government than from each other.

For example, we were tired of the Writs of Assistance which permitted authorities to search houses without specific designation nor oath or evidence, and enabled petty governmental authorities by day or night to perform the dreaded "knock on the door." These writs were supervised, as was the entire legal system, by jurists who presided at the pleasure of the king, made their decisions without a jury, and were paid by fees which increased with the amount of property they confiscated.[6]

Then, too, there was the larger question of taxation which finally exploded when England imposed a three-pence-a-pound duty on tea. What followed had little to do with taxation, but much to do with power politics. For although there was a three-pence-a-pound duty in the colonies, there was a one-shilling-a-pound tax in England! Consequently, the tea drinker in Boston got her tea cheaper than the tea drinker in Bristol. The issue was not the amount, but whether we would allow the king to impose any tax in the Colonies without giving us a voice in the matter. We were not content with cheap tea if we had to admit the legitimacy of a tax imposed by a government in which we had no representation. We threw the tax, the British Empire, and the tea overboard in a raid on the Dartmouth in Boston. This three-pence tax upon the American Colonies opened the first fissures that eventually broke up the British Empire.

The doctrine of individualism, the philosophy of natural rights, and the philosophical optimism of the Enlightenment were characteristic of 18th and 19th century America.[7] Self-help was the predomi-

6. *See generally*, MAURICE H. SMITH, THE WRITS OF ASSISTANCE CASES (1978).

7. From the death of Descartes in 1650 until the death of Hume in 1770, the philosophy of Enlightenment swept across both Europe and America, converting our founders. Indeed, John Locke, philosophical scholar of the day, argued that there is a discoverable law of nature governing human nature and that our social universe is orderly, lawful, and harmonious. This wisdom contributed to the conviction that great changes were coming

nant means of protection; civil order was the result of self-control; religion provided our moral basis; and Americans were generally optimistic. There was plenty of room for expansion. Land was virtually free. New inventions, new discoveries, and America's expansion continuously created new jobs and contributed to an expanding economy. Free from external pressure and economically prosperous, the United States had the time to allow democracy to build its momentum.

In democratic theory, however, we created a slightly flawed document. Only one of the governmental bodies was chosen by direct popular election.[8] The majority of Americans were disenfranchised in some way; they were denied the right to vote,[9] to own property, to engage in business, and in many instances were denied the right to life itself. Slavery was deplored and denounced, but alas, was not only retained, but recognized and implicitly sanctioned in the Constitution itself.[10] Evidently, the rights of some were not so "self-evident" to others.

Because the Constitution lacked an explicit definition of states' rights, we were led to the most bloody civil war of its time. And slav-

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over the world, that human reason was liberating and created the potential for human happiness beyond that which had been imagined. Optimism in the development of the new land coincided with the euphoric optimism of this age. It is doubtful that anything we could have done, that any government we could have created, would not have succeeded.

8. The bicameral Congress was not meant to be democratic. It resulted from a compromise of theories. The Senate was somewhat insulated from direct public reprisal so that it could respond to its own best opinion and act as a delegate of the state. The House of Representatives, delegates and agents of the electorate, would respond to the will of the people.

The President is elected by state electors, who are elected by the states. The electors limit the power of the people, being theoretically free to elect whomever they want. Although the electoral college is today a formality, it is also a sleeping giant, capable of much mischief if awakened.

The judiciary is even more insulated because judges are selected by the President and confirmed by the Senate. Life tenure assures the independence and separation envisioned by Montesquieu and others. *See* 38 MONTESQUIEU, THE SPIRIT OF LAWS 22 (Thomas Nugent, trans., Great Books ed., 1952).

9. The wisdom of the day called for nothing more with respect to suffrage. Kant, in THE SCIENCE OF RIGHT, written in 1787, would grant the right to vote only to "active" citizens, or those who had become independent by education and achieved a landed, economic independence. "Passive" persons, on the other hand, who could not vote, did have vertical mobility and could, through industry and providence, rise to "active" voting status. 42 IMMANUEL KANT, THE SCIENCE OF RIGHT 437 (W. Hastie, trans., Great Books ed., 1952).

Advocates for universal suffrage and political equality did not have a real philosophical patron until J. S. Mill, who wrote *Representative Government* in 1861, claiming that suffrage itself was the best way to educate and raise the citizenry to an optimal republican level. 43 JOHN S. MILL, REPRESENTATIVE GOVERNMENT 355 (Great Books, ed. 1952).

10. *See* Dred Scott v. Sanford, 60 U.S. 393 (1856).

ery's legacy of racism has yet to dissipate. The sins of our national fathers have been visited upon us, child to child to child. Indeed, weighed in the scales of contemporary justice, the United States Constitution as written was a monstrous fraud. And yet, it created and enforced a system of rights, and produced a culture more powerful, more prosperous, more informed, and more free than any other the world has seen.

The Constitution, while imperfect, has remained relatively unchanged. In over 200 years, although over 10,000 amendments have been proposed, only twenty-seven have been adopted. How is it that our constitutional framework, while remaining virtually the same for 200 years, could survive and remain both the guiding principle in American life and the mother lode of freedom for the world? Part of the answer comes from the words of Oliver Wendell Holmes:

> [T]he provisions of the constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words in a dictionary, but by considering their origin and the line of their growth.[11]

This unique instrument has survived because while it has remained a sea anchor, continuously pointing our ship of state into the wind and waves, it has permitted us, and itself, to change. Through evolution in the courts, the Constitution remains a dynamic document. By applying it successfully to specific cases and controversies, we have developed a respect for it and a confidence in it because it works—not just for one, but for all.

The United States Constitution developed along the Lockean notions of just *three* types of rights: life, liberty, and property.[12] Hobbes had interjected the concept of rights, which he called "proprieties," into civilized government, and Locke gave that concept respectability. Content with Locke's philosophy, we really have never seriously attempted to question it. We realize that the dual controls of law and constitution are necessary for order. Moreover, after two centuries of

11. Gompers v. United States, 233 U.S. 604, 610 (1914).

12. As Locke noted

> Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, or a number of men in the world, hath by nature a power not only to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men, but to judge and punish the breaches of that law . . . .

35 JOHN LOCKE, CONCERNING CIVIL GOVERNMENT 44 (Great Books, ed. 1952).

evolution, we are confident that the order will both protect us and provide for continued development.

People have advanced, however, beyond Locke's three types of rights, to the consideration of a new, a fourth generation of human rights: the rights to education, to housing, to employment, to medical care, and the right to safety, including a justice system that truly attempts to correct its offenders.

Both Hobbes and Locke neglected the notion of concomitant responsibilities inherent in and inseparable from rights. Aristotle, upon whom Hobbes purportedly depended, placed in his philosophy a greater emphasis upon the vocabulary of virtue; that is, the notion that one does not merely claim rights, but also has a moral obligation to participate both in the polity and in society, from which he then can claim rights. "Justice," said Aristotle, "alone of all virtues is thought to be another's good."

Aristotle's ideas logically lead to Plato and the Socratic theory of responsibility, which included responsibility—even unto death—to society and its laws. These theories led me to conclude that any "charter" should have both "rights and responsibilities," following Mills' view that "man is entitled to use [only] the liberty that he can use justly, that is, without injuring his fellow man, or the common good." Perhaps a shortcoming of the American experience is that we underplayed this end of the balance.

## II. Modern Democracy in Eastern Europe

Just as the United States was in 1787, the democracies in Central and Eastern Europe are not completely established. As we had then, they have now merely a notion of where they want to go. And, as we were then, they are now engaged in power struggles. These power struggles are among individuals, each of whom wishes to emerge a leader. There are also power struggles between territories within these countries, similar to the jealousies that existed among our states. But in contrast to our experience, many of these countries have to deal with religious divisions and the baggage of generations of territorial, cultural, and ethnic conflict.

### A.

The task in Eastern Europe now, nevertheless, has basic similarities to our task then in Philadelphia. It was our assignment then, and it is their assignment now, to lay a foundation for the future development of democratic, constitutionally controlled government. We be-

lieved then, as they should now, in the idea as old as the Greek philosophers: that a constitution is coeval with the formation of a stable government.

Modern Eastern Europe, additionally, must dispel the Marxist notion that rights are granted by the government, and instead must revive the concept, first developed in the Magna Charta and upon which Locke based his theory, that rights are possessed by the people.[13] Its people must understand and believe that these rights, first, are being codified to create a visible, known wall of protection, impervious to attacks by the overzealous in their pursuit of power and, second, are being placed into a document carefully tailored to permit enforcement by an independent judiciary selected from among their professional scholars.[14]

In each of these European countries, democracy seeks to replace an established but moribund institution that nevertheless had been a source of stability, protection, and a social order in which many found comfort. With communist and socialist backgrounds, the people of Europe need assurances that what they are receiving exceeds what they are giving up.

The freedom to succeed is also the freedom to fail. Nonetheless, the new Eastern European democracies must guard against the perception among their citizens that, cut loose from the bonds of tyranny, they are being set completely adrift to be swept along in the current of a developing democracy. Hence, one task of these new democracies, and our task in helping them to develop democracy, is to gain the confidence of the people who must ratify their charters of rights. The citizens of each country must know that they are not being set completely adrift from their current comforts.[15]

13. "Who shall judge whether the prince or legislative act contrary to their trust? . . . To this I reply, the people shall be judge . . . ." LOCKE, *supra* note 12, at 81.

14. Plato's notion of philosopher kings is not an elitism, but a solemn challenge. Plato said that "until philosophers are kings [or government leaders] or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one . . . cities will never have rest from their evils." 7 PLATO, THE REPUBLIC 369 (Great Books, ed. 1952). Political greatness and wisdom are ideal characteristics in a governmental leader, perhaps most necessary in the judiciary, where, unlike the other two branches, standards can be set for selection. Indeed, in a practical sense, the United States judiciary is the only branch of the government that requires an advanced degree.

15. Enter Jean Paul Sartre and the existential philosophical viewpoint that accords primacy to existence over essence.

**B.**

I shall never forget my impressions as our plane descended into Bucharest. The runway was lined with anti-aircraft batteries and tanks, and we taxied along the apron between a phalanx of armored personnel carriers and military vehicles. As we came to a stop, we were surrounded by a ring of uniformed soldiers carrying Kalishnikov automatic rifles. I knew that within a few airborne hours, I had passed into another political dimension.

And, as I stood in Red Square, looking up at the Kremlin Wall, I saw the vacant stares and the unsmiling, sometimes hostile faces; I knew that the notion of developing a constitution not from the past, but for the future, would be different. These were the skeptical minds and fallen faces of those who had suffered generations of oppression, frustration, and disappointment. This was not Philadelphia. This was not 1791.

As we approach the twenty-first century, the people of the world are concerned with more than Americans were 200 years ago. A bill of rights for the twenty-first century can not be just a set of rules. Each Eastern European country had suffered generations of moral marasmus under Marxist philosophy, and a constitution for them must be an applied moral order; a unifying set of precepts from which all other regulations will emanate.

Moreover, the notion of rights in any democracy is a great arena of passionate, moral sparring; in these countries it would be no different. When one at last claims one's rights, the rights must be well-defined or the confidence and hope they inspire may quickly deteriorate into the despair that nothing really has changed. To be truly free, people must not only be prepared to accept freedom, they must know they are free of their chains.[16]

These are among the factors I considered as I worked to develop constitutions for the twenty-first century and as I compiled my "Charter of Rights and Responsibilities." What must a constitution and

16. "Man is born free; and everywhere he is in chains." 38 JEAN JACQUES ROUSEAU, THE SOCIAL CONTRACT 387 (Great Books, ed. 1952). Recall with me an historical analogue: The Israelites, who were slaves in Egypt, never entered the "Promised Land" because they continued to think like slaves. When confronted with the Canaanites, they lamented the loss of safety and security they had as slaves. God returned them all to the wilderness for forty more years of independence while the newer generations learned to be free. *Numbers* 13, 14:1-39. So, too, is an evolution of thought from dominated to free, a "forty years in the wilderness," necessary in Eastern Europe before its people are conditioned to freedom.

charter of rights contain to be ratified now, to be in service into the twenty-first century?

## III. A Bill of Rights for the Twenty-First Century

First, constitutions developing today are more complete documents, containing more thorough blueprints for society. Building upon the experience of the years, there is simply no reason to leave constitutional evolution to chance. Hence, included within today's constitutions are such things as judiciary acts, commerce acts, and other important controls that in the United States were left to be developed by legislation.

Second, in my Charter of Rights I included much of what developed in our history as "due process." We now have the additional experience of the United Nations' "Universal Declaration on Human Rights;"[17] the OAS's "American Convention on Human Rights;"[18] the "International Covenant on Economic, Social and Cultural Rights;"[19] the "International Covenant on Civil and Political Rights;"[20] the "Convention on the Political Rights of Women;"[21] the "European Convention on Human Rights;"[22] and proposed and adopted constitutions from around the world. Hobbes' notion of rights, it seems, has matured. Notions that were once merely claims have gained currency as rights.

Third, while compiling my Charter of Rights, and preparing my comments on the constitutions for these various countries, I spoke with constitutional drafters from around the world: Turkey, Central America, and South Africa. Constitutions now have a worldwide network and each is becoming, in some way related to the others. We are beginning to develop a worldwide body of caselaw, a constitutional

17. Universal Declaration on Human Rights, G.A. Res. 217A, No. 3(1) U.N. GAOR Res. 71, U.N. Doc. A/810 (1948).

18. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, CEA/SER. K/XVI/1.1, Doc. 65, Rev. 1, corr. 1, OAS Treaty Series, No. 36 (1970), *in* 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM BOOKLET 3, at 1 (T. Buerganthal & R. Norris, eds., 1982).

19. International Covenant on Economic Social And Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

20. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force on Jan. 3, 1976).

21. The Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 193 U.N.T.S. 135 (entered into force May 22, 1962).

22. EUROPEAN CONVENTION ON HUMAN RIGHTS: TEXTS AND DOCUMENTS (Herbert Michsler & Herbert Petzold eds., 1982) (bilingual version).

community if you will, that interprets the various rights documents and defines rights in concrete fact settings on case-by-case bases.

Consequently, it is important that rights be expressed in identical terms to enable a constitutional lawyer or court in one country to use precedent from around the world to interpret the right at issue. Draftsmanship must guard against time-dated, time-bound, or idiomatic descriptions of rights, which can be distorted in the adversarial arena. General terms are no longer sufficient, and specifics cannot be left to the vagaries of a court to interpret. Detail is essential.

Fourth, I tried to convince each country to include the same rights. The reasons are obvious. Human rights have no country. They are not Romanian, Russian, Lithuanian, or American. They are humankind-wide. Since the time of Aristotle, freedom of speech has been a central feature of every democracy, so we know that information will be freely exchanged, not only between the people within a country, but with neighboring countries. Information is now exchanged rapidly, and distance means nothing. As a consequence, and because it is very likely that a citizen of one country will know the rights of a citizen in another, I felt it imperative that the citizens of different countries within the constitutional community have identical rights. Equality within and among countries will tend towards a power equilibrium. Inequality will lead to instability.[23] No country is now isolated; the new democracies will not have an 18th century incubator of isolation in which to develop.[24]

Fifth, the notion of rights encompasses claims that are not and should not necessarily be enforceable in the courts. When you say, "my rights" in the United States, one immediately thinks of a court as the exclusive arbiter of those rights. This concept, however, is uniquely American. In our new European neighbors, the general courts are not the exclusive arbiter of constitutional rights. Parliament shares an equal responsibility, and the final decision, if one is

23. Lord Acton said, "We know that the anarchy of competing foreign states must lead to war."

Alexander Hamilton, in THE FEDERALIST, quotes Abbe de Mably who said, "Neighbouring nations are naturally enemies of each other, unless their common weakness forces them to league in a confederate republic, and their constitution prevents the differences that neighbourhood occasions, extinguishing that secret jealousy which disposes all states to aggrandise themselves at the expense of their neighbours." THE FEDERALIST, at 41 (Alexander Hamilton) (Great Books ed., 1952).

24. These countries do not and will not have the luxury of time, nor will they have a Hamilton or a Madison to "stump" for ratification among a limited number of the influential citizens. These constitutions, these rights, must prevail in a populist forum, among a diverse electorate of skeptical people.

needed, often comes from a constitutional tribunal far removed from both courtroom contests and parliamentary politics. Thus certain rights are expressed, not as mature, concrete, court-enforceable claims, but as political and social goals. These include, for example, economic rights, the right to work, environmental rights, educational rights, and the right to the treatment and correction of prisoners.

With these goals, and upon these backgrounds, I compiled a "Charter of Rights and Responsibilities" that has been given to several countries in Central and Eastern Europe. Only time will test the success of our efforts and only history can give us the results.

Each of us can recall when patriotism was not considered intellectual, and it was very much in style to question democratic ideals, when the intellectuals and political scientists tried to act daring and worldly by quoting Marx, Lenin, and Mao with approval. But Marxism was as bankrupt then as it is now. Today, however, we recognize this.

José Ortega y Gasset said, "The death of democracy is not likely to be an assassination from ambush. It will be a slow extinction from apathy, indifference and undernourishment." The new revolutions in world democracy will be as healthy for the United States as they are for the evolving democracies because we have been allowed, perhaps required, to reexamine our own philosophical roots. There is a sort of philosophical succession, a passing of the blessing from one concept to the next, a passing of ideas from one philosopher to the next, by which we can trace, establish, and prove the legitimacy of our notions of government, and defend our concept of rights.[25] Time, evolution, and revolution have spawned a new generation of democracies. Democracy has won. Indeed, it was right all the time.

25. Georg Hegel, who had contempt for political liberalism and believed that the state had absolute power as the source of moral authority over the individual, said that philosophical enlightenment ("The Owl of Minerva") within any society comes too late to transform it, but that philosophical wisdom can only empower a society to understand its culture and to defend its philosophical bases. 38 GEORG W.F. HEGEL, THE PHILOSOPHY OF RIGHT 7 (T.M. Knox, trans., Great Books ed., 1952).

# APPENDIX A.

## Charter of Rights and Responsibilities

*Compiled by* RICHARD LOWELL NYGAARD, U.S. Circuit Judge.

*Article 1*: This Charter of Rights and Responsibilities of the People expresses the self-evident principle that it is the People and not the government who possess the Rights.

*Article 2:* Slavery, involuntary servitude, or forced or compulsory labor shall be prohibited in the Republic. "Forced or compulsory labor" shall not include any labor required by a sentence, order of the court or any service of a military character.

*Article 3:* RIGHT TO LIFE

The government shall make no law or take no action to deprive any person of his or her life.

Deprivation of life shall not be in contravention of this Article when it results from the use of force by the government which is no more than absolutely necessary:

(a) to defend any person against unlawful violence;
(b) to effect a lawful arrest for a serious crime or to prevent the escape of a person lawfully detained;
(c) for the purpose of quelling a riot or insurrection.

[Capital punishment shall be prohibited in the Republic.]

*Article 4:* RIGHT TO EQUAL PROTECTION UNDER THE LAW

The People shall be entitled to equal protection under the law. Equal protection under the law means that the government shall treat equally and shall not distinguish or discriminate against any person on the basis of race, color, language, ethnicity, sex, creed, religion, education, opinion, social position, financial situation, birth, parentage, legitimacy or other status.

*Article 5:* RIGHT TO DUE PROCESS OF LAW

The People shall be entitled to due process of law. Due process of law means a fundamentally fair process as that concept has evolved since the Magna Charta, thereby embracing all law within the rationality, justice, fairness, and equity precepts of Western Civilization and law.

No legislative organ shall make, nor shall the President of the Republic enforce, nor shall any person be compelled to obey, any statute, regulation, or rule that deprives any person of liberty, property,

or any other rights, privileges, immunities, or other protected interests without due process of law.

*Article 6*: RIGHTS OF SPEECH, ASSEMBLY, AND INFORMATION

The government shall make no law or take no action abridging freedom of speech. Freedom of speech means that the People shall have the right to think as they will and to speak as they think without government censorship, oppression, discrimination, or any other forms of discouragement. Speech shall encompass more than the written or spoken word. It shall encompass all forms of human communication, expression, ideas, hopes, and values.

It includes the right to freedom of the press, radio, television, and other instruments of public information. The government shall in no way control or influence any instrument of public information.[26]

The People shall have the right to assemble peacefully and without arms, and to submit petitions for the redress of grievances and injustices.

The government shall be accountable to the People on matters of government affairs. The People shall have the right to be informed on government, economic, social, and international affairs, with the exception of government secrets. Government secrets shall be information that must remain secret to preserve and secure the safety of the sovereignty of the Republic.

*Article 7:* THE RIGHTS OF RELIGION AND ASSOCIATION

The government shall make no law or take no action abridging the right to freedom of religion. Freedom of religion means that the People shall have the right to believe or not to believe in a religion and to practice their religion without oppression, discrimination, or any other forms of discouragement.

The government shall promote freedom of religion. Religious organizations and sects shall be equal before the law. [The government may promote religion but shall not establish a government religion.][27]

26. A citizen cannot become a mere object of propaganda. One of the great dangers to democracy is control of information by controlling speech or by controlling the instruments of communication.

27. There are few issues as divisive, nor civil rights as litigated in the United States as the Establishment and Free Exercise Clauses of the First Amendment. Few would argue against "freedom of religion." But whether the government permits or sanctions religion by allowing certain practices, i.e., study of religious texts even as history in schools, religious displays on public property, etc., is a great moral battleground. But we are a unique

The People shall have the right to freedom of association. Freedom of association means that the People shall have the right to associate, disassociate, join, or otherwise affiliate with anyone, any organization, craft, or group without oppression, discrimination, or any other form of government discouragement.

*Article 8:* RIGHT TO PRIVACY

The government shall make no law or take no action abridging the right to privacy. The home shall be inviolable. No one shall be permitted to enter another person's home without the consent of that person. Representatives of a competent government organ may enter a person's home upon that person's consent and at a reasonable hour. If that person refuses to consent, entry is forbidden without an order from a court of competent jurisdiction. The court shall determine that any order comports with this Constitution and other laws, and only then may it issue. In all other circumstances, representatives shall be prohibited from entering a person's home, unless exigent circumstances create an immediate and imminent danger to any person or the public at large.

The People enjoy the right to be free from unreasonable searches of and seizures from their persons and possessions.

The government shall not violate the secrecy of correspondence or other means of communication, except a competent government organ may violate the secrecy of correspondence and other means of communication only if it obtains a court order from a court of competent jurisdiction and only if executed in the least intrusive manner. The court shall determine that any order issued comports with this Constitution and other laws, and only then may it issue.

*Article 9:* RIGHT TO NONDISCRIMINATION

No individual or group shall receive privileges or be subject to discrimination, domination or abuse on the grounds of race, color, lan-

heterogeneous society. Official religions and some identity of church and government has worked well elsewhere, where the populations are more homogeneous. Moreover, religious teaching provides "instant" simple and understandable codes of ethics so needed in some new democracies. Finally, religions provide, whether some like it or not, much of the philosophical bases for culture and politics. The American philosopher, Jacob Needleman, says, "Plato plus Christianity equals ninety percent of the world we know and live in." JACOB NEEDLEMAN, THE HEART OF PHILOSOPHY 27 (1982). Hence I believed it imperative that not only "freedom" but "establishment" must be considered in the context of each country's needs and desires.

guage, ethnicity, sex, creed, religion, education, opinion, social position, financial situation, birth, parentage, legitimacy, or other status.

Disabled persons shall enjoy equal rights in all areas of public and private life, including but not limited to employment and education, with those persons not disabled.

Women and men shall enjoy equal rights in all areas of public and private life, including but not limited to employment and education.

*Article 10:* RIGHT TO VOTE[28]

All citizens who have reached the age of eighteen shall have the right to vote, and it shall be the responsibility of each citizen to vote. All citizens entitled to vote shall be entitled to stand for and occupy any position or office in any organ of government or administration except as otherwise provided in this Constitution. The government may provide by law that certain individuals may be denied the franchise of voting, but only for reasons of criminal conviction and mental incompetence, both of which must be determined by a court of competent jurisdiction.

The People shall elect their representative organs through universal, equal, direct, and secret voting. Secret voting means that the government shall provide means of voting so that a person can vote in private and that the vote cannot be identified with that person. Equal voting means that the government shall ensure one person one vote. The government shall do this by creating voting districts that have a like number of people, and at all times by enforcing fairness in voting.

Government at all levels shall be accountable to the electorate to enable the People to make the necessary inquiries of their elected representatives so as to remain an informed electorate.

Elections shall be conducted in accordance with an Electoral Law that comports with this Constitution.

28. The Constitution, to which each citizen shall have given consent by exercising his or her suffrage whether to ratify, provides for a decision by a majority vote. Hence, each citizen shall have accepted in advance the principle of majority rule. Having done so, the citizen has also accepted the results of majority rule, whether or not his or her vote is with the majority. It is hence of no consequence that a citizen may not like the law or policy that is adopted. Obedience to it may be contrary to one's wishes. But by obeying, one suffers no loss of political liberty. Nor, if the law or policy is in accord with duly constituted principles and process, and even if it is contrary to one's individual interest or desire, does their compliance with it deprive them of political freedom. MORTIMER J. ADLER, SIX GREAT IDEAS 148 (1981).

Elections shall be regular, free, and fair, and based upon universal franchise, and a roll of voters which shall be available to all candidates, parties, or political organizations.

All citizens shall have the right to form and join political parties and to campaign for social, economic, and political change, either directly or through freely chosen representatives.

All political parties and organizations shall be separate from the government. The government shall encourage and foster conditions for them to carry out their activities and to influence the policies of the government through democratic means. Parties or organizations whose intention it is to overthrow the constitutional system by force or violence shall be prohibited in the Republic.

The activity of political parties shall be prohibited in the military units and institutions of the Ministry of Defense, the Ministry of the Interior, the Ministry of Foreign Affairs and in the diplomatic representations abroad, and among the employees of the courts.

*Article 11:* RIGHT TO A FAIR TRIAL[29]

Every person charged with a criminal offense shall have all the rights, immunities, privileges, and protection of the law, including but not limited to due process and equal protection.

Every person charged with a criminal offense shall be presumed innocent until proven guilty beyond a reasonable doubt. Beyond a reasonable doubt means that there is no rational doubt that a crime has been committed and that the person charged committed it. Only when a suspect shall have been determined to be guilty beyond a reasonable doubt in a fair trial may that person be deprived of liberty or otherwise punished. No person may be deprived of liberty or otherwise punished in absentia.

No person shall be arrested or detained for any purpose other than that of bringing them to trial on a criminal charge.

Arrests shall take place according to procedures that comport with due process. Any person taken into custody shall have these minimum rights:

1. The right to be immediately informed of the charges lodged against her or him.

29. As Aristotle noted:

> Man . . . when separated from the law and justice, he is the worst of all . . . [b]ut justice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society.

9 ARISTOTLE, THE POLITICS 446 (Great Books, ed. 1952).

2. The right to institute judicial proceedings to determine the lawfulness of the arrest or detention.
3. The right to be brought before a court of competent jurisdiction within two working days for the purpose of having the court determine whether there is probable cause to hold the arrested person for trial. Probable cause means that it is more likely than not a crime has been committed and that the detained person has committed it.
4. The right to be released immediately upon a determination that the arrest or detention was unlawful or that there is no probable cause.
5. The right to a fair trial within a reasonable period of time from a determination that there is probable cause.

The court shall be empowered to enforce an order releasing a person from custody upon determining that the arrest or detention was unlawful or that there is no probable cause.

Reasonable bail shall be granted to persons awaiting trial, unless a court determines that in the interest of justice and the safety of public mandate that they should remain in custody.

No person shall be twice tried for the same offense, but retrial may be permitted after a conviction has been set aside by a court of competent jurisdiction following a defendant's appeal.

The courts shall ensure that accused persons understand the charges against them, receive the procedures due them, and receive a fair trial before a fair and impartial tribunal. A fair trial shall ensure the accused person these minimum rights:

1. The right to be informed in writing of the precise allegations lodged against the accused person.
2. The right to adequate time to prepare and conduct a defense.
3. The right to challenge all evidence presented.
4. The right to be defended by competent counsel.
5. The right to confront the accusers and to hear all evidence presented, and to compel attendance of witnesses at trial.
6. The right to have counsel paid by the government if the accused person is unable to pay for legal counsel and if the interests of justice so require.
7. The right not to be compelled in any manner to testify against himself or herself. This means that the accused may choose not to testify at trial and silence in the face of accusation shall not be construed as evidence against the accused person.

No person shall be required to testify against a spouse, parent, or child, except in cases of domestic violence or abuse.

No evidence obtained through torture or cruel, inhuman, or any degrading treatment shall be admissible in any proceeding.

Juveniles shall be separated from adult offenders, tried in separate courts established for juvenile offenders, and if incarcerated, not commingled with adult offenders.

A person who is declared innocent or who is unjustly deprived of his freedom has the right to rehabilitation, to reinstatement of the rights that were violated, and to compensation for related damage.

No person shall be deprived of liberty or property on the basis of any ex post facto law, any bill of attainder, or any statute intending to punish or discriminate against any particular person or entity.

No person shall be accused or found guilty of any crime on the basis of any act or omission that did not constitute a crime when allegedly committed, nor shall a heavier penalty be imposed than the one applicable when the crime was committed. No person shall be subjected to torture or to inhuman or degrading treatment or punishment, or to excessive fines or deprivations. The stated purpose of criminal sentencing is to correct criminal behavior.[30]

Every person convicted of a crime shall be subjected to such corrective measures as are necessary to protect society and so as to insure that when released from incarceration, he or she is prepared to be reinculturated into society.[31]

No person shall be imprisoned for failure to pay any debt.

No person shall be imprisoned for failure to pay a fine assessed as a punishment for a crime unless he or she has been afforded a reasonable time to make payment and has been found to have the means to do so.

30. "Salus populi suprema lex esto." (The safety of the public shall be the first law.) Cicero De Legibus, III. iii. 8.

31. I reject the libertarian notion of equality of opportunity upon which criminal trials to determine culpability are based. Equality, or in other words, parity or like sentences for like crimes, it must be understood, is incompatible with pure correction-based sentences. The entire dimension of correction-based sentences is to correct (or to incapacitate, if correction is not possible) criminal behavior and, hence, to prevent recurrence. Retributive punishment only forms the minimal parameters necessary to create a sufficient pain or penalty to counter the perceived advantage of the criminal act.

*Article 12:* RIGHT TO JUDICIAL REVIEW

Any person adversely affected by any administrative or executive act shall have the right to petition for review to a court of competent jurisdiction.

*Article 13:* RIGHTS AND RESPONSIBILITIES OF CITIZENSHIP

Citizens of the Republic are those whose citizenship is recognized by law.

No one can be deprived of citizenship without his or her express request.

It shall be the responsibility of all citizens to respect and protect the rights of others.

Citizens shall have freedom of movement and the right to freely enter or leave the territory of the Republic. The government shall impose no limitation of this right except by law when necessary to protect national security, order, public health, or the rights and freedoms of its citizens.

*Article 14*: ECONOMIC, LAND, AND PROPERTY RIGHTS[32]

Government, private, cooperative, and other organizational property rights shall exist in the Republic.

Legislation on economic matters shall encourage collaboration between the Republic and the private, cooperative, and family divisions with the view to reducing inequality, promoting growth, and providing goods and services for the population.

All persons in lawfully constituted organizations and entities shall be entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property in any part of the country without distinction based upon race, color, ethnicity, language, sex, or creed.

All natural resources below and above the surface of the land, including the air, and all forms of potential energy or minerals in the Republic or under its exclusive control through treaty, which are not owned by any person or entity at the time this Constitution is ratified, shall belong to the Republic.

32. Private ownership and property rights are fundamental to a liberal, contemporary democracy and a free market economy. Moreover, they are anathema to Communist theory. Marx and Engels wrote in THE COMMUNIST MANIFESTO in 1847, "The theory of the Communists may be summed up in a single sentence: abolition of private property." 50 KARL MARX & FREDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY 425 (Great Books ed., 1952).

The Republic shall have the right to regulate the exploitation of natural resources, grant franchises, and determine royalties, and sell or transfer property or rights to private persons or entities subject to payment of appropriate compensation in the event of any interference with any interest lawfully vested in any other person or entity.

The Republic may by legislation take steps to make restitution for the effects of past statutory discrimination in relation to the enjoyment of property rights. No person may be forcibly removed from community, home, or land on the basis of race, color, ethnicity, language, gender, or creed.

The government shall not deprive any person or legal entity of their property or possessions except on grounds of public interest or public utility, and then only pursuant to laws that comport with this Constitution, upon legal process, and upon payment of just compensation. In the event of any dispute regarding the amount of compensation or its mode of payment, provision shall be made for recourse to an independent administrative tribunal with the right of appeal therefrom to the courts of the Republic.

The sections of this Article shall not be interpreted in any way to impede the right of the Republic to adopt such measures as might be deemed necessary in any republican or democratic society to control, use, or acquire property in accordance with the general interest, or to preserve the environment, or to regulate or curtail monopolies, or to secure payment of taxes or other contributions or penalties.

The Republic shall be empowered to create zones providing for the highest and best use of the land within its borders, to pass laws regulating land use, and to create administrative agencies or organs to review and recommend land use changes.

The government shall ensure the right to private ownership of property and the right to freely alienate or inherit it.

A foreign person, or legal entity, may obtain permission to own property upon conditions to be determined by law.

A foreign person or entity has the right to conduct independent economic activity, to invest in local enterprises, and to set up joint enterprises in compliance with conditions to be determined by law.

All persons or other entities shall have the right to freely contract with one another. No law shall unreasonably abridge the right of any person or entity to make and enforce contracts with any other person or entity, according to generally accepted principles of western law, but nothing herein shall be construed to prohibit the government from enacting reasonable statutes regulating the right to contract.

*Article 15:* RIGHT TO WORK

The government shall exercise control over foreign trade.

All citizens shall have the right and responsibility to work. Citizens shall have the right to choose and to exercise their profession according to their abilities.

Workers, except military personnel and other workers designated by law as emergency, security or safety personnel, shall have the right to form and join trade unions and to regulate such unions without interference from the government, subject only to the principles of nondiscrimination set out in this Constitution. No worker shall be victimized or discriminated against on account of membership or nonmembership in any union.

The right to organize and to bargain collectively on any social, economic or other matter affecting workers' interests shall be guaranteed.

Trade unions shall be entitled to reasonable and non-disruptive access to the premises of enterprises, and to receive such information as may be reasonably necessary to assist the workers in their organizing rights.

No law shall prevent representative trade unions from negotiating collective agreements binding upon all workers covered by such agreements.

Workers shall have the right to strike in pursuance of their social and economic interests. These rights shall be subject to reasonable limitations upon any interruption of services that would endanger life, health, or personal safety of the community or any section of the population.

Workers shall have the right to picket peacefully, subject to such reasonable conditions as would be acceptable in a republican or democratic society.

Trade unions shall have the right to participate in lawful political activities.

Trade unions shall have the right to form national federations and to affiliate with international federations.

Employers shall provide a clean, safe, and dignified work environment, and shall offer pay and holidays in accordance with law.

The Republic shall make provision by way of legislation for compensation to be paid to workers injured in the course of their employment, and for benefits to be paid to unemployed or retired workers.

Citizens shall be entitled to the right of emigration to work abroad. The government shall have the power to regulate emigration, to protect its citizens' rights of emigration and the rights of its immigrant citizens.

Legislation shall provide employment opportunities for disabled persons, for the removal of anything which acts as an obstacle to the enjoyment of amenities generally available to the Republic, and to integrate them into all areas of life.

*Article 16:* ENVIRONMENTAL RIGHTS

The People shall have the right to a healthy and ecologically balanced environment and shall have the responsibility to defend and protect it.

To secure this right the Republic, acting through appropriate agencies and organs, shall conserve, protect, and improve the environment, and act in particular:

1. to prevent and control pollution of the air, land, and waters and the degradation and erosion of the soil;
2. with respect to local, regional, and national planning and zoning, to maintain or create balanced ecological and biological areas, and to prevent or minimize harmful effects of industry, agriculture, and other land use on the environment;
3. to promote rational use of natural resources and to safeguard both their capacity for renewal and economic stability;
4. to ensure that long-term damage is not done to the environment by industrial, agricultural, or any other land use or waste; and
5. to maintain, create and develop the natural resources of the Republic, its parks, and recreational areas, and to classify and protect other sites and landscape so as to ensure the preservation and protection of areas within the Republic having cultural, historic, and natural interest.

The government shall provide appropriate penalties and reparation in the case of any significant damage caused to the environment by any person or agency or by any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause damage to the environment, and shall permit interdiction by any interested person or by any agency established for the protection of the environment to prevent any irreparable damage to it.

*Article 17:* FAMILY RIGHTS

Men and women shall have the right to marry, subject only to reasonable regulations by the government designed to protect the welfare of the individual and society.

People shall have the right to marry the spouses of their choice, subject to prerequisites and procedures to be established by the government, and shall have the right to establish families.

Marriage shall be contracted before officials or religious leaders so empowered by law. Marriage may not be dissolved except in accordance with the law.

Marriage shall be based upon the preconsent of each, and spouses shall enjoy equal rights at, during the marriage, and after its dissolution.

Parents shall be responsible for the welfare of their children.

Children shall have the responsibility to care for their disabled parents or parents without sufficient means to care for themselves.

Children born outside marriage shall have the same rights and duties as children born of marriage.

Parentless children and children without support shall be raised at the expense of the government.

The privacy of the home shall be respected, except that reasonable steps shall be permitted to prevent domestic violence or abuse.

*Article 18:* EDUCATIONAL RIGHTS[33]

In order to guarantee the right to education, the government shall, in collaboration with nongovernmental and private educational institutions where appropriate, ensure — years of free and compulsory education for all.

The government shall endeavor to provide an expansion of access by all children to a secondary education and to institutes of vocational training and of higher learning.

It is the responsibility of each citizen to participate in educational opportunities and to encourage and foster education of his or her children.

Education shall be directed towards the full development of the human personality in a sense of personal dignity, and shall aim at strengthening respect for human rights and fundamental freedoms,

33. Aristotle said the citizens should be educated to obey when young and to rule when old. ARISTOTLE, *supra* note 29, at 536.

and promoting understanding, tolerance, and friendship among all citizens and between the citizens of other nations.[34]

*Article 19:* HUMAN RIGHTS COMMISSION

The government shall have a special responsibility to ensure the basic social, educational, economic, and welfare rights as set out in this Constitution and Charter of Rights and Responsibilities of citizens, are respected.

The government shall enact special legislation creating a human rights commission to promote observance of this Charter of Rights and Responsibilities of Citizens.

This commission shall have the right to establish agencies to investigate violations of any of the terms of this Charter of Rights and Responsibilities of Citizens and to receive and investigate complaints, and to bring proceedings in courts whenever it, in its independent judgment, deems the same to be appropriate and necessary to insure these rights.

The commission shall monitor legislation proposed in the governmental organs with a view towards reporting to the government on the impact of proposed legislation on rights as set out in this Constitution.

In the event the commission shall fail to act upon a complaint, it shall be the right of any citizen to act on behalf of an aggrieved and in the name of the state to prosecute the complaint.

*Article 20:* OMBUDSMAN

The government shall enact special legislation to establish the office of ombudsman with a view to insuring that all functions and duties under the Constitution are carried out fairly and with due respect for the rights of citizens.

The ombudsman shall be independent in carrying out his or her functions, and may open offices in different parts of the country.

The ombudsman shall receive and investigate complaints from members of the public concerning abuse of power or unfair, insensitive, capricious, harsh, discourteous, or unduly delayed treatment of any person by any official of the government or any attempt by any such official to extort benefits or corruptly to receive favors.

In accordance with the ombudsman's findings, the ombudsman may initiate legal proceedings, refer the matter for prosecution to the

34. Lord Acton said, "A country that is at once powerful, inexperienced, and undereducated can be a great danger to world peace."

attorney general, negotiate a compromise, or make a report to the offending department or organ containing recommendations with the view towards remedying the improper conduct, preventing repetition, and, where appropriate, making restitution, including monetary compensation.