

WILL CONSTITUTION TRUMP REVOLUTION IN EASTERN EUROPE?

by K. L. Billingsley

The movement that saw itself as the wave of the future, and whose leaders threatened to bury the West, is now consigned to the ash dump of history. Communism, the nationalization of human beings, officially died in 1989, some 70 years and countless millions of casualties too late. That year saw the reversal of the domino theory, with the vassal states of the Soviet Empire throwing off their chains and smashing down walls at an astonishing rate.

The democratic revolution was for the most part peaceful and has brought enormous gains in freedom, the only true basis for the future prosperity that the region so desperately needs. But are those revolutionary gains currently being undone by constitutional means? That may well be the case, according to an American who helped draft some of those constitutions. He is a man well suited to the task.

University of Chicago graduate Bernard H. Siegan is Distinguished Professor of Law at the University of San Diego. An expert on the Constitution, he was a member of the National Commission on the Bicentennial of the Constitution. Professor Siegan also served as member of President Reagan's Commission on Housing and as a

consultant to the Department of Justice. Known as a strong defender of property rights and free enterprise, Siegan is a former columnist for Freedom Newspapers and author of a number of books including *Land Use Without Zoning* and *Economic Liberties and the Constitution*.

In 1987 Ronald Reagan nominated Siegan for the Ninth Circuit Court of Appeals and the nomination received strong backing across the political spectrum. Supporters included former Chief Justice Warren Burger, Nobel laureates Milton Friedman and James Buchanan, and the liberal author Alan Dershowitz, professor of law at Harvard. But the nomination touched off a furious reaction from the American left, particularly its extreme reaches. The reason for such reaction is not difficult to discern.

Always out of touch with the people, the left has relied on unelected judges to push through its policies by judicial fiat. Activists in these quarters are not fond of judges who interpret the Constitution according to the intent of its authors, and not as a blank check for statist intervention. Professor Siegan does not believe, as does the left, that a court constitutes a robed politburo. He also fails to find mysterious rights hidden in "emanations" and "penumbras."

Bankrolled by Hollywood moguls such as Ted Field, Norman Lear's People for the

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American Way launched a massive propaganda campaign against Siegan and flooded the land with a slick 39-page document opposing his nomination. The campaign rivaled the vicious slanders against Robert Bork. The radical National Lawyers Guild expressed "vehement opposition" to Siegan's appointment.

Anita Hill and her defenders should consider Siegan's ordeal. For 18 months the powerful Senate Judiciary Committee combed the professor's record trying to find some moral basis on which to dismiss him. All they succeeded in finding was a record of outstanding scholarship, sound legal practice, and moral rectitude. Unfortunately, partisan politics ensured that the nomination did not get out of committee. This disappointment, however, did not prevent the professor from finding other important work. In recent years Mr. Siegan has provided constitutional advice to countries as diverse as Brazil, Armenia, Ukraine, Canada, and Bulgaria.

Reinventing Bulgaria

One of the Eastern Bloc's most loathsome dictators was Bulgaria's Todor Zhivkov, whose regime murdered defectors such as the poet Georgi Markov. After Zhivkov's removal, the new government of Bulgaria asked the United States Chamber of Commerce—not the official State or Commerce Departments, interestingly enough—to help them with the transition to a democratic society. The Chamber then put together a "Bulgarian Economic Growth and Transition Project" that included Professor Siegan.

The professor made several visits to Bulgaria and consulted with people across the political spectrum. On these trips, said Siegan, "I did not meet a single person who was not enthusiastic about privatization." In August 1990 Siegan suggested to Bulgarian prime minister Andrei Lukanov that the American Constitution should be the "major source" for the Bulgarian constitution. Lukanov was initially wary.

While the Bulgarians accepted the separation of powers, they wanted to invest the

most power in the legislature so "the people" could rule instead of, as had unfortunately been the case, a political party. Many Bulgarians, Siegan found, viewed judges as glorified clerks and were nervous about them ruling on law. But Siegan pointed out that foreigners would not invest in Bulgaria if the parliament enjoyed the unopposed power to confiscate property. With their country desperately in need of foreign investment, Lukanov and his colleagues then began to find the professor's views more acceptable.

Back at his La Jolla home, Siegan penned a 17-page model constitution providing for a national assembly of one or two houses, a president, and a two-part supreme court, with one part to deal with exclusively constitutional matters. Though indeed based on the U.S. Constitution, the model reinforced guarantees of individual rights, particularly property rights. Siegan purposely made the constitution difficult to amend because "a constitution that can be readily changed is more of a law than a constitution." By its very meaning, the professor argues, "a constitution must be enduring."

"Every person has the right," Siegan's draft said, "to purchase, acquire, rent, own, use, sell, lease, transfer, and inherit private property, or any part or portion thereof." Siegan also showed that he had learned the lessons of the West, as well as those of the East. His model constitution forbade the government to incur "an indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenues provided for such year." When state revenues exceed expenditures, "the surplus shall be used to reduce the amount levied for the subsequent year." Further, the maximum amount of taxes on real property or commercial ventures "shall not exceed one percent of the full market value of such property or venture." Such language would have free-spending American representatives snapping full clips into their Uzis.

Siegan's Model Constitution

Siegan soon found his services much in demand. Representatives from several So-

viet republics, including Armenia, sought him out through Resistance International. The Burmese Resistance Movement, not yet in power, also made overtures. In cooperation with the Locke Institute and the Institute for Humane Studies, the professor then set to work on "Drafting a Constitution for a Nation or Republic Emerging Into Freedom."

Professor Siegan's suggested model constitution grants citizenship to "all persons permanently residing" within the borders of a nation. It protects peaceful assembly, redress of grievances and guards the freedom of speech, movement, privacy. The rights of life, liberty, and property "include any form of human activity that is not destructive of the rights of life, liberty, and property of others." Persons accused of crime enjoy strong protection, including the presumption of innocence previously lacking all over Eastern Europe. As the late Malcolm Muggeridge put it, the Communists replaced habeas corpus with habeas cadaver.

But as a foreigner all Siegan could do was advise and recommend. The final draft of the actual constitution fell to others. Siegan recommended that the final draft should be submitted for widespread consideration and discussion before approval. This is something that "apparently did not occur," and the final draft contained measures that the professor found alarming.

The Constitution of the Republic of Bulgaria, adopted on July 12, 1991, features what Siegan calls "schizophrenia of language." For example, Article 37 (1) says that "Freedom of conscience, freedom of thought, and choice of religion or religious or atheistic views are inviolable." However, article 37 (2) says that "Freedom of conscience and religion may not be detrimental to national security, public order, public health and morality, or the rights and freedoms of other citizens." Freedom of movement is also subject to restriction, and not just for security purposes. The state can restrict this right for "public health" and the "freedoms of other citizens."

Article 40(1) states that "the Press and other information media are free and not subject to censorship." But Article 40(2)

adds that "a printed publication may be suppressed or confiscated only through an act of judicial authorities, when good mores are violated." Exactly what constitutes "good mores" is not specified and it is a subject on which everyone disagrees, particularly politicians. The freedom of movement guaranteed in article 35(1) is subject to restriction "in order to safeguard national security, public health, or the rights and freedoms of other citizens."

Article 17(3) declares private property "inviolable," but there is no guarantee of fair compensation when the state must expropriate. Further, Article 18(1) proclaims the state "sole owner of all underground resources, the coastal beaches, public roadways, waters, forests, and parks of national significance, natural preserves, and archaeological sites." The formulation "underground resources" is a rather sweeping one that surely includes mining, petroleum, drinking water, and possibly even agriculture.

The Bulgarian constitution also provides for a minimum wage, "free obstetrical care, easier working conditions, and other types of social assistance." Citizens have the "right to health insurance . . . and to free medical services." Citizens also have the right "to a healthy and favorable environment, consistent with stipulated standards and regulations." Further, "they have an obligation to protect the environment." As Professor Siegan points out, these "rights" are really not rights at all but entitlements whose implementation may inhibit economic liberties and drive up debt even as they have in America. Exactly how the "obligation" to protect the environment will be legislated and enforced remains to be seen. And any responsible person in public life, in any country, should know that no government service can possibly be "free." The temptation to use misleading and utopian language is apparently irresistible to politicians of all nations.

The Czech Charter

The Czech Republic—recently separated from the more agrarian and socialistically

inclined Slovakia—has been billed as the Eastern European nation most committed to democracy and free enterprise. Friedrich Hayek and Ludwig von Mises are reportedly the most popular economists. A number of Western companies have located there and Prague is becoming a magnet for Western youth. Professor Siegan provided the Czechs with constitutional guidance, some of which was evidently not followed.

Article 7(1) of the Czech “Charter of Fundamental Rights and Freedoms,” adopted January 9, 1991, says that privacy “may be limited only in cases specified by law.” The most casual observer will see the potential for mischief in that clause. Article 11(3) says that property “may not be misused to the detriment of the rights of others or against legally protected public interests.” The exercise of property “may not cause damage to human health, nature and the environment beyond statutory limits.”

The Czech document proclaims the sanctity of the home “inviolable,” but Article 12(3) says that sanctity may be violated “if it is essential in a democratic state for protecting the life or health of individuals, for protecting the rights and freedoms of others, or for averting a serious threat to public security and order.”

Freedom of expression, according to article 17(4), “may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality.” The right of assembly “may be limited by law” to protect “public order, health, morality, prosperity or the security of the State.”

Freedom of religion, says Article 14(3) “may be limited by the law in the case of measures which are “essential in a democratic society for protection of public security and order, health and morality, or the rights and freedoms of others.”

Professor Siegan laments that the Czech protections are “conditional, much more on the order of the communist than of the

United States Constitution.” Siegan notes that there are similar measures in the proposed constitution of Ukraine, another country he has advised.

Reform in Ukraine

This nation of 52 million boasts the most fertile soil in Europe, if not the world, and could emerge as a powerful force in European affairs. Ukrainian president Leonid Kravchuk has been described as a “not-quite-ex-enough Communist” who has threatened to expel journalists as troublemakers. The parliament remains dominated by Communists and the potentially rich economy still suffers from statist policies. There is, however, a vigorous opposition that is gaining strength. In the first week of October, miners from Donetsk came to Kiev demanding genuine privatization of the economy. The opposition Rukh movement, which supports the miners, also wants new elections and a referendum on a new constitution.

Thus, the timing seemed especially right for Siegan’s visit to Ukraine in October of 1992. The professor expounded his constitutional philosophy and reports that his speech was well received. After all his travel and hard work, it is Siegan’s hope that Ukraine may avoid the pitfalls of the Bulgarian and Czech constitutions. In those countries the exceptions to the basic rights are so broad, Siegan says, that “the exceptions seem to consume the guarantee.” Indeed, the loopholes seem large enough for tanks to drive through, and they may do just that.

Siegan notes that the world has recently seen extraordinary historical events that few had forecast. “Almost simultaneously,” he says, “millions of people in many countries shed despotism in favor of freedom” and demolished a system “which smothered their humanity and foreclosed their opportunity for progress and betterment.” In the entire history of freedom, Siegan says, “there never has been so great an advance within so brief a period.”

That is why the professor believes it would be a “horrible tragedy if governments

were now established that would return these people to "the oppressions from which they escaped." Without mentioning names, Siegan says that he has observed American advisers who urged new states to adopt measures "that might bring about such a terrible result." In fact, some Czech officials told Siegan that their greatest problem is now "infiltration from the West." Those Eastern Europeans who favor statist measures openly acknowledge influence from France, Germany, and Britain.

The democratic revolution in Eastern Europe, says Siegan, was "against an evil system and not evil rulers." The reforms were "intended to minimize the rule of the state and maximize the freedom of the people." Those who "advocate establishing a huge governmental role in the economies of these nations," says Siegan, "do not comprehend the meaning of what has occurred." Governments "should be powerful enough to protect the people against their foreign and local enemies and domestic perils and excesses," the professor writes. But governments "must never be powerful

enough to oppress the people or inhibit their wisdom and productivity."

Based on Siegan's revelations it seems that reports of a laissez-faire paradise emerging in Eastern Europe are greatly exaggerated. The overall quest seems not to build a society based on limited government, individual rights, and free markets but for another version of socialism with a human face—the nanny state without the gulag and Communist party, but with Western pop culture and environmentalism as a kind of civil religion. The preferred model appears to be Sweden, not America, though the differences between these two are not always apparent. Indeed, American politicians seem committed to further encroachments of the state in private life.

Siegan's conclusion thus seems particularly fitting for both Europe and America at this critical time in history: "The great lesson of modern times is the strong relationship between freedom and progress. Maximizing freedom will also maximize a nation's philosophical, cultural, and material resources." □

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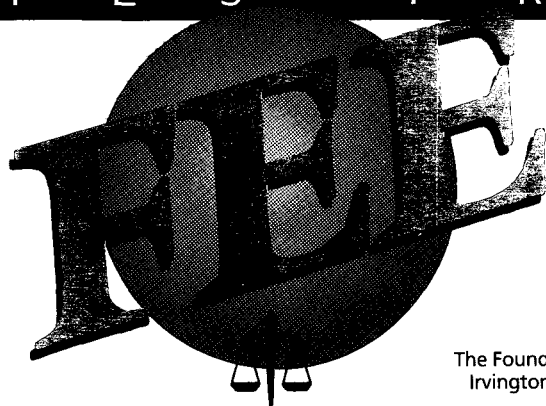
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POOR COUNTRIES

*I*ndividual poverty may be no disgrace, but it is always painful and annoying. It may strike when an individual or a family, for any reason, fails to earn an income sufficient to purchase the essentials of food, clothing, housing, and fuel. The penalties of poverty are grave and numerous, such as weakness and illness, lack of training and education and few opportunities for economic improvements.

*C*ollective poverty indicates a widespread prevalence of economic misery in a country. It is strikingly evident not only in the dismal levels of living but also in the life expectancy of the population. In the most prosperous countries of the world, such as Switzerland, Japan, and the United States, per capita production now exceeds \$20,000 per year and the life expectancy at birth is more than 76 years. In the poor countries of the world, such as Ethiopia, Somalia, and Bangladesh, per capita production amounts to barely \$200 per year and the life expectancy may be less than fifty years. If the average output per person is less than \$200, the average income is likely to be \$150 or less, and the poorest of the poor may linger on \$100 or less. And, if the average life expectancy is barely fifty years, the poorest of the poor can expect forty years or less. Indeed, much of the

world's population lives in misery and dies in despair.

Increasing the productivity of an underdeveloped country is always difficult but never impossible. In Ethiopia, Somalia, Bangladesh, and other such countries, the conditions for development are extraordinarily difficult because they differ so radically from present conditions. *The thoughts, values, and mores of the people must change so that they may change the world around them.* The dogmas of the past must be abandoned so that there can be new thought and action for income and wealth. In short, the old order must change and yield place to a new.

Surely, only the wise are receptive to new mental conceptions. But even to them, new ideas are always painful and slow to advance especially if they confront habit and tradition, mores and religion. If Muhammad, the Prophet of Islam, prohibits all forms of interest taking, it is difficult for a devout Muslim to tolerate banking and all other manifestations of the capital market. It is even more difficult to imagine economic development in Muslim countries without capital markets. If Buddha, the founder of another great Asian religion, beseeches his followers to aspire to perfect sainthood through liberation and purification

from all desires, it is well-nigh impossible for all pious Buddhists to aspire to greater want satisfaction. If the Buddhist monk must not demean himself receiving money, it is difficult for lay Buddhists throughout Asia to seek and reap monetary rewards.

It is difficult to advance economically if for any reason a society espouses and clings to notions of common ownership in the means of production. If the people are convinced that property is theft, it is hard to create and keep property. And it is unlikely that people will strive to improve their economic condition if they cannot own the means of production needed to improve their condition.

A society is destined to be poor if the voices of education tirelessly denounce and slander the private-property order commonly called "capitalism." They may indict it for being heartless, merciless, cruel, inhuman, selfish, and exploitative. The textbooks of economics may set the tone, summarily rejecting capitalism, because the strong are said to prey on the weak, employers are believed to exploit their workers, and businessmen allegedly gouge their customers.

Actually, the private-property order rests squarely on truthfulness, reliability, and voluntary cooperation among all groups and classes of society. In freedom, it is rather difficult to cheat, shortchange, or short-weight another person. If customers and businessmen are free to choose, they are free to shun fraud and deception. Goods and services must be satisfactory and priced right or they cannot be sold. A businessman who deceives his customers will lose them. If he mistreats his suppliers, they refuse to sell. If he abuses

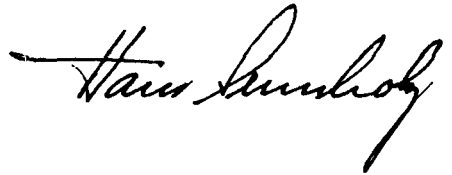
his workers, they will leave him. It is in everyone's interest to be peaceful, honest, truthful, and cooperative.

Economic poverty and misery flow from a code of morality that is hostile to economic production. There can be no prosperity where theft and plunder are commonplace, where private property is confiscated, expropriated, seized, blocked, or taxed away by political authority. Where people interact with force and violence, poverty is bound to be widespread.

A society which is driven by envy and covetousness is bound to be a poor society. The apparatus of government may be used to redistribute income and wealth according to the dictates of the envious. Industrious people may be forced to bear the expenses of numerous transfer programs and to face the costs of vice and crime, for envy and covetousness are the fertile soil in which vice and crime do grow and prosper.

Yet, these costs may be rather modest when compared with the hidden costs of fear. Bodily violence and property loss, or merely the fear thereof, do not invite investments nor encourage economic activity. In fact, even in developed countries, fear has turned many inner cities into economic wastelands, and many productive communities into islands of depression and poverty.

Moral, social, and economic ideas that guide human action are the key to human well-being. They make all the difference between wealth and poverty.



Hans F. Sennholz

You cannot correct all the evils of the world, nor relieve all the poverty in the world.
You cannot comfort all in distress, nor support all the underprivileged.
But you can stand by FEE which brings the light of freedom to the world.

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by Mary Sennholz

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VIETNAM: A FATE OF ITS OWN

by James R. Bauknecht

“Lonely, distraught,
Kieu viewed the way ahead with fear and doubt.
A storm-tossed rose . . . such
was her future, all she’d ever be.”

The Tale of Kieu, Nguyen Du¹

Before we left for Vietnam in June of 1992, a Vietnamese friend from California (a Viet Kieu, or Vietnamese expatriate) told us to expect to find a country of people who were barbarians, thieves, or despairing idealists. “Trust no one,” she instructed. “And I really mean it,” she blurted out with an uncompromising wince. Unsettled by the apparent harshness of her comment, we interpreted her views as the excesses of an embittered expatriate. Undaunted, my wife, my daughter, and I set out to discover the land from which my wife, a Vietnamese refugee, had fled 17 years earlier. To our dismay, though we certainly did not encounter barbarians in Vietnam, we soon found ourselves unprepared for the disillusionments, the lies, and petty frauds perpetrated by many Vietnamese who live picaresque lives out of the sheer necessity to survive.

Our lesson about life in Vietnam was not long in coming. On the third day of our visit to Vietnam, we arrived in Vung Tau, a resort

city on the southeast coast. Having rented a room at a government-owned hotel that boasted a pool and other modern conveniences, we discovered, to our mortification, that the pool contained slime that made it useless and dangerous, that our bathroom shower did not work, that two panes were missing from our room’s windows, and that the warped bathroom door not only would not shut, but had no knob either. Believing the hotel management had made an error in assigning us a room, we talked to other tenants, only to discover that most of the rooms of this year-old hotel, were, in full view of management, equally in disrepair. This and many other similar experiences began to suggest the structure of the society into which we had plunged.

Indeed, the harshness and distrust that characterize Vietnamese society today owe to three principal causes: a devastated economy that has produced a vicious and ubiquitous poverty, a corrupt and oppressive Communist government, and an ancient and equally oppressive class system.

Though poverty is not the most fundamental problem in Vietnam, it is the most visible. Never a wealthy country, Vietnam

James Bauknecht has been a Fulbright exchange lecturer at Bury College in Manchester, England, and currently teaches English and world literature at a community college in Wisconsin.