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Recommended Citation

Cass R. Sunstein, "Something Old, Something New Feature," 1 East European Constitutional Review 18 (1992).

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Rights, aspirations and state action in Eastern European constitutions.

SOMETHING OLD, SOMETHING NEW

By Cass R. Sunstein

The theory of what belongs in a constitution remains in a surprisingly primitive state. Indeed, the theory has been in transition in the last hundred, fifty, or even twenty-five years. With respect to the matter of rights, scholars have suggested that there have been three distinct generations of understandings. The “first generation” rights involve the conventional civil and political liberties, most prominently the right to own property, to freedom of contract, to freedom of speech, and to freedom of religion. The “second generation”—still quite controversial—includes rights to positive state protection of human well-being, including the right to social security, to decent housing, to leisure, and to food. The “third generation” of rights involves the environment, peace, and economic development. The act of constitution-making in Eastern Europe—against the backdrop of the demise of Communism—affords a distinctive opportunity for self-conscious reflection about the proper place of different conceptions of rights in a constitution. What emerges should provide important, and quite general, lessons about the theory and practice of constitutionalism.

Constitutionalism, East and West

In approaching the current drafts, it is useful to distinguish between two conceptions of constitutionalism, between which the current reform efforts are now poised. Most of the old-regime Eastern European constitutions were similar to or modelled on the Stalinist constitution of the Soviet Union. Westerners often think that Soviet-style constitutions are not constitutions at all. In fact, however, they embody a distinctive conception of consti-

tutionalism, with three especially interesting features. First, and crucially, such constitutions do not distinguish between public and private spheres. They apply their prohibitions and permissions to everyone, not only to the government. No civil society is immunized from constitutional constraint. The “state action” doctrine of course plays an important role in American constitutionalism, immunizing the behavior of private persons (and corporations) from constitutional constraints. The Soviet constitution contains no such doctrine, and the same is true for the post-1946 constitutions of Poland, East Germany, Romania, Bulgaria, Albania, and Czechoslovakia. The refusal to incorporate a state action doctrine in these constitutions is a predictable consequence of the attack on the public-private distinction and the traditional Communist reluctance to foster a civil society independent of the state.

Second, such constitutions contain duties as well as rights. They do not merely grant privileges to citizens, but also impose obligations on them. The Soviet constitution, for example, created a duty for citizens “to make thrifty use of the people’s wealth” (Article 61), “to preserve and protect socialist property” (Article 61), to “work conscientiously” (Article 60), and “to concern themselves with the upbringing of children” (Article 65).

Finally, and most important, the central provisions of Soviet-style constitutions set out very general social aspirations or commitments. Their provisions are designed to state those aspirations—not to create concrete entitlements that citizens can attempt to vindicate, through an independent judiciary and as a matter of ordinary law, against government officials. In fact, no judicial enforcement of constitutional rights is authorized.

The absence of judicial enforcement helps in turn to account for the existence of broad aspirations. The existence of judicial enforcement disciplines and limits the category of protected rights, restricting it to matters over which court superintendence is most plausible.

In Soviet-style constitutions, the enumerated aspirations include a wide range of "positive" rights. I put the term "positive" in quotation marks because some of the so-called negative rights in Western democracies have a positive dimension. The rights to private property and freedom of contract, for example, require state institutions to be available to provide positive protection on their behalf. In this way the distinction between negative and positive rights—as traditionally understood in American law—is no distinction at all. It is nonetheless perfectly possible to understand the difference between the rights protected in different legal systems. Thus, for example, the Soviet constitution includes the right to work (Art. 40), the right to rest and leisure (Art. 41), the right to health protection (Art. 42), and the right to maintenance in old age, sickness, and disability (Art. 43). The Polish constitution includes the right to work (Art. 68), the right to rest and leisure (Art. 69), and the right to health protection (Art. 70). The Bulgarian constitution offers the right to a holiday (Art. 42), the right to work (Art. 40), the right to labor safety (Art. 41), the right to social security (Art. 43), and the right to free medical care (Art. 47).

Along each of these dimensions, Western constitutions are of course quite different. Their provisions generally apply only to the government, and not to private actors (with prominent exceptions such as our Thirteenth Amendment). The distinction is conventionally justified as a means of protecting and fostering a private realm, or civil society, by insulating it from constitutional constraints. Of course a legislature may impose such constraints, and this is far from uncommon in the United States. For example, the proscription on race and sex discrimination is generally applied to nongovernmental entities. But it is important, both practically and symbolically, that the proscription is remitted to democratic processes, and is not constitutionally mandated.

Western constitutions also fail to impose duties; instead they create rights. In one sense, of course, the opposition between rights and duties is unhelpful. To create a right is to impose a duty. If one person has a right to property, other people have a duty not to trespass. If you

have a right to be free from racial discrimination, others are under a duty not to act on the basis of the color of your skin. Because legal rights create legal duties, and vice versa, the apparent failure of Western constitutionalism to create duties must be understood through the lens of the state action doctrine. The rights created by such constitutions generally do not run against private persons. It is therefore the state, and not private persons, that is under constitutionally enforceable duties. Soviet-style constitutions are distinctive in their willingness expressly to impose duties on private persons.

Most important, Western constitutions aim to create solid individual rights, ones that can be invoked by individual citizens, whenever they see fit, in an independent tribunal authorized to bar governmental action. Western constitutions generally do not include broad aspirations, and they usually avoid "positive" rights of the sort that is characteristic of Soviet-style documents. In America, it has sometimes been urged that broad constitutional provisions be interpreted to create such rights, most notably the right to subsistence. These arguments have had no success in the courts. Whether or not the courts should have taken arguments of this sort more seriously, the current outcomes are consistent with the general tendency to reject positive rights of this kind.

The Lasting Legacy of Communism? Or a Third Way?

With this background, we are in a position to make some general comments about the rights recognized in the draft constitutions and the new constitutions of Bulgaria and Hungary. There are many surprising developments here. One of the most remarkable features of these documents is that in many respects, they are much closer to their Soviet-style predecessors than to Western constitutions. Like Soviet-style constitutions, they do not make distinctions between the public and private spheres. In general, the text of all of the drafts suggest that they apply equally to public and private actors. The constitutions do not attempt to foster or even anticipate a civil society, except insofar as they make occasional references to religious institutions or labor unions.

To be sure, it is unclear to what extent some constitutional rights can be raised against the private sphere. The right to protection of property against takings without

compensation, for example, seems to run only against official organs. The same is almost certainly true of the right to free education and to social security. But there is no general understanding, in any of these documents, that the constitution applies only to the government. In this respect, the drafts are a surprisingly conspicuous outgrowth of their predecessors.

Equally remarkably, every one of the draft constitutions contains a rich array of welfare entitlements. In this regard, the draft constitutions generally go well beyond their Communist predecessors. The Albanian constitution is typical. It includes the right to work, the right to remuneration in cases of work stoppage, the right to a paid holiday, the right to recreation, the right to social security, guaranteed free medical service, and paid maternity leave. The Polish draft is quite similar. The Czech draft includes the right to work, the right to safe working conditions, the right to recreation after work and to a paid holiday, and the right to social security. It also provides rights to education and training for the disabled. The Czechoslovak draft includes in addition to these the right to a sound and worthy environment—a right found in the new Hungarian constitution and in the Slovak and Romanian drafts as well. The Bulgarian constitution contains many such rights, with especially vigorous commitments to the environment. The Lithuanian draft protects the right to an adequate living standard and to adequate and safe working conditions, as well as the general right to “adequate payment.” Many of the drafts contain duties.

At the same time, the draft constitutions contain a large set of rights that are quite foreign to the Communist documents. Most notably, every one of the drafts, including the Hungarian constitution, includes the right to private ownership of property. There are differences in formulations. The Albanian draft, for example, guarantees private ownership, but also states that the “land and underground resources, the mines, forests, waters, natural resources of energy, means of communication of national importance, means of railway transportation, telecommunications, radio and TV stations, and cinematography are the property of the state” (Art. 12). It is especially notable to see a constitutional principle of public ownership of the means of communication—a principle that appears in no other document, and that is likely to provide a large obstacle to freedom of expression. Even

the Albanian draft, however, makes it clear that the law will recognize and guarantee private ownership of property (Art. 15).

We might think of private property and freedom of contract as the foundational liberties of a system built on the principle of free markets. Surprisingly, however, not one of the documents contains a general protection of freedom of contract. Contractual liberty is conspicuously absent from the drafts—conspicuous in view of the apparent shift to a market economy. All of the documents do protect the right to choose a job, and building on this idea, some of them guarantee somewhat broader rights of contractual liberty in connection with employment. Thus the Czechoslovak draft also protects against forced labor, and singles out for protection the (especially ambiguous) right to enterprise and other economic initiatives; this latter provision finds a close parallel in the Hungarian constitution.

There may be an eventual conflict between broadly guaranteed rights of freedom of choice in employment on the one hand and constitutionally-compelled regulation of the labor market on the other. Free choice in labor markets is often said to entail constraints on governmental controls on those markets. The tension will predictably arise in Eastern Europe. The existence of potentially conflicting provisions in the draft constitutions attests to the current ambivalence about unconstrained markets, at least with respect to employment.

Writing Constitutions Against the Past

The draft constitutions also contain an extraordinary panoply of other rights. For present purposes I will be very brief. What we might call “participatory rights” are generally included—including the freedom to speak, to vote, to join and leave associations, and to strike. The Albanian constitution, for example, grants a general right to elect and to be elected to all citizens over the age of 18. There are broadly defined rights against the police. In their range and detail, these go well beyond the American constitution, and give a remarkable picture of the abuses against which the post-Communist nations have thought it most necessary to guard. In view of the widespread denial of political rights under Communism, and the frequent brutality of the police during that period, these provisions are of particular interest.

Moreover, discrimination on the basis of ethnicity, religion, and sex is peculiarly likely to arise in the wake of Communism. Antidiscrimination provisions of some sort appear in all the documents, and the particular wording of the relevant provisions of course bear on this threat. It is conspicuous in this regard that the Bulgarian constitution contemplates compulsory instruction in the Bulgarian language, specifically prohibits any organization or alliance along ethnic lines or attempting to foster ethnicity, and refuses to put ethnic minorities on a plane of equality. Several of the drafts expressly forbid sex discrimination, but many do not. Protections against discrimination on the basis of religion and ethnicity take a variety of different forms. They also set out a range of protections in the criminal justice system. Several of them bar capital punishment. Many of the protected rights are subject to quite open-ended abrogation where the public interest so

requires; the Bulgarian, Lithuanian, and Romanian documents are especially notable here.

For Western observers, however, the most remarkable feature of the current drafts is their broadly aspirational nature, protecting positive rights of many kinds, and their apparent application of constitutional rights and duties to nongovernmental action. On the optimistic view, this strategy may represent a healthy effort to synthesize the best of two very different conceptions of constitutionalism. Pessimists, on the other hand, would argue that an approach of this sort will seriously endanger the transition to civil society and a market economy—and perhaps threaten constitutionalism itself.

Drafts and final versions of Central and Eastern European constitutions may be obtained from the Center for the Study of Constitutionalism in Eastern Europe.

Some preliminary notes on the intransigence of ethnic politics.

STRONG CAUSES, WEAK CURES

By Claus Offe

Large parts of the Western public in general and liberal intellectuals in particular are dismayed by the outbursts of nationalist politics and ethnic strife that have emerged in the post-Communist societies. At the risk of increasing their dismay, I would argue (a) that the “ethnification” of the politics of transition is the outcome of powerful causal forces that cannot easily be wished away, and (b) that it is exceedingly difficult to design institutional or constitutional arrangements that would conform to universalist standards and pave the way for the peaceful coexistence of ethnic groups within East European states. In short, the ills of ethnic politics have strong causes and weak cures.

The “ethnification” of politics involves several inter-related strategies. First, territorial boundaries are drawn in a way that maximizes ethnic homogeneity. Second, policies are pursued which differentiate the status rights of citizens according to ethnic affiliation. Third, policies are proposed, advocated and resisted, and political parties

and other associations formed, in the name of fostering the well-being of one ethnic community while excluding those who don’t belong. In all three of these strategies, ethnicity plays the role of the dominant cleavage and the source of symbolic representations.

Given the situation in which individual and collective actors find themselves in post-Communist Eastern Europe, ethnification appears rational to them. Thus, it is no longer enough to convince the political leaders of these societies that ethnification is inconsistent with Western standards of universalism and political modernization, standards to which they themselves supposedly aspire. What is called for is not moral exhortations but a change in the parameters of action of these leaders that would make it both preferable and affordable for them to refrain from pursuing strategies of ethnification.

It is well known that the ethnification of politics, apart from the emotional gratifications it may have to offer, involves a number of serious dangers. First, ethni-