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On Property and Constitutionalism
It is generally understood that the recent revolutions in Eastern Europe and elsewhere are producing a large-scale "transition." It is important, however, to distinguish among the quite different features of the current changes. The new reform movements actually involve three distinctive transitions. The first is a transition from a command economy to markets. The second is a transition from a system of one-party domination to democracy. The third is a transition from a system in which government is unconstrained by laws laid down in advance to constitutionalism and the rule of law.

Although important work is occurring on all these fronts, participants in current debates generally assume that the three transitions are not closely connected. At the present, and for the foreseeable future, it seems clear that the transition to markets, and the accompanying efforts to promote economic development, will be foremost in the minds of the reformers. Democratization appears also on the agenda, but it is usually taking a secondary role. In the meantime, the movement for constitutional reform generally draws little public attention, and indeed has been dwarfed by other matters.

I believe that the separation of the three transitions, and the devaluation of constitution-writing, are unfortunate and potentially dangerous mistakes. In fact the transitions are closely related. The right kind of constitution could play a crucial role in fueling economic development and democratic reform; indeed, it may under current conditions be indispensable to them. The wrong kind of constitution—or no constitution at all—could be devastating to both of these.

In Eastern Europe, there is a more pressing need for constitutional protection of economic and democratic rights than there was in the United States. In the United States, the process of constitution making was much simplified by the fact that well before that process began, private property, the common law, and civil society were firmly in place. The constitution makers could build on, and attempt to protect, existing achievements.

The task of constitution making elsewhere is both more critical and more daunting, precisely because
of the absence of well-established institutions protecting market ordering and civil society. The emerging constitutions must not only create the basic governmental structures and protect the conventional catalog of liberal rights, but also concern themselves with the creation of safeguards for the transition to (some version of) market ordering. If they fail to do so, a large amount of the important work will occur on the legislative front, where there may be special barriers to success. A particular problem is that democratic politics may make it difficult to create real markets, which produce such transitional problems as inflation and unemployment. Even more fundamentally, the process of constitution making could become irrelevant to many of the fundamental issues now facing Eastern Europe. There is a serious current danger that the moment of constitutional opportunity will be irretrievably lost; and if it is, both prosperity and democratization will be at risk.

Property, Prosperity, Democracy

We should begin by distinguishing between two sorts of constitutions. Westerners often think that the constitutions of Eastern Europe before the downfall of Communism are not constitutions at all. In fact, however, they embody a distinctive conception of constitutionalism.

Crucially, such constitutions do not distinguish between public and private spheres. They apply their prohibitions and permissions to everyone. Moreover, such constitutions contain duties as well as rights. They do not merely grant privileges to citizens, but also impose obligations on them.

Finally, and most important of all, the central provisions of these 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, against government officials. These aspirations include a wide range of "positive" rights.

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). It imposes on citizens the duty to "preserve and protect socialist property" and to "enhance the power and prestige" of the Soviet State (Art. 62). 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 Romanian Constitution includes the right to leisure (Art. 19), the right to work, including equal pay for equal work and measures for the protection and safety of workers (Art. 18); the Bulgarian Constitution offers the right to a holiday (Art. 42), the right to work (Art. 42), 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 quite different. The provisions of such constitutions generally apply only to the government, and not to private actors. They do not impose duties. Most important, they aim to create solid individual rights, ones that can be invoked by individual citizens, as of right, in an independent tribunal autho-

rized to bar governmental action. Western constitutions generally do not include broad aspirations. Positive rights are the exception, and when they exist they are usually not subject to judicial enforcement.

Property and Constitution Making

The task of economic development cannot be rigidly separated from the task of constitution making. Without constitutional protection of property rights, there will be continuous pressure to adjust distributions of property on an ad hoc basis. When a group of people have acquired a good deal of money, it will be tempting to tax them heavily. When another group has verged on bankruptcy, there will be a temptation to subsidize them. After the fact, these steps may seem fair or even necessary; but if everyone knows that government might respond in this way, there will be a powerful deterrent to the creation of a market economy. No citizen—and no international or domestic investor—can be secure of his immunity from the state.

For a constitution to ease the transition to economic markets and private property, constitutional protections must be judicially enforceable—that is, a court must be available to vindicate any rights that the constitution creates. Ordinary citizens must have a general right to raise constitutional objections before an independent tribunal authorized to provide redress. Without judicial review, constitutions tend to be worth little more than the paper on which they are written. They become simple words, or public relations documents, rather than instruments that confer genuine rights.
For Eastern Europe, the drafting of the constitution appears to pose two especially distinctive challenges. The first is to begin the process of creating a legal culture with firm judicial protection of individual rights. By individual rights, I mean, first and foremost, traditional “negative” rights against government, prominent among them private property and freedom of contract.

The second challenge is to facilitate the creation of a market economy and of a civil society—that is, a realm of private action containing institutions (churches, markets, corporations, labor unions, women’s organizations, and so forth) that are independent of the state and constrained minimally by it. Through meeting these challenges, a constitution could simultaneously promote democratic goals and help bring about economic prosperity.

To carry out this task, constitution makers should avoid three strategies that contain serious risks. All of these strategies are characteristic features of communist constitutionalism. Unfortunately, all of them appear to be influencing current debates in the post-communist era. The draft Constitutions, on file with the University of Chicago Center on Constitutionalism in Eastern Europe, tend to replicate the errors of the communist constitutions themselves.

The first such strategy is to use a constitution as a place for setting out very general social aspirations, or for imposing positive duties on government. There are three reasons why this would be dangerous.

First, to state aspirations and impose positive duties—prominent of course in the Soviet Constitution—runs the risk of turning a constitution into something other than a legal document with real-world consequences. It is important to remember that if it is to create rights realistically enforceable in the world, a constitution should not list all things to which a country aspires. It should limit itself, for the most part, to rights that it is genuinely able to enforce.

A constitution that creates positive rights is not likely to be subject to judicial enforcement, because these rights are vaguely defined, simultaneously involve the interests of numerous people, and depend for their existence on active management of government institutions—something for which judges are ill-suited.

The existence of unenforceable rights could in turn tend to destroy the negative rights—freedom of speech, freedom of religion, and so forth—that might otherwise be genuine ones. If some rights are shown to be unenforceable, it is likely that other rights will be unenforceable as well.

The second problem with positive rights is that they will work against the general current efforts to diminish the sense of entitlement to state protection, and to encourage individual initiative and self-reliance. Both markets and democracy tend to develop these highly salutary characteristics.

To say this is emphatically not to say that in the post-reform era, nations in Eastern Europe should eliminate social welfare protections and leave their citizens to the vicissitudes of the market. Such a route would be a recipe for disaster, since it would allow for mass suffering of the kind that is unacceptable in any nation. But these protections should be created at the level of ordinary legislation, and subject to democratic discussion, rather than placed in the foundational document.

The third problem with positive rights is that they establish government interference with markets...
as a constitutional duty. The current effort is to limit such interference, and to establish the preconditions for private markets, free trade, and free contract. To impose a constitutional duty of interference is to move in precisely the wrong direction. At most, any positive rights and aspirations should be understood to be unenforceable.

Another strategy, posing similar risks, is to use the constitution as a place for creating “duties” as well as rights. Such duties are not likely to be enforceable through courts. Their statement in a constitution tends to weaken the understanding that the document creates protected rights, with real meaning, against the state. Moreover, countries in Eastern Europe are attempting to eliminate the effects of the notion that the state imposes “duties” on citizens, rather than giving them rights.

Yet another dangerous strategy is to make constitutional provisions binding against private people and private organizations as well as against the state. In almost all Western systems, the constitution applies only to the government, not to the people in general. This is extremely important, because it recognizes and helps create a private sphere—a civil society that operates independently of the state. It also frees up private organizations—employers, religious organizations, unions, and so forth—to act as they choose. If the people want to apply particular constitutional provisions to particular private organizations, of course they can do so, through ordinary legislation. But it is a mistake to apply such provisions through the constitution itself. Above all, this strategy works to erase the distinction between the private and public spheres, in a way that would tend to defeat current aspirations in Eastern Europe.

Ironically, these dangers are more serious for the East than for the West. In the United States, for example, the institutions of private property and civil society are firmly in place, and social injustice frequently occurs precisely because of the absence of positive protections and of safeguards against the power of private institutions. The case for a firm right to some forms of social assistance is at least a plausible one in America. Such a right would not seriously jeopardize existing legal and social institutions; it could not possibly threaten the general belief in markets, solid property rights, and civil society.

In systems that are seeking for the first time to establish free markets and civil society, and that already have a strong public commitment to a social welfare state, the relevant considerations point in precisely the opposite direction. A dramatic legal and cultural shift, creating a belief in private property and a respect for markets, is indispensable.

We might draw a more general conclusion from this discussion. It is often said that constitutions, as a form of higher law, must be compatible with the culture and mores of those whom they regulate. In one sense, however, the opposite is true. Constitutional provisions should be designed to work against precisely those aspects of a country’s culture and tradition that are likely to produce harm through that country’s ordinary political processes. Constitutions should work against the particular nation’s most threatening tendencies. This point explains why extremely powerful safeguards against sex discrimina-
tion and ethnic and religious oppression are necessary in Eastern Europe (a point that would, however, take me well beyond the scope of this essay). It is above all for this reason that constitutions designed for one nation are ill-adapted for others.

**Particular Provisions**

In the next few years, it will be critical to develop a set of potential provisions for inclusion as an "economic freedoms" section of the proposed constitution. Indeed, this section could serve as one of the many possible new contributions of current constitution makers to the general theory and practice of constitutionalism. There is no such section in western constitutions. Its design should be understood not as an effort to export western ideas to Eastern Europe, but instead as an exercise in constitutional drafting intended specifically for problems in that part of the world.

I provide in this section a preliminary outline of constitutional provisions that might be adopted in the interest of creating a well-functioning system of property rights and economic markets. The outline amounts to little more than a list; it is intended only to provide a starting point for discussion.

1. **The rule of law.** In order to comply with the rule of law, a government must ensure that action may not be taken against citizens unless it has laid down, in advance, a pertinent law. The rule of law requires that any such restriction must be clear rather than vague and publicly available rather than secret; and it must operate in the world as it does on the books.

A guarantee of the rule of law is both an economic and a democratic right. It creates a wall of protection around citizens, giving a guarantee of immunity and ensuring that they may engage in productive activity without fear of the state. And by creating this wall of protection, the guarantee creates the kind of security and independence that are prerequisites for the role of a citizen in a democracy.

2. **Protection of property against takings without compensation.** Many constitutions contain protection of this kind. The American Constitution embodies this idea in the fifth amendment, which says, "nor shall private property be taken for public use, without just compensation." A provision of this general sort is indispensable on both economic and democratic grounds. Without such a provision, there is not, in fact or in law, a system of private property.

3. **Protection of property against takings without due process.** This is a procedural rather than substantive protection of property. It means that citizens will be provided with a hearing before government may interfere with their holdings. A provision of this sort accomplishes two functions.

   First, it promotes accurate factfinding. A hearing before an independent tribunal ensures that property will not be taken capriciously, or on the basis of whim, or for discriminatory or irrelevant reasons. Second, the hearing right carries out an important dignitary and participatory function. To say that people cannot be deprived of property without a hearing is to say that before it acts against them, the government must listen to what they have to say. This constraint improves governmental legitimacy as well. There is considerable evidence that people feel more secure and trustful if government affords them an opportunity to be heard before it undertakes action harmful to their interests.

4. **Protection of contracts.** Many constitutions protect contractual liberty from governmental invasion—as in, for example, a provision to the effect that government shall not pass any "Law impairing the Obligations of Contracts." Constitutional protection of contracts ensures citizens that when they engage in economic arrangements, they can do so free from the specter of governmental interventions. Without this right, there will be a serious deterrent to productive activity.

5. **Occupational liberty.**

   There are several possible provisions for protecting occupational liberty.

   (a) **Protection of free entry into occupations, trades, and business.** A provision of this sort can be found in the German Constitution. This is a salutary protection against governmental restrictions on an important form of liberty, one that is part and parcel of free labor markets.

   (b) **The right to choose one’s occupation.** A provision of this general sort can be found in the German Constitution. It overlaps a good deal with protection of free entry into trades, and has similar virtues.

   (c) **A prohibition on forced labor.** This provision seems indispensable to the emerging Eastern Europe democracies. It nicely complements the right to choose one’s occupation, by saying that government cannot require people to engage in work that it prefers them to undertake. It also tends to guarantee free labor markets.
6. Prohibition on government monopolies (de jure).

If the goal is to create a market economy, the Constitution should say that government may not give itself a legal monopoly over any sector of the economy. A right of exclusive management of agriculture or telecommunications is a sure way of stifling competition and of impairing economic productivity. The government should be banned from embarking on this course.

A guarantee of the rule of law is both an economic and a democratic right. It creates a wall of protection around citizens, giving a guarantee of immunity and ensuring them that they may engage in productive activity without fear of the state.

It would probably be a mistake to create a constitutional prohibition on government monopolies that exist in fact but that are not created through law. In the transition from communism, some de facto monopolies are likely, and it is hard to see how a constitutional court can prevent them. Here we encounter one of the limits of constitutionalism: the narrow remedial power of the judiciary.

7. Nondiscrimination against private enterprises.

It probably follows from what has been said thus far that government should be constrained from imposing special disabilities on private enterprises, that is, from taxing, regulating, or otherwise discouraging private entities from operating on equal terms with official organs. Government might well seek to create such disabilities as a way of insulating itself from competition or of protecting its own instrumentalities. If it does so, it will create severe harms to civil society and to economic markets. A prohibition could accomplish considerable good.

8. The right to travel within the nation and to and from the nation.

Protection of the right to travel serves both economic and democratic functions. Especially in a system with some degree of jurisdictional decentralization, the right to travel is a safeguard against oppressive regulation. If citizens can leave, there is a powerful deterrent to such regulation; people are able to “vote with their feet.” It is fully plausible to think that in the United States, the right to travel has been one of the greatest safeguards against legislation harmful to economic development. The right to travel internally creates a build-in check on tyranny, at least in a federal system. The right to leave one’s nation serves the same function. In this sense the right is simultaneously an economic and a political one.

9. The fiscal constitution.

It might be appropriate to introduce a series of provisions amounting to a “fiscal constitution,” that is, a document designed to regulate institutions dealing with the relationship between government and the economy. Of course such provisions would overlap with those discussed above. I offer a few examples here. I do not discuss monetary arrangements and institutions, because they would call for lengthy discussion; but certainly provisions bearing on that issue warrant consideration.

(a) Ban on tariffs and duties. It has probably been established, through both theory and practice, that tariffs and duties are on balance harmful to the citizens of a nation. Despite this fact, there is constant pressure for these measures, from the usually narrow groups and interests that would benefit from them. Because tariffs and duties would create aggregate harms but short-term and narrow gains, it might be sensible to enact, in advance, a constitutional prohibition on them. The problem with this strategy is that it is at least reasonable to think that tariffs and duties are necessary under some conditions, and perhaps their availability is an important device for government to have while it is negotiating with other nations.

(b) Balanced budget. In the United States, there has recently been some interest in a constitutional amendment that would require “balanced budgets.” The case for such an amendment is not obscure. For legislators or governments with short-term electoral and domestic problems, it may well make sense to spend more than one receives. The dangers of such a course are felt by future generations. A constitutional provision might be directed against this form of myopia.

On reflection, however, it would probably be a mistake to include such a provision in a Constitution. A decision not to balance the budget might be the right one in any particular year. The consequences of unbalanced budgets are sharply disputed among economists. It is hardly clear that they
are seriously harmful. Moreover, a
 provision to this effect would not
 readily be subject to judicial
 enforcement.
 (c) Restrictions on the taxing
 power. A fiscal constitution might
 also impose restrictions on the
 power of taxation. Most plausible
 here would be a ban on retroactive
 taxation. If government may tax
 resources accumulated in a period
 in which they could not be taxed,
 it should not, consistently with the
 rule of law, be permitted to
 introduce a tax that will be
 imposed retroactively. There are
 also questions here about possible
 restrictions on progressivity.
 (d) Ban on controls on export or
 import of currency. It might well
 make sense to accompany a right
to travel with a prohibition on
 legal controls on the export or
 import of currency. Such a prohibi-
tion could serve similar func-
tions in guarding against pro-
tectionism.

Conclusion

The three transitions now taking
place should be brought more
closely together. Above all, the
 task of constitution making can
help facilitate the transitions to
economic markets and to democ-
Ratic self-government. To this
end, I have outlined some possible
constitutional provisions designed
to protect the basic institutions
of private property, free markets, and
civil society. A similar analysis
might be applied to provisions not
directly concerned with the
protection of markets—including
rights to associational liberty;
freedom from discrimination on
the basis of sex, race, religion, and
ethnicity; and rights of political
and religious liberty.

The most general point is that
with strong constitutional pro-
tection of private property and
economic markets, nations can
take an important step on the
way to both economic growth and
democratic self-government. The
connection between private
property and prosperity is well
understood; the experience of
nations in transition confirms a
less obvious point, involving the
contributions of such rights to the
security indispensable to citi-
zenship.

To say this is hardly to chal-
lenge programs that redistribute
resources, training, or opportuni-
ties to the poor, or that otherwise
protect the vulnerable. The
instrumental arguments that
justify private property call for
efforts to ensure that everyone
can have some of it. These
arguments powerfully support
government programs supple-
menting market arrangements.
Without strong constitutional
provisions on behalf of property
rights, civil society, and markets,
there will probably be a substan-
tial temptation to intrude on all
of these institutions, and, by so
doing, to recreate the very
problems that such institutions
are supposed to solve. In Eastern
Europe, the task of constitution
making is more difficult, and far
more pressing, than it was in the
West, in which a well-established
backdrop of rights and institu-
tions was already in place. The
ironic conclusion is that the case
for a firm negative constitution,
and for creation and protection of
property rights and free markets,
is very strong in Eastern Europe;
and this is so even if the corre-
sponding case is, in the West,
somewhat ambiguous.

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