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Against Positive Rights Feature

Cass R. Sunstein

lature in times of emergency and when the Parliament is incapable of forming a cabinet. Some provisions indicate that dissolution is considered a solution of last resort to conflicts between the executive and legislative branches, one which is to be avoided by all means. In fact, the detailed preconditions in the Hungarian and Slovak constitutions seem to make dissolution almost impossible. In Hungary, Parliament must vote no confidence at least four times during a twelve-month period, and in Slovakia the cabinet policy statement must be rejected at least three times in six months for the Assembly to be dissolved. These prerequisites coexist with other limitations. The Romanian and Yugoslav constitutions prohibit dissolution in the last months of the terms of President and the parliament. The Hungarian President can dissolve the Assembly only twice during his term, while Romanian President can use it only once a year. Almost all the constitutions of the emerging democracies stipulate that the President must consult with other high officials and politicians before opting for dissolution. While the typical procedure is to consult the Speaker of the House, in Hungary the President must confer with the Prime Minister, the Speaker and the leaders of all the parliamentary factions. Some of the constitutions prohibit dissolution in time of presidential succession. Even if all the necessary preconditions are satisfied, an interim President does not possess this power. The 1992 Interim Constitution in Poland, among other novelties, contains a provision of crucial importance—the President is under obligation to dissolve the Parliament if the Legislature fails to adopt a budget bill in the three months following its introduction.

Due to lack of space, this brief survey of the features of rationalized parliamentarism is by no means exhaustive. Two conclusions, however, seem clear. First, rationalized parliamentarism requires great political skill of the principals in the difficult process of transition from totalitarianism to democracy. Second, the new parliamentarism strengthens cabinets and prevents easy no-confidence motions that can threaten political stability and when used improperly might even invite government paralysis, if unpopular officials use these techniques to prevent the necessary changes that are underway.

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Why social and economic rights *don't* belong in the new constitutions of post-Communist Europe.

AGAINST POSITIVE RIGHTS

By Cass Sunstein

If we look at the actual and proposed constitutions for Eastern Europe, we will find a truly dazzling array of social and economic rights. The Hungarian constitution, for example, protects not merely the right to equal pay for equal work, but also the right to an income conforming with the quantity and quality of work performed. The Slovak constitution guarantees the right to a "favorable living environment." Almost all of the actual and proposed drafts include the rights to recreation, to paid holidays, to food and shelter, to a minimum wage, and to much more. A chaotic catalogue of abstractions from the social welfare state coexists with the traditional rights to religious liberty, free speech, and so on. (For details, see my "Something Old, Something New," *EECR*, Spring 1992, page 18.)

I think that this is a large mistake, possibly a disaster. It seems clear that Eastern European countries should use their constitutions to produce two things: (a) firm liberal rights—free speech, voting rights, protection against abuse of the criminal justice system, religious liberty, barriers to invidious discrimination, property and contract rights; and (b) the preconditions for some kind of market

economy. The endless catalogue of what I will be calling "positive rights," many of them absurd, threatens to undermine both of these important tasks.

Three qualifications are necessary at the outset. First, the argument against these rights applies with distinctive force to countries in the unique position of transition from Communism to a market economy. Other countries, especially in the West, are in a much different situation, and here it is by no means clear that social and economic rights would be harmful. We may draw an important and general conclusion from this suggestion. 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. But in one sense, the opposite is true. Constitutions can be understood as *precommitment strategies*, in which nations use a founding document to protect against the most common problems in their usual political processes. Constitutions should therefore work against a nation's most threatening tendencies. If this is so, there may be a good case for subsistence rights in (say) the United States, but not in Poland or Russia. On this view, it is irrelevant, even if true, that many international human rights documents contain positive rights. While it is unclear whether these rights have done much good, it is also hard to argue that they have produced any real harm; but they may do exactly this for countries making the transition from Communist rule.

Constitutions as legal documents

Second, there is a big difference between what a decent society should provide and what a good constitution should guarantee. A decent society ensures that its citizens have food and shelter; it tries to guarantee medical care; it is concerned to offer good education, good jobs, and a clean environment. It undoubtedly makes sense for nations in Eastern Europe to experiment with diverse kinds of market arrangements and with various strategies for redistribution (see John Roemer and Jon Elster's article on page 38). But a constitution is in large part a legal document, with concrete tasks. If the Constitution tries to specify everything to which a decent society commits itself, it threatens to become a mere piece of paper, worth nothing in the real world. (Hence I think that Herman Schwartz is incorrect to suggest that the opposition to positive rights in the constitution actually amounts to opposition to programs creating such rights; see "In Defense of Aiming High," *EECR*, Fall 1992, page 25.) Opposition to social and economic rights in the Constitution does not entail a belief that nations in Eastern Europe should eliminate social and economic programs that provide crucial protection against the vicissitudes of the free market.

Third, not all positive rights are the same. The right to education, for example, is more readily subject to judicial enforcement than the right to a clean environment. Some of the relevant rights pose especially severe risks; others are relatively harmless. But I believe that few of them belong in Eastern European constitutions. Here's why:

Governments should not be compelled to interfere with free markets. Some positive rights establish government interference with free markets as a constitutional obligation. For countries that are trying to create market economies, this is perverse. A constitution that prevents the operation of free labor markets may defeat current aspirations in Eastern Europe. Recall that the Hungarian Constitution protects not merely the right to equal pay for equal work, but also the right to an income conforming with the quantity and quality of work performed. This provision will have one of two consequences. (a) If the provision is to mean something, courts will have to oversee labor markets very closely, to make sure that every bargain produces the right wage. We know enough to know that government is ill-equipped to undertake this task. Courts are in an even worse position to do so. If courts are going to oversee the labor market, it will be impossible to have a labor market. (b) The relevant provisions will be ignored—treated as goals or aspirations not subject to legal enforcement. This is a better outcome than (a), and courts in Eastern Europe should be encouraged to reach this conclusion. But it is far from ideal to have a system in which many constitutional rights are ignored.

The Hungarian provision is an extreme example, but similar problems are raised by provisions calling for specified maximum hours, for paid parental leave, for paid holidays, and much else. Many of these provisions may make sense if they are placed in ordinary legislation. But this is where they belong—not in the constitution. The constitution should not undertake close control of the private sphere, of civil society and economic markets. In the West, the constitution generally does not apply to the private sphere at all; it only regulates government. (The

emphasis on positive rights in the Eastern European documents suggests the remarkable and quite general absence of *any* distinction between the private and public spheres.) Perhaps some small companies in the East should be allowed to get ahead by paying their workers a great deal in return for long hours, or for less in the way of leave; perhaps not. Perhaps medical care should not be free—especially for people who have the money to pay for it. These issues should be subject to democratic debate, not constitutional foreclosure.

Many positive rights are unenforceable by courts. Courts lack the tools of a bureaucracy. They cannot create government programs. They do not have a systematic overview of government policy. In these circumstances, it is unrealistic to expect courts to enforce many positive rights. Consider, for example, another provision in the Hungarian Constitution: "People living within the territory of the Republic of Hungary have the right to the highest possible level of physical health." How could courts enforce this right? The same problem appears for many (not all) of the positive rights, including the right to work, the right to a clean environment, and the right to training for the disabled.

To be sure, constitutions are not only legal documents, as Schwartz points out. In the United States, the identification of the Constitution with the decisions of courts has been damaging to democratic deliberation. Constitutions can be a catalyst for public discussion. But in Eastern Europe, it is crucial to establish very soon that whatever else they are, constitutions are indeed legal documents—in the sense that an individual citizen may count on the constitution to protect rights, whatever a police officer, a legislature, or even a prime minister or President may say. One of the enduring legacies of Communism is a large degree of cynicism about constitutions—a belief that constitutions may be pretty, but that they do not have meaning in the real world. If the right to "the highest possible level of physical health" is not subject to judicial enforcement, perhaps the same will become true of the right to free speech and to due process of law.

Undoing the culture of dependency

The inclusion of many positive rights could work against general current effort to diminish sense of entitlement to state protection and to encourage individual initiative. I have said that a decent society provides its citizens with food, shelter, and much more. But if positive dispensations from the state are seen as a matter of individual entitlement, there can be corrosive effects on individual enterprise and initiative. This effect can be seen in both the West and the East. The risk of corrosion is no reason to eliminate programs that provide for subsistence. But in today's Eastern Europe, it is important to undertake a cultural shift through which people will look less to the state for their support, and more to their own efforts and enterprise. One way to help do this is to provide social welfare guarantees through ordinary legislation, and to reserve the constitution for other matters. In this cultural shift, it will be understood that the state furnishes, among other things, a safety net for those who are unable to make provision for themselves. A constitution that indiscriminately merges guarantees of "just pay" and "recreation" with traditional liberal rights is likely to send just the wrong signals.

Many positive rights would do no affirmative good, and this is a serious problem for incipient constitutionalism. Even if all of the foregoing is overstated, most of the positive rights would not make things better for anyone. To be sure, it is possible that such rights would affect legislative deliberations, quite apart from judicial action. Perhaps the existence of a right to a safe environment would prompt legislatures to attend to environmental issues when they otherwise might not. It is also possible that the existence of positive rights or social aspirations will affect judicial interpretation of existing statutory provisions. We cannot rule out the prospect of some beneficial effects. But if the likelihood is small, there is an independent argument against social and economic rights: If they will probably not make things better, they are mere surplusage, and constitutional surplusage is itself bad for nations that are trying to create a culture of constitutionalism.

It is true that some of these arguments depend on somewhat speculative assumptions. Analysis of what belongs in a constitution is not like mathematics. Perhaps the positive rights would have little adverse affect on individual initiative; perhaps their existence would not affect judicial attitudes toward more readily enforceable rights, like the right to free speech. In the end these are empirical questions on which we have no hard evidence. The ultimate question is how to proceed in the absence of such evidence. Here the most we can do is to assess the magnitude of the relevant risks. If what I have said is correct, it seems hard to believe that positive rights would

actually help the lives of citizens in Eastern Europe, and it seems very possible that such rights would undermine the prospects for a form of constitutionalism that offers firm protection to basic rights and that furnishes the preconditions for the transition to a market economy.

In these circumstances, what ought to be done? I suggest three routes for the future. First, people now drafting constitutions for Eastern Europe should delete or minimize provisions that call for positive rights. At least, they should eliminate those rights that fare worst under the criteria I have set out here, and restrict such rights to those that fare best (perhaps the right to social security).

Second, those now drafting constitutions for Eastern Europe might put the positive rights in a separate section, as President Walesa's draft bill of rights has done in Poland, making clear that such rights are not for judicial enforcement, that they occupy a separate status, and that they are intended to set out general aspirations for public officials and for the citizenry at large.

Third, judges and lawyers in Eastern Europe should now be at work developing a jurisprudence that minimizes the potential risks and maximizes the potential benefits of positive rights. As a key part of this task, they might adopt the notion that rights are "nonjusticiable"—not subject to judicial enforcement—when they call for large-scale interference with the operation of free markets, or when they call for managerial tasks not within judicial competence. Any such notion must, however, make it clear that courts will vigorously enforce the basic political and civil rights whose violation was a daily affair under Communist rule—rights such as free speech, religious liberty, freedom from police abuse, due process, and nondiscrimination on grounds of ethnicity, race, religion, and sex.

With constitutional rights, as with much else, less may be more. A constitution that purports to guarantee a decent society may, in the process, guarantee nothing at all. This was a central problem with Communist constitutionalism. It would be a cruel irony if the problem were to be duplicated in the emerging democracies of Eastern Europe.

Constitutional issues in market socialism.

A THIRD WAY?

By John Roemer and Jon Elster

The separation of powers is a central issue in constitutional thought. The separation of executive and legislative powers, discussed elsewhere in this issue, is a prominent case. An independent judiciary is another. In a broader sense, the independence of the central bank and of the state-owned media can also be seen in this perspective. The argument for separation of powers rests both on positive and negative considerations. On the one hand, the separation of powers is a form of division of labor that enhances the efficiency of the political system. On the other, it serves to prevent total usurpation of power by any one state agency.

One special problem with separation of powers—or lack of separation—plagues a number of political systems. It may be briefly characterized as the need to separate the instruments of economic policy from the tools of social policy. In theory, and in the long run, both economy and society will benefit if policies are oriented towards economic efficiency, thus maximizing the revenues that can be used to alleviate problems of unemployment and poverty. In practice, because policy-makers are often influenced by short-term considerations, there is a temptation to make economic choices on the basis of their immediate social consequences. To maintain employment, governments all over the world support declining industries and inefficient firms, blunting the edge of competition. The bailout of Chrysler in United States and the subsidization of the mining industry in Britain are two prominent examples from the West. With regard to the planned Communist economies, Janos Kornai coined the phrase "soft budget constraint" to describe the position of managers who know that banks or local governments have a strong vested interest in keeping their firms afloat—and the political clout to do so. The results in Eastern Europe, as we know, were disastrous.

To be more precise, the economic crisis of the Communist countries was due largely to their failure to solve various *principal-agent problems*. A principal-agent problem arises when one actor or group relies on another to carry out orders or provide information, but where the two