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The dubious status of the Charter of Rights and Freedoms**A Constitutional Anomaly in the Czech Republic?***Cass R. Sunstein*

On May 1, 1995, Prime Minister Vaclav Klaus, the remarkable leader of the Czech Republic, visited the University of Chicago. His visit became the occasion for an intriguing discussion of the status of constitutional rights in the Czech Republic.

The bare facts are these. In 1991, the Federal Assembly of the Czech and Slovak Federal Republic passed the Constitutional Act Instituting the Charter of Fundamental Rights and Freedoms. This Charter was written with considerable help from Western Europeans and Americans. It contains an ample set of rights and freedoms, including freedom of speech and religion, protection against abuse of police authority, protection against discrimination, and much more in the way of civil rights and liberties. The Charter also includes a set of social and economic guarantees. Consider the following examples:

Article 28: Employees are entitled to fair remuneration for work and to satisfactory working conditions.

Article 29: Women, adolescents, and handicapped persons are entitled to increased protection of their health at work and to special working conditions. Adolescents and handicapped persons are entitled to special protection in labor relations and to assistance in vocational training.

Article 31: Citizens are entitled under public insurance to free medical care and to medical aid under conditions set by law.

Article 30: Citizens are entitled to material security in old age and during incapacitation for work, as well as in the case of loss of their provider. Everybody who suffers from material need is entitled to such assistance as is essential for securing his or her basic living conditions.

Article 35: Everybody has the right to live in a favorable living environment.

Article 32: Parents who are raising children are entitled to assistance from the state.

Article 26(3): Everybody has the right to acquire the means of his or her livelihood by work. The State shall provide appropriate material security to those citizens who are unable without their fault to exercise this right.

Shortly after the enactment of this Charter, the conflict between the two republics threw the status of the Charter into great doubt. But the Charter had a continuing effect on Czech and Slovak constitutionalism. The Constitution of the Slovak Republic was passed on September 1, 1992, and it expressly included the Charter, with deliberate modifications, in its text. On December 16, 1992, the new Czech Constitution was enacted. It did not, however, contain an explicit set of provisions guaranteeing fundamental rights and freedoms. Unlike the Slovak Constitution, it did not include the Charter in its text. Instead it contained two very short, relevant articles:

Article 3: The Charter of Fundamental Rights and Freedoms forms a part of the constitutional order of the Czech Republic.

Article 4: The fundamental rights and freedoms shall enjoy the protection of the judicial power.

To say the least, these are unusual provisions. A lawyer, a political scientist, or a citizen of the Czech Republic should at this stage raise two questions: What is the precise status of the Charter in the current Czech Republic? And what was the genesis of these puzzling articles? The first question seems easier to answer than the second. Articles 3 and 4 appear to give the Charter the same status as anything else in the Czech Constitution. Something that is "a part of the constitutional order" seems, at least to an outsider, to be a part of the Constitution. In any case some such conclusion seems very important to reach, since if the Charter is not part of the

Constitution of the Czech Republic, there is no bill of rights in that republic—no protection of free speech, freedom of religion, fairness in the criminal justice system, or anything else. It therefore seems easy to conclude that the Charter has been made part of the Czech Constitution.

But we should not jump to conclusions, for the problematic genesis of Articles 3 and 4 raises many relevant questions. Some people in the Czech Republic claim that these Articles were not voluntarily adopted by the Czechs at all, and were not a product of any deliberative judgment from the leaders and citizens of the Czech Republic. On their view, these articles were produced by a form of compulsion from the Council of Europe and from West European intermediaries, and in particular from Brussels and Strassburg. This appears to be right, but it may not be the whole story. Some observers claim that Articles 3 and 4—and the specific contents of the Charter—had something to do with pressures from, among others, communists and former Communists, who wanted social and economic guarantees to receive constitutional status.

I do not claim that either of these accounts is entirely true. In fact I do not know exactly what lay behind Article 3 and 4. But it now seems clear that the odd genesis of both the Charter and Articles 3 and 4 has made their legal status highly questionable. Are they or are they not a serious part of the Czech Constitution? Are they enforceable in the Constitutional Court? Are they binding on the prime minister and the Parliament? Do the prime minister and other officials take them to be binding? What is the current status of the

Charter and its many parts? Do the social and economic guarantees have the same status as political and civil rights? Might uncertainty about the guarantees create similar uncertainty for the rights? These are very important questions. But they are not easy questions to answer.

We might draw three general conclusions from all this. First: The leaders and citizens of the new Czech Republic have not yet had a sustained discussion of what sorts of rights and liberties they want in their Constitution. Such a discussion should probably occur before very long, so as to create more security for rights than Article 3 and 4 may now provide.

Second: Sometimes the problematic origins of a constitutional provision will give that provision dubious legitimacy. When leaders are aware of those problematic origins, a constitutional provision may not mean much.

Third: In some parts of some postcommunist nations, the real-world consequences of constitutional provisions remain unclear. Under communism, constitutional guarantees were not worth the paper on which they were written; leaders felt free to ignore them if the situation so required. There is no doubt that many leaders in postcommunist nations, including Prime Minister Klaus, have done remarkable things under difficult circumstances, displayed brilliance and courage, and improved prospects for their people. But in some postcommunist nations, it is far from certain that leaders will deem themselves bound by constitutional provisions that they find inconvenient or that they dislike, because of their dubious origins or because of their consequences.