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FEATURE:

Rights After Communism

Introduction

Cass R. Sunstein

Contrary to the suggestion in much Western political thought, rights do not fall from the sky. They depend for their existence on public institutions. They cost money, perhaps a great deal of money. (This is true not only for social and economic rights but for so-called negative rights as well; government cannot protect property and life itself without resources.) Rights will not exist without a rights-bearing culture, that is, a culture in which ordinary people are at least sometimes willing to take serious personal risks by challenging powerful people by insisting that rights are at stake. The protection of rights will require government to act in both public and private spheres, sometimes within the family itself (as, for example, in the prevention of domestic violence).

These are the principal lessons that emerge from the following essays on rights after Communism. Ewa Letowska shows that the activity of the ombudsman—a potentially crucial actor in Eastern Europe—has been necessary to ensure that rights on paper actually mean something in the real world. Ombudsman action was required in Poland to establish that a woman could not be refused employment because the job of engine driver was “too hard for her”; ombudsman action was also necessary to upset

a conviction of a professor who had criticized a particular decision of the minister of education as reminiscent of “socialist pathology.” (The prosecution itself certainly deserved that appellation even if the decision at issue did not.) Kim Lane Scheppele shows that paper guarantees of sex equality can coexist with extensive sex discrimination and inequality. Consider the fact that in Poland, 90 occupations are closed to women by law, and that no laws in Eastern Europe ban sexual harassment. Russia has created extensive constitutional protections for the accused and committed those protections to paper; but the Supreme Court of Russia has held that the privilege against self-incrimination is sufficiently protected if the defendant is told that he has a right to give a statement of confession (on the astonishing theory that this statement implicitly conveys the right *not* to give such a statement).

Inga Mikhailovskaia’s important empirical study shows, among many other things, that the right to religious liberty and the right to receive and distribute information are ranked as “important” or “very important” by less than half of respondents, whereas the right to social security is so ranked by nearly 96 percent. This finding has many possible implications. Certainly it is reason-

able to say that the finding suggests what will happen in the future: The rights people actually have will likely have some connection with the rights that they want. But we might react as well by insisting that the responses are disturbing, since the category of rights, and especially of constitutional rights, need not be coextensive with the category of important human interests. Rights are, among other things, *pragmatic instruments whose acknowledgment in law is designed to accomplish concrete social tasks*. To say that there ought not to be a legal right to (for example) environmental quality is not to disparage environmental protection; so too with the right to fair compensation for one's labor; so too with the right to equal pay for equal work. The acknowledgment of these things as rights may not accomplish anything in the world; rights of this sort may not realistically be subject to protection through courts or through other public channels. We do not disparage such interests if we refuse to recognize them as rights, or if we reserve the category of legal rights to human interests whose protection as rights will actually do some good for human beings.

There is a final point. One of Mikhailovskaia's questions opposes individual rights to the interests of the state, and asks whether the former can be

abridged because of the latter. But many rights actually serve collective interests, by making it possible to have and maintain a certain kind of society with a certain sort of culture. Consider here the legal philosopher Joseph Raz's striking suggestion: "If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option." *Rights and Individual Well-Being*, in *Ethics in the Public Domain* 39 (1994). Part of the reason for a system of free speech is not to protect the individual speaker, but to allow processes of public deliberation and discussion that serve public goals by, for example, constraining governmental power and making just and effective outcomes more likely.

This point—often ignored in the West as well as the East—suggests that many rights deserve to exist because of their consequences for society in general. A point of this kind permeates the essays that follow. It helps account for the need for real-world institutions safeguarding constitutional guarantees, and for the more than occasional difficulty of obtaining such institutions in view of the complex psychology of rights.