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American Advice and New Constitutions

Cass R. Sunstein

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The early 1990s were among the most extraordinary periods for constitution-making in the history of the world. Several people at the University of Chicago Law School played a role in this period, mostly as observers, to some small degree as participants. The editors of this Journal have asked me for some brief reflections on this remarkable time; I am grateful to have been asked and happy to oblige.

This is an impressionistic essay, but I do have a principal theme. It involves the conflict between what might be called *pragmatic* and *expressive* conceptions of constitution-making and constitutionalism. Americans generally tend to think of constitutions as pragmatic instruments, important for what they do in the real world. In Eastern Europe and (to a lesser extent) South Africa, by contrast, expressive considerations loomed very large; what constitutions *say*—what ideals they express—was extremely important, not merely what constitutions would *do*. Of course what constitutions do is often a function of what they say; I am emphasizing the role of constitutions as carriers of symbols and statements, largely for their own sake. I also offer some brief notations on the contrast between Eastern Europe and South Africa, and on what Americans might learn from constitution-making efforts elsewhere.

I. FOUR TRANSITIONS AND RECURRING ISSUES

After the downfall of the Soviet Union, a large number of nations were embarking on a remarkable enterprise in self-definition and constitutional reform. At the time it was clear that several quite different transitions were involved. Four are easy to identify. The first involved a shift from a command economy to some form of capitalism, or at least a system in which private property was acceptable. The second was a shift from party rule to some form of democracy. The third, of particular interest to law professors and lawyers, involved a shift from rampant official lawlessness, and meaningless constitutions, to some version of constitutionalism and the rule of law. "Constitutions did not play an important role under communism."[1] One of the principal goals of the transition from communism was to produce a system of meaningful constitutions; ten years later this goal has been largely achieved, to one degree or another.[2] The fourth transition involved a shift to domestic rule from more than occasional control by the Soviet Union. This shift—from Soviet domination to

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1. See Jon Elster, Claus Offe and Ulrich K. Preuss, *Institutional Design in Post-Communist Societies* 63 (Cambridge 1998).

2. See id at 107.

national self-government—turned out to be extremely important to the early 1990s, and often it seemed foremost in the minds of the reformers.

Soon after the fall of communism, it was clear to several of us at the University of Chicago that it would be very valuable to attempt to track and analyze the new efforts at constitution-making. Jon Elster, Stephen Holmes, and I created a Center on Constitutionalism in Eastern Europe, designed above all to house records and to engage in fact-gathering and analysis.[3] Our mission was emphatically not to provide "advice" to nations involved in constitution-making. As an organization, we believed that the academic tasks might be compromised by advice-giving roles.

Nonetheless, some of us did participate, to a greater or lesser extent, as spectators and advice-givers with respect to constitution-making, not only in Eastern Europe but also in South Africa (with which the Center was not concerned). Many issues were discussed, in quite similar terms, in a range of countries—for example, whether to give the Constitutional Court the power to issue advisory opinions; whether the Court should be available to ordinary citizens, to government officials, or both; whether and how to handle problems of ethnic pluralism; whether and how to promote sex equality (an issue that was greatly neglected in Eastern Europe, but quite prominent in South Africa); the circumstances in which rights could be abridged (what form of words would be appropriate for identifying those circumstances?); whether to include social and economic guarantees; and whether to distinguish between constitutional rights against the state and constitutional rights against private actors.

II. A CONTRAST

My informal impression was that the South African constitution-makers had an extraordinary degree of sophistication about constitution-making and constitutions, including encyclopedic knowledge of other nations' constitutions. Indeed, this encyclopedic knowledge put their American counterparts to considerable shame; Americans tend to know little or nothing about constitutionalism elsewhere. For example, I well remember a debate in South Africa about whether (and how) the new constitution should include guarantees of minimal economic well-being. The participants had full knowledge of actual and possible approaches to the topic. In addition, all of the concerns voiced by American observers were well-understood by the South Africans, and the South African debate went far beyond the American one in its appreciation of possible rejoinders (partly having to do with desirable effects on the legislature, whose responsibility would be made clear in the founding document).

This degree of sophistication sharply distinguished the constitution-making experience in South Africa from the experience in much of Eastern Europe, where knowledge about constitutionalism was new and partial, and where many of the most

3. The original plan was for a five-year center, compiling information and producing the East European Constitutional Review. The center and the Review were eventually moved to New York University.

basic ideas seemed unfamiliar. Sometimes there was little thought about the nature of judicial review or about the pragmatic consequences of one or another approach. Law itself seemed in disrepute, a point that might have contributed to the enthusiasm for expressive understandings of constitutions. I remember, for example, an exchange with Ukrainian constitution-makers (during a meeting held in Prague) — true heroes, by the way, who had helped to break apart the Soviet Union, with a range of activities on behalf of freedom and democracy. In that exchange, the Ukrainians asked whether the Constitution ought not to have a provision requiring the press and the media to be "objective." It was responded that a free country recognized that what was "objective" was itself disputed, and that a newspaper should be permitted to say what it liked however "subjective." To this response, the Ukrainian constitution-makers replied with uneasy stares.

The same was true of frequent discussions of whether parts of the Constitution might be made applicable only to the government, and not to the private sphere; this seemed to be a quite unfamiliar idea. I also remember that some of the Ukrainian constitution-makers, like some of those involved in constitution-making in other nations, emphasized that domestic political constraints called for particular constitutional provisions, above all provisions that would give some kind of security to citizens generally or to particular constituents concerned about what they might lose. In this way the Constitution's real-world functions were less important than ensuring agreement from potentially troublesome groups. And because it seemed unclear whether the Constitution would actually function as law—because the notion of a constitution as binding law seemed unfamiliar—the real-world issue often appeared to be obtaining consensus, rather than obtaining a Constitution that would have good effects once ratified. Compare the South African experience, where difficult questions about judicial enforcement led to the ratification of a number of provisions making it clear that the legislature would have enforcement authority, with a supplemental (or no) judicial rule.[4]

It is noteworthy in this connection that in both Eastern Europe and South Africa, constitution-making was often made possible only by virtue of agreement on abstractions amidst uncertainty or disagreement about what those abstractions might specifically entail. General principles of free speech, religious liberty, and equality under the law could be accepted amidst sharp social contests about the concise substance of those principles. There is a large lesson about law, I think, in the possibility of obtaining, amidst considerable social heterogeneity, incompletely theorized agreements about abstractions.[5]

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4. See, for example, S Afr Const Art 9(4) ("National legislation must be enacted to prevent or prohibit unfair discrimination."); Art 3(3) ("National legislation must provide for the acquisition, loss and restoration of citizenship."). For similar provision requiring legislative action, see also Art 6(4) (national languages); Art 26(2) (housing); Art 27(2) (health care, food, water and social security); Art 32(2) (access to information); Art 33 (3) (just administrative action).

5. This point is emphasized in Cass R. Sunstein, *Legal Reasoning and Political Conflict* at 35-61 (Oxford 1996); I learned the lesson from experience in Eastern Europe.

III. CONSTITUTIONS: PRAGMATIC OR EXPRESSIVE?

One impression, however, lingers above all others, and this has to do with a large difference between the process of constitution-making that we witnessed and the more distinctly American understanding of constitutionalism. In brief, Americans, or at least American lawyers, tend to think that constitutions are largely pragmatic instruments, to be evaluated for what they *do*, not merely what they *say*. For us, a successful constitution accomplishes a great deal in the real world; it is far more than a set of statements of basic commitments. (This is not to say that the American Constitution is fully implemented in the world; for example, there are violations of the fourth amendment every day.) In Eastern Europe, by contrast, one of the central points of constitution-making was emphatically *expressive*—to make a statement about what was being accomplished and to articulate national commitments or goals.[6] It is easy to overlook what was entirely visible at the time: the struggle, on the part of many nations, to reassert national identity, or more simply nationhood, in the aftermath of what had been seen by many as a form of Soviet occupation. Discussions with constitution-makers at the time made quite clear that casting off Soviet rule was a widely shared goal, and a key part of what the new constitutions were to claim. Whether the consequence was to produce liberal democracy, and if so of what kind, was a much harder question.

But the expressive nature of constitutional provisions extended far beyond nationhood, and captured a great deal of additional territory. When the new constitutions speak, as many of them do, of a right to work[7] or to a healthy or favorable environment,[8] what was generally envisioned was a statement of general policy and intention, rather than judicially enforceable rights.[9] In these ways, constitution-making in Eastern Europe had some of the features of design of a party platform in the United States, though of course the stakes, in the former case, were, and were broadly perceived as, much higher.

South Africa was an interesting contrast in this regard. There it was understood that the Constitution would have a preeminent legal function, and crucial provisions were devised with attention squarely directed to real-world consequences. At the same time, it was thought important to devise some rights that would not be self-implementing, partly for expressive reasons, but partly also to give both a political and

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6. For similar reflections about Italy, see Guido Calabresi, *Two Functions of Formalism*, 67 U Chi L Rev (forthcoming 2000).

7. Considering references to Slovenia, please see attached letter. See, for example, Hungary Const Art 70/B(1), Czech Republic Const Charter Art 26(1); Slovak Republic Const Art 35(3); Bulgaria Const Art 48(1).

8. Regarding reference to Hungary, please see attached letter. See, for example, Czech Republic Const Charter Art 35(1); Slovak Republic Const Art 44(1); Bulgaria Const Art 55.11.

9. The constitutions may not contemplate legislative enforcement either; the relevant provisions have some ambiguity on this point, with some specifying that the rights "may be claimed only within the scope of the laws implementing these provisions." Czech Republic Const Charter Art 41(1); Slovak Republic Const Art 51.

a rhetorical advantage to those arguing on behalf of certain claims in the political process. As I have noted, the South African Constitution makes a sharp distinction between judicially enforceable rights and rights whose enforcement is left to the political process. The South African Constitution also has an expressive dimension, especially in the firm commitment to national unity amidst a recognition of great pluralism.[10] Thus, the South African Constitution has a great deal of sophistication about various classes of provisions: those that require judicial enforcement; those that will be implemented legislatively; and those that are designed simply to state something about national self-conception.[11]

The conflict between the expressive notion of a constitution, and the notion of a constitution as a genuine guarantee of individual rights, has created some obvious puzzles in Eastern Europe. The Constitutional Court has played a large role in welfare reform in Hungary, a role that, to say the least, has not been regarded as productive or desirable by all observers.[12] But in retrospect, it seems clear that American advice-givers were insufficiently sensitive to questions about culture and context; some of us acted as if there was one general model for democratic constitutions, and downplayed domestic fears and concerns, some of which called for an emphatically expressive constitution, and others of which called for unusual provisions and approaches.

IV. WHAT AMERICANS LEARNED

Americans learned a great deal from these exercises in constitution-making, and they could learn much more from reflecting on what has happened in the last decade and more. I offer two brief thoughts here.

The first clear lesson has to do with *the dependence of rights-protection on resources, and the absence of a sharp distinction, along this dimension, between so-called negative rights and so-called positive rights.* In Eastern Europe, and South Africa as well, it was clear to all

10. "We, the people of South Africa, . . . [b]elieve that South Africa belongs to all who live in it, united in our diversity." S Afr Const Preamble.

11. With respect to South Africa, I attended a range of diverse meetings, extending over a number of years. The first was held in Washington DC, before the fall of apartheid, and it was run by white judges, in charge of a constitutional commission. The judges did not believe in apartheid—they clearly thought that it failed, and was unjust, and deserved and needed to go—but they were extremely interested in providing means to protect "groups as such" via constitutional provisions. It took a while for me to understand that the search for these means was basically an effort to protect "whites as such"—an understanding that cast some new light on the idea of "group rights" in general. (The head of the working group, a distinguished South African judge, seemed obsessed with my last name, which he used, puzzlingly and somewhat inappropriately, on a number of occasions, culminating in dinner one evening, when he used it three times in a row, as if it were a song lyric, and immediately added, "We have a Jew on our Court. My wife calls him the Gentle Jew.") Expressive concerns played a large role in this draft, but they were dominated by instrumental goals. It should be needless to say that the drafts that emerged turned out to matter not at all to the ultimate process of constitution-making in South Africa.

12. See Andras Sajo, *How the Rule of Law Killed Hungarian Welfare Reform*, 5 E Eur Const Rev 31 (1996).

that compliance with constitutional commands would require money. A right to a jury trial, for example, would commandeer a great deal of local court budgets in Russia; protection of basic property rights would call for a well-organized system to extract and deploy taxpayer funds. Even the most negative of negative rights could not exist without public support, and hence negative rights, as they are misleadingly called, require the expenditure of public resources. This point was entirely clear in Eastern Europe and South Africa, and it draws much of conventional American wisdom into grave doubt.[13]

A second lesson is the *limited importance of the constitutional text and the overriding importance of cultural support for constitutional institutions*. In retrospect, the precise text of constitutional provisions could increase probabilities of various sorts, and reduce risks; but, it could do little more. This is true in America as well as Eastern Europe. Our constitution does not foreordain existing practices with respect to either institutions or rights; a close reader of the text might well be shocked to learn about our recent institutions and our recent rights. The administrative state is not discussed in the Constitution, for example, and from a reading of the first amendment (which applies only to Congress), it would be very hard to generate the current structure of first amendment doctrine. This does not mean that we lack a Constitution; it means only that the written words constrain us less than we tend to think.

Of course, the institutional provisions of a Constitution—setting up a court with the power of judicial review, separating the executive and legislative branches—can make a great deal of difference. But we should not overstate the importance of a constitutional text, nor should we underestimate the need for a culture that is committed, first, to the rule of law and constitutional limitations, and second, to some kind of orderly process for ensuring that any implementation of unclear constitutional provisions, or any adjustment of such provisions, takes place in a way that is not inconsistent with respect for constitutional ideals. Note in this regard that communist constitutions contain ample rights provisions, which meant nothing in practice; and that the right to equality on the basis of sex does not exist in Eastern Europe, notwithstanding the fact that most of the Eastern European constitutions protect such a right, expressly or by implication.

One final point: It is now ten years after the fall of communism, and a good time to take stock in a way that is empirically informed. Which constitutions have worked well, and which have worked badly? To the extent that nations are doing well or badly, is the Constitution responsible? Most important: have we learned anything about what sorts of provisions belong in a constitution at all? Answering such questions would provide a great deal of knowledge, and it would be quite productive to get started on this endeavor. For the moment, however, I conclude with two documents that might give a sense of some aspects of constitutional debate immediately after the fall of communism.

13. For a general discussion, see Stephen Holmes and Cass R. Sunstein, *The Cost of Rights* (Norton 1999).

APPENDIX ONE

MEMORANDUM

To: Constitutional Working Group, Government of Ukraine

From: Cass R. Sunstein, Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago; Co-Director, Center on Constitutionalism in Eastern Europe, University of Chicago

Re: Ukraine's Draft Constitution

I am most grateful to have the opportunity to comment on the new Draft Constitution of Ukraine. At the outset, three disclaimers. (1) The views expressed here are tentative and provisional. I am sure that with further discussions, and with additional readings of the Draft Constitution, some of my views will change. (2) There are of course severe limitations in the perspective, on a country's constitutional reform efforts, offered by someone who does not know that country well. Some of what follows will undoubtedly reflect my limited perspective. (3) I have been asked to concentrate on human rights and the constitutional court, and I restrict myself to those issues here.

Having read and commented on a large number of Eastern European draft Constitutions, I might note that this seems to me an excellent draft—in terms of both clarity and substance. The provisions about ethnic and religious rights are especially good; indeed, they could stand as a model for both the East and the West.

I do, however, have one basic concern about this draft. The statement of liberties looks, in part, like a general list of aspirations, rather than a catalogue of legally protected rights. *It creates too many promises of what the state will do—rather than clear limits on what the state can do.*

The draft should, I believe, be changed to delete the many promises of state intervention into the economy, and the many guarantees of positive rights. It should instead restrict itself, for the most part, to negative rights held by individuals against the government. In its current form, it sounds too much like the Soviet Constitution, which was not worth the paper on which it was written. If the various unenforceable promises are not to be deleted, they should be placed in a separate section, intended to set forth "social aspirations" that are not for judicial enforcement.

Most of my remarks are intended to spell out this basic concern.

I. GENERAL OBSERVATIONS

Let me begin with some brief general observations. For Ukraine, the drafting of the Constitution appears to be pose two especially distinctive challenges. The first challenge 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: freedom of speech, freedom of religion, private property and freedom of contract, security against the criminal justice system (including cruel or unusual punishment, official action not authorized by statute, unjustified searches and seizures, inadequate hearings).

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, 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 ensure economic prosperity.

To carry out this task, constitution-makers in Ukraine should probably try to avoid several strategies that contain serious risks. One risky strategy is to use a constitution as a place for stating very general social aspirations, or for imposing positive duties on government (such as the provision of a social welfare state including leisure time, social security, and occupational safety and health law). To put it bluntly: *The strategy of stating aspirations and imposing positive duties—prominent of course in the old Soviet Constitution—runs the risk of turning a constitution into something worthless.* It is important to remember here that 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.

Another strategy posing similar risks is to use the constitution as a place for creating "duties" as well as rights. (This too is, I believe, a holdover from Soviet constitutionalism.) These 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.

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 generally applies 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, and so forth—to act as they choose.

If the people of Ukraine want to apply particular constitutional provisions to particular private organizations, of course they can do so, through ordinary legislation. But it is probably 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 may tend to defeat Ukraine's current aspirations.

II. CHANGES TO CREATE A CONSTITUTION RELIABLY PROTECTING NEGATIVE RIGHTS

In this section I make suggestions for changes in the human rights provisions. These suggestions are in line with my general remarks. The goal is to ensure reliable protection of individual rights, through legal organs, and to help facilitate the creation

of a private sphere and a market economy.

(a) Most important: I would either (1) delete the provisions that create positive rights (e.g., to rest and leisure, a maximum work week, adequate payment) or (2) put those provisions in separate chapters, making it clear that such provisions are not for judicial enforcement.

There are many problems with these positive rights. They appear to apply to the private sphere as well as government—a genuine disaster. They also appear to threaten the new market economy, by requiring governmental involvement in areas that Ukraine now hopes to give to private people and to decentralized economic decisions.

For example, the statement "all who work conscientiously have the right to fair and satisfactory remuneration," or that "Every person, without any discrimination, has the right to equal pay for the same amount of work" (Article 49), is, in my view, a large mistake. It is inconsistent with a market economy, in which the government does not supervise wages to make sure that they are "fair." Wages are set by the market, not by government.

In any case: What could these provisions possibly mean, in court, or anywhere else? They sound like a general aspiration signifying nothing. So too, there should not be a right to safe working conditions and protection against unemployment—at least not in the Constitution (see above). These are matters for ordinary legislation. Not everything desirable belongs in the Constitution. Much of Articles 49 through 57 should therefore be deleted.

(b) Along the same lines, I would delete the right to rest; the right to an adequate living standard; the right to medical assistance; and the right to a safe environment. Environmental questions, for example, involve extremely difficult trade-offs among competing social goods: environmental quality, economic growth, employment, poverty, and inflation. Constitutional protection of a "safe environment" might be (a) too vague to mean anything, (b) impossible for courts to enforce, or (c) an invitation for judicial involvement in an area in which they cannot be helpful. Here as well as elsewhere, recognition of a constitutional right is reminiscent of the old Soviet model. Also a good candidate for deletion: Article 75, second to last sentence: "Ownership is socially oriented and must serve the interests of society."

(c) Much of Chapters 8 and 11 unnecessarily puts aspects of the "welfare state" into the Constitution. Article 84, specifying what enterprises are obliged to do, should be deleted. (It's a duty, not a right; this Constitution should restrict itself to rights.) Article 85 should also be deleted; it belongs in ordinary legislation. Article 87 states broad generalities that could not conceivably have meaning in court. It should be deleted. I would delete Chapter 11 entirely.

As an alternative, there could be a different section, entitled "social aspirations," containing some version of these chapters. If this were done, everyone would know

that aspirations belong in a separate category from rights. My fear is that the current version of the Constitution—by including so much which is not plausibly enforceable—could damage all rights, including those that are otherwise enforceable.

(d) If there is to be a section on ecological safety, it should consist, I believe, of a few summary paragraphs. Article 89 should be deleted; article 93, by contrast, seems to be a good idea.

(e) Article 97 contains sex discrimination! It assumes that women will always and forever be the primary care-takers of children. This is inconsistent with Article 96. I would encourage you to change the word "motherhood" to the word "parenthood," and change the word "mother" to the word "parent."

Sex discrimination is, I fear, a serious threat in the new Eastern European democracies. The Constitution should not allow it, must less contain it. I hope that we will be able to discuss this matter in some detail.

(f) All provisions that impose "duties" on citizens should, I think, be deleted (see Articles 71 through 74). What good do these provisions do? These duties, as stated, are legally unenforceable. Any genuine legal duties should be imposed through ordinary law. The Constitution is the place to guarantee and protect rights, not to impose duties.

(g) Much of the draft Constitution is written as if many of its provisions apply to all private and public entities. Some such provisions do not refer to the state or the government at all, thus implying that they apply to private as well as official institutions. See, for example, the right to rest, or the right to adequate payment. I would recommend that the Constitution be redrafted to make it clear that the basic rights are guaranteed against government, not against private institutions. As it stands, the Constitution, perversely, would require constant government interference with the market. At the present juncture, the Ukrainian Constitution should not do this.

(h) The section on "enterprise"—an excellent general idea!—should probably be rewritten to carry out, more clearly than it now does, the central goal of protecting rights of private property and freedom of contract. As it stands, this section is a bit thin on this point. There is no constitutional provision at all for freedom of contract. Such a section might say: "No law shall impair the obligations of contracts." It might include some of the existing provisions that are designed to create "market freedoms." This is a separate idea from (for example) political liberties of speech; it might be placed in this separate section. Such a section might include a clear right to free choice of occupation and to a general freedom to travel. (Article 38 might be insufficiently protective.)

(i) Some of the religion provisions raise hard questions. "No one may be

exempted from discharging one's duties toward the state or refuse to obey laws on religious grounds." (Article 40). This sounds good, but in some cases an exemption might be required in the interest of religious liberty (e.g., from a Sunday closing law). Also, it is not clear that "the rousing of hostility and hatred on religious grounds" should be "punishable under the law" (Article 40). This provision might stop free expression, e.g., criticism of certain religious theories and practices. I hope that we will be able to discuss this in some detail.

III. The Constitutional Court

The provisions relating to the constitutional court seem quite good. A few notes:

1. It might make sense to specify the number of judges in the Constitution. One possibility is that political actors will manipulate the number of judges to ensure outcomes in accordance with prevailing political will.

2. The jurisdiction of the Constitutional Court should be spelled out in more detail. Some of this is specified in chapter 20; but I am not entirely clear on the matter.

(a) Does the Constitutional Court have advisory duties, or do its powers extend only to cases and controversies? (I hope the latter.)

(b) When a constitutional issue arises, is it automatically referred to the Constitutional Court?

(c) Does the Court have discretion to refuse to hear cases raising trivial issues? Perhaps some of this can be specified in the Constitution.

Conclusion

Most generally, I suggest that the draft Constitution should be rewritten so as to conform more closely to Ukraine's desire to create firm individual rights. The Constitution should not contain everything to which a society aspires. It should contain real rights that real courts can really enforce. Most of my comments are intended to move the draft away from the old Soviet model, which did so little for the people of Ukraine. Some of the draft draws too much from that old model.

In any case, I am extremely grateful to have an opportunity to comment on the draft Constitution at such an extraordinary time in Ukraine's history. I very much look forward to our meeting.

APPENDIX TWO

MEMORANDUM

To: Constitutional Working Group, Government of Ukraine

From: Cass R. Sunstein, Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago; Co-Director, Center on Constitutionalism in Eastern Europe, University of Chicago

Date: March 9, 1992

Re: Ukraine's Draft Constitution

Here are some additional comments on the constitutional draft. I might say at the outset that our meetings were an extraordinary opportunity for me. It was also an enormous pleasure and honor to have a chance to discuss these issues with you.

I will organize this memorandum by beginning with relatively modest suggestions and ending with relatively large ones. I restrict myself to the constitutional court and basic liberties and rights, since these have been the areas on which I was asked to focus.

I. MODEST SUGGESTIONS

1. The human rights should include a separate provision banning discrimination. I suggest that Article 7, sentence two, should be inserted in Article 24, after current sentence 1. The second sentence in Article 24 should be deleted; it invites discrimination.

2. There should be a distinct provision, banning discrimination on the basis of sex. Article 55, sentences 2 and 3, contains sex discrimination. These provisions should be deleted. Article 97 also includes sex discrimination. It would be best to say "parenthood" rather than "motherhood." (This issue may seem trivial now. It is not trivial. It will not seem trivial in a generation, or even in a decade.)

3. MOST IMPORTANT: The various "exceptions" and "restrictions" on rights should be rewritten. Some provisions allow open-ended restriction, so long as the restriction occurs through "law." Some provisions do not contain a standard for restrictions. I know that your intention is to include only narrow restrictions. I include some possible examples for improvement in this regard.

I would change Article 26 so as to comply with the European Convention. A possible new Article 26 would read: "Any restrictions of constitutional rights and freedoms shall be as narrow as possible, shall be proportionate, and shall always be

consistent with the aims of a democratic order." Some other wording might be preferable. This is only a suggestion, needless to say.

Articles 34, 36, 37, and 39 should allow invasion only on a showing of "probable cause" for any restriction. This would be easy to do; simply specify that the government must show "probable cause" to restrict these rights.

Article 34 should require that the warrant be approved by the court, not just the procurator.

Article 41, second sentence, should read, "Any abridgement of this freedom must be established by law, and must be necessary to avoid a clear and present danger to the democratic order or to the constitutional rights of other people."

Article 64, 5th sentence, should read, "A suspect is under no obligation to prove his or her innocence and may be convicted only after the government has proved guilt beyond a reasonable doubt."

4. The Constitution does not clearly state the cases in which the Constitutional Court shall issue its decisions. This should be spelled out. In any case the Court should not be allowed to comment on laws before they are enacted.

5. Part III, chapter 4 is an odd mixture of economic FREEDOMS (no forced labor, right to strike) and economic ENTITLEMENTS (unemployment insurance, medical benefits, safe working conditions). At the very least, there should be one section on economic or market freedoms, and one separate section on economic benefits from government.

6. Article 44, second sentence, should be deleted. There should be no requirement of notice to the government before a meeting or rally. This is potentially tyrannical.

7. Some constitutional rights should be explicitly "entrenched"—that is, they should be unamendable, even through constitutional means. There are models for doing this. The specific unamendable rights might include freedom of speech and religion, freedom from torture and cruel punishment, freedom from discrimination, and several others.

II. MODERATE SUGGESTIONS

1. There should be stronger guarantees of market freedom or economic liberties. I suggest a separate section, entitled "economic liberties." This would include what you now have: general economic freedom (Art. 48), a prohibition on forced labor (Art. 52), a right to strike (Art. 53), a prohibition on forced appropriation of property without compensation (Art. 81), and freedom of enterprise (Art. 82). These fundamental liberties—so crucial to economic development—should be reorganized and put in the same section.

I would add the following provisions.

(a) Freedom of contract is guaranteed. The state shall not limit liberty to enter into contractual arrangements.
(b) The government may not assume a legal monopoly over any enterprise. It must permit private competition.
(c) People have a right of free entry into businesses, trades, and occupations. The state shall not interfere with this right.
(d) The government may not discriminate against private enterprise. It must permit private enterprise to operate on the same basis as public enterprise.

2. The Constitutional Court should be available to the individual citizen. This is a crucial guarantee of liberty. The citizen should not depend on some government official to give him access to the Court. Thus I suggest that an Article 231 be added, saying: "Any citizen claiming that his or her constitutional rights have been violated shall have access to the Constitution Court, directly or by appeal, in any case or controversy."

3. I suggest that the positive rights should be made less specific and pared down. Instead of a right to a 40 hour work week, there should be a right to rest and leisure. Articles 49 and 51 are too detailed and specific; they could be reduced to one or two sentences. Article 56, second sentence, should be deleted. Articles 84 and 85 are too detailed for a Constitution. Article 87 is inconsistent with a market economy, and should be deleted. Article 93 is excellent, but chapter 9 should consist of one or two brief, general sections. It's far too detailed. Articles 100 and 101 could consist just of the first sentence of Article 100, or perhaps of that sentence plus the first clause of Article 101.

4. I suggest that the positive rights should be placed in a separate section and treated as judicially unenforceable obligations of the legislature. If it remains as is, it could endanger the Constitution in general, by making it less enforceable.

5. There should be a set of provisions for conditions of emergency. This should specify the rights that are at risk and the rights that are not at risk under conditions of emergency.

III. LARGE SUGGESTIONS

1. All duties should be deleted. The Constitution is the place for rights, not duties. This would entail eliminating Part III, chapter 6.

2. It might well be best to eliminate all positive rights, and all general social aspirations. Positive rights and social aspirations are the defining characteristic of Soviet-style constitutionalism. They tend to turn a constitution into something not

worth the paper on which it is written. I realize that this is a controversial matter and have therefore suggested more moderate possibilities above.

3. The Constitutional Court should basically be available to individual citizens. It is dangerous to give the Court the power to issue advisory opinions at the behest of government or legislative officials—dangerous because this tends to compromise judicial independence. (If the judges are communicating closely with the executive and the legislature, they may well become its allies.) But if the Court is to issue advisory opinions, the circumstances should be specifically set out.

4. The Constitution should, for the most part, be a barrier to acts of public officials, not to acts of private people. Most Western Constitutions are applicable to government. Private people, including private companies, can do as they wish, subject only to ordinary law. This is an important aspect of democratic liberty, and it helps promote economic prosperity as well, by freeing civil society from legal regulation.

I strongly encourage you to go through this draft and to make most provisions into barriers to government action, rather than to private action as well. This would be easy to do. It would simply entail a review of the human rights provisions, and a minor linguistic change to say that "public officials" may not invade certain rights.

I very much hope that these comments are helpful. And I would be delighted to continue to consult with you during this extraordinary period in Ukraine's history.

CJIL