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Wiktor Osiatynski
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HUMAN RIGHTS AND THEIR LIMITS

Human Rights and Their Limits shows that the concept of human rights has developed in waves: each call for rights serves the purpose of social groups that try to stop further proliferation of rights after their own goals are reached.

Although defending the universality of human rights as norms of behavior, Wiktor Osiatyński admits that the philosophy on human rights does not need to be universal. He calls for a “soft universalism” that will not impose rights on others but will share the experience of freedom and help the victims of human rights violations. He also suggests that the enjoyment of social rights should be contingent on the recipient’s contribution to society.

Although a state of unlimited democracy threatens rights, excessive rights can limit resources indispensable for democracy. This book argues that although rights are a prerequisite of freedom, they should be balanced with other values that are indispensable for social harmony and personal happiness.

Wiktor Osiatyński is a professor at the Central European University in Budapest, where he teaches at the CEU Legal Program. He is a former codirector of the Chicago Law School’s Center for the Study of Constitutionalism in Eastern Europe and an advisor to a number of constitutional committees in Poland’s Parliament. The author of more than twenty books, Osiatyński is on the boards of the Open Society Institute (OSI), the OSI Justice Initiative, and the Human Rights and Governance Grant Program. In 2007, he cofounded the Women’s Party in Poland.

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*To my daughter Natalia,
with hope that your generation will possess human rights
and not cease to sustain them*

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Preface

The ideas that form this book are my most significant learning, gathered from more than 20 years of research and teaching on human rights. My interest in rights extends beyond the past 20 years, however, as I have witnessed firsthand the world around me slowly wake up to the concept of human rights. For that reason, my interest in rights has always had a practical focus, more immediate than theory itself. For me, this book represents a personal culmination of a lifetime's involvement with rights and other values.

My boyhood was spent in the communist Poland of the 1950s, among many schoolmates orphaned by the war and in the ruins of a city burned by the Nazis after the 1943 ghetto and 1944 Warsaw uprisings. Countless former activists were in jail, sentenced for the slightest – or purported – unwillingness to cooperate with the oppressive postwar system. After Stalin's death and the ensuing political thaw, this system became less brutal, but it was still a regime that thwarted freedom at every turn. Most unbearable for intellectuals was the lack of freedom of speech. The state's monopoly over the media, along with the strictest kind of censorship, made it difficult for ordinary citizens to learn the truth, both about “the rest of the world” and about Poland's own history. Communication between people came in whispers, cloaked in fear of being manipulated or overheard by secret police informants. In the evenings, we would tune in to the Voice of America and Radio Free Europe, making sure to keep the volume on the shortwave low enough to avoid being caught.

Every few years, the people of Poland rebelled. Workers would go on strike, sometimes initiating demonstrations that would ultimately be silenced by force. The intelligentsia would write letters and sign resolutions demanding freedom. In March 1968, I was among the university students who rallied in defense of the freedom of expression. These led to reprisals in which a wave of anti-Semitism was unleashed by the communist government. The protesting students were labeled outlaws; our intellectual leaders were pronounced Zionist enemies of the state. In search of justification for our protest, we turned to the Communist Constitution.

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Although we knew that the Communist Constitution had been a useless document since its adoption in 1952, we nonetheless were able to construct on it our argument that the authorities were not living up to their own standards. As one would expect, however, our voices were never heard.

Eight years later, as a new wave of protest swept over Poland, the justification for the rebellion changed dramatically. Now, with the adoption of UN Human Rights Covenants and the signing of the Helsinki Agreement in 1975, international human rights standards could serve to legitimize protests and demands for freedom. In 1980–1981, human rights became an important element of the Solidarity movement. After its forceful suppression, rights provided arguments for those who did not succumb to power. By invoking human rights, the dissents were legitimately able to claim the support of the free world in their struggle. Such was also the case with Charter 77 in Czechoslovakia and with human rights groups in the Soviet Union.

It was around that time that I focused my research on human rights. I was interested primarily in defining the social and political conditions in which the idea of rights and freedoms could flourish. In 1989, as communism in Poland disintegrated, these ideas became practical. I attempted to put them to use as advisor to several constitution-making bodies in Poland, as well as in other transition countries. In 1992, I coauthored the draft of the Bill of Rights submitted by President Lech Wałęsa to the Polish Parliament, and, subsequently, I wrote a number of the provisions to Poland's new Constitution, which was formally adopted in 1997. I continued my research as codirector of the Center for the Study of Constitutionalism in Eastern Europe at the University of Chicago Law School, where I taught one quarter of every year, between 1990 and 2001. In the mid-1990s, I also became involved in various activities of the Open Society Institute and the network of Open Society Foundations: first, in the post-Communist world and, later, in Africa, Asia, and Latin America. In this capacity, I have been involved in a number of projects that aimed to make human rights both respected and enforceable. During that time, I watched as an important evolution in the thinking about human rights took place in several transition countries: a two-stage shift from mere education about rights to the advocacy of those rights based on the hope that governments would respect them, and – finally – to strategic litigation aimed at forcing governments to respect rights.

Thus, practical involvement has influenced my research. In fact, throughout my entire life, my academic curiosity has been guided by real-life experiences. Situations that I encountered repeatedly led me to new theoretical questions that I wanted to clarify. Before I delve into the theory and practice that make up the chapters of this book, I will share some of these formative experiences.

My first experience related to the idea of freedom in general: Under communism, with its censorship-based notion of “truth,” our most cherished value was the freedom

of expression. We enjoyed being dissidents and we respected ourselves for it. Not only did we disagree with the party line, we also disagreed among ourselves as much as we could. We had a saying: “Wherever you have two Poles, you have at least three opinions.” Such was the idea of freedom among those who did not have it.

To us, freedom was in the United States. Because I was not able to travel to America, I did my best to let America come to me; as a university student I became a tour guide for American visitors to Poland. I clearly remember waiting for that first bus to arrive on the Czechoslovak/Polish border in the summer of 1963. For the first time, I was about to meet free people from a free country. How would this freedom express itself in a face-to-face encounter, I wondered.

For days, I got to talk with and listen to people from America, and I remember being overwhelmed not by any sense of freedom but by the conformity I was witnessing. The tourists were members and relatives of the U.S. military and support personnel stationed in West Germany. The majority were nearing the end of their term of service and wanted to see “the demon behind the iron curtain” before the trip back to the States. I was shocked to encounter sixty people who had identical opinions on almost everything. Unimaginably to me, these opinions were also nearly identical to the official line of the U.S. State Department. And thus, the first important question arose for me: Why do we cherish freedom so much when we don’t have it and neglect it when it is a given? Both the dynamics of the post-Communist transition to democracy and the recent events surrounding the “war on terror” in the United States have only reconfirmed the importance of this question.

The idea of rights that appealed to us in the 1970s and 1980s was a relatively simple one. It consisted of personal liberty, which translated into freedom from being jailed by the state, the freedoms of speech and expression, a free press, the freedom of association and other civil liberties, and political rights. These were the rights and freedoms we did not have, and they defined our demands and aspirations.

In 1974, I visited Laos as a journalist. The country was still suffering from the consequences of bombings by the U.S. Air Force during the Vietnam war, and politically, it was torn between a conservative pro-Western government headed by Prince Souvanphouma in Luangprabang and the pro-communist Consultative Council led by the “red prince” Souphanavong in Vientiane. I had a young guide named Phouang who reminded me a lot of myself, 11 years earlier. One day, Phouang asked me if there was freedom in Poland. I replied that the freedom we had was limited. He asked if there was censorship. Yes, I said, but we try to manipulate it by writing between the lines. My answer did not satisfy Phouang. I would not like to live in such a country, he informed me.

Phouang had attended the American school in Luang Prabang. There, he had learned that censorship was bad. At the time, there was no such thing as censorship

in Laos, simply because there was just one major newspaper, probably printed by the military itself. A few days later, Phouang and I talked about education. “How difficult is it to get a university degree in Poland?” he asked. “You have to pass an entrance exam and then you have to pass exams in all your courses,” I replied. How does one afford it? No problem – it is free. I also mentioned that the government had introduced a type of affirmative action in the 1970s, and the children of workers and peasants from small towns and villages were given additional points on their entrance exams to compensate for any unequal opportunities. Phouang liked the sound of this. When I told him that we had foreign students from many Third World countries, he decided he too wanted to come and study medicine in Poland. I asked him if he would not mind censorship. No, he said, he wouldn’t.

This took place just as the first international campaigns for human rights were being launched. Westerners saw other nations as trading freedom for equality and assumed that their role was to promote freedom. But to me, it did not appear that the choice facing Phouang was one of freedom versus equality. No one in his family had ever known either of the two; they had no freedom to trade for equality. What Phouang wanted was the opportunity to be able to afford freedom – and he believed that education would grant him both. I recall wondering if there existed an order of rights and freedoms. Do they reflect the hierarchy of human needs? Is it so that we do not have to starve before we can think of freedom? Then why did such a strong desire for freedom exist among those starving in death camps? Years later, my understanding of the connection between bread and freedom that began with my talks with Phouang would shape my proposals for a way of constitutionalizing social and economic rights in Poland.

Under communism, the people in Poland were oppressed by the state. So were the people of Chile under Pinochet, as well as the citizens of many other authoritarian countries. We needed human rights to protect ourselves from oppression by police and prosecutors, servile courts, and sadistic prison staff. Documenting the details of these forms of oppression was what human rights monitoring was about.

In 1985, I had the good fortune of being invited to teach at Antioch University in Los Angeles. During this time, Antioch had a program at the Frontera prison for women. Every Wednesday, I taught American history and human rights to the inmates of an American prison. This was, of course, a riveting experience for a person coming from a communist country under martial law. At the beginning of the course, I asked my new students to write a paper describing the specific situations in which their rights had been violated. I was expecting documentations of abuses committed by the stereotypical violators, such as police officers and prison guards.

To my surprise, only one of the thirty inmates mentioned police. For all the others, the violators were not state officials at all but fathers, husbands, and lovers. These

were the people who shattered these women's lives: most often by abusing them and, sometimes, by using their coercive power to make the women accessories to their crimes. At the time, such "private" abuse was not covered by what was understood as human rights. It was believed that these were matters for civil and criminal law rather than human rights. But in the cases I read about in these women's personal accounts, appropriate laws were nonexistent or unenforced. Does it matter, for one's sense of violation, who administers the suffering? Should the victims of private violations be left alone? What is the role of the state in relation to the violations of rights by private perpetrators? Thus began my research into the so-called horizontal application of human rights.

At one time, human rights and democracy were synonymous. We were ruled by "them," and "they" were the source of evil. We believed that if we could only have "our" government, our rights would be safe.

One of the first bold moves in Poland's transition to democracy consisted of decentralization: meaning, more power to local self-governments. One such democratically elected local government, in an affluent suburb of Warsaw, soon issued a local law banning HIV-positive people from the community. This ordinance had the clear support of the majority of voters. Suddenly, Poles everywhere were proving James Madison's thesis from two centuries ago: namely, that a majority can be insensitive to the interests and rights of minorities and, therefore, minorities need protection – even in democracies. But in 1990, Poland did not yet have an enforceable Bill of Rights. Decisions of local councils could only be made void by the president of Poland, provided he deemed them illegal. As it happened, the first postcommunist head of state was former communist leader General Jaruzelski, whose appointment was part of the compromise allowing for the transition in Poland. He did, in fact, waive the ordinance and, thus, paradoxically, the same man who had introduced martial law in 1981 became the first defender of minority rights in the young democracy a scant decade later.

Tensions between democracy and human rights have been resonating throughout the entire period of transition. Today, we realize that democracy and human rights are interdependent, but it is clear that the excesses of democracy threaten human rights. At the same time, excessive constitutional rights can impoverish democracy. The need for a balance is one of the themes I address in this book.

The vision of rights we sought in order to protect ourselves against the communist state led us to overlook many problems, including those of social equality and inclusion. After all, we all suffered equally by the hand of our oppressors. We fought for the rights of the nation, not for the rights of particular groups. We were afraid that special claims would dilute our struggle and rob us of our resources. It turned

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out that it was easier to demand that the state stop oppression than to reconcile our own behavior and beliefs with respect for human rights. Most difficult, perhaps, was acknowledging and addressing gender inequality.

In the mid-1990s, I visited a foundation in the Balkans, accompanied by others from the United States and East Central Europe, all supporters of democratic transition and human rights. At the beginning of our meeting, it was announced that the wife of one of the hosts had just delivered a baby. Someone asked, “Boy or girl?” I remember observing that everyone was stunned into silence. “Boy,” came the answer. The congratulations that ensued carried a distinct flavor of relief, as if news of a baby girl would have been a curse. I wondered how many times I had not noticed anything awry in similar situations in the past, and I wondered how the women in the room were feeling. That was the first time I clearly understood the venom of prevailing gender stereotype.

In 2001, I accompanied two colleagues to Peru on behalf of the Open Society Institute, seeking to assist in the transition to democracy, launched after the collapse of the Fujimori-Montesinos regime. We met with the new president and the political elite. We discussed the reform of the criminal justice system with the minister of justice and the needs for assistance to political parties with their leaders. Toward the end of our trip, we left Lima and went on to Cuzco, where we met with a number of activists for the local nongovernmental organizations. We asked them what their problems were and what they thought needed to be done. Only two problems were raised: one was that wives were being beaten and raped by their husbands. The second was the plight of young girls from villages, who were being given away to work as domestic servants in the cities and towns. Essentially a form of slavery, it was a practice that helped the poorest citizens escape poverty and starvation, but the price was high: deprived by their masters of any personal liberty, these young women had no protection from abuse. It was clear that no other problems were as destructive to the communities in and around Cuzco as these – yet none of the politicians in Lima had even mentioned either of these issues. I wondered how many of these men of state had young village girls for servants. I remember thinking that if they did, they probably thought that they were doing them and their families a favor.

I have already mentioned that human rights have always been, for us, an American idea. This perception was reinforced in 1977, during President Jimmy Carter’s visit to Poland. The communist government badly needed American subsidies. Carter asked that the press conference at the end of his visit be aired live on Polish television. The government agreed, knowing that they could screen the journalists and provide them with appropriate questions. But just before the end of the conference, Carter announced that the U.S. embassy in Poland had passed along a question from the editors of an underground newspaper who had not been allowed to attend the

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conference. He took a piece of paper from his pocket and read aloud a question about the prospects for human rights in Poland. He then answered it, saying that the U.S. government would do its best to promote human rights around the world in accordance with the 1975 Helsinki Agreement.

It was what we expected. To us Poles, the American roots of the idea of individual rights were obvious – from the Declaration of Independence to FDR's Four Freedoms, the Atlantic Charter, and U.S. leadership in the defense of the free world during the Cold War. In fact, in the 1980s, I wrote a paper about the influence of the U.S. idea of rights on Poland's history.

In 1990, I was invited by the University of Chicago to teach human rights. The dean of the law school was a recognized constitutional scholar. One day, after he and I had become friends, he asked me to tell him what exactly I was teaching in my human rights course. I told him some general things about rights and their role in the world, but he was not satisfied with my answer. He wanted to know the specific subject matter of the individual sessions. When I progressed from general theory to the details of the freedoms of speech, expression, and association, he exclaimed that what I was teaching was, in essence, the very same thing he was teaching in Constitutional Law I and II. I then realized that, for Americans, human rights was an export product. They thought that they had no need for them at home, precisely because they had their Constitution and constitutional law. I understood why the United States had ratified so few international human rights treaties, covenants, and declarations. This experience awakened me to a reinterpretation of the history of human rights. A reader may find many surprising ideas in the historical chapter of this book.

The last experience I want to mention occurred in November 2001 at a conference on the universality of human rights at Columbia University. Many of the speakers challenged the universal validity of human rights. Some even invoked the notion of "human rights imperialism" and spoke out against the forceful imposition of the idea of human rights by the West. The discussion, although heated, was highly theoretical. Philosophical and moral arguments for and against the universality of rights were flung with considerable force. I will never forget when the dark-skinned man sitting in the back of the auditorium stood up and spoke.

"My name is Koi," he said. "I am from Kenya. I was imprisoned for seventeen years. I was tortured. There is probably not a single bone in my body that has not been broken. Eventually, the regime changed, I was released on amnesty, and, finally, I was allowed to emigrate. I live in New York and I am a writer. I attend conferences like this one. I want to share two things. The first is that while I was in prison, my oppressors talked to me. They wanted me to collaborate with them and give up my comrades. They alternately threatened me and promised me things. I understood everything they were saying. But, here, as I listen to you basically discuss my life,

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I understand very little. Perhaps, this is too sophisticated for me. But I understand enough to make my second point. I hear some of you say that human rights are not universal. You give arguments that sound complicated. But I want to say that while I was in jail being threatened and tortured, it never occurred to me, even for a second, that there might exist some reason that would justify one human being administering such pain to another.”

Koi ended his brief speech with that simple statement and, to this day, he may not be aware that by standing up to speak when he did, he provided me with the strongest argument for the universality of human rights that I have ever known.

Thank you, Koi.

Acknowledgments

This book is the result of both years of research and countless real-world experiences that have challenged my prior knowledge and questioned conventional wisdom. I hope that my readers will be stimulated not only to seek knowledge but also to reflect on their own experiences. I believe that it is from within that real understanding and wisdom emerge.

Many people and institutions helped me with the research that is the basis of this book. The beginnings of my research on human rights took place in the 1980s at the Center for the Study of Human Rights at Columbia University under the most precious guidance of Louis Henkin and Paul Martin. In 1985–1987, I taught human rights at Antioch University Los Angeles, a position I owed to Alvin Toffler, who was on the Antioch Board and Bill Birenbaum, who was the president of the university. In the early 1990s, I received a grant from the Ford Foundation to write a book on constitution making in Poland. Only now, however, having completed this work, can I say that I have fulfilled the intentions of that long-forgotten grant. In 1992, I was a research scholar at the University of Bremen; in 1994, I was in residence at the Maison des Sciences des Homme in Paris; and in 1994–1995, I spent a year at the Wissenschaftskolleg in Berlin, a venture made possible through a grant from the Mellon Foundation. In 1996, I was a Fellow at the Hoover Institute in Palo Alto. On several occasions, I visited the Institute for the Study of Man in Vienna. In 2000, I was a Marsha Lilien Gladstein visiting professor in human rights at the University of Connecticut; it was then that I began to write this book. My most recent research projects were at the Human Rights Center of the University of Connecticut, completed in collaboration with Richard Ashby Wilson; at the University of Siena with Marcello Flores; and at the Central European University with Andras Sajó and other scholars from all over the world. Many of the ideas presented in this book were first formulated as lectures to the Polish and international participants of the School of Human Rights, organized annually since 1990 by the Helsinki Foundation for Human Rights in Warsaw. I am grateful to all my sponsors, colleagues, and hosts.

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Because this book is the result of many years of research, some parts of this book are based on my past published writings. Chapter 2 (“A Short History of Human Rights”) includes sections of the article “On the Universality of the Universal Declaration of Human Rights,” which was published in *Human Rights with Modesty: The Problem of Universalism*. Chapter 4 is an extended combination of two previous articles: “Social and Economic Rights in a New Constitution for Poland,” which is in *Western Rights, Eastern Applications*, and “Needs-Based Approach to Social and Economic Rights,” which is in *Economic Rights: Conceptual, Measurement, and Policy Issues*. Chapter 6 is based on one previous article, “Beyond Rights,” which is in *Abuse: The Dark Side of Fundamental Rights*. I extend my thanks to the publishers of these articles.

Many thanks to all the people who helped me shape the ideas developed in this book. Years ago, I received many important comments on the first version from the late Marek Nowicki and from Zaza Namoradze. The penultimate draft was improved thanks to comments by Joanna Weschler, David P. Forsythe, Jerzy Celichowski, and Richard Ashby Wilson. Andrzej Rapaczynski provided me with such an abundance of detailed comments and suggestions that I decided to rewrite the entire book and change its original structure. I owe a lot to discussions with scholars at the University of Chicago Law School, Columbia University, Stanford University, CEU, and the University of Connecticut, as well as my colleagues at the Open Society Institute. I am particularly grateful to the members of boards and staff of the Open Society Justice Initiative in New York and the Human Rights and Governance Grants Program in Budapest. Our formal meetings and informal conversations have created fertile soil in which my understanding of human rights could grow. I hope that as you read this book you will be able to appreciate just how much you have contributed to it.

I owe as much to the students of the universities of Chicago, Connecticut, and Siena, and, most importantly, of the Central European University, whose truly multicultural student body allowed me to test my ideas about the relevance of human rights and their universality.

My most affectionate thanks go to my wife, Ewa Woydyłło-Osiatyńska, who has supported me throughout years of my immersion in research and tolerated my ensuing absence from our daily life. We have often discussed my ideas and, by challenging many of them, Ewa has helped me to clarify and develop my thoughts. I also thank Ewa for her insightful first readings of the subsequent versions of each chapter.

Finally, this book would not exist if it were not for my daughter, Natalia, who refined my crude English version of this book into the readable text before you. Although formally trained as a linguist, Natalia faultlessly edited every flaw in substance along the way. If she missed anything, I must have misled her and it is I who should be held responsible.