

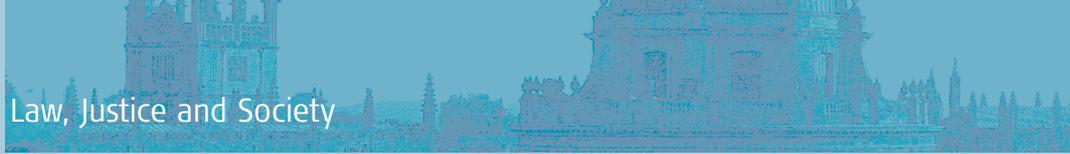
**Courts and the Making of Public Policy
and The Social Contract Revisited**

Constitutional Socio-Economic Rights: Lessons from Central Europe

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Executive Summary

- Whether socio-economic rights should be entrenched in constitutions has been a subject of lively debate. On the one hand, it has been argued that such an entrenchment is necessary in order to recognize the worth and standing of those rights and in order to give individual claimants sufficient remedies in cases of a breach of a right. On the other hand, it has been argued that it is unnecessary (because statutory recognition is sufficient) and even harmful because it invites judges to enter into the field of social policy where they have neither competence nor legitimacy to act.
- The dominant view in Europe, in contrast to the United States, is that social rights properly belong in constitutions; what is unclear is what their constitutional catalogue should be and whether they should be accorded equal legal status with other more 'traditional' or 'liberal' rights.
- In Western Europe there are at least four distinct models of constitutional design of social rights, but one thing is common: regardless of the textual models, there has been an almost uniform tendency by constitutional authors and/or courts to draw a line between social and 'liberal' rights, and to restrict or altogether exclude justiciability (judicial enforcement) of social rights.
- Central and Eastern Europe (CEE) presents an attractive and recent illustration of the 'problem' of socio-economic constitutional rights. All CEE constitutions include reasonably 'generous' catalogues of such rights, with broadly stated rights to social security, to work, and to education in particular. With some exceptions (in particular, Czech Republic and Slovakia), the differences in legal status between socio-economic rights and liberty rights are either minimal (Poland) or nil (Hungary).
- It was the task of constitutional courts to establish the distinctions in status between various categories of rights. Notwithstanding the textual provisions, courts have almost uniformly concluded that most socio-economic rights do not give rise to specific individual claims but can nevertheless be the basis for an abstract review of statutory provisions and policy decisions. In this way a realistic and balanced compromise has been struck between, on the one hand, a view that socio-economic rights provide individuals with a strong claim to a particular benefit and, on the other hand, a view that such rights are merely 'programmatic' and have no binding effect upon the legislatures and policymakers.

Constitutional Socio-Economic Rights: Lessons from Central Europe

Introduction

The idea of legally protecting 'social rights' has never been seriously challenged in central and Eastern Europe (CEE) after the fall of Communism; this has been for a number of reasons which are mutually interrelated. The rise of social inequalities and the huge social zones of poverty; the relative weakness, almost nonexistence, of the classical liberal (in the *laissez-faire* sense) political parties, movements, and intellectual currents; a widespread sense of entitlement to state protection in need, inherited largely from the state-socialist period; the gravitational pull of the European Union social policy where the idea of social rights is largely taken for granted – all these meant that the existential questions about social rights have never been seriously asked in the transition from Communism to democracy. But it does not follow that the catalogue, the meaning, and the forms of legal protection have been self-evident. In particular, the '*whys*' and the '*hows*' of constitutionalization of socio-economic rights have been subject to an intense debate, which is reflected in the constitutional drafting and in the jurisprudence of constitutional courts in the region.

This is an interesting and illuminating phenomenon, also for those who are not necessarily interested primarily in legal or political developments in central Europe: there are general lessons to be learnt for the constitutional policies of social rights in other countries. The emergence and development of constitutional justice in post-Communist central Europe provides constitutional scholars, analysts, and policymakers with an attractive, recent, and not yet fully settled laboratory for analysing constitutionalism in general.

It should also be emphasized that social rights will be discussed in this paper through the prism of *constitutions*. Admittedly, this is not the only perspective, and perhaps even not the most important one from which to study social rights. There is, after all, no necessary correlation between the range of social policies in a given country and the 'generosity' of social rights dispensation in that country. It is not too difficult to identify the states which lack any social rights in their constitutions (or where the catalogues and the status of those rights are very thin) and yet which have very robust social welfare policies: Australia, New Zealand, Nordic states. Constitutional entrenchment of social rights is not a necessary indicator of the state of social policy, and perhaps not even the most important one. And yet, it is not a trivial perspective.

First, while there may be no correlation between the depth of social policy and the range of constitutional social rights, it would be implausible to say that the constitutionalization of those rights is insignificant with regard to the status of social rights. To deny the importance of constitutionalization of social rights would be to deny the importance of constitutions. Second, constitutionalization of social rights has a powerful symbolic significance. In the European tradition, constitutions are not only *legal* documents, they are also emphatic statements of intentions, aspirations, and goals, as well as articulations of ideological standpoints. For some, this 'declaratory' character of constitutions is their weakness, but this is not the point here: it is a fact about European constitutionalism, whether we like it or not.

The very fact that there is no clear correlation between the scope of social policy and the range

and status of social rights in the constitutions raises some very interesting questions for constitutional theory. What are the real consequences of constitutionalization if they cannot be reduced to mandating a specific social policy? The usual answer is that it empowers judges to enter into the area of social policy in a way that would not be open to them in the absence of constitutionalization. But how far and in what ways can the judges reign there? This is usually presented as the question of justiciability and judicial enforcement of social rights, with all the obvious dilemmas related to judicial competence, legitimacy, and (ir)responsibility for the financial costs of their decisions. I believe that the central-Eastern European experience is instructive in this debate.

Constitutional social rights in Western Europe

Constitutional design and constitutional practice in CEE have been largely influenced by the Western European precedents, so a quick survey of constitutional social rights in these countries may be useful at the outset. While there is no uniformity, one thing seems to be clear, namely that either in the process of constitutional drafting or in the process of giving authoritative interpretation of constitutional rights by constitutional courts (or other quasi-judicial bodies), a marked distinction has been made between the status of social rights and that of other, more 'liberal' rights. And this, notwithstanding the tendency for influential legal scholars to question the grounds for such a distinction.

Western Europe presents a telling contrast between the legal literature and legal conditions as far as socio-economic rights are concerned. While the dominant view in legal literature (if I read it correctly) is to minimize the distinctiveness and specificity of socio-economic rights as compared to 'classical' liberal rights, and consequently to uphold their justiciability and capacity for judicial enforcement, few, if any legal systems in Western Europe take this equivalence (of social and liberal rights) fully seriously: legal texts (documentary

constitutions) and/or case law of courts draw a quite clear line between both types of rights, as far as their status is concerned.

To facilitate the overview, I will distinguish several models that will be presented in a stylized, schematic way. The British model is the least representative for Europe, for here we cannot speak of constitutional social rights at all. The preponderance of social rights is established by legislation, with the clear hostility of British judges to recognize individual social rights in the common law. In that sense, the legal scheme of protection of social rights in Great Britain is quite similar to the US system, and has had hardly any influence on constitutional thinking in post-Communist states of Europe.

The model which *had* some influence was the French one. While the French Constitution does not contain any explicit bill of rights, it describes the state as a 'social Republic' (art. 2), and also explicitly incorporates the Preamble of the Constitution of 1946 and its several references to 'social rights'. But both in legal theory and also in the jurisprudence of *Conseil constitutionnel* there has been a traditional insistence that social rights have different juridical foundations than the traditional liberties. Accordingly, the *Conseil constitutionnel* has been reluctant to interpret social rights as legally binding and fully enforceable rights but has seen them as programmatic principles.

The third influential model, that of Germany, has the 'Social State' (*Sozialstaat*) clause as the main constitutional anchor for its social rights, although it lacks a catalogue of any specific social rights. It has been viewed, in the process of constitutional adjudication, as not merely programmatic but also as binding upon the legislative branch, which is obliged to organize state functions according to this principle, giving rise to a constitutional right to minimum social subsistence. However, while in the practice of the Federal Constitutional Court the Social State clause has been used (together with the principle of legitimate expectation) to review the

constitutionality of legislative restrictions upon constitutional rights, it has never been used as a basis for a positive claim for a specific benefit, without the existence of an enabling legislation.

Finally, the Scandinavian model is perhaps the best example illustrating the possibility of coexistence of a very robust, developed social policy with very thin constitutional bases for social rights (and correspondingly, weak judicial review under those rights). The Nordic constitutions contain some socio-economic rights (in particular, the right to work and a commitment to full employment) but, by and large, they are not exhaustive and are not accompanied by a 'social state' clause. This may be partly explained by the fact that, with the exception of the Swedish Instrument of Government (1974), they originate from the first half of the nineteenth century, although they have been amended many times. This can also be accounted for by a tradition of judicial restraint and a more parliamentary than judicial model of review of constitutionality of acts; partly also by the fact that the Nordic welfare model, at least until recently, relied highly on the self-regulating, consensus-oriented process hammered out in the negotiations between the employers and trade unions, where there is a relatively lesser space for court litigation and adjudication in constitutional courts.

In addition to the four models above, it is useful to mention two in which the distinction between socio-economic rights and all other rights is made explicitly and very starkly, by describing the aims of state policy as distinct from a bill of rights. The Spanish Constitution draws a distinction between 'Rights and Freedoms' (Chapter II) and 'The Guiding Principles of Economic and Social Policy' (Chapter III). Similarly, the Constitution of Ireland distinguishes between 'Fundamental Rights' (arts. 40–45) and 'Directive Principles of Social Policy' (art. 45), with a provision in the latter to the effect that 'they shall not be cognisable by any Court' (art. 45).

Constitutional design of socio-economic rights in CEE

Given the conditions outlined in the introduction to this policy brief, the constitutions of CEE countries all include socio-economic rights; the only variables concern the specific catalogues of these rights, and what status is given to these rights. Hence, while the three primary rights to social security, to health care, and to free education are present universally, there are some local varieties. In the case of the right to social security, in some countries it is qualified as given only to those unable to work or otherwise in material need (e.g., in Poland, Hungary, Czech Republic, Slovakia). Right to free health care is proclaimed sometimes without any qualifications (e.g., in Czech Republic, Estonia, Latvia), and sometimes in a more qualified way, as in Poland, where it is conferred only upon the elderly, children, or pregnant women. Finally, the range of free education is differently delimited: sometimes it is provided up to the level of higher education (Poland, Romania, Slovenia), sometimes up to the secondary level (Bulgaria, Czech Republic, Slovakia) and sometimes only at the primary level (Hungary).

In addition to these three rights, the most frequently listed rights are those related to work: to proper working conditions, to choose one's profession, to adequate pay, etc. Other, less frequently featured rights are the protection of the family, training for the disabled, protection of culture, and a right to a good environment; it is interesting that a right to adequate housing is listed very rarely, and even then, it is usually articulated as an aim for the state policy rather than an enforceable right.¹ But overall, one can conclude that the degree of diversity among CEE constitutions as far as social rights are concerned is not that great, and that in a worldwide context they fall at the more 'generous' end of the spectrum.

¹ For a detailed account, see Sadurski, W. (2005) *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Dordrecht: Springer, pp. 176–78.

Perhaps more important than a catalogue is the constitutional model of the status of social rights, compared to classical, liberal liberties. From this point of view, two main models within CEE constitutions can be identified. The first model is of no distinction at all: no textual difference is made between social rights and any other rights (e.g., in Bulgaria, Hungary, Romania, and all three Baltic states). The second model is exemplified by the constitutions of the Czech Republic and Slovakia, which contain a general clause that a number of specifically enumerated rights (which include all social rights) can be claimed only within the limits of the laws enacted to implement these rights. As a result of this limiting clause, social rights may be subjected to legislative restrictions over which the lawmaker has a broad discretion, and where judicial enforcement is very limited. There is also a hybrid model: some social rights are directly enforceable and others are covered by a limiting clause of the sort existing in the second model (Albania, Poland, Slovenia).

With the exception of two post-Czechoslovakia states, all CEE constitutions ignore the distinction in status between classical liberty rights and at least some (often all, as is the case in Hungary) social rights. This has resulted in the unenviable task of drawing such a distinction, and explaining its relevance, falling to constitutional courts.

Line-drawing by constitutional courts

Constitutional courts in CEE have reasserted a strict legal status of socio-economic rights (resisting the temptation of considering them as purely 'programmatic'). Nevertheless, the leading authoritative view has been that, even if these constitutional rights cannot be the grounds for an individual claimant, they can be the basis of a constitutional review of legislation conducted by the constitutional court in the process of its abstract review. The main task before the courts has been, however, to establish the status of distinctions between socio-economic rights and 'liberal' rights, despite the absence of any textual constitutional mandate.

Here, the case of Hungary is particularly significant because in the Hungarian Constitution there are no distinctions of status, regarding the enforceability, judicial review, and the scope for legislative discretion, between *any* of its rights. In 1990 the Hungarian Constitutional Court established that the right to social security (art. 70E of the Constitution) does not entitle any citizen to any specific benefit: 'social security means neither guaranteed income, nor that the achieved living standard could not deteriorate'. In fact, the Court effectively converted the 'rights' provisions into targets for the state to pursue. A more recent example can be found in a decision on the rate of pension increase at the end of 1999. In this case, it was held that the state has a constitutional obligation to maintain a social security system, but that the detailed rules of this cannot be derived from the Constitution itself. In the situation of pension increase, pensioners have no right to a specific rate, although it would be unconstitutional if the state did not provide any increase at all, or if the rate of increase was established arbitrarily.

However, the fact that socio-economic rights are not directly enforceable by the courts does not prevent these rights from becoming grounds for constitutional challenges to laws and policies through the process of abstract judicial review. It is one thing for the court to say that a specific individual has a legitimate claim to a particular good, and another to find a particular governmental policy unconstitutional. Indeed, the dominant opinion in post-Communist constitutional doctrine is that all constitutional provisions, including those that contain socio-economic rights, can be used as yardsticks to assess the constitutionality of statutes. As a result, constitutional courts have been quite active in reviewing, and at times invalidating, statutes under the standards of socio-economic rights, even though this often calls for judgments on social and economic policies, in which judges have no expertise to provide adequate review. A view that these rights are 'merely programmatic', and thus nonjusticiable, has never become a dominant, recognized doctrine.

It is significant that when constitutional courts in the region have had a choice between striking down a law under a general constitutional clause such as 'social justice' or 'equality' on the one hand, or under a specific welfare right on the other, they usually have opted for the former. At first impression, this strategy may seem surprising. After all, general clauses such as those guaranteeing a 'law-based state', the principle of trust, or of fidelity to vested rights, seem much vaguer than specific socio-economic rights. The fact that constitutional courts usually choose recourse to the former, notwithstanding their abstract nature, may be significant. It shows that the courts themselves feel that they are on very shaky grounds when dictating to governments or legislatures what, to whom, and how much, should be paid or supplied to citizens by way of enforcing their socio-economic constitutional rights. This perhaps confirms the opinion that, had constitution-makers opted for a solution under which the welfare interests of citizens belonged to the category of constitutional 'targets' (with the clear implication that, as such, they are not cognizable by the courts), much clarity could have been gained.

So far I have been drawing on various cases on social security. A word about the right to work and to education is in order. Even though most of the CEE constitutions contain simple 'right to work' provisions, these have nevertheless come to be understood *not* as proclaiming a right to be provided with employment by the state. Constitutional courts have played an important role in this reinterpretation; for example, in Hungary, the right to work was identified by the Constitutional Court with the right to free enterprise; further, in negative terms, the Court stated that this right secured no 'subjective right' to obtain employment.

As mentioned earlier, some CEE constitutions provided for the right to free public education. This principle ran into some practical difficulties, and, again, it was the job of the constitutional courts to narrow down its meaning. Consider the example of Poland. Here, the constitutional text was rather ambiguous: Art. 70 para. 2 provided, in the

first sentence, that, 'Education in public schools is free', while the second sentence allowed a statute to provide for 'rendering some educational services by public universities for a fee'. Many understood that those 'educational services' applied to mature and correspondence students who attend separate courses, and that the first sentence of this provision prevented the imposition of fees upon day students admitted in the regular selection process. Despite this, the Constitutional Tribunal upheld in 2000 statutory regulations that provided for tuition fees to be paid by regular students in public universities, as long as the universities also provide regular education to a certain number of students for free. The argument of the tribunal was that the right to education (art. 70) is, in its essence, a guarantee of 'availability and universality' of education, not of its being free of cost. To be sure, the second paragraph of the article provides for 'free education in public schools', but this is only one of the elements of that right and should be interpreted as being derivative from the principle of 'availability and universality'. In effect, the Court tried to reconcile the general principle of free education with a realistic understanding of the dire economic situation of universities.

Conclusions

The constitutional developments in central and Eastern Europe convey various lessons for those interested in constitutional socio-economic rights. These are best considered in relation to the primary arguments against constitutional social rights.

Firstly, it has been argued that to elevate social rights to the constitutional realm merely serves to force judges – especially constitutional judges – into making decisions on economic policymaking for which they have questionable competence, knowledge, or legitimacy; furthermore, this disempowers parliaments and the executive in a way contrary to democratic principles. Secondly, an argument has been made that elevating welfare rights to the constitutional level may promote attitudes of welfare dependency and become a counter-incentive to self-reliance and

individual initiative. Thirdly, a 'contamination' argument has been made: namely, the concern about 'contaminating' the entire charter of rights by the under-enforcement of this one particular category. Since these rights are, by their nature, under-enforceable, the concern exists that a tolerance for under-enforcement of some rights could erode a rigid commitment to the enforcement of all other rights, including civil-political ones.

Based on the experience from CEE, I do not think that there is any convincing empirical evidence for the welfare dependency and 'contamination' arguments. However, the first argument, that judges are not the proper actors for making decisions concerning economic policy, is less easy to refute. The question is, can constitutional judges and other political actors operating under constitutions that

enshrine socio-economic rights find the right balance between respecting both the constitutional mandate and the democratic responsibility of the legislative? The example of constitutional adjudication in central and Eastern Europe suggests that it is possible. The balance is not always easy to strike, and not every solution is laudable, but the pattern that emerges is, by and large, a positive one.

The general lesson that can be drawn from the CEE experience is that, regardless of the textual constitutional provisions of social rights, constitutional courts will, with a proper institutional system for judicial review, gradually come to redefine the status of those rights in a way that balances the need for entrenching those rights and leaving sufficient discretion to the legislative and executive branches in finding the means and resources to implement those rights.

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