

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

The Constitutional Politics of Socio-Economic Rights: Proceduralism 'Writ Large'

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Executive Summary

- The approach to adjudication on socio-economic rights proposed here is very close in spirit to John Hart Ely's well-known 'proceduralist' theory of adjudication advanced in *Democracy and Distrust*, in which courts are seen as bodies capable of remedying some of the failures of the formal democratic process.
- It is argued that Ely understood the failures of democracy very narrowly by limiting them to issues important in US domestic politics, such as the reinforcement of voting rights and the protection of insular minorities. When we move beyond the US context, it becomes apparent that other failures of electoral democracy are not less important than these, and that there are dangers of marginalization and exclusion, which cannot be addressed by strengthening voting rights and fighting discrimination and segregation.
- The judicial enforcement of socio-economic rights, in certain circumstances, might be necessary in order for constitutional courts to remedy problems of persistent marginalization and exclusion.
- According to the proposed approach, the overall goal of adjudication is to create an inclusive liberal democracy in which all citizens have a stake.

The Constitutional Politics of Socio-Economic Rights: Proceduralism 'Writ Large'

In contemporary politics the programmes of political parties have aligned themselves very closely with each other on substantive economic questions, whilst diverging on issues of identity, such as nationalism, religion, culture, etc. Political actors generally claim to pursue policies which are in the interest of all from an economic point of view: they seek supporters from virtually all socio-economic groups and classes. Therefore, the traditional distinction between the Left and the Right in the socio-economic area has become increasingly irrelevant, as illustrated by the success of the Blairite 'Third way' in the United Kingdom.

In such an environment, groups of citizens dissatisfied with the mainstream parties' socio-economic quasi-consensus turn to alternative actors to protect their interests; courts are one such actor. Thus, somewhat paradoxically, politics becomes increasingly concerned with issues like abortion, the rights of sexual minorities, and corruption, which have in the past typically been handled by courts. At the same time, adjudication is moving into areas traditionally reserved for politics, like social justice and welfare entitlements. Arguably, in such circumstances, socio-economic rights become more and more important from a judicial perspective. This policy brief examines the constitutional protection of such rights in their relationship to the political process. How should constitutional courts approach claims of socio-economic rights? Should they defer to politically elected bodies? If not, what kind of arguments should judges employ in their reasoning?

The main argument developed here is that socio-economic rights are best understood as a form of political rights of *participation*, which prevent certain groups of the population from being marginalized and socially excluded. The socio-economic rights are part of the constitutional infrastructure of liberal

democracy, which is designed to ensure that each citizen is granted equal respect by the state, or 'equal part' and 'equal stake' in the communal enterprise. Just as the right to vote is essential for ensuring equality of participation in formal electoral procedures, so socio-economic rights are essential to safeguard certain groups from being reduced to 'second-class' citizenship.

The fact that courts, and constitutional courts in particular, *can* interpret and enforce socio-economic rights as legal rights does not mean that judges are always best placed to determine the scope and character of these rights. Courts are largely secondary players to political bodies on such issues; they can help to redress particular weaknesses of the political process, but they cannot be a complete substitute for political bodies in matters related to socio-economic entitlements. Therefore, there is a need for a theory of adjudication by which courts can act as partners of the political bodies of power in a dialogue aimed at creating an inclusive and representative liberal democracy.

The approach proposed here is very close in spirit to John Hart Ely's well-known 'proceduralist' theory of adjudication advanced in *Democracy and Distrust*, in which courts are seen as bodies capable of remedying some of the failures of the formal democratic process. However, it is argued that Ely understood the failures of democracy very narrowly by limiting them to issues important in US domestic politics, such as the reinforcement of voting rights and the protection of insular minorities.¹ When we

1. For an insightful discussion of the advantages and limitations of Ely's representation reinforcement theory as applied to socio-economic rights see Fredman, S. (2008) *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford: Oxford University Press, pp. 109–13.

move beyond the US context, it becomes apparent that other failures of electoral democracy are not less important than these, and that there are dangers of marginalization and exclusion, which cannot be addressed by strengthening voting rights and fighting discrimination and segregation. This brief comparative analysis shows us that socio-economic rights might prove a useful tool for constitutional courts to remedy such problems, if their goal is the establishment of a liberal democracy in which all citizens have 'a stake'.

What is 'a policy of justice'?

The concrete implementation and enforcement of rights depends on specific state policies. Let us call such specific policies 'policies of justice'. Let us also stress that both positive and negative rights require such specific policies of justice for their enforcement. Holmes and Sunstein, to take an example, have convincingly argued that the enforcement of most rights needs huge public investment in institutions, such as policing and law enforcing bodies, courts, regulatory agencies, etc., even in the case of negative rights.²

To illustrate this point, let us take one important classical negative right – the right to private property – and demonstrate its full dependence on specific 'policies of justice' for the determination of its scope and enforcement. The restitution of agricultural lands in Eastern Europe provides a revealing example in this regard. In Bulgaria, the problem with the property rights of the owners of lands nationalized by the communist regime in the late 1940s and 1950s proved to be one of the most disputed aspects of the transition to market economy and democracy. There were two general proposals for compensating or restoring the rights of the landowners after the fall of the regime in 1989, which we can see as two competing 'policies of justice'.

The first policy, defended by the fledgling democratic forces (Union of Democratic Forces [UDF]), envisaged *full* restitution of most lands to their former owners in their real boundaries. The second policy, advanced by the ex-communist Bulgarian Socialist Party, envisaged a *limited* restitution of lands, and compensation for the rest of the property through government bonds, money, or other lands. Under the second model the owners were not supposed to recover their own lands in their real boundaries from the time before the communist nationalization, in order to facilitate the preservation of some large-scale cooperative farms. The model envisaged either later privatization of these farms or their transformation into real cooperations among the former landowners and the workers and the management of the state farms.

These two competing policies of justice would lead to completely different determinations of the actual scope of property rights in Bulgaria. Not surprisingly, the issue was thoroughly politicized. First, the ex-communists, who won the first democratic elections in 1990, managed to pass a land-reform law, which was based on the principle of limited restitution and compensation. However, the second general election in 1991 brought to power a new right-wing majority dominated by the UDF. This majority changed the law³ and provided for a much more extensive restitution of agricultural lands in their *real boundaries*. The restitution thus presupposed the liquidation of the state-owned cooperative farms.

At this time, the recently established Bulgarian Constitutional Court began intervening quite significantly in the area of land restitution. The general constitutional policy of this body was supportive of the policy of full restitution and the fledgling democratic forces in general. Firstly, in 1992 the Court ruled that the amendment to the reformed communists' law, which introduced the

2. Holmes, S. and Sunstein, C. (1999) *The Cost of Rights: Why Liberty Depends on Taxes*. New York: W. W. Norton.

3. Law on the Amendment to and the Supplementation of the Law on the Ownership and the Utilisation of Agricultural Lands, Official Gazette No. 28, 1992.

principle of extensive restitution, was constitutional.⁴ Secondly, after the right-wing coalition lost its majority in Parliament at the end of 1992, the Court began consistently defending the principles of extensive restitution as the only model of restoring the rights of the former landowners, compatible with the Constitution.⁵ When the UDF government replaced the Socialists in 1997, the Court somewhat 'softened' its position on the enforcement of the right of property in order to allow for certain governmental initiatives in the agricultural sector aimed at speeding up the reforms.

This small case study raises an important institutional question: which is the institution best placed to take decisions on 'policies of justice'? Is it the legislature (or another democratically legitimated body) or the Constitutional Court? In concrete terms, was the Bulgarian Constitutional Court right in overturning the 'policy of justice' proposed by the ex-communists? In general, should judges be allowed to review a particular 'policy of justice' adopted by the legislature?

The traditional view is that matters of policy are to be generally deferred to the legislature. But here the difficulty lies in the fact that the 'policies of justice' are a mixture of policies and principles. The exact character of this mixture would determine quite dramatically the scope, extent, and enforcement of rights. Therefore, it is not at all clear that courts should be denied powers of review of policies of justice.

'Proceduralism writ large' and the constitutional policies of justice

If constitutional courts are allowed to adjudicate on the 'policies of justice' adopted by the legislatures, the question centres on how they should approach such matters. Here, I sketch an adjudicative theory, which addresses this issue, without reducing constitutional adjudication to 'mere politics' or

'partisan politics'. I suggest that it is meaningful to draw a distinction between 'legislative' policies of justice (appropriate for political bodies) and 'constitutional' policies of justice (designed for constitutional courts). The discussion below is focused primarily on the constitutional policies of justice.

John Hart Ely's proceduralist theory is a good starting point for a 'constitutional' policy of justice. Ely argued that judges should intervene only when they either have an express legal mandate given them by clear constitutional rules, or, more significant to our project here, when the normal democratic political process fails to provide a just and fair result, by denying participation to certain groups (e.g., ethnic minorities) and neglecting the interests of insular minorities, whose electoral impact is negligible. The main idea behind this theory seems sound, namely, that formal electoral democracy sometimes fails to be sufficiently inclusive and participatory as to guarantee procedural justice. It is also clear, however, that the failures that Ely points out are heavily context-dependent: the representation of minorities and their participatory rights were based on US domestic political debates in the 1960s; particularly the jurisprudence of the Warren Court, which provided the inspiration for Ely's theory.

If we change the context, it will become apparent that formal electoral democracy is prone to other failures as well. In some of the countries of Eastern Europe, for instance, immediately after 1989 the fledgling democratic opposition was facing strong opposition from the established and well-organized ex-communist parties, which rebranded themselves overnight as 'socialist'. In Bulgaria, the ex-communist party was so much better organized than the opposition that it managed to control the main economic actors and the media in the country well after the fall of the communist regime. In such a context, formal electoral democracy would not necessarily lead to an inclusive, pluralistic, and participatory liberal democracy. Here, we could speak of a specific failure of democracy, which cannot be remedied by the 'representation reinforcement' strategies suggested by Ely. If we are to preserve the

4. Decision 6 (1992).

5. Decision 12 (1993); Decision 7 (1995); Decision 8 (1995); Decision 4 (1996).

spirit of his theory – namely, that the goal of judicial review is to remedy the failures of formal electoral democracy, and to establish a more pluralistic, inclusive, and fair political process – then we have to increase the scope of remedies at the disposal of courts. Again, the focus of judges should be on the *democratic process*, but this process should be writ larger than Ely imagined.

Consider the following factors of the democratic political process that judges should take into account if they are to provide efficient remedies to democratic failures:

- The *degree of separation of powers in the system*. As a rule, nonfederal, rationalized parliamentary systems with single legislative chambers provide fewer guarantees against the monopolization of public life by a single actor: a political party or a coalition of parties. The fewer the guarantees, the greater the justification for judicial interventions against the policies of the dominant majority.
 - The *length of the domination of a single party or a cohesive coalition of parties over the government and the legislature*. In the application of this standard, the particular institutional arrangements of the system must be taken into account. Parliamentary and presidential systems would again differ in terms of possibilities of long domination of a single party in power. The greater the length, the greater the justification for a court to redress the balance.
 - The *intensity of the competition between different political actors* or the existence of social groups in the community which advance comprehensive doctrines different from that of the dominant majority, and reject the dominant comprehensive doctrine.⁶ In general, the greater
- the intensity of the competition, the greater the justification for court intervention on behalf of the dominated doctrines.
 - The *degree of openness of the political system* to citizens and civil society organizations. If the political system has extensive mechanisms (such as plebiscites and referenda) for authoritative feedback and consultation with citizens and nongovernmental organizations on crucial political questions, the necessity for judicial intervention against the politically dominant force may be significantly reduced.
 - The *long-term significance of the particular question in the dispute*. If the issue is capable of 'freezing' some aspect of public life in a direction backed by a single contested worldview or comprehensive doctrine, other things being equal, there will be a greater justification for a court to interfere with the political process in order to prevent such long-term 'freezing'.
 - The *practices of cooperation and consensual decision-making* that are not regulated by rigid rules but still exist must also be taken into account. The more established these practices are, the less a court would need to interfere with the political process.
 - The *political preferences of the majority of the court*. If these preferences coincide with the views of the dominant political majority, judicial intervention in politics would most likely worsen the situation with regard to the fundamental issues of justice. Yet, even in such circumstances, if the constitutional court is the only authoritative outlet for 'opposition' views based on dissident comprehensive doctrines, judicial intervention in their favour may still be required by the court. This is the point at which *constitutional politics* differs from ordinary *legislative policy*. The former concerns mainly issues of justice, while the latter consists in the expression of particular views about the good. Judges should not be guided primarily by their own views about the common good:

6. A requirement of 'reasonableness' of the competing doctrines (or at least of the behaviour of their supporters) is necessary, of course, so that the emergence of strong anti-system forces is not encouraged.

the tasks of constitutional politics are different. (Whether it is realistic to expect judges to disregard their political convictions in favour of considerations of overall justice is a difficult empirical question: in any event, judges are not different from legislators in this regard, and a model with judicial review should not be ruled out on this ground.)

These factors are obviously context dependent, and the list is definitely not exhaustive, but it is a good starting point for the analysis of constitutional policies of justice. As on Ely's theory, the goal of the judges is to move beyond the formal electoral democratic process and to defend the idea that liberal democracy is more than just the counting of votes. It includes ideals of pluralism, inclusiveness, and participation, and provides for a wide range of citizenship entitlements. On the 'proceduralist theory writ large', judges are entitled to improve democracy through interventions on behalf of excluded and marginalized members of society, interventions that go well beyond the strengthening of voting rights.

Returning to the case study on restitution presented above, we could argue that the suggested theory of adjudication would provide an argument in favour of the intervention of the Bulgarian Constitutional Court in support of the extensive restitution principle. The situation in Bulgaria in the period 1992–2001, in my view, was such that most of the factors listed above pointed to the need for more intense judicial intervention in the political process. The major beneficiary of this judicial activism concerning the process of restitution had to be the pro-reform oriented, right-of-centre parties, who were facing a formidable ex-communist opponent still occupying most of the Bulgarian public sphere. In order to ensure a more pluralistic, more inclusive, and ultimately politically and procedurally more just democracy, the Court needed to support the specific 'policy of justice' of one of the political players – the fledgling democratic forces, who were threatened with marginalization by their better established opponents. It could be argued, therefore, that in this

case the Court read well the political process, and took a justified decision, no matter how complex and controversial from the point of view of social utility its decision was.

The Bulgarian Constitutional Court clearly held no great expertise on agricultural issues, and it could not anticipate all the complexities of its decision. But very much as Ely argued, judges are good at reading processes, and they could identify procedural problems of democratic representation, functioning, and participation. Most helpfully from the point of view of the suggested theory, constitutional judges in Eastern Europe are usually a combination of professional jurists and politicians: they have experience both in legal matters and in the political process. Some of them are nominated by political bodies; others have had experience as politicians or become politicians after their mandate. In this sense, they could be treated as experts on 'processes' in a broader sense than that suggested by Ely.

The politics of socio-economic rights

On the approach advocated here, socio-economic rights could prove a useful tool for constitutional courts to prevent the marginalization and social exclusion of specific groups whose interests are not properly taken care of by the political process. Have courts made use of this?

A general assessment would indicate that they have used such rights quite sparingly. The most famous example of a constitutional court invalidating a major welfare reform act on the basis of socio-economic rights came from Hungary in the mid-1990s.⁷ The Solyom activist Constitutional Court overruled a package of reform laws proposed by Finance Minister

7. For an in-depth discussion of the jurisprudence of the Hungarian Constitutional Court on socio-economic rights see: Uitz, R. (2006) 'Grand Promises in the Face of high Expectations: Welfare Rights in Hungarian Constitutional Jurisprudence'. In: Udombana and Besirevic (eds) *Socio-Economic Rights in an Insecure World*. Budapest: Central European University Press.

Bokros. The Court argued that these violated 'acquired rights' and thus the principle of legal stability, since they lowered significantly the size of certain welfare entitlements. The initial reactions to this decision by constitutional scholars and politicians were quite critical: the court was accused of a lack of understanding of its legitimate mandate, of populism, and political involvement.⁸ Probably because of this negative response, this positive stance on positive rights remained something of an exception not only in Hungary, but in the region as a whole. Constitutional courts rarely confronted the legislature on issues involving socio-economic rights.

More recently, Kim Lane Scheppele has offered a more nuanced, and rather insightful analysis of the 1995–1996 decisions of the Hungarian Constitutional Court.⁹ She argues that the court had actually helped the legislature and the political bodies to withstand pressures from international financial institutions (World Bank, International Monetary Fund) to introduce one-size-fits-all austerity programmes and measures, the overall wisdom of which is yet to be fully assessed. The Court decisions did not block economic reforms, but helpfully reminded the legislature and the political establishment that they were ultimately responsible for the welfare of the Hungarian people, that economic growth and financial stability could not be pursued regardless of the social costs, etc. These basic truths of contemporary democracy are often forgotten by governments fully embracing the economic libertarianism of the Washington Consensus – a view particularly influential among Eastern European political elites.

This realpolitik defence of the use of socio-economic rights might be interpreted as an instance of the application of the 'proceduralism writ large'

adjudicative approach. On this approach, as we saw, the task of the judges is to examine whether the democratic political process fails in specific ways to address the interests of groups of the population and to be representative of them, which would lead to their marginalization and exclusion. This could happen not only in the situations envisaged by Ely (denied and diluted voting rights and insular minorities), but also in situations when the entire party system becomes more responsive to pressures from outside (in the discussed case, from international financial institutions), than to the concerns of the citizenry.

Yet the Hungarian experience, as mentioned, was rather exceptional in this regard. (A similar, although a much more modest attempt was made by the Russian Constitutional Court in its framework decision 20P, 16 December 1997. The policy effects of this decisions were much less significant, however.) The more common approach was demonstrated in the jurisprudence of the Bulgarian Constitutional Court, which was fully deferential to the legislature on issues such as welfare and health care reforms, and never enforced socio-economic rights against legislative decisions.¹⁰ This cannot be ascribed to a judicial deference to the legislature – since the case study on restitution regarding the right to property illustrates that the Court was not averse to quite an activist role when it saw fit. Rather, this asymmetry in the attitude of judges is revealing of the fact that they are influenced by the same ideologies as the rest of the political establishment. If the political establishment is influenced by the ideology of the Washington Consensus, the likelihood is that judges are also going to be influenced by it. This is a serious problem for any counter-majoritarian theory, such as Ely's proceduralism, or the expanded version of it advanced in this policy brief.

This difficulty becomes even more apparent when we take into account some recent political developments in Eastern Europe, which some have called 'rising

8. See especially Sajó, A. (1996) 'How the Rule of Law Killed Hungarian Welfare Reform', *East European Constitutional Review*, Winter.

9. 'A Realpolitik Defence of Social Rights', forthcoming in the *Texas Law Review*.

10. See in particular Decisions 12 (1997) and 21 (1998) on pension reform, and Decisions 8 (1998) and 32 (1998) on health care reform.

populism' and others 'democratic backsliding'.¹¹ In short, especially in central Europe, there are emergent populist parties and players, who rely extensively on nationalism, anti-corruption rhetoric, and campaign extravagance, and manage to lure significant electorates. Politics has moved from economic substance – which is more or less a matter of consensus¹² – to nationalism, religion, and other more symbolic issues. Party cleavages no longer reflect any socio-economic differences in status and preference, but focus on cultural, religious, ethnic, and other divisions. In such circumstances, it is not surprising that groups that are dissatisfied with the socio-economic mainstream consensus turn more and more to courts, and constitutional courts in particular, for the defence of their interests. What strategy should the courts employ in these circumstances?

The evidence thus far is that judges largely follow their already traditional deference to political bodies on socio-economic issues: the Bulgarian experience again is quite illustrative of the point. But is this deference justified and sustainable in the longer term? Should not courts send a strong signal to the political parties, to prevent the democratic process from becoming too focused on symbolic cultural issues, thereby systematically neglecting deeper social problems? If such a signal is to be sent

to the political system, how should judges do this in reality? Should they become activist to the point of recklessness (by systematically invalidating major budget laws and reform acts) just to focus attention on the seriousness of the problem?

Few would advocate this strategy of judicial extremism, but probably many would agree that constitutional courts will do a service to liberal democracy in Eastern Europe, if they manage to enter into a meaningful dialogue with the political bodies of power on social and economic policies, and if they stress the interests of groups in danger of marginalization and social exclusion due to the persistent problems of poverty, lack of adequate housing, and poor education. Of course, no one could expect that courts could single-handedly solve the problems of democratic representation in Eastern Europe, but they should not remain indifferent to the most important regional failures of democracy at present. The fine-tuning of this response would depend on the concrete political process in specific countries. Suffice it to say that from a normative point of view, they should try to read correctly the specific failures of the democratic processes in their jurisdiction, and provide well-tailored remedies, which improve democracy, rather than substitute it with some form of juristocracy.

11. For a brief discussion of these developments see Smilov, D. (2007) 'Populism, Courts and the Rule of Law: Eastern European Perspectives'. In: D. Butt (ed.) *Democracy, Courts and the Making of Public Policy*. Oxford: The Foundation for Law, Justice and Society. Available at: <www.fljs.org/Courts1>.

12. This consensus is built around points typical of the neoliberal Washington Consensus.

The Foundation

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