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**Constitutional Courts in the Process of Articulating
Constitutional Rights in the Post-Communist States of
Central and Eastern Europe**
Part I:
Social and Economic Rights

WOJCIECH SADURSKI

BADIA FIESOLANA, SAN DOMENICO (FI)

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European University Institute
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I – 50016 San Domenico (FI)
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Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe (Part I):

Social and Economic Rights

Wojciech Sadurski*

General Introduction to the series of four Working Papers

This is the first in a series of four working papers which aim to describe the ways in which the constitutional courts of Central and Eastern Europe (CEE) interpret and articulate various categories of constitutional rights. This paper is devoted to the courts' articulation of socio-economic rights; the remaining working papers in the series give an account of the courts' articulation of civil and political rights (Part 2), equality and minority rights (Part 3), and limitations of rights and the treatment of citizens' duties (Part 4). A brief explanation of the nature and purposes of this series is in order.

Firstly, this series is part of a larger research project devoted to constitutional justice in the countries of CEE after the collapse of Communism. Constitutional justice is, naturally, a broader concept than the articulation of rights by constitutional courts; these courts do much more than give a binding interpretation (even including the result of striking down statutory provisions) of the rights entrenched in constitutional charters. They adjudicate in conflicts between the supreme organs of the state; clarify the specific meaning of the principles of separation of powers and of the electoral system; monitor the procedures of law-making and the compatibility of proposed laws with international treaties and conventions ratified by a given state etc. Outside the law-making process *sensu largo*, they also often perform a variety of other functions, such as determining the accuracy of election results, deciding about the outlawing of political parties, impeachment etc. This brief catalogue shows that the articulation of rights is only a part of the overall process of "constitutional justice". However, it is a very important (and, I would claim, the most important) part. Constitutional rights are at the very center of the self-definition of the polity, and of the construction of the status of an individual vis-à-vis the state and the others.

* Professor in the Department of Law, European University Institute.

Secondly, the accounts of constitutional strictures and of court decisions provided in this series, should be viewed in light of the conceptual background outlined in the two earlier working papers recently published by this Institute. In the paper on the quest for legitimacy by post-communist constitutional courts, I outlined what I considered to be the main dilemmas raised by the activist and (often) enthusiastic constitutional courts which emerged in all post-communist states of CEE.¹ In contrast to the dominant literature on these courts, I expressed a high degree of scepticism about the effects of such quasi-judicial bodies with formidable powers to strike down legislation, and *without* the constraining factors which have accompanied development of those institutions in the more established parliamentary democracies, which have served as models for their development. My broader views about the constitutional courts in CEE can be found in this earlier paper, and I deliberately abstain from repeating – even summarizing – my reflections on the overall phenomenon here, in this series. The other work which informs the theoretical background for the current series, is my article on the role of judicial review in the promotion of constitutional rights.² In that paper, I made a plea for a “fact-sensitive” theory of judicial review; a theory which would not content itself with statements that, as a “matter of principle”, robust judicial review is either necessary for, or fatally detrimental to, the promotion of general constitutional rights as written into the constitution of a given country. Rather, I suggested a “matrix” which recognizes the different, and often conflicting, effects of judicial review (both of individual decisions and of the very institution) upon the protection of constitutional rights. The present series may be seen as supplying the evidential material which would allow such a matrix to be applied to CEE. Thus, the four working papers are largely descriptive, and taken together, attempt to give an account of the articulation of rights by constitutional courts in that region.

Thirdly, the larger project of which this series is a part, aims to be fairly comprehensive both in terms of the scope of categories of rights, and in terms of taking into account the full range of post-communist countries of CEE. As to the first aspect of comprehensiveness, some rights are of course more fundamental or crucial than others, and I have deliberately left out certain types of rights from this series (though not outside the broader project). One definite gap is the set of rights related to the integrity of the judicial process; in particular, the rights of defendants in criminal trials. The constitutional courts in at least some of the

¹ Wojciech Sadurski, *Postcommunist Constitutional Courts in Search of Political Legitimacy*, European University Institute Working Paper, LAW No. 2001/11, Florence, December 2001.

² Wojciech Sadurski, *Promoting Rights in the Shadow of the Judiciary: Towards a Fact-Sensitive Theory of Judicial Review*, European University Institute Working Paper, LAW No. 2001/14, Florence, December 2001.

countries discussed here, have made an important contribution to the removal of some highly questionable provisions from the relevant statutes, and the only reason for omission of this issue here is the lack of space. This omission should not be seen as an under-estimation of the role of these activities of the constitutional courts. The second aspect of comprehensiveness is even more problematic; can one include, in a single analysis, the “output” of some twenty courts operating in different states, affected by different traditions and political-legal cultures, in countries which differ widely in so many relevant respects? A simple answer is: yes, one can, as long as one holds that (1) the condition of “post-communism” creates a degree of commonality to all the countries thus described, and (2) one is aware of all the differences between individual countries of the region. This is not the place in which to develop these two thoughts about the commonality of some aspects of post-communism and about the divergent conditions which exist in different post-communist states. However, the fact that the illustrations of the judicial articulation of various rights provided here are culled from different countries, does not imply that there is a single constitutional space in which courts in Albania and the Czech Republic, Lithuania and Hungary, participate together in shaping a uniform regime of rights for a large, CEE polity. This would be nonsense. Rather, the aspiration is to draw a picture in which similar institutions in different countries of a region which is largely unknown to Western constitutional scholars, grapple with issues not dissimilar to those which are a staple of Western constitutional review.

Fourthly, seeing *why* the constitutional courts brought about certain outcomes and observing the patterns of their reasoning and argument, is at least as important as ascertaining those outcomes. This is one lesson learned by studying the processes of judicial review in systems where this institution has been more durably established. Students of judicial review know that often it is more significant to see how the judges reasoned and what argumentative devices they employed, rather than to simply register whether they upheld or struck down a challenged piece of legislation. This is because the patterns of argument illuminate the philosophical perspectives that the judges bring to bear upon the political and moral conflicts which find their expression in cases before constitutional courts. They also provide a basis for predictions about future developments. This is why a considerable amount of attention – and space – will be devoted in these working papers to summarising (and occasionally quoting) actual judicial decisions which, in my view, can be seen as landmark cases on this or that particular constitutional right. An impatient reader may, of course, by-pass these descriptions (which, for readers’ convenience, are in italics) and merely register the outcomes but, in my view, both the promises and the threats to the prospect of enhanced protection of constitutional rights in CEE, can be found in the patterns of argument employed by these institutions.

Finally, I should perhaps disclose a hidden agenda that I have in producing this series. One of the fascinating issues, on the eve of the accession of a number of CEE countries to the European Union, is how the constitutional texts, structures of thinking and practices- in a word, constitutional cultures- of new members states, will fit with the common constitutional traditions of the existing EU members. This notion of a “common constitutional tradition” is not merely an academic and intellectual construct; it is also a term of art in the constitutional language of EU law.³ One crucial issue related to the Eastward enlargement of the EU, is whether this concept will retain any significance when the EU embraces a number of new members. What constitutional traditions, patterns of conduct and structures of thinking will they bring to bear upon the issues of constitutional rights for the citizens of the EU? Will they be partners of good standing in the sharing, understanding, and implementation of those rights which are agreed upon by the current member states, in the form of the EU Charter of Fundamental Rights? Elsewhere, I have begun sketching an answer to this question by showing that the constitutional *texts* in candidate states disclose very similar patterns of thinking about constitutional rights to those revealed by the EU Charter.⁴ However, of course, this was only the beginning of an answer; a constitutional culture of rights may well begin with constitutional texts, but is certainly not confined to them. Much (though not all) of a constitutional culture of rights is to be found in the ways constitutional courts understand, interpret, articulate and develop (or limit) the constitutional rights as outlined in constitutional texts. This series of working papers (though not limited to candidate states) attempts to describe this phase of the creation of a constitutional culture of rights. It may, therefore, be seen as a resource which helps constitutional lawyers in the EU answer the question of whether, and if so, to what degree, the constitutional structures in the candidate states fit with the “common constitutional traditions” of the EU member states, insofar as the constitutional rights of citizens are concerned.

³ Article 6.2 of the Treaty on European Union proclaims, *inter alia*, that the "Union shall respect fundamental rights . . . as they result from the constitutional traditions common to the Member States . . .". The concept of "constitutional traditions common to the member States" features prominently in the case law of the ECJ, see generally Alessandro Pizzorusso, *Il patrimonio costituzionale europeo* (Il Mulino: Bologna 2002), pp.7-12, and also figures in the Preamble to the Charter of Fundamental Rights of the E.U. (5th paragraph).

⁴ Wojciech Sadurski, "Charter and Enlargement", *E.L.J.* 8 (2002): 340-62.

Socio-Economic Rights

1. Introduction

Two preliminary remarks are in order here. Firstly, while socio-economic rights are usually treated as “positive” rights, and as identifying “programmatically” goals for the government, such characterization is not quite accurate. The distinction between policy guidelines and rights *sensu stricto*, does not correspond to a distinction between socio-economic rights and civil-political rights (because the rights which apply to a socio-economic sphere may have a determinate content which imposes clear limits upon state action). Nor does it correspond to a distinction between “positive” and “negative” rights (“positive” rights may impose determinate limits upon state action, with the result that the failure to act may be unconstitutional). The positive/negative distinction, in turn, does not correspond to a distinction between socio-economic and civil-political rights (some civil and political rights may require positive state action;⁵ some socio-economic rights may demand state non-interference with individual action).⁶ It is therefore important to keep these three distinctions (determinate rights v. policy guidelines, socio-economic v. civil-political rights, and positive v. negative rights) separate.

Secondly, even within the same range of rights, either a “minimal” or a “strong” use can be made of these rights, both in the process of enforcement and in judicial review. A minimum use would consist of viewing entrenchment as a guarantee against arbitrary and discriminatory limits on access to a given socio-economic program, whatever it may be. In other words, it does not order a state to run any particular program, say of education, housing or health care, but once a program is in place, constitutionalization amounts merely to a guarantee of equal access.⁷ Such a use of socio-economic rights has been suggested, for example, by Herman Schwartz.⁸ In turn, a strong use of socio-economic rights goes much further than prohibiting arbitrary or discriminatory exclusions, and calls for adoption of efficient means by the government to attain the

⁵ See Cécile Fabre, “Constitutionalising Social Rights”, *Journal of Political Philosophy* 6 (1998): 263-84 at 268-70.

⁶ See, in particular, Henry Shue, *Basic Rights* (Princeton University Press: Princeton N.J., 1980), pp. 39-40, 55-56.

⁷ This understanding is not equivalent to the notion of a “programmatically” right, because the latter requires the state to have a program. A “minimum” use of the right merely requires that, *if* there is a program, it must not be arbitrarily denied to some beneficiaries.

⁸ Herman Schwartz, “In Defense of Aiming High”, *East European Constitutional Review* 1 (1992, No. 3): 25-28 at 27. It is important to note that this was not the only function of socio-economic rights prescribed by Professor Schwartz in his article.

programmatic goals as defined by the constitution-maker. While choosing the “minimal” interpretation would probably weaken much of the criticism against “socio-economic rights,” that interpretation is rather implausible because of its redundancy; discriminatory policy is already prohibited by constitutional rules against discrimination.

2. Controversy around socio-economic rights

Regardless of philosophical discussions about whether socio-economic rights properly belong in constitutions, the omission of such rights was never a plausible political option for constitution-makers after the fall of communism. For one thing, the economic legacy of communism consisted of widespread poverty, deprivation, and a lack of equal economic, cultural, and educational opportunities. While the economic transformation unquestionably brought some benefits, at the same time it also brought about a sharp increase in inequality, unemployment and poverty in large segments of the population– and this, in a region used to the ideas of (relative) economic equality, full employment, and universal social safety nets. Omitting socio-economic rights from the new constitutions would have sent a signal to the “ordinary people” in those societies, that the political élites which emerged after the fall of communism were insensitive to the plight of common people who had been so dramatically affected by the dire economic situation in these countries. Socio-economic rights have been a visible, and highly symbolic, expression of numerous claims, demands and pressures upon social policy-making in a novel, and for many, highly dramatic situation, where “[s]ocial policy was . . . used to compensate for the immediate social consequences of economic transformation”.⁹ In addition, the impact of liberal political forces (“liberal” in the European, free-market sense), which may have been reluctant, on philosophical grounds, to constitutionalize broad catalogues of socio-economic rights, has been relatively weak, and the political weight of social democrats and Christian Democrats in the region has been quite strong.¹⁰ These parties, as well as non-ideological peasant parties, had a strong stake in infusing the constitutional charters of rights with symbolic statements of their attachment to the idea of an activist state, protecting the citizens against economic calamities. To some degree, this was also an ideological legacy of communism,¹¹ which generated strong welfare

⁹ *The Political Dimension of EU Enlargement: Looking Towards Post-Accession*, Report of the Reflection Group chaired by Jean-Luc Dehaene (Robert Schuman Centre at the EUI, Florence 2001), <http://www.iue.it/RSC/pdf/dehaenereport.pdf>, p.18.

¹⁰ For a discussion of different “political orientations” influencing constitution-making in post-communist Poland, see Piotr Winczorek, “Axiological Foundations of the Constitution of Poland”, *St. Louis-Warsaw Transatlantic L.J.* (1997): 59 at 61-62.

¹¹ Jean-Marie Henckaerts & Stefaan Van der Jeught, “Human Rights Protection Under the

expectations. The idea that citizens are entitled to a certain, albeit often a miserably low, standard of living, work, recreation and education, has proved particularly well entrenched in mass consciousness.¹²

This may explain the popularity of views advocating broad constitutionalization of socio-economic rights. For example, in Poland, a prominent and influential lawyer Tadeusz Zieliński, argued that, unless socio-economic rights are elevated to the constitutional level, the authorities will have full discretion to disregard, or even to further reduce, citizens' social entitlements.¹³ Referring to his own experience as Poland's second ombudsman, Professor Zieliński claimed that, unless socio-economic rights are constitutionalized, even legislative and executive acts contrary to the European Social Charter and international human rights covenants, will be immune to challenge.¹⁴ Similarly, Herman Schwartz argued that many socio-economic rights *are*, or may be, judicially enforceable;¹⁵ that even if they are not, they nevertheless are "a way of imposing political and moral obligations on those who operate the state's governmental apparatus" to take appropriate steps.¹⁶ He argued that at least some of the critics of constitutionalization of these rights are, in fact, opposed to the very implementation of the rights, constitutionally or otherwise.¹⁷

It is also worth adding that the absence of socio-economic rights in the constitution, does not necessarily mean the absence of any constitutional anchor for social welfare programmes; terms such as "social justice" (e.g., in Estonia's Constitution, art. 10), or "social state" (Slovenia art. 2, see also Germany art. 20,

New Constitutions of Central Europe", 20 *Loy. L.A. Int'l & Comp. L. Rev.* 20 (1998) 475 at 491.

¹² See, e.g. the recent public-opinion survey by a reputed OBOP institute in Poland, in June 2002. 65 % of respondents believe that the State should look after the welfare of its citizens; 53 % believe that budget expenditure for social-welfare purposes is more important than spending to stimulate economic growth; 62 % believe that the State should subsidize employment if this is necessary to fight unemployment, even if it is not economically profitable. See "Opinia społeczna: Miło już było", *Rzeczpospolita* (Warsaw) 13 August 2002 at A-1, also at http://www.rzeczpospolita.pl/wydanie_020813/publicystyka/publicystyka_a_3.html, visited 14 August 2002.

¹³ Tadeusz Zieliński, Panel discussion, in *Konstytucja w służbie demokracji; Constitution in Service of Democracy*, conference papers: The International Centre for Development of Democracy Foundation, 10-12 March, 1995, Cracow, pp. 211-212.

¹⁴ *Id.*, pp. 212-213.

¹⁵ Schwartz, "In Defense of Aiming High", at 26-27.

¹⁶ *Id.*, p. 27

¹⁷ *Id.*, p. 28.

or France art. 2 which refers to “social Republic”) may be the basis for constitutional review of government social programs.

In proclaiming broad catalogues of socio-economic rights, CEE constitution-makers were no different from the drafters of the West European constitutions which, in contrast to the US model of constitutionalism, included these types of rights, alongside civil and political ones. These constitutions which, in their majority, originated in the post-World War Two wave of constitution-making (or, as was the case of Spain and Portugal, from the fall of authoritarian regimes well after the War), elevated the then dominant model of Welfare State into a constitutional structure. Hence, almost all of the West European constitutions¹⁸ proclaimed either the general Social State principle,¹⁹ or enumerated broad catalogues of socio-economic rights,²⁰ or did both.²¹ In addition, the predilection of West European constitutionalism for dispensing broad socio-economic rights (often interspersed with descriptions of the goals of the state in the field of socio-economic policy) is visible in the most recent constitutional “product” in Western Europe, namely the Charter of Fundamental Rights of the EU. The Charter proclaims a number of social rights grouped mainly in Chapter IV (“Solidarity”), with a few social rights listed in Chapter II (“Freedoms”) and III (“Equality”). Some of them are formulated in a categorical fashion, suggesting that they impose strict conditions upon the lower laws, and that all the EU and national laws must comply with them. These include rights to education (including to free compulsory education),²² rights of children to protection and care, to express their views freely, and to maintain their contacts with both parents,²³ freedom to choose an occupation and the right to engage in work,²⁴ maternity-related rights (against dismissal and to paid maternity and parental leave),²⁵ etc. Other social rights depend for their protection upon other Community and national laws so, presumably, they cannot be used to declare the Community laws contrary to the Charter (though, arguably, a failure to provide for such rights would constitute a violation of the Charter). This category includes the rights to social security and social assistance,²⁶ to health care,²⁷ to

¹⁸ With the partial exception of Scandinavian states, see footnote 36 below.

¹⁹ E.g. German Constitution, art. 20.

²⁰ See, e.g., Constitutions of Belgium, Ireland, Italy, Luxembourg, Netherlands, Greece, Spain and Portugal.

²¹ See, e.g., Spain and Italy.

²² Art. 14 (1) and (2) of the EU Charter.

²³ Art. 24 (1) and (3).

²⁴ Art. 15.

²⁵ Art. 33 (2).

²⁶ Art. 34.

services of general economic interest,²⁸ etc. Finally, there are some provisions in the Charter, the wording of which suggests that they are not really viewed as “rights” (even though they are contained in the “Charter of Fundamental Rights”) but rather as policy directives regarding certain socio-economic goals to be pursued by the authorities, such as the goal to achieve a high level of health protection,²⁹ to provide legal, economic and social protection of the family,³⁰ to ensure integration of persons with disabilities,³¹ and to ensure the right of dignity and independence for the elderly.³²

It is thus clear that, in this respect at least, CEE constitutions follow the pattern of West European constitutionalism, and contrast starkly with the constitutional tradition of the United States, where all attempts to read welfare rights into the Constitution have been consistently and emphatically resisted by the Supreme Court.³³ In the oft-quoted words of Judge Richard A. Posner, the official interpretation of the Bill of Rights is of “a charter of negative rather than positive liberties”, motivated not by the concern “that government might do too little for the people but that it might do too much to them.”³⁴ Decidedly, the concern that the governments “might do too little” featured prominently in the minds of the drafters of CEE constitutions.

However, it is one thing to say that the inclusion of socio-economic rights was politically the only plausible option, and another to say that it was unproblematic. Far from it – in the constitutional debates within post-communist states and among outside observers, some important objections were raised to

²⁷ Art. 35.

²⁸ Art. 36.

²⁹ Art. 35, 2nd sentence.

³⁰ Art. 33 (1).

³¹ Art. 26.

³² Art. 25. These two latter provisions (Articles 26 and 25) which draw on the equivalent provisions of the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers, use the language of “rights” (“The Union recognises and respects the rights. . .”). However, I believe that it is more correct to see them as descriptions of policy directives; similarly Agustín José Menéndez, “The Sinews of Peace: Rights to Solidarity in the Charter of Fundamental Rights of the Union”, in Erik Oddvar Eriksen, John Erik Fossum & Agustín José Menéndez, *The Chartering of Europe: The Charter of Fundamental Rights in Context* (ARENA Report 8/2001, Oslo 2001), pp. 201-26 at 215.

³³ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (finding no fundamental right to public education); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding no fundamental right to adequate housing).

³⁴ *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

the idea of constitutionalizing welfare rights. It is important to emphasize that the reasons for the rejection of the idea of constitutional welfare rights, were *not* grounded on a rejection of welfare policies.³⁵ The basic idea was that there is a non-sequitur between advocating a welfare policy and advocating the elevation of welfare rights to a constitutional level. It is interesting to note that some of the countries with the most developed and generous welfare policies, have no constitutional social rights: Scandinavian countries,³⁶ Australia and New Zealand belong to this category. This serves to rebut the objection that those who oppose constitutional socio-economic rights are anti-welfare. Some participants in this debate compare, on the one hand, generous welfare states with no socio-economic rights in their constitutions with, on the other hand, countries that have an appalling welfare situation but impressive catalogues of constitutional socio-economic rights. Some scholars actually go a step further and assert an *inverse* relationship between socio-economic rights being in a constitution and the existence of a welfare safety net. For example, Ulrich Preuss, a careful student of post-communist constitutionalism noted, with respect to CEE constitutions, that “it is striking that a number of [constitutional] pledges—be they state goals or social rights—increase in inverse proportion to the extent that these countries are able and prepared to establish a welfare state....”³⁷

As already said, the opponents of constitutional welfare rights may or may not have been advocating broad welfare policies. Practice around the world shows that there is no tight connection between how “generous” social rights are in a constitution, and how generous social welfare policy is. Those opponents of *constitutional* welfare rights were concerned that once a welfare right is written into a constitution, even if subject to various provisions about nonjusticiability, there is nothing that will disable a constitutional court from scrutinizing a government policy or a new law under the standard of this constitutional

³⁵ For a general discussion, see Wiktor Osiatynski, "Rights in New Constitutions of East Central Europe", *Colum. Hum. Rts. L. Rev.* 26 (1994) 111, 138-45.

³⁶ This is not entirely accurate; 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 19th Century, though they have been amended many times. As one commentator noted, they “retain the liberal character of the time of their adoption”, see George S. Katrougalos, “The Implementation of Social Rights in Europe”, *Columbia Journal of European Law* 2 (1996): 277-312 at 294.

³⁷ Ulrich K. Preuss, "Patterns of Constitutional Evolution and Change in Eastern Europe", in *Constitutional Policy and Change in Europe* (J.J. Hesse & N. Johnson eds., 1995) 95, 103; see also Jon Elster, "The Impact of Rights on Economic Performance", in *Western Rights? Post-Communist Application* (A. Sajo ed., 1996) 347.

provision. As Ulrich Preuss noted: “Both social rights and state goals [when entrenched in constitutions] increase the power of the executive – which has the resources to design and to implement particular policies – and that of the courts – which make the final decision about the constitutional duties of the government – at the expense of the democratic authority of the parliament.”³⁸ Thus, the primary reason for disapproving of constitutional welfare rights, is that they will produce an unfortunate institutional shift in the separation of powers and will allow (indeed, require) constitutional judges to decide matters in which they have neither qualifications nor political authority—essentially, an institutional-competence argument.³⁹

Perhaps the most eloquent criticism of this transfer of powers from the legislature and the executive, to the judiciary, has been raised by Andras Sajo in his article about the impact of the Hungarian Constitutional Court’s decisions upon governmental attempts to restructure the welfare system.⁴⁰ Sajo’s passionate critique was occasioned by a series of Hungarian CC decisions striking down several laws that made up an austerity policy package (the “Bokros package”, named after the then Hungarian Minister of Finance). Among other laws, the Court invalidated changes to maternity and family support, reductions to household allowances and state subsidized sick leave, and a raise in the interest rate on state loans to homebuilders.⁴¹ Characteristically, the journal in which Sajo’s article appeared, provided it with the subtitle: “Welfare rights + constitutional court = state socialism redivivus”. Also, in Poland, the prospect of review by the Constitutional Tribunal (CT) under the new Constitution which contains a broad array of “programmatic” socio-economic rights, has led some commentators to fear that the Tribunal would get embroiled in policy-making. As a leading Polish constitutionalist (who later became a judge of the CT) Jerzy Ciemniowski warned, if the CT gets to wield the power

³⁸ Preuss, "Patterns" at 101.

³⁹ Id.; Wiktor Osiatynski, "Social and Economic Rights in a New Constitution for Poland", in *Western Rights? Post-Communist Application* (A. Sajo ed., 1996) 233, 262-69; Andrzej Rapaczynski, "Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament", in *Constitution Making in Eastern Europe* (A.E. Dick Howard ed., 1993) 93, 107-8

⁴⁰ Andras Sajo, “How the Rule of Law Killed Hungarian Welfare Reform”, *East European Constitutional Review* 5 (1996, No. 1): 31-41.

⁴¹ For excerpts of one of the central decisions in this series, Decision No. 43/1995 of 30 June 1995 concerning social security benefits, see László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* 1, 36 (University of Michigan Press: Ann Arbor, 2000) at 322-32. For a discussion, see Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press: Chicago, 2000) at 92-93; Bojan Bugarcic, "Courts as Policy-Makers: Lessons from Transition", *Harv. Int'l L.J.* 42 (2001) 247, 251.

of review under certain socio-economic constitutional norms, “we will embark upon a very dangerous path by combining the roles and functions of different categories of branches of state and by confusing the scope and nature of the responsibilities carried by these bodies.”⁴²

It is clear that interpreting the scope and limits of socio-economic rights provides the constitutional courts with the most obvious opportunity to engage in making economic policy judgments. This fact has been recognized, for example, by a leading Polish scholar, supportive of the Constitutional Court and of social-economic rights, later to become judge of the CT and now a judge of the ECHR, Professor Lech Garlicki. He recognized (approvingly) that “If one of the criteria of limiting the social rights of citizens is the difficult situation of the state budget . . . then it becomes necessary for the [Polish Constitutional] Tribunal to form economic judgments”.⁴³ The same author later stated, in describing the current doctrine of the Tribunal, that even though the Tribunal recognized the broad discretion of legislators in the area of social rights, nevertheless “the appeals to the principle of social justice and to the notion of the ‘essence’ of social rights . . . leave a large margin of intervention to the Constitutional Tribunal should it consider it justified”.⁴⁴

A second reason for not including socio-economic rights, was the fear of “contaminating” the entire charter of rights by the under-enforcement of socio-economic rights.⁴⁵ These rights are, by their nature, under-enforceable. The fear was that a habit of tolerance for under-enforcement of some rights, can erode a rigid commitment to enforcement of all other rights, including civil-political ones. The plausibility of this argument has been strongly disputed, among other people, by Herman Schwartz: “This notion that if some rights turn out not to be effective, others will be in some way degraded in value, is utterly complete nonsense.”⁴⁶ For my part, I believe that Schwartz’s point may well be correct with regard to systems where the values of constitutionalism, the rule of law,

⁴² Jerzy Ciemniowski, "Sejm i Senat w projekcie Konstytucji RP [The Sejm and the Senate in the Draft Constitution of the Republic of Poland]", in Józef Krukowski (ed.), *Ocena projektu Konstytucji RP [An Evaluation of the Draft Constitution of the Republic of Poland]* (Towarzystwo Naukowe Katolickiego Uniwersytetu Lubelskiego: Lublin, 1996), p. 41.

⁴³ Leszek Garlicki, "Orzecznictwo Trybunału Konstytucyjnego w 1993 roku", *Przegląd Sądowy* (1994, no. 10): 31-52 at 37.

⁴⁴ Leszek Garlicki, "Orzecznictwo Trybunału Konstytucyjnego w 1997 roku", *Przegląd Sądowy* (1998, no. 6): 35-58 at 55.

⁴⁵ See, e.g., Jon Elster, "Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea", *Public Admin.* 71 (Spring/Summer 1993) 169, 198.

⁴⁶ Herman Schwartz, H., 1995. Panel discussion, pp. 215-23 in *Konstytucja*, supra, 215-23 at 221.

and the protection of rights are well established, and where disagreements about rights pertain to the margins, rather than to their core meaning. However, in a system where a nihilist tradition of treating a constitution as a purely decorative instrument is strongly embedded, and where the fundamental notions of constitutionalism and the rule of law have a weak hold upon the collective consciousness, anything that undermines a strict construction of constitutional limits upon discretionary governmental action, is to be regarded with concern.

Finally, it has been claimed that, while statutory welfare rights may be a good thing, writing them into the constitution is wrong because the very nature of a constitution is meant to restrain legislators (and indirectly, the electorate) against likely, pernicious temptations.⁴⁷ Constitutional rights are seen primarily as restraints upon the actions which may arise from human nature under some particular socio-political circumstances. In the context of CEE constitutions, Cass Sunstein claimed that elevating welfare rights to a constitutional level may promote attitudes of welfare-dependency and become a counterincentive to self-reliance and individual initiative.⁴⁸ But once one explicitly spells out this rationale, one immediately sees why it is extremely unlikely that any actual constitution-making process will follow its logic. Politically speaking, it is an almost impossible proposition, because it would require the constitution-makers to propose—and enact—ideas explicitly contrary to conventional societal norms.

3. Constitutional catalogues of socio-economic rights

As a result of these theoretical and political discussions, and of differences in local circumstances, there is some variety in the catalogues of socio-economic rights and in their status within postcommunist constitutions of CEE countries. The three fundamental socio-economic rights that figure most prominently in these constitutions are social security, health care, and education.

Nearly all of the constitutions of the region contain broad provisions for rights to social security, either for all those unable to work or for all those in material need.⁴⁹ The latter group is sometimes defined as those that have no other means

⁴⁷ Cass R. Sunstein, “Against Positive Rights”, *Eastern European Constitutional Review*, Winter 1993, 35-39, at 36.

⁴⁸ *Id.* at 37. For a more recent exposition by Sunstein of his views on constitutional socio-economic rights, see Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press: Oxford 2001) at 221-38.

⁴⁹ Alb. Const. art. 52; Belr. Const. art. 41(1); Croat. Const. art. 57; Czech. Rep. Charter art. 26; Est. Const. art. 28; Hung. Const. art. 70E; Lat. Const. art. 109; Lith. Const. art. 52; Mold. Const. art. 47; Pol. Const. art. 67; Rom. Const. art. 43; Slov. Const. arts. 35, 39; Ukr. Const. art. 46; Yugoslavia Const. art. 58; Mont. Const. art. 55; Serb. Const. art. 39.

of support.⁵⁰ Many of these social security provisions go on to delineate specific subcategories of people who could be subsumed under the general notion of persons unable to work. These subcategories include the old,⁵¹ the ill,⁵² the disabled,⁵³ those who have lost their breadwinner,⁵⁴ and those who have been widowed or orphaned.⁵⁵ In contrast to these constitutions with “generous” provisions, a small minority of the constitutions in the region⁵⁶ have only narrowly drafted provisions for social security, while two have no such provision at all.⁵⁷

A right to health care,⁵⁸ present in all the constitutions, has been proclaimed very “generously” (with free health care for all) in twelve constitutions of the region;⁵⁹ in some constitutions, health care is only a right conferred upon some

⁵⁰ E.g., Pol. Const. art. 67; Yugoslavia Const. art. 58; Mont. Const. art. 55; Serb. Const. art. 39.

⁵¹ Alb. Const. art. 52; Belr. Const. art. 47; Est. Const. art. 28; Hung. Const. art. 70E; Lat. Const. art. 109; Lith. Const. art. 52; Mold. Const. art. 47(2); Pol. Const. art. 67; Slov. Const. art. 39 (1); Ukr. Const. art. 46.

⁵² Belr. Const. art. 47; Hung. Const. art. 70E; Lith. Const. art. 52; Mold. Const. art. 47(2); Pol. Const. art. 67.

⁵³ Belr. Const. art. 47; Croat. Const. art. 57; Hung. Const. art. 70E; Lat. Const. art. 109; Lith. Const. art. 52; Mold. Const. art. 47(2); Pol. Const. art. 67; Rom. Const. art. 46; Slov. Const. art. 38(1); Ukr. Const. art. 46.

⁵⁴ Belr. Const. art. 47; Est. Const. art. 28; Lith. Const. art. 52; Slov. Const. art. 39(1); Ukr. Const. art. 46.

⁵⁵ Hung. Const. art. 70E (widowhood and orphanhood); Lith. Const. art. 52 (widowhood); Mold. Const. arts. 47(2) (widowhood), 49(3) (orphanhood).

⁵⁶ Russia, Bulgaria, Macedonia, and Slovenia all include provisions for social security. The Russian Constitution (art. 39) provides for social security in cases of old age, illness, disability, and loss of breadwinner. The Bulgarian Constitution (art. 51) provides for social security only in cases of old age, disability or temporary unemployment. The Macedonian constitution only provides for social security in cases of temporary unemployment (art. 32) and then says all other social security rights will be determined by law (art. 34). The Slovenian constitution (art. 50) provides that all those who fulfil the conditions laid down by law will receive social security benefits.

⁵⁷ Georgia, and Bosnia and Herzegovina.

⁵⁸ See, generally, Viktor Mavi, “The Right to Health and the New East European Constitutions”, *Journal of Constitutional Law in Eastern and Central Europe* 3 (1996): 213-24.

⁵⁹ Belr. Const. art. 45; Croat. Const. art. 58; Czech. Rep. Charter art. 30; Est. Const. art. 28; Lat. Const. art. 111; Lith. Const. art. 53 (although note that this constitutional provision uses the language of the State's duty to take care of people's health rather than of an individual right to health care); Maced. Const. art. 39; Mold. Const. art. 36; Rom. Const. art. 43; Russ. Const. art. 41; Slov. Const. art. 40; Ukr. Const. art. 49.

categories of people, such as the elderly, children, and pregnant women.⁶⁰ Five constitutions delegate to lawmakers the task of determining who will obtain free health care.⁶¹ Three constitutions cautiously provide a right of all to health insurance rather than to actual health care.⁶² The Hungarian Constitution proclaims a right for all those living in the territory of Hungary “to the highest possible level of physical and mental health”,⁶³ a guarantee which deftly evades any possible challenges, because of the vagueness and indeterminacy of the term “highest possible level”. Often, health is linked in constitutional provisions with the person’s environment, again not in terms of a state objective to care for this environment, but in terms of citizens’ right to a “healthy environment”⁶⁴ or “healthy life . . . [in] a healthy environment”.⁶⁵

The third right, that to free education, is recognized universally, though the level of constitutionally mandated free education varies; a free education is guaranteed up to university level in eight constitutions,⁶⁶ up to secondary level in five constitutions,⁶⁷ and up to primary level in six constitutions in the region.⁶⁸

Among other socio-economic rights, the most frequently mentioned are those which relate to working conditions, including a right to choose one’s own profession, a right to safe conditions at work, to “adequate pay,” to guaranteed leisure time, and special protection for certain specified categories of employees (women, the young, the old) in the workplace. Without going into detail, the analysis shows that ten constitutions have a very broad list of those work-related rights.⁶⁹ Other assorted socio-economic rights include the protection of the

⁶⁰ Pol. Const. art. 68; Serb. Const. art. 30.

⁶¹ Bulg. Const. art. 52; Slovn. Const. art. 51; Yugoslavia Const. art. 60; Mont. Const. art. 55; Serb. Const. art. 30.

⁶² Alb. Const. art. 55; Bulg. Const. art. 52; Geor. Const. art. 37.

⁶³ Hung. Const. art. 70D.

⁶⁴ Bulg. Const. art. 55, Maced. Const. art. 43, Slovn. Const. art. 72.

⁶⁵ Croat. Const. art. 69.

⁶⁶ Belr. Const. art. 49; Lith. Const. art. 41; Mold. Const. art. 35; Pol. Const. art. 70; Rom. Const. art. 32; Russ. Const. art. 43; Slovn. Const. art. 57; Ukr. Const. art. 53.

⁶⁷ Alb. Const. art. 57; Bulg. Const. art. 53; Czech. Rep. Charter art. 33; Lat. Const. art. 112; Slovk. Const. art. 42.

⁶⁸ Croat. Const. art. 65; Geor. Const. art. 35; Hung. Const. art. 70F (although it also guarantees financial support to all students); Maced. Const. art. 44; Yugoslavia Const. art. 62; Mont. Const. art. 62. Two constitutions are unclear about the specific level at which free education is guaranteed: The Serbian Constitution mentions all “regular education” (art. 32), and Estonian provides for such a right to “school-age children” (art. 36).

⁶⁹ Belarus, Hungary, Poland, Romania, Russia, Slovakia, Ukraine, Yugoslavia, Montenegro

family, motherhood, and/or childhood (14 constitutions), training for the disabled (8), protection of culture (13), and a right to a good environment (13).⁷⁰ Considering the catastrophic housing situation in most of these countries, it is not surprising that only four constitutions explicitly proclaim a right to adequate housing,⁷¹ with two others listing it as an aim of the state rather than an enforceable right.⁷²

To sum up the textual analysis of the catalogues of socio-economic rights, one can establish a simple taxonomy of the constitutions, as falling into the following categories:

1. nine constitutions list comprehensive social security, education, health care, work protection rights, and other socio-economic rights; these nine are the most “generous” constitutions;⁷³
2. seven constitutions have limited social security, education, and health care rights, but good work protection guarantees, and many other socio-economic rights;⁷⁴
3. three constitutions provide for good social security, education, and health care rights, but only a limited number of the other rights;⁷⁵ and
4. two constitutions with very few socio-economic rights.⁷⁶

At this stage, three preliminary conclusions can be drawn. Firstly, postcommunist constitutions are, overall, “rich” in socio-economic rights. If one imagines a continuum in world constitutionalism based upon the “generosity” of dispensing socio-economic rights, postcommunist constitutions are approaching the pole that provides the maximum number. Secondly, the range of local variety is not all that great. If one ignores two “aberration” cases (Bosnia and Herzegovina, and Georgia), and perhaps also the three Baltic states, then the degree of diversity is relatively small. Thirdly, and most importantly, there is no discernible variable that would significantly account for this ‘generosity’. Not a

and Serbia.

⁷⁰ In addition, five other constitutions establish a good environment as an aim for the state, though not enforceable as a right.

⁷¹ Belr. Const. art. 48; Russ. Const. art. 40; Slovn. Const. art. 78; Ukr. Const. art. 47.

⁷² Alb. Const. art. 59; Pol. Const. art. 75.

⁷³ Belarus, Croatia, Czech Republic, Moldova, Poland, Romania, Russia, Slovakia, and Ukraine.

⁷⁴ Bulgaria, Hungary, Macedonia, Slovenia, Yugoslavia, Montenegro, and Serbia.

⁷⁵ Three Baltic states: Estonia, Latvia, and Lithuania. In fact, Lithuania falls in between this and the first category, with a middling number of work-protection and other rights.

⁷⁶ Bosnia and Herzegovina, and Georgia.

single significant factor can persuasively explain the taxonomy suggested above—neither the stage of economic growth, nor the adopted strategy of development, nor the strength of postcommunist political forces, nor the heritage of belonging to the former U.S.S.R., nor the speed with which the constitution was created, nor the realistic prospect of admission to the EU, and so on. For instance, category (1) (the most “generous” constitutions) includes both the relatively affluent (Czech Republic, Poland) and the poorest (Moldova, Ukraine) countries of the region; those countries which adopted economic “shock therapy” in transition to a free market economy (Poland) and those that failed to adopt free-market measures (Belarus); those countries where postcommunist parties have been relatively marginalized (Czech Republic) and those where they have maintained their grip on power for a reasonably long time (Belarus, Slovakia); those that adopted constitutions soon after the transition (Slovakia) and those that took a long time to do so (Poland). Similar points can be made about category (2). In other words, there is no meaningful correlation between the “generosity” of catalogues of socio-economic rights in a constitution, and the objective circumstances of that country. Apart from everything else, this confirms the proposition that the constitutionalization of welfare rights has little or no effect upon the actual welfare policy of the government, though it may have an effect upon the institutional system of separation of powers.

4. The status of socio-economic rights

The effect of enhancing the powers of constitutional courts by bringing them into the making of social policy, is as much a matter of the socio-economic rights’ constitutional status compared to other, more “traditional” rights, as the actual catalogue of such rights is. This is why it is important to study, not only the catalogues of rights, but also the ways in which post-communist constitutions handle the constitutional weight of socio-economic rights, compared to other constitutional rights. Especially since, as a keen observer of the constitutional scene of the region remarks, there is “a growing sensitivity in East-Central Europe that social and economic rights should be treated differently from political rights and citizens’ freedoms”.⁷⁷

How has this “sensitivity” penetrated the actual structures of constitutional texts? Looked at from this angle, one can distinguish three categories of constitutions. The first group, by far the largest, contains those constitutions that do not draw any meaningful distinctions between socio-economic and all other rights. In the fifteen constitutions belonging to this category,⁷⁸ no differentiation

⁷⁷ Rett R. Ludwikowski, *Constitution-Making in the Region of Former Soviet Dominance* (Duke University Press: Durham, 1996), p. 230.

⁷⁸ Belarus, Bulgaria, Croatia, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Romania, Russia, Ukraine, Yugoslavia, Montenegro, and Serbia.

is made as to the enforceability of socio-economic versus civil-political rights. In some of these constitutions, the two types of rights are even lumped together in the same subdivision of the constitutional text.⁷⁹ The second category contains two constitutions: those of the Czech Republic and Slovakia (not surprisingly, considering that their respective bills of rights originate from one and the same text).⁸⁰ Here, a clear separation of socio-economic rights from the other rights is achieved by a general clause,⁸¹ which states that a number of specifically enumerated rights (including most socio-economic rights) can be claimed only within the limits of the laws implementing these rights-provisions. Hence, in contrast to all other rights unaffected by this general limiting clause, and which can only be restricted in accordance with constitutionally established criteria, socio-economic rights are subject to legislative restrictions over which the (ordinary) legislator has wide discretion. This largely limits the possibility of mounting constitutional challenges to laws and policies under these rights. Also, it effectively, though not formally, reduces the weight of these rights to the weight of constitutionally established state targets or aims – politically binding upon the legislature and the executive, but not judicially enforceable.

It should be noted that in the first category of constitutions (those with no distinction between socio-economic and other rights), one can also find particular provisions which establish that practical details of certain rights shall be decided by law. For example, a Russian constitutional provision guaranteeing the right to social security, is accompanied by a proviso that the details of state pensions and social benefits shall be established by laws.⁸² This, however, is different from a general clause (in Czech and Slovak fashion) which conditions enforceability of a right upon a legislative choice. Indeed, both the Czech and Slovak constitutional documents contain some (non socio-economic) rights which refer to laws that establish the details of the right, yet are not covered by the general limiting clause.⁸³

⁷⁹ For example, in Hungary.

⁸⁰ In January 1991, the federal parliament of Czechoslovakia adopted the Charter of Fundamental Rights and Freedoms as a constitutional act. Even before the formal dissolution of the federation, the two republics adopted slightly different legal strategies towards the Charter, in their respective constitutions: The Slovak Republic incorporated the Charter into its constitution (of September 1992) while the Czech Constitution (of December 1992) stated that the Charter formed a part of the constitutional order of the Republic without incorporating it directly, see Czech Rep. Const. art. 112 (1).

⁸¹ Czech. Rep. Charter art. 41; Slov. Const. art. 51.

⁸² Russ. Const. art. 39.

⁸³ *E.g.*, Czech. Rep. Charter arts. 32(5)-(6) (providing assistance to parents raising their children); Slov. Const. art. 43(2) (providing the right of access to the cultural heritage).

The third group is a hybrid category, which combines the first and second solutions. In four constitutions in the region,⁸⁴ we find a mixture both of socio-economic rights that are directly enforceable, and of those that are left for legislative discretion (which can be seen as targets of the state). The Polish Constitution serves as an example. It contains a general limiting clause, similar to the one in the Czech Charter and the Slovak Constitution. This applies only to a select number of socio-economic rights. These rights (which include the rights to a minimum wage, full employment, and aid to disabled persons) “may be asserted subject to limitations specified by law”.⁸⁵ On the other hand, the constitution lists a number of socio-economic rights to which the general limiting clause does *not* apply, even if they have their own clauses attached, which delegate to the legislature the duty to determine the scope and form of implementation of the right (the right to social security⁸⁶ is an example). The fact that these particular socio-economic rights were deliberately left outside the scope of control of the general limiting clause, suggests that they are seen as fully enforceable rights.

In fact, the Constitutional Tribunal’s jurisprudence and “authoritative” doctrine extend enforceability also to those socio-economic rights to which the limiting clause apparently applies. According to the dominant doctrine, the constitutional rules which define the state’s tasks in the field of socio-economic policy, have the full normative power of constitutional provisions and hence can serve as a basis for constitutional review. The authoritative commentary on the statute of the CT, when discussing provisions to which article 81 applies,⁸⁷ states that the “limitation” stemming from article 81 “applies only to the procedural sphere and restricts the range of means of protection of rights and liberties which are at individuals’ disposal. It does not, therefore, undermine the normative character of rights and liberties enumerated in Art. 81 and so there are no obstacles against these rights and principles serving as an independent basis of constitutional

⁸⁴ Albania, Moldova, Poland, and Slovenia.

⁸⁵ Pol. Const. art. 81.

⁸⁶ *Id.* at art. 67 (1).

⁸⁷ Article 81 states that certain rights, listed earlier in the Constitution, can be claimed only within the limits defined by a particular statute. These rights include: minimum income (Art. 65 para 4), full employment and state bodies combating unemployment (Art. 65 para 5), safety and hygiene at work (Art. 66), days free of work and annual paid holiday (Art. 66 para. 2), assistance to handicapped persons (Art. 69), protection of families and special protection of mothers (Art. 71), protection of the environment (Art. 74), satisfaction of needs of accommodation, combating homelessness and protection of tenants’ rights (Art. 75), and protection of consumers’ rights (Art. 76).

review if a proper motion is addressed to the Constitutional Tribunal by an authorized subject".⁸⁸ I will return to this point below.

Overall, the survey above shows that nearly all postcommunist constitutions ignore the distinction in status between civil and political rights on the one hand, and socio-economic rights (either all constitutional socio-economic rights, or at least a significant number of them) on the other. This is a messy arrangement. Pretending that socio-economic rights may be enforceable in exactly the same way as the rights to freedom of speech or to vote, creates expectations which cannot be fulfilled. It also brings the courts into complex policy-making, and threatens to dilute the enforceability of civil and political rights.

As an example of how to reconcile socio-economic constitutional commitments with a clear separation of socio-economic rights and the objectives of the state in the field of socio-economic policy, the constitution-makers of the region could have followed the example of some West European constitutions, notably the Spanish and the Irish ones. 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 that "they shall not be cognisable by any Court" (art. 45).

There were some attempts at similar constitutional design (other than in the Czech Republic and Slovakia where, as was just shown, this model was adopted). One such heroic attempt should be acknowledged in particular. The 1992 "Presidential" (so-called because it was formally proposed by the then President, Lech Wałęsa) draft of the constitutional Charter of Rights and Freedoms, in Poland.⁸⁹ It clearly distinguished "Social and Economic Rights and Freedoms" (including the right to education, to labor safety, to medical protection, to social welfare, and to freedom of work) from "Economic, Social and Cultural Obligations of Public Authorities" (including, amongst other

⁸⁸ Zdzisław Czeszejko-Sochacki, Leszek Garlicki, Janusz Trzciniński, *Komentarz do ustawy o Trybunale Konstytucyjnym* (Wydawnictwo Sejmowe: Warszawa, 1999), p. 35.

⁸⁹ The Polish text was published in *Rzeczpospolita* (Warsaw), 15 November 1992. For an English translation, see "Draft of the Charter of Rights and Freedoms", *St. Louis-Warsaw Transatlantic L.J.* (1996) 73 (Stanislaw Frankowski trans.). For useful discussion on this issue, see generally Stanislaw Frankowski, "Lech Walesa's Draft of the Charter of Rights and Freedoms: An Overview", *St. Louis-Warsaw Transatlantic L.J.* (1996) 65; Wiktor Osiatynski, "A Bill of Rights for Poland", *E. Eur. Const. Rev.* 1 (Fall 1992) 29-32 (discussing the drafting and provisions of Walesa's proposed charter of rights); Andrzej Rzeplinski, "The Polish Bill of Rights and Freedoms: A Case Study of Constitution-Making in Poland", *E. Eur. Const. Rev.* 2 (Summer 1993), at 26 (discussing the absence of political pressure for the prompt introduction of a bill of rights). This constitutional draft was eventually aborted, and disowned by President Wałęsa himself.

things, improvement of working conditions, full employment, aid to families, and medical care beyond the basic level).⁹⁰ There was also an explicit statement that the latter “obligations” are to be performed by public authorities “depending upon their economic resources.”⁹¹ This was meant to convey the idea that provisions on “socio-economic tasks” applied to governmental actions and aspirations, rather than to determinate results. As a result, no pretense was made that these tasks and aspirations described a range of constitutional “rights.” This project, however, never became law.

5. The drawing of distinctions between different types of rights by the courts: social security cases

In some of the countries of the region, the task of drawing the necessary distinctions between various categories of rights, has been undertaken by constitutional courts. For example, 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”.⁹² As one Hungarian constitutional expert commenting on this decision suggests, “the interpretation of Chief Justice Sólyom clearly states that social and economic rights are not raised to the rank of subjective rights that can be enforced by the judiciary against the state”.⁹³ In fact, the Court effectively turned the “rights” provisions into targets for the State to pursue. However, this was not an obvious path to choose, and as Justice Sólyom later commented, “On no other question was the Court so divided...”.⁹⁴ In his ex-post statement of the doctrine which emerged from this decision and throughout the following years, “a method became established . . . according to which an infringement upon the social rights provision of the Constitution could only be sustained if the benefits sank below a minimum level determined by the Constitutional Court”.⁹⁵ This, somewhat surprisingly, Justice Sólyom takes to be equivalent “to a silent acceptance by the whole Court of the understanding of social rights as being similar to ‘state goals’”. There appears to be a conflict here – clearly not

⁹⁰ Draft of the Charter, *supra*, ch. V.

⁹¹ *Id.* art. 48.

⁹² Decision 31/1990, quoted in László Sólyom, "Introduction to the Decisions of the Constitutional Court of the Republic of Hungary", in Sólyom & Brunner, *Constitutional Judiciary*, *supra*, at 36.

⁹³ Péter Paczolay, "Human Rights and Minorities in Hungary", *J. of Const. L. in E. and Cent. Eur.* 3 (1996): 111-26 at 121.

⁹⁴ Sólyom, "Introduction", *supra*, at 35.

⁹⁵ *Id.* at 37.

recognized as such by Sólyom himself – between the “minimum level” standard (as determined by the Court) and the view of social rights as merely determining the goals to be pursued by the state.

A more recent exposition of this doctrine can be found in a decision on the rate of pensions increase at the end of 1999. This case announced that the state has a constitutional obligation to maintain a social security system, but the detailed rules cannot be derived from the Constitution. In the situation of pensions increase, pensioners have no right to a specific rate, though it would be unconstitutional if the state did not provide any increase at all, or if the increase was on an arbitrary basis.⁹⁶ The original rule of the pension law of 1997 provided that social security pensions would be increased in January 1999, to adjust their level to the net growth of income projected in 1998. However, the 1999 budget amended this increased rate, and established that the pensions would be raised by 11 percent in addition to inflation; this would have resulted, according to the petitioners, in a smaller rate of increase than if the original rule were maintained. The petitioners argued that the amendment violated vested rights. The Court explained, however, that the state has a constitutional obligation to maintain a social security system (Art 70/E of the Constitution), but the pensioners have no vested rights in the rate of increase. Hence, the reduction of increase rate did not violate a vested right.

However, the fact that socio-economic rights are not directly enforceable by the courts⁹⁷ 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 postcommunist constitutional doctrine is that all constitutional provisions, including those which contain socio-economic rights, can be used as a yardstick to assess the constitutionality of statutes.⁹⁸ As a result, constitutional courts have been quite active in reviewing, and at times invalidating, statutes under the standards of socio-

⁹⁶ Summarized in "Constitution Watch", *E. Eur. Const. Rev.* 9 (Winter/Spring 2000), at 20-21.

⁹⁷ As a general proposition (not in the context of CEE), the thesis of non-justiciability of the socio-economic rights of individuals, and of the socio-economic duties of the State, was strongly refuted by K. D. Ewing, "Social Rights and Constitutional Law", *Public Law* (1999): 104-23 at 119-21.

⁹⁸ Czeszejko-Sochacki, Garlicki & Trzciński, *supra*: a breach of a “programmatic norm” (including those that proclaim socio-economic rights, the details of which are to be spelled out by legislators) happens when “the legislator incorrectly interprets a provision of the Constitution which defines a particular goal or task of public authorities, and in particular, enacts a statute which provides for such measures which cannot lead to that goal and thus breaches constitutional liberties or rights”, at 163.

economic rights, even though this often calls for judgments of social and economic policies, in which judges have no expertise to provide adequate review. A view that these rights are “merely programmatic,” and thus non-justiciable,⁹⁹ has never become a dominant, recognized doctrine.

For instance, in Poland, the Constitutional Tribunal began striking down some laws on the basis of violation of certain socio-economic rights even before the democratic transition and thus before amendments to the “socialist” constitution had occurred. As an example, consider the decision of 30 November 1988,¹⁰⁰ in which the Tribunal reviewed and partly invalidated the law of 14 December 1982, which revised the rules relating to acquiring disability pensions for the handicapped. The petitioners (trade unions) objected to the fact that the law limited the eligibility for those benefits (by, among other things, increasing from 5 to 10 years the required period of earlier employment for those employees who took up their first job after 40 years of age). The Tribunal considered the compatibility of this deterioration of benefits with art. 70 of the then Constitution of the Polish People’s Republic (social security). In particular, it considered the petitioners’ argument that the constitutional provision for an “even fuller implementation” of the right to social security prevents the legislator from ever reducing benefits; in other words, a “ratchet” theory (without using this word). The Tribunal rejected this argument by saying that such violation would occur only if several consecutive laws issued over a “longer period of time” denied the principle of steady improvement of citizens’ rights. It is, however, not the case that art. 70 is violated if a particular provision, taken in isolation from others, causes deterioration in the benefits derived from a particular entitlement.¹⁰¹ However, in this case, the Tribunal found that this particular provision “has deprived a certain group of people of their right to a disability pension, which has been formed during many years of development of the pension system in Poland, without at the same time establishing any other benefit entitlement” For this reason, the new rule violated art. 70 because this constitutional provision entrenched a “ratchet” requirement (in a long-term interpretation of the requirement) upon the legislator.¹⁰² [It should be added that, in the years to come, the Tribunal consistently resisted invitations to adopt a “ratchet” theory of socio-economic rights; in a 1997 decision on family benefits, it observed that it would not be

⁹⁹ Jon Elster, Claus Offe & Ulrich K. Preuss, *Institutional Design in Post-communist Societies* (Cambridge University Press: Cambridge, 1998) at 87; A. E. Dick Howard, "The Indeterminacy of Constitutions", *Wake Forest L. Rev.* 31 (1996) 383, 409.

¹⁰⁰ Decision K. 1/88; the full text of the Decision on file with the author.

¹⁰¹ Id. p. 7 (section III.1 of the Decision).

¹⁰² Id. p. 8, section IV of the Decision. The notion of "ratchet" requirement is mine, not the Tribunal's.

rational for the law-maker to adopt the new economic system – meaning, market economy – and at the same time enact rules which would render impossible the reforms necessary to bring about this new system].¹⁰³ The Tribunal, in this pre-transition time, also found a violation of the constitutional principles of social justice and non-retroactivity of the law. However, at this stage of its activity, the Tribunal still emphasized the by-and-large “programmatically” character of the socio-economic provisions of the Constitution.¹⁰⁴ With time, however, the CT abandoned the doctrine of “programmatically” rights, and unequivocally accepted that those rights may serve as a basis for decisions invalidating statutes on the grounds of unconstitutionality.¹⁰⁵

This approach by the CT applies not only to the abstract review of statutes, but also to concrete review. In Poland, the view that “programmatically constitutional norms” can be the basis of citizens’ claims and complaints has been dominant; the authors of the authoritative Commentary on the Law of the Constitutional Tribunal explicitly reject the view that so called “programmatically norms” of the Polish Constitution cannot serve as the basis for “constitutional complaint”. As they say, a breach of a “programmatically norm” happens when “the legislator incorrectly interprets a provision of the Constitution which defines a particular goal or task of the public authorities, and in particular, has enacted a statute which provides for measures which cannot lead to that goal and thus breached constitutional liberties or rights”.¹⁰⁶ This view (which has the authoritative backing of three judges of the Polish CT, who authored the *Komentarz*) effectively blurs the borderline between “programmatically norms” and “claim rights”. However, this is not a unanimous doctrinal view. There is also an influential view that the issue of the enforceability of socio-economic rights should be distinguished from the issue of socio-economic rights as a ground for judicial review, and that “programmatically” rights are essentially different from claim rights. This is meant to suggest that constitutionalization of the right to

¹⁰³ Decision K. 21/95 of 25 February 1997, discussed in Jerzy Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego* (Zakamycze: Kraków, 2000), p. 457.

¹⁰⁴ See e.g. Decision K. 7/89 of 8 November 1989. According to Professor Garlicki, there is a sharp difference between the early stage of CT jurisprudence, when this programmatically nature of socio-economic rights was very pronounced, and the later stage when the Tribunal had no doubts about treating these rights as a basis for evaluating laws, see Leszek Garlicki, "Orzecznictwo Trybunału Konstytucyjnego w 1993 roku", *Przegląd Sądowy* (1996, no. 7-8): 110-38 at 119.

¹⁰⁵ See Decision K 8/96, of 17 July 1996, invalidating a law that prohibited the indexation of pensions. The Tribunal announced that the non-indexation of pensions (that is, a failure to adjust them to the rise of costs of living) amounts to a violation of the pensioners’ constitutional rights to their pensions.

¹⁰⁶ Czeszejko-Sochacki, Garlicki & Trzeciński, *supra* at 163.

work, housing, health care etc. does not authorize citizens to press any specific claims against the government in court, but merely imposes a duty upon the government to conduct an effective policy aimed at fulfilment of these programmatic goals. In this sense, these rights are not directly enforceable, or self-executing. A leading Polish proponent of the view that the constitutional prescription of tasks for the state, in the area of housing, work, etc. can be captured by the concept of rights, Tadeusz Zieliński, distinguishes between “claim rights” and “programmatic rights,” the latter “defin[ing] the tasks of public authorities in the area of welfare rights of citizens.” In addition, “[a] right to work means only that a citizen has a right to assistance in finding a job by the public authorities. A right to lodging means only that a citizen is provided the opportunity to make use of policies leading to satisfying citizens’ needs for lodging.”¹⁰⁷ However, if *all* there is to a right is an opportunity to benefit from whatever state policy is in operation, then it is redundant to call it a “right”; it is, rather, another way of urging the government to have *a* policy in this field.

For another example of enforcement of the right to a pension, consider a decision of the Bulgarian CC on pension entitlements, which held that restricting this right when another constitutional right, namely the right to work, was being exercised, was unconstitutional.¹⁰⁸ In this Decision, articles 50(1) and 59(2) of the Pension Act (a law adopted by the left wing government of the BSP) were challenged. According to those provisions, pension entitlement would be withdrawn from all pensioners that had an earned income (i.e those who worked and got an income from this). The CC held that this was contrary to the right to social security (art. 51(1) of the Constitution) because pensions are a type of social security entitlement covered by Art. 51(1). Rights can only be restricted in accordance with the Constitution, but the Constitution provided for no restrictions to this right. The linking of the entitlement to a pension and having an earned income was unreasonable, according to the Court; the right to social security is a totally separate right from the right to work, and it cannot be made dependent on whether the right to work is being exercised or not. For this reason, the challenged section of the law was held to be unconstitutional.¹⁰⁹

¹⁰⁷ Tadeusz Zieliński, “Prawo do chleba, mieszkania i pracy”, *Gazeta Wyborcza* (Warsaw), 27 August 1996, p. 12.

¹⁰⁸ Decision of the Bulgarian CC no 12/1997 of 25 Sept. 1997, described in the *Bulletin on Constit. Case-Law* 3 (1997) at 357, originally published in Bulgarian in *Darzhaven Vestnik* no. 89 of 7.10.1997.

¹⁰⁹ For similar reasons, the Romanian CC invalidated, in 1998, a provision of the law on the social protection of unemployed persons. This law stated that those who had completed secondary education and were in vocational training were not eligible for unemployment benefits, Decision no. 81/1998 of 19 May 1998, summarised in *Bull. Constit. Case-Law* 1998 (2): 288-89, ROM-1998-2-004. This was meant to remove students benefiting from student grants, from the group of those eligible for unemployment benefits, but one of the

As Justice Todorov explained in an interview, two conflicting theories were raised in the Court's deliberations.¹¹⁰ One – which gained the majority support – was more “civilistic”, and assumed that the state attains an obligation to pay a pension to any person who has been working and “making his contributions to the budget”. This obligation has a “contractual” nature; it is a contract between a person and the state. As Justice Todorov said, he supported this theory because, in his words, “I am inclined to reason like the civil lawyer”.¹¹¹ The second theory (espoused by two dissenting justices, Milcho Kostov and Aleksandr Arabadjiev, a rapporteur in this case) presupposed – in the words of Justice Todorov – that ‘the money for pensions, as a whole sum, is produced by the generation living in the moment of paying the pension’.¹¹² (It is therefore a “pay-as-you-go” theory of pensions). As the financial and budgetary situation may change, the obligation of the state to pay the pension depends not on the contribution, but on the ability of society to pay the pension. The Court – Justice Todorov says – chose the former theory and decided that the state cannot free itself from paying the full amount of pensions, even if this creates financial difficulties. “Thinking about it again, I am not so convinced about this position any more”, Justice Todorov admitted a few years after the decision had been taken, but he stressed that the original view of the Court majority had been affected by two considerations. Firstly, the majority judges were afraid that “if you say that the state can determine the pension, you give a very broad scope of discretion to the state”, after all, the government always says that the situation is very difficult.¹¹³ Secondly, there was strong pressure from public opinion; the situation of Bulgarian pensioners was very difficult, the pension stipend being around 70 Leva per month.¹¹⁴ In general, according to Justice Todorov, there is a conflict between two constitutional principles; the “liberal principle” and the social state, the latter demanding a degree of welfare and distributive justice. However, as a result of the dire economic situation, the principle of the “social state” remains “a dead letter”.¹¹⁵

consequences was that those who had been working prior to (or during) their studies, and then lost their employment while studying, were denied unemployment benefits. The Court, in invalidating the provision, argued (among other things) that the exercise of one right (education) cannot be used as the ground for curtailing another (unemployment benefit).

¹¹⁰ Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia 11 May 2001.

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Approximately US\$ 32 in 2001 exchange rates.

¹¹⁵ Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria,

An interesting feature of this case is that, while the Court had no qualms about invalidating a government policy on the grounds of a socio-economic right, it chose to base its decision upon a more “legalistic” philosophy of acquired benefits and the contractual obligation, rather than upon its theory of social justice of a distributive kind. Ironically, the choice of the former led, in this particular case, to a less deferential attitude towards State policy. This is because the austerity measure under challenge here might well have been defensible on the theory that, in the context of the dramatic economic scarcity, those fortunate enough to have paid employment should forsake their pensions in order to benefit those who cannot work.

On the other hand, 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 solution.¹¹⁶ This is a symptom of a certain malaise over the direct enforcement of socio-economic rights.

As another example of such a strategy, one may consider a 1996 Slovenian decision on the reduction of extra benefits for disabled soldiers.¹¹⁷ In February 1994, a new assessment basis for such benefits came into effect, and as a result the payments were significantly reduced (by about one-fourth). The Constitution provides that war veterans and civilian casualties of war are guaranteed special benefits from the state (Art. 50 (3)), which means that they should receive more than the basic level of social security. The Court admitted that amending a law related to benefits is not unconstitutional in itself. However, the principle of trust means that the state will not worsen a person’s position without real cause, grounded in the legitimate public interest. The extent of the reduction of benefits, and the absence of any transitional period of gradual phasing down of benefits, meant that the State had behaved in a way inconsistent with the general criteria of a “law based State” (Art. 2 of the Constitution). Thus, it was unnecessary – according to the Constitutional Court – to analyze whether there was a violation of the specific constitutional provision on benefits to disabled soldiers.¹¹⁸ The Court clearly preferred such a strategy of to that of a direct appeal to a specific welfare right.

Sofia 11 May 2001.

¹¹⁶ See Venelin I. Ganey, "Bulgaria: The (Ir)Relevance of Post-communist Constitutionalism", in Jan Zielonka (ed.), *Democratic Consolidation in Eastern Europe*, vol. 1: *Institutional Engineering* (Oxford University Press, Oxford 2001): 186-211 at 186, 198.

¹¹⁷ Decision U-I-86/96 of 12 December 1996, English translation available at <http://www.us-rs.si/en/casefr.html>, visited 10 May 2001.

¹¹⁸ Section 10 of the Decision.

At first blush, this strategy may seem surprising. After all, general clauses such as “law based state”, the principle of trust or of fidelity to vested rights, seem much more vague than specific socio-economic rights. The fact that, notwithstanding their lofty character, CCs usually prefer the former to the latter, may be significant. It shows that the Courts themselves feel that they enter very shaky ground when telling governments or legislatures what, to whom, and how much, should be paid or supplied to citizens as a result of 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 they are not cognizable by the courts), much clarity could have been gained.¹¹⁹

6. The right to work

The “right to work” has undergone a dramatic transformation since the fall of Communism. The advent of private industry (for example, in Slovakia by 1998, 75 % of the GDP was produced by the private sector; in Slovenia, 55 %) ¹²⁰ and the experience of unemployment, ¹²¹ rendered hollow the idea that the state has a duty to provide all those able and willing to work with meaningful employment. Within a market economy, even one with activist State functions, the “right to work” may at most mean (as is the case of the European Social Charter, and of some West European Constitution, e.g. Constitution of Italy, Art. 4) that the State has a duty to create a policy aiming at full employment, to protect the opportunities of every worker to earn their living in the occupation of their choice, to run vocational training and employment services, etc, and a the duty to provide social assistance to those unable to find work. However, as Bob Hepple noted, the “right to work” cannot be meaningfully understood as giving birth to a state duty to provide employment, because “such a ‘duty’ would simply beg the question how that employment was to be created”. As he adds: “We cannot expect ambiguous legal ‘rights’ of this kind to succeed where social and economic policies of full employment have failed”. ¹²²

¹¹⁹ See Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press: Princeton, 1999) at 169-72 (advocating constitutional welfare rights that are not enforceable by courts).

¹²⁰ *The Political Dimension of EU Enlargement*, supra at 38.

¹²¹ E.g. in Poland in 2001, around 18 % of the labour force was unemployed; in the Czech Republic, 8.2 %; in Hungary, 5.8 %, OECD *Quarterly Labour Force Statistics*, No. 1 (2002), Paris.

¹²² Bob Hepple, “A Right to Work?”, *Industrial Law Journal* 10 (1981): 65-83 at 73.

This has been reflected in the constitutional treatment of the right. Even though roughly a half of the CEE constitutions contain simple “right to work” provisions,¹²³ nevertheless they have come to be understood *not* as proclaiming a right to be provided with employment by the state. Constitutional courts played an important role in this re-interpretation; for example, in Hungary, the right to work became identified by the CC with the right to free enterprise; also, on the negative side, the CC stated that the right to work secured no “subjective right” to obtain a given job.¹²⁴ In the remaining constitutions, no express “right to work” is specified, but rather the right to freely choose one’s own occupation has been proclaimed.¹²⁵ It should be added that, in addition to those provisions, most constitutions impose upon the State some positive duties with regard to the field of employment, such as to provide training,¹²⁶ to create “conditions for the exercising” of the right to work,¹²⁷ or to pursue policies aimed at full employment.¹²⁸

The difference between the “right to work” and the mere right to free choice of occupation, has not resulted in different constitutional (or, indeed, socio-political) practices. In Poland, the former right was inscribed in the Constitution until 1997¹²⁹ but by then, the “right to work” had been interpreted by the CT not as an individual’s claim to be employed, but only as freedom to choose work,

¹²³ They are those of Albania (art. 49), Belarus (art. 41), Bulgaria (art. 48), Croatia (art. 54), Czech Republic (art. 26), Hungary (art. 70B), Macedonia (art. 32), Slovenia (art. 49), Romania (art. 38), Slovakia (art. 35), Ukraine (art. 43), Montenegro (art. 52), and Serbia (art. 35).

¹²⁴ See Sólyom, "Introduction", *supra*, at 35.

¹²⁵ Estonia (art. 29), Georgia (art. 30), Latvia (art. 106), Lithuania (art. 48), Moldova (art. 43), Poland (art. 65), Russia (art. 37), F.R. Yugoslavia (arts. 69 and 54). The only Constitution which contains no work-related rights is that of Bosnia and Herzegovina.

¹²⁶ Five constitutions contain a general provision granting the right to be trained for work, namely, the Constitutions of Belarus (art. 41) (although this does only apply to those who are unemployed through no fault of their own), Czech Republic (art. 26), Estonia (art. 29(3)), Slovakia (art. 35), and the Ukraine (art. 43). In addition, some constitutions grant the right to be trained to specific groups in society. Thus, the Czech Charter (art.29) and Slovak Const. (art. 38) provide for training for the young. Those of Moldova (art. 51), Poland (art. 69), Romania (art. 46), and Slovenia (art. 52) provide for training for the disabled. The Slovak Const. (art. 38) also provides for training for the unhealthy.

¹²⁷ The quotation is from the Const. of Bulgaria, art. 48; see also similarly Slovenia (art. 66) and Ukraine (art. 43). The Const. of Georgia has a slightly different type of provision, stating at art. 32, *inter alia*, that “The state must help the unemployed to find work”.

¹²⁸ Albania (art. 59), Belarus (art. 41), Poland (art. 65).

¹²⁹ The old Constitution (of 1952) contained article 68 which was kept in force until 1997: "Citizens . . . shall have the right to work, that is, the right to employment paid in accordance with the quantity and quality of the work done".

and – in the jurisprudence developed still under the old Constitution – a right to be rewarded in accordance with the “amount and quality” of the work, but only in those areas where the state directly controlled the salary of an employee.¹³⁰ Also, as a correlated right, there is the right to unemployment benefit. When it comes to those already employed, however, the Tribunal read the requirement of paying at least a minimal salary, as being a constitutive part of the right to work itself. Consequently, paying a lower rate than the minimum rate (as determined by the Minister of Labour) is a breach of the constitutional right to work.¹³¹ This rule was announced in a decision which concerned a rather specific situation, namely, the employment of prisoners. While, in general, the Tribunal determined that the general rules of labour law do not apply to the employment of prisoners (because this is not based on contracts of employment), nevertheless the rates of minimum pay apply to the prisoners’ labour, on the basis of the constitutional right to work. This, as one can see, is an interpretation stretching the very concept of the right to work quite far. The most charitable interpretation for this decision is that the Tribunal wanted, properly, to grant a degree of protection to a particularly vulnerable and defenceless category of “workers”, as far as payments for labour are concerned, and that the nearest constitutional provision that could serve this purpose was the right to work. However, it is ironic because the most straightforward reading of this “right” suggests the element of voluntariness of employment, a feature precisely missing in the case of prisoners. Under the new Polish Constitution, where the “right to work” has been finally dropped and replaced by the right to freedom of employment and to minimum pay,¹³² the focus of the CT interpretation shifted; it focused on the qualifications and conditions of hiring or of conducting business activity. Are qualifications required for certain types of jobs or business activity a limitation on the freedom to work? The answer, of course, depends on the relevance of those qualifications to the type of job or business in question, but these judgments are eminently controversial, and so are the legislative choices and the Constitutional Courts’ decisions on this matter.

One such decision was the Polish CT’s invalidation of a statutory requirement forbidding employment as taxi drivers (or granting licenses for other road transport businesses) of those with a criminal record.¹³³ The CT found no proper relationship between this condition and any legitimate purpose served by such regulation. It therefore found such regulation an excessive restriction of the constitutional right to work. It remarked, sensibly, that the “no criminal record”

¹³⁰ Decision K. 14/91 of 11 February 1992.

¹³¹ Decision K. 7/96 of 7 January 1997.

¹³² Article 65.

¹³³ Decision K. 33/98 of 26 April 1999.

requirement may be relevant in a number of positions, especially when they are connected to the exercise of public authority, and/or require a degree of public trust. However, adopting such a condition in this particular case would lead to the possibility that the “no criminal record” condition could be extended to a great number of positions and businesses, with a negative side effect of making it excessively difficult for people with a criminal past to return to a law-abiding way of life in society.¹³⁴ As I have remarked, this is a sensible judgment, but at the same time controversial. It nicely illustrates the fact that, by combining constitutional socio-economic rights with active judicial review, the door is opened for a non-representative body to displace controversial judgments of the legislature on which reasonable people may, and do, disagree. The CT’s arguments are serious and reasonable. However, one may oppose them with the motives – not unreasonable either – that the legislators had (or might have had) in erecting this barrier to obtaining a position as a taxi-driver (or other transport business). If one looks at the actual reality, and notes the declining standards of personal behaviour and honesty by taxi drivers, the alarming conditions of road safety, and a high supply of candidates for these jobs, then the inclusion of the criminal record as one of the screening devices for hiring in this field, ceases to look so unreasonable.

Incidentally, the right to choose one’s profession was discussed by the Hungarian CC, also in relation to taxi drivers’ work. In a 1993 decision, the Court struck down a provision of the statute enabling local governments to limit the number of taxi licenses.¹³⁵ The main constitutional provision under which the Court considered the matter, was the right to free enterprise (Art. 9 (2)) and the principle of market economy (art. 9 (1)). While the Court said the setting of conditions for obtaining taxi licenses was not unconstitutional per se, nevertheless the placing of restrictions on the number of taxis conflicted with these constitutional provisions. However, in addition, the Court found the limits to be unnecessary and disproportionate restrictions of the right to choose one’s profession (Art. 70 (b) (1)).

The question of occupational qualifications, as a matter infringing the right to free choice of occupation, has also been raised before the Slovenian CC. Two decisions of the Court dealt with the matter in two opposite ways; firstly, by looking at the setting of qualification conditions as a putative infringement of the constitutional right to freedom of choice of work, secondly, by considering the failure to set certain qualifications as a violation of the constitutional rights of others. *In its 1995 decision, the Court considered a provision of the Notaries Act, which specified the conditions that must be met by persons who wish to*

¹³⁴ See discussion of this case in Oniszczyk, *supra*, at 466.

¹³⁵ Decision 8/1993 of 27 February 1993, transl. in *East Europ. Case Reporter of Const. Law* 1 (1994): 247-48.

become a notary.¹³⁶ One of these conditions was that the person must be worthy of public trust, and a person is not worthy of such trust if he has been the subject of criminal proceedings for a crime that would make him morally unworthy to perform such work, has been convicted of such a crime, or behaves in such a way that it can be concluded that he will not honestly and conscientiously perform notary work. In its discussion of these conditions, the Court declared that the office of notary is a public service, and therefore a restriction of the constitutional right to freely carry on work or a profession (Article 49 of the Constitution) serves an important public good; the protection of the rights of others to legal security in legal business, which a notary guarantees. (The Court did not fail to mention that this limiting criterion is different from that which ruled under the Communist system, which “allowed privilege or discrimination in relation to ideological or political convictions and activity”).¹³⁷ Since the Constitution allows the limitation of Constitutional rights to protect the rights and freedoms of others (Article 15), this limitation of the right to obtain the position of a notary is constitutional. As the Court said, “a guarantee of [the candidates’] honestly and conscientiously performing the notary profession must . . . be established prior to the appointment as a notary”.¹³⁸ Interestingly, however, the Court struck down one part of the challenged provision; namely, the section that stipulated that people who are subject to criminal proceedings will be deemed morally unworthy. The Court held that this contradicts the presumption of innocence in that, prior to a court judgement, no negative consequences should be created for the accused and, most certainly, their constitutional rights should not be restricted.¹³⁹

In the second decision dealing with the conditions for obtaining a position, the Court dealt with two laws; the Securities Market Act and the Investment Funds in Management Companies Act which did not place any conditions upon who could become a stockbroker.¹⁴⁰ The Constitutional Court explained that there is a right to freely choose employment (Article 49 of the Constitution) but that this can be limited on the basis of Article 15 of the Constitution, to protect the rights

¹³⁶ Decision U-I-344/94, of 1 June 1995, transl. in <http://www.us-rs.si/en/casefr.html>, visited 10 May 2001.

¹³⁷ Section 6 of the Decision. As the text of the Decision further reveals, this was in response to one of the petitioner’s arguments, that the conditions for appointment to the position of notary mean, in the words of the Court, “a reintroduction of the former criteria on socio-political (un)suitability”, Section 9 of the Decision.

¹³⁸ Section 14 of the Decision.

¹³⁹ Section 12 of the Decision.

¹⁴⁰ Decision U-I-287/95 of 14 November 1996, transl. in <http://www.us-rs.si/en/casefr.html>, visited 10 May 2001. The matter of qualifications for the job was only one of a number of aspects of these two statutes reviewed in this Decision.

of others. The measures that can be imposed for that purpose can include special knowledge, level of qualifications, professional examinations, practical experience, necessary personality characteristics (for example reliability), and minimum age. They are only allowable if they are indispensable and the public interest cannot be safeguarded in another manner. However, such indispensability was, according to the Court, the case here; failure to determine in the statute the qualifications necessary for obtaining the stockbroker's license could impinge on other people's rights. Such criteria and examinations which screen the candidates were not determined by the statute, thus leaving a full discretion in this matter to the specialized agency set up by the statutes. "Statute should specify at least the limits within which the Agency would be allowed to interfere with the rights of stock brokers who have obtained the license, and the purpose of such interference".¹⁴¹ The Court determined that, within a year, the legislator must pass a law that restricts the entry into this profession.

The Lithuanian CC also dealt with the right to free choice of occupation, more than once. In a lengthy and complex decision in 1999, it examined the situation of former employees of the Soviet security forces not being allowed to hold certain posts in the Republic of Lithuania.¹⁴² I discuss this decision elsewhere¹⁴³, because the only provision of the challenged law that the Court actually invalidated was the scheme for setting up a presidential commission empowered to waive the application of the general rule of the law: this was found to offend the principle that matters regarding restrictions of constitutional rights must be decided by statute rather than delegated to the executive branch. However, on the central substantive issue, the Court found no constitutional defect in the law that imposed checks on persons holding influential positions in public life, to see whether they had had any ties with the secret services of the former communist regime. In a much more recent decision, the right to choose one's employment also came up, albeit marginally and indirectly.¹⁴⁴ The provisions under challenge were two articles of the Laws on the Bar, establishing the rules of incompatibility for the practising lawyer (advocate) in a given court; namely, if they had worked in that same court as a judge within the last three years, or if their close relatives were working in that same court as a judge. The central constitutional provision upon which these rules were challenged, was the right to legal counsel in criminal cases (art. 31 (6)) which implies also the right to choose one's advocate. The CC rejected this challenge by saying that the incompatibility rules indeed restricted the right to the choice

¹⁴¹ Section 10 of the Decision.

¹⁴² Decision of 4 March 1999, <http://www.lrkt.lt/1999/n9a0304a.htm>, visited 15-5-2001.

¹⁴³ See Working Paper No. 4 in this series.

¹⁴⁴ Decision of 12 February 2002, <http://www.lrkt.lt/angdoc.htm> visited 15-5-2001.

of one's lawyers, but did so properly, in order to ensure the impartiality and independence of courts and judges, without at the same time taking away altogether, people's choice of a lawyer. Yet another ground of challenge was art. 48 (2) of the Constitution, which provides that "Every person may freely choose an occupation or business...". However, according to the Court, the law contained no restrictions on a person becoming an advocate, as they did not relate to the possibility of attaining this post (which is a choice of occupation), but just restricted some of the functions of being an advocate in some courts.

7. Rights to health and education

The right-to-health provisions have been rarely applied in the CC's jurisprudence so far. One example was a Croatian CC decision of 1998, in which a provision of the Law on Health Insurance was successfully challenged.¹⁴⁵ The provision denied health protection services (except for urgent medical help) to those patients whose contributions to medical insurance had not been made. Considering that such payments were the obligation of the employers, not the patients themselves, the failure to make such payments may not have been the fault of the employees, and so a denial of health protection to them was found to be in violation of the constitutional right to health care (Art. 58). This is an example of how an old right, with state socialism provenience, became quite crucial in the new situation in which the state ceased to be the main employer and, in consequence, provider of a quasi-automatic health insurance to all those employed. With the introduction of health insurance funds, and a partial privatisation of health services, the constitutional right to health takes on the function of protecting patients against arbitrary discrimination and exclusion from the benefits, rather than of supporting a claim for universal provision of such services.

As mentioned earlier, some CEE constitutions provided for the right to free public education. This principle ran into practical troubles, and again, it was the job of CCs to narrow down the meaning of this right. Consider the example of

¹⁴⁵ Decision no. U-I-222/1995 of 9 November 1998, summarised in *Bull. Constit. Case-Law* 1998 (3): 403, CRO-1998-3-018. Another, much more marginal, example was the decision of the Polish Constitutional Tribunal which upheld a provision of the statute on anti-alcohol measures, against a challenge of inconsistency with the state's constitutional duty to protect public health (under an old Constitution, superseded in 1997), Decision no. K. 3/97 of 23 June 1997. The challengers (a group of MPs) claimed that a provision on temporary, one-off licenses to sell alcohol during public open-air events was too lax and, as a result, did not guarantee sufficient protection against alcohol abuse, thus unconstitutionally endangering public health. The Tribunal rejected this claim on the basis that the provision under challenge did not constitute a "drastic" breach of the legislature's duties stemming from the constitutional provisions on health protection. However, note that this decision, strictly speaking, was not made under a "right to health" heading.

Poland. Here, the constitutional text was rather ambiguous: Art. 70 para. 2 provided in the first sentence that “Education in public schools is free”, the second sentence allowed a statute to provide for “rendering some educational services by public universities for fee”. This was understood by many to mean that those “educational services” applied to mature and correspondence students who attend separate courses, and that the first sentence prevented the imposition of fees upon day students admitted in the regular selection process. *Despite this, the CC upheld, in its decision of 8 November 2000¹⁴⁶, statutory regulations which 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 CC was the following; 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 2nd para. of the article provides for “free education in public schools”¹⁴⁷, but this is only one of the elements of that right and should be interpreted as being derivative and instrumental vis-à-vis the principle of “availability and universality”. The guarantee of free university education is not absolute and unlimited. Art. 70 para. 2 cannot be interpreted as conferring a right to free university education to everyone who meets the formal requirements to be a student. Only those who meet additional criteria, established in the selection procedures of particular universities, can be beneficiaries of this right. Public universities have a duty to implement the principle of universal access to education by different forms of studies; both unpaid (as the fundamental form) and also other forms of studies. In deciding about the actual fee for tuition, the actual costs of study play the central role, and the fees cannot apply to that part of educational work of the university which is fully financed by public funds made available to the university. The Court also rejected an argument that the introduction of fees in relation to only some students, violates the principle of non-discrimination (art. 32 of the Constitution) “under the condition that introduction of tuition fees was done in order to assure as wide access to education as possible”. As can be seen, the Court tried to reconcile the general principle of free education with a realistic understanding of the dire economic situation of universities, starved for funds.*

The argument proceeds on an unspoken assumption that to introduce full fees for at least some regular students (but not to all, which *would* be unconstitutional) is a Pareto-optimal solution, because the only alternative would be to reduce the student intake, and so those who now have to pay would

¹⁴⁶ Decision SK 18/99 of 8 November 2000, see *Wybór tez i sentencji Orzeczeń Trybunału Konstytucyjnego, II Półrocze 2000* (Wydawnictwo TK, Warszawa 2001), at 30-33.

¹⁴⁷ Note that, in Polish, the word "schools" includes also tertiary education institutions such as universities.

not have been admitted if the universities were compelled to offer education to non-paying students only. This seems like a common-sense solution, but of course the downside is that it creates incentives for universities to steadily reduce the number of places offered for free, and in practice, to endanger the very principle of universal access which is posited as the essential meaning of the Art. 70 guarantee.

8. Conclusions

For various reasons mentioned at the beginning of this Working Paper, constitution-makers in CEE did not face the dilemma of whether to constitutionalize socio-economic rights (notwithstanding the invitation of some foreign, especially American, experts to leave these rights outside the new constitutions). They rather had to decide how many, which rights and how they should be constitutionalized. As a result, CEE constitutions present reasonably broad catalogues (with some variants identified earlier in this Working Paper) of the rights which correspond to the frustrations, dire needs and legitimate claims of people in the field of social policy, in an age of economic transformation resulting in the dismantling of some old certainties, such as full employment (even if often accompanied by so-called hidden unemployment, hiding a de-facto unnecessary employment), paternalistic social services offered by state-owned enterprises (including child-care, leisure etc), state-provided free education, health and social services (even if often at a lamentably low level, forcing the beneficiaries to pay the difference in order to obtain services of satisfactory quality), etc. The end of these certainties focused the attention of public opinion upon the socio-economic rights written into their constitutions. The contrast between a plain reading of certain “promises” contained in the constitution and the grim reality of a state unable to fulfil these promises, made socio-economic rights the most hotly contested area in the field of constitutional rights, after the fall of communism. The sheer number of people having a stake in the vindication of these rights, contributed to the size of the problem. For instance, in Poland there are 9 million old-age or disability pensioners in a total population of 39 million. In a situation in which governments struggling with budget deficits were forced to restrict spending on social services, the potential for challenge centered around the socio-economic rights written in the constitution, was obvious.

These challenges naturally had their expression in the case law of CCs in the region. Willy-nilly, these courts have been forced into the domain of socio-economic policy-making under the guise of defending constitutional rights. This is particularly so in those countries (such as Hungary or Poland) where the constitutions themselves have not drawn any meaningful boundaries between the rights which are and which are not enforceable by these courts in the process of constitutional review. The courts found themselves, as a result, subject to

conflicting temptations, incentives and pressures. On the one hand, the combination of societal pressure to invalidate a “heartless” policy, the pursuit of popularity, understanding of socio-economic rights as giving the courts an entry into the domain of socio-economic policy-making, and probably sincere understanding that all they were doing is applying constitutional strictures, inclined the courts to displace decisions and policies of governments and parliaments in this area. On the other hand, the rhetoric of judicial restraint, awareness of the complexity of the issues involved, including an awareness of the possibility of negative side-effects of their decisions upon those whom they purported to benefit, the sense of their low institutional competence and technical expertise in the field, and the “minimalist” understanding of the function of socio-economic rights, combined to constrain the courts from entering this minefield.

In the face of such conflicting pressures and incentives, it is no wonder that the overall picture of the CCs’ output in this field is ambiguous. Regardless of whether one welcomes or deplors the intrusion of CCs into the arena of socio-economic rights, one must admit that, at times, some of the CCs of the region handed down decisions of great economic importance. The pensions decisions in Poland,¹⁴⁸ and Croatia,¹⁴⁹ to mention only two countries, frustrated to a very high degree the respective governments’ plans for reforms of the social security system. On the other hand, there were cases when the CCs did not intervene, even though there was a textual basis in the constitution for striking down a law or policy. For example, when the parliament in Lithuania adopted, in 1997, a national health insurance scheme based on employee contributions, it was not challenged by the CC even though it might have been seen to contradict the constitutional right to free health care.¹⁵⁰

There were also numerous instances where the Courts did intervene (as they were constitutionally compelled to), and reinterpreted the right in question in such a way as to make it compatible with a socio-economic system in which the state no longer dispenses all the benefits covered by the meaning of a constitutional right. They thus rendered the right more realistic, more relevant, and more appropriate considering both the systemic changes and the fiscal realities of the state. The decision of the Polish CT on the right to “free”

¹⁴⁸ See, e.g., Decision K. 8/96 of 17 July 1996.

¹⁴⁹ The Croatian Constitutional Court invalidated, in 1998, a provision of the 1993 Code on Equating Retirement Incomes, on the basis that the code demanded that pensions increase relative to changes in the cost of living, rather than relative to the increase of average incomes, see “Constitution Watch”, *East European Constitutional Review* 7 no. 3 (1998), p. 9.

¹⁵⁰ See *The Political Dimension of EU Enlargement*, supra at 19.

education¹⁵¹ is a good example of such a re-interpretation in light of a clash between the text of the constitutional right (itself a product of populist constitution drafting) and the realities of starved-for-funds public universities. To prevent those universities from charging some students for education would, in effect, harm those very people whom the constitutional right in question was meant to protect. If a university has a choice of between restricting the number of enrolments (because of scarcity of public funds and inability to charge tuition) or charging some students for tuition (under the condition that the rules are clear and non-arbitrary), then given the strong persistence of formal and informal mechanisms of the reproduction of the student body as composed of children of those with higher education (and being traditionally better-off), the less advantaged may actually be better off in terms of access to education, if they can buy education at a public university rather than if its doors would stay closed to them. While there is no one obvious answer to the dilemma faced by the Tribunal in this decision, the outcome that it reached is not obviously unreasonable, and led to a partial reconciliation of the constitutional text with socio-economic realities.

For this reason, I am unable to agree with a leading expert on post-communist constitutionalism, Professor Andras Sajo, who deplores that post-communist constitutional courts have perpetrated *wrong* welfare policies. That, once they entered into this domain, they supported the status quo in the field of welfare, rather than transformative welfare policies, and that they consistently opted for an egalitarian-distributive conception of justice rather than for merely corrective justice.¹⁵² Perhaps we have a fundamental philosophical disagreement here, because I would not characterize any policies which look like they are based on distributive justice – for instance, universal as opposed to individualized free services; provision of some services in kind rather than in cash; pay-as-you-go social insurance schemes as opposed to fully funded, contribution based schemes – as necessarily irrational, in the way State-sponsored egalitarianism is irrational. I would see some of them at least as being a kind of insurance scheme (though based on Dworkinian hypothetical insurance, because there have not been conditions for real insurance).¹⁵³ Others, I would classify as examples of paternalism, but cases in which paternalism is not necessarily an objectionable policy, but rather a rational response to the lack of knowledge or rationality, as in the right to compulsory and free education up to a certain stage.

¹⁵¹ See text accompanying note 146 above.

¹⁵² Andras Sajo, "Welfare Rights in the Post-Communist Constitutional Experience", in *Constitutionalism in Transition: Africa and Eastern Europe* (The Helsinki Foundation for Human Rights: Warsaw, forthcoming 2002).

¹⁵³ See Ronald Dworkin, *Sovereign Virtue* (Harvard University Press: Cambridge Mass., 2000), chapters 8 and 9.

However, more importantly from the point of view of the discussion of CEE post-communist social policy, I do not think that the distinction between corrective justice – safety net – and distributive justice, is as sharp as Sajo implies. I would venture a thesis that the lower the overall level of general welfare in society, the less significant is the distinction between corrective justice and distributive justice. This is because the *absolute* level of welfare is so low, and the number of people in need so high, that distributive transfers through state provision of welfare services are likely to benefit those in need.

There will always be, of course, a degree of over-inclusion (in terms of some benefits going to those who do not “deserve” them in terms of corrective justice) but this cost has to be balanced against the costs of administering a highly individualized corrective justice. These are, to start with, obvious administrative costs, for example, of monitoring and means-testing (corrective justice prefers means tests to universal eligibility criteria). Further, there is a cost in the form of moral hazard – incentives to cheat – and the deterring of this. Finally, there are possible perverse incentive effects. For example, a decision to refuse a pension to those pensioners who undertake paid work – a typical corrective justice device – created a counter-incentive against pursuit of employment by retirees who are able to work. This was the subject-matter of a decision by the Bulgarian CC in 1997, discussed above.¹⁵⁴ The law in question would make the right to a pension contingent upon not having any other income. The CC struck down this law, let us recall, as making an impermissible link between the exercise of a property right (pension) with the surrender of the exercise of another right (the right to work). This Court’s action indeed looks like a “distributive” rather than corrective measure, in Sajo’s distinction. A purely and properly-termed “corrective” measure would be to confine pensions only to those who truly need them, and therefore who have no other income. However, in terms of *incentives*, the Court’s action makes good sense, because to uphold the law would be to produce counterincentives to retired job-seekers.

Has the activity of the CCs – in interpreting welfare rights, and in articulating the meaning of other provisions with consequences for welfare – been uniquely status-quo-maintaining? This is the thesis of Sajo, and in his paper he supplies important evidence to show this pro-status-quo effect (the doctrine of vested rights, etc). He additionally explains that the logic of representative democracy reinforces the governing elites’ incentives to cater to the interests of groups interested in the status quo. Then again, there is also the opposite – though perhaps weaker – influence of democracy and civil-political rights, and some credit for protecting them must be given to CCs. János Mátyás Kovács coined the notion of “invisible welfare”, that is, welfare promoted by the new

¹⁵⁴ See text accompanying notes 108-115 above.

liberties.¹⁵⁵ Democracy and the rule of law, claims Kovacs, promoted the establishment of new welfare institutions, from trade unions to private kindergartens, and the introduction of new social policies, from openly acknowledging poverty to granting free choice of medical doctor to patients. This is an example of the transformative impact of civil liberties on welfare. It has to be admitted that, by and large, CCs in the region have a positive score card when it comes to the protection of constitutional civil and political rights, regardless of occasional bad decisions in which rights-restrictive laws have not been struck down or rights-protective laws have been invalidated.¹⁵⁶

¹⁵⁵ See János Mátyás Kovács, “Approaching the EU and Reaching the US? Rival Narratives on Transforming Welfare Regimes in East-Central Europe”, in Peter Mair & Jan Zielonka, eds, *The Enlarged European Union: Diversity and Adaptation* (Frank Cass: London, 2002): 175-204 at 197.

¹⁵⁶ See, generally, working paper no. 2 in this series.