CHAPTER 7

SOCIO-ECONOMIC RIGHTS

Regardless of philosophical controversies over 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 was characterized by widespread poverty, deprivation, and a lack of equal economic, cultural, and educational opportunities. While the economic transformation unquestionably brought some benefits, it also caused, at the same time, 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 that 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, dramatic situation, in which “[s]ocial policy was . . . used to compensate for the immediate social consequences of economic transformation”.¹

In addition, the impact of liberal political forces (“liberal” in the European, free-market sense), which are often reluctant, on philosophical grounds, to constitutionalise 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.² These parties, as well as non-ideological peasant parties, played an important role 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 communism³ which generated strong welfare expectations. The idea that citizens are entitled to a certain, albeit often miserably low, standard of living, work, recreation and education has proved to be particularly well entrenched in public consciousness.⁴

This may explain the popularity of views advocating broad constitutionalisation of socio-economic rights. For example, in Poland, a prominent and influential lawyer, Tadeusz Zieliński, has argued that, unless socio-economic rights are elevated to the constitutional level, the authorities will have full discretion to further reduce, or even to disregard, citizens’ social entitlements.⁵ Referring to his own experience as Poland’s second ombudsman, Professor Zieliński further claimed that,
unless socio-economic rights are constitutionalised, even legislative and executive acts contrary to the European Social Charter and international human rights covenants will be immune to legal challenge. Similarly, Herman Schwartz has argued that many socio-economic rights are, or may be, judicially enforceable; and that, even if they are not, they nevertheless represent “a way of imposing political and moral obligations on those who operate the state’s governmental apparatus” to take appropriate steps. He went on to suggest that at least some of the critics of the constitutionalisation of these rights are, in fact, opposed to their very implementation, constitutionally or otherwise.

It is also worth adding that the absence of socio-economic rights in the constitution does not necessarily imply 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, or France art. 2, which refers to “social Republic”) may also serve as the basis for constitutional review of government social programs.

Two caveats of terminological nature are useful at the outset. While socio-economic rights are usually treated as “positive” rights, and as identifying “programmatic” goals for the government, such characterisation is not quite accurate. The distinction between policy guidelines and rights sensu stricto does not correspond neatly to a distinction between socio-economic rights and civil-political rights (because the rights that apply to a socio-economic sphere may have a determinate content that 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 a 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 while some socio-economic rights may demand state non-interference with individual action). 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.

Furthermore, even within the same range of rights, either a “minimal” or a “strong” use can be made thereof, both in the process of enforcement and in judicial review. A minimal use would be to view 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 the state to run any particular program, say, of education, housing or health care; however, once a program is in place, constitutionalisation amounts merely to a guarantee of equal access. Such a use of socio-economic rights has been suggested, for example, by Herman Schwartz. A strong use of socio-economic rights, on the other hand, would go further than merely prohibiting arbitrary or discriminatory exclusions; it would call for the adoption by the government of effective measures aimed at attaining the programmatic goals as defined by the constitution-maker. While choosing the “minimal” interpretation would probably weaken much of the criticism of the constitutionalisation of socio-economic rights, such interpretation seems somewhat
implausible, due to its redundancy: discriminatory policy is already prohibited by constitutional rules against discrimination.

1. CONTROVERSY AROUND SOCIO-ECONOMIC RIGHTS

In proclaiming broad catalogues of socio-economic rights, CEE constitution-makers were no different from the drafters of the Western European constitutions who, in contrast to the US model of constitutionalism, included these types of rights alongside civil and political ones. These constitutions, the majority of which 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 Western European constitutions proclaimed the general principle of the Social State, or enumerated broad catalogues of socio-economic rights, or did both. In addition, the predilection of Western 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-rights product of 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 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 EU and national laws must comply with them. These include rights to education (including to free compulsory education), rights of children to protection and care, to express their views freely, and to maintain contact with both parents; freedom to choose an occupation and the right to engage in work; maternity-related rights (against dismissal and to paid maternity and parental leave), etc. Other social rights depend for their protection upon other Community and national laws; therefore they presumably cannot be used to declare Community laws contrary to the Charter (although, 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, to health care, to services of general economic interest, etc. Finally, certain provisions in the Charter are worded in such a way as to suggest 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, to provide legal, economic and social protection of the family, to ensure the social integration of persons with disabilities, and to ensure the right of dignity and independence for the elderly.

It is thus clear that, in this respect at least, CEE constitutions follow the pattern of Western 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. 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.” Decidedly, the concern that the governments “might do too little” featured prominently in the minds of the drafters of CEE constitutions.

It is, however, one thing to say that the inclusion of socio-economic rights was politically the only plausible option, and quite 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 the idea of constitutionalising welfare rights. It is important to emphasise that the reasons for the rejection of the idea of constitutional welfare rights were not grounded on a rejection of welfare policies. The basic idea was that there is a non sequitur between advocating a welfare policy and advocating the elevation of welfare rights to the 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: the Scandinavian countries, Australia and New Zealand belong to this category. This serves to rebut the objection that all 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, countries that have an appalling welfare situation despite boasting impressive catalogues of constitutional socio-economic rights. Some scholars actually go a step further, and assert an inverse relationship between the presence of socio-economic rights in a constitution and the existence of a welfare safety net. For example, Ulrich Preuss, a careful student of post-communist constitutionalism, has 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…”

As already mentioned, the opponents of constitutional welfare rights may or may not be advocates of broad welfare policies. Practice around the world shows that there is no tight connection between how “generous” the social rights in a constitution are, and how generous social welfare policy actually is. Some opponents of constitutional welfare rights are concerned that, once a welfare right is written into a constitution, even if subject to various provisions relating to non-justiciability, there is nothing that will disable a constitutional court from scrutinising a government policy or a new law in terms of its compatibility with the right in question. As Preuss has 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.

Thus, the primary reason for disapproving of constitutional welfare rights is that they produce an unfortunate institutional shift in the separation of powers and allow (indeed, require) constitutional judges to decide matters in which they have neither qualifications nor political authority.
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 on the impact of decisions by the Hungarian Constitutional Court upon governmental attempts to restructure the welfare system. Sajo’s passionate critique was occasioned by a series of Hungarian Constitutional Court decisions striking down several laws that together made up an austerity policy package (the “Bokros package”, named after the Hungarian Minister of Finance). The Court invalidated, among others, changes to maternity and family support, reductions to household allowances and state subsidised sick leave, and a raise in the interest rate on state loans to homebuilders. Significantly, the journal in which Sajo’s article appeared provided it with the following subtitle: “Welfare rights + constitutional court = state socialism redivivus”. Also in Poland, the prospect of review by the Constitutional Tribunal 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 constitutional scholar (who later became a judge of the Constitutional Tribunal) Jerzy Cieniewski warned, if the Tribunal gets to wield the power of review of the compatibility of laws with 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”.

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 recognised, for example, by a leading Polish constitutional scholar, supportive of the Constitutional Court and of social-economic rights, later to become a judge of the Constitutional Tribunal and now a judge of the European Court of Human Rights, Professor Lech Garlicki. He acknowledged (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”. The same author later stated, in describing the current doctrine of the Tribunal, that despite the fact that the Tribunal recognised the broad discretion of legislators in the area of social rights, nevertheless “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”.

A second reason for not including socio-economic rights in the constitutions was the fear of “contaminating” the entire charter of rights by the under-enforcement of this one particular category. These rights are, by their nature, under-enforceable. The fear was that a habit of tolerance for under-enforcement of some rights could erode a rigid commitment to the enforcement of all other rights, including civil-political ones. The plausibility of this argument has been strongly disputed by, among other people, 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”. For my part, I believe that Schwartz’s point may well be correct with regard to systems in which the values of constitutionalism, the rule of law 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 in which 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, by its very nature, a constitution is meant to restrain legislators (and indirectly, the electorate) from giving in to potentially pernicious temptations. Constitutional rights are seen primarily as restraints upon certain actions that may arise from human nature under some particular socio-political circumstances. For example, in the context of CEE constitutions, Cass Sunstein has claimed that elevating welfare rights to a constitutional level may promote attitudes of welfare-dependency and become a counter-incentive to self-reliance and individual initiative. However, as soon as this rationale is explicitly spelled out, it becomes immediately evident that it is extremely unlikely that any actual constitution-making process will follow its logic. Politically speaking, it is an almost impossible proposition, as it would require the constitution-makers to propose, and enact, ideas directly contrary to conventional societal norms.

2. 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 the post communist 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 in material need. The latter group is sometimes defined as those that have no other means of support. Many of these social security provisions go on to delineate specific subcategories of people who can legitimately be subsumed under the general notion of persons unable to work. These subcategories include the old, the ill, the disabled, those that have lost their breadwinner, and widows and orphans. In contrast to these constitutions with “generous” provisions, a small minority of the constitutions in the region has only narrowly drafted provisions for social security, while two have no such provision at all.

A right to health care is present in all of the constitutions of the region: it has been proclaimed very “generously” (with free health care for all) in twelve; in some, however, health care is only a right conferred upon some categories of people, such as the elderly, children, and pregnant women. Four constitutions delegate to lawmakers the task of determining who will obtain free health care. Three constitutions cautiously provide a right for all to health insurance rather than to actual health care. 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” – a guarantee that deftly evades any possible challenges due to the vagueness and indeterminacy of the term “highest possible level”. Often, health is linked in constitutional provisions with the individual’s environment, again not in terms of a state objective to care for the latter, but rather in terms of citizens’ right to a “healthy environment” or “healthy life . . . [in] a healthy environment”.

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

Among other socio-economic rights, the most frequently mentioned are those that 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 nine constitutions have a very broad list of such work-related rights. Other assorted socio-economic rights include the protection of the family, motherhood, and/or childhood (14 constitutions), training for the disabled (8), protection of culture (13), and a right to a good environment (13). 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, with two others listing it as an aim of the state rather than an enforceable right.

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;

2. Six constitutions have limited social security, education, and health care rights, but good work protection guarantees, and many other socio-economic rights;

3. Three constitutions provide for good social security, education, and health care rights, but only a limited number of the other rights;

4. Two constitutions have very few socio-economic rights at all.

At this stage, three preliminary conclusions can be drawn. Firstly, post-communist 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, post communist constitutions are approaching the pole that provides the maximum number. Secondly, the range of local variety is not particularly wide. If one ignores two non-typical cases (Bosnia and Herzegovina and Georgia), and perhaps also the three Baltic states, 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 single significant factor can persuasively explain the taxonomy suggested above – not the level of economic growth, not the adopted strategy of development, not the strength of post communist political forces, not the legacy of the former USSR, not the speed with which the constitution was created, not the realistic prospect of admission to the EU, and so on. For instance, category (1) above (the most “generous” constitutions) includes both the relatively affluent (Czech Republic, Poland) and the poorest (Moldova, Ukraine) countries of the region; those countries that adopted economic “shock therapy” in the transition to a free market economy (Poland) and those that failed to adopt free-market measures (Belarus); those countries where post communist parties have been relatively marginalised (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 seems to be no meaningful correlation between the “generosity” of the catalogues of socio-economic rights in a given constitution, and the objective circumstances of that country. Apart from everything else, this would confirm the hypothesis that the constitutionalisation of welfare rights has little or no effect upon the actual welfare policy of the government, although it certainly may have an effect upon the institutional system of separation of powers.

3. THE STATUS OF SOCIO-ECONOMIC RIGHTS

The effect of enhancing the powers of constitutional courts by bringing them into the social policy-making process is as much a matter of the constitutional status of socio-economic rights vis à vis the “traditional” rights as of the content of the actual catalogue of the former group of rights itself. 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. Particularly because, as one keen observer of the constitutional scene of the region has remarked, there is “a growing sensitivity in East-Central Europe that social and economic rights should be treated differently from political rights and citizens’ freedoms”.

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 fourteen constitutions belonging to this category, no differentiation 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.\textsuperscript{75} 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).\textsuperscript{76} Here, a clear separation of socio-economic from other rights is achieved by a general clause stating that a number of specifically enumerated rights (including most socio-economic rights) can be claimed only within the limits of the laws enacted to implement these rights-provisions.\textsuperscript{77} Hence, in contrast to all other rights unaffected by this general limiting clause (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 severely limits the possibility of mounting constitutional challenges to laws and policies in terms of these rights. Also, it effectively, though not formally, reduces the weight of these rights by putting them on par with 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 that establish that practical details of certain rights shall be decided by law. For example, the 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 law.\textsuperscript{78} This, however, is different from a general clause (in the Czech and Slovak fashion) that conditions enforceability of a right upon a legislative choice. Indeed, both the Czech and Slovak constitutional documents contain some (not socio-economic) rights that provide that the details of a right are to be established by law, and yet are not covered by the general limiting clause.\textsuperscript{79}

The third group is a hybrid category that combines the first and second approaches. In four constitutions in the region,\textsuperscript{80} we find a mixture; some socio-economic rights are directly enforceable, and some are left to legislative discretion (and can thus be viewed 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.”\textsuperscript{81} 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 that delegate the duty to determine the scope and form of implementation to the legislature (the right to social security\textsuperscript{82} is an example). The fact that these particular socio-economic rights were deliberately left outside the scope 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 that 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 Constitutional Tribunal, when discussing the provisions to which article 81 applies, 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 that belong to an individual. 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 review if a proper motion is addressed to the Constitutional Tribunal by an authorised subject.”

Overall, the above survey shows that nearly all post-communist 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 that 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 Western European constitutions, notably those of Spain and Ireland. The Spanish Constitution draws a distinction between “Rights and Freedoms” (Chapter II) and “The Guiding Principles of Economic and Social Policy” (Chapter III). Similarly, the Constitution of Ireland distinguishes between “Fundamental Rights” (arts 40-45) and “Directive Principles of Social Policy” (art. 45), with a provision in the latter to the effect that “they shall not be cognisable by any Court” (art. 45).

There were some attempts at similar constitutional design (other than in the Czech Republic and Slovakia where, as just shown, this model was adopted). One such heroic attempt deserves particular acknowledgement: the 1992 “Presidential draft” (so called because it was formally proposed by the then President, Lech Wałęsa) of the constitutional Charter of Rights and Freedoms, in Poland. It clearly distinguished “Social and Economic Rights and Freedoms” (including the right to education, to safety in the workplace, to medical protection, to social welfare, and to freedom to work) from “Economic, Social and Cultural Obligations of Public Authorities” (including, amongst other things, improvement of working conditions, full employment, aid to families, and medical care beyond the basic level). There was also an explicit statement that the latter “obligations” were to be performed by public authorities “depending upon their economic resources.” 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 pretence was made that these tasks and aspirations described a range of constitutional “rights.” This project, however, never became law.
4. 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, the Hungarian Constitutional Court established in 1990 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.” 88 As one Hungarian constitutional expert commenting on this decision has suggested, “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”. 89 In fact, the Court effectively converted 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…”. 90 In his ex-post description of the doctrine that 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”. 91 This, somewhat surprisingly, Justice Sólyom understood 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 recognised 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 pension increase at the end of 1999. 92 In this case, it was held that the state has a constitutional obligation to maintain a social security system, but that the detailed rules of this cannot be derived from the Constitution itself. In the situation of pension increase, pensioners have no right to a specific rate, although it would be unconstitutional if the state did not provide any increase at all, or if the rate of increase was established arbitrarily. 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 pensions would be raised by eleven percent above the inflation; this would have resulted, according to the petitioners, in a smaller rate of increase than if the original rule had been 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 courts 93 does not prevent these rights from becoming grounds for constitutional challenges to laws and policies through the process of abstract judicial review. It is one thing for the court to say that a specific individual has a legitimate claim to a
particular good, and another to find a particular governmental policy unconstitutional. Indeed, the dominant opinion in post-communist constitutional doctrine is that all constitutional provisions, including those that contain socio-economic rights, can be used as yardsticks to assess the constitutionality of statutes. As a result, constitutional courts have been quite active in reviewing, and at times invalidating, statutes under the standards of socio-economic rights, even though this often calls for judgments on social and economic policies, in which judges have no expertise to provide adequate review. A view that these rights are “merely programmatic,” and thus non-justiciable, has never become a dominant, recognised 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, 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 five to ten 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 reduction of benefits with art. 70 of the Constitution which was valid at the time (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 was therefore not the case that art. 70 was violated if a particular provision, taken in isolation from others, caused deterioration in the benefits derived from a particular entitlement. 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 upon the legislator. (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 rational for the law-maker to adopt the new economic system – meaning, market economy – and at the same time enact rules that would render impossible the reforms necessary to bring about this new system). The Tribunal, in this pre-transition period, also found a violation of the constitutional principles of social justice and non-retroactivity of the law. Despite this, at this early stage of its activity, the Tribunal still emphasised the by-and-large “programmatic” character of the socio-economic provisions of the Constitution. With time, however, it abandoned the doctrine of “programmatic” rights, and unequivocally accepted that those rights
may serve as a basis for decisions invalidating statutes on the grounds of unconstitutionality.\textsuperscript{101}

This approach adopted by the Constitutional Tribunal applies not only to the abstract review of statutes but also to concrete review. In Poland, the view that “programmatic constitutional norms” can be the basis of citizens’ claims and complaints has become dominant; the authors of the Commentary on the Law of the Constitutional Tribunal explicitly reject the view that the so-called “programmatic norms” of the Polish Constitution cannot serve as the basis for “constitutional complaint”. As they say, a breach of a “programmatic norm” happens when “the legislator incorrectly interprets a provision of the Constitution that defines a particular goal or task of the public authorities, and, in particular, has enacted a statute that provides for measures that cannot lead to that goal and thus breached constitutional liberties or rights”.\textsuperscript{102} This view (which has the authoritative backing of three judges of the Polish Constitutional Tribunal, who jointly authored the Komentarz) effectively blurs the borderline between “programmatic norms” and “claim rights”. However, this is not the unanimously accepted doctrinal position. 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 “programmatic” rights are essentially different from claim rights. This is meant to suggest that the constitutionalisation of the right to work, housing, health care etc. does not authorise 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 the fulfilment of these programmatic goals. In this sense, these rights are not directly enforceable, or self-executing. A leading Polish proponent of this view, the late Tadeusz Zieliński, distinguished between “claim rights” and “programmatic rights”, with 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.”\textsuperscript{103} However, if all there is to a right is an opportunity to benefit from whatever state policy is in operation, 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 Constitutional Court on pension entitlements, which held that restricting this right when another constitutional right, namely the right to work, was being exercised was unconstitutional.\textsuperscript{104} In this decision, articles 50(1) and 59(2) of the Pension Act (a law adopted by the left wing government of the Bulgarian Socialist Party) were challenged. According to those provisions, pension entitlement would be withdrawn from all pensioners that had an earned income (i.e. those that worked and got an income from this). The Constitutional Court 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 to having no earned income was unreasonable, according to the Court; the right to social
security is a totally separate right from the right to work, and the former cannot be
made dependent upon whether the latter is being exercised or not. For this reason,
the challenged section of the law was held to be unconstitutional.105

As Justice Todorov explained recently in an interview, two conflicting theories
were raised in the Court’s deliberations.106 One – which gained support of the
majority – was more “civilistic” (in Todorov’s words), and assumed that the state
has 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 the person concerned and the state. As Justice Todorov
acknowledged, he supported this theory because, in his words, “I am inclined to
reason like a civil lawyer”.107 The second theory (espoused by two dissenting
justices, Milcho Kostov and Aleksandr Arabadjiev, the rapporteur in this case)
was supposed, 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”108 (therefore, a “pay-as-you-go” model of pensions). As the financial and
budgetary situation may change, the obligation of the state to pay the pension
depends not upon the contribution received from each individual, but rather on the
ability of society to provide it. The Court, according to Justice Todorov, 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 majority of the Court had been affected by two considerations.
Firstly, the majority judges were concerned 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 argues that the financial situation is very difficult.109
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.110 In general, according to Justice Todorov, there was 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”.111

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 rest its decision upon a more “legalistic” philosophy of acquired benefits and
contractual obligation rather than upon a theory of social justice of a distributive
kind. Ironically, the choice of the former led, in this particular case, to a less
differential attitude towards state policy. This is because the austerity measure under
challenge here might well have been defensible based on the theory that, in the
context of drastic 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. This is a symptom of a certain malaise over the direct enforcement of socio-economic rights.

As an example of such a strategy, consider a 1996 Slovenian decision on the reduction of extra benefits for disabled soldiers. In February 1994, a new assessment basis for such benefits came into effect, and as a result the payments were significantly reduced (by about a quarter). 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 was 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 the benefits, and the absence of any transitional period in which they were lowered gradually, meant that the State had behaved in a way inconsistent with the general criteria of a “law-based State”, or Rechtsstaat (Art. 2 of the Constitution). Thus, it was unnecessary – according to the Constitutional Court – to analyse whether there was a violation of the specific constitutional provision on benefits to disabled soldiers. The Court clearly preferred such a strategy to that of a direct appeal to a specific welfare right.

At first blush, this strategy may seem surprising. After all, general clauses such as those guaranteeing a “law-based state”, the principle of trust or of fidelity to vested rights, seem to be more vague than specific socio-economic rights. The fact that constitutional courts usually prefer the former, notwithstanding their lofty character, may be significant. It shows that the courts themselves feel that they are on rather shaky grounds 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, as such, they are not cognisable by the courts), much clarity could have been gained.

5. THE RIGHT TO WORK

The “right to work” has undergone a dramatic transformation since the fall of Communism. The advent and growth of private industry (for example, in Slovakia, 75 % of the GDP was produced by the private sector by 1998; in Slovenia, this figure was 55 %) and the generalised experience of unemployment, 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 that provides a significant role to an “activist” state, the “right to work” may at most mean (as is the case of the European Social Charter, and of some Western European Constitutions, e.g. the 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 to provide social assistance to those unable to find work. However,
as Bob Hepple has argued, 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”.

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

The difference between the “right to work” in some constitutions and the mere right to free choice of occupation in others has not resulted in different constitutional (or, indeed, socio-political) practices. In Poland, the former right was inscribed in the Constitution until 1997; by then, however, the “right to work” had come to be interpreted by the Constitutional Tribunal not as an individual’s claim to be employed, but only as freedom to choose work, 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. Further, there exists the correlated right to unemployment benefits. For those already employed, however, the Tribunal held that a requirement to pay at least a certain, minimal salary was a constitutive part of the right to work itself. Consequently, paying employees at a level lower than the minimum rate (as determined by the Minister of Labour) is a breach of the constitutional right to work. This rule was announced in a decision that concerned a somewhat 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 do apply to the prisoners’ labour, on the basis of the constitutional right to work.

This, as one can see, is the interpretation that stretches the very concept of the right to work quite far. The most charitable justification 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 best 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 voluntary element of employment; and it is precisely this that is missing in the case of prisoners. Under the new Polish Constitution, in which the “right to work” has been finally dropped and replaced by the right to freedom of
employment and to minimum pay, the focus of the interpretation by the Constitutional Tribunal has shifted; it now centres on the qualifications sought and the conditions of hiring or of conducting business activity. Are the 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; such assessments, however, are eminently controversial, as are the legislative choices of parliaments and the decisions of constitutional courts on this matter.

One such decision was the Polish Constitutional Tribunal’s invalidation of a statutory requirement forbidding the employment as taxi drivers of (or granting licenses for other road transport businesses to) those with a criminal record. The Tribunal found no proper relationship between this condition and any legitimate purpose served by such a regulation. It therefore found the regulation to be an excessive restriction of the constitutional right to work. It remarked, sensibly, that the “no criminal record” requirement may be relevant in a number of positions, particularly when they are connected to the exercise of public authority, and/or require a degree of public trust. However, allowing 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 the 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. As I have remarked, this was a sensible judgment but, at the same time, it was controversial. It nicely illustrated the fact that, by combining constitutional socio-economic rights with active judicial review, the door is opened for a non-representative body to displace the controversial judgments of the legislature, on which reasonable people may, and do, disagree. The arguments of the Tribunal are serious and reasonable; one may, however, oppose them with the (equally reasonable) motives that the legislators had (or might have had) in enacting this barrier to obtaining a position as a taxi-driver (or other transport business). If one looks at actual reality, and notes the declining standards of personal behaviour and honesty of taxi drivers, the alarming conditions of road safety, and the high supply of candidates for these jobs, then the inclusion of the “no criminal record” requirement 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 Constitutional Court, 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. The main constitutional provisions under which the Court considered the matter were the right to free enterprise (Art. 9(2)), and the principle of market economy (art. 9(1)). While the Court stated that the setting of conditions for obtaining taxi licenses was not unconstitutional per se, it nevertheless held that the placing of restrictions on the number of taxi licences available conflicted with these constitutional provisions. In addition to this, 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, in terms of potential infringements of the right to free choice of occupation, has also been raised before the Slovenian
Constitutional Court. In a 1995 decision, the Court considered a provision of the Notaries Act that specified the conditions that must be met by all persons wishing to become notaries. One of these conditions was that the person must be worthy of public trust; and it further stated that 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 his duties as a notary. 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 was different from that which ruled under the Communist system, which “allowed privilege or discrimination in relation to ideological or political convictions and activity”). Given that 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 notary was found to be constitutional. As the Court noted, “a guarantee of [the candidates’] honestly and conscientiously performing the notary profession must . . . be established prior to the appointment as a notary”. Interestingly, however, the Court struck down one part of the challenged provision; namely, the section that stipulated that people who have been 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.

The Lithuanian Constitutional Court has dealt more than once with the right to free choice of occupation. In a lengthy and complex decision in 1999, it examined the situation of former employees of the Soviet security forces being barred from holding certain posts in the Republic of Lithuania. I discuss this decision elsewhere in this book; 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, in order to determine 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 was also raised, albeit marginally and indirectly. 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 a close relative was working as a judge in that same court. 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 Constitutional Court rejected this challenge, finding that although the
incompatibility rules did indeed restrict the right to the choice of one’s lawyers, they did so properly, in order to ensure the impartiality and independence of courts and judges, without at the same time removing altogether people’s ability to choose a lawyer. Another ground of the 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 merely restricted some of the functions of advocates in certain courts.

6. RIGHTS TO HEALTH AND EDUCATION

The right-to-health provisions have only rarely been applied in the jurisprudence of the constitutional courts of CEE thus far. One example was a Croatian Constitutional Court decision of 1998, in which a provision of the Law on Health Insurance was successfully challenged. 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 thus the 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 showing how an old right, with a state socialism pedigree, became quite crucial in the new economic situation in which the state has ceased to be the main employer and, in consequence, is no longer the provider of 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 of health care, 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 some practical difficulties, and, again, it was the job of the constitutional courts to narrow down its meaning. Consider the example of Poland. Here, the constitutional text was rather ambiguous: Art. 70 para. 2 provided, in the first sentence, that “Education in public schools is free”, while the second sentence allowed a statute to provide for “rendering some educational services by public universities for fee”. Many understood that those “educational services” applied to mature and distance-education students who attend separate courses, and that the first sentence of this provision prevented the imposition of fees upon day students admitted in the regular selection process. Despite this, the Constitutional Tribunal upheld statutory regulations that provided for tuition fees to be paid by regular students in public universities, as long as the universities also provide regular education to a certain number of students for free. The argument of the Tribunal went as follows: the right to education (art. 70) is, in its essence, a guarantee of “availability and universality” of education, not of it being free of cost. To be sure, the second paragraph of the article provides for “free education in public
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schools” but this is only one of the elements of that right and should be interpreted as being derivative from and instrumental to the principle of “availability and universality”. The guarantee of free university education is not absolute and unlimited. Article 70 paragraph 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 through different types of study programmes; both free (as the fundamental form) and also other forms of studies with respect to which students themselves would be expected to contribute financially. In deciding on the tuition fee, the actual costs of study play the central role, and the fees cannot apply to that part of the educational work of the university that is fully financed by public funds. The Tribunal 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) “on the condition that the introduction of tuition fees was brought about in order to assure as wide access to education as possible”. As can be seen, the Tribunal 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 the basis of the unspoken assumption that to introduce full fees for at least some regular students (but not to all, as this would be unconstitutional) is a Pareto-optimal solution because the only other alternative option would be to reduce the student intake; thus, those who now have to pay would not have been admitted at all if the universities had been compelled to offer education to non-paying students only. This seems like a common-sense solution; the downside, however, is, of course, that it creates incentives for universities to steadily reduce the number of places offered for free, and thus, in practice, to endanger the very principle of universal access that is posited as the essential meaning of the Art. 70 guarantee.

7. CONCLUSIONS

For various reasons mentioned at the beginning of this chapter, constitution-makers in CEE did not really face the choice of whether to constitutionalise socio-economic rights (notwithstanding the invitations by some foreign, especially American, experts to leave these rights outside the new constitutions). They rather had to decide how many rights, which rights and how these rights should be constitutionalised. As a result, CEE constitutions present reasonably broad catalogues (with some variants, identified earlier in this chapter) of these rights, which correspond to the concerns, basic needs and legitimate claims of people in the field of social policy in an age of economic transformation resulting in the collapse 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 the general public 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 and implementation of these rights has contributed to the size of the problem; in Poland, for example, there are nine million people claiming old-age pensions or disability benefits in a total population of thirty-nine million. In a situation in which governments, struggling with budget deficits, were forced to restrict spending on social services, the potential for challenge centred on the socio-economic rights written into the various constitutions was obvious.

These challenges naturally found their expression in the case law of the constitutional courts in the region. Whether they wanted it or not, 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) in which the constitutions themselves have not drawn any meaningful boundaries between those rights that are and those that are not enforceable by the courts in the process of constitutional review. The courts have 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, an understanding of socio-economic rights as giving the courts a legitimate entry into the domain of socio-economic policy-making, and the probably sincere belief that all they were doing was applying constitutional strictures has encouraged 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), a sense of their own low institutional competence and technical expertise in the field, and a “minimalist” understanding of the function of socio-economic rights have often combined to constrain the courts from entering this minefield.

In the face of such conflicting pressures and incentives, it is unsurprising that the overall picture of the output of constitutional courts in this field is ambiguous. Regardless of whether one welcomes or deplores the intrusion of these courts into the arena of socio-economic rights, one must admit that, at times, some decisions of great economic importance have been handed down. The decisions on pensions in Poland\(^{142}\) and Croatia,\(^{143}\) to mention only two countries, frustrated to a very high degree the plans of the respective governments for reform of the social security system. On the other hand, there were cases in which the constitutional courts 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 invalidated by the Constitutional Court, even though it might have been seen to contradict the constitutional right to free health care.\(^{144}\)
There were also numerous instances in which the constitutional courts did intervene (as they were constitutionally compelled to), and reinterpreted the right in question in such a manner as to make it compatible with the new reality of a socio-economic system in which the state no longer dispensed all of the benefits once covered by the meaning of a constitutional right. They thus rendered the right more realistic, more relevant, and more appropriate considering the systemic changes to, and the fiscal realities of, the post-communist state. The decision of the Polish Constitutional Tribunal on the right to “free” education 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 tuition would, in effect, harm the very people whom the constitutional right in question was meant to protect. If a university has to make a choice between restricting the number of enrolments (because of scarcity of public funds and inability to charge tuition) or charging some students for tuition (on the condition that the rules are clear and non-arbitrary), and given the strong persistence of formal and informal mechanisms of social reproduction that ensure that the student body is largely composed of children whose parents themselves went through higher education (and are thus, typically, more affluent than others), the less advantaged may actually be better off in terms of access to education if they can buy their way into a public university rather than if its doors would remain closed to them. While there is no one obvious answer to the dilemma faced by the Constitutional Tribunal in this decision, the outcome that it reached is not obviously unreasonable, and led to a partial reconciliation of the constitutional text with prevailing socio-economic realities.

For this reason, I am unable to agree with a leading expert on post-communist constitutionalism, Professor Andras Sajo, who deplores the fact that post-communist constitutional courts have perpetuated the wrong welfare policies. Sajo’s claim is that, upon entering this domain, the courts have supported the status quo in the field of welfare, rather than transformative welfare policies, and that they have consistently opted for an egalitarian-distributive, rather than a merely corrective, conception of justice. For one thing, I would not characterise all policies that look as if they are based on distributive justice (e.g., universal as opposed to individualised free services, the 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, etc.) as necessarily irrational, in the same way that State-sponsored, mechanical 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). 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 of the purported beneficiaries, as in the right to compulsory and free education up to a certain stage.

However, and 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 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 its cost has to be balanced against the costs of administering a highly individualised system of corrective justice. These include, to begin with, the 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 deterrence of this. Finally, there is the possibility of “perverse incentive” effects. For example, a decision to refuse a pension to those pensioners who undertake paid work – a typical corrective justice device – may create a counter-incentive against pursuit of employment by retirees who are able to work. This was the subject matter of the decision by the Bulgarian Constitutional Court in 1997, discussed above. The law in question would make the right to a pension contingent upon not having any other income. It is worth recalling that the Constitutional Court struck down this law 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). The Court’s action in this case indeed resembles 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 constitutional courts – in interpreting welfare rights and in articulating the meaning of other provisions with consequences for welfare – been uniquely *status quo*-maintaining? This is Sajo’s thesis, and, in his article, he supplies important evidence to illustrate this pro-*status quo* effects of their judgments (the doctrine of vested rights, etc). He additionally explains that the logic of representative democracy reinforces the incentives of the governing elites to cater to the interests of groups interested in the maintenance of the *status quo*. Then again, it is certainly arguable that democracy and civil and political rights can also play a role (although, perhaps, a weaker one) in influencing socio-economic policy in the direction of change; and some credit for protecting these must be given to constitutional courts. János Mátyas Kovács has coined the notion of “invisible welfare”, that is, welfare promoted by the new liberties. Democracy and the rule of law, claims Kovács, promote the establishment of new welfare institutions, from trade unions to private kindergartens, and the introduction of new social policies, from openly acknowledging poverty to allowing patients to be cared for by the doctor of their choice. These are examples of the potentially transformative impact of civil liberties on welfare. It has to be admitted that, by and large, constitutional courts in the region have a positive score card when it comes to the protection of constitutional civil and political rights, regardless of the occasional bad decisions in
which rights-restrictive laws have not been struck down or rights-protective laws have been invalidated, as shown in Chapter 6 of this book.