



**Lex et Res Publica**

Polish Legal and Political Studies

Edited by Anna Jaroń

Volume 1

Anna Jaroń

# Socio-Economic Constitutional Rights in Democratisation Processes

An Account of the Constitutional Dialogue Theory



**PETER LANG**

Internationaler Verlag der Wissenschaften

## Chapter 3

# Constitutional Debates: Similarities and Differences

The inclusion of social and economic rights in the constitutions of Poland, the Czech Republic and Slovakia was one of the most pertinent issues of the constitutional debates in these countries in the 1990s. The major regime change from communism to democracy mainly intensified discussions over the constitutional enforcement of individual rights in the newborn democracies, what was an expression of a need to guarantee stable and reliable mechanisms that regulate the relationship between the state and individuals. In the early phase of the constitutional debates, largely dominated by emerging political elites,<sup>120</sup> ideologically driven proposals on how to formulate and define constitutional rights were put forward. The scale of socio-economic rights advocacy took different dimensions in these three countries, not only because of the diverging design of constitutional debates but also because of the differences in the structures of the three constitutions. One of the important factors that has influenced the make-up of constitutional debates was perhaps the already mentioned role of political elites in the three countries. Secondly, the timing and the length of debates, which consequently affected the quality of constitutional debates of that time, indirectly influenced the manner in which individual rights have been written in the constitutions. Moreover, organisation of the text of constitutions as well as references and influences of external factors, such as international law, formalized the rights contained therein.

The main characteristics that the three countries' constitutional debates share is not only the general tendency to inscribe individual rights in democratic constitutions, but also to introduce new laws within the framework of social and economic reforms. The latter, was an especially interesting and complex issue as

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120 For a detailed study on post-communist elites in Poland, the Czech Republic and Slovakia, their influence and role in the process of constitution drafting see: John Higley, György Lengyel, *Elites after state socialism: theories and analysis*, Rowman & Littlefield, 2000.

it revealed the problem of adjusting laws to the capacities of the in-transition states to provide for certain benefits, but also pointed out the future duties and obligations of the state once it was democratised. As a consequence, attention has to be paid to the question of the institutional arrangements, and consequences of the introduction of justiciable constitutional social and economic rights. This in turn leads to an interesting study on the way in which constitutional courts have gained their strong position in constitutional interpretation. After all, constitutional courts were the new institutions either introduced by the constitutions, or which started to operate as a result of democratic changes, not having had a strong tradition within the institutional design of the Central and Eastern European states. Were the constitutional provisions so obvious in assigning the courts a privilege of the "last word"? How did the constitutional courts interact with other institutions, contributing thus to overall inter-institutional accountability? And finally, were the Polish, Czech and Slovak Courts active in adjudicating socio-economic cases?

### 3.1 Socio-Economic Rights Debated

The constitutional discussions took different forms and varied in timings, lengths, actors involved and formulas accepted to organize such debates.<sup>121</sup> In Poland, the debate over the draft constitutional Charter of Rights and Freedoms clearly distinguishing "Social and Economic Rights and Freedoms" from "Economic, Social and Cultural Obligations of Public Authorities" was interrupted by the dissolution of the Parliament that led to new parliamentary elections. In the case of the Czech and Slovak Republics the issue of the division of the country was more important than the actual provisions of fundamental rights, despite the great Czech commitment to the fundamental rights' movement encouraged by Václav Havel. Finally, the Slovak constitutional provisions on fundamental rights are only slightly different from the Czech Charter on Fundamental Rights

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121 Poland was the last country among the three under study to have its constitution adopted (1997). The case of the Czech Republic and Slovakia is interesting, since these two countries underwent a separation from one political entity (first Czechoslovakia, and then the Czecho-Slovak Republic). Consequently, the Slovak Constitution was passed in September 1992, while the Czech was adopted in December 1992. Constitutional design was negotiated in Poland between the reformed-communist leadership and the opposition over a period of several months, while the constitutional debates in Czecho-Slovakia were dominated by the political developments and took a form of hasty meetings of the political elites. The focus on social issues and economic reforms in these two countries was therefore put aside until the split of Czecho-Slovakia.

and Basic Freedoms. This not only indicates a poor commitment to the enforcement of human rights at the beginning of the constitutional drafting process, but more importantly has a bearing on the development of the institutional system of promotion and protection of these rights.

The social and economic provisions inscribed in all the three constitutions result from a political compromise conceived under pressing conditions and specific political contexts. Does it imply that social and economic rights lack any axiological or substantive coherence in the constitutions of Poland, the Czech Republic and Slovakia? A short overview of socio-economic constitutional provisions with background indicators to their constitutional fixation should shed a light on the logic according to which this category of rights has been settled down in the three respective constitutions.

### 3.1.1 Who?- Composition and Role of Political Elites in Constitution Drafting

The social and political change from state socialism encouraged modifications within the political elite, who, during the period of transformation, bore the primary responsibility for framing post-socialist order and played a seminal role in shaping the institutional and legal design of the new democratic regime. It is clearly recognized that the emergence of “new” elites in states governed by democratic constitutions was neither the effect of the replacement of ex-communists by the members of opposition, nor was it the result of the creation of an entirely new political class. Instead, the phenomena of elite circulation, described by Mosca and Pareto,<sup>122</sup> belongs to the various processes accompanying a widely understood democratic transformation. By and large, the political elites in communist Poland and Czechoslovakia oriented themselves towards political, economic and social reforms. The growing importance of opposition and the progressive internal changes in both the Polish and the Czech communist parties that allowed its members to adapt to upcoming democratisation, stimulated the so called “socialism with human face”, an orientation towards principles characteristic to democratic regimes, mainly of political liberalisation. Especially after Stalin’s era the Party apparatus started to move away from using repression as a primary tool for keeping the power. Likewise, the leadership tried to refer to and reinforce its legitimacy to the population. Notwithstanding the fact that the late communist or rather socialistic regimes to a certain and lim-

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122 Gaetano Mosca, *The Ruling Class*, McGraw-Hill, New York, 1939; Vilfredo Pareto, *The Rise and the Fall of Elites*, Torowa, New York, 1968.

ited degree turned to legality, it was still unthinkable to assault or to resist the leading role of the Communist Party. Nevertheless, the legal norms the leadership turned to had to become somehow more reliable and realistic. Naturally, changes reached the constitutional level.

In Poland numerous amendments were largely introduced in 1976, and later in 1989 by the so called April Amendment (*nowela kwietniowa*) and the amendments of the contractual parliament,<sup>123</sup> and from 1992 up until 1997 when the new Constitution has been agreed upon, consequently turned the focus from the People's democracy through state socialism to the rule of law. One of the most meaningful amendments concerned the issue of restoration of sovereignty, the abolishment of the formal limitation on sovereignty determined by membership in the Warsaw Pact and dependence on the Soviet Union, as well as the severance of the Brezhnev Doctrine which set the possibilities for internal reforms. These changes authenticated primary constitutional reforms.

Importantly, the first democratic elections in Poland and also in the then-Czechoslovakia did not acknowledge any clear electoral preferences between communists and anti-communists. The results of these elections were rather a proof for a desire to distance the politics from the communist doctrine, but it did not entirely exclude ex-members of the Communist Party from the political scene. Groups of the "reformers" (the reform oriented members of the Communist Part) played a vital role in leading to the negotiated democratic transition, and participated in the subsequent constitutional debates. Being a democrat was not reserved only for the members of the anti-communist opposition, but also became accessible to all who believed in democratisation. In Czechoslovakia it was a number of Prague Spring reformers (the so called: *osmasedesatnik*) together with the 1980s dissidents like Václav Havel that formed the Civic Forum (*Občanské Forum*), a form of a civil society organisation, which then was transformed into a political party and which played a major role in drafting the text of the Czech Constitution, also adopted with some minor changes in Slovakia.<sup>124</sup>

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123 Parliament chosen in the first semi-democratic elections where seats were guaranteed to the Communist Party despite of free elections.

124 Note that the Charter of Fundamental Rights and Basic Freedoms was adopted on 16 December 1992 by both the Czech National Council and the Slovak National Council, just a few weeks before the Czech and Slovak Federal Republic ceased to exist. Pursuant to Art.1.2 of the Constitutional Act No. 542/1992 the Czech Republic and Slovakia became the successor states, which implies that the question of legal continuity had to be resolved. By passing a Law on Provisions Connected with the Dissolution of the Czech and Slovak Federal Republic (Constitutional Act of the Czech National Council No. 4/1993 Coll. of 15 December 1992), the Czech Republic assumed all of the obligations arising from interna-

The unity of the Czechoslovak elites was disrupted by the Velvet Divorce in January 1993, with the separation of the major sources of economic conflict between Czech and Slovak Republics. This fact, nevertheless, did not have significant influence on the constitution drafting in Slovakia.

After the June 1990 elections in Czechoslovakia a new Federal Assembly was elected, which then re-elected Václav Havel as President.<sup>125</sup> In September 1990, members of the National Assembly brought into being the Constitutional Commission to draft a new constitution.<sup>126</sup> The competence of the Commission was limited however, since certain sections of the Constitution such as issues dealing with federalism, the bill of rights, and the constitutional courts, were subjected to the competences of the Federal Assembly. It was decided that the Federal Assembly would adopt solutions relevant to the reserved issues by way of amendments to the current Constitution, and that it would incorporate them into the final text of the new constitution.<sup>127</sup>

In Poland, after the first democratic elections in June 1989, the Constitutional Commission of the Polish Parliament (Sejm) was established.<sup>128</sup> According to the principle of proportionality all of the groups present in the Sejm had their representatives in the Commission, although the membership varied and changed because of frequent changes in the compositions of political parties at that time. The Constitutional Commission was composed of three Subcommittees: the Subcommittee on Institutions, charged with designing a new structure of government; the Subcommittee on Social and Economic Provisions, charged with preparing articles dealing with new economic order, issues of property and labour; and the Subcommittee on Human Rights, charged with the preparation of a new bill of rights. The first Committee was dominated by the members of the ex-Communist Party, the PZPR (*Polish United Workers' Party*), while the two others were mainly composed of the Solidarity representatives associated in the

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tional law in respect of the Czech and Slovak Republic, except for obligations associated with the territory to which the sovereignty of the Czech Republic does not extend, therefore explicitly defining the territorial scope of its legal obligations.

125 Havel became president on December 29, 1989. According to the new election laws, adopted in the spring of 1990, the Federal Assembly re-elected him for the post of the President.

126 The Commission was assisted by a committee of experts.

127 The amendment procedure under the Constitution of 1960 as amended in 1968 predicted that changes required a three-fifths vote of each national delegation in the Chamber of Nations as well as three-fifths of members of the Chamber of the People.

128 The Constitutional Commission was called into being on 7 December 1989.

Civic Parliamentary Club (*Obywatelski Klub Parlamentarny*).<sup>129</sup> The Commission met fifty six times from December 1989 until October 1991, and although it concentrated its works on the issue of the new constitution, it has largely directed its attention to three issues of major importance; namely, on the electoral law for the future parliamentary elections, constitutional amendments (what inhibited the Commission members from working on merits), and on the question of a constitutional referendum. The main issues discussed in the Subcommittee on Social and Economic Provisions concerned the principle of social justice<sup>130</sup> and the question of the actual inscription of socio-economic rights within the new constitution. While the first issue helped to find a common ground for fur-

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129 According to Wiktor Osiatyński, one of the Constitutional Commission's external experts, inasmuch as most important constitutional reforms concerning the change of the political system have already been approved in the Small Constitution, the majority of seats in the Sub-Committee on the Institutions were offered to the ex-communists in order to allow the parliamentarians who had descended from the opposition to sit in the two other Subcommittees. Consequently, Osiatyński claims that by assigning chairmanship to the Solidarity descendants, members of the OKP- Andrzej Zawisłak (and then to Anna Dynowska) in the Subcommittee on Social and Economic Provisions, and Hanna Suchocka in the Subcommittee on Human Rights- it had been assured that the creation of a new socio-economic system would first envisage protection of reforms commenced by the then Minister of Finance Leszek Balcerowicz, and second that in this way it renders the domain of human rights protection and promotion to the representatives of the Solidarity movement, which considered fundamental human rights as a basic principle in its fight against the communist regime. See in: Ryszard Chruściak, Wiktor Osiatyński, *Tworzenie Konstytucji w Polsce w latach 1989-1997*, Instytut Spraw Publicznych, 2001, p. 14-15. Andrzej Rapaczyński, another external expert of the Subcommittee on Institutions, also records the fact that most of the members of this Committee were tied to the old regime. He admits that except for a few expatriate experts associated with the new regime others were recruited from the once-tightly controlled university's law faculties. Despite of Solidarity concerns over the work of this crucial Committee, in Rapaczyński's opinion, the Committee managed to distance itself from the communist loyalties and worked quite harmoniously to draft the best possible proposals for the sections of the Constitution dealing with the composition and functioning of the parliament, the government, the presidency, and the judiciary. See in: Andrzej Rapaczyński, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, University of Chicago Law Review, No.58, 1991, p.603

130 The principle of social justice as one of the constitutional principles, which should be taken into account in the new Constitution was discussed on the plenum of the Commission for the first time in February 1990. See: Komisja Konstytucyjna Zgromadzenia Narodowego. Builetyn I, Wydawnictwo Sejmowe, Warszawa 1991

ther discussion,<sup>131</sup> the latter resulted in a clear division of opinions and convictions. Notwithstanding the general tendency of democratisation supported by political elites- both ex-communist and opposition- questions on the legitimacy of representatives who drafted the democratic Constitution of Poland and Czechoslovakia (then of the Czech Republic and of the Slovak Republic) arose not only in public debates but also amongst the elites. The question of struggle for power prevailed over constitutional merits, and what consequently provoked either lengthy doctrinal disputes in Poland,<sup>132</sup> in Czechoslovakia resulted in the rapid initiative of a group of politicians to draft the Constitution overnight.

In Poland especially, there was considerable controversy over the fact that the Contractual Sejm was not a product of fully free elections.<sup>133</sup> With the preponderance of the ex-communist deputies, the Sejm was not considered to be fully legitimate to give expression of the will of the Polish people. When recalling in 1995 the works of the Constitutional Commission its President Bronisław Geremek said in one of the interviews that the first Parliament was least democratic from among the Parliaments he has worked in but had a sense of original sin and therefore functioned differently. Nevertheless, in his view, it worked most efficiently for the democracy.<sup>134</sup> Rapaczyński, one of the Commission's experts, on the other hand

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131 Ryszard Chruściak, Wiktor Osiatyński, *op.cit.*, p.19-23. During constitutional debates in the Commission both the principle of social justice and the role of work in societal life were most commonly referred to as a manifestation of the rapprochement between socialist doctrine and the Catholic Church's social teaching. Paradoxically, even though traditionally communists showed reluctance and aversion to the Catholic social teaching, it was easier for the post-communist socialists to find a common language in this sphere with catholic groupings rather than with the followers of liberalism.

132 Mostly however, attention from the merits on constitutional rights shifted to the power-relations dispute when Lech Wałęsa became the first president of the Republic of Poland and when he and the Solidarity forces around him lobbied for a strong presidency system. The Solidarity movement was divided in this respect, since the so called Warsaw group favoured the Chancellor system. In this sense, issues under jurisprudence of the Constitutional Committee were often politicised and watered down the Commission's importance.

133 Contrary then to the Sejm, the June elections to the Senat (the upper Chamber of the Parliament) were entirely free. As a result Senat was predominantly composed of the Solidarity representatives. This as a matter of fact became yet another factor which gave a reason to weaken Sejm's Constitutional Commission. Namely, the Senate, with a sense of its greater legitimacy, formed its own Constitutional Commission and began to work on a separate draft of the Constitution.

134 See: Witkor Osiatyński, *An Argument against Popular Ratification and for Chancellor Democracy. Bronislaw Geremek on constitution-making in Poland. Interview with Bronislaw Geremek*, EECR, Vol.4, Nr.1 1995, pp.42-45, p.45.



claims that the Sejm was perhaps more representative than if the elections had been entirely free and the Solidarity dominated Senate was a good example of it. Moreover, the unelected but contracted members of the Sejm not only introduced some variety to its composition, but they also tried to prove that the dubious legitimacy of their position made them exercise great care in opposing the Solidarity-dominated parliamentary leadership.<sup>135</sup> Consequently, a doubt on the legitimacy of the drafters resulted in questioning the legality of the resultant text of the Constitution. In order to overcome this obscurity it was decided (mainly by the Solidarity leadership in the Parliament) that after the draft of the Constitution was being completed by the Constitutional Commission, the National Assembly would approve the new constitution by a two-thirds majority and then submit it to a national referendum. Although technically the referendum was non-binding, it gave the new constitution the legitimacy derived from direct popular approval. Ratification of the Constitution through a broad participation of the political elite and the society was thought to confer legitimacy on the text.<sup>136</sup>

### 3.1.2 When and How?- Time and Length of Constitutional Debates

During the early stages of the constitutional debate in Poland, Sejm's Constitutional Commission met in plenary sessions and discussed the general principles of the new constitutional order, the relationship between Polish domestic law and international law, and the basic types of individual rights that were to be included in the new Constitution. Subcommittees met to discuss more detailed issues within their competences and subsequently sent the results to the Commission. The upper Chamber of the Parliament, the Senat has also initiated works on the new Constitution. Nevertheless, little attention has been given to its work, because no party leaders (including Solidarity's) approved its formation. Consequently, the Sejm's Commission managed to retain its position and continued to work on the constitutional project. Yet, the Senat's initiative was also questioned as to its legitimacy, since the 1952 Constitution placed the matter of constitutional changes to the Sejm. The role of the Senat was clarified in a statute

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135 Andrzej Rapaczynski, *Constitutional Politics in Poland...*, p.603-604.

136 Still, predominant political tensions and the focus on consensus building was not perhaps the best solution for the drafting of the Constitution. See again the interview with Bronisław Geremek in: *An Argument against Popular Ratification ...EECR Vol. 4 Nr 1 1995 pp.42-45*, p.43. Geremek assesses from a time perspective that "compromise should not shape the actual drafting of the constitution but [...] it should be an aspect of the general political conditions, preceding the constitution-making process". Subsequently he ascertains that in such circumstances, constitution should be passed when conflicts are at minimum and the chances for agreement are greatest.