

ENDING POVERTY BY JUDICIAL DECREE

Constitutionalised welfare rights are a utopian nightmare,
argues **Suri Ratnapala**

There is a movement around the world that is clamouring for the recognition of an extensive catalogue of positive social, economic and cultural rights as constitutionally protected and judicially enforceable entitlements. The claims include rights to free health and education, sufficient food, adequate shelter, decent employment, state pensions, fair wages and prices, consumer protection, and a clean environment. There is plenty more on the wish list. The push for judicialising welfare rights is strongest in countries that can least afford judicially mandated welfare goods but it is also gaining some traction in Western democracies, as evidenced by the recent Swiss referendum on a proposal to create a universal basic income and similar moves in Finland. The Swiss proposal was overwhelmingly rejected by the electorate but this idea is receiving serious attention in some European legislatures.¹

At the time of writing there are reports of serious civil unrest in South Africa, Brazil and Venezuela related to economic hardship. These three countries possess enormous natural resources. They have constitutionalised welfare rights. In all three democracy and basic civil rights and liberties have been debased by the abuse of state power and corruption. There is a lesson in these facts that countries contemplating justiciable welfare rights ignore at their peril.

I argue that the movement to judicialise welfare rights is a wholly misguided program that will seriously damage cherished institutions like representative democracy, the separation of powers, the rule of law and classic civil rights and liberties. It will also have disastrous economic consequences

that will disproportionately harm the most disadvantaged members of society and defeat the very object of the exercise.

Motivation behind the movement to judicialise welfare rights

The countries that have embraced this utopian constitutional model include most Latin American nations, Kenya, Zimbabwe, Haiti, South Sudan, East Timor, Somalia, Bolivia, South Africa, Nepal, Niger, Kenya and Venezuela, which has a bill of rights longer than the entire Australian Constitution. These countries share two features. First, they have unimpressive records of promoting the welfare of people, some of them being among the poorest by the measures of human development.² Even the resource-rich Republic of South Africa is ranked by the most recent United Nations Development Programme index at 116 out of 188 countries. Second, they rank poorly on key indicators of the rule of law.³ In contrast, constitutions of the most prosperous Western democracies with extensive welfare systems do not entrench social welfare as constitutional rights. The so-called Asian Tigers (the nations of the



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Far-East with dynamic economies) have achieved phenomenal success in national wealth creation and raising the living standards of their citizens without judicial interventions in social and economic policy. The success of these countries was built on the rule of law and economic freedom. The positive correlation between economic performance and economic freedom is compelling.⁴ So what drives this movement to imitate the losers and ignore the winners?

Socialism had the chance to prove itself in the workers' dictatorships of the 20th century but failed. First, because they were dictatorships that could not be held to account by the people they were supposed to serve. Second, because their command and control economic systems were too inefficient, flawed and corrupt to produce the goods and services needed by the people. Modern socialists seek to combine capitalist modes of production necessary to create wealth with redistributive programs to disperse wealth. They are often aided in these aims by conservative, liberal and populist parties seeking electoral advantages.

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The movement to judicialise social and economic rights is a recent strategy to advance the socialist vision. The concept of right with its connotation of private entitlement is alien to traditional socialism. Marx and Engels argued that rights presuppose law and law serves to facilitate and maintain the capitalist modes of production.⁵ Professor Tom Campbell, a deep-thinking socialist opposed to the judicialising of welfare rights, explains: 'Socialist rights are more organisational than political in that they inform the cooperative social effort rather than represent demands to be disputed and traded off against each other. . . . Socialist rights relate to mandatory rules but not to a supporting set of coercive sanctions'.⁶ The idea of rights is also rejected by modern day radical theorists like those in the Critical Legal Studies and deconstructionist schools of thought.

The constitutional welfare rights movement is driven mainly by leftist activists who are creatures of the liberal democratic political order and who seek to use all the instruments of power that the system offers to transform the fundamentals of that order. It is part of the progressivist effort to sanctify welfare entitlements as human rights, constitutionally entrench them and thereby foreclose further political contestation about them. According to activists, the debate on social and economic rights is over just as the debate about climate science is settled. Once these rights are constitutionalised, the political system simply has to find ways and means to deliver the benefits, where necessary at the direction of the courts. The welfare rights movement is naturally popular in less developed nations where large segments of the population seek short-term relief from poverty. It is also supported by sections of the professions and industries that stand to gain by providing court-mandated goods and services. Those who oppose them are vilified as heartless neoliberals out of step with modern constitutional values.

Reasons not to constitutionalise welfare rights

We all desire a world in which all persons enjoy high living standards. The question is how can we get there?

Advocates of constitutional welfare rights appeal frequently to international treaties. Yet no international treaty requires social and economic rights to be judicially enforceable. The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not set up an enforcement system. The principal obligation of states is to make progress by all appropriate means including legislation (Art 1(1)). The means are left to the judgment of elected governments and lawmakers. The only absolute obligation is not to discriminate among persons in facilitating the enjoyment of these rights—a norm that is derived from civil rights. No sensible person can quarrel with this statement. In fact this is what representative democracy is all about. No international treaty is needed to instruct liberal democracies on their obligation to promote the welfare of citizens.

We have to ask why—despite almost universal support for them and despite these rights being at the centre of political struggles both at national and international levels at least since the French Revolution—they have not been made judicially enforceable even in the richest nations with the most extensive welfare systems like Australia, Britain, Sweden, Norway and Germany. The answers are compelling.

1. Welfare rights are not rights in the true sense

There are different theories about the nature of a right, but it is indisputable that a person has a right only if someone else has a correlative duty.⁷ I can claim a sum of money but unless someone else has a duty to hand me that sum, my claim is just a wish. There are of course moral rights and legal rights, often coinciding. A seller has a moral right and a legal right to be paid for goods delivered. But not every moral right carries a legal duty. Benefactors have a moral right that beneficiaries show gratitude, but no legal right to receive it. The existence of a right depends on a rule of conduct for without rules there are no duties and therefore no rights. Welfare rights are expressed as generalised claims not as rules of conduct. They are rights only in the sense of moral or political claims. The content of a welfare ‘right’ is unknowable in advance.

2. Enforceability of welfare rights undermines the rule of law and harms judicial independence

The rule of law requires the governance of knowable, general and predictable law. Welfare rights as legal entitlements depend heavily on judicial discretions based on policy and personal moral judgments. They are by nature aspirational. It is not possible for the state or citizens to identify in advance a rule of conduct that complies with a welfare right. A court that is called upon to determine the just wage or the reasonable price for a product or service or the emission standard for a particular industry would be making the law and not adjudicating according to law. Moreover, the court in many cases will not be able to state a general rule of conduct but will have to make the law for the particular case. A particular ruling, though, can unsettle the rights of

countless others as the ripple effect is felt across the policy spectrum.⁸

If economic and social rights are made justiciable, the courts vested with this jurisdiction will become forums for distributional politics. There is then the real danger of the courts becoming politicised, leading to the loss of public confidence and moral authority. This is why the High Court of Australia has consistently ruled against the vesting of non-judicial powers in federal courts.⁹

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3. Judicial usurpation of parliamentary authority

Justiciability of welfare rights diminishes parliament’s power to determine social and economic policy and hence undermines democracy by removing these issues to an unelected body. An elected government responsible to an elected parliament is best placed to make policy decisions that promote prosperity and the general welfare of the people.

The judiciary is wholly incompetent to make judgments on social and economic policy. For example, what is the better way to generate jobs and increase incomes? Is it by policies that promote private enterprise and competition or by the expansion of the public sector? How can the environment be improved? What should be the just wage of construction workers that would not result in a contraction of the building industry? These are political decisions that should only be made by a government with access to relevant expertise and which is responsive to the pressures of public opinion, qualities that the judiciary lacks. Aryeh Neier, a Human Rights Watch co-founder and one time national director of the American Civil Liberties Union, makes the point this way:

If you are allocating the resources of a society, how do you deal with the person who says they need that kidney transplant

or that bypass or those anti-retroviral drugs to save their life when the cost of these procedures may be equivalent to providing primary health care for a thousand children? Do you say the greater good for the greater number, a utilitarian principle, and exclude the person whose life is at stake if they do not get the health care that they require? I do not believe that is the kind of thing a court should do.¹⁰

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Under a system of justiciable economic and social rights the courts gain power to make decisions that impose costs for which they are not responsible. The court, for example can ask the government to provide a service without stating how it is to be funded. Unlike in judicial decisions made according to law, judges simply cannot foresee the consequences of their decrees to provide welfare benefits. A government that must comply with an irresponsible court order will be compelled to reduce expenditure in other areas or increase the tax burden on the people.

Enforcing the economic right of one section of the community may impact on the economic right of another section. The costs of protectionist policies, for example, are borne by consumers. Price control of basic consumer goods leads to scarcities and black markets, harming the poor most. In some cases the affected sections of the community may have to be compensated in one way or another—something a court cannot do. These are decisions for a politically responsive elected government. As Daniel M. Brinks and William Forbath comment: ‘it appears that, if judicial interventions on behalf of SER (social and economic rights) are to have any impact at all, courts and advocates alike will have to be sophisticated in ways that go far beyond traditional roles’.¹¹ The problem is that the further the courts move away from their traditional role of adjudicating according to law, the greater the harm

they cause to democracy, constitutional government and civil liberties.

4. Judicial enforcement of welfare rights endangers civil and political rights.

It is no surprise that the nations that have the most extensive social welfare systems are those that have built national wealth on the foundations of the rule of law, robust democracy and civil liberties. The scale and affordability of the welfare state in Western democracies has been seriously questioned in recent years. That aside, there is no doubt that the most generous welfare systems in the world are found in developed countries whose superior economic performance is based on civil and political freedoms, in particular secure property rights and freedom to engage in a trade, occupation or profession. Civil rights and liberties directly and indirectly contribute to the progressive improvement of the conditions that make welfare claims affordable. The Asian Tiger economies have not produced extensive welfare systems but have delivered high living standards that make state welfare largely superfluous.

The coercive enforcement of economic and social rights by courts has the opposite effect. Welfare claims are not decided according to rights and duties established by law. They are resolved according to policy and the court’s subjective view of fairness and the litigant’s perceived needs. This means that welfare claims against individuals and firms such as employers, traders, private hospitals and private schools, almost always are met by derogating from their existing rights. These judicial interventions, by destabilising rights and limiting freedoms, undermine the very conditions that promote national prosperity and therefore the affordability of welfare.

5. Constitutionalising welfare rights harms the poor

Upper income groups have been the main beneficiaries of constitutionalised welfare rights. This is not surprising in a constitutional scheme that invites expensive litigation. There are two kinds of litigation to expect: (a) public interest litigation seeking broad rulings such as the determination of a national fair wage, a universal age pension, free

education and free health care; and (b) individual claims for benefits such as support for expensive medical treatments. The experience of countries that have embraced the judicialised welfare model is that the overwhelming majority of cases will be of the latter kind. Octavio Ferraz points out that there are over 40,000 individual actions for medical benefits in Brazil each year.¹² Most of these cases are claims for expensive medical treatments presented by the rich. Ferraz concludes:

The explanation for this high concentration of litigation in developed states, cities, and districts is hardly surprising: access to courts and lawyers is beyond the means and reach of most poor Brazilians. Given this profile in which most litigation focuses on health attention that cannot be regarded as a priority for a resource-constrained public health system operating in a highly unequal country, and which mostly benefits a small minority who is able to use the court system to its advantage, the case for taking social rights away from the Brazilian courts seems rather strong.¹³

The less privileged sections of the society who form the majority of people in developing countries have greater bargaining power at the ballot box than in the court room. This is the virtue of representative democracy.

Constitutionalised welfare rights—a utopian nightmare

Welfare claims are moral and political claims. They must be addressed in the theatres of political and moral discourse. Modern progressivists think that putting the courts in charge of welfare rights will insulate them from market forces and reactionary politics. Unfortunately, they will also succeed in removing matters of great national consequence from the public to the private sphere where a privileged minority will be able to gain benefits at the expense of the less-endowed majority. An ill-informed judiciary with power to intervene arbitrarily in market processes will dampen the economic activity on which the welfare of the people depends.

Advocates of constitutionalising welfare rights will do well to remember that it is not governments and courts but people who generate wealth and well-being. This is the most important lesson of economic history. The surest way to secure the welfare of everyone is to release the creative energies of the people. This can be done by strengthening civil rights and liberties, not by promoting an agenda of amorphous ambit claims in the guise of human rights.

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Endnotes

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