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The Wisdom and Enforceability of Welfare Rights as Constitutional Rights*

by Herman Schwartz**

For many people in the former communist bloc, the collapse of communism has been a very mixed blessing. There is obviously more freedom in most of these countries, but the modest economic security on which so many people relied is now gone and this in turn threatens democracy. This is not just a problem for countries in transition. The development of global capitalism and the dominance of market thinking have resulted in massive inequalities in many countries. In the United States, perhaps the richest country in world history, one in five children lives in poverty. As market capitalism sweeps the western and other parts of the world, the problem of inequality will grow.

At the same time, the last half-century has seen the ascendancy of the judiciary. This is the age of the judges. The establishment in much of the world of constitutional courts is perhaps the most prominent example of this development. These tribunals exercise immense powers in many areas and thus have had to confront the severe economic and social problems growing out of the transition to a market economy. The broad jurisdiction of these tribunals is due in part to the framework of these constitutions. Like constitutions elsewhere in the world, and unlike the United States constitution, East European constitutions contain extensive lists of social welfare rights and governmental obligations, which have been brought before their constitutional courts. These rights include the right to basic subsistence, food, clothing, housing, health care, education, special protection for mothers and children, and the right to work in its many facets, including the right to safe and fair conditions of work, to form trade unions, and to strike.

Whether economic and social rights should be included in new constitutions has been hotly debated among academics. As a practical matter, this is largely a non-issue now because almost all the constitutions adopted since 1945 contain a relatively full complement of such rights, in a variety of formulations. To most U.S. lawyers, however, including social welfare rights in a constitution verges on the unthinkable. Partly this is because Americans have been taught to think that constitutional rights depend on judicial enforceability almost by definition, and most U.S. lawyers believe that courts can enforce only negative rights, rights that *deny* power, and cannot impose positive obligations upon government, which social welfare rights do.

For purposes of discussion, there are two arguments against constitutionalizing social welfare rights: (1) whether they are judicially enforceable; and (2) whether it is consistent with a free, democratic, market-oriented civil society to have such rights in a constitution.

Before turning to these questions, however, a preliminary clearing away is necessary. Insofar as the issue is put in terms of the contrast between positive and negative rights, it should first be noted that many of the so-called social rights at issue are essentially negative rights. Some of these, such as the right to form unions, are just variations of the right to freely associate, a traditional negative right. The related right to strike includes the right to be free from interference with strikes, also a negative right. Even so outlandish seeming a right as the right to a clean environment will often call for just stopping public and private actors from polluting the atmosphere or the land, which is similar to traditional public-nuisance litigation.

Many of these social rights also are closely related to rights that are indisputably negative. The most significant of these is the right to be free from discrimination. Most countries already have statutes creating rights to public health care, education, maternity benefits, housing, social security, and similar benefits. In the enforcement of such statutory rights, the right of putative recipients to be free from discrimination has been routinely invoked.

Discrimination is not the only possible abuse of these rights. Established social programs may be administered in ways

implicating other recognized "negative" rights. Benefits can and have been denied to people because of their outspokenness, religion, or political affiliation. Such denials implicate freedom of speech, religion, and association. This implication of negative rights also applies to an interference with the right to work, and can come up in the context of hiring, discharge, or unfair working conditions.

Moreover, some social rights that require courts to order affirmative remedial measures involve traditional judicial functions. The right to safe working conditions is a good example. Courts frequently enforce this right in statutory, common law, and even constitutional cases.

The courts' role in commanding specific positive action, and not limiting themselves to prohibiting lawless acts, raises a larger consideration. As the late Harvard Law School Professor Abram Chayes pointed out 25 years ago, even U.S. courts have moved far beyond the narrow roles they used to play, and are engaged today in a wide variety of affirmative activities, ranging from supervision of school desegregation, prisons, and nursing homes, to monitoring corrupt unions. In all these cases, courts are doing much more than merely saying "No." Rather, they are actually setting standards, and in many cases requiring the expenditure of public money.

It is this latter point—court-ordered expenditures of public money—that raises the problems to which the criticism of constitutionalizing rights is primarily addressed. Suppose there is no health care or housing or educational system. By what authority does a court tell a legislature that it must create such a program? The exercise of such a power by a court raises issues relating to

continued on next page

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Welfare Rights, continued from previous page

separation of powers, budgetary priorities, and judicial competence. Moreover, it can induce conflicts within societies, for it involves reordering fundamental priorities, which historically has fallen within the province of the representative branches. And suppose there is so little money that the programs cannot be established. Won't there be disillusionment with democracy if such rights are not implemented?

This problem is more theoretical than real because almost all modern nations already have public health care, education, social security, and other benefits. The problems that arise usually revolve around the discriminatory or arbitrary administration of existing programs with which courts have been dealing for a long time.

Where healthcare, education, and social security programs do not exist, should the courts order the creation of such a benefit system? Americans wince at the thought that a court may order a legislature to pass legislation or spend money, even though much that United States and other courts do requires the expenditure of substantial funds on pain of contempt or some other sanction.

By contrast, many European and other constitutional courts do not seem at all reluctant to tell legislatures they must adopt specific legislation. For instance, in the early 1990s the Hungarian Court ordered the parliament to pass legislation protecting minorities and to establish a system of radio and television regulation. Though each took a long time to enact, the court orders were ultimately obeyed. Such judicial orders to a parliament to act, while not common, are not unusual, and in some cases, the court's authority to issue such orders is constitutionally authorized.

A legislature may, of course, refuse to follow the court's direction. Will this not weaken a court and indeed the rule of law itself, perhaps irreparably? Perhaps, but it is not likely. From time to time, courts have been defied, but this has not necessarily impaired their prestige, so long as such defiance was isolated and not routine.

The most implausible argument of all is that non-enforcement of some social rights will depreciate the currency of all or other rights, and of the rule of law itself. There is simply no evidence whatsoever that the denial or non-enforceability of some rights prejudices the enforcement of others, whether in the United States or elsewhere.

Nor does it follow that the presence of rights in a constitution requires that they be *judicially* enforceable for them to be meaningful. There is also *political* enforceability. An obligation that is constitutionally mandated will have more persuasive force in debates over budget and other priorities than something that is completely discretionary with the legislature. Proponents of universal health care and those concerned about the poor and needy might have fared better in the health care debates if health care and welfare were considered matters of constitutional right.

Nor does this mean that courts will second-guess the adequacy of governmental programs to effectuate such rights. In most countries, courts exercise very little supervision over the details of such programs, so long as there is no discrimination or other arbitrary application, and proper procedures are employed.

Nevertheless, questions remain: why should these rights be included in a constitution? Why should the relevant demands and needs not be left to the discretion of changing legislative majorities?

The answers to these questions depend on how one views a constitution. A constitution is more than a legal document. Drawing on a nation's experience of the past and its hopes for the future, it is the foundation charter of the national polity. Constitutions

create a set of mechanisms and values that are beyond the power of ordinary legislative majorities to change. Obviously, these include the mechanisms for the distribution of power, which are the most controversial everywhere and always. Further, constitutions ensure that the fundamental values of society are also rendered immune to transient legislative majorities.

In the United States and in most western societies, we have long accepted the fundamental nature of the basic civil and political rights. Almost all societies, save the United States, have also recognized the prime importance of social rights. Far from such rights being newly sprung from the paternalistic soil of communism, these rights go back at least to former U.S. president Franklin D. Roosevelt's Four Freedoms, which were prefigured in his 1941 State of the Union speech. They are enumerated in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, as well as in constitutions as conservative as the French Gaullist Constitution of 1958, and in the Italian, Spanish, Japanese, and virtually every other nation's constitution. This is because social rights are inextricably intertwined with civil and political rights. Destitute hungry people don't vote, and hungry people with no work to occupy them have no patience with the slow, often tedious haggling among sharply differing groups, and the resulting slow progress that is characteristic of democracy.

Finally, it has also been argued that positive rights impose a constitutional duty on governments to interfere with markets. But

the mere presence of such rights in the Polish or Hungarian constitutions, and the enforcement of these rights by their constitutional courts, hasn't interfered with the Polish or Hungarian free market reforms. Moreover, this is not really an argument against putting these rights into the constitutions, but against having them at all, for there is no reason to think that it is the constitu-

tionalization of these rights that is crucial. Regardless of whether the programs implementing such rights are in a statute adopted by a politically created majority, or result from governmental action fulfilling a constitutional duty, the interference with the market is the same. The fact that the interference results from an entrenched constitutional mandate rather than from an enactment by a transient legislative majority does not affect the fact or degree of interference.

It is now clear beyond dispute that a free society, dedicated to democracy and the rule of law, cannot be either established or maintained if people are hungry, homeless, sick, or uneducated. It is also becoming clear that, except in unusual circumstances, freedom, democracy, and their associated civil and political rights, are necessary for long-term economic and social stability. Few dispute the courts' role in promoting the traditional civil and political rights. But there also must be fairness and equity in the distribution of society's benefits, particularly those public benefits that are necessary to live a decent life, and especially during periods of economic and social privation. Experience in Europe, India, South Africa, and elsewhere demonstrates that while courts cannot abolish economic privation, they can provide at least some of the necessary fairness and equity. ☺

** This article is excerpted from "Should Social and Economic Rights Be Included In A Constitution?," an essay for a Festschrift in honor of Professor Helmut Steinberger. The essay was prepared for the Heidelberg Germany Max Planck Institute of Comparative Public Law and International Law.*

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