**Justiciable rights?**

BY BAKH TAWAR BIL A L SOOFI | 4/2/2019

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| THE prime minister has recently expressed his intention to amend the Constitution and bring socioeconomic rights such as the right to food, shelter, clothing, education and health within the ambit of fundamental rights thatcan be enforcedinourcourts.At present, these rights are not justiciable. This means that even though the state is required to provide housing, a person who is denied this facility cannot petition the court to obtain one. The prime minister proposes to change this by enabling citizens to compel the government to provide them with the most basic necessities of life. The idea is driven by the desire to promote social justice. Though it may be noble and lofty in theory, it may not work out in practice.When you impose an affirmative obligation on the state to provide for the satisfaction of its citizens` material needs and make that obligation justiciable, you end up taking power away from the people and give it to a group of unelected judges who can veto the collective will of the people.One of the primary functions of government is to determine how scarce resources are to be allocated and distributed amongst the competing claims of dif ferent individuals. People can disagree on how well the government has gone about its business and whether the existing distribution of resources is just or unjust. But these matters are best left to the political process where people can discuss them with one another and have a fair chance of convincing their peers of the merits of their proposals. What gives legitimacy to the political process is the f act that the losers of today can become the winners of tomorrow.When a counter-majoritarian institution acquires a veto over a matter that otherwise ought to be lef t to the people, it undermines not just the popular will of today but also the democratic deliberation of the future because the losers of today`s process know that even if they have a fair chance of winning tomorrow, there is no guarantee that their vision of distributive and social justice will be implemented as it must now also be approved by another branch of government.Becoming a winner in the political process is no longer enough.Another reason why socioeconomic rights should not be made justiciable is because the judicial branch is not well-suited to making such determinations. Securing socioeconomic rights requires resource allocation.Because resources are scarce, every decision regarding the allocation and distribution of such resources involves an opportunity cost.Money spent on road infrastructure could instead have been spent on providing shelter.These choices should be made by the people.If socioeconomic rights become justicia-ble and some people are still without adequate housing, any project can be challenged on the grounds that instead of discharging its af firmative obligation to provide housing, the government has diverted money elsewhere. Judges would then need to exercise restraint in order to ensure that they don`t get drawn into deciding the constitutionality of every government project.But what judicial yardstick will they use to determine when a particular road or other infrastructure project infringes upon the people`s right to adequate food, housing, clothing, education and health? And how can we be so sure that an individual crusader will not emerge from within the judicial ranks to upend the entire system? The issue is not restricted to projects only.Many laws will become subject to constitutional challenge too. A zoning law that imposes design and uses restrictions could also be challenged because it makes home ownership more expensive. And the list goes on and on.Despite all this, one argument can still bemade in favour of the prime minister`s proposal. People who do nothave accesstofood, housing or clothing are the poorest of the poor of our society who have failed to command any attention in the political arena. Since there is no equality of opportunity and chances of upward social mobilityare limited, the political process does not give them any chance of winning tomorrow.They are condemned forever.By making socioeconomic rights justiciable, the Constitution gives them an important stake in the distribution of social goods and a voice that they would not have otherwise had. Even though the argument is plausible, the problem can still be solved by making the political process more inclusive and devolving greater powers to local governments that are closer and more responsive to the people. Inviting judicial intrusion into complex questions of resource allocation is not the best way of going about it.So while we must strive towards creating a more egalitarian society, the means we employ to provide the disenfranchised amongst us with the most basic necessitates of life ought to be contested. Making socioeconomic rights justiciable should not be one of the options. The writer is a lawyer.b.soofi@gmail.com Twitter: bbsoofi |