



Letter to the editor

The constitutionalization of the social state and the right to health in El Salvador

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Dear Editor,

I refer to the letter “The importance of health rights in health legislation”, published in volume 7, number 2, of *Alerta*.¹ In that publication, a contemporary debate over the effectiveness of the right to health protection in the Salvadoran context can be identified. In this regard, I wish to continue this debate, not from the immediacy of current problems, but from a more structural level: the constitutionalization of the social state, and its decisive connection with the right to health, which is the subject of this correspondence.

Among the problems identified is the constitutional recognition of health, a significant issue in its own right. In Western constitutionalism, its integration into the legal sphere marks a civilizational milestone. This development evolved over more than two centuries, amid debates between the liberal state’s abstentionist logic and rising demands for social² justice during industrialization. From the first public welfare institutions to Bismarck’s late-19th-century German health insurance, health protection shifted from the private to the public sphere. In this process, constitutionalism moved beyond guaranteeing individual freedoms to also ensuring the material conditions of existence.

Not all constitutionalists agree on the scope of this transformation. While some constitutionalists understood the welfare state as a programmatic framework, entrusting legislators with defining its content, others asserted its binding normative character, whereby social rights are imposed as specific obligations on public authorities, requiring services to provide services, establish public policies, and grant adequate funding.³ This tension dates to the welfare state’s inception. I agree with those who believe the welfare state under the rule of law is more than just a set of aspirations; such a reduction would strip it of its core purpose: balancing freedom with equality.

History supports this perspective. The Political Constitution of Mexico (1917)⁴ and the Weimar Constitution (1919)⁵ pioneered the addition of social rights to constitutionalism. They broke with the liberal focus on negative freedoms and organizing power. In Weimar, courts turned social clauses into empty formulas, reducing their effectiveness.⁶ However, this legal setback does not hide the qualitative leap of making social rights constitutional.

The Bonn Basic Law of 1949⁷ confirmed this trend. Its explicit reference to the social rule of law, along with Article 79.3’s “intangibility clause,” showed that the social principle was central and lasting. Bonn made it clear:

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the social state is not just a political promise but a guiding, binding principle.

Latin America reflected these trends. In El Salvador, the 1950⁸ Constitution was the first to allocate a budget to protect health as a right. It listed social rights, recognized health as a public good, and imposed duties on the State and individuals. This step was more than symbolic. It meant the state had to guarantee health, and society had to help protect and restore it. Later constitutions in 1962⁹ and 1983¹⁰ extended this, requiring the state to ensure the right to health for all. The right became enforceable, allowing individuals to demand it in court.

What does it mean, in practice, for health to be a constitutional right? Central to my argument is that it entails three things: first, that health cannot be governed solely by market logic; second, that the state is obligated to take active measures ensuring equitable access; and third, that citizens have the enforceable right to demand protection of health, leading to meaningful participation in oversight and decisions.¹¹

Some critics claim that expanding the welfare state's legal reach has created too many expectations. In times of fiscal crisis, they say, social rights like health can become hollow or unsustainable. Others warn that the breadth of social clauses can weaken legal certainty and lead to overly broad interpretations. However, in response to these criticisms, it is argued that constitutionalizing the right to health protection is the best legal response to structural inequality. The risk of vagueness can be corrected without weakening the principle. In reply, it is argued that making health a constitutional right best addresses structural inequality. Any risk of vagueness can be fixed, without weakening the main principle.

Health best shows the transformative power of the social state. Guaranteeing hospitals or medicines is not enough. The right to health demands prevention, regulation of medical products, control of health risks, and better living conditions. In other words, it is a right that obliges the state to intervene in all phases that make the health and well-being of the population possible, including, but not limited to, practical challenges such as: financing and sustainability of the health system, persistent inequalities in access and quality, and tension between public policies and judicial decisions (judicialization of the right to health).

The COVID-19 pandemic exposed weaknesses in health systems and the limitations of the state response, even in countries with robust constitutional provisions. The crisis exposed gaps between

constitutional promises and actual action across infrastructure, local differences, and regulation. Instead of weakening the social state's model, these events support it: only a state fully embracing social duties can handle such crises.

Defending the welfare state and the right to health is neither nostalgic nor just theoretical. It is a real and urgent need. Giving up on the welfare state or treating it as empty formalism would mean giving up the constitution's main tool to improve people's lives.

In conclusion, making the welfare state and right to health constitutional in El Salvador remains a key social achievement. This is a historic milestone that endures, despite crises. Health as a public good and a fundamental right is a legal and ethical obligation. Keeping this goal alive means having not just rules, but institutions to enforce them. Only then will the welfare state cease to be a promise and become a real guarantee of a dignified life for all, in which health governance is strengthened, equitable financing mechanisms are created, and strategies for social participation in decision-making are promoted.

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