

## “COURTING” LEGITIMACY:

Democratic Agency and the Justiciability of Economic and Social Rights

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### INTRODUCTION

The potential of Economic and Social Rights (ESR) as a tool to ensure the inherent dignity<sup>1</sup> of all has been, to use a popular phrase, “detained for questioning.” Over the last sixty years, debate has centered on arguments denying the justiciability and judicial enforcement of Economic and Social Rights. However, the former UN High Commissioner on Human Rights, Louise Arbour, recently stated that “[i]t is now widely recognized that there is nothing inherently non-justiciable about economic, social and cultural rights.”<sup>2</sup> The enactment of an Optional Protocol on Economic, Social and Cultural Rights, detailing an international “communications procedure” for violations of ESR supports Ms. Arbour’s contention.<sup>3</sup> However, scholars, nation-states, and courts themselves still argue against the idea that ESR are justiciable rights capable of being adjudicated by courts. Even where objections to ESR’s justiciability are overcome, arguments are still made in favor of limiting the scope of judicial oversight, oft times by the courts themselves.

In this paper I reconsider scholarly approaches to justiciability. The language of legitimacy is miscast. The idea that the (nominally) elected government only, and not the courts, has the absolute and exclusive legitimacy to decide on questions of resource allocation is a sham: the worse off a polity, the less democratic agency its citizens exercise. The already delegitimized character of poor governments justifies judicial intervention in distributive questions *in democratic terms* as an exercise of the will of the people to serve the common good. Traditional arguments against the justiciability of ESR are based in a concept of *democratic deficit*; traditional arguments in favor of ESR are made in terms of a comparative analysis to civil and political rights (CPR). This is based in the concept of the indivisibility of rights, making such comparisons appealing. However, that conceptual framework cannot be applied in an effective manner to countries where there is insufficient democratic agency for meaningful democracy, whether due to poverty, mismanagement, or corruption. In this paper I use the democratic legitimation argument to support judicial intervention and engage with the democratic deficit problem itself. Part I of the paper will sketch out the recent arguments for and against the justiciability of ESR from the point of view of scholars, governments, and courts. Parts II and III will examine the question of legitimacy of governments and courts to deal with this issue and argue that, if breaches of ESR affect polities’ ability effectively to participate in elections, a government’s legitimacy must be questioned.

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights (henceforth ICESCR), Preamble, 16 (December 1966).

<sup>2</sup> *High Commissioner backs work on mechanism to consider complaints of breaches of economic, social and cultural rights*, United Nations Press Release, 16 July 2007, at [www.unhchr.ch/hurricane.nsf/view01/BAB7C795CD5D6F23C125731B004C4E7B?opendocument](http://www.unhchr.ch/hurricane.nsf/view01/BAB7C795CD5D6F23C125731B004C4E7B?opendocument) (accessed 3 Nov. 2009).

<sup>3</sup> United Nations Department of Public Information, *Third Committee Recommends General Assembly Adoption of Optional Protocol to International Convention on Economic, Social and Cultural Rights* Press Release GA/SHC/3938 (18 Nov. 2008), [www.un.org/News/Press/docs/2008/gashc3938.doc.htm](http://www.un.org/News/Press/docs/2008/gashc3938.doc.htm) (accessed 3 Nov. 2009).

Part IV will look at the implications of this on governments, NGOs, and judiciaries, and argue that, this being the case, it is inappropriate to exclude the judiciary from a role in ESR enforcement (in the wide sense of the word), and, further, that they should have a positive role. Part V will conclude that, given the calculus of contrasted legitimacy between government and judiciary, this argument has implications for both poor countries and rich countries with a substantial poor population.

## I. CAPACITY, LEGITIMACY, JUSTICIABILITY

Prior to examining arguments for and against the justiciability of ESR, we should know what exactly is meant by these rights. One approach to understanding ESR is to hew close to specific texts or formal documents; to that end, Articles 22-27 of the Universal Declaration of Human Rights and the ICESCR are useful. However, a more theoretical-philosophical approach provides a definition that is normatively cogent. ESR are instruments providing for certain social outcomes. To this extent they are normative, rooted in the presumption of achieving human dignity through every individual's right to minimum levels of certain, interlinked goods, such as food, water, healthcare, education, and the like. These are to be provided through a combination of direct action and putting in place conditions that enable each individual to gain access to the same. Because these social outcomes have some distributive implications, it follows that they impact the social order, and, further, as rights, they ought to exist in law. That is:

When a legal inquiry will identify it as one of those norms to which anyone who aims to be law-abiding should, for that very reason, normally feel a substantial if not decisive pressure to adhere. To get a norm into law is to produce a state of public affairs in which that sort of pressure can be expected to impinge on whoever is supposed to bear obligations attendant upon the norm.<sup>4</sup>

The latter part of Michelman's argument means that there is an expectation upon *all* arms of the state that they will develop and execute policies in order that, or, more generally, to ensure that desired social outcomes are realized.

The fact that this obligation exists upon the legislative and executive branches is (at least for the purposes of this study) uncontroversial. However, the involvement of the judicial branch has led the intellectual debate onto more rugged, contested terrain. The justiciability of ESR is a vexed question. It has been argued against by a remarkable range of people, with differing beliefs, from the left and right, and from those skeptical about rights projects and those skeptical about ESR as a specific category. Indeed, such a line of argumentation can come from those who are otherwise extremely positive about civil and political rights (CPR). Aryeh Neier, a notable "believer in very strong civil and political rights," critiqued ESR's justiciability thus:

. . . [ESR are] unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail . . .

[T]he purpose of the democratic process is essentially to deal with two questions: public safety and the development and allocation of a society's resources.... Economic and security matters ought to be questions of public debate. To withdraw either of them from the democratic process is to

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<sup>4</sup> Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 667 (2008).

carve the heart out of that process . . . [A] court is not the place where it is possible to engage in [the necessary] sort of negotiation and compromise.<sup>5</sup>

Neier outlines the main arguments against justiciability very neatly. They tend to be based on the issue of *resource distribution and legitimacy*. Proponents of this view argue that a court cannot and should not decide on issues of resource distribution—it is not set up to do so nor does it have the mandate to do so.

It is clear that ESR are distributive in nature; this fact cannot be escaped. Orthodox arguments for ESR embrace this fact: they begin by drawing parallels between ESR and CPR, go on to highlight the distributive nature of CPR and conclude by implying that the courts are able to adjudicate in a substantive fashion on distributive matters and thus can adjudicate on ESR. For example, Shue critiques the rigid dichotomy established between so-called “negative” (or procedural) and “positive” (or distributive) rights. Taking “security rights,” he argues that “it is impossible to protect anyone’s rights to physical security without taking, or making payments towards the taking of, a wide range of positive actions. For example, at the very least the protection of rights to physical security necessitates police forces; criminal courts; penitentiaries; schools for training police, lawyers, and guards; and taxes to support an enormous system for the prevention, detection and punishment of violations of personal security.”<sup>6</sup> There are also some arguments more heterodox in flavor; for example, Buchanan focuses on remedies and argues that negative rights are just as intrusive as positive rights as the law acts “monopolistically” in applying those rights—it restrains the ability of members of society to pursue all remedies that may exist and of which they would be able to avail themselves.<sup>7</sup> However, such arguments are contingent upon the relationship between ESR and CPR and are not arguments for the justiciability of ESR from first principles or *per se*.

In order to construct an argument for justiciability *per se*, one should return to the argument against judicial intervention. The first line of reasoning underpinning this argument is ontological; it presumes that the very logic and epistemology of a court is not appropriate to deal with distributive questions. To presuppose that the court is an inappropriate forum to decide questions of public resource allocation and people’s material well-being is to presuppose that the moral and rational approach of a court is *deontological*, while that of the government is *utilitarian*. This logic further presupposes that the government, with its utilitarian approach, is best placed to deal with public funds as they are limited, and thus a utility-maximizing approach is to be preferred. However, this has been contested by recent work that compiled studies of five countries with different levels of ESR provision in their constitutions (Brazil, India, South Africa, Indonesia and Nigeria). The study concludes:

The traditional deontological/utilitarian distinction between the approaches of the court and legislature led to the conclusion that courts were inherently incapable of allocating resources; however, recent studies show that there is no inherent difference between the possible allocative logics of the court and legislature when dealing with ESR. The courts’ decision making in fact takes into account a whole host of factors in the same way

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<sup>5</sup> Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1, 1-2 (2006).

<sup>6</sup> Henry Shue, *BASIC RIGHTS* 37-8 (2<sup>nd</sup> edn., 1996).

<sup>7</sup> Allen Buchanan, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 198 (2004).

that the legislature's does, including popular demands, infrastructural issues, governmental priorities, resource allocation etc.<sup>8</sup>

If the court is in fact capable of executing such an approach, objections to justiciability then fall into two categories: practical and normative. The former set of objections contends that the court lacks sufficient practical capacity to engage in questions of resource allocation. This is a question for empirical study. The latter set contends that the judiciary is not competent to rule on ESR matters as they involve budgetary allocation and the running of programs, which only the legislature and executive is competent to carry out. The implication is that it would not be legitimate for the judiciary to carry out a costing exercise when democratically elected rulers should do so. In this view the judiciary's role is at best one of oversight. This objection can best be described as the *democratic deficit*.

This idea is put forward by academic commentators arguing against justiciability and even by those arguing for limited judicial oversight. Although writing in terms of an international complaints mechanism, the argument made by Dennis and Stewart<sup>9</sup> can be applied to the general issue of justiciability. They believe that that the legitimacy and procedural transparency of democratically elected bodies provide the most desirable means of achieving ESR. The requirement of governments to deal with resource constraints means that they should be afforded discretion when acting and not be tied into the straitjacket of legal enforcement. There is a risk, they argue, that "instead of advancing respect for, and implementation of, economic, social, and cultural rights in states parties that to date have given them short shrift, there is a significant risk that trying to 'enforce' such rights [through binding international adjudication] will have the opposite result, causing states to deemphasize them and further undermining their stature and acceptability."<sup>10</sup> It must be noted in the context of their argument that no definition of legitimacy is offered; it is taken as *a priori* knowledge. I will argue that flawed definitions of legitimacy are at the heart of the objections to the justiciability of ESR based on the democratic deficit.

However, even in the context of arguing in favor of justiciable ESR, it has been argued that ESR "may legitimize levels of state interference in the private economic affairs of individuals and corporations that would otherwise have been difficult to justify."<sup>11</sup> Such arguments even accuse the justiciability of ESR as leading to the "judicialization" of decision-making (i.e., the transfer of the role of decision-maker from the legislature or executive to the judiciary)<sup>12</sup> and the "displace[ment of] legislative judgments about how social policies should be ranked."<sup>13</sup> Even supporters of ESR are chary of the risk of courts encroaching on an area that is not their traditional domain if ESR were to be considered justiciable:

. . . courts would stray too far from their legitimate role in a constitutional democracy if they adjudicated these kinds of rights . . . [ESR] are too

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<sup>8</sup> Varun Gauri & Daniel M. Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, in Varun Gauri & Daniel M. Brinks (eds.), *COURTING SOCIAL JUSTICE* 1, 5 (2008).

<sup>9</sup> Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* 98 AM. J. INT'L. L. 462 (2004).

<sup>10</sup> *Id.* at 467.

<sup>11</sup> Marius Pieterse, *The Legitimizing / Insulating Effect of Socio-Economic Rights*, 22 CAN. J.L. & SOC'Y 1, 20 (2007).

<sup>12</sup> C. Neal Tate & Torbjörn Vallinder (eds.), *THE GLOBAL EXPANSION OF JUDICIAL POWER* (1995).

<sup>13</sup> Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEXAS L.R. 1895, 1897 (2004).

vague, costly, and institutionally complex for the judiciary to implement. In order to enforce a housing guarantee in the face of government neglect, for example, courts might have to design housing programs, require money be spent to implement them, and perhaps even take over their administration. Thus, it is argued, courts cannot enforce [ESR] without usurping the role of the legislative and/or administrative branches of government . . . Yet even those who argue for a robust judicial role in the enforcement of [ESR] admit that their full implementation threatens to strain judicial capacities and push boundaries of judicial legitimacy.<sup>14</sup>

Such scholarly arguments are summarized by Hirschl. His analysis of Canada, New Zealand, Israel, and South Africa leads him to the conclusion that most courts understand rights in a narrow manner, focusing in an aggressive fashion on negative rights which protect the private sphere from the state (CPR). The courts see an increase in state interference in people's lives as undesirable, leading them to take a narrow interpretation of positive rights as enforceable in a court of law. The judiciary auto-conceptualizes as a counterbalance to the state's (i.e., executive and legislature's) positive role.<sup>15</sup> Liebenberg extends the idea of limited focus to negative aspects of ESR; in other words, courts are more willing to get involved and grant remedies to stop deprivation of existing access, but have a very incremental approach to "individually enforceable positive rights."<sup>16</sup>

This approach does not remain the domain of the purely theoretical, but looms large in the minds of policymakers and state apparatuses themselves. The recent debate over the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) was a prescient example of the importance of this view of a political approach to ESR: "Recognizing that all human rights were universal, indivisible and interrelated, the representative of *Switzerland* said that his delegation fully supported development in the area of the protection of economic, social and cultural rights. However, he also recalled his delegation's position that those rights were, first, a matter for the legislative bodies that had been elected to give them effect."<sup>17</sup>

Such arguments are also taken seriously by courts themselves. Courts that have taken a view of themselves more in line with Hirschl's analysis have unsurprisingly been quiescent in the matter. The English Court of Appeal in *R v. Cambridge Health Authority, ex parte B*<sup>18</sup> was asked to reverse the decision of the state-run health service (the NHS) to refuse treatment to a girl with cancer. The decision was taken on grounds of internal policy, owing to the low chance of success of the treatment compared to its cost. The court's reaction was clear: "Difficult and agonising [sic] judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make . . . I feel bound to regard this as an attempt, wholly understandable but none the less misguided, to involve the court in a field

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<sup>14</sup> Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights* 39 COLUM. HUM. RTS. L. REV. 351, 353-4 (2008).

<sup>15</sup> Ran Hirschl, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 146-7 (2004).

<sup>16</sup> Sandra Liebenberg, *Needs, Rights and Transformation: Adjudicating Social Rights*, NYU Center for Human Rights and Global Justice Working Paper No. 08 (2005), at 22-3, available at [www.chrgj.org/publications/docs/wp/Liebenberg\\_Needs\\_Rights\\_and\\_Transformation.pdf](http://www.chrgj.org/publications/docs/wp/Liebenberg_Needs_Rights_and_Transformation.pdf) (accessed 3 Nov. 2009).

<sup>17</sup> United Nations Department of Public Information.

<sup>18</sup> [1995] 1 W.L.R. 898.

of activity where it is not fitted to make any decision favourable [sic] to the patient."<sup>19</sup>

However, even courts with a more activist frame of mind and conception of self have a reflexive (in both senses of the word) reaction of restriction when dealing with questions of resource allocation. This reaction is often asserted, unexplained or discussed in non-rational terms. The South African Constitutional Court, portrayed as *nouvelle vague* in the field of ESR, had the following to say in *Soobramoney*: "A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."<sup>20</sup> This approach was fleshed out in the *TAC* case, in which the court construed its role as one of *limited oversight*:

The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for . . . deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse . . .<sup>21</sup>

It is important to note, however, that in this case there is a distinct contrast between the court's language and the substance of its judgment. The court gave detailed orders that went beyond simple oversight; for example, the court issued a requirement to "permit and facilitate the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics."<sup>22</sup> However, the facts of the case are unusual, as nevirapine, the drug in question, was provided to the government for free; thus the issue of resource distribution was less pressing and may have made the court more comfortable in giving detailed instructions. Whatever the issue, the fact remains that even courts feel an obligation to use the language and promote an image of no or limited review.

Despite the assertions by Ms. Arbour and others at the UN, the issue of justiciability remains alive, even contentious. Scholars, states, and even courts grapple with it, and all operate from a presumption of limited or no judicial involvement, premised on the concept of a democratic deficit. Yet, as highlighted in the comments on Dennis and Stewart, *supra*, a definition of legitimacy is not offered; rather, it is taken as granted that the legislative and executive branches of government possess greater legitimacy than the judicial when it comes to questions of resource distribution. This argument, however, fails to explore the impact that the concept of agency has on the legitimacy of government.

## II. LEGITIMACY AND DEMOCRATIC AGENCY

The starting point for my analysis of governmental legitimacy will be a democratically-elected government; (the complexity of legitimacy-analysis for other forms of government is far beyond the scope of this paper). It is an uncontroversial second step to say that a legitimate, democratically elected government must be elected by autonomous voters. This means that there must be no form of *primary*

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<sup>19</sup> *Id.* at 906, 907 per Bingham MR.

<sup>20</sup> *Soobramoney v. Minister of Health (Kwazulu-Natal)*, Constitutional Court of South Africa, Case CCT 32/907, 27 Nov. 1997 at [29]

<sup>21</sup> *Minister of Health v. Treatment Action Campaign*, Constitutional Court of South Africa, Case CCT 8/02, 5 July 2002 at [36].

<sup>22</sup> *Id.* at [135 3b].

*coercion*, such as outright vote-buying, torture, the rigging of elections, and so on. This is part of the concept of a "free and fair" election, and falls neatly into the category of CPR. However, there must also be no *secondary coercion*: every individual voter must have sufficient agency to make his or her voting choice and to make it freely. This has been expressed in terms of reducing the cost of voting to those most socially disadvantaged. For example, certain African-American communities cannot take the time off to vote as they have multiple jobs; their work may not pay them if they leave and their marginal utility of pay is too high for them to leave without pay. In such situations, nominal payments by the state to overcome those hurdles have been advocated.<sup>23</sup> The ethical problems with such payments are freely acknowledged, but such problems are not directly relevant to this analysis of ESR.

### A. Economic and Social Rights Actuate Democratic Agency

A legitimacy-based argument begins with the supposition that a government must have social and economic structures installed which ensure that all citizens have the minimum agency to vote. Agency is used here in the democratic sense, i.e., possessed of such liberty and autonomy that an individual can participate in the democratic process as that process requires (in other words, formal participation is insufficient if unaccompanied by participation at the requisite substantive level). Further, this implies that a range of economic and social conditions must be accounted for. For example, if it is desirable that a voter is able to read the ballot and is at least in a position to be informed at a basic level about the candidates (whether or not the voter actually is), the voter will need access to sufficient education provisions. Such provisions must be accompanied by a certain amount of nutritional provision in order for the individual to function well mentally, but also so that the individual does not have to miss school in order to obtain food. Clean water is relevant for similar reasons. The provision of sufficient healthcare will also be important, at the very least to do what is possible to ensure sufficient mental and physical capacity to vote. It is clear from this analysis that the underlying conception of democracy will affect the required capacity of the voter, and that this will affect the level and nature of the socio-economic outcomes required. A *demos* that is more deliberative "in the sense of maintaining conditions of equality and accessibility and encouraging participation, publicity, and cooperation" will make majoritarian decisions based on reasonable policy.<sup>24</sup> For this to take place, the polity must be well informed, capable of debate, and able to access the spaces and fora of debate. Clearly, for this to occur, voters must be brought to a higher level of agency than in other, less deliberative democracies.

From what has been argued, it follows that the agency required is contingent on the realization of an individual's rights (i.e., on certain outcomes either being brought into effect or made available for individuals to attain). These rights are civil and political, but also economic and social. The link between agency and rights has cogently been supported by Griffin:

The first stage of agency is our taking our own decisions for ourselves, not being dominated or controlled by someone else (autonomy). To be more than empty tokens, our decisions must be informed; we must have basic education, access to information and to other people's views. And then,

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<sup>23</sup> Pamela S. Karlan, *Not By Money but By Virtue Won? Vote Trafficking and the Voting Rights System* 80 VA. L. REV. 1455, 1472 (1994). See also Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era* 24 HARV. C.R.-C.L. L. REV. 393 (1989).

<sup>24</sup> Simone Chambers, *Can Procedural Democracy be Radical?*, in David Ingram (ed.), *THE POLITICAL* 179 (2002).

having formed a conception of a good life, we must be able to pursue it. So we need enough in the way of material provisions to support ourselves. And if we have all that, then we need others not to stop us (liberty).<sup>25</sup>

Griffin is arguing on first principles for ESR. Yet his comments are equally applicable to democratic agency. In his terms, “having formed a conception of” democratic agency, that is enfranchisement, we must be able to pursue it. Whether or not one agrees with all of Griffin’s conclusions, he is clear on the point that agency requires not just political rights, but a minimum level of resources to exercise one’s personhood. It should be ensured that individuals can develop their basic capability to have fully human lives.<sup>26</sup> This is the sort of agency that is required to be able to cast a meaningful vote: one needs to be healthy enough to vote, strong enough to get to the polling place, educated enough to understand what or whom one is voting for, sufficiently absent of hunger that one’s utility function and thought process (and thus ability to make a rational voting choice) is not distorted, etc. A caveat: this model clearly envisages the voter as an individual agent, meaning it takes an aggregative view of a democratic polity. This has implications on the ability of elites to capture and mobilize blocks of the poor in their favor that are too complex to be explored here.<sup>27</sup>

The idea of an individual’s democratic agency being a function of socio-economic conditions is not a new one: ESR have been recognized as providing individuals the “wherewithal necessary to participate effectively in the democratic process.”<sup>28</sup> Indeed, some form of economic and social context for democratic agency can be inferred from the “fair value” aspect of Rawls’ first principle.<sup>29</sup>

## B. Political Mobilization or Economic Emancipation: A Critique of Sen

The issue of socio-economic outcomes and the democratic process has been placed in a framework by Sen’s work on capabilities. He argues that “[d]evelopment consists of the removal of various types of unfreedoms that leave people with little choices and little opportunity of exercising their reasoned agency.”<sup>30</sup> At first glance this looks similar to the argument above that a lack of socio-economic outcomes (i.e., socio-economic “unfreedoms”) restrict the agency of the individual. However, Sen’s thesis is problematic. In his view, the existence of reasoned agency is not contingent upon an individual’s economic and social conditions (such as education), nor is his/her ability to exercise it; rather, the opportunities to exercise this inherent reasoned agency are lacking, which create unfreedoms. This is an important distinction. If both reasoned agency and the ability to exercise it inhere to every individual, conditions leading to mental and physical development (such as education, nutrition etc.) are not pressing so long as one is provided with opportunities to exercise this inherent reasoned agency. The impli-

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<sup>25</sup> James Griffin, *Discrepancies Between the Best Philosophical Account of Human Rights and The International Law of Human Rights*, 101 PROC. ARIST. SOC. 1, 7 (2001).

<sup>26</sup> Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-economic Rights*, 21 S. AFR. J. HUM. RTS. 1, 7 (2005).

<sup>27</sup> For a Marxist view on the risk of capture of poor caste groups in India, see Dilip Menon, *CASTE, NATIONALISM AND COMMUNISM IN SOUTH INDIA* (1994), and Subho Basu, *DOES CLASS MATTER?: COLONIAL CAPITAL AND WORKERS’ RESISTANCE IN BENGAL* (2004).

<sup>28</sup> Neil Walker, *Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism*, in Tom Campbell et al. (eds.), *SCEPTICAL ESSAYS ON HUMAN RIGHTS* 119, 124 (2001).

<sup>29</sup> John Rawls, *A THEORY OF JUSTICE* 198-9 (Revised Edn., 1999).

<sup>30</sup> Amartya Kumar Sen, *DEVELOPMENT AS FREEDOM* xii (1999).

ation is that emphasis must be placed on the political process. This can be seen in Sen's work on famine, in which he argues that the potential opprobrium of an electorate towards a government which allows famine (the breach of ESR in Sen's case study) will drive those in power to ensure that such a disaster will not eventuate. His argument is, in essence, that political mobilization will lead to socio-economic emancipation.

Once this distinction becomes clear, it is possible to critique Sen's approach. Sen has overlooked the possibility that breaches in ESR can retard the development of "critical autonomy."<sup>31</sup> This would clearly lead to an infringement of democratic agency, and would undermine political mobilization as a solution. Elizabeth Anderson, analyzing capabilities in relation to equalitarianism<sup>32</sup>, argues for two concomitant types of capabilities that map onto the two types of coercion (primary and secondary) discussed *supra*: "Negatively, people are entitled to whatever capabilities are necessary to enable them to avoid or escape entanglement in oppressive social relationships. Positively, they are entitled to the capabilities necessary for functioning as an equal citizen in a democratic state."<sup>33</sup> This moves away from Sen's belief in inherent agency that unfreedoms limit to an agency that must be developed and nurtured. It is clear that, rather than limiting the scope of exercising agency, breaches of ESR limit the democratic agency of the individual herself.

### III. LEGITIMACY AND A SOCIAL MINIMUM

Once the need for democratic agency and its link to ESR has been established, it is necessary to decide whether agency is cardinal and continuous. In other words, does an individual have more or less agency, or is one either an agent or not? And further, if one has more or less agency, is it possible to place a boundary in the continuum beyond which one is capable of acting as a democratic agent? It is possible to presume that agency is cardinal and continuous. Methods of measurement attempted on human development (and thus human dignity), such as the Human Development Index, attempt to break dignity down into qualitative criteria similar to rights and then quantify them. It is important to note that objections are raised to the development of rights-based indicators as normatively undesirable. Firstly, it is argued that rights are not capable of such quantitative assessment, and, secondly, that rights are incommensurable and cannot as such be compared.<sup>34</sup> Yet the fact that they cannot be translated onto an index does not mean that rights (and thus agency) are not cardinal. This objection stems from rendering them cardinal in comparison to a static standard or scale, thereby making them comparable. Each right, as well as the overall level of agency, can be cardinal. The idea of progressive realization<sup>35</sup> of ESR indicates that the level of rights realization can increase; presuming the level of agency is proportional to level of rights realization, the level of individual agency can also increase.

Given the cardinal nature of agency, it must be possible to construct a minimum on the continuum that allows for sufficient agency to participate in elections. This sort of qualitative assessment is complicated, yet it is something courts do all the time. Take, for example, the question of mental capacity. The English courts are not only required to assess the patient's medical condition, but also whether his

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<sup>31</sup> Michael J. Watts, *Struggles over Geography: Violence, Freedom and Development at the Millennium*, 3 HETTNER LECTURES 57 (University of Heidelberg, 2000).

<sup>32</sup> Elizabeth Anderson, *What is the Point of Equality?* 109 ETHICS 287, 305, 316 (1999).

<sup>33</sup> *Id.* at 316.

<sup>34</sup> Phillip Alston, *Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council* 15 J. TRANSNAT'L L. & POL'Y 49, 77-8 (2005).

<sup>35</sup> ICESCR, Art. 2.

detention is necessary for the protection of himself or others.<sup>36</sup> This requires an examination of his mental condition but also a qualitative assessment of the nature and gravity of his mental state *in a social context*. Here the idea of a minimum standard becomes useful: criteria are required to provide the court (or any other body) a framework around which to assess the issue.

An effort has already been made to outline a minimum standard, or core, for ESR realization.<sup>37</sup> This minimum core may or may not be sufficient to ensure democratic agency. Its terms of reference did not involve a specific examination of what is required to engage in voting. A minimum standard of ESR for democratic participation would carefully have to examine the mental and physical faculties required to vote. It is clear that a range of rights and socioeconomic outcomes are relevant and further that they are interconnected. In a study of child malnourishment and undernourishment in India and their relationship to the right to food, Jean Drèze found that “. . . hunger and undernutrition are intrinsic deprivations and severely diminish the quality of life. Further, undernutrition is associated with reduced learning abilities, greater exposure to disease, and other impairments of individual and social opportunities.”<sup>38</sup> These “impairments” affect the ability to vote. Levels of water and housing can also affect exposure to disease and impairments similar to those that Drèze highlights. They can also have secondary effects: for example, the search for water may take priority over taking the time to vote. Levels of education have direct relevance for engagement with civic society and also, at an even more basic level, the ability to participate in a *demos*.<sup>39</sup> Coming up with a minimum for these goods is difficult, especially when these rights are now being construed instrumentally; such teleology reduces the flexibility of interpretation of ESR, which may reduce the efficacy of its implementation.

When constructing this minimum, there is a concern over child mortality. An election is a static snapshot of a democratic polity at the time. Let us presume that there is a government in place in a country which, owing to intent or lack of concern, has a program of economic and social considerations which ignores or harms the well-being of those under voting age of a certain tribe, caste or other sub-group in that state, and it harms them to such an extent that child mortality is high. Let us also presume that this group has a high birth rate and *ceteris paribus* would continue to expand as a polity if it were not for the high child mortality rate. These children are not of voting age and thus do not directly impact on the government's legitimacy. Yet they are *potential* votes. If it is possible to exclude the impact that high mortality rates has on high fertility levels (parents having greater numbers of babies so that at least some of them survive), it would appear just to say that the democratic legitimacy of the government would be affected by the breaches of ESR of these minors also.

However, holding a government's legitimacy with respect to ESR hostage to voters *in potentia* causes theoretical problems; for example, if a state excludes convicted criminals or felons from its voting register, would it be correct to infer a decrease in governmental legitimacy from those whose control over their situation was not absolute (take, for example, those who cultivate poppy as the only viable

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<sup>36</sup> Mental Health Act 1983 § 136. See also *R. (Von Brandenburg) v. East London and the City Mental Health NHS Trust and Another* [2004] 2 A.C. 280.

<sup>37</sup> UN Committee on ESCR, *General Comment 3*, UN DOC. E/1991/23 (1990).

<sup>38</sup> Jean Drèze, *Democracy and the Right to Food*, in Philip Alston & Mary Robinson (eds.), *HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT* 45, 47 (2005).

<sup>39</sup> See Noel F. McGinn, *Education, Democratization, and Globalization: A Challenge for Comparative Education* 40 *COMPARATIVE EDUCATION REV.* 341 (1996), particularly 343-9 and 355-7 (suggesting how education is to be improved to realize democratically-engaged citizens). He states that educational “[a]ssociations act as *schools for democracy* in which people learn how to argue without fighting” (emphasis in the original), at 343.

source of livelihood income<sup>40</sup>) owing to inadequate education and social-security provisions? They have been driven to break a social contract by the inability of a government to provide goods for them that would have permitted them to vote effectively and change that government. It can certainly be said that if it is in the public interest to engage in a blanket exclusion on voting with regard to all convicted criminals, the government need not pursue absolute legitimacy.

Irrespective of the answer to that question, such a minimum would be linked to the concept of absolute, rather than relative deprivation,<sup>41</sup> although it may be relative in the sense that it is relative to our conception of what makes one a democratic agent, and this may change as democracy evolves (e.g., it is possible that the operation of democracy in a certain country requires the agent to be computer-literate). The existence and methodology of the poverty line becomes useful here: it takes into account food, safe drinking water, sanitation, health, shelter, education, information, etc.<sup>42</sup> However, rather than a poverty line, this enquiry seeks a *democracy line* of ESR required to make a voter. I do not propose to engage in such an enquiry here; I merely wish to highlight the fact that, with research and thought, it is possible. A government can meet the democracy line either when it has provided all the goods to its citizens or has put in place conditions that enable each citizen to gain access to them.

It follows that in countries where the democracy line has been met and the minimum level of ESR has been realized, a government is fully legitimate as all of its voters have acted as agents and made a choice. It represents the will of the democratic polity *in toto*. Thus, in all cases relating to a distribution of resources it is reasonable to keep them in the hands of the legislature and executive. However, if there are voters below the democracy line, the government cannot be wholly legitimate. Votes have been cast without voters being full democratic agents or votes have not been cast that would have been had the voter been possessed of agency. For example, starvation may make an individual or group a client of a political elite; alternatively, it may inhibit an individual from voting at all. This is not to deny the value of voting to the individual, nor is it to say that the votes of the poor are worth less than those with full democratic agency; rather that the government's failure to ensure citizens have the ability to choose has affected its own legitimacy. Frances Stewart, professor of development economics at Oxford, argues: "Democracies are often run by ethnically based groups prepared to do terrible things to other ethnic groups . . . Or they can be very corrupt, dominated by elites . . . Capitalist, democratic states put the emphasis on the private sector, which doesn't always deliver on social goods. The free press is good on major disasters like classic famines, but it tolerates chronic hunger as much as anyone else." She further argues that to be fully represented, the poor need institutions like trade unions and political parties that speak for them.<sup>43</sup> The key part of her analysis is the fact that the poor in such situations lack proper representation. The issue of civil society and its impact on justiciability is discussed *infra*. The conclusion must remain that without sufficient ESR it is possible to impugn the absolute legitimacy of a democratically-elected government.

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<sup>40</sup> Afghanistan Independent Human Rights Commission, ECONOMIC AND SOCIAL RIGHTS REPORT IN AFGHANISTAN-III 19 (2008).

<sup>41</sup> See Alan Gewirth, THE COMMUNITY OF RIGHTS 107-8 (1996).

<sup>42</sup> See generally Amartya Kumar Sen, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1983).

<sup>43</sup> Michael Massing, *Does Democracy Avert Famine?*, N. Y. TIMES, 1 Mar. 2003.

## IV. DYNAMIC LEGITIMACY AND JUSTICIABILITY

### A. Governmental Legitimacy

If the government is not wholly legitimate, it cannot be right to exclude the judiciary from oversight on the grounds of democracy deficit or a lack of legitimacy to manage a budget. A judiciary gains its legitimacy from the presumption of independence.<sup>44</sup> It is not easy to define what is meant by “judicial independence” (beyond the imprecation that we all know what it means<sup>45</sup>). Numerous attempts have been made, highlighting as key variables: appointments, compensation, jurisdictional controls and impeachment or accountability;<sup>46</sup> political insularity, impartiality, institutional respect and jurisdiction;<sup>47</sup> consistency, political neutrality and political insularity;<sup>48</sup> and freedom from coercion and an evidentiary-based deontological logic.<sup>49</sup> A synthesis of these elements is complex and beyond the scope of this paper, but it is sufficient to say that this independence must be formal (from appointment processes to restrictions on political activity), but also substantive (e.g., avoiding political capture). Further sources of legitimacy (perhaps akin to Larkins’ idea of institutional respect) may be: the erudition of the judges, the transparency of their process, and the domestic experience/expertise that accompany them. Whatever the determinants of judicial legitimacy, it suffices to say that if the judiciary has legitimacy, arguments excluding them from the ESR process based on *absolute governmental legitimacy* do not stand.

To take a more nuanced view, presume that, just as agency is cardinal, so is governmental legitimacy. The severity of voters’ agency deficit will affect their ability to choose in a proportional manner. The distortion of choice leads to a reduction in legitimacy. In other words, a lack of agency amongst voters means that the government is not wholly representative: election results will, to a certain degree, be a distorted representation of the preferences of the polity compared to what the preferences would be if everyone had enough agency to vote. If a government fails to provide for ESR it obstructs the free expression of political preferences, meaning “a polity [is] less democratic, but it [is] not . . . undemocratic. So long as contestation and participation obtain, democracy is a continuous variable, not a discrete or dichotomous variable” (original emphasis).<sup>50</sup>

Given this nuanced view, opponents of justiciability can argue that, where there is a failure to provide ESR to the public, the legislature still has democratic legitimacy, even if it is reduced, while the judiciary has none at all when dealing with resource allocation. They can thus contend that it should always be left to the legislature as peoples’ representatives, no matter how imperfect, to oversee and implement these programs. This argument depends on the *gravity* of non-representation. If the government is very illegitimate, the judiciary can intervene as

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<sup>44</sup> For concerns with the very idea of judicial independence, see J. Mark Ramseyer & Eric B. Rasmusen, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 169-172 (2003).

<sup>45</sup> See Theodore Becker, COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS 1-8 (1970).

<sup>46</sup> Mathew Paulose, Jr., *The Legislature’s Prerogative to Determine Impeachable Offenses*, 36 COURT REV. 22, 23-5 (1999).

<sup>47</sup> Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 611 (1996).

<sup>48</sup> Becker, *supra* note 25, at 144.

<sup>49</sup> Keith Rosenn, *The Protection of Judicial Independence in Latin America* 19 U. MIAMI INTER-AM. L. REV. 1, 7 (1987).

<sup>50</sup> Ashutosh Varshney, *Democracy and Poverty*, in Deepa Narayan (ed.), MEASURING EMPOWERMENT: CROSS-DISCIPLINARY PERSPECTIVES 383, 388 (2005). Varshney is discussing poverty here, but the analogies to ESR are clear.

their legitimacy is not just in a judicial capacity but, more basically, as an arm of government. Courts have stepped in to situations in which the government failed to get anything done. In the case of *People's Union for Civil Liberties v. Union of India* before the Indian Supreme Court, the judgment repeatedly admonished the government for a reticent approach: “. . . the approach of Government is more distressing since . . . [some] aspects required to be dealt with in the last order have [not] been adverted to.’ The court castigated the authorities for ‘vague’ affidavits and, most damningly, the finding that the government’s [m]ere schemes without any implementation are of no use. What is important is that the food must reach the hungry.”<sup>51</sup>

Here, the analogy with CPR is strong. If the legislature is not wholly legitimate and has failed to ensure democratic agency because of defects in its own mandate, a legitimate judiciary must step in. Griffin expresses it in terms of personhood: “. . . Tradition[al views] regard procedural justice as a matter of human rights, but not distributive justice. Procedural justice protects our liberties. Distributive justice, for all its importance, does not bear on our personhood—so long, that is, as the human right to minimum provision is respected.”<sup>52</sup> When discussing the court’s legitimacy, the minimum standard relates directly to the ability to vote, rather than to personhood in full, but otherwise the analysis is appropriate.

### B. CSOs/NGOs

The role of civil society organizations (CSOs) and NGOs have been construed as providing some representation for those who do not have full democratic agency, ensuring that they have a voice in the corridors of power and making up a legitimacy gap. Drèze, when discussing B. R. Ambedkar, architect of the Indian constitution, asserted that “legal action is not the only means of holding the state accountable to its responsibilities. In cases where rights cannot be enforced through the courts, they can be asserted through other democratic means, based for instance on parliamentary interventions, the electoral process, the media, international solidarity, street action, or even civil disobedience.”<sup>53</sup> But these organizations have an *ad hoc* method of constitution and representation. They cannot be wholly aggregative of the choice of those without democratic agency. Further, they are not organs integrated into the body of the state, so their impact on state policy is not determinative of outcome.

Advocates of the role of CSOs argue that civil society allows effective representation of local preferences in a fashion superior to “ordinary majoritarian politics or traditional judicial decision-making.”<sup>54</sup> Klein argues that this means the judiciary should be governors of “accountability,”<sup>55</sup> denying them a role in any form of resource distribution. She thereby runs the risk of trapping a society in a system where distorted representation means some individuals’ rights are left unrealized, yet they are overlooked as it is presumed that the CSO/governmental nexus has provided for them. The problem with this is tacitly acknowledged by Klein in the very next paragraph: “The most developed and theorized accountability-centered approaches to constitutional rights realization have been called experimentalist. Experimentalist systems require *participation of all stakeholders* in defining goals and measuring SER achievement at a local level, and require political units to

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<sup>51</sup> *People’s Union for Civil Liberties v. Union of India & Ors.*, Supreme Court of India, May 2003, Interim Order, available at [www.escriet.org/usr\\_doc/Interim\\_Order\\_of\\_May\\_2\\_doc](http://www.escriet.org/usr_doc/Interim_Order_of_May_2_doc) (accessed 3 Nov. 2009).

<sup>52</sup> Griffin, *supra* note 25, at 14.

<sup>53</sup> Drèze, *supra* note 38, at 54.

<sup>54</sup> Klein, *supra* note 14, at 356.

<sup>55</sup> *Id.* at 355.

measure and share data about progress toward these goals and to adopt best practices of other units” (emphasis added).<sup>56</sup> Klein’s model requires that *all* stakeholders participate. If all stakeholders have input, NGOs are transformed into a vehicle of preference to the state, rather than actors in their own right. While Klein is in theory correct, the likelihood that all citizens, as stakeholders in the provision of ESR, will participate and adequately be represented is low. Hirschl continues this line of argument, positing that there are those who argue for NGOs to take up the mantle of enforcers of “underenforced” norms but highlighting in response the “chastening” of aspirations of liberals and progressives in America when such action proved to be limited.<sup>57</sup>

A better solution can be found in Rittich; namely, that NGOs are “useful vehicles of resistance to the state.”<sup>58</sup> It is worth noting that she goes on to say NGOs are useful conduits of information and democratic preferences to policymakers. Yet they still do not solve the problem of legitimacy. It would be incorrect to think of NGOs as a sufficient makeweight to a government’s popular mandate. It may be appropriate for courts to be limited to assessing accountability, but substantive intervention should not be barred outright. The level of involvement should be a function of the level of democratic agency. While the work of CSOs is important, they are not sufficient to be a constant in the calculus of legitimacy. Their existence should not interfere with legitimacy-based justifications for judicial intervention.

### C. Judicial Intervention

To return now to the overarching question of legitimacy, it can be seen that the greater the number of people who lack agency becomes, the more valid judicial intervention becomes. What must be considered is the *dynamic interrelationship* between agency and the implications for governmental legitimacy on the one hand and the legitimacy of the judicial structure on the other. This relationship will determine the appropriate levels of intervention: the more legitimate the judiciary is in relation to the government, the more important it is for the judiciary to act. Once the barrier of absolute governmental legitimacy falls, arguments such as those of Dennis and Stewart<sup>59</sup> lose their appeal and weight has to be given to the arguments for judicial involvement (e.g., Michelman’s state-constitutive rights<sup>60</sup> and Gewirth’s “communal” rights<sup>61</sup>) when analyzing this interrelationship and the importance of judicial intervention; these arguments must now be considered on their merits.

Judicial intervention is helpfully described as the *legalization* of economic and social rights, or “the extent to which courts and lawyers . . . become relevant actors, and the language and categories of law and rights become relevant concepts, in the design and implementation of public policy.” It takes the following shape: “(a) the placing of cases on the court’s docket . . . ; (b) the judicial decision; (c) a bureaucratic, political or private-party response; and, in many cases, (d) some follow-up litigation.”<sup>62</sup> Not only do the courts become relevant actors, but they must have a range of tools commensurate with their level of involvement. Michelman suggests

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<sup>56</sup> *Id.*

<sup>57</sup> Ran Hirschl, *Reply: Constitutionalism, Judicial Review, and Progressive Change: A Rejoinder to McClain and Fleming*, 84 TEX. L. REV. 471, 484-5 (2005).

<sup>58</sup> Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in David M. Trubek & Alvaro Santos (eds.), *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 203, 223 (2006).

<sup>59</sup> *Supra* notes 9 and 10 and accompanying text.

<sup>60</sup> Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT’L J. CONST. L. 13, 14-15 (2003).

<sup>61</sup> Gewirth, *supra* note 41, at 71-106.

<sup>62</sup> Gauri and Brinks, *supra* note 8, at 4.

that the "inclusion of socioeconomic commitments in a country's constitutional law courts may enable courts to 'take steps to ensure that basic needs receive a degree of priority, and to correct conspicuous neglect,'"<sup>63</sup> and that the success of this may depend on whether there is "the right judicial toolkit and . . . the right forms of cross-branch interaction."<sup>64</sup>

For example, under this model, if a government has made very poor provision for its citizenry, a court can examine not just whether a choice was reasonable (as in *Soobramoney* and *TAC*), but also which choice is best given the circumstances. Having examined all the evidence, a court may further give specific instructions as to resource allocation. The decision of the Indian Supreme Court in the *PUCL* case<sup>65</sup> is an example of this. The court found that famine-related deaths were occurring despite a food surplus. It thus ordered that a policy of state-provided mid-day meals be introduced in all government schools. Further, it ordered the state to implement food and employment schemes with significant resource implications: the food scheme involved 50 billion rupees of cash and five million tones of grain. It also appointed commissioners to monitor progress and report back to the court, allowing the court to take an active role in process management through the issuance of orders. It did this in order to "prod[. . .] the Union and State governments into action."<sup>66</sup>

As can be seen, this approach has the benefit of dealing with the problem of recalcitrant governments. Recalcitrance to allocate resources to the poor in order to remedy breaches of ESR may often be a function of the non-representative nature of government. If the government is a distorted representation of voter preference, it may not understand that its popular mandate *should* include the allocation of money to programs such as famine alleviation or irrigation. Currently, courts often turn, at best, to deferential standards of review when dealing with ESR. Yet, if faced with a non-responsive executive and legislative, courts must choose between "more aggressively setting out and enforcing the precise details of government obligations or backing away from enforcement."<sup>67</sup> The approach outlined in this paper gives courts the legitimacy to pursue a more aggressive approach if needed. If a court makes a rational calculation about the legitimacy of a government, based upon the severity of breach of the democracy line as compared to its own legitimacy, it will not be overstepping its bounds. Nor, if this legitimacy approach becomes part of the discourse, will it be *seen* to be overstepping its bounds.

## V. CONCLUSION

The justiciability and the extent of judicial oversight of ESR must be seen in the context of the proportion of the population whose ESR has been breached to the extent that it affects their democratic agency. In countries such as India, where about 40 percent of the population live below the poverty line,<sup>68</sup> it is safe to deduce that a substantial proportion of the population live below the democracy line. Thus judicial intervention in the food system is legitimated when a substantial proportion of the population are undernourished. Judicial review of the medical system is

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<sup>63</sup> Michelman, *supra* note 4, at 671, citing Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* 56 SYR. L. REV. 1, 16 (2005).

<sup>64</sup> Michelman, *supra* note 4, at 671.

<sup>65</sup> In decisions leading up to *PUCL*, *supra* note 51.

<sup>66</sup> Kamayani Bali Mahabal, *Enforcing the right to Food in India: The Impact of Social Activism*, 5 ESR REV. 7, 9 (March 2004).

<sup>67</sup> Klein, *supra* note 14, at 354-5.

<sup>68</sup> 2005 World Bank figures, cited in *Define Poverty Anew*, THE ECONOMIC TIMES, 30 Aug. 2008, available at [http://economictimes.indiatimes.com/Editorials/Define\\_poverty\\_anew/articleshow/3423435.cms](http://economictimes.indiatimes.com/Editorials/Define_poverty_anew/articleshow/3423435.cms) (accessed 3 Nov. 2009).

appropriate when many people live without health care. In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, the Indian Supreme Court held: “It is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints.”<sup>69</sup>

While the aggressive denial of resource complaints seems alarming, it must be remembered that courts work in the context of a legislature and executive,<sup>70</sup> and that they are capable of allocative logic;<sup>71</sup> thus, the correct judicial approach may well be hard rhetoric along with pragmatic solution-building. For example, on the issue of a clean environment, the Indian courts created Environmental Pollution (Prevention and Control) Authority to monitor air quality and worked with authorities to create policy solutions.<sup>72</sup> These are all parts of the tool kit of a legitimate judiciary that must promote the interests of the democratic polity and fulfill the socioeconomic obligations of the state in instances where the government’s election does not fully represent the preference to do so.

Formulated in this fashion, there are also implications for developed countries such as the United States. It cannot be legitimate to argue that there should be no judicial oversight of ESR when a government’s absolute legitimacy can be impugned by the existence of 12 percent of the population who live below the poverty line,<sup>73</sup> 16 percent who have no health coverage,<sup>74</sup> and about 35 percent who are underinsured.<sup>75</sup> These socioeconomic outcomes must be enshrined in a form amenable to oversight by the judiciary, not only allowing for review but also “concrete, positive enforcement orders in a pretentious...attempt to reshuffle . . . basic resource-management priorities”!<sup>76</sup>

Justiciability does not reduce or harm democratic governance; rather, it promotes democratic governance by focusing on the agency of voters: “such rights can serve, not to preempt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate.”<sup>77</sup>

This paper sketched out a path for a change in discourse. Arguments against justiciability are based in a flawed concept of democratic legitimacy. The concept of absolute legislative legitimacy appears to be a smokescreen in the context of ESR. This is the logical result of failing to provide for democratic agency. By *comparing* the legitimacy of the judiciary and the elected branches of government, it may be possible to suggest how far the court should get involved. Clearly further work is required to define two key variables in this paper: the “democracy line” and the concept of judicial legitimacy; it must then be seen whether a comparative metric

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<sup>69</sup> Supreme Court of India, May 1996, at [16], available at [www.pwtn.org/pictures/EU\\_pics/FINAL\\_STANDARDS/standards/National\\_documents%5CII\\_cases%5C62\\_Paschim\\_Banga\\_Khet\\_Mazdoor\\_Samity.doc](http://www.pwtn.org/pictures/EU_pics/FINAL_STANDARDS/standards/National_documents%5CII_cases%5C62_Paschim_Banga_Khet_Mazdoor_Samity.doc) (accessed 3 Nov. 2009).

<sup>70</sup> Daniel M. Brinks and Varun Gauri, *A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World*, in Gauri and Brinks, *supra* note 8, at 303, 345.

<sup>71</sup> Gauri and Brinks, *supra* note 8.

<sup>72</sup> Brinks and Gauri, *supra* note 70, at 322.

<sup>73</sup> Carmen DeNavas-Walt et al., *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005* 13 (2006).

<sup>74</sup> *Id.* at 23.

<sup>75</sup> Cathy Schoen et al., *Insured But Not Protected: How Many Adults Are Underinsured?*, 24 *HEALTH AFF.* W5-289, W5-293 (2005).

<sup>76</sup> Michelman, *supra* note 60, at 16.

<sup>77</sup> Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, University of Chicago, Public Law and Legal Theory Working Paper No. 12, 1 (2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=269657](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269657) (accessed 3 Nov. 2009).

of legitimacy is derivable. Yet, by arguing for a discursive change, I hope not that a “juristocracy”<sup>78</sup> establishes itself but that the narrative of justiciability progresses, moving on from arguments about democratic deficits and the exclusion of the judiciary so as to facilitate constant oversight of economic and social rights based on a narrative of contrasted legitimacy.

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<sup>78</sup> Hirschl, *supra* note 15.