

IMPLEMENTATION OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: PERSPECTIVES FROM DELIBERATIVE DEMOCRACY

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Introduction

The 1986 International Covenant on Economic, Social and Cultural Rights (ICESCR),¹ currently ratified by 166 countries,² recognises economic, social and cultural rights (ESCRs) as human rights. Since the late 1950s, substantial geopolitical changes have affected the recognition of human rights. After successive waves of decolonisation and the fall of the Soviet Union, many countries have included ESCRs alongside traditional civil and political rights (CPRs) in their constitutions or have made them judicially enforceable.³

Thirty years after the adoption of the ICESCR, however, the issue of global inequality remains significant on the global policy agenda. ESCRs, and their judicialisation, have received considerable attention from scholars and theorists alike. Proponents of a variety of ideological schools have advocated for the judicialisation of ESCRs as a purpose-built and fast solution to social inequality. However, a chorus of opposing voices argue that the judicialisation of ESCRs (whether on a constitutional basis or otherwise) would be, at best, an inefficient tool to ensure their effective implementation. Some have gone as far as to argue that enshrining ESCRs in constitutions would render the foundational text a mere collection of

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¹ International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3 [ICESCR].

² *Ratification Status for CESCR - International Covenant on Economic, Social and Cultural Rights*, <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>> (visited 12 February 2016).

³ Ellen Wiles, "Aspirational Principles or enforceable rights? The future for socio-economic rights in national law" (2006) 22:1 *AmUInt'l LRev* 35, at 37.

“good intentions,” widen the democratic gap and damage the system as a whole.⁴

The practical difficulties of judicialising ESCRs often overshadow the conceptual barriers. Enforcing ESCRs naturally provokes questions about the fair allocation of scarce resources. Without unlimited resources, governments and policymakers must inevitably prioritise certain rights over others, selectively allocating resources to further only a handful of causes. This style of decision-making, it will be seen, often unfairly restricts the benefits of ESCRs to certain sections of the population. This essay argues that many of these practical injustices stem from an inadequate institutional framework. An institutional framework that leaves ESCRs unenforced and unenforceable calls into question their status as human rights. The purpose of this essay is manifold: it aims to analyse the issues raised by the implementation of ESCRs and then forward the notion that these difficulties could be circumvented by reinterpreting the implementation of ESCRs from the perspective of deliberative democracy.

This essay is divided into three parts. The first part outlines the two major issues facing the implementation of ESCRs. The second part offers a critique of the current model of representative democracy in the context of the implementation of ESCRs. Following the seminal work of Habermas, Gutmann and Thompson, the second part continues by outlining the principles of deliberative democracy that will be tested in the third part. Finally, after considering some of the most compelling arguments raised by opponents of the judicialisation of ESCRs, the third part offers a fresh approach to the question of the implementation of ESCRs by exploring heterodox institutional engineering. It will be argued that mechanisms of deliberative democracy could circumvent many of the barriers raised against ESCRs.

I. Economic, Social, and Cultural Rights: An Overview

The end of WWII, the decolonisation movement and the fall of the USSR triggered consecutive waves of democratization during the 20th century.⁵ These waves hit countries from the shores of Europe to Africa and the Americas. Freedom House, which ranks countries according to their citizen's freedom to exercise political rights and civil liberties, noted that by

⁴ Cass R. Sunstein, “Against Positive Rights” in Andras Sajó (ed.), *Western rights?: Postcommunist Application* (Kluwer Law International, 1996), at 225.

⁵ Robin Luckham, Anne Marie Goetz, Mary Kaldor, “Democratic Institutions and Politics in Context of Inequality, Poverty and Conflict” (1998) *IDS Working Paper* 104.

2014, 89 countries were considered to be democratic and 55 were considered to be partly democratic. Altogether, this amounts to 64 percent of the global population.⁶ Out of these “free” democracies,⁷ nearly two thirds have included ESCRs in their constitutions and/or have judicialised them.⁸ However, even in jurisdictions where ESCRs benefit from official recognition, they commonly face two major stumbling blocks. First, where ESCRs are justiciable, judges often face questions of legitimacy when interfering with the powers and budget of the other organs of government. Second, where ESCRs are judicialized, not all members of the population benefit equally.

A. Judicialisation and ESCRs

There is a notable global trend towards the recognition and judicialisation of ESCRs. Prominent examples include South Africa, Colombia, Brazil and India. However, where ESCRs have been officially recognised, the Courts are often unwilling to enforce them. This, Mark Tushnet emphasises, raises problems as “a purported right without an accompanying judicially enforceable obligation is, almost literally, toothless.”⁹ ESCRs without enforcement are mere political directives dependent on political will rather than minimum standards of dignity that each human being ought to enjoy.¹⁰

However, the judicialisation of ESCRs, even as a concept, is controversial. Salma Yusuf recently summarised the main grounds of criticisms raised by sceptics when challenging judicial enforcement of ESCRs.¹¹ The first concern relates to the lack of legitimacy carried by judicial decisions adjudicating cases related to ESCRs. Judicial enforcement of ESCRs would require judges to make mandatory orders directing the executive or the legislature to act and to use resources in certain ways. This, it is argued, damages the separation of powers necessary in a democracy.

⁶ *Freedom in the World 2015*

<https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf> (visited 12 February 2016).

⁷ Micro states have not been taken into account.

⁸ Jacob Mchanga, *Legalizing economic and social rights won't help the poor* <<https://www.opendemocracy.net/openglobalrights/jacob-mchangama/legalizing-economic-and-social-rights-won%E2%80%99t-help-poor-0>> (visited 12 February 2016).

⁹ Mark Tushnet, “Social Welfare Rights and the Forms of Judicial Review” (2003) 82 *TexasLRev* 1901.

¹⁰ Mark Tushnet, note 9, 1901.

¹¹ Salma Yusuf, “The Rise of Judicially Enforced Economic, Social and Cultural Rights: Refocusing Perspectives” (2012) *SeattleJSocJust* 754.

By making such mandatory orders, judges encroach on the sphere of competence of the legislature and the executive powers.¹² The issue is that, in many cases, the judiciary are an unelected body.¹³ Critics argue that decisions relating to public policy and state budgets should only be made by elected holders of a democratic mandate. The second variety of criticisms targeting the enforcement of ESCRs by the judiciary involves the lack of technical know-how of judges in cases involving ESCRs. Even if judges might legitimately make decisions on resource allocation, they are fallible and lack all of the required knowledge to make informed decisions.¹⁴ ESCR claims are often “polycentric”: a violation of a particular ESCR is often interrelated with the implementation of other ESCRs.¹⁵

These criticisms seem to suggest that the judicialisation of ESCRs is conceptually flawed. It could be possible to alleviate these issues, and it would seem prudent to do so, if it were the case that judicial enforcement was effectively upholding ESCRs across the populations of jurisdictions that recognised such rights. However, the current model of judicialisation within representative democracy is not effectively upholding ESCRs. As will be made clear in the next section, the judicialisation of ESCRs has not extended the benefits to all sections of the population.

B. Indicators and ESCRs

A brief account of the progressive realisation of ESCRs will be useful to this essay so as to illustrate that the judicialisation of ESCRs in the ICESCR did not immediately ensure that ESCRs are enjoyed by every sector of society. This analysis must be read in the context of Article 2 of the ICESCR, which imposes an immediate cross-cutting obligation that prohibits any discrimination on grounds set out in the Article.¹⁶ When states operationalise any ESCR enshrined in the ICESCR, they cannot discriminate, formally or substantively,¹⁷ on the ground of colour, sex, language, religion, political or other opinion, national or social origin,

¹² Ellen Wiles, note 3.

¹³ Salma Yusuf, note 11, at 760.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at 764.

¹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), “General Comment No. 20. Non-discrimination in economic, social and cultural rights” (2 July 2009) E/C.12/GC/20, at 7.

¹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), “General Comment No. 3. The nature of States parties’ obligations” (14 December 1990) E/1991/23, at 8.

property, birth or other status.¹⁸ Once an ESCR has been extended to one section of the population, a state is under an immediate obligation to extend it to all.

The term “human rights indicators” refers to a broad range of statistics and figures which allow easy assessment of a jurisdiction’s human rights compliance. Indicators have been used in development studies for over forty years and their usefulness for assessing compliance has been recognised amongst scholars, as well as by international organisations.¹⁹ Given the progressive nature of ESCRs, indicators are essential to the successful monitoring of the achievement of the rights, whether enshrined in the ICESCR by the Committee or at the domestic level by ordinary jurisdictions in charge of their enforceability. Current indicators assessing the progressive implementation of ESCRs largely focus on the right to health and the right to education.²⁰

The Human Development Index (HDI) was designed by the UN Development Programme. It draws on the seminal work of Amartya Sen, who uses indicators to measure a population’s “capability to lead the kind of lives we have reason to value”.²¹ The HDI aims to measure the average realisation of ESCRs in a given country by considering three dimensions: “a long and healthy life, access to knowledge, and a decent standard of living.”²² The final HDI aggregates data across the three dimensions of health expectancy, expected years of schooling for children at school entering age and the Gross National Income per capita²³ to arrive at a single

¹⁸ ICESCR, note 1, art. 2(2).

¹⁹ Organisation of American States (Inter-American Commission on Human Rights), “Guidelines For Preparation Of Progress Indicators in The Area Of Economic, Social And Cultural Rights” (2008) OEAL/V/II.132; UN Office of the High Commissioner for Human Rights (OHCHR), “Report on indicators for promoting and monitoring the implementation of human rights” (6 June 2008) HRI/MCi2008/3.

²⁰ Sital Kalantry, Jocelyn E. Getgen, Steven Arrigg Koh, “Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR” (2010) *HumRtsQ* 32, 260.

²¹ Amartya Sen, *Development as Freedom* (Oxford Paperbacks, 1999), at 285.

²² UN UNDP, “Composite indices — HDI and beyond” <<http://hdr.undp.org/en/statistics/understanding/indices>> (visited 12 February 2016).

²³ According to the World Bank, the GNI per capita is based on purchasing power parity. It is a global indicator that assesses a country as a whole: it is the Gross Domestic Product less a set of variables (primary incomes payable to non resident units plus primary incomes receivable from non-resident units). See *GNI Per Capita*, <<http://data.worldbank.org/indicator/NY.GNP.PCAP.PP.CD>> (visited 12 February 2016).

metric. A change in the metric broadly indicates a change in the quality of lives.²⁴

HDI trends over the past 20 years indicate a substantial global improvement (with varying intensity among countries) from a global average of 0.597²⁵ in 1990 to 0.702 in 2013.²⁶ From a regional perspective, the HDI of Asian and Arab states registered the highest growth, followed by South America, Sub-Saharan Africa and finally Europe and Central Asia. In 2013, South America, closely followed by Europe, registered the highest HDI with 0.740 and 0.738 respectively, while to South-Asia and Sub-Saharan Africa registered an HDI of 0.588 and 0.502.²⁷

Nevertheless, when inequality is assessed through the Gini coefficient, which measures the deviation from a perfectly equal distribution of income, different conclusions are reached.²⁸ A Gini coefficient of 1 represents perfect inequality, with one individual having all the income. A coefficient of 0 accounts for a perfectly equal distribution of income among a given society. Over the past 20 years, the average Gini coefficient of per capita incomes of countries shows a global gradual decrease: a move towards equality of distribution. Yet, if one removes the impact of China's growth from the data, it emerges that the Gini coefficient was higher in 2010 than in 1980.²⁹ This means that, globally, the gap of distribution of income between the lowest decile and the highest decile has increased between 1980 and 2010.

The pattern followed by the HDI is of constant increase, which is *prima facie* a positive trend. However, this global trend paints a deceptive picture. Even a cursory examination of the trend illustrated by the Gini coefficient implies that not all sectors of society are benefitting from increased ESCR enforcement. It remains difficult to give a full account of the discrimination suffered by some sectors of the population. The

²⁴ UNDP, Human Development Index <<http://hdr.undp.org/en/content/human-development-index-hdi>> (visited 12 February 2016).

²⁵ A score of 1 is a utopian ideal: it would be the highest score in each of the different indicators (GNI, life expectancy, etc). See UNDP, *Human Development Index* <<http://hdr.undp.org/en/content/human-development-index-hdi>> (visited 12 February 2016).

²⁶ UNDP, Human Development Report 2014, Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience <<http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf>> (visited 12 February 2016).

²⁷ *Ibid.*

²⁸ World Bank, Gini Index <<http://data.worldbank.org/indicator/SI.POV.GINI/countries/all?display=default>> (12 February 2016).

²⁹ UN Department of Economic and Social Affairs, "Inequality Matters Report of the World Social Situation" (2013) ST/ESA/345, at 27.

aggregation of data done by the UN HDI when assessing the overall compliance of a jurisdiction often hides the plight of minorities. As Katarina Tomasevski notes, “multi-layered discrimination remains statistically invisible.”³⁰ If aggregation of data obscures the progress of ESCRs in some sections of the population, we cannot assess the compliance of states with the non-discrimination provision of the ICESCR. What is needed is “a set of mutually exclusive and exhaustive attributes and corresponding indicators” in order to fully assess how ESCRs are implemented.³¹

The analysis of the second Millennium Development Goal – *Achieving universal primary education* – from 1990 to 2014 with regard to gender and income is illuminating. By presenting the data in a disaggregated form, the study clearly shows that the benefits of the overall trends are not enjoyed by all. Since 1990, the number of out-of-school children has dramatically fallen, by nearly 45%.³² In 1990, the average gap in the number of out-of-school children between developed and developing countries was 16%. By 2015, it had fallen to 5%.³³ However, the United Nations Development Programme estimates that children in the poorest households are four times more likely to be out of school than children of the wealthiest households.³⁴ In fact, 21.9% of adolescents from the poorest quintile do not complete primary school compared to 5.5% in the richest quintile. Children from rural areas are twice as likely to be out of school than those from urban areas.³⁵ From a gender perspective, in the developing world, parity was reached in primary school by 64% of countries in 2012, while only 4% in tertiary education.³⁶

Two comments can be made from this brief analysis. First, as underlined in the literature and official reports, data unavailability increases the difficulties of presenting a complete account. In order to provide an in-depth account of global compliance on the right to primary education which takes into account all sections of the population, data regarding ethnicity, disability, sexual orientation, etc, must be collected. Second, the

³⁰ Katarina Tomasevski, *Manual on rights-based education: global human rights requirements made simple* (UNESCO Bangkok 2004), at 26.

³¹ UN OHCHR, “Human Rights Indicators: A Guide to Measurement and Implementation”, HR/PUB/12/5 (2012 NY/Geneva) United Nations, at 81.

³² UN Development Programme, “The Millennium Development Goals Report 2015” (UN: New York 2015), at 25.

³³ UNDP, “Indicators for Human Rights Based Approaches to Development” (UNDP 2006), at 24.

³⁴ *Ibid.*

³⁵ *Ibid.*, at 26.

³⁶ *Ibid.*, at 29.

implementation of ESCRs must include their enjoyment by the most marginalised sectors of society. This partial account shows us that despite well-intentioned attempts to achieve full implementation of ESCRs, and the spread of democracy as a model of governance, current representative models of democracy seem unable to ensure equality when implementing ESCRs. It is submitted that it could be useful to bring key normative conceptions advocated by deliberative democrats, which have been gaining considerable ground, to provide creative solutions to the problem.

II. Deliberative Democracy

This part briefly outlines the major differences between the representative and deliberative models. It examines some of the relevant criticisms of representative democracy as it currently stands. It subsequently outlines the relevant principles of deliberative democracy. This discussion will help illustrate the precise advantages of deliberative democracy mechanisms over those of representative democracy when judicialising ESCRs.

A. Representative versus Deliberative Models of Democracy

Since the beginning of the 1990s, an important shift from representative “vote-centric” to deliberative “talk-centric” theories of democracy has occurred.³⁷ Representative democracy³⁸ is the paradigmatic model of democracy worldwide.³⁹ Deliberative democracy has been offered as an alternative.⁴⁰

Representative democracy is not primarily concerned with the question of opinion-and-will formation. In the political process, it considers preferences shaped by competition between different “[strategic]...collectives”, all acting to maintain or acquire a position of power in society.⁴¹ The aggregation of preferences is classically undertaken by electing representatives through the “competitive struggle for the

³⁷ Alan Patten, Will Kymlicka, “Introduction: Language Rights and Political Theory: Context, Issues and Approaches”, in Will Kymlicka, Alan Patten eds., *Language rights and political theory* (OUP 2003), at 13.

³⁸ Though “representative” democracy is often labelled “aggregative” democracy in the literature, I use the former term here for clarity.

³⁹ Robin Luckham et al., note 5.

⁴⁰ Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004).

⁴¹ Raphael Kies, “Deliberative Democracy: Origins, Meaning, and Major Controversies” in *Promises and Limits of Web Deliberation* (Palgrave, 2010), at 22.

people's vote.'⁴² The legitimacy of decisions taken in the political sphere derives from the democratic mandate secured through elections and from the balances and separation of powers provided by the legislative, executive and judicial organs⁴³ without necessarily requiring any public justification for the decisions taken.⁴⁴

In contrast, deliberative democrats emphasise political opinion-and-will formation among citizens. The essential focus is on the formation of interests and preferences prior to decision-making. Deliberative democrats assume that preferences "exist independent of, and prior to, the process itself."⁴⁵ In short, if the two models share several principles, they fundamentally differ in their focus. The central political unit of representative democracy is the voter, whereas for deliberative democracy the focus is on the deliberative process and on the idea that decisions must receive "reflective assent" by those impacted by the decision.⁴⁶ Nonetheless, several principles are shared between these two models: the right of citizens to pursue a life of their own; the inclusion of free and equal citizens in the political system; and the acknowledgement of an independent public sphere.⁴⁷

Two broad criticisms of representative democracy will be examined: lack of legitimacy and lack of participation by the citizens. These criticisms mirror the issues identified with the current model of judicialisation of ESCRs. The problems with judicialisation, it is suggested, stem from the problems with representative democracy. The alternatives offered by deliberative democracy may go far towards addressing the flaws in the current model of ESCR enforcement.

First, decisions taken in the representative model may suffer from a lack of legitimacy. The representative model is not "reason-giving", in that it does not require rational justifications for every decision taken by decision-makers when it comes to public policies that implement, for instance, rights enshrined in the ICESCR or the constitution. The rationale of the representative model is that the vote of citizens electing their representatives has given decision-makers a mandate to take these

⁴² Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper and Row, 1950), at 269.

⁴³ Raphael Kies, note 41, at 23.

⁴⁴ Gutmann and Thompson, note 40, at 15.

⁴⁵ Adeno Addis, "Constitutionalizing Deliberative Democracy in Multilingual societies" (2007) 117(25) *BerkJIntL* 124.

⁴⁶ John Dryzek, "Legitimacy and economy in deliberative democracy" (2001) 2(5) *PolTheory* 651.

⁴⁷ Raphael Kies, note 41, at 22.

decisions. If the decisions taken were against their interests, the citizens would vote the politician out.⁴⁸ In the long run, however, this may perpetuate structures of unequal distributions of power. Decision-makers may act out of pure “self interest, prejudice or even ignorance.”⁴⁹ As such decisions under a representative model could be perceived as unjust and unfair by certain citizens, especially when a decision leaves them among a minority, or even a majority, not benefitting from a particular ESCR.

Second, critics address the lack of participation. Donald Horowitz gives a compelling account: “In ethnically divided societies, majority rule is not a solution; it is a problem, because it permits domination, apparently in perpetuity.”⁵⁰ Amy Gutmann and Dennis Thompson highlight how representative models of democracy reinforce the existing unequal distribution of power.⁵¹ The neutrality of the law and government under the representative model has been challenged by feminist, race, queer and Marxist perspectives on law. They highlight how sectors of society constituting large minorities or even majorities, such as women or low-income workers, do not see their interests taken into account by political decision-makers.⁵² Minority groups, without the adequate institutional safeguards, have been similarly voiceless and been equally unable to protect their rights.

Bearing in mind these objections, this essay now turns to a review of the principles grounding deliberative democracy.

B. The Normative Principles of Deliberative Democracy

Jürgen Habermas’ seminal work and its conceptualisation of “robust and rational decision-making”⁵³ laid down the theoretical foundations of deliberative democracy at small or larger scales. The present essay focuses on the subsequent work of Gutmann and Thompson who adopt the hallmarks of deliberative democracy, which have, in small-scale experiments, “defeated cynics who deny that ordinary citizens have what it

⁴⁸ Claus Offe, “Crisis and Innovation of Liberal Democracy: Can Deliberation Be Institutionalised?” (2011) *CSR Essays in Social Theory*, at 447 <http://www.euro.centre.org/data/1310545115_27711.pdf> (visited 12 February 2016).

⁴⁹ Adeno Addis, note 45, at 124.

⁵⁰ Donald L. Horowitz, “Democracy in Divided Societies” (1993) 4(4) *JDemocr* 29.

⁵¹ Gutmann and Thompson, note 40, at 16.

⁵² Duncan Kennedy, “The Critique of Rights in Critical Legal Studies” in Wendy Brown and Janet Halley eds., *Left Legalism Left Critique* (Duke University Press, 2002).

⁵³ Ron Levy, “The Law of Deliberative Democracy: seeding the field” (2013) 12(4) *ElecLawJ* 361.

takes to think through complex public issues”⁵⁴ and operationalise them on a larger scale.⁵⁵

In *Why Deliberative Democracy*, Gutmann & Thompson explore six necessary principles for a successful deliberative process at a practical level.⁵⁶ These principles can be categorized as procedural and substantive.

Uncontroversial amongst deliberative democrats, procedural principles are essential to achieve a reason-giving discourse in a cooperative context. These procedural principles are publicity, accountability and reciprocity.⁵⁷ The *principle of publicity* entails that deliberation must take place in a public place and deliberations must be of public concern.⁵⁸ The *principle of accountability* requires decision-makers – whether they are elected or not – to justify their political decisions to the people. Finally, the *principle of reciprocity* calls for participants to raise justified arguments backed by reason that others are able to accept, setting aside religious or authoritative positions.⁵⁹

Through their second grouping of principles, Gutmann and Thompson sought to ensure that a deliberative model introduces substantive, not simply procedural changes.⁶⁰ They highlight three principles that are important in governing the content of deliberation: basic liberty, basic opportunity and fair opportunity.⁶¹ The *principle of basic liberty* requires that basic civil and political liberties be respected. The *principle of basic opportunity* requires a minimum level of respect for certain ESCRs understood as absolutely necessary to make “choices among good lives.”⁶² Finally the *principle of fair opportunity* refers to “the distribution of social resources that people value highly but may not be essential to living a good life or having a choice among good lives.”⁶³ The principles have obvious corresponding obligations under international human rights law. The principle of basic liberty and the principle of basic opportunity relate respectively to the UNDHR and to minimum core obligations defined by the Committee on

⁵⁴ Bruce Ackerman and James S. Fishkin, *Deliberation Day* (Yale University Press 2004), at 5.

⁵⁵ Gutmann and Thompson, note 40.

⁵⁶ Gutmann and Thompson, note 40.

⁵⁷ Gutmann and Thompson, note 40, at 133.

⁵⁸ Gutmann and Thompson, note 40, at 135.

⁵⁹ Gutmann and Thompson, note 40, at 4; Jürgen Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (MIT Press 1996), at 299.

⁶⁰ Gutmann and Thompson, note 40.

⁶¹ Gutmann and Thompson, note 40.

⁶² Gutmann and Thompson, note 40.

⁶³ Gutmann and Thompson, note 40, at 137.

ESCRs.⁶⁴ Finally, the principle of fair opportunity echoes the prohibition of discrimination of Art. 2(2) of the ICESCR.⁶⁵

These substantive principles have generated debate amongst deliberative democrats. Iris Young acknowledges them as necessary but argues that they should not be a precondition to the deliberative process and advocates instead for an overall value of inclusion.⁶⁶ Inclusion has two aspects: inclusion of those affected by a policy in the decision-making process and the provision of opportunity to influence the outcomes of decisions to those affected by decisions.⁶⁷

The next section will examine how the implementation of these principles could, in theory, alleviate some of the problems of representative democracy and the implementation of ESCRs exposed above.

III. Deliberative Perspective on ESCRs

If discussions about judicialising ESCRs were merely theoretical prior to the 1990s, they have since moved to more practical matters. Present discussion in many fora addresses how the judiciary could give substantive meaning and content to these rights. This part aims to explore how the institutional arrangements of deliberative democracy, acting as a complement to existing structures, could improve the implementation of ESCRs. Acknowledgement will be made to the inadequacy of the normative principles of deliberative democracy for immediate practical purposes and, following other deliberative democrats, the necessity to accommodate these normative principles within already existing non-deliberative democratic mechanisms will be recognised.⁶⁸ Some concrete suggestions will be made regarding features of deliberative democracy that could be integrated within the representative model.

Democratic institutions do not per se imply democratic politics. However, this part will analyse the way in which democratic institutions can foster democratic politics understood as the processes of political contestation which animate liberal democracies,⁶⁹ including the capacity of

⁶⁴ CESCR, note 17, at 10.

⁶⁵ *Ibid.*, at 7.

⁶⁶ See, for example, Iris Young, "Justice, Inclusion and Deliberative Democracy" in Stephan Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (OUP 1999), at 152.

⁶⁷ Iris Young, *Inclusion and democracy* (OUP 2000), at 5.

⁶⁸ Jane Mansbridge (*et al*), "Self-Interest and Power in Deliberative Democracy" (2010) 18 *JPolitica Philos* 1, at 64.

⁶⁹ Robin Luckham *et al*, note 5, at 5.

citizens to hold to account not only agents from the state but also private actors.⁷⁰

A. *The Potential Impact of Deliberative Democracy*

At the heart of many of the problems relating to ESCRs is the high cost of implementation and the question of how public funding should be allocated efficiently and fairly. The right to health is usually used to illustrate this dilemma. Given the unavoidable resource constraints, ethical issues have to be resolved and as such, judges may be ill-equipped to make a decision. Where the right to health has been made enforceable through individual complaints mechanisms, as was the case in Brazil, empirical research has shown that judges tend to adjudicate in favour of expensive individual treatments for claimants belonging to the highest strata of society⁷¹ despite the ICESCR obligation of non-discrimination.⁷²

For now, even with the best possible intentions, the judiciary's inability to make these rights meaningful may lead some to consider that ESCRs are inevitably beyond the grasp of citizens. Nonetheless, by implementing institutional reforms that would align with the normative principles of deliberative democracy, benefits of ESCRs would be fostered through increased legitimacy and the increased inclusiveness of the decisions made.

As discussed above, both the decisions of judges in relation to ESCRs and the decisions of elected representatives may suffer from a lack of legitimacy. The normative requirements of deliberative democracy, however, are a move away from the idea that voting in elections confers unquestionable legitimacy. The Habermesian deliberative conception understands legitimacy as *earned* through the process of deliberation. It is essential that the process includes every sector of society in pre- and post-policy decision-making deliberation. As discussed, Young labels this the "principle of inclusion". Similarly, Gutmann and Thompson set substantive principles that are considered preconditional to the deliberative processes and thus ensure that it does not fall into the drawbacks of the representative model.⁷³ Deliberative mechanisms could enhance the democratic legitimacy

⁷⁰ Robin Luckham *et al*, note 5, at 11.

⁷¹ Octavio L. Motta Ferraz, "Harming the Poor through Social Rights Litigation: Lessons from Brazil" (2011) 89 *TexasL Rev* 1643, at 1667.

⁷² ICESCR, art 2(2).

⁷³ Gutmann and Thompson, note 40, at 137.

and acceptability of government decisions and lend more democratic legitimacy to judicial review of those decisions.

Deliberative mechanisms also have potential to alleviate the second major criticism of representative democracy and ESCR judicialisation: non-homogenous enjoyment of ESCRs and a failure to address the needs of minorities. They could achieve this through inclusion of alternative or minority points of view in the decision-making process. The principle of reciprocity creates an obligation to justify governmental decisions through rational arguments. An outcome is reached not because a majority agrees, but because the arguments advanced are the most compelling. Advocates of other outcomes, though unsuccessful, should agree that the decision taken is rationally acceptable. The deliberative process provides the assurance that the decision reached will be optimally acceptable for the population. One would hope that, if the process of decision-making is sufficiently inclusive, an optimally acceptable decision would be one that ensured the benefits of ESCRs for the maximum number of people and sectors within a population. Given that the substantive principles of deliberative democracy imply the inclusion of viewpoints from every segment of society, the decision reached will likely be closer to complying with the international prohibition of discrimination. In the rare case that a decision cannot be reached, the deliberative process has the benefit of outlining conflicting views on ethical issues in society arising among citizens. It adds the demands of the most marginalised to the discussion⁷⁴ and it ensures that the weakest, most vulnerable voices are heard. This “ongoing confrontation” is part of the vibrancy of a democracy as it enables a more accurate account of the demands of a given society.⁷⁵ In heterogeneous societies, which are erected on different cultural and thereby communicative foundations, discussion and consensus are more difficult. By acknowledging the existing conflicts through deliberative processes, the implementation of deliberative processes can help ensure that the social fabric is not damaged and is therefore able to provide productive solutions (independently of the question of ESCRs).

⁷⁴ Joshua Cohen, Charles Sabel, “Directly-Deliberative Polyarchy” (1997) 3(4) *ELJ* 1322.

⁷⁵ Chantal Mouffe, “Deliberative Democracy or Agonistic Pluralism?” (1999) 66(3) *Social Research* 755.

B. Potential Drawbacks

Deliberative democracy should not be praised solely on the basis that it is an alternative to the representative model. It may help alleviate some of the problems representative democracy creates for ESCRs. It is not, however, a perfect solution. There are three prominent problems inherent in the nature of deliberative democracy.

The first problem of the deliberative process is a particular discursive style which tends to exclude people and types of information.⁷⁶ This particular criticism undermines the principle of reciprocity and manifests itself in two ways.

First, the issue known as the “elite problem”. The participatory advantages of deliberative democracy may be restricted to certain classes; those in the upper class or those with a university education may find themselves with a stronger voice in the discourse than those with less education. It need not be a problem inherent in the system either: there may be issues of credibility and self-censorship among minority voices which could impede their proper participation in the deliberative process.⁷⁷

Second, cultural heterogeneity could undermine the inclusiveness of the discourse.⁷⁸ If, due to cultural differences, each party is unable to understand the other, reciprocity becomes impossible to implement. This critique highlights that the Western stance on the superiority of reason to religious or spiritual arguments must be accepted in order for deliberative democracy to function. Hence, it might exclude groups such as religious fundamentalists or indigenous tribes from the process.

The deliberative process is not a discussion: it is a framework to reach decisions about specific policy problems. However, deliberative models not addressing these issues would fall into many of the pitfalls of the representative model noted above. The disparity in the enjoyment of ESCRs between different sectors of society could stem from the inability of marginalised groups to express their needs and demands. Acknowledging this risk enables the design of institutional mechanisms that combat the appropriation of the deliberative process by groups enjoying a more

⁷⁶ Sidney Verba, Kay Lehman Scholzman and Henry Brady, *Voice and Equality: Civic Voluntarism and American Politics* (HUP 1995), at 500.

⁷⁷ Yannis Papadopoulos and Philippe Warin, “Are innovative, participatory and deliberative procedures in policy making democratic and effective?” (2007) 46 *EJPR* 455.

⁷⁸ Ilan Kapoor, “Deliberative Democracy or Agonistic Pluralism? The Relevance of the Habermas-Mouffe Debate for Third World Politics” (2002) 27(4) *Alternatives: Global, Local, Political* 464.

preeminent position in society. Gutmann and Thompson partially addressed this problem by insisting on the use of the three substantive principles (basic liberty, basic opportunity and fair opportunity) when designing a model of deliberative democracy.

The second major critique of deliberative democracy relates to the choice between competing arguments. This has been labelled the “accommodation problem”.⁷⁹ It involves deciding when the discussion should stop and the decision should be made. Indeed, deliberative democracy is based on the idea that consensus and opinion-and-will formation can fluctuate during the deliberative process through the submission of considerations backed by reason. Furthermore, every decision must receive the “reflective assent”⁸⁰ of those affected by decisions taken. Some theorists have attempted to address this problem. Rawls, for example believes that “overlapping consensus” should be reached. This means that every participant in the deliberative process agrees on the decision taken.⁸¹ Juan Perote Peña and Ashley Piggins would put an end to the discussion when no other rational consideration can convince other participants to change their opinion.⁸²

The third major concern is the “performative problem”. This relates to the impossibility of attaining the ideal system of deliberative democracy. It is simply impracticable to gather each and every member of the community for decision-making.⁸³ The performance problem calls into question one of the main advantages that deliberative democracy purports to deliver: increased legitimacy of decision-making. As a solution, John Dryzek proposes the installation of different combinations of deliberative mechanisms and representative mechanisms. Rawls proposes to limit discussion to deciding on the basic structure of society. Another option could be to ensure representation of marginalised groups in the deliberative process by “proceedings to call to mind the interests of those who do not participate.”⁸⁴ In short, mechanisms are generally considered legitimate by deliberative democrats if they sufficiently address the normative principles of deliberative democracy.⁸⁵

⁷⁹ Ron Levy, “The Law of Deliberative Democracy: seeding the field” (2013) 12(4) *ElectLawJ* 361, at 369.

⁸⁰ John Dryzek, note 46, at 651.

⁸¹ Ron Levy, note 79, at 361.

⁸² Juan Perote Peña and Ashley Piggins, *A Model of Deliverative and Aggregative Democracy* (2011 Working paper no. 170) <<http://hdl.handle.net/10379/2301>> (visited 12 February 2016).

⁸³ Ron Levy, note 79, at 83.

⁸⁴ John Dryzek, note 46, at 655.

⁸⁵ Jane Mansbridge *et al*, note 68, at 75.

If these problems were sufficiently addressed, it seems that deliberative democracy would have much to offer to foster a fairer distribution of ESCRs and to ensure compliance with international standards. Yet the question of implementation must be dealt with.

C. Some Thoughts on Implementation

Deliberative democracy is, undeniably, an idealistic goal. Considering the size and complexity of modern society and the role of government within it, it is unlikely that a state governed on a fully deliberative basis is fully realisable. Yet, despite this, there may be ways to integrate features of the deliberative model into existing representative frameworks. A full technical examination of all aspects of the implementation of deliberative mechanisms is beyond the scope of this article. However, some suggestions will be made in relation to possible mechanisms for implementation.

Constitutional legacies, existing institutional frameworks and current political systems affect future institutional modifications. When designing an institutional framework to address specific issues, political scientists and lawyers must bear in mind that it ought to tessellate with each society's demographic peculiarities and particular needs. What follows are some thoughts and caveats to bear in mind when considering how deliberative mechanisms might be implemented within existing institutional frameworks. To ensure the desired effect, mechanisms should be tailored to reflect the substantive principles of deliberative democracy.

First, special attention to participation is the key to ensuring the success of institutional adjustments. As a precondition to achieving greater inclusion, and to meet the principle of publicity, there must be a concerted effort to inform the public of issues that affect them and their rights. This could occur through the traditional media of television, print and radio but, considering the near universal access to the internet in the Western world and the constantly improving access to the internet elsewhere, online communication campaigns should be conducted. The "elite problem" outlined in the previous section, which challenges the principle of fair opportunity, should not be allowed to eventuate. From the perspective of efficient governance, it may be advisable to have a filter mechanism to determine in the intensity of the obligation to inform and ensure inclusion. The obligation should be greater where a more important ESCR is affected or a greater number of ESCRs are implicated. For example, a proposal to significantly alter the budget allocated to education in general may require significant advertising and information campaigns and a high minimum

input from deliberative mechanisms. A small alteration to the particular collection of verbs examinable on the early secondary school French language curriculum might not.

Second, a key part of inclusion is access. Discussion and deliberation fora should be established, where fair and reasoned discussion can take place to uphold the principle of reciprocity. All issues should benefit from online discussion at least. Major issues might call for a major centralised physical forum or minor travelling ones. At all points, the goal of giving access to all sections of society and due consideration to all points of view must be borne in mind. It would seem prudent to also have an online petition mechanism to ensure that ostensibly minor but individually significant issues do not go unheard.

Third, the process must actually be effective. There must be an explicit requirement for the legislature to take the views and arguments expressed through the relevant channels into consideration when making decisions. It may be appropriate, in the interests of reciprocity, to have a minimum quorum or number and distribution of participants which must be met before a decision can be made. Again, that minimum number could be raised and that distribution could be extended as the potential impact of decisions becomes more significant. This practice is not dissimilar to the current planning procedures in some jurisdictions which require the publication of proposed developments and the consideration of objections.⁸⁶ An effective mechanism would likely require a public intermediary body to propose, promote and manage deliberative mechanisms and to compile the views and arguments expressed throughout the process before presenting their findings to the governmental powers.

Fourth, in accordance with the principle of accountability, there must be some mechanism to hold decision-makers to account for failing to accord proper consideration to opinions and arguments. Existing judicial review mechanisms could potentially be adapted for this purpose. It must be acknowledged, however, that the legislature and executive need a margin of appreciation to effectively carry out their duties.

It is acknowledged that this examination of implementation strategies is far from complete. It has not addressed the requirements of liberty and basic opportunity recognised by Gutmann and Thompson and significant further study and preparation would be needed for effective implementation of any of the above deliberative mechanisms. However, the statistics and indicators discussed above show clearly that current mechanisms for ESCR

⁸⁶ See, for example, the Irish Planning and Development Act, 2001, s.29.

enforcement are not effective. It is submitted that many of the difficulties can be traced back to the inherent problems of representative democracy. It is further submitted that the implementation of deliberative mechanisms within current representative frameworks might help to extend the benefits of ESCRs to all.

Conclusion

What emerges from this essay is an alternative path to foster the implementation of ESCRs and their enjoyment among every sector of society. It is hoped that inequality is not inevitable. The immediate purpose has not been to provide an exhaustive response to the issue at hand, but to discuss and theoretically explore the issue in light of the normative principles of deliberative democracy, understood as a complement to the existing system of adjudication and protection of ESCRs.

First, the issues of democratic legitimacy currently facing judges in the context of ESCRs enforcement were examined. These democratic shortcomings create huge reluctance among the judiciary of many states to actively intervene in the implementation of ESCRs. Acknowledging the lack of available disaggregated data to provide a comprehensive account, the global trends of enjoyment of ESCRs – characterised by unremitting gender, geographical and racial inequality – were highlighted through the example of the universalisation of primary education. The essay outlined the structural inadequacy of the current system, and how, despite small improvements, it fails to address the issues at hand.

The second part offered an overview of deliberative democracy as an alternative political system that has been gaining recognition over the past 20 years. It continued with a discussion of the inherent flaws of the representative model, paradigmatic among democracies worldwide. The aim was to demonstrate how the current institutional frameworks tend to reproduce existing political inequalities, and how political equality could be improved through alternative arrangements.

The third part analysed the implementation of ESCRs. The normative principles that ground the model of deliberative democracy were explained, based on the work of Gutmann and Thompson. Drawbacks were discussed, but more attention was given to the benefits that deliberative democracy could potentially bring to the community. Deliberative principles were offered as a solution for a more productive and robust implementation, and as a way to enable marginalised societies to acknowledge their political interests and fully participate in the democratic game. Mention was made of

the increased inclusivity of deliberative democracy, and its effect on decision-making in public policy. The part also warned of the necessity to bear in mind several caveats in order not to fall into the pitfalls of the representative model.

Institutional engineering should be in line with the systemic nature of ESCRs. Given the inherent problems of ESCRs, deliberative democracy appears to offer valuable insight to the existing discourse by fostering the legitimacy and inclusivity of decisions.

Key to the success of a deliberative democratic solution is the enabling and inclusion of marginalised segments of society. For if political participation is denied to certain groups, then democracy, regardless of the variety, can never flourish. The practical design of institutional arrangements implementing mechanisms of deliberative democracy to foster the enjoyment of ESCRs in the current institutional context remains an open question that deserves future study.