

Workshop at EIUC 'Legal Theory and Human Rights'
Monastery of San Nicolo, Lido, December 17-18, 2010

A Democratic Argument for the Constitutional Protection of Economic and Social Rights

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Abstract: This paper examines the normative-political status of economic and social rights (ESR). In light of the empirical observation that countries adopt very different legal instruments to safeguard ESR, three related questions arise. First, can we conceive of a genuine minimal standard of rights protection that any legal system *must* satisfy? Second, what sort of legal instruments are most appropriate to constitute the “basic structure” that secures the minimum protection of a universal ESR standard? Third, what is the philosophical justification for a universal ESR standard and its legal protection mechanism? This work argues that answering the conceptual and institutional questions requires developing an appropriate philosophical account that simultaneously justifies a particular standard of ESR and its (constitutional) protection regime. I propose that a *democratic theory of political legitimacy* is the most plausible candidate for such an account. More specifically, my paper discusses the normative and political foundations of ESR as revolving around the tension between *legal constitutionalism* and *political constitutionalism* over the appropriate role of constitutional protections of rights. In this paper I argue that the theory of democracy as political legitimacy allows us 1) to differentiate between two different thresholds of economic and social rights (ESR associated with basic needs and those related to less urgent claims of just distribution), 2) to examine the complex justificatory relationship of this theory to these different thresholds of ESR, and 3) to ascertain the advantages and limitations of, respectively, legal and political constitutional protection mechanisms to secure the different thresholds of ESR.

Keywords: Economic and Social Rights. Democracy. Legal constitutionalism. Political Constitutionalism. Distributive Justice