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Socioeconomic Rights in the Indian Constitution: Toward A Broader Conception of Legitimacy

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SOCIOECONOMIC RIGHTS IN THE INDIAN CONSTITUTION: TOWARD A BROADER CONCEPTION OF LEGITIMACY

*Rehan Abeyratne**

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INTRODUCTION

The Indian Constitution contains “Directive Principles of State Policy”¹ that require the state to pursue socioeconomic justice.² These principles are explicitly nonjusticiable under the Constitution.³ However, the Indian Supreme Court (“Supreme Court” or “Court”) has interpreted the right to life under Article 21 of the Constitution to protect a right to “live with dignity.”⁴ It has since held that directive principles pertaining, inter alia, to food, shelter, and a decent livelihood are essential to human dignity and are therefore judicially enforceable rights.⁵

Much scholarship has been devoted to the Supreme Court’s jurisprudence in this area, focusing mostly on the judiciary’s role in a constitutional democracy. These works either criticize

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1. Directive principles include, inter alia, working toward providing free education and improving nutritional standards. See INDIA CONST. arts. 36–51.

2. “Socioeconomic justice” broadly refers to what Professor Michelman describes as “social rights” or policies aimed at the “satisfaction of certain material needs or wants, or access to the means of satisfaction.” Such rights or policies include the provision or access to a minimum adequate standard of living, food, and shelter. See generally Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 21–24 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

3. See INDIA CONST. art. 37 (stating that directive principles “shall not be enforceable by any court”).

4. See *Mullin v. Adm’r, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 518 (India).

5. A “right” refers to a constitutionally recognized, judicially enforceable restraint on popular government. See generally Mahendra P. Singh, *Constitutionalization and Realization of Human Rights in India*, in HUMAN RIGHTS, JUSTICE & CONSTITUTIONAL EMPOWERMENT (C. Raj Kumar & K. Chockalingam eds., 2007).

the Court for “judicial activism” or applaud it for proactively defending the rights of the poor and marginalized.⁶

This Article analyzes socioeconomic rights in India from a Rawlsian perspective, which illuminates a neglected aspect of this debate. While addressing concerns of judicial overreach, I argue that the Supreme Court’s reasoning for locating justiciable socioeconomic rights in the Indian Constitution raises a more fundamental concern: it threatens the Constitution’s legitimacy.

The Article has five parts. Part I sets forth the theoretical framework, which is grounded in John Rawls’s liberal principle of legitimacy. This principle states that political power is justified only when it is exercised in accordance with a constitution that all citizens would accept assuming they are rationally self-interested and reasonable.⁷ It then discusses Professor Frank Michelman’s recent work, which draws on Rawlsian theory to examine what makes a constitution legitimate in a liberal state.

In *The Constitution, Social Rights and Liberal Political Justification*, Michelman questions the wisdom of conferring constitutional status on socioeconomic rights.⁸ He makes a positive case for including socioeconomic rights in a constitution, which must overcome two major objections.⁹ The first is a “democratic objection,” where broad “social citizenship rights” would leave “no leading issue . . . untouched” in the political sphere.¹⁰ Imag-

6. Compare Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70 (2007) and Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in SUPREME BUT NOT INFALLIBLE 107 (B.N. Kirpal et al. eds., 2000) (criticizing the Indian Supreme Court’s excessive use of judicial review) with Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985) (commending the Court for becoming a more populist “Supreme Court for Indians”) and Vijayashri Sripati, *Human Rights in India—Fifty Years after Independence*, 26 DENV. J. INT’L L. & POL’Y 93, 136 (1997) (defending the Court’s “activism” for recognizing an “impressive array of Fundamental Rights”).

7. See Michelman, *supra* note 2, at 28; JOHN RAWLS, POLITICAL LIBERALISM 217 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM].

8. See Michelman, *supra* note 2. While Michelman uses the term “social rights,” this paper refers to the same set of rights as “socioeconomic rights” to convey a broader understanding of their scope and impact.

9. *Id.* at 23–24.

10. *Id.* at 30–33.

ine a constitution that includes enforceable rights to housing, food, and clean water. Such a constitution would constrain policy choices in any area involving the allocation and distribution of resources, including taxation, trade, immigration, and education. In extreme cases, representative democracy would be rendered meaningless, as elected representatives would not be able to make “the most basic choices of political economy.”¹¹

Conferring constitutional status on socioeconomic rights also invites a “contractarian objection.”¹² Social contractarians believe that a constitution is legitimate if rational citizens, acting reasonably, can understand its terms and agree to be governed by them.¹³ To accept a constitution’s terms, citizens must be able to determine whether their government actually abides by constitutional principles. If they cannot make this determination, they may not regard the constitution as a legitimate “basis for political rule.”¹⁴

However, it is difficult to gauge if a government fulfills socioeconomic rights. Take, for instance, the right to adequate housing. What if the government provides free housing to 90% of those living in poverty? Does it therefore “violate” this right vis-à-vis the remaining 10%? Because socioeconomic rights require positive action by the government, including the provision of entitlements, the extent to which the government “complies” with these rights depends on an individual citizen’s views of distributive justice. This sort of indeterminacy is potentially fatal for contractarian legitimacy, as citizens cannot determine when their government violates socioeconomic rights.¹⁵ Rawls avoids this difficulty by defining a legitimate constitutional scheme as one that includes certain constitutionally essential civil and political rights.¹⁶ Judicial and policy decisions with respect to socioeconomic rights are held to a lesser standard—what Rawls referred to as the “constraint of public reason.”¹⁷

11. *Id.* at 33.

12. *Id.* at 35–37.

13. *Id.* at 35.

14. *See id.* at 36.

15. *See id.* at 36.

16. *Id.* at 38.

17. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 90 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS]; RAWLS, POLITICAL

Part II describes the drafting and enactment of the Indian Constitution. Unlike the U.S. Constitution, which is silent on the issue of socioeconomic justice, or the South African Constitution, which enumerates justiciable socioeconomic rights,¹⁸ India's Constitution takes a middle ground. It does not contain enforceable socioeconomic rights, but includes instead "Directive Principles of State Policy."¹⁹ The framers of the Indian Constitution placed fundamental rights and directive principles in Part III and Part IV of the Constitution, respectively.²⁰ They empowered the Supreme Court to enforce fundamental rights through Article 32,²¹ but specified in Article 37 that directive principles are not justiciable.²² Nevertheless, these principles "give a certain inflection to political public reason" to guide legislators toward the progressive realization of socioeconomic justice.²³

Giving socioeconomic guarantees this nonjusticiable status should have avoided both the democratic and contractarian objections. When directive principles do not legally bind elected officials, but guide them toward improving socioeconomic conditions, then no serious democratic objection arises. And, if representatives make policy decisions reflecting their honest judgment of how to best pursue socioeconomic justice and they are willing to fully and transparently explain their votes to citizens—that is, they fulfill the constraint of public reason—then

LIBERALISM, *supra* note 7, at 214–17 (explaining that public reason requires citizens [including elected representatives and judges] to present publicly acceptable reasons to each other for their views, at least with regard to basic justice [which includes socioeconomic justice] and constitutional essentials. Citizens must also be willing to "listen to others" and display "fair-mindedness in deciding when accommodations to their views should reasonably be made").

18. See S. AFR. CONST., 1996, §§ 26, 27.

19. See INDIA CONST. arts. 38–47.

20. See INDIA CONST. arts. 12–51. See also GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 50–83 (1966) [hereinafter AUSTIN, THE INDIAN CONSTITUTION].

21. See INDIA CONST. art. 32 (guaranteeing the right of individual citizens "to move the Supreme Court by appropriate proceedings for the enforcement of [fundamental] . . . rights").

22. *Id.* art. 37.

23. Michelman, *supra* note 2, at 39.

the contractarian objection does not arise.²⁴ In practice, though, India's constitutional experience has given rise to both objections.

Part III surveys the evolving constitutional status of socioeconomic rights. Over the past forty years, the Indian Supreme Court has moved away from its early precedents and understanding of the Indian Constitution. It has ruled that the Constitution confers on citizens enforceable socioeconomic rights that, if violated, can be redressed in court. Under this prevailing interpretation, India faces serious democratic and contractarian objections to its basic constitutional framework.

Part IV discusses the democratic objection in light of the Indian Supreme Court rulings on socioeconomic rights. The Court has required both central and state governments to adopt specific distributive policies.²⁵ These include giving mid-day meals to schoolchildren, improving the public food supply distribution system, and providing shelter, food, and sanitation to the homeless.²⁶

This robust exercise of judicial review prevents elected officials from deliberating, negotiating, and crafting policies concerning socioeconomic justice. The Court does not simply declare socioeconomic policies unconstitutional, but creates and enforces its own policy solutions.²⁷ In several cases, the Court has essentially dictated policies to elected officials that allocate resources to assist disadvantaged communities. It has even instituted timelines for the completion of these policies, which it enforces through interim orders.²⁸ This sort of policymaking is precisely what the democratic objection opposes, as it appears to seriously undermine representative democracy.

For Rawls, however, a robust form of judicial review might be acceptable in some societies. He stated that judicial review "can

24. *Id.* at 37–38; *see also* RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 89–94.

25. *See, e.g.*, PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India).

26. *See* Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 694, 700 (2010); Singh, *supra* note 5, at 35.

27. *See, e.g.*, Morcha v. Union of India, (1984) 2 S.C.R. 67 (India).

28. *See id.*; PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India).

perhaps be defended given certain historical circumstances and conditions of political culture.”²⁹ India is beset with such chronic inequality, poverty, and malnourishment that its elected representatives have been unable or unwilling to improve,³⁰ leaving the Supreme Court to remedy these conditions. In other words, justice might require the Court’s intrusion into matters usually assigned to the elected branches given these political and historical circumstances.

Part V addresses the contractarian objection to justiciable socioeconomic rights in India. Article 21 of the Indian Constitution states, “No person shall be deprived of his life . . . except according to procedure established by law.”³¹ The Indian Supreme Court has held that socioeconomic guarantees are judicially enforceable by interpreting this provision to encompass a broader right to “live with dignity.”³² It has since held that rights to adequate food, education, and shelter, *inter alia*, are essential for citizens to live with dignity and are justiciable under Art. 21.³³

Through this capacious reading of Article 21, the Indian Supreme Court has essentially shoehorned socioeconomic guarantees into a “constitutionally essential” civil right. This judicial sleight of hand makes the right to life indeterminate under the Indian Constitution, as a right to “live with dignity” could extend to a range of guarantees that rational citizens could not reasonably foresee and therefore could not endorse. More troublingly, the Court does not explain how it gets past the clear textual command in Article 37 of the Constitution, which plainly states that directive principles “shall not be enforceable by any court.”³⁴

29. RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 240.

30. *See, e.g.*, Jean Dreze, *Democracy and the Right to Food*, 39 *ECON. & POL. WKLY.* 1723 (2004).

31. INDIA CONST. art. 21.

32. *See Mullin v. Adm’r, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 529 (India).

33. *See PUCCL v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India); *Unni Krishnan v. State of A.P.*, (1993) 1 S.C.R. 594, 700–01 (India); *Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. Supp. 51, 83 (India).

34. INDIA CONST. art. 37.

Rawls called the Supreme Court the “exemplar of public reason”³⁵ to convey that it has a greater obligation than other branches of government to justify its decisions with transparent and clearly articulated reasons that are acceptable to all rational and reasonable citizens. When it fails to set forth such reasons, as with its expansive interpretation of Article 21, citizens might not assent to be governed by the Constitution, as they could not know with any clarity or certainty what this constitutionally essential right requires and therefore could not determine if it is being met.

The Article concludes by highlighting some analytical insights into Indian Constitutional law that emerge from its theoretical framework. It also suggests that a legitimate constitutional system requires more than acceptable institutional arrangements that allow for desirable political outcomes—it demands honesty and clarity in the reasoning employed by public institutions on matters of basic justice and constitutional essentials.

I. THEORETICAL FRAMEWORK

A. *Justice as Fairness*

This Article is grounded in John Rawls’s theory of justice as fairness that he articulated in *A THEORY OF JUSTICE* and refined in his later work.³⁶ Justice as fairness rests on three basic premises. First, it is framed for a democratic society—a society that has a “fair system of social cooperation between citizens regarded as free and equal.”³⁷ Here, Rawls adopts a “thick” conception of democracy, beyond mere majoritarian democracy. He describes the idea of society as a fair system of social cooperation that has at least three essential features: (1) social cooperation is guided by publicly recognized rules and procedures, and not simply socially coordinated activity; (2) social cooperation involves fair terms of cooperation that each participant should accept, provided everyone else accepts them, and includes an idea of reciprocity wherein participants that follow

35. RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 231.

36. *See generally* JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999); RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17.

37. *See* RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17, at 39.

the established rules benefit in a manner specified by a public and agreed-upon standard; (3) social “cooperation also includes the idea of each participant’s rational advantage, or good. The idea of rational advantage specifies what it is that those engaged in cooperation are seeking to advance” in terms of their own good.³⁸ By “free and equal persons,” Rawls means, “in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free.”³⁹ He assumes here that citizens have “these powers to the requisite minimum degree to be fully cooperating members of society,” which makes them equal.⁴⁰

A second premise of justice as fairness is that it considers the basic structure of society as the “primary subject of political justice.”⁴¹ In other words, it focuses on political and social institutions and “how they fit into one unified system of cooperation.”⁴² These institutions include the political constitution, independent judiciary, economic institutions such as competitive markets, and the family.⁴³ The basic structure, then, “is the background social framework” within which all of society’s individual and collective activities take place.⁴⁴

The third premise is that justice as fairness is a form of political liberalism that aims to justify the coercion of the state over free and equal citizens in society.⁴⁵ This is a difficult task because of the “fact of reasonable pluralism”—the fact that citizens in any democratic society hold a diverse range of reasonable, comprehensive doctrines.⁴⁶ Rawls asks, if reasonable pluralism always exists, and political power in a democracy is the collective power of free and equal citizens, on what basis can citizens (through their elected representatives) legitimately exercise coercive power over their fellow citizens?⁴⁷

38. *Id.* at 6.

39. RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 18–19.

40. *Id.* at 19.

41. RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 10.

42. *Id.* at 40.

43. *Id.* at 10.

44. *Id.*

45. *See generally id.* at 18–24, 40.

46. *Id.* *See also* RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 58–66.

47. *See* RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 40–41.

The answer for Rawls is the liberal principle of legitimacy.⁴⁸ The principle holds that “political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in light of their common human reason.”⁴⁹ In determining what these “constitutional essentials” might be, and in addressing questions of basic justice, Rawls argues that we should only appeal to principles that all citizens could rationally and reasonably endorse.⁵⁰

Rawls set forth an elaborate thought experiment to deduce these principles. He begins with the “original position,” where representatives of a society convene to decide upon its basic constitutional structure. These representatives are normal cooperating members of society who, despite differences in ability and socioeconomic standing, are free and equal in their ability to exercise their two moral powers to at least the requisite minimum degree.⁵¹ Representatives negotiate the basic structure behind a “veil of ignorance [where they] . . . are not allowed to know” their social positions or the comprehensive doctrines of the individuals they represent.⁵² The “veil” also prevents representatives from knowing their constituents’ sex, race, ethnic group, strength, intelligence, and other “native endowments.”⁵³ When choosing which principles to adopt, representatives are limited to the same body of general facts and the same information about the “general circumstances of society.”⁵⁴ Under these constraints, representatives deliberate from an equal position and under fair terms of social cooperation to agree on

48. *See id.* at 41.

49. *Id.*

50. *Id.* at 41, 6–7 (“[R]easonable persons are ready to propose, or to acknowledge when proposed by others, the principles needed to specify what can be seen by all as fair terms of cooperation. Reasonable persons also understand that they are to honor these principles, even at the expense of their own interests.”) (emphasis added); *id.* at 7 (“[I]t may be that some have a superior political power or are placed in more fortunate circumstances . . . it may be *rational* for those so placed to take advantage of their situation . . . but *unreasonable* all the same.”) (emphasis added).

51. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 22–28.

52. RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 15.

53. *Id.*

54. *Id.* at 86–87.

principles of political justice for the basic structure—put otherwise, justice as fairness.⁵⁵

What emanates from the original position is one of Rawls's most seminal contributions: the two principles of justice that specify basic rights and liberties and regulate economic and social inequalities in the basic structure.⁵⁶ The first principle holds that “[e]ach person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.”⁵⁷ For Rawls, the first principle is constitutionally essential,⁵⁸ meaning that the liberal principle of legitimacy cannot be satisfied if a society's basic law—its Constitution—does not meet the criteria of the first principle.

The first principle of justice requires that democratic societies put in place a basic set of fundamental rights available to all citizens. These rights include the “freedom of thought and liberty of conscience[,] political liberties” (such as the right to vote), freedom of association, rights and liberties associated with the integrity of the person, and the rights and liberties specified by the rule of law.⁵⁹ It also includes a “social minimum” to be provided to all citizens.⁶⁰ This list is neither exclusive nor exhaustive. Rawls merely specifies a minimal set of fundamental rights with which any just society must abide, but leaves it to individual societies to work out the specific contours of those rights. Imagine, for instance, two democratic societies that constitutionally protect the right to free speech, but the first prohibits hate speech, while the second does not. The scope of this fundamental right is therefore broader in the second society than the first. Still, the restriction on free speech in

55. *Id.* at 16, 87.

56. *Id.* at 41–42.

57. *Id.* at 42.

58. *Id.* at 46.

59. *Id.* at 44.

60. RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 166, 228–29 (noting that it is constitutionally essential for the state to provide a “social minimum” providing for satisfaction of citizens’ “basic” material needs to the extent required to enable them to take effective part in political and social life).

the first society is reasonable and does not necessarily violate the first principle.⁶¹

The second principle of justice requires that “[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.”⁶² The first clause requires formal equality—that is, there should be no discrimination in the selection process for public offices and social positions. It also requires that all citizens have a “fair chance” to attain these offices or positions.⁶³ The second clause, commonly referred to as the “difference principle,” essentially imposes a distributive policy on society. When tackling social and economic inequality, this principle requires society to distribute resources to the greatest benefit of its least privileged members.⁶⁴

Crucially, for the purposes of this Article, Rawls does not consider the second principle of justice—which concerns socioeconomic justice—constitutionally essential.⁶⁵ He specified that the first principle is prior to the second not only in his taxonomy, but also in terms of importance and application.⁶⁶ The second principle is only to be implemented within a setting of background institutions created by a constitution, whose essentials are set out in the first principle.⁶⁷ Therefore, the first principle must be fully satisfied before the application of the second principle.⁶⁸

The two principles are also to be applied at different stages of a society’s development. The first principle applies “at the stage of the constitutional convention,” as it is “more urgent” to settle

61. See Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1597 (2010) (noting that democratic states such as England, Canada, France, Denmark, Germany, and New Zealand all prohibit hate speech, while the United States does not; and, drawing on Rawlsian theory, arguing that hate speech regulation is compatible with democratic legitimacy).

62. RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 42–43.

63. *Id.* at 43.

64. *Id.* at 52.

65. See *id.* at 46.

66. See *id.* at 43, 46–47.

67. *Id.* at 46.

68. *Id.* at 46–47.

constitutional essentials than to determine policies of economic and social justice.⁶⁹ In contrast, the second principle applies “at the legislative stage and it bears on all kinds of social and economic legislation, and on the many kinds of issues arising at this point.”⁷⁰ This lag in the application of the second principle stems not only from Rawls’s view that the constitutional essentials of the first principle are more important than the distributive justice required by the second principle, but also from his belief that “[i]t is far easier to tell whether . . . [constitutional] essentials are realized.”⁷¹ He noted a crucial difference between the principles is that while “it seems possible to gain agreement on what . . . [constitutional] essentials should be,” the realization of the second principle is “always open to reasonable differences of opinion . . . [it] depend[s] on inference and judgment in assessing complex social and economic information.”⁷²

Here, Rawls seems to have anticipated the contractarian objection to placing economic and social rights within a constitution.⁷³ Recognizing that rational citizens, acting reasonably, will likely disagree on the appropriate allocation and distribution of resources, Rawls defers decisions of socioeconomic justice to the legislative process.⁷⁴ At that point, a society’s basic constitutional structure is in place, including a political framework that can effectively tackle these complex, information-driven policy questions.

69. *Id.* at 48–49.

70. *Id.* at 48.

71. *Id.* at 49.

72. *Id.* at 48–49. See also Frank I. Michelman, *Poverty in Liberalism: A Comment on the Constitutional Essentials*, 60 DRAKE L. REV. 1001, 1016–19 (2012) [hereinafter Michelman, *Poverty in Liberalism*] (noting that the placement of socioeconomic justice within the second principle does not degrade its importance but rather leaves it to a more suitable process).

73. See Michelman, *supra* note 2, at 23.

74. See RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 48.

B. The Constraint of Public Reason

1. A Shift in Rawlsian Thought

In his later writings, John Rawls moved away from the comprehensive doctrine he set out in *A THEORY OF JUSTICE*.⁷⁵ *A THEORY OF JUSTICE* sought to improve on the work of social contractarians like Kant and Rousseau to create a superior theory to the “dominant tradition of utilitarianism.”⁷⁶ To that end, it promulgated the “theory of justice as fairness as a comprehensive doctrine.”⁷⁷ Recognizing the fact of reasonable pluralism—that citizens in any democratic society hold a diverse range of comprehensive doctrines—Rawls’s later work regards a society adhering to a single comprehensive doctrine as impossible to create.⁷⁸ Rawls therefore introduces the idea of “overlapping consensus” to formulate a more realistic, well-ordered society.⁷⁹ This concept reconciles the fact of reasonable pluralism with Rawls’s view that all citizens must agree on the same political conception of justice to have a well-ordered society. Since citizens will not be able to agree on a single comprehensive view, citizens should instead aim for a reasonable overlapping consensus of this political conception despite conflicting moral, religious, and philosophical views within a society.⁸⁰ In other words, the political conception of justice as fairness can be a “shared point of view” even though citizens do not affirm it for the same reasons.⁸¹

In this pluralistic society, there must be reasonable grounds for communication among citizens with different (and sometimes conflicting) reasons for endorsing justice as fairness as a political conception of justice. In particular, there must be agreement on the guidelines of public inquiry and on the criteria as to what information and knowledge is relevant in dis-

75. See JOHN RAWLS, *THE LAW OF PEOPLES WITH “THE IDEA OF PUBLIC REASON REVISITED”* 179–80 (2001).

76. *Id.*

77. *Id.*

78. RAWLS, *POLITICAL LIBERALISM*, *supra* note 7.

79. See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17, at 32. See also RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 133–72.

80. RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17, at 32.

81. *Id.*

cussing questions of basic justice and constitutional essentials.⁸²

Enter the constraint of public reason—it is the means through which societies faced with reasonable pluralism can conform to the liberal principle of legitimacy. Since each citizen has an equal share of political power, that power should be exercised in ways that all citizens can publicly endorse in light of their own reason.⁸³ Public reason therefore requires that citizens present publicly acceptable reasons to each other for their political views, at least with regard to basic justice and constitutional essentials.⁸⁴ Citizens must also be willing to “listen to others” and display “fair-mindedness in deciding when accommodations to their views should reasonably be made.”⁸⁵

Public reason extends to all public discourse pertaining to basic justice and constitutional essentials, but not to other political questions.⁸⁶ It also does not constrain personal deliberations about political questions or the discussion of such questions within associations such as churches and universities.⁸⁷ As for its subjects, public reason applies to the public acts, pronouncements, and deliberations of elected officials, the decision making of judges, and to political discourse among ordinary citizens when, for instance, they exercise their right to vote or engage in public advocacy.⁸⁸

Rawls did not precisely specify the content of public reason. He stated that it includes “general beliefs and reasoning found in common sense, and the methods and conclusions of science, when not controversial.”⁸⁹ He added that while comprehensive religious and philosophical doctrines can be introduced and discussed so that citizens better understand each other’s views, these doctrines are not public reasons and therefore cannot

82. See *id.* at 89; RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 214.

83. See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17, at 90–91.

84. See *id.* at 90. See also Bruce Ackerman, *Political Liberalisms*, 91 J. PHIL. 364, 366 (1994) (referring to Rawls’s conception of public reason as representing one of the “most important breaks” from Rawls’s earlier work and exhibiting an “overriding commitment to public dialogue”).

85. RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 217.

86. *Id.* at 214.

87. *Id.* at 215.

88. See *id.* 213–16.

89. RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17, at 90.

form the basis for public discourse on matters of basic justice and constitutional essentials.⁹⁰ Citizens (including elected representatives and judges) must instead advocate for the laws and public policies they favor using general knowledge and ways of reasoning that all other citizens can access using their common powers of reason.⁹¹

2. Public Reason and the Supreme Court

Among the various institutions in a well-ordered democratic society, Rawls singled out the Supreme Court to play a “special role” in the application of public reason.⁹² He noted that a constitutional democracy is dualist in nature: it contains both ordinary (legislative) and higher (constitutional) law.⁹³ Because the Supreme Court is the final arbiter on questions of constitutional law, it plays an important role in preventing erosion in this higher law by “transient majorities or . . . by organized and well-situated narrow interests skilled at getting their way.”⁹⁴ The Court therefore acts as an anti-majoritarian institution toward ordinary law or legislation. Yet, as Rawls made clear, it is not anti-majoritarian with regard to the higher, constitutional law. More specifically, when its decisions reasonably fit with the text of the Constitution, constitutional precedents and political understandings of the Constitution, the Court is not anti-majoritarian.⁹⁵ Thus, Supreme Court justices must employ public reasons to explain and justify their decisions to a greater extent than society expects from legislative and executive officials.⁹⁶

Rawls referred to the Supreme Court as the “exemplar of public reason” because the Court may not employ any other sort of reason in discharging its constitutional duty.⁹⁷ While ordinary citizens and elected representatives confront all sorts

90. *Id.*

91. *See id.*

92. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 216.

93. *See id.* at 233; *See also* Frank I. Michelman, *Justice as Fairness, Legitimacy and the Question of Judicial Review: A Comment*, 72 *FORDHAM L. REV.* 1407, 1408 (2004) [hereinafter Michelman, *Justice as Fairness*].

94. RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 233.

95. *Id.* at 234, 236.

96. *See id.* at 216.

97. *Id.* at 216, 235.

of political questions that do not concern basic justice and constitutional essentials—and therefore do not fall under the constraint of public reason—Supreme Court justices are tasked with trying to articulate the best interpretation of the Constitution. They seek to do this through reasoned opinions that cannot invoke their own (or anyone else’s) moral or philosophical beliefs, but must be grounded in political values that reflect their best understanding of the public conception of justice.⁹⁸ They must justify their decisions with public reasons and fit them into “a coherent constitutional view over the whole range of their decisions.”⁹⁹ As a result, the idea of public reason applies “more strictly” to judges, particularly to Supreme Court justices, than to other members of society.¹⁰⁰

Rawls was careful to clarify, however, that in marking out the Supreme Court for an exemplary role in this context, he did not intend to defend the practice of judicial review.¹⁰¹ He instead noted, rather ambiguously, judicial review “can perhaps be defended given certain historical circumstances and conditions of political culture.”¹⁰² Part IV, *infra*, applies this claim to the Indian context, and considers whether political and historical factors justify the Indian Supreme Court’s heavy-handed exercise of judicial review.

C. Socioeconomic Rights as Constitutional Rights

The final component of this Article’s theoretical framework is to connect Rawlsian political theory to legal constitutional theory. Here, it draws on the scholarship of Professor Frank Michelman, who has contributed several academic papers on

98. *Id.* at 236.

99. *Id.* at 235.

100. RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 234.

101. *See id.* at 240.

102. *Id.* *But see* Michelman, *Justice as Fairness*, *supra* note 93, at 1413.

To say . . . that justice as fairness can take judicial review or leave it, depending on the circumstances, is not to equivocate; it is rather to take a stand. Judicial review being neither always required by justice nor always excluded by justice (so goes Rawls’s claim), the question of having it or not is a pragmatic one to be made with certain justice-related concerns in view.

Id.

the intersection of these two fields.¹⁰³ The focus in much of this scholarship is constitutional legitimacy. In particular, Michelman examines the extent to which constitutional law and the practice of judicial review can be legitimate in light of substantive disagreements among citizens in a democratic society on major questions of political justice.¹⁰⁴

In *The Constitution, Social Rights and Liberal Political Justification*, Michelman addresses the effects of constitutional socioeconomic rights on a constitution's legitimacy.¹⁰⁵ As an initial matter, he notes that part of the debate over whether it is wise to confer constitutional status on socioeconomic guarantees turns on substantive disagreements.¹⁰⁶ For instance, not everyone believes that a moral and just society must include constitutional rights to food, adequate housing, or other means of social support. Yet, even those who are morally convinced that socioeconomic guarantees should be given constitutional status must overcome certain non-substantive objections to make a persuasive case for such constitutionalization.¹⁰⁷

The most common non-substantive objection to granting socioeconomic guarantees constitutional protection pertains to the judiciary's role in enforcing socioeconomic rights. The concern is that courts will be "unable to make convincingly crisp assessments of the government's compliance or non-compliance with social rights guarantees, or to fashion apt and pointed re-

103. See, e.g., Michelman, *supra* note 2; Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101 (2004); Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579 (2003); Frank I. Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 FORDHAM L. REV. 345 (2003); Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MODERN L. REV. 1 (2003); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893 (2001); Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 RATIO JURIS 63 (2000). See also Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485 (2004) (providing an overview of Professor Michelman's work in this area).

104. See Balkin, *supra* note 103, at 485–86.

105. Michelman, *supra* note 2.

106. *Id.* at 22.

107. *Id.*

medial orders . . . without getting themselves disastrously mixed up in matters beyond their province and their ken.”¹⁰⁸

While this is a valid concern, the terms of the debate would be incomplete if the concern is solely (or even primarily) with the judiciary’s proper role in a separation of powers framework and its institutional competence. As Michelman points out, the judiciary can play a “useful, if modest, role[] in the promotion of distributive aims of social guarantees.”¹⁰⁹ Alternatively, if courts are barred from adjudicating questions of socioeconomic justice, it “would not be a good argument against constitutionalization in the sight of anyone who believes that a morally legitimate political regime must include a visible, effective commitment” to certain positive entitlements provided by the state.¹¹⁰

In Michelman’s view, even if we accept the above two points, the positive case for constitutional socioeconomic rights is not complete.¹¹¹ He ventures beyond judiciary-related concerns and sets out two more non-substantive objections to the constitutionalization of socioeconomic rights.¹¹² First, he lays out a “democratic objection”—namely that the placement of socioeconomic rights in a Constitution will unduly constrain democratic decision making, regardless of whether courts are involved in enforcing these rights.¹¹³ Second, there is a “contractarian objection” that opposes constitutionalization on the ground that socioeconomic rights would be so indeterminate that rational citizens, acting reasonably, could not agree to be governed by a constitution that included such rights.¹¹⁴ On this view, the inclusion of socioeconomic rights in a constitution defeats one of the fundamental purposes of a constitution—to provide liberal political legitimacy to coercive laws and acts of the state.

Michelman suggests that both objections are manageable. He says: (1) that their force depends on how sweepingly (or specifically) socioeconomic rights are couched; (2) that the contractarian objection is mitigated by the constraint of public reason;

108. *Id.* at 22–23.

109. *Id.* at 23.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.* at 23, 35.

and (3) that the democratic objection is only grave if we accept a narrow conception of democracy.¹¹⁵

1. The Democratic Objection

The democratic objection asserts that placing socioeconomic guarantees in a constitution would excessively restrict democratic policymaking on a range of issues. William Forbath provides a “dramatic” illustration of this objection in his proposal of constitutional rights to “social citizenship.”¹¹⁶ Going beyond what he refers to as “welfare rights” (rights to a minimum amount of money or of basic necessities for work), Forbath proposes constitutional rights to social citizenship that provide assurances so one can make a decent living through forms of social participation that provide the opportunity for self-improvement, material interdependence, and security for all.¹¹⁷ Though Forbath does not define the exact contours of such rights, they seem to affect a number of policy areas including spending on public works, union and industrial policy, tax laws and policies, workplace health and safety, immigration laws, and trade policy.¹¹⁸ Thus, if socioeconomic rights are conceived as constitutional rights to social citizenship, there might not be a single issue on the political agenda left untouched.¹¹⁹

Michelman contrasts these vast social citizenship rights to Section 26 of the South African Constitution, which requires the government to take reasonable measures toward the progressive realization of adequate housing for all citizens.¹²⁰ In

115. *See id.* at 23–24, 37–38.

116. *Id.* at 31; W.E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1887–88 (2001) [hereinafter Forbath, *Constitutional Welfare Rights*]. *See also* W.E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present*, 39 *TULSA L. REV.* 597 (2004).

117. *See* Forbath, *Constitutional Welfare Rights*, *supra* note 116, at 1827 (“Centered on decent work, livelihoods, and social provision, [the social citizenship tradition] . . . read[s] the promise of the Antislavery and Reconstruction Amendments in ‘Free Labor’ terms, as a guarantee of opportunities for self-improvement and a measure of material independence and security for all.”); Michelman, *supra* note 2, at 31.

118. *See* Michelman, *supra* note 2, at 32; W.E. Forbath, *Caste, Class and Equal Citizenship*, 98 *MICH. L. REV.* 1, 49 (1999).

119. Michelman, *supra* note 2, at 32–33.

120. *See id.* at 31–33; S. AFR. CONST., 1996, § 26.

Government of the Republic of South Africa v. Grootboom, the South African Constitutional Court held that government-housing measures did not meet the reasonableness standard set forth under Section 26 and ordered the government to submit revised plans for judicial review.¹²¹

Here, as in many other cases before the South African Constitutional Court, the court required socioeconomic policies to meet a not-too-burdensome reasonableness standard and did not formulate its own solutions when the government failed to meet that standard.¹²² This approach does not unduly interfere with democratic policymaking. By contrast, Forbath's social citizenship rights would seem to remove many issues from the policymaking agenda, or constrain the choices available to policymakers to a potentially intolerable extent in a representative democracy. Thus, the strength of the democratic objection turns, in part, on the way socioeconomic rights are couched in a constitution.

Even if constitutional socioeconomic rights are couched broadly as in Forbath's conception, they still might be democratically acceptable. Assuming that policymakers in the elected branches take the constitution seriously and constitutional rights figure prominently in their policymaking, it might still be useful to include broad socioeconomic rights in a constitution to "give a certain inflection to political public reason."¹²³ In this scenario—where the judiciary plays no role—elected officials would be forced to exercise judgment on how to make political choices that are conducive to social citizenship for all. This requires moving away from the traditional definition of democracy as "a series of free-for-all contests of normatively unregulated preferences" toward a fuller conception of democracy as "the practice by which citizens communicatively form, test, exchange, revise and pool their constitutional-interpretive

121. See *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at ¶ 93 (S. Afr.).

122. See generally HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS* 143–46 (2010).

123. Michelman, *supra* note 2, at 39. See also RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 212–20.

judgments, only *counting* them as required to obtain . . . the institutional settlements a country needs.”¹²⁴

If democracy is defined in these broad and idealistic terms, and if socioeconomic rights are couched narrowly (as in South Africa), the democratic objection poses little threat to constitutional legitimacy. The Indian Supreme Court, however, has interpreted the Indian Constitution to include expansive socioeconomic rights that the judiciary can enforce in a manner that undermines democratic policymaking.¹²⁵ This strong form of judicial review is perhaps only defensible in light of India’s history and political culture.¹²⁶

2. The Contractarian Objection

The contractarian objection focuses on the difficulty of measuring government compliance with socioeconomic rights. Social contractarians maintain that a citizen will only agree to abide by a constitution—which provides the government coercive power to compel her to act in prescribed ways and the ability to make policy choices with which she disagrees—if she sees other citizens and her government also complying with this constitution.¹²⁷ This ability to observe others abiding by the constitution is essential. It allows each citizen to confirm that the con-

124. Michelman, *supra* note 2, at 40 (acknowledging that this is a “pretty idealistic view of democracy” but noting that “the idea of liberal justice or liberal legitimacy within any possible system of positive legal ordering” seems to depend on this view).

125. See, e.g., SUPREME COURT ORDERS ON THE RIGHT TO FOOD: A TOOL FOR ACTION 3–7 (2005), available at <http://www.righttofoodindia.org/orders/interimorders.html> [hereinafter A TOOL FOR ACTION] (showing how a case on the Right to Food in six Indian states has expanded to include all Indian states as respondents and how the Court’s orders have been enforced through a number of interim orders and specific policy directions to elected governments). *But see* Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011 (India) (drafting legal guidelines to protect women from sexual harassment in the workplace in light of “a vacuum of existing legislation,” but stating that these guidelines would be superseded by duly enacted legislation in this area).

126. See *infra* Section V; RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 240. See also Michelman, *Justice as Fairness*, *supra* note 93, at 1408.

127. See Michelman, *supra* note 2, at 35–36.

stitution's provisions, entailing commitments that make it universally acceptable, are in fact real.¹²⁸

However, it might not be possible to identify when others, including the government, comply with constitutionally mandated socioeconomic rights. Imagine two societies that have enacted constitutional rights to sufficient food. In one society, the government passes laws aimed at increasing agricultural production, improving the food distribution system, and giving food stamps to everyone living below the poverty line. These provisions will take ten years to supply adequate food to all citizens, but will provide a sustainable food supply thereafter. In the second society, the government only passes one law that mandates the immediate distribution of sufficient food to all citizens living below the poverty line. Yet, food supplies are limited, and in the long-term there will not be adequate food production to supply everyone in need. In this hypothetical scenario, one society has adopted laws that will gradually but sustainably provide food for all, while the other provides food immediately to every citizen in need at the cost of long-term food security. Does one society comply with the right to food while the other does not? If so, which one? Isn't it plausible that both (or neither) have fulfilled this right? It seems that one cannot decisively say if such a right is or is not being satisfied.¹²⁹

According to the contractarian objection, this "raging indeterminacy" prevents rational citizens, acting reasonably, from determining when their government complies with or violates socioeconomic rights.¹³⁰ Constitutional legitimacy is therefore threatened, as citizens will not consent to be governed by a constitution when they cannot observe their government abiding by what should be universally accepted constitutional commitments.¹³¹

Socioeconomic rights, as this argument goes, lack the "transparency" of civil and political rights.¹³² They cannot be "more-or-less detectably . . . realised (or not) at any given moment."¹³³

128. *See id.* at 36.

129. *See id.*

130. *See id.* at 35–36.

131. *Id.* at 36.

132. *Id.*

133. *Id.*

Traditionally, civil and political rights, including, inter alia, the right to the freedom of speech, freedom of assembly, due process, and equal protection were referred to as “negative rights.”¹³⁴ This is because civil and political rights protect individual liberty against state intrusion. Socioeconomic rights concern distributive justice. They require the government to provide positive entitlements to satisfy material needs or wants, or to provide access to the means of satisfaction.¹³⁵

The distinction between these two sets of rights has been criticized in the academic literature. Critics argue that the distinction is artificial because these rights interact in important ways. In particular, they point out that those suffering from serious want or need cannot effectively exercise civil and political rights.¹³⁶ It is of little value to an individual dying of starvation or thirst, for instance, to have a constitutional right to vote.

Nevertheless, the contractarian objection relies on this distinction. It depends on the premise that it is significantly more difficult to gauge compliance with or violations of socioeconomic rights than of civil and political rights.¹³⁷ This perceived indeterminacy of socioeconomic rights also factored into Rawls’s decision to defer questions of socioeconomic justice to the legislative process after the constitutional essentials (including a scheme of basic liberties or negative rights) are decided.¹³⁸

134. See Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 863–65 (2001); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990).

135. See Michelman, *supra* note 2, at 22.

136. See generally SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* (2008); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (2d ed. 1996). *But see* Cross, *supra* note 134, at 866–68 (defending the distinction between negative and positive rights on the grounds that negative rights would be automatically fulfilled if no government existed but positive rights would not).

137. See Michelman, *supra* note 2, at 36.

138. RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17, at 48 (noting that determining if the second principle is fulfilled is “always open to reasonable differences of opinion . . . [it] depend[s] on inference and judgment in assessing complex social and economic information”). See also Michelman, *Justice as Fairness*, *supra* note 93 at 1409–10.

Still, constitutionalized socioeconomic rights are not fatal to contractarian legitimacy under Rawlsian theory.¹³⁹ Under Rawls's liberal principle of legitimacy, a constitution is only legitimate if all its citizens, who are rationally self-interested and reasonable, consent to be governed by its essentials.¹⁴⁰ Since socioeconomic rights are not part of the scheme of "constitutionally essential" negative rights, reasonable minds can disagree as to their implementation, but must express their views pursuant to the constraint of public reason.¹⁴¹ Thus, citizens and public institutions must be willing to explain and defend their votes on matters of socioeconomic justice, in a manner that reflects their honest best judgments on how to ensure socioeconomic justice for all.¹⁴² This "eases the strain on constitutional contractarians" because policy choices in this realm would simply have to accord with *some* conception of a complete, legitimate constitutional agreement that all rational citizens, acting reasonably, would accept.¹⁴³ However, if citizens cannot reasonably maintain confidence that their policymaking institutions are fulfilling the constraint of public reason, then the "extant system of positive legal ordering is unjust."¹⁴⁴

Thus, the move to public reason allows a range of distributive policies and laws to be acceptable from a contractarian perspective. This is particularly true if socioeconomic guarantees are given the status of "directive principles" rather than "rights."¹⁴⁵ These principles would guide public decision making on matters of socioeconomic justice, but leave it to elected representatives to fashion the most effective laws and policies.

The following section shows how the drafters of the Indian Constitution sought to avoid this contractarian difficulty by addressing socioeconomic justice through non-binding "Di-

139. See Michelman, *supra* note 2, at 37–38.

140. RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17, at 41.

141. *Id.* at 38; see RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 214.

142. Michelman, *supra* note 2, at 38.

143. *Id.*

144. *Id.*

145. See *id.* at 37–39. Cf. Michelman, *Poverty in Liberalism*, *supra* note 72, at 1017–19 (noting that instead of making most socioeconomic rights constitutionally essential, Rawls attached great importance to transparency in the adjudication of these rights as the means to effectively pursue justice).

rective Principles of State Policy” that would “give a certain inflection to political public reason.”¹⁴⁶

II. THE FRAMING OF THE INDIAN CONSTITUTION

A. Directive Principles and Article 21

India gained independence from British rule in 1947 and adopted a Constitution in 1950, which remains in force today.¹⁴⁷ The drafting of the Constitution began prior to independence with the formation of a Constituent Assembly that began its work in December 1946.¹⁴⁸ Their final product, a sprawling document of more than 300 articles and twelve schedules, balanced “negative” protections of individual liberty from government interference with “positive” guidelines for socioeconomic justice.¹⁴⁹ Thus, Part III of the Constitution, entitled “Fundamental Rights,” sets forth a list of justiciable rights, including the rights to life, freedom of speech, and freedom of religion that was modeled largely on the American Bill of Rights.¹⁵⁰ Part IV of the Constitution, by contrast, contains “Directive Principles of State Policy”—nonjusticiable economic and social provisions to be progressively realized by the Indian state. As Granville Austin put it, Part IV “set forth the humanitarian precepts that were . . . the aims of the Indian Social Revolution.”¹⁵¹

According to Austin, the Indian Constitution was, at its core, a “social document.”¹⁵² He noted that the Constituent Assembly sought to design a Constitution that would bring about social revolution in India.¹⁵³ This ambitious goal had its roots in the struggle for independence, as the Indian National Congress was founded primarily to demand rights for Indian citizens

146. Michelman, *supra* note 2, at 39.

147. *See* INDIA CONST.

148. *See* AUSTIN, THE INDIAN CONSTITUTION, *supra* note 20, at 3–8, 58 (1966).

149. *See* Manoj Mate, *The Origins of Due Process of India: The Role of Borrowing in Personal Liberty and Preventative Detention Cases*, 28 BERKELEY J. INT'L L. 216, 218–19 (2010).

150. *See id.* at 219; AUSTIN, THE INDIAN CONSTITUTION, *supra* note 20, at 55.

151. AUSTIN, THE INDIAN CONSTITUTION, *supra* note 20, at 75.

152. *Id.* at 50.

153. *Id.* at 26–27, 50.

from the British Raj.¹⁵⁴ It set forth these demands in various resolutions, including the Constitution of India Bill (1895), the Commonwealth of India Bill (1925), and the Karachi Resolution (1931). The Karachi Resolution was the first public demand for positive rights toward greater socioeconomic justice.¹⁵⁵ The Resolution proclaimed, “in order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions.”¹⁵⁶

Austin and others have argued that members of the Constituent Assembly (or “framers”) placed such high value on socioeconomic justice that they did not differentiate between Parts III and IV of the Constitution in terms of importance.¹⁵⁷ However, the members disagreed as to whether the directive principles should be justiciable. Before the Constituent Assembly was formed, the most significant writing on this issue was the Sapru Report of 1945, which outlined a scheme of fundamental rights intended to alleviate the fears of minority groups.¹⁵⁸ The Sapru Report’s most significant contribution was to distinguish between justiciable and nonjusticiable rights, even though it was in the context of minority protections with no mention of negative and positive rights.¹⁵⁹

B.N. Rau, one of the principal architects of Part IV, adopted the distinction between justiciable and nonjusticiable rights and applied it to the drafting of the Constitution. Rau was a member of the Drafting Committee, for which he assembled a set of precedents that the committee could draw on for ideas

154. *See id.* at 50–54; Mate, *supra* note 149, at 224–25.

155. *See* AUSTIN, THE INDIAN CONSTITUTION, *supra* note 20, at 56; Mate, *supra* note 149, at 225.

156. AUSTIN, THE INDIAN CONSTITUTION, *supra* note 20, at 56 (referencing the Resolution on Fundamental Rights and Economic and Social Change, adopted in Karachi in March 1931) (internal quotation marks omitted).

157. *See id.* at 52. *See also* P.K. TRIPATHI, SPOTLIGHTS ON CONSTITUTIONAL INTERPRETATION 293 (1972) (arguing that in comparison to fundamental rights, “directive principles . . . do not constitute a set of inferior and subsidiary principles”); *See* Singh, *supra* note 5, at 28–30. *Cf.* Jagat Narain, *Judicial Law Making and the Place of Directive Principles in Indian Constitution*, 27 J. INDIAN L. INST. 198, 203 (1985) (arguing that “directive principles are superior to fundamental rights”).

158. *See* AUSTIN, THE INDIAN CONSTITUTION, *supra* note 20, at 57.

159. *See id.*; Mate, *supra* note 149, at 226.

and inspiration.¹⁶⁰ Rau relied heavily on the Irish constitutional model, which included Directive Principles of State Policy. He believed India should emulate the Irish model by setting out positive rights “in the nature of moral precepts for the authorities of the State.”¹⁶¹

Other members of the Drafting Committee felt that this approach did not go far enough. They believed the Indian Constitution should include justiciable socioeconomic rights. K.M. Munshi, for instance, put forth draft lists of the “Rights of Workers” and “Social Rights,” which included the right to a living wage and protections for women and children.¹⁶² B.R. Ambedkar, who famously rose from disadvantaged beginnings—he belonged to a scheduled (untouchable) caste—to become the Chairman of the Drafting Committee, favored an extensive set of rights for members of minority communities, particularly the scheduled castes.¹⁶³ He also pushed for a social scheme to nationalize all major industries that would take effect ten years after the Constitution was adopted.¹⁶⁴ Similarly, Drafting Committee member K.T. Shah believed that even if directive principles were initially nonbinding, they should become justiciable after a specified time.¹⁶⁵ He also believed that all natural resources and key industries should become property of the state.¹⁶⁶

These views reflect the deep-seated socialist beliefs of many Constituent Assembly members, which largely derived from the negative association between British imperialism and capitalism.¹⁶⁷ As ex-colonial subjects, the framers were wary of replacing British capitalists—who were widely seen as exploiting Indian resources for the benefit of the home country—with homegrown Indian capitalists.¹⁶⁸ They also believed that India’s very survival rested on their ability to bring about a rapid

160. See generally B.N. RAU, CONSTITUTIONAL PRECEDENTS, THIRD SERIES (1947).

161. *Id.* at 22.

162. See AUSTIN, THE INDIAN CONSTITUTION, *supra* note 20, at 78.

163. *Id.*

164. *Id.*

165. *Id.* at 79.

166. *Id.*

167. See *id.* at 60.

168. See *id.* at 60–61.

socioeconomic transformation among the poverty-stricken “masses.”¹⁶⁹ Jawaharlal Nehru, India’s first Prime Minister, stated that the first task of the Constituent Assembly was “to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself.”¹⁷⁰ If the Assembly failed to bring about this social revolution, Nehru warned “all our paper constitutions will become useless and purposeless . . . if India goes down, all will go down.”¹⁷¹

Still, despite their strong socialist leanings, the Drafting Committee—and eventually the Constituent Assembly—adopted the Irish model that separated justiciable fundamental rights from non-enforceable directive principles.¹⁷² There appear to be two separate motivations behind this decision. First, the framers wanted to leave some discretion to the legislature on matters of socioeconomic justice, rather than tie their hands with binding constitutional provisions. Ambedkar’s social scheme, other proposals for enforceable rights, and time-bound provisions toward greater socioeconomic justice were rejected on these grounds.¹⁷³ Ambedkar eventually came around to support nonbinding directive principles, believing that future legislatures would be compelled to fulfill their mandate or “answer for them before the electorate at election time.”¹⁷⁴

A second motivation to separate justiciable fundamental rights from nonenforceable directive principles was Assembly members’ skepticism of the judiciary and desire to minimize its impact on social legislation.¹⁷⁵ B.N. Rau visited the United States in 1947 where he met with U.S. Supreme Court Justice Felix Frankfurter.¹⁷⁶ Frankfurter, a noted proponent of judicial

169. *See id.*

170. STUART CORBRIDGE & JOHN HARRISS, *REINVENTING INDIA: LIBERALIZATION, HINDU NATIONALISM AND POPULAR DEMOCRACY* 20 (2000) (internal quotation marks omitted).

171. AUSTIN, *THE INDIAN CONSTITUTION*, *supra* note 20, at 27 (referencing the Constituent Assembly Debates) (internal quotation marks omitted).

172. *Id.* at 79–80; RAU, *supra* note 160, at 21.

173. *Id.* at 78.

174. *Id.* (referencing Constituent Assembly Debates).

175. *See* Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J. INDIAN L. INST. 302, 312–14. (1994).

176. *See* Mate, *supra* note 149, at 221; AUSTIN, *THE INDIAN CONSTITUTION*, *supra* note 20, at 103.

restraint, generally opposed U.S. Supreme Court decisions that struck down legislative or executive acts.¹⁷⁷ In his view, wide-ranging judicial review was not only burdensome to the judiciary, but also undemocratic for allowing a few unelected judges to invalidate laws and orders issued by elected officials.¹⁷⁸ Frankfurter strongly influenced Rau, who convinced the Drafting Committee to remove the words “due process” from Article 21 of the Constitution.¹⁷⁹ As a result, the final version of Article 21 reads, “No person shall be deprived of his life or personal liberty except according to *procedure established by law*”.¹⁸⁰ Thus, under the original understanding of Article 21, the Indian state may deprive individuals of life or liberty as long as it follows some legal process, the content or fairness of which lies outside the domain of judicial review.

Additionally, the Constituent Assembly adopted the judicial conservatism of their former British rulers. According to Rajeev Dhavan, the British took pains “to ensure that the courts of the *Raj* were not empowered to question governmental action.”¹⁸¹ “Judges were selected for their conservatism, loyalty and independence,” creating a judiciary that was a “safe institution.”¹⁸² The British therefore created a tradition of judicial passivity that was passed on to the Constituent Assembly members. For instance, Ambedkar expressed the framers’ general view that the judiciary should remain independent from political interference but should nonetheless limit its review of government policies. He stated before the Assembly, “the judiciary is engaged in deciding issue(s) between citizens, and very rarely be-

177. See, e.g., *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 600 (1940).

But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties . . . To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

Id.

178. See Mate, *supra* note 149, at 221. See also Dhavan, *supra* note 175, at 313 (stating that the drafters of the Indian Constitution were “[f]earful of the American New Deal experience”).

179. See Mate, *supra* note 149, at 222.

180. INDIA CONST. art. 21. (emphasis added).

181. Dhavan, *supra* note 175, at 313.

182. *Id.*

tween citizens and Government. Consequently, the chances of influencing the . . . judiciary by the government are very remote.”¹⁸³

Thus, Ambedkar, Rau, and the other drafters were not proponents of a strong judiciary. They were wary of New Deal jurisprudence from the United States,¹⁸⁴ and were steeped in the British tradition of judicial conservatism. This influenced the drafting of Article 21 and probably influenced the drafting of the directive principles as well. Though most (if not all) of the framers had strong socialist convictions, they agreed in the end to separate justiciable rights (Part III) from non-binding directive principles (Part IV). The drafting of Parts III and IV therefore do not reflect the framers’ socialist views as much as their twin desires to defer to the legislature on matters of socio-economic justice and to limit the power and reach of the judiciary.

To clearly separate these two Parts of the Constitution, the framers placed unambiguous textual commands to indicate that fundamental rights in Part III are justiciable, but that directive principles in Part IV are not. Article 32 of the Constitution guarantees the right of individual citizens “to move the Supreme Court by appropriate proceedings for the enforcement” of fundamental rights.¹⁸⁵ Article 37, though, states that directive principles “shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the

183. *Id.* (internal quotation marks omitted).

184. The drafters were likely aware and wary of the U.S. Supreme Court’s move toward incorporating the Bill of Rights against the states through the Fourteenth Amendment. *See, e.g.*, *Betts v. Brady*, 316 U.S. 455, 474–75 & n.1 (1942) (Black, J., dissenting); *Adamson v. California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting); *Palko v. Connecticut*, 302 U.S. 319 (1937). For an overview of New Deal jurisprudence, see Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 460 (2001) (noting that the New Deal judicial revolution “extended well beyond the political goals of the New Deal Democrats” and that the Court spoke of applying the Bill of Rights against the states as early as 1937). *See also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1196–97 (1992) (describing the various judicial philosophies that informed the incorporation debate).

185. INDIA CONST. art. 32. Article 226 extends this right to the High Courts. *Id.* art. 226.

State to apply these principles in making laws.”¹⁸⁶ This rule clearly prevents the judiciary from enforcing directive principles against the Indian State.

B. Standing (Locus Standi) Requirements for Article 32

Article 32 is the primary mechanism in the Indian Constitution to redress violations of fundamental rights. Ambedkar referred to it as the heart and soul of the Constitution, emphasizing its vital role in preventing government from encroaching upon individual rights.¹⁸⁷

Article 32 empowers the Indian Supreme Court to grant a range of remedies.¹⁸⁸ It provides that the Court may issue “directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*” as it deems appropriate in a given case.¹⁸⁹ Article 32 also states that citizens may move the Supreme Court for the enforcement of a right through “appropriate proceedings.”¹⁹⁰ This grants the Court some discretion to determine the procedure through which citizens may bring petitions alleging fundamental rights violations.¹⁹¹

In the Court’s early jurisprudence, the phrase “appropriate proceedings” was construed narrowly to permit only those individuals whose rights had been directly infringed to bring suit.¹⁹² Much like the framers who were strongly influenced by British notions of judicial conservatism, the Supreme Court borrowed from the Anglo-American legal tradition to adopt strict standing (or *locus standi*) requirements under Article 32.¹⁹³

186. *Id.* art. 37.

187. S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL’Y 29, 39 (2001); P.P. Craig & S.L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 OXFORD J. LEGAL STUD. 356, 357 (1989).

188. INDIA CONST. art. 32.

189. *Id.*

190. *Id.*

191. See MADHAV KHOSLA, THE INDIAN CONSTITUTION 120–21 (2012) [hereinafter KHOSLA, THE INDIAN CONSTITUTION].

192. See Craig & Deshpande, *supra* note 187, at 357.

193. See *id.*

In *Chiranjit Lal v. Union of India* (1951), the Court held that a shareholder of a company did not have standing under Article 32 to petition the Court to enforce a corporation's right to hold and dispose of property under Article 19(1)(f) of the Constitution.¹⁹⁴ The Court noted that a corporation and its shareholders are separate entities, and therefore only the corporation could properly bring this claim.¹⁹⁵

Similarly, in *G.C. College Silchar v. Gauhati University* (1973), petitioners challenged a resolution by a Gauhati University's Academic Council to retain English and introduce the native language (Assamese) as the languages of instruction.¹⁹⁶ The petitioners claimed that this resolution violated their rights under Articles 29 and 30 (allowing minorities to enroll in any educational institution of their choice and preventing the state from discriminating against minorities in academic admissions, respectively) of the Constitution.¹⁹⁷ Prior to this resolution, the university had used Bengali alongside English to help students understand the content of English-language lectures.¹⁹⁸ Despite the fact that one petitioner was a Bengali-speaking student, the Court found that "the impugned resolution does not presently affect the petitioners."¹⁹⁹ Thus, it held that the petitioners lacked standing to file this petition.²⁰⁰

These cases evince a broader pattern in the Court's early jurisprudence to deny standing under Article 32 unless petitioners could demonstrate that an impugned law had directly harmed them.²⁰¹ However, as the following section shows, the Court would later relax its standing requirements to allow any person to move for the enforcement of the fundamental rights of other individuals and groups too disadvantaged to file petitions themselves.²⁰²

194. See *Chowdhuri v. Union of India*, (1951) S.C.R. 869 (India).

195. *Id.*

196. See *G.C. College Silchar v. Gauhati University*, A.I.R. 1973 S.C. 761 ¶ 1–2 (India).

197. See *id.* ¶ 1.

198. See *id.* ¶ 4.

199. *Id.*

200. *Id.*; see also *Craig & Deshpande*, *supra* note 187, at 358.

201. See *Craig & Deshpande*, *supra* note 187, at 357–58.

202. See *id.* at 360–61; Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494, 498–99 (1987).

III. EVOLVING CONSTITUTIONAL INTERPRETATIONS,
PROCEDURAL INNOVATIONS AND THE JUDICIARY'S EXPANDING
ROLE

This Section will show how the Indian Supreme Court's jurisprudence with respect to both Article 21 and Article 32 has transformed dramatically since the early years of the Indian republic. At the time of their adoption, Articles 21 and 32 of the Indian Constitution were construed narrowly. Drawing from Justice Frankfurter and the British views of judicial restraint, Article 21 was carefully drafted to exclude any mention of "due process" in favor of the phrase "procedure established by law."²⁰³ This sought to avoid the "substantive due process" doctrine that emerged in the United States, and permitted the government to deprive citizens of life or liberty as long as it acted pursuant to a duly enacted law. Similarly, relying on American and British jurisprudence, the Supreme Court's early cases imposed strict standing requirements on petitioners under Article 32.²⁰⁴ Thus, only petitioners directly harmed by a disputed law could petition the Court to redress violations of the fundamental rights enshrined in Part III of the Constitution.

Over time, Article 21 has not only evolved toward American-style due process,²⁰⁵ but has also been read to encompass the right to "live with dignity,"²⁰⁶ which includes socioeconomic rights. Meanwhile, Article 32 standing requirements have been relaxed through the development of public interest litigation ("PIL").²⁰⁷ These changes allow any citizen to petition the Court to redress fundamental rights violations suffered by disadvantaged individuals or groups. The advent of PIL has also brought about a series of procedural innovations that give the

203. See INDIA CONST. art. 21. See Mate, *supra* note 149, at 222; Dhavan, *supra* note 175, at 313.

204. See Craig & Deshpande, *supra* note 187, at 357-59.

205. See Mate, *supra* note 149, at 218.

206. See *Mullin v. Adm'r, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 529 (India).

207. See Cunningham, *supra* note 202, at 498; Craig & Deshpande, *supra* note 187, at 359-65.

courts greater authority in monitoring and enforcing rights-protective schemes.²⁰⁸

These substantive and procedural developments in the law have fundamentally altered the judiciary's role within the Indian constitutional framework. In particular, there has been an increase in (1) the range of rights that courts can enforce; (2) the number of people that are permitted to file (and are affected by) petitions alleging fundamental rights violations; and (3) the extent to which the courts can supervise the implementation of their orders. Together, these developments vest a great deal of additional authority in the judiciary at the expense of democratic decision making in the elected branches of government.

A. *The Evolution of Article 21*

1. Early Cases

In its early years, the Indian Supreme Court remained faithful to the original understanding of Article 21. In the first major case to examine Article 21, *Gopalan v. State of Madras* (1950), the Supreme Court declined to adopt an expansive interpretation.²⁰⁹ In *Gopalan*, the primary issue was whether certain provisions of the Preventative Detention Act of 1950 violated Articles 13, 19, and 21 of the Indian Constitution.²¹⁰ The petitioner, who was detained pursuant to this Act, drew on the U.S. Constitution to argue that the Court should interpret Article 21 in line with American jurisprudence on the Fifth and Fourteenth Amendments.²¹¹ Writing for the Court, Chief Justice Kania rejected this argument, noting, *inter alia*, that the word "liberty" in Article 21 means merely "personal liberty," whereas in the American context, liberty has a more expansive meaning.²¹² The Chief Justice also looked to the Constituent Assembly debates to establish that the words "due process" were intentionally omitted in favor of the more government-

208. See generally KHOSLA, THE INDIAN CONSTITUTION, *supra* note 191, at 120–22; Craig & Deshpande, *supra* note 187.

209. See *Gopalan v. State of Madras*, (1950) S.C.R. 88, 111 (India); Mate, *supra* note 149, at 232.

210. See *Gopalan v. State of Madras*, (1950) S.C.R. 88, 95 (India).

211. See *id.* at 107.

212. See *id.* at 111.

friendly “procedure established by law.”²¹³ Thus, the Court held that Article 21 permitted the state to deprive an individual of liberty as long as it did so pursuant to a “procedure prescribed by the law of the state.”²¹⁴

The *Gopalan* Court’s interpretation of Article 21, which rejected broad interpretations of “liberty” and analogies to American due process, was later challenged and rejected. The move away from *Gopalan* began in the landmark case *Keshavananda Bharati Sripadagalvaru v. State of Kerala* (1973).²¹⁵ While this case did not address the meaning of Article 21, it had lasting implications on constitutional interpretation generally.²¹⁶ *Keshavananda* held that amendments to the Constitution are invalid if they violate the “basic structure” of the Constitution.²¹⁷ Article 368 of the Indian Constitution permits amendments if they are adopted by a two-thirds majority in both houses of Parliament.²¹⁸ However, according to Justice Khanna in *Keshavananda*, the words “this Constitution” and “the Constitution shall stand amended” that appear in Article 368 are evidence of a constitutional identity that the legislature did not have the authority to alter.²¹⁹ For instance, an amendment abolishing the Supreme Court would be invalid, as it would fundamentally alter the separation of powers framework of the Constitution.

For the purposes of this Article, *Keshavananda* is significant for three reasons. First, it replaced the framer’s model of parliamentary supremacy with a form of judicial supremacy, signaling a change in the allocation of power among branches of

213. *See id.* at 111–12.

214. *See id.* at 111; *See also* Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 HASTINGS INT’L & COMP. L. REV. 55, 83–84 (2009).

215. *See Keshavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461, ¶ 1518 (India).

216. *See* Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the ‘Basic Structure,’* in INDIA’S LIVING CONSTITUTION 179–81 (Zoya Hasan, Eswaran Sridharan & R. Sudarshan eds., Anthem Press 2005).

217. *See Keshavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461, ¶ 1599 (India).

218. *See* INDIA CONST. art. 368.

219. *See Keshavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461, ¶ 1481–82 (India); KHOSLA, THE INDIAN CONSTITUTION, *supra* note 191, at 153.

government.²²⁰ Second, it paved the way for future cases that describe the content of the Constitution's "basic structure," in which the Supreme Court equates fundamental rights with directive principles in terms of their importance. For instance, in *Minerva Mills Ltd. v. Union of India* (1980), Justice Chandrachud stated that Parts III and IV of the Constitution act "like a twin formula for achieving a social revolution which is the ideal . . . the visionary founders of the Constitution set before themselves."²²¹ This laid the foundation for the Supreme Court to rule that Article 21 includes socioeconomic rights within its ambit. Finally, *Keshavananda* provided the impetus for many of the laws and constitutional amendments passed during the era of Emergency Rule.²²²

2. Emergency Rule and Its Aftermath

Emergency Rule (1975–77) was declared by Prime Minister Indira Gandhi to allow her to remain in power and rule by executive decree following widespread calls for her resignation. In 1975, Mrs. Gandhi was convicted by the Allahabad High Court for election fraud in the 1971 general elections.²²³ In the face of strong pressure to resign, Mrs. Gandhi declared a state of emergency in June 1975. Her regime then suspended habeas corpus, severely restricted civil liberties and the freedom of the press, and sought to weaken the judiciary.²²⁴

In fact, Mrs. Gandhi's administration had openly attacked the judiciary prior to declaring Emergency Rule.²²⁵ In reaction to the *Keshavananda* decision in 1973, Mrs. Gandhi went against tradition and installed her own pro-government nominee—who had dissented in *Keshavananda*—as Chief Justice of

220. See Mehta, *supra* note 216, at 180. But see KHOSLA, THE INDIAN CONSTITUTION, *supra* note 191, at 155–60 (arguing that *Keshavananda*'s impact has been exaggerated in the academic literature).

221. *Minerva Mills Ltd. v. Union of India*, (1981) 1 S.C.R. 206, 208–09 (India); Mehta, *supra* note 216, at 198 (internal quotation marks omitted).

222. See Granville Austin, *The Expected and the Unintended in Working a Democratic Constitution*, in INDIA'S LIVING CONSTITUTION, *supra* note 216, at 324–25.

223. See Mate, *supra* note 149, at 243.

224. See *id.*

225. See Austin, *supra* note 222, at 325–26; Dhavan, *supra* note 175, at 316.

the Supreme Court, ahead of three more senior justices.²²⁶ This sort of political manipulation of the judiciary increased during Emergency Rule, as Mrs. Gandhi's regime transferred judges from one High Court to another as punishment for ruling against the central government.²²⁷

The Emergency Rule era also witnessed the passage of four constitutional amendments that were designed to limit the judiciary's power.²²⁸ The most controversial was the Forty-second Amendment, which prohibited judicial review of the disputed 1971 election, overturned *Keshavananda* by barring the Supreme Court from reviewing constitutional amendments, and required a two-third majority of Court benches to hold statutes unconstitutional.²²⁹ Even more radically, the Forty-second Amendment gave the nonjusticiable directive principles in Part IV of the Constitution precedence over the fundamental rights in Part III.²³⁰ Ostensibly, this amendment was supposed to vindicate the framers' vision for social revolution, but in reality it permitted the government to detain thousands of political opponents without charge and impose an authoritarian socialist vision on the country that the framers, with their reverence for democracy, would never have supported.²³¹

Fortunately, Emergency Rule ended less than two years later in March 1977. Mrs. Gandhi finally called for elections and her Indian National Congress Party was defeated by the opposition Janata Party.²³² The Janata Party moved quickly to rescind the controversial constitutional amendments passed by Mrs. Gandhi's regime, and also repealed the Emergency Rule era laws that suppressed free speech and suspended habeas corpus.²³³

Emergency Rule still left a lasting impression on the status of directive principles under the Indian Constitution. After the

226. See Austin, *supra* note 222, at 326; *Long March of the Supreme Court Bar Association*, SUPREME COURT BAR ASS'N, <http://www.lexsite.com/services/network/scba/history.shtml> (last visited Aug. 25, 2013).

227. See Dhavan, *supra* note 175, at 316.

228. See Mate, *supra* note 149, at 243.

229. *Id.*

230. See Austin, *supra* note 222, at 324–25.

231. See Austin, *supra* note 222, at 325.

232. See Mate, *supra* note 149, at 244.

233. See *id.*

repeal of the Forty-second Amendment—which had, inter alia, overruled *Keshavananda* and made directive principles superior to fundamental rights—the Supreme Court relied on *Keshavananda* to hold that directive principles and fundamental rights are equivalent parts of the “basic structure” of the Constitution.²³⁴ In making this bold claim, the Court, much like Mrs. Gandhi’s regime, cited the need for social revolution. It drew inspiration from the framers, quoting Nehru for the proposition that while fundamental rights are “static,” directive principles “represent a dynamic move towards a certain objective.”²³⁵ The Court did not put forth any legal reasons to explain why directive principles should be placed on the same footing as fundamental rights.²³⁶ Nevertheless, it did not merely declare that Parts III and IV of the Constitution were equivalent, but actually ruled in a series of cases that the directive principles were justiciable under the right to life in Article 21.

3. *Maneka Gandhi* and the Right to “Live with Dignity”

The Supreme Court’s landmark decision in *Maneka Gandhi v. Union of India* (1978) dramatically expanded the meaning of Article 21.²³⁷ Maneka Gandhi, Prime Minister Indira Gandhi’s daughter-in-law, alleged that the ruling Janata government had illegally seized her passport pursuant to the Passport Act of 1967.²³⁸ She argued that the Act contained no procedural guidelines for how to seize a citizen’s passport, and even if such a procedure existed, “it was arbitrary and unreasonable” and therefore violated, inter alia, Article 21 of the Constitution.²³⁹ Writing for the Court, Justice Bhagwati construed the phrase “personal liberty” in Article 21 broadly to bring within its am-

234. See *Minerva Mills Ltd. v. Union of India*, (1981) 1 S.C.R. 206, 208 (India); *Waman Rao v. Union of India*, (1981) 2 S.C.R. 1 (India).

235. See *Waman Rao*, (1981) 2 S.C.R. at 24 (India) (quoting from Prime Minister Nehru’s speech in a Parliamentary Debate).

236. See Mehta, *supra* note 216, at 198 (“Other than a hortatory appeal to the need for a social revolution, the court did not advance reasons for why the directive principles are an expression of the equal standing of free and independent citizens in the same way that fundamental rights are.”).

237. See *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621, 670 (India).

238. See *id.* at 622.

239. *Id.*; see also Mate, *supra* note 149, at 245–46; Khosla, *supra* note 214, at 84.

bit the right to travel abroad.²⁴⁰ He said “[t]he expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man.”²⁴¹ These rights include the right to equality under Article 14 and the right to freedom (including freedom of speech and to practice any profession) under Article 19. Justice Bhagwati further observed that the relevant statute did not provide a reasonable opportunity for the petitioner “to be heard in advance before impounding a passport.”²⁴² He therefore argued that principles of “natural justice” and fairness had to be read into Article 21 so as “to invest law with fairness.”²⁴³

The Court held that the Act arbitrarily deprived petitioner of personal liberty under Article 21.²⁴⁴ Through its decision, the Court implicitly overruled *Gopalan* by adopting a due process standard drawn from the Fifth and Fourteenth Amendments of the U.S. Constitution.²⁴⁵ Despite the framers’ purposeful omission of the words “due process,” the Court here expanded the meaning Article 21—and thereby expanded its own authority—to require the government to show not only that a deprivation of life or liberty is conducted pursuant to a procedure established by law, but also that this procedure is reasonable and not “arbitrary, fanciful, or oppressive.”²⁴⁶

The *Maneka Gandhi* judgment also set the stage for a further expansion of Article 21 that would embrace socioeconomic principles as justiciable rights. Justice Bhagwati hinted at this development in his majority opinion:

Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial justice (social, economic and politi-

240. See *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621, 628 (India).

241. *Id.* at 670.

242. *Id.* at 629.

243. *Id.*

244. *Id.* at 671.

245. See *Mate*, *supra* note 149, at 249; *Sathe*, *supra* note 187, at 55–56. *But see Khosla*, *supra* note 214, at 84 (stating that *Maneka* did not overrule *Gopalan*).

246. *Khosla*, *supra* note 214, at 84; *Mate*, *supra* note 149, at 248.

cal), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of fraternity (assuring dignity of the individual and the unity of the nation).²⁴⁷

Such broad rights-protective language signaled the Court's expanding approach to fundamental rights. This excerpt makes a powerful rhetorical case for the interconnectedness of various rights, which the Court would go on to implement through the right to life in Article 21.

Socioeconomic rights were included within the ambit of Article 21 in *Francis Coralie Mullin v. Union Territory of Delhi* (1981). In this case, the Supreme Court had to determine whether a detainee held in preventative detention had the right to meet with his lawyer and family.²⁴⁸ While the case only raised this narrow issue, the Court, led by Justice Bhagwati, saw an opportunity to further expand the meaning of Article 21. It held that the right to life includes a broader right to "live with human dignity."²⁴⁹ This included "the bare [necessities] of life such as nutrition, clothing, and shelter."²⁵⁰ In adopting this expansive interpretation, Justice Bhagwati made clear his belief in a flexible, adaptive reading of the Constitution. In his view, "[A] constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes."²⁵¹

The Supreme Court would follow this interpretative approach in later cases to hold that the right to life includes, inter alia, the rights to education,²⁵² food,²⁵³ shelter,²⁵⁴ health and medical

247. *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621, 648 (India).

248. *Mullin v. Adm'r, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 520 (India).

249. *Id.* at 518.

250. *Id.* at 529.

251. *Id.* at 517.

252. *See Unni Krishnan v. State of A.P.*, (1993) 1 S.C.R. 594, 719 (India).

253. *See, e.g., PUC v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India).

254. *See Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. Supp. 51, 83 (India).

care,²⁵⁵ and a livelihood.²⁵⁶ Thus, a range of justiciable socioeconomic rights has been realized since the *Francis Coralie* decision. To accomplish this feat, the Supreme Court substantively relied on an expansive reading of Article 21 where, despite the clear language in Article 37 stating that directive principles are not judicially enforceable,²⁵⁷ the right to life was held to encompass a right to live with dignity and therefore many of the directive principles.

This substantive change in the law expanded the Court's authority to strike down legislation as incompatible with fundamental rights. Procedural changes—particularly with regard to standing requirements—also contributed to broadening judicial authority. These procedural modifications permit a greater number of citizens to bring claims of fundamental rights violations and empower the Court to actively monitor the implementation of its remedial schemes.

B. The Development of Public Interest Litigation (PIL)

PIL arose in response to a fundamental change in the Indian judiciary during the 1980s and 1990s in which the courts took an active role in promoting socioeconomic justice.²⁵⁸ The Supreme Court facilitated this process by instituting procedural changes, which allowed (and encouraged) public interest organizations to file petitions on behalf of disadvantaged groups to hold the government accountable for large-scale violations of fundamental rights.

PIL was a fundamentally new sort of litigation. It moved away from the traditional model of winner-take-all contests between two parties (or interests), where the judge acted as a passive referee, and courts focused on providing compensation

255. See, e.g., *Paschim Banga Khet Mazdoor Samity v. State of W.B.*, (1996) 4 S.C.C. 37 (India).

256. See *Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. Supp. 51, 83 (India).

257. See INDIA CONST. art. 37.

258. See Cunningham, *supra* note 202, at 494–96. See also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing a similar transformation in American law); See Baxi, *supra* note 6, at 108–11 (preferring the term “social action litigation” to differentiate the Indian and American experiences).

for past wrongs.²⁵⁹ Under the PIL paradigm, lawsuits involve a number of affected individuals or groups, judges assume an active role in shaping litigation, and courts order various forms of relief in addition to compensation, including prospective relief that is monitored and reevaluated from time to time after litigation ends.²⁶⁰

The Indian Supreme Court developed PIL in the post-Emergency Rule era through a series of procedural innovations. The adoption of more liberal standing rules was one of the most significant innovations. Recall that the Court's early cases imposed strict standing requirements that permitted only individuals directly affected by an impugned law to file petitions under Article 32 of the Constitution.²⁶¹ However, Article 32 does not require this restrictive approach, as it sets forth the right of individual citizens to petition the Supreme Court via "appropriate proceedings" to enforce fundamental rights.²⁶²

The Court's interpretation of "appropriate proceedings" would shift over time toward the provision of greater social justice. The transformation began in *Fertilizer Corporation Kamgar Union v. Union of India* (1981).²⁶³ In this case, the Chief Justice's majority opinion hewed to the traditional view that standing under Article 32 should remain primarily with those individuals whose rights had been directly affected.²⁶⁴ However, Justice Iyer, joined by Justice Bhagwati, wrote a concurring opinion that adopted a much broader approach. In their view, "*locus standi* must be liberalized to meet the challenges" facing a developing country like India.²⁶⁵

This approach later prevailed in *S.P. Gupta v. Union of India* (1982).²⁶⁶ The petitioners in this case brought a number of claims alleging government interference with the judiciary. For

259. See Cunningham, *supra* note 202, at 494; Chayes, *supra* note 258, at 1282–83.

260. See Cunningham, *supra* note 202, at 494.

261. See *supra* Part II.B; see also Chowdhuri v. Union of India, (1951) S.C.R. 869 (India); G.C. College Silchar v. Gauhati University, A.I.R. 1973 S.C. 761 (India).

262. INDIA CONST. art. 32.

263. *Fertilizer Corp. Kamgar Union v. Union of India* (1981) 2 S.C.R. 52, 54 (India).

264. See *id.* at 65.

265. *Id.* at 66–71; Craig & Deshpande, *supra* note 187, at 358.

266. See *S.P. Gupta v. President of India*, (1982) 2 S.C.R. 365 (India).

instance, they challenged a policy that gave judges only short-term appointments, which they claimed had perverse effects on judicial independence.²⁶⁷ The Indian Government objected to this writ petition on the grounds that the petitioners were not the judges themselves.²⁶⁸ As a result, the government argued they had not been directly injured by this policy and lacked standing to file a petition under Article 32.²⁶⁹ The Court rejected this argument in a majority opinion written by Justice Bhagwati.²⁷⁰ According to Justice Bhagwati, traditional standing rules were no longer appropriate because they developed “when private law dominated the legal scene and public law had not yet been born.”²⁷¹ “Public law” here refers to landmark cases like *Maneka Gandhi* and *Francis Coralie*—Justice Bhagwati wrote the majority opinion in both cases—that transformed the meaning of Article 21 to take into account the social and economic conditions of the public at large.²⁷² Thus, to adapt to this new era of public law, the Court rejected the traditional view of standing and recognized the right of any member of the public to petition for redress of a wrong to a “person or to a determinate class of persons . . . (who) by reason of poverty, helplessness or disability or socially disadvantaged position” cannot approach the Court themselves.²⁷³ *S.P. Gupta* empowered citizens to file claims of fundamental rights violations on behalf of others less fortunate, a monumental change from the original rule requiring direct injury to petition the Court under Article 32.

According to Craig and Deshpande, in their seminal article on the rise of PIL, two major themes emerge from the Court’s reasoning for this radical shift in standing rules.²⁷⁴ First, the Court sought to exercise a greater degree of judicial review over

267. *Id.* at ¶ 3.

268. *See id.* at ¶ 7; Craig & Deshpande, *supra* note 187, at 359.

269. *See* Craig & Deshpande, *supra* note 187, at 359.

270. *See* S.P. Gupta v. President of India, (1982) 2 S.C.R. 365 (India).

271. *Id.* at ¶ 14.

272. *See* Maneka Gandhi v. Union of India, (1978) 2 S.C.R. 621 (India); *see generally* Mullin v. Adm’r, Union Territory of Delhi, (1981) 2 S.C.R. 516 (India).

273. S.P. Gupta v. President of India, (1982) 2 S.C.R. 365, ¶ 17 (India); Cunningham, *supra* note 202, at 499 (internal citations omitted).

274. Craig & Deshpande, *supra* note 187, at 361.

the actions of elected authorities. By adopting looser standing rules, the Court enabled the public to hold authorities accountable to the judiciary and not simply to the “sweet will” of the authorities themselves.²⁷⁵

A second and more innovative theme in the Court’s reasoning is that standing rules had to be changed “because the very purpose of the law itself was undergoing a transformation. It was being used to foster social justice by creating new categories of rights.”²⁷⁶ This is closely linked to the simultaneous transformation in the Court’s interpretation of Article 21. Justice Bhagwati explicitly made this connection in his *S.P. Gupta* opinion. He noted that fundamental rights were “practically meaningless . . . unless accompanied by social rights necessary to make them effective and really accessible to all.”²⁷⁷ By “social rights,” Justice Bhagwati meant the directive principles in Part IV of the Indian Constitution, which he believed were inextricably linked to the fundamental rights in Part III.²⁷⁸ This is evident in the following passage:

More and more frequently the conferment of . . . socio-economic rights and imposition of public duties on the State and other authorities for taking positive action generates situations in which single human action can be beneficial or prejudicial to a large number of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair. For example, the discharge of effluent in a lake or river may harm all who want to enjoy its clean water; emission of noxious gas may cause injury to large numbers of people who inhale it along with the air, defective or unhealthy packaging may cause damage to all consumers of goods and so also illegal raising of railway or bus fares may affect the entire public which wants to use the railway or bus as a means of transport.²⁷⁹

Thus, for Justice Bhagwati, the traditional model of litigation was inadequate to protect the public interest from individual acts that harmed large swathes of the population. He therefore

275. *Id.* (internal quotation marks omitted).

276. *Id.*

277. *S.P. Gupta v. President of India*, (1982) 2 S.C.R. 365, ¶ 19 (India).

278. *See id.*; *See* INDIA CONST. art. 37; Craig & Deshpande, *supra* note 187, at 361.

279. *S.P. Gupta v. President of India*, (1982) 2 S.C.R. 365, ¶ 19 (India).

gave an instrumental justification for liberalizing standing rules—they permitted the Court to give broader (and, in Bhagwati's view, proper) meaning to Part III of the Constitution, by supplementing fundamental rights with directive principles.

Justice Bhagwati's approach was enforced in *Bandhua Mukti Morcha v. Union of India* (1984).²⁸⁰ Here, a public interest organization petitioned to eradicate bonded labor.²⁸¹ Though Article 23 of the Indian Constitution prohibits forced labor, the government argued that bonded labor did not violate any fundamental rights.²⁸² Once again writing for the majority, Justice Bhagwati dismissed this argument, relying primarily on the right to life in Article 21.²⁸³ He reaffirmed that Article 21 protected the right to live with dignity, which included the right to live free from exploitation.²⁸⁴ To support this broad interpretation, Justice Bhagwati drew on various directive principles (Articles 39, 41, and 42) that he said provided the "life breath" to Article 21.²⁸⁵

Additionally, the *Morcha* case further entrenched the liberal standing requirements adopted in the *S.P. Gupta* case—it allowed a nongovernmental organization ("NGO") not directly affected by bonded labor to bring a claim under Article 32.²⁸⁶ Justice Bhagwati even went so far as to suggest that PIL was nonadversarial. In fact, he encouraged the government to "welcome public interest litigation because it would [allow the government] . . . to examine whether the poor and down-trodden are getting their social and economic entitlements."²⁸⁷ Justice Bhagwati would later describe PIL as a sort of "collaborative" litigation, where the petitioner, the government, and the Court work together rather than as adversaries to determine the best solutions to major social problems.²⁸⁸

280. See *Morcha v. Union of India*, (1984) 2 S.C.R. 67 (India).

281. *Id.* at 102; Craig & Deshpande, *supra* note 187, at 362.

282. See *Morcha*, (1984) 2 S.C.R. at 103 (India).

283. See *id.*; Craig & Deshpande, *supra* note 187, at 362.

284. See *Morcha*, (1984) 2 S.C.R. at 103 (India).

285. *Id.*

286. *Id.*; Craig & Deshpande, *supra* note 187, at 362–63.

287. *Morcha*, (1984) 2 S.C.R. at 103 (India).

288. Cunningham, *supra* note 202, at 504 (referencing Justice Bhagwati's interview with *FRONTLINE*).

C. The Indian Judiciary Today: Judges as Policymakers

In the spirit of “collaborative” litigation, the Supreme Court in *Morcha* and later cases devised further procedural innovations to give the judiciary a more substantial role in monitoring and enforcing the implementation of judicial orders.²⁸⁹ The Supreme Court appoints special commissions to conduct fact-finding, propose remedies, and monitor compliance with its orders.²⁹⁰ For instance, the *Morcha* Court appointed a special commission to investigate facts on its behalf.²⁹¹ The Commission was ordered to prepare a report of its findings that “would furnish prima facie evidence of the facts and data . . . It would be entirely for the Court to determine what weight to attach to the facts and data.”²⁹²

Other procedural innovations of the Supreme Court include: “epistolary jurisdiction”²⁹³ where courts treat a letter from a state detainee or prisoner as a writ petition under Article 32; and “continuing mandamus,” which, in cases like *Morcha*, allows the Court to enforce its orders on a continuous basis even after litigation ends.²⁹⁴ Generally, the mechanism for enforcement is a series of interim orders, which allows the Court not only to keep track of whether government schemes meet judicial guidelines, but also to instruct the government on how to execute those schemes.²⁹⁵

An example of how closely the Court supervises the implementation of its orders is the ongoing “Right to Food” litigation. In April 2001, the People’s Union for Civil Liberties (“PUCL”) filed a writ petition under Article 32 of the Indian Constitution alleging that the Government of India, the Food Corporation of

289. See, e.g., *Morcha*, (1984) 2 S.C.R. at 107 (India); *Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. Supp. 51 (India); *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India).

290. See, e.g., *M.C. Mehta v. Union of India*, (1987) 1 S.C.R. 819, 829 (India); *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India).

291. See *Morcha*, (1984) 2 S.C.R. at 105 (India).

292. *Id.* at 111–12; see also *Cunningham*, *supra* note 202, at 506.

293. See, e.g., *S.P. Gupta v. Union of India*, (1982) 2 S.C.R. 365, 520–21; *Sobraj v. Superintendent, Cent. Jail Tihar* (1979) 1 S.C.R. 512 (India). See also, *Baxi*, *supra* note 6, at 118; *Dhavan*, *supra* note 175, at 306–07.

294. See *Morcha*, (1984) 2 S.C.R. at 71 (India).

295. See *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India); *Birchfield & Corsi*, *supra* note 26, at 699–701.

India ("FCI"), and six state governments had violated the right to life of millions of Indian citizens under Article 21.²⁹⁶ When the petition was filed, India was experiencing a severe drought leading to high rates of poverty and malnutrition.²⁹⁷ The petitioners argued that these government officials and the FCI had failed to provide adequate food supplies and employment to the affected population, which they were required to under the Famine Code of 1962.²⁹⁸ According to petitioners, since adequate food is a necessary condition to sustain life, these state actors had an affirmative duty to provide and distribute food to citizens affected by the drought.²⁹⁹ This argument drew from the Supreme Court's interpretation of Article 21 in *Francis Coralie*, where it held that the right to life encompassed a right to "live with dignity."³⁰⁰

On November 28, 2001, the Supreme Court issued an interim order recognizing certain food schemes as legal entitlements under Article 21.³⁰¹ It also gave the central and state governments specific orders on how to implement those schemes. For instance, the Court instructed state governments "to complete the identification of BPL [below poverty line] families, issuing of cards and commencement of distribution of 25 kgs. grain per family per month latest by 1st January, 2002."³⁰² Additionally, it directed the central and state governments to provide "every child in every Government and Government assisted Primary Schools with a prepared mid day meal with a minimum content

296. PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India). For an overview of and update on the right to food litigation, see RIGHT TO FOOD CAMPAIGN, <http://www.righttofoodindia.org/index.html> (last visited Aug. 27, 2013).

297. See Colin Gonsalves et al., RIGHT TO FOOD: COMMISSIONS REPORTS, SUPREME COURT ORDERS, NHRC REPORTS (2d ed. 2005) (reporting that in Rajasthan, one of the worst-affected states, 50% of children were malnourished and half of the state's population lived below the poverty line).

298. PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India); Birchfield & Corsi, *supra* note 26, at 697-98.

299. See PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India).

300. Mullin v. Adm'r, Union Territory of Delhi, (1981) 2 S.C.R. 516, 529 (India).

301. See PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India) (Nov. 28, 2001 interim order), *available at* <http://www.righttofoodindia.org/orders/nov28.html>.

302. *Id.*

of 300 calories and 8–12 grams of protein each day of school for a minimum of 200 days.”³⁰³

In an interim order issued on May 2, 2003, the Court went even further to engage in “something strikingly close to law-making.”³⁰⁴ To facilitate the proper distribution of grain supplies, the Court issued directions to the government on how to regulate the issuance of licenses to distributors. These directions are formulated much like a statute would be. They require

(1) Licensees, who (a) do not keep their shops open throughout the month during the stipulated period, (b) fail to provide grain to BPL families strictly at BPL rates and no higher, (c) keep the cards of BPL households with them, (d) make false entries in the BPL cards, (e) engage in black-marketing or siphoning away of grains to the open market and hand over such ration shops to such other person/organizations, shall make themselves liable for cancellation of their licenses. The concerned authorities/functionaries would not show any laxity on the subject.³⁰⁵

Today, more than a decade after it began, the “Right to Food” litigation continues with the Court issuing regular interim orders directing the government how to implement its schemes and instituting timelines for the completion of those schemes.³⁰⁶ Over time, the litigation has grown to include all Indian state governments as respondents.³⁰⁷ Its scope has also expanded to cover a range of issues not directly related to the right to food, including urban poverty, the right to work, and even general issues of transparency and accountability in government implementation.³⁰⁸

303. *Id.*

304. Birchfield & Corsi, *supra* note 26, at 700. See PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India) (May 2, 2003 interim order), available at <http://www.righttofoodindia.org/orders/may203.html>.

305. PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India) (May 2, 2003 interim order), available at <http://www.righttofoodindia.org/orders/may203.html>.

306. See Birchfield & Corsi, *supra* note 26, at 699–701.

307. See A TOOL FOR ACTION, *supra* note 125, at 3 (2005).

308. *Id.* at 4.

IV. JUDICIAL POLICYMAKING AND THE DEMOCRATIC OBJECTION

The judiciary, led by the Supreme Court, has transformed itself into a significant policymaking institution since the Constitution's adoption in 1950. The effect of this transformation is clear: the separation of powers framework set forth in the Constitution has been weakened. The Court has sought to replace the division of powers among three branches of government "with a 'unitarian' claim of formal judicial supremacy."³⁰⁹

This supremacy emerged out of both substantive and procedural developments in the Indian Supreme Court's jurisprudence. The directive principles in Part IV of the Constitution were drafted as nonjusticiable guidelines, but have become justiciable rights under the right to "live with dignity" in Article 21.³¹⁰ This has enabled the Supreme Court to adjudicate cases pertaining to socioeconomic rights. The concurrent development of PIL led to relaxed standing rules, the appointment of special commissions, and other procedural innovations that allow the Court to take on a greater range of cases and to craft policy schemes that affect large numbers. Thus, PIL-related procedural changes, combined with an expansive substantive interpretation of the right to life, have fundamentally transformed the judiciary's role under the Indian Constitution.

The "Right to Food" litigation exemplifies this transformation and shows how the Supreme Court has become a major player in formulating national socioeconomic policy. As of 2005, the Court in that case had issued forty-four interim orders and appointed two Commissioners charged with "monitoring and reporting to this Court of the implementation by the respondents of the various welfare measures and schemes."³¹¹ This sort of judicial policymaking calls forth a serious democratic objection. The Court today constrains democratic decision making on a wide range—and potentially indefinite—set of policy issues,

309. Mehta, *supra* note 6, at 72.

310. See *Mullin v. Adm'r, Union Territory of Delhi*, (1981) 2 S.C.R. 516 (India).

311. A TOOL FOR ACTION, *supra* note 125, at 7. The Supreme Court has passed a number of interim orders since 2005. For a representative list, see *Legal Action: Supreme Court Orders*, RIGHT TO FOOD CAMPAIGN <http://www.righttofoodindia.org/orders/interimorders.html> (last updated Feb. 28, 2013) [hereinafter *Supreme Court Orders*].

leading many commentators to declare it the “most powerful court in the world.”³¹²

The Court’s role in Indian political life is difficult to square with a Rawlsian liberal conception of democracy. It is important to note this conception does not necessarily envision a strict separation of powers. In fact, Michelman does not rely on (nor even accept) the standard separation of powers trope, in which legislatures make policy choices without regard to law and courts appear later to review the legality of legislative action.³¹³ In fact, he argues that the democratic objection, which grows out of this view, “trades on a particular, contestable and indeed poor, conception of democracy.”³¹⁴ Thus, society need not accept this narrow conception of separation of powers or the idea that norms should not be considered part of constitutional law simply because they are not enforced by courts.³¹⁵ In fact, Michelman puts forth a different conception—one in which constitutional law figures prominently in the “conduct of public affairs,” constraining the acts of the executive and legislature.³¹⁶

This view relies on a framing of socioeconomic guarantees as directive principles guiding legislative action toward certain societal goals, and not as judicially enforceable rights. Even if courts are kept away from adjudicating socioeconomic rights, there is still value in placing these rights within a Constitution. The value lies in a subtle but important effect that constitutional status confers—it would create a “certain pressure on the frame of mind” of citizens and their representatives to consider principles of socioeconomic justice in their deliberations

312. Alexander Fischer, *Higher Law Making as a Political Resource: Constitutional Amendments and the Constructive Fragmentation of Sovereignty in India*, in SOVEREIGNTY AND DIVERSITY 186 (Miodrag Jovanović & Kristin Henrard eds. 2008) (pointing out that both Upendra Baxi and S. P. Sathe have referred to the Indian Supreme Court as the “most powerful in the world”); Sathe, *supra* note 187, at 89 (“None of the political players have protested against judicial intrusion into matters that essentially belonged to the executive. Some feeble whispers are heard, but they are from those whose vested interests are adversely affected.”).

313. See Michelman, *supra* note 2, at 33.

314. *Id.* at 39.

315. *Id.* at 33.

316. *Id.*

and public policy decisions.³¹⁷ These principles would not overly constrain democratic policymaking but give a “certain inflection to political public reason.”³¹⁸

This is exactly what the framers of the Indian Constitution had in mind when they separated fundamental rights from directive principles and explicitly made the latter nonjusticiable.³¹⁹ However, the Indian judiciary, led by the Supreme Court, fundamentally altered the original Constitutional framework. The “Right to Food” litigation illustrates at least three ways in which the Supreme Court increased its own power and decision-making influence.

First, as a result of its expansive reading of Article 21, the Court can enforce a greater number of rights than it could in the early years of the republic. When the Court first declared a right to “live with dignity,” it stated that it included “the bare necessities of life such as . . . nutrition, clothing, and shelter” over the head.³²⁰ However, the Court placed no limiting principle on this right,³²¹ and this interpretation grows ever more expansive over time. The “Right to Food” litigation is emblematic of that growth—it began as a case about the supply and distribution of food to famine-affected populations, but now encompasses issues of homelessness, maternity, and child development.³²²

In another recent case, the Supreme Court declared that even the “right to sleep” falls within the ambit of Article 21. According to the Court, “[s]leep is essential . . . to maintain the delicate balance of health necessary for its very existence and survival.”³²³ Adequate sleep is therefore an important aspect of

317. *Id.* at 39.

318. *Id.*

319. See INDIA CONST. art. 37; see *supra* Part II.

320. *Mullin v. Adm’r, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 529 (India).

321. See *id.*

322. See A TOOL FOR ACTION, *supra* note 125, at 4; *Supreme Court Orders*, *supra* note 311 (listing interim orders on homelessness, the National Maternity Benefit Scheme, and the Integrated Child Development Scheme).

323. In *Re Ramlila Maidan Incident Dt. 4/5.06.2011 v. Home Sec’y, Union of India*, 2012 STPL (Web) 124 S.C. (India) at 76 [hereinafter *Right to Sleep Case*], available at [http://www.stpl-india.in/SCJFiles/2012_STPL\(Web\)_124_SC.pdf](http://www.stpl-india.in/SCJFiles/2012_STPL(Web)_124_SC.pdf).

human dignity “without which the existence of life itself would be in peril.”³²⁴

Cases like this suggest that the right to “live with dignity” has potentially infinite scope. It calls to mind W.E. Forbath’s right to “social citizenship” that would provide assurances to all citizens that they can make a decent living through forms of social participation that provide the opportunity for self-improvement, material interdependence, and security for all.³²⁵ As Michelman noted, such a broadly conceived right would leave “no leading [political] issue . . . untouched.”³²⁶ This is the core of the democratic objection—when constitutional rights are couched in some of the widest imaginable terms, as they are by the Indian Supreme Court, the Constitution unduly restricts democratic decision making on a range of issues.³²⁷

By contrast, the South African Constitution couches its socioeconomic rights in much narrower terms. It includes judicially enforceable rights to a clean environment, housing, food, water, social security, and education.³²⁸ Faced with this finite, enumerated list of socioeconomic rights, the South African Constitutional Court is much more constrained than its Indian counterpart. For instance, it could not recognize a “right to sleep.” Moreover, with regard to the rights to housing, food, water, and social security, the South African Court requires only that the government take reasonable measures toward the progressive realization of these rights for all citizens.³²⁹ The Indian Supreme Court, however, is not so constrained—it has not set forth a clear standard of review for socioeconomic policies, giving it a greater license to intervene as it sees fit.

A second way in which the Indian Supreme Court has increased its influence on socioeconomic policy is through new, accommodating procedural requirements under Article 32, including “epistolary jurisdiction” and relaxed standing rules.

324. *Id.*; see also Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991–1992) (making the case that homelessness, which deprives individuals of adequate sleep, constitutes a deprivation of human dignity and freedom).

325. See Forbath, *Constitutional Welfare Rights*, *supra* note 116, at 1827.

326. Michelman, *supra* note 2, at 33.

327. See *id.* at 30–33.

328. See S. AFR. CONST., 1996, §§ 24, 26, 27, 29.

329. See Michelman, *supra* note 2, at 31; S. AFR. CONST., 1996, §§ 26, 27.

This has transformed the Court into a forum where social movements, led by NGOs, can voice their grievances on behalf of large segments of the population, and in the process, obtain relief against the government. As Upendra Baxi put it, "People now know that the Court has constitutional power of intervention, which can be invoked to ameliorate their miseries."³³⁰

For example, take the "Right to Food" litigation; PUCL, an NGO, filed a petition under Article 32 of the Constitution on behalf of thousands affected by famine, even though the NGO was not itself directly affected.³³¹ Over time, the case expanded to include all Indian states as respondents,³³² meaning that the Supreme Court's interim orders could potentially impact all Indian citizens.

Finally, a third and related means toward greater policymaking authority for the Indian Supreme Court is a series of procedural innovations; this includes the continuing mandamus and the appointment of special commissions that enable it to monitor compliance with its orders. The "Right to Food" litigation has continued for more than eleven years, with the Court having issued forty-four interim orders by 2005 and several more since then.³³³ More strikingly, the Court instructed both central and state governments on how to allocate resources under various socioeconomic policy schemes and instituted timelines for their completion.³³⁴ The Court also appointed special commissioners to monitor and report whether government actors are complying with the Court's orders.³³⁵

Together, these developments illustrate the judiciary's rise as a policymaking institution and call forth a serious democratic objection. The fact that socioeconomic rights are couched in very broad terms under Article 21 is problematic in the Indian context, but need not be *per se*. For instance, say the Indian

330. Baxi, *supra* note 6, at 108.

331. See PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India).

332. See A TOOL FOR ACTION, *supra* note 125, at 4.

333. See *id.* at 4-7; *Supreme Court Orders*, *supra* note 311 (listing several recent interim orders).

334. PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India) (May 2, 2003 interim order), available at <http://www.righttofoodindia.org/orders/may203.html>.

335. See A TOOL FOR ACTION, *supra* note 125, at 4-7.

Supreme Court continued to locate a number of rights within the right to “live with dignity,” but instead of formulating and enforcing its own policy prescriptions to remedy violations of those rights, it simply held government policies to a reasonableness standard. In this scenario, a “constitutionally declared right . . . of social citizenship would leave just about every major issue of public policy still to be decided.”³³⁶ This would mitigate (if not eliminate) the democratic objection, as the court would leave it to the elected branches of government to make socioeconomic policy and would confine itself to simply judging the constitutionality of those policies under a relatively lenient standard of review. This is the approach adopted by the South African Constitutional Court.³³⁷ Compared to South Africa, socioeconomic rights in India have been couched in very broad and obtuse terms by the Indian Supreme Court. The Court has not specified or placed any limiting principle on the rights that could be inferred under the “right to live with dignity.” It has also failed to establish a standard to review government socioeconomic policies.³³⁸ Together, these developments give the Court wide latitude to shape socioeconomic policy at the expense of democratic deliberation and compromise. Going forward, the Indian Supreme Court would lessen the democratic objection if it were to clearly prescribe limits on the “right to live with dignity” and set forth a standard of review for socioeconomic policy schemes. However, this seems unlikely in light of judicially-created procedural innovations at every stage of litigation that have allowed the Court to transform itself into a policymaking institution capable of affecting change on a large scale.³³⁹ As the “Right to Food” litigation shows, the Indian Su-

336. Michelman, *supra* note 2, at 39.

337. See, e.g., Gov’t of the Republic of S. Afr. v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.).

338. See Mehta, *supra* note 6, at 72 (“[E]ven as the Supreme Court has established itself as a forum for resolving public-policy problems, the principles informing its actions have become less clear.”); KHOSLA, THE INDIAN CONSTITUTION, *supra* note 191, at 129 (arguing that the Supreme Court has adopted neither a “minimum core” or reasonableness standard, but instead operates on a “conditional social rights model” that examines only the implementation of government schemes, not their content).

339. See Cunningham, *supra* note 202, at 522–23 (“[V]olunteer social activists are allowed standing, a simple letter can be accepted as a writ petition,

preme Court, unlike its South African counterpart, does not simply declare government socioeconomic policy schemes unconstitutional, but issues specific directions for how to fix those schemes that it enforces with interim orders.³⁴⁰ In light of Michelman's proposed solution to the democratic objection—to move beyond courts and toward representative democracy informed by directive principles and constrained by public reason—the Indian Supreme Court's approach of first locating socioeconomic rights in the Constitution and then vigorously enforcing them is democratically problematic.

Nevertheless, drawing from Rawls, even the Court's strong exercise of judicial review is perhaps defensible "given certain historical circumstances and conditions of political culture" in India.³⁴¹ While Rawls did not elaborate on what he meant here, he suggests that the need for judicial review (and perhaps also its scope) varies among societies based on "justice-related concerns."³⁴² Thus, even in its strongest form, judicial review might be justified where the elected branches of government do not provide citizens with a "social minimum,"³⁴³ or violate the "difference principle" by failing to distribute resources to the greatest benefit of a society's least-privileged members.³⁴⁴

A full discussion of the history and politics of socioeconomic justice in India is beyond the scope of this Article,³⁴⁵ but one's initial impression is that judicial review might be justified in light of certain facts. Historically, India has struggled with chronic poverty and malnourishment, which have not improved much over time.³⁴⁶ This lack of improvement is widely attribut-

the court itself will . . . [establish] the facts through commissions, and whenever possible the case will move swiftly to the issue of remedy.").

340. See A TOOL FOR ACTION, *supra* note 125, at 4–7.

341. See RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 240.

342. Michelman, *Justice as Fairness*, *supra* note 93, at 1413.

343. See RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 166, 228–29 (providing that the state must provide a "social minimum" providing for satisfaction of citizens' "basic" material needs to the extent required for them to take effective part in political and social life).

344. See RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 49–52.

345. For a comprehensive overview, see C.J. NIRMAL, HUMAN RIGHTS IN INDIA: HISTORICAL, SOCIAL AND POLITICAL PERSPECTIVES (2002).

346. See Dreze, *supra* note 30, at 1723 (noting that a 1998–1999 study found that 47% of all Indian children were undernourished and 52% of all

ed to rampant corruption at all levels of government.³⁴⁷ Studies on the right to food and the right to health have concluded that government schemes in these areas have failed because of bribery, rent seeking, and other corrupt practices.³⁴⁸

With respect to the right to food, the Supreme Court appointed a Committee headed by former Justice Wadhwa to investigate the Public Distribution System (“PDS”). The PDS was initiated to ensure that adequate food reached poorer segments of Indian society at subsidized prices. The Committee, however, found that most of the food released at subsidized rates never reaches its intended recipients.³⁴⁹ It concluded that the impact of the PDS is “virtually non-existent on the ground and as a result, malpractices abound to the great discomfiture of the common man.”³⁵⁰

Thus, the elected branches do not effectively provide a social minimum for many of its citizens, nor a just system of distribution. At first glance, then, historical circumstances and political conditions in India appear to justify the Supreme Court’s robust exercise of judicial review, even though it has increasingly limited democratic decision making.

More fundamentally, such dysfunction in representative government calls into question the institutional assumptions on which the democratic objection is based. As David Landau argues, the idea that the legislature should operate in a separate

adult women were anemic); *id.* at 1728 (positing that the “improvement of nutrition indicators over time is very slow”).

347. See C. RAJ KUMAR, CORRUPTION AND HUMAN RIGHTS IN INDIA 2–3 (2011) (arguing that corruption in India “undermines the very social fabric, and the political and bureaucratic structure of the Indian society . . . [it] violates the constitutional foundations of Indian democracy”).

348. On the right to food, see JUSTICE WADHWA COMMITTEE REPORT ON THE PUBLIC DISTRIBUTION SYSTEM, *available at* <http://www.prsindia.org/uploads/media/Food%20Security/Justice%20Wadhwa%20Committee%20Report%20on%20PDS.pdf> [hereinafter WADHWA COMMITTEE REPORT]. On the right to health, see R. Huss et al., *Good Governance and Corruption in the Health Sector: Lessons from the Karnataka Experience*, 26 HEALTH POL. & PLANNING 471 (2011). See also Susan Rose-Ackerman, *The Political Economy for Corruption*, INST. FOR INT’L ECON., *available at* iee.com/publications/chapters_preview/12/2iie2334.pdf.

349. See WADHWA COMMITTEE REPORT, *supra* note 348.

350. *Executive Summary*, CENTRAL VIGILANCE COMMITTEE ON PUBLIC DISTRIBUTION SYSTEM (Aug. 17, 2007), *available at* <http://pdscvc.nic.in/Executive%20Summary-17Aug2007.htm>.

space from the judiciary assumes, *inter alia*, that the legislature is responsive to popular will, attuned to constitutional values, and has greater capacity than the judiciary—assumptions that do not apply in developing countries like India.³⁵¹ The judiciary's role therefore should be judged in its institutional context. In India, this means accepting that the judiciary acts as a political institution that gains democratic legitimacy by exercising policymaking as well as judicial power.³⁵²

V. THE CONTRACTARIAN OBJECTION TO CONSTITUTIONAL SOCIOECONOMIC RIGHTS IN INDIA

The Indian Supreme Court has assumed an increasingly prominent role in the formulation and enforcement of socioeconomic policy through both substantive and procedural shifts in its jurisprudence. But has it set forth publicly acceptable reasons to justify its decisions to relax procedural requirements under Article 32 of the Constitution and to make socioeconomic rights justiciable under Article 21? This is the central question posed by the contractarian objection. It shifts our focus from the Court's role in India's constitutional framework to the legitimacy of its decision-making process.

The contractarian objection begins with the premise that a constitution's legitimacy requires, at a minimum, that rational citizens (acting reasonably) understand its terms and can agree to be governed by them.³⁵³ If citizens cannot understand the terms or are unable to determine if their government or fellow citizens are complying with constitutional principles, they will not regard the constitution as a legitimate source of political authority.³⁵⁴

To put this objection in the context of socioeconomic rights, recall that Rawls clearly differentiates between the first principle of justice that sets out a scheme of basic liberties that are "constitutionally essential," and the second principle, which

351. See generally David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319 (2010).

352. See UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* 10–30 (1979).

353. See Michelman, *supra* note 2, at 35.

354. See *id.* at 36.

pertains to non-constitutionally essential questions of social and economic policy.³⁵⁵ A constitutional system can be *legitimate* if it complies with a range of basic liberties, but nonetheless *unjust* for failing to pursue socioeconomic justice.³⁵⁶

While the second principle is not constitutionally essential, it nonetheless pertains to what Rawls calls “basic justice” and is therefore governed by the constraint of public reason.³⁵⁷ This requires citizens and their public institutions to present each other with publicly acceptable reasons for their political views, to be willing to listen to others, and to display “fair-mindedness in deciding when accommodations to their views should reasonably be made.”³⁵⁸

The constraint of public reason applies more stringently to the Supreme Court.³⁵⁹ In many democratic societies, including India’s, the Supreme Court is the final arbiter of constitutional interpretation. Its justices must articulate the best interpretation of the Constitution through reasoned opinions that are grounded in political values that reflect their best understanding of the public conception of justice.³⁶⁰ Unlike ordinary citizens or their elected representatives who deliberate on a range of policy issues, the justices are concerned with the higher (constitutional) law and matters of basic justice, and therefore must only use public reasons to explain their decisions.³⁶¹ The need for the Court to explain its decisions through public reasons is heightened with regard to socioeconomic rights. These rights “lack the trait of transparency,” as it is difficult to measure if they are being realized at any given moment.³⁶² This lack of transparency accounts for one of the primary distinctions between the first and second principles. Rawls believes that in comparison to the second principle, “it is far easier to tell

355. RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 46.

356. See Michelman, *Justice as Fairness*, *supra* note 93, at 1414.

357. See RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 214; see Michelman, *supra* note 2, at 37–38.

358. RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 217.

359. See *id.* at 216, 231.

360. *Id.* at 236.

361. See *id.* at 216, 234.

362. Michelman, *supra* note 2, at 36.

whether . . . [Constitutional] essentials are realized.”³⁶³ He states that the realization of the second principle is “always open to reasonable differences of opinion . . . [it] depend[s] on inference and judgment in assessing complex social and economic information.”³⁶⁴ Thus, Rawls argues that the first principle should apply “at the stage of the constitutional convention,” while issues of socioeconomic justice should be decided by elected representatives after the basic constitutional structure is in place.³⁶⁵ In essence, this is the structure adopted by the framers of the Indian Constitution. They set forth a scheme of basic liberties in Part III of the Constitution, followed by non-justiciable Directive Principles of State Policy in Part IV.³⁶⁶ The Indian Supreme Court altered this constitutional structure by interpreting Articles 21 and 32 to make socioeconomic rights justiciable and allow the Court to assume a central role in their enforcement.

As the “exemplar of public reason,” the Supreme Court’s decisions must reasonably comport with the text of the Constitution, constitutional precedents, and political understandings of the Constitution to articulate “a coherent constitutional view over the whole range of their decisions.”³⁶⁷ If its decisions do not meet these criteria, citizens might lose confidence that public reason applies to decisions of socioeconomic justice and the “extant system of positive legal ordering is unjust.”³⁶⁸ More broadly, if citizens cannot understand what constitutionally essential provisions require, they will doubt the legitimacy of the whole constitutional system.³⁶⁹

363. RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 49. *See also* Michelman, *Poverty in Liberalism*, *supra* note 72, at 1016 (“It is more urgent, Rawls proposes, to settle constitutionally the framework of ‘just political procedure’—in which he includes guaranteed personal and political liberties—than it is to settle matters of economic justice, fairness, and distribution. And that is all the more so, he adds, given the relative non-transparency of judgment regarding satisfaction of that latter part of justice.”).

364. RAWLS, JUSTICE AS FAIRNESS, *supra* note 17, at 48.

365. *See id.* at 48.

366. *See* INDIA CONST. §§ 12–51; AUSTIN, THE INDIAN CONSTITUTION, *supra* note 20, at 50–83.

367. RAWLS, POLITICAL LIBERALISM, *supra* note 7, at 231, 234–36.

368. Michelman, *supra* note 2, at 38.

369. *See id.*

With respect to Article 32, the Court's decisions appear to fit within the constraint of public reason. As a preliminary matter, the text of Article 32 sets forth a flexible standard rather than a fixed rule that allows the Court some interpretive discretion.³⁷⁰ It states that citizens may petition the Supreme Court via "appropriate proceedings" to obtain relief for violations of fundamental rights.³⁷¹ As discussed in Part III, *supra*, the term "appropriate proceedings" originally limited standing to petitioners directly affected by a challenged law. Yet, over time the Court loosened this requirement to accommodate petitions from any member of the public on behalf of disadvantaged individuals or groups.³⁷² This interpretation is within the bounds of public reason because the phrase "appropriate proceedings" clearly sets forth a standard rather than a rule. All mainstream theories of constitutional interpretation, with the exception of what Jack Balkin calls "original expected application,"³⁷³ would accept that the phrase "appropriate proceedings" can (or even should) evolve over time.³⁷⁴

The Court is also quite clear in its reasoning on this question of interpretation. For instance, in *Bandhua Mukti Morcha*, Justice Bhagwati states,

There is no limitation in regard to the kind of proceeding envisaged in clause (1) of Article 32 except that the proceeding must be "appropriate" and this requirement of appropriateness must be judged in the light of the purpose for which the

370. See INDIA CONST. art. 32.

371. *Id.*

372. See generally Craig & Deshpande, *supra* note 187; Cunningham, *supra* note 202.

373. JACK M. BALKIN, LIVING ORIGINALISM 6–7 (2011). For an example of this sort of originalism, see generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

374. See, e.g., BALKIN, LIVING ORIGINALISM, *supra* note 373, at 7 ("When the Constitution uses vague standards or abstract principles, we must apply them to our own circumstances in our own time."); DAVID STRAUSS, THE LIVING CONSTITUTION 8 (2010) ("[Some] provisions of the Constitution, while written in plain enough English, do not give us . . . unequivocal instructions."); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007) (noting that some constitutional provisions are "open ended and invite constitutional decisionmaking that expresses national ideals").

proceeding is to be taken, namely, enforcement of a fundamental right.³⁷⁵

He goes on to state that the framers "did not lay down any particular form of proceeding . . . nor did they stipulate that such proceeding should conform to any rigid pattern or straight jacket," since this would be "self-defeating because it would place enforcement of fundamental rights beyond the reach of the common man."³⁷⁶ This justification depends on the very plausible premise that the framers knew that an open-ended provision was necessary in "a country like India, where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation."³⁷⁷

Justice Bhagwati also described the changing nature of litigation, where "Public Interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government."³⁷⁸ Here, Justice Bhagwati defends the Court's evolving interpretation of Article 32 on the grounds that "appropriate proceedings" should be interpreted according to the purpose of the litigation in question, and the purpose of public interest litigation, particularly in a country like India, is to allow ordinary citizens to approach the Court to hold the government accountable on matters of social justice.

While this justification does not lessen (and might even reinforce) the democratic objection,³⁷⁹ it overcomes the contractarian objection. The Court has interpreted Article 32 in a manner consistent with the text that recognizes the framers' broader goals of social revolution,³⁸⁰ as well as the real need for PIL in India. This fulfills the constraint of public reason: the Court's reasoning is transparent, clearly articulated, and is accessible to all Indian citizens in light of their own reasons.³⁸¹

The Court's reasoning with regard to Article 21 is more problematic. The Court has interpreted the right to life expansively

375. *Morcha v. Union of India*, (1984) 2 S.C.R 67, (India).

376. *Id.*; See also Craig & Deshpande, *supra* note 187, at 364 ("The justification given by Bhagwati, J for reading Article 32 in this manner is clear and forthright.").

377. *Morcha*, (1984) 2 S.C.R at 71 (India).

378. *Id.*

379. See *supra* Part IV.

380. See AUSTIN, *THE INDIAN CONSTITUTION*, *supra* note 20, at 26–27, 50.

381. See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 17, at 90–91.

to include a right to “live with dignity,” which includes a range of socioeconomic rights.³⁸² However, the structure of the Indian Constitution clearly demarcates fundamental rights in Part III and directive principles in Part IV. More importantly, Article 37 of the Constitution states that directive principles “shall not be enforceable by any court” even though these principles are “fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”³⁸³ Unlike Article 32, which uses a flexible standard, Article 37 sets forth a clear rule. The text of Article 37 is unambiguous and does not permit any deviation. Indeed, no major theory of constitutional interpretation would endorse a judicial interpretation of a bright-line rule that deviates from the plain meaning of the language of the text.³⁸⁴

The Indian Supreme Court therefore has a heavy burden in justifying its deviation from the text of Article 37. In the seminal cases that transformed the meaning of Article 21 into a broader right to live with dignity, the Court’s reasoning is inadequate—it either sidesteps or completely ignores the clear textual command of Article 37.

In *Maneka Gandhi*, which first set out a broader interpretation of Article 21, the Court included substantial dicta about the right to life without providing any justification for these pronouncements. It says, for instance, that fundamental rights in Part III of the Constitution “represent the basic values cher-

382. See *Mullin v. Adm’r, Union Territory of Delhi*, (1981) 2 S.C.R. 516 (India).

383. INDIA CONST. art. 37.

384. See, e.g., Jack M. Balkin, *Fidelity to Text and Principle*, in *THE CONSTITUTION IN 2020*, at 12 (Jack M. Balkin & Reva B. Siegel eds., 2009) (“The Constitution’s text contains determinate rules (the president must be thirty-five, there are two houses of Congress), standards (no ‘unreasonable searches and seizures,’ a right to a ‘speedy’ trial), and principles (‘freedom of speech,’ ‘equal protection’) . . . Adopters use fixed rules because they want to limit discretion.”); STRAUSS, *supra* note 374, at 7 (“Many provisions . . . are quite precise and leave no room for quarreling, or for fancy questions about interpretation.”); Post & Siegel, *supra* note 374, at 378 (“There may be constitutional provisions of which it can be said . . . that ‘an important—perhaps the important—function of law is its ability to settle authoritatively what is to be done.’”) (quoting Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) (emphasis in original)).

ished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.”³⁸⁵

It then builds on these broad assertions in *Francis Coralie*, proclaiming that the right to life

includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.³⁸⁶

As with the excerpt from *Maneka Gandhi*, this definition of the right to life appears to be invented out of whole cloth, without reference to any precedent, constituent assembly debate, or other source of law. Moreover, both the *Maneka Gandhi* and the *Francis Coralie* decisions fail even to mention Article 37, much less explain how the Court got past the plain meaning of Article 37 when it reinterpreted Article 21 to make socioeconomic rights justiciable.³⁸⁷

Justice Bhagwati provided some hints as to the Court’s reasoning on this issue in the *Bandhua Mukti Morcha* case. First, he acknowledges that directive principles “are not enforceable in a court of law,” and the Court therefore cannot compel the government to pass laws or executive orders to meet socioeconomic goals.³⁸⁸ Still, he adds that if the state has already passed legislation impacting socioeconomic justice, state actors “can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21.”³⁸⁹

The distinction drawn here is illusory. Article 37 does not merely state that courts cannot compel the state to pass laws

385. *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621, 627 (India).

386. *Mullin v. Adm’r, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 518 (India).

387. See *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621 (India) See generally *Mullin v. Adm’r, Union Territory of Delhi*, (1981) 2 S.C.R. 516 (India).

388. *Morcha v. Union of India*, (1984) 2 S.C.R. 67, 103 (India).

389. *Id.*

or orders; it flatly prohibits the enforcement of directive principles. Justice Bhagwati does not put forth evidence to support his view that Article 37 is not intended to apply to judicial review of existing laws. Further, even if the Court is permitted to review existing laws affecting socioeconomic policy, it has never clearly stated (in this case or otherwise) exactly to what standard the government is held.³⁹⁰ Additionally, as the “Right to Food” litigation demonstrates, the Court does not confine itself to a “reasonableness” or “minimum core” standard, but actually imposes its own policy prescriptions and timelines for completion on elected officials.³⁹¹

Justice Bhagwati’s opinion in *Bandhua Mukti Morcha* also states that certain directive principles (Articles 39, 41, and 42) provide Article 21 with its “life breath.”³⁹² These articles direct the state to secure, inter alia, a fair economic system, adequate livelihood, education, public health access, and humane working conditions for all citizens.³⁹³ According to Justice Bhagwati, these principles constitute “the minimum requirements which must exist in order to enable a person to live with human dignity.”³⁹⁴ The Court therefore implies a degree of interplay between Parts III and IV of the Constitution. It uses the directive principles to determine the scope and meaning of fundamental rights. Thus, Part IV of the Constitution is not justiciable on its own, but plays an important role in defining what the “right to life” encompasses.³⁹⁵

This reasoning is flawed in light of the clear language in Article 37 prohibiting courts from enforcing directive principles.

390. See generally *id.*; Mehta, *supra* note 6, at 74 (“The Court has helped itself to so much power . . . without explaining from whence its own authority is supposed to come.”); Cunningham, *supra* note 202, at 512 (noting that in several cases the Court has granted relief to petitioners and issued specific directions to the government before deciding whether it has jurisdiction).

391. See *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India).

392. *Morcha*, (1984) 2 S.C.R at 103 (India).

393. See INDIA CONST. arts. 39, 41, 42.

394. *Morcha*, (1984) 2 S.C.R at 103 (India).

395. See Craig & Deshpande, *supra* note 187, at 366 (“Part IV becomes of seminal importance in determining the more precise meaning which . . . [fundamental] rights should have when concrete specification has to be given concerning their enforcement. The judicial approach therefore rejects any rigid division between liberty and the worth of liberty.”).

Rather than enforcing them directly, the Supreme Court essentially sidesteps this provision by enforcing the directive principles through a right to "live with dignity" in Article 21. Moreover, the Court does not place any limits on the scope of this right. While the *Francis Coralie* case lists only a few rights, including the rights to adequate nutrition, food, and shelter,³⁹⁶ the Court has since inferred that Article 21 protects the right to education,³⁹⁷ the right to a clean environment,³⁹⁸ and even rights that do not appear in the directive principles, such as the right to sleep.³⁹⁹

Through its disregard for the text of Article 37 and its capacious interpretation of Article 21, the Indian Supreme Court renders important Constitutional provisions inscrutable to Indian citizens. However, this contractarian objection was not inevitable. The Indian Supreme Court could have avoided this result by producing well-reasoned and circumscribed judgments. As discussed earlier, South Africa does not face this problem because its constitutional court is limited to enforcing clearly defined, narrowly couched socioeconomic rights that are enumerated in the South African Constitution.⁴⁰⁰ The Indian Constitution, by contrast, lists directive principles that are explicitly nonjusticiable under Article 37. The Indian Supreme Court has not explained how it moved past Article 37's plain meaning. There is no articulated standard of judicial review or limit to the scope of the right to life under Article 21. The Court therefore fails to meet the constraint of public reason in its judgments on socioeconomic rights.

The right to "live with dignity" is indeterminate; any number of positive entitlements might be deemed essential to human dignity, and any government policy in this area might be ruled unconstitutional for reasons that rational and reasonable citizens could not discern or predict with any certainty. Thus, citizens may no longer accept the Constitution as a legitimate source of political authority.

396. See *Mullin v. Adm'r, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 518 (India).

397. See *Unni Krishnan v. State of A.P.*, (1993) 1 S.C.R. 594, 719 (India).

398. See *RLEK v. State of U.P.*, A.I.R. 1987 S.C. 2426 (India).

399. See *Right to Sleep Case*, *supra* note 323, at 76.

400. See S. AFR. CONST., 1996, §§ 24, 26, 27, 29.

CONCLUSION: TOWARD A BROADER CONCEPTION OF LEGITIMACY

Since the adoption of the Indian Constitution in 1950, the judiciary, led by the Supreme Court, has greatly increased its policymaking authority. The Court not only expanded the meaning of Article 21 to make socioeconomic rights justiciable under the Constitution, but also oversaw several modifications to fundamental rights litigation under Article 32.⁴⁰¹ Three significant changes emerge from the Court's approach: (1) the judiciary can enforce a greater number of rights; (2) through relaxed standing rules, public interest groups and concerned citizens may file petitions under Article 32; and (3) courts have become significant players in formulating and enforcing socioeconomic policy. The first change is substantive, the latter two are procedural.

This Article has set forth two objections to these changes. The democratic objection arises from the Court's transformation into a policymaking institution such that there is potentially no issue of public policy that it cannot reach or government scheme that it cannot review. The contractarian objection is narrower—it asks whether the reasons put forward by the Court to justify its decisions on socioeconomic rights meet the constraint of public reason.

The Article's theoretical framework offers at least two major benefits as a lens through which to examine socioeconomic rights in India. First, it distinguishes between two sorts of critiques: (1) those pertaining to the Supreme Court's role in India's constitutional framework, and (2) those involving the Court's substantive interpretation of the Constitution and the resulting problem with legitimacy. This distinction is potentially useful in light of the current literature in this area. While some scholars elide this distinction by criticizing the Supreme Court's policymaking role in terms of legitimacy,⁴⁰² others focus only on the democratic objection.⁴⁰³

401. See generally Craig & Deshpande, *supra* note 187; Cunningham, *supra* note 202.

402. See, e.g., Mehta, *supra* note 6, at 71–72, 79–82 (discussing both the rise of PIL and the “legitimacy of judicial intervention” as part of the same phenomenon); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible*, 37 AM. J. COMP. L. 495, 509 (1989).

The democratic objection implicates both the substantive and procedural changes described above, as the Court today does not simply adjudicate on a greater number of issues, but has become the central forum for social movements and public interest organizations to affect far-reaching policy changes with regard to socioeconomic justice.⁴⁰⁴

The contractarian objection, though, forces us to distinguish among the substantive and procedural changes in the Court's jurisprudence. While all three changes contribute to the democratic objection, the contractarian objection only arises in response to substantive changes—namely, the Court's broad reading of Article 21 (and disregard for Article 37) to make socioeconomic rights justiciable. As discussed, the Court's interpretation of Article 21 is not justified by the text or clearly explained in the Court's opinions and therefore fails to meet the constraint of public reason.

However, the procedural changes are not problematic from a contractarian perspective. The Court's expansive interpretation of Article 32 is reasonable under this provision's open-ended language. The Court's decisions to allow a wider class of citizens to file writ petitions, to allow special commissions to undertake fact-finding, or to empower courts to issue and enforce detailed interim orders are also explained with clear and publicly accessible reasons. Thus, while many look at these substantive and procedural changes as coterminous elements within the broader development of PIL, the contractarian view shows that they are distinct in this important respect.

A second benefit of this Article's theoretical framework is that it steps back from analyzing the political effects of Su-

The court has been charged not only with exceeding its institutional capacity, but with reversing constitutional priorities, usurping both legislative and administrative functions, violating the rule of law, riding roughshod over traditional rights and succumbing to the corrupting temptations of power. Such criticisms are ordinarily couched in the language of legitimacy.

Id.

403. See, e.g., Khosla, *supra* note 214, at 56–57 (noting that while the term “judicial activism has become commonplace in evaluations of the Court's functioning” and has spawned a “wide-ranging body of literature,” this literature has not effectively engaged with what “judicial activism” means).

404. See Baxi, *supra* note 6, at 107–11.

preme Court judgments to examine the *process* of the Court's decision making. The current academic literature on socioeconomic rights under the Indian Constitution is concerned primarily with the effects of Supreme Court judgments on, inter alia, the Court's legitimacy, India's separation of powers framework, and Indian society at large.⁴⁰⁵ Those who defend the Court's exercise of judicial review have relied on the failure of elected representatives to improve socioeconomic conditions to justify the Court's intervention into matters of policy.⁴⁰⁶ Others, echoing the democratic objection, have criticized what they believe is the judiciary's usurpation of legislative and executive authority.⁴⁰⁷ Their disagreement appears to rest on di-

405. See, e.g., Mehta, *supra* note 6, at 80 ("What legitimizes judicial activism and makes it an exertion not of mere power, but of just authority? One possible answer is that judicial activism is justified to the extent that it helps to preserve democratic institutions and values."); Sathe, *supra* note 187, at 88–89 (arguing that the Supreme Court "is not equipped with the skills and the competence to discharge functions that essentially belong to other coordinate bodies of government. Its institutional equipment is inadequate for undertaking legislative or administrative functions."); Sripati, *supra* note 6, at 135 ("The Court's crucial directives to the government and appointment of individuals as commissions of enquiry enhance the political visibility of human rights violations, serve to ignite effective legislative action, raise public consciousness and create opportunities for individuals and institutions to make meaningful contributions for the realization of constitutional values.").

406. See, e.g., Upendra Baxi, *Judicial Discourse: Dialectics of the Face and the Mask*, 35 J. INDIAN L. INST. 1, 12 (1993) (characterizing judicial activism as "a struggle for the recovery of the Indian Constitution" and arguing that forceful judicial intervention had led to accountability in governance).

I do not mean . . . to suggest that the Supreme Court is the sole agency to safeguard and advance human rights in a democratic society like India . . . it is nonetheless a crucial agency, sometimes perhaps—in the light of a corrupt and an errant executive, an irresponsible Parliament—a virtually indispensable one for the protection of human rights in India.

Sripati, *supra* note 6, at 135–36.

407. See, e.g., Sathe, *supra* note 187, at 88 ("After surveying Indian Supreme Court caselaw, we arrive at the conclusion that the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to either the legislature or the executive."); SRI KRISHNA AGRAWALA, PUBLIC INTEREST LITIGATION IN INDIA 37 (1986).

India being a welfare state, legislation already exists on most matters . . . If the Court states enforcing all such legislation under the

vergent views as to the appropriate role of the judiciary in a democratic society—views that probably cannot be reconciled. Even from the Rawlsian perspective, it is open to interpretation whether the Indian Supreme Court's robust use of judicial review is justified in Indian society, though a strong case can be mounted for the Court in light of historical and political circumstances.⁴⁰⁸

By looking at the Supreme Court's decisions on socioeconomic rights through the lens of public reason, this Article has focused on whether the Court's decision-making process is worthy of acceptance by Indian citizens. And, in short, it might not be worthy: the Court fails to provide clear and transparent reasons to justify its interpretations of Articles 21 and 37.⁴⁰⁹ As a result, Indian citizens could not understand constitutionally essential provisions with any clarity or conviction, which might prevent them from assenting to be governed under this Constitution. The Court's judgments in this area therefore threaten the legitimacy of the present constitutional order.

This article's claim that the legitimacy of the Indian constitutional order is threatened by the Supreme Court's enforcement of socioeconomic rights might appear counterintuitive. After all, it seems to conflict with the fact that the Court is one of the few Indian public institutions that shows the will and the capacity to actually improve the lot of the least privileged mem-

spacious plea that non-enforcement is violative of article 21, perhaps no state activity can be spared from the purview of the Supreme Court as a PIL matter. Its logical extension could mean the taking over of the total administration of the country from the executive by the Court.

Id.

408. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 7, at 240; see *supra* Part IV.

409. Interestingly, Supreme Court justices have invoked Rawls outside the socioeconomic rights context to justify broad rights-based constitutional interpretations and judicial intervention. See, e.g., *Soshit v. Union of India*, (1981) 2 S.C.R. 185 (India) (Reddy, J., concurring) (relying on the "Difference Principle" to argue in favor of preferential treatment for Scheduled Castes and Scheduled Tribes in the Railway Administration); *State of U.P. v. Bisht*, (2007) 6 S.C.C. 586 (India) (Sinha, J., concurring) (invoking public reason in a consumer protection dispute to argue against judicial restraint and for a greater role for the Court in this area).

bers of society.⁴¹⁰ The Supreme Court enjoys widespread support among Indian citizens who approach the Court in large numbers to obtain various sorts of relief against the government.⁴¹¹ The public also views the judiciary as one of the least corrupt state institutions.⁴¹² Moreover, Supreme Court judgments on socioeconomic rights have brought about positive change—the “Right to Food” litigation, for instance, provides midday meals to schoolchildren across India.⁴¹³

From a broader perspective, taking a social contractarian view of the Indian Constitution presents an opportunity to rethink our conception of legitimacy. Specifically, in the context of socioeconomic rights, this view proposes that a legitimate constitutional system demands not only acceptable institutional arrangements and policy-related outcomes, but also that public institutions, particularly the Supreme Court, are held to a strict, process-based standard—they must present clear and transparent reasons for their decisions that are accessible to all citizens in light of their common reason.

410. See Baxi, *supra* note 6, at 107 (“For too long, the apex constitutional court had become ‘an arena of legal quibbling for men with long purses.’ Now, increasingly, the Court is being identified by justices as well as people as the ‘last resort for the oppressed and the bewildered.’”).

411. See Nick Robinson, *Structure Matters: The Impact of Court Structure on Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 101, 104–06 (2012) (noting that the Indian Supreme Court has been dubbed the “people’s court” and is one of the most accessible—and therefore overloaded—highest courts in the world).

412. *India Ninth-Most Corrupt Country: Survey*, ECON. TIMES (Dec. 10, 2010), available at http://articles.economictimes.indiatimes.com/2010-12-10/news/27614571_1_corrupt-country-transparency-international-petty-corruption (reporting that the Indian public views political parties, the police, parliament, and civil servants as more corrupt than the judiciary); A. Abdurraheem, *Corruption in India: An Overview*, 59 SOCIAL ACTION 351 (2009), available at <http://www.isidelhi.org.in/saissues/articles/artoct09.pdf> (noting that a survey conducted by Transparency International reported that 58% of Indian respondents identified politicians to be the most corrupt state actors, 45% felt that the government was ineffective in addressing corruption in the country, but only 3% believed the judiciary was corrupt).

413. See A TOOL FOR ACTION, *supra* note 125, at 15–19.