

# Judicial Enforcement of Socioeconomic Rights: A Comparison Between Transformative Projects in India and South Africa

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## Introduction

Constitutionally enshrined socioeconomic rights are a topic of enduring controversy. Societies overcoming exploitive regimes in the twentieth century have experienced popular demand for rapid economic and social transformation.<sup>1</sup> Even before the adoption of the Universal Declaration of Human Rights, emerging constitutional democracies debated the transformative potential of enforceable socioeconomic rights.<sup>2</sup>

Opponents of constitutionalizing socioeconomic rights have not disputed the need for transformation in such societies, but argue that such rights are non-justiciable because they present pressing questions of social policy best left to the democratically accountable actors in government.<sup>3</sup> A related objection proposes that judicial enforcement of socioeconomic rights is dangerous to a system of separation of powers.<sup>4</sup>

This Note considers socioeconomic rights enshrined in the Indian and South African Constitutions as written and enforced. Both the Constitution of the Republic of South Africa (“South African Constitution”) and the Constitution of India (“Indian Constitution”) were products of popular liberation movements against exploitive regimes,<sup>5</sup> but the models of socioeconomic rights adopted in these constitutions and the jurisprudence of the respective high courts enforcing these rights are vastly different.<sup>6</sup> The dis-

1. See Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. ON HUM. RTS. 451, 451-52 (1992).

2. India’s constitutional debate involving socioeconomic rights, for example, was contemporaneous with the adoption of the Universal Declaration of Human Rights (1948) (“UDHR”). Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT’L & COMP. L. 49, 60-67 (2007). The Constitution of Ireland, upon which the socioeconomic rights provisions of the Constitution of India are based, predates the UDHR by more than a decade. Rehan Abeyratne, *Socioeconomic Rights in the Indian Constitution: Towards a Broader Conception of Legitimacy*, 39 BROOKLYN J. INT’L L. 1, 29 (2014); David Keane, *The Irish Influence on the Indian Constitution: 60 Years On*, HUM. RTS. IR. (Sept. 27, 2010), <http://humanrights.ie/constitution-of-ireland/the-irish-influence-on-the-indian-constitution-60-years-on/>.

3. See, e.g., Stephen Ellmann, *A Constitutional Confluence: American ‘State Action’ Law and the Application of South Africa’s Socioeconomic Rights Guarantees to Private Actors*, 45 N.Y.L. SCH. L. REV. 21, 41-42 (2001); Chris Sprigman & Michael Osborne, *Du Plessis Is Not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes*, 15 S. AFR. J. ON HUM. RTS. 25, 43 (1999).

4. See Abeyratne, *supra* note 2, at 3-4; Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. ON HUM. RTS. 464, 465-68 (1992). But see Sandra Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide*, 21 S. AFR. J. ON HUM. RTS. 163, 168-70 (2005); Haysom, *supra* note 1, at 456-60 (responding to some of these critiques).

5. The Indian Constitution was adopted in 1950, three years after India achieved independence from British colonial rule. Abeyratne, *supra* note 2, at 28-30; Sripati, *supra* note 2, at 56, 75. The South African Constitution was adopted by the Constitutional Assembly in 1996, two years after the first full franchise elections after the apartheid regime. Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J. INT’L L. & FOREIGN AFF. 369, 378-81 (2008).

6. See *infra* Parts II & III.

tinct jurisprudence of the Constitutional Court of South Africa (“South African Court”) and the Supreme Court of India (“Indian Court”) offer unique responses to the objections leveled against judicially enforceable socioeconomic rights, with illuminating implications for constitutional legitimacy.

The comparative study of judicial enforcement of socioeconomic rights in India and South Africa identifies tension between two important considerations for the role of the judiciary in a constitutional democracy. On the one hand, judicial enforcement of rights should not unduly restrict the space for balancing policy priorities through the legislative process. A deferential or process-oriented approach to judicial enforcement of socioeconomic rights best preserves this space. On the other hand, democratic accountability requires that the public have some framework against which to judge whether the government respects and promotes constitutional rights. Courts can help to establish this framework by setting clear standards through adjudication of socioeconomic rights. The high courts of South Africa and India have adopted distinct balances between these considerations. Both legal systems demonstrate, however, that judicial enforcement of socioeconomic rights is both possible and immensely valuable. Part I begins with a brief overview of the debate surrounding socioeconomic rights in general and constitutional socioeconomic rights in particular, and outlines a few objections to constitutional socioeconomic rights. Part II provides background on the drafting of new constitutions in South Africa after apartheid and in India after colonialism, and the debates regarding socioeconomic rights. Part III describes how the highest courts have applied socioeconomic rights in each country. Part IV considers the implications of judicial enforcement for constitutional legitimacy, in light of objections to constitutional socioeconomic rights. Finally, Part V suggests some lessons from a comparison of the two systems of judicial enforcement with a view towards a model for enforcement of constitutional socioeconomic rights.

## I. Background

### A. Early Controversy and International Calls for Constitutional Socioeconomic Rights

Scholars hotly debated the wisdom of including positive, socioeconomic rights in emerging constitutions during the twentieth century. Ideological conflicts between democratic and socialist states during the Cold War influenced the debate surrounding socioeconomic rights in general.<sup>7</sup> Socialism provided some of the impetus for the early emergence of socioeconomic rights in post-Soviet constitutions,<sup>8</sup> but the roots of the concept of justiciable socioeconomic rights are also historically evident in the legis-

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7. Mario Gomez, *Social Economic Rights and Human Rights Commissions*, 17 *HUM. RTS. Q.* 155, 160–61 (1995).

8. Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 *L. & CONTEMP. PROBS.* 223, 227–28 (2002).

lation and jurisprudence of western democracies.<sup>9</sup>

The development of the Universal Declaration of Human Rights (“UDHR”) and subsequent international instruments lent structure to the international debate surrounding judicially enforceable socioeconomic rights. The United Nations Commission on Human Rights (“Commission”) was responsible for drafting the UDHR between January 1947 and December 1948, with the intent that it would serve as a model for emerging constitutions.<sup>10</sup> During the drafting process, the Commission debated the inclusion of socioeconomic rights in the UDHR.<sup>11</sup> Latin American delegations with socialist constitutions championed the inclusion of socioeconomic rights, with the support of other former colonies, including India and a number of smaller states.<sup>12</sup> The final UDHR contains a number of socioeconomic provisions, including rights to social security, leisure, health, education, and “just and favorable remuneration,”<sup>13</sup> but as a United Nations resolution it cannot be directly enforced against states.<sup>14</sup>

A number of constitutional documents drafted in the twentieth century followed the example set by the UDHR in enumerating positive socioeconomic rights. In addition to the South African Constitution and the Indian Constitution (discussed in detail below), 158 constitutional documents now include more than one socioeconomic right,<sup>15</sup> including the constitutions of Germany (1949),<sup>16</sup> Pakistan (1973),<sup>17</sup> Brazil (1988),<sup>18</sup> and Colombia (1991),<sup>19</sup> although the possibility and frequency of judicial enforcement of these rights varies widely.<sup>20</sup>

Opponents to the constitutionalization of socioeconomic rights were quick to point out the difference between accepting a strong, transformative agenda through legislation and social policy, on the one hand, and

9. See Richard L. Siegel, *Socioeconomic Human Rights: Past and Future*, 7 HUM. RTS. Q. 255, 256, 260–65 (1985).

10. Sripati, *supra* note 2, at 60–61. India was one of the original members of the Commission and the process of drafting the UDHR occurred roughly contemporaneously with the drafting of Part III of the Indian Constitution. *Id.* at 61–62.

11. See *id.* at 66–67; Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 44, 63 (2001).

12. Sripati, *supra* note 2, at 66–67; Waltz, *supra* note 11, at 55–66 (describing the role of less powerful states in the debates surrounding the UDHR, including socioeconomic rights).

13. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948), arts. 22–26.

14. REBECCA M. WALLACE & OLGA MARTIN-ORTEGA, *INTERNATIONAL LAW* 30–31 (7th ed. 2013).

15. Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1050 (2014).

16. GRUNDGESETZ [GG] [BASIC LAW], translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

17. PAKISTAN CONST.

18. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.).

19. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.].

20. See generally Jung, *supra* note 15 (empirical study of judicial enforcement of socioeconomic rights globally).

writing socioeconomic rights into a constitution, on the other.<sup>21</sup> Accepting that transformative social and economic policies were necessary—both for the legitimacy of a new government and in service of social welfare—opponents have nonetheless raised a number of objections against the constitutionalization of socioeconomic rights, and especially against judicial enforcement of such rights.

## B. Objections to Constitutionalized Socioeconomic Rights

In an influential essay, *The Constitution, Social Rights, and Liberal Political Justification*, Professor Frank Michelman identifies two objections to judicial enforcement of socioeconomic rights drawn from John Rawls' concept of democratic legitimacy.<sup>22</sup>

### 1. Democratic Objection

The first objection is the democratic objection: judicial enforcement of socioeconomic rights restricts the scope of democratic decision-making.<sup>23</sup> A single judgment may require the political branches of government to adjust democratically developed policies or treat an individual beneficiary or class of beneficiaries differently.<sup>24</sup> Under this view, judicial enforcement of socioeconomic rights raises two structural concerns. First, it raises a concern for the separation of powers between the judicial branch and the democratic branches, because it allows courts to invalidate choices as to allocation of resources that are fundamentally political.<sup>25</sup> Second, enforcement of socioeconomic rights raises a concern of judicial capacity because judges are not the best-placed state actors to weigh potential policy options and choose between priorities.<sup>26</sup> Judges arguably lack the research capacity and democratic accountability of legislators and executive officers.

Taken to its most extreme conclusion, the democratic objection suggests that extensive judicial enforcement of socioeconomic rights could render democracy meaningless.<sup>27</sup> A full body of constitutional jurisprudence enforcing socioeconomic rights could entirely fill the space of social policy, tying the hands of elected politicians.<sup>28</sup>

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21. See Sadurski, *supra* note 8, at 228–29.

22. Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 21, 21–24, 35–38 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007). Rawls' "liberal principle of legitimacy" holds that coercive political power is legitimate only if "exercised in accordance with a constitution . . . which all citizens, as reasonable and rational, can endorse in the light of their common human reason." JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 41 (Erin Kelly ed., 2001).

23. Michelman, *supra* note 22, at 23.

24. *Id.* at 33.

25. See Abeyratne, *supra* note 2, at 18–19.

26. See *id.*

27. See Michelman, *supra* note 22, at 32–33.

28. See *id.*

Professor Michelman responds to these objections by pointing out that socioeconomic rights need not be written—or interpreted—so broadly. States may draft socioeconomic rights as obligations for the state to pursue gradual, progressive realization, rather than as absolute individual rights, providing greater policy flexibility.<sup>29</sup> Socioeconomic rights may serve to shape outer bounds of policy decisions without negating space for democratic priority setting.<sup>30</sup>

## 2. Contractarian Objection

The second general objection is the contractarian objection: fulfillment of socioeconomic rights is difficult to measure, frustrating citizens' abilities to assess adherence to the state's constitutional obligations.<sup>31</sup> The indeterminacy of the degree of achievement of socioeconomic rights makes it impossible for citizens to judge whether political policy choices respect or violate their rights.<sup>32</sup> This could lead to a perceived failure of democratic legitimacy because citizens are not fully informed about the performance of their political leaders.<sup>33</sup>

Professor Michelman suggests that this objection, too, may be overcome.<sup>34</sup> Although reasonable citizens may differ in their assessments of the realization of a socioeconomic right, they may be able to agree on a range of acceptable policy choices and procedures for assigning priorities.<sup>35</sup> If reasonable citizens see constitutional socioeconomic rights as creating bounds on the acceptable policy space, then they may assess the extent to which legislators have kept within that space with relative ease.<sup>36</sup>

## II. Framing Constitutional Socioeconomic Rights in South Africa and India

The constitutional projects of post-colonial India and post-apartheid South Africa both elicited debate regarding the transformative potential of socioeconomic rights.<sup>37</sup> The Constituent Assembly of India sought advice from international jurists to frame its transformative goals, while the South African Constitutional Assembly formally banned input from foreign commentators but actively sought public participation as part of a broad campaign to seed the values of constitutionalism.<sup>38</sup>

29. See Abeyratne, *supra* note 2, at 20-21; Michelman, *supra* note 22, at 31-33

30. See Abeyratne, *supra* note 2, at 20-22.

31. See Michelman, *supra* note 22, at 23, 35-36.

32. See Abeyratne, *supra* note 2, at 22-26.

33. See *id.* at 24.

34. See Michelman, *supra* note 22, at 37-38.

35. See Abeyratne, *supra* note 2, at 24 (citing Michelman, *supra* note 22, at 37-39).

36. See *id.*

37. See, e.g., Haysom, *supra* note 1, at 456-60 (outlining and responding to objections to socioeconomic rights during the early days of constitutional debate).

38. See Abeyratne, *supra* note 2, at 29-30 (describing the influence of Justice Frankfurter of the U.S. Supreme Court on the Indian Constituent Assembly); Sripati, *supra* note 2, at 88 (international advisors formally banned from the debate of the South African Constitutional Assembly).

### A. The Indian Constitution

Rhetorically powerful demands for socioeconomic rights unified the Indian National Congress (“INC”), creating the historical context for socioeconomic rights in the Indian Constitution.<sup>39</sup> The INC published the Karachi Resolution in 1931, in which it declared the necessity of socioeconomic rights for a post-colonial project of transformation.<sup>40</sup> The Karachi Resolution declared that, “in order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions.”<sup>41</sup>

In the years leading to independence, however, India’s Constituent Assembly hotly debated the wisdom of making socioeconomic rights judicially enforceable.<sup>42</sup> The Sapru Report, published shortly before the Constituent Assembly began the project of drafting the Indian Constitution, outlined a system of fundamental rights intended to protect minority groups in a post-colonial society.<sup>43</sup> The Sapru Report drew a distinction between judicially enforceable rights and other rights that helped to frame the debate that followed.<sup>44</sup>

During the drafting of the Indian Constitution, B. N. Rau, Constitutional Adviser to the Constituent Assembly, suggested including socioeconomic policy goals without justiciable rights.<sup>45</sup> Rau was influenced by the Irish constitutional model of Directive Principles of State Policy, and by U.S. Supreme Court Justice Felix Frankfurter, who believed that socioeconomic rights were beyond the competence of courts.<sup>46</sup> Some on the Drafting Committee thought that Rau’s suggestions did not go far enough to ensure social and economic transformation; their contributions reflected socialist theory and a belief that the survival of the new state required rapid socioeconomic transformation.<sup>47</sup> Ultimately, the Constituent Assembly preferred Rau’s suggestion, and adopted a constitution with judicially enforceable political and civil Fundamental Rights<sup>48</sup> and expressly non-justiciable Directive Principles of socioeconomic policy.<sup>49</sup> Article 32 created a cause of action for violations of Fundamental Rights; by contrast, Article 37 declares the Directive Principles non-justiciable.<sup>50</sup>

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39. See Sripathi, *supra* note 2, at 63–65.

40. See Abeyratne, *supra* note 2, at 27.

41. *Id.* (quoting GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 56 (1966)).

42. *Id.* at 27–31.

43. *Id.* at 27.

44. *Id.*

45. *Id.* at 27–28.

46. *Id.* at 28–30.

47. *Id.*

48. See INDIA CONST. Part III.

49. See *id.* at Part IV.

50. Compare *id.* at art. 32 (guaranteeing “[t]he right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by [Part III]” and authorizing, among other remedies, “*habeas corpus*, *mandamus*, prohibitions, *quo warranto*, and *certiorari*”), with *id.* at art. 37 (“The provisions contained in [Part IV] shall not be enforced by any court.”).

Despite this limitation, the Supreme Court of India has expanded the enforceability of Fundamental Rights to enforce the obligations created by the Directive Principles as well.<sup>51</sup> Section III, below, will discuss the development of this jurisprudence.

## B. The South African Constitution

South Africa's constitutional project developed in three stages. During the first stage, South Africa adopted an interim constitution to guide the constitutional drafting process.<sup>52</sup> The second stage involved the drafting of the constitution by the Constitutional Assembly.<sup>53</sup> The final stage required certification by the Constitutional Court of South Africa.<sup>54</sup>

The first stage involved a Multi-Party Negotiating Process between the old regime and the African National Congress ("ANC"), resulting in an interim constitution and a set of constitutional principles.<sup>55</sup> During this stage, the Multi-Party Negotiating Process adopted procedural guidelines for the drafting process and principles that the parties agreed would be binding on the final constitution.<sup>56</sup> The interim constitution included a "sunset clause," which provided a five-year power sharing system between the old and new regimes and the new to alleviate fear of reprisals against the white minority and political leaders of apartheid.<sup>57</sup>

The second stage of the constitutional project began with South Africa's first full-franchise elections in 1994.<sup>58</sup> The country elected a new parliament, which would double as the Constitutional Assembly.<sup>59</sup> The Constitutional Assembly considered the legal status of socioeconomic rights, which it recognized as political imperatives.<sup>60</sup> A series of papers circulated in the early 1990s by Albie Sachs—later Justice of the Constitutional Court—called for a strong system of enforceable socioeconomic rights:

[T]he danger exists in our country as in any other, that a new elite will emerge which will use its official position to accumulate wealth, power and status for itself. The poor will remain poor and the oppressed oppressed [sic]. The only difference would be that the poor and powerless will no longer be disenfranchised, that they will only be poor and powerless and

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51. See generally Abeyratne, *supra* note 2 (arguing that the Indian Court has exceeded the intended scope of judicial enforcement of Part IV).

52. See Sripati, *supra* note 2, at 83-84.

53. See *id.* at 84-85.

54. Certification by the Court was required by the terms of the interim constitution. See *id.* at 83, 85-86.

55. *Id.* at 83-84.

56. *Id.*

57. *Id.* at 84.

58. See *id.*

59. *Id.*

60. The transformative potential of socioeconomic rights was an established theme in the ANC's internal debate. For example, the 1955 Freedom Charter, a foundational document, declared rights to housing, health care, public utilities, and recreation, among others. See Christiansen, *supra* note 5, at 378-79.



that instead of racial oppression we will have nonracial oppression.<sup>61</sup>

Substantively, Sachs proposed a minimum core model of individual entitlements similar to the model advocated by the United Nations Committee on Social, Economic, and Cultural Rights.<sup>62</sup>

Sachs did not, however, favor the enforcement of socioeconomic rights by ordinary courts.<sup>63</sup> Instead, he suggested a system of independent commissions with broad mandates, made up of highly qualified experts, reflecting a deep distrust of a judiciary that had proven willing to bend the law in support of the apartheid regime.<sup>64</sup> He wrote:

In South African conditions, it is unthinkable that the power to direct the process of affirmative action should be left to those who are basically hostile to it. In later years, when the foundations of a stable new nation have been laid and when its institutions have gained habitual acceptance, it may be possible to conceive of a new-phase Bill of Rights interpreted and applied by a “mountaintop” judiciary. At present the great deed is to give people confidence in Parliament and representative institutions, to make them feel that their vote really counts and that Parliamentary democracy serves their interests.

The Constitutional Assembly rejected the suggestion of a minimum core model and ultimately adopted a progressive model of socioeconomic rights,<sup>65</sup> obliging the government to “take reasonable legislative and other measures, within . . . available resources, to achieve . . . progressive realization . . . ,” but without minimum individual entitlements.<sup>66</sup> It abandoned the minimum core model in light of concerns about the practicality of immediately achieving those rights.<sup>67</sup>

In the third and final stage of South Africa’s constitutional project, the debate continued before the Constitutional Court at the certification stage.<sup>68</sup> Opponents raised three objections to socioeconomic rights: (1) a

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61. Dennis Davis, *Socio-Economic Rights in South Africa: The Record After Ten Years*, 2 N.Z. J. PUB. INT’L L. 47, 48 (2004) (quoting ALBIE SACHS, *ADVANCING HUMAN RIGHTS IN SOUTH AFRICA* xi (1993)).

62. *Id.*

63. *Id.* at 49.

64. *Id.*

65. See Christiansen, *supra* note 5, at 382.

66. See, e.g., S. AFR. CONST., 1996 §§ 26(2) (progressive realization of right to housing), 27(2) (health care, food, and social security), 29(2) (education).

67. Compare Davis, *supra* note 61, at 48–50, and *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at paras. 34–35 (S. Afr.) (“[T]he socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them . . . . All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to . . . socioeconomic rights identified in [the Constitution] on a progressive basis.”), with Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13 - The Right to Education, U.N. DOC E/C.12/1999/10, para. 57 (1999) (interpreting the International Covenant on Economic, Social, and Cultural Rights’ article 13 right to education as imposing a minimum core on member states), and Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113, 113–75 (2008).

68. See Raylene Keightley, *The Challenges of Litigating Socio-Economic Rights in South Africa*, 2011 N.Z. L. REV. 295, 298 (2011).

lack of universal consensus regarding the content of such rights; (2) the danger that judicial enforcement would violate the principle of separation of powers by requiring the judiciary to encroach upon economic and social policy decisions; and (3) the limited competence of courts to assess policy decisions and assign priorities to conflicting imperatives.<sup>69</sup>

The Constitutional Court rejected each of these objections.<sup>70</sup> It held that enforcement of socioeconomic rights would not create a significantly greater danger to the separation of powers than enforcement of political rights like the rights to due process and free expression, which occasionally require a similar type of review of social and economic policy.<sup>71</sup> While recognizing concerns about courts' competence to measure and reach optimal social and economic policy, the Court declared: "Nevertheless, we are of the view that these rights are, at least to some extent, justiciable."<sup>72</sup>

### III. Judicial Enforcement of Socioeconomic Rights in South Africa and India

The Constitutional Court of South Africa and the Supreme Court of India have developed divergent jurisprudence regarding socioeconomic rights. The South African Court, with the clearer constitutional mandate for judicial enforcement, has afforded deference to legislative and executive policy choices within the bounds of reasonableness, reflecting the progressive approach adopted by the Constitutional Assembly.<sup>73</sup> By contrast, the Indian Court has read the provision for enforcement of Fundamental Rights expansively to enforce socioeconomic rights enumerated under the Directive Principles of State Policy, while simultaneously relaxing procedural and standing barriers to enforcement by individual claimants.<sup>74</sup>

#### A. Enforcement in India

The Indian Court's expansion of enforceable socioeconomic rights began after the period of Emergency Rule (1975-77) during which Prime Minister Indira Gandhi sought to weaken judicial review.<sup>75</sup> Following Gandhi's conviction by the Allahabad High Court in 1975 for election fraud in connection with the 1971 general elections, she declared a state of emer-

69. See Davis, *supra* note 61, at 50.

70. See *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at paras. 76-78 (S. Afr.).

71. See *id.* at para. 77 ("In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.")

72. *Id.* at para. 78.

73. See Fredman, *supra* note 4, at 180-82; Tara Usher, *Adjudication of Socio-Economic Rights: One Size Does Not Fit All*, 1 U.C. LONDON HUM. RTS. REV. 155, 168-69 (2008).

74. See Usher, *supra* note 73, at 165-68. Article 32 provides significant discretion to the Court to adopt "appropriate proceedings" for the enforcement of Fundamental Rights. INDIA CONST. art. 32.

75. See Abeyratne, *supra* note 2, at 37-39.

gency allowing her to rule by executive decree, suspended habeas corpus, and restricted freedom of the press.<sup>76</sup>

Even before the period of emergency rule, Prime Minister Gandhi demonstrated hostility to judicial review. In *Kesavananda Bharati Sripadagalvaru v. State of Kerala* (1973),<sup>77</sup> the Indian Court held that amendments to the Indian Constitution were invalid if they violated the “basic structure” of the Constitution.<sup>78</sup> In response, Gandhi violated tradition by appointing her own nominee, who had dissented in *Kesavananda*, as Chief Justice of the Supreme Court.<sup>79</sup>

During emergency rule, Prime Minister Gandhi passed four controversial constitutional amendments designed to limit judicial scrutiny of government action.<sup>80</sup> The Forty-second Amendment overruled *Kesavananda* by prohibiting the Court from reviewing constitutional amendments, required a two-thirds vote of the Court to invalidate statutes as unconstitutional, and declared the 1971 election to be beyond judicial review altogether.<sup>81</sup> The Forty-second Amendment also gave the socioeconomic Directive Principles in Part IV of the Indian Constitution precedence over the Fundamental Rights in Part III of the Constitution, authorizing authoritarian socialism and resulting in the detention of political opponents.<sup>82</sup>

Following restoration of democratic procedures with the election of the Janata Party in 1977 and repeal of the controversial constitutional amendments,<sup>83</sup> the Court decided a number of landmark cases extending judicial review into the realm of socioeconomic rights.

In *Maneka Gandhi v. Union of India* (1978),<sup>84</sup> the Court held that the state’s confiscation of Ms. Gandhi’s passport without sufficient “procedure established in law” violated her Fundamental Right to personal liberty<sup>85</sup> as well as natural justice, where the Passport Act provided no recourse or opportunity for a hearing.<sup>86</sup> In *Francis Coralie Mullin v. Union Territory of Delhi* (1981),<sup>87</sup> the Court expanded the Fundamental Rights to life and personal liberty<sup>88</sup> to include the right of a detainee to “live with human dignity,” including “the bare [necessities] of life.”<sup>89</sup> Finally, the Court

76. *Id.*

77. *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, AIR 1973 SC 1461 (India).

78. *Id.* at paras. 316-17.

79. *See* Abeyratne, *supra* note 2, at 37-38.

80. *Id.* at 38.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 (India).

85. This right is guaranteed by Article 21 and enforceable pursuant to Article 32. INDIA CONST. arts. 21, 32.

86. *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621, 664 (India) (quoting INDIA CONST. art. 21).

87. *Francis Coralie Mullin v. Union Territory of Delhi*, (1981) 2 SCR 516 (India).

88. Guaranteed by Article 21 and enforceable pursuant to Article 32. INDIA CONST. arts. 21, 32.

89. *Francis Coralie Mullin v. Union Territory of Delhi*, (1981) 2 SCR 516, 529 (India). *See* Usher, *supra* note 73, at 165-66.

explicitly associated the right to life with the socioeconomic Directive Principles in *Bandhua Mukti Morcha v. Union of India* (1983),<sup>90</sup> explaining that the “right to live with human dignity, enshrined in Article 21[,] derives its life breath from the Directive Principles.”<sup>91</sup>

The Court simultaneously relaxed procedural and standing barriers to public interest litigation. The Court believed these reforms were necessary “because the very purpose of the law . . . was undergoing a transformation. It was being used to foster social justice by creating new categories of rights.”<sup>92</sup> In *S.P. Gupta v. President of India* (1981),<sup>93</sup> the Court abandoned common law concepts of *locus standi* to allow anyone to bring a claim on behalf of a “person [who] by reason of poverty . . . or socially or economically disadvantaged position” cannot bring a claim themselves.<sup>94</sup> For example, in *Bandhua Mukti Morcha v. Union of India* (1983),<sup>95</sup> the Court allowed a public interest organization to challenge the constitutionality of bonded labor, and encouraging the government to affirmatively welcome public interest litigation.<sup>96</sup>

The Court has also taken an expansive approach to its own role in enforcing socioeconomic rights. For example, in *Bandhua Mukti Morcha*, the Court not only ordered the state to release bonded laborers but also required the state to ensure that laborers earn a minimum wage in the future.<sup>97</sup> At times, the Court’s judgments have approached full-scale policymaking. One extreme example is the “*Right to Food*” *Litigation* (2003)<sup>98</sup> in which the Court declared a duty on the part of the state to provide emergency nutrition<sup>99</sup> and issued forty-nine various interim orders between 2001 and 2005 implementing its judgment at a detailed level of social policy, touching on everything from school lunches to accountability.<sup>100</sup>

90. *Bandhua Mukti Morcha v. Union of India*, (1984) 2 SCR 67 (India).

91. *Id.* at 103.

92. Abeyratne, *supra* note 2, at 45 (quoting P. P. Craig & S. L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 OXFORD J. LEGAL STUD. 356, 361 (1989)).

93. *S.P. Gupta v. President of India*, (1982) 2 SCR 365 (India).

94. *Id.* at para. 17.

95. *Bandhua Mukti Morcha v. Union of India*, (1984) 2 SCR 67 (India).

96. *Id.* at 101-04; *see also* *S.P. Gupta v. President of India*, (1982) 2 SCR 365 at paras. 16-17 (India) (allowing a claim challenging government interference with the judiciary over the government’s objection that the claim was not brought by the judges themselves).

97. *Bandhua Mukti Morcha v. Union of India*, (1984) 2 SCR 67, 136-37 (India).

98. *See* People’s Union for Civil Liberties (“PUCL”) v. Union of India, Writ Petition (Civil) No. 196 (2001) (India) and subsequent interim orders at <http://www.righttofoodindia.org/case/case.html>.

99. *See* Interim Order of May 2, 2003, PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India), <http://www.righttofoodindia.org/orders/may203.html> (ordering distribution of ration cards to vulnerable individuals and families).

100. *See* Supreme Court Order of Nov. 28, 2001, PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India), <http://www.righttofoodindia.org/orders/nov28.html> (ordering introduction of cooked midday meals at all government primary schools); Supreme Court Order of Oct. 1, 2008, PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India), <http://www.righttofoodindia.org/orders/interimorders.html#box19> (directing the judge-led Wadhwa Commission to extend its review of food

## B. Enforcement in South Africa

The Constitutional Court of South Africa has allowed greater discretion to policymakers and demonstrated greater deference to policy choices. *Soobramoney v. Minister of Health, KwaZulu-Natal* (1997)<sup>101</sup> was the first case before the Constitutional Court in which a private individual sought to enforce constitutional socioeconomic rights.<sup>102</sup> The claimant challenged a hospital policy prioritizing curable cases for publicly-funded dialysis treatment at the expense of terminal cases such as his. The Court held that the policy was reasonable in light of the limited resources available for health services, and it did not violate the constitutional right to emergency healthcare.<sup>103</sup>

The Court added substantive limits to this deference for reasonable policy choices in *Republic of South Africa v. Grootboom* (2000).<sup>104</sup> There, the Court required the government to implement a “coherent . . . program[ ] directed towards the progressive realization of [a constitutional] right . . . within the state’s available means. The program[ ] must be capable of facilitating the reali[z]ation of the right.”<sup>105</sup> The Court held that a government housing project violated this obligation because it failed to prioritize assistance to those “living in intolerable conditions or crisis situations.”<sup>106</sup>

The Court added a procedural dimension to the reasonableness standard of review in *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg* (2008),<sup>107</sup> requiring the government to engage in good-faith consultations with the community before pursuing evictions, and take resulting homelessness into consideration.<sup>108</sup>

The Court has occasionally granted judgments against the state while refusing to award individual remedies to successful litigants, reinforcing an understanding of socioeconomic rights in South Africa as creating obligations for the government to pursue progressive realization rather than achieve individual entitlements.<sup>109</sup> For example, in *Grootboom*, the Court declared a housing policy unconstitutional and required the government to revise it, but denied immediate or direct relief to claimants.<sup>110</sup> In *Nokoty-*

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aid programs nationally); Abeyratne, *supra* note 2, at 48-51; see also *Legal Action: Supreme Court Orders*, RIGHT TO FOOD CAMPAIGN, <http://www.righttofoodindia.org/orders/interimorders.html> (listing and describing interim orders) (last visited Aug. 19, 2016).

101. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

102. See Davis, *supra* note 61, at 51.

103. See *id.*

104. *Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

105. *Id.* at para. 41.

106. *Id.* at para. 99(2)(b).

107. *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.); see also Christiansen, *supra* note 5, at 384-85.

108. *Occupiers of 51 Olivia Road* 2008 (3) SA 208 (CC) at paras. 16-22 (S. Afr.).

109. See Christiansen, *supra* note 5, at 384-85.

110. See *Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at para. 99 (S. Afr.).

ana v. Ekurhuleni Metropolitan Municipality (2009),<sup>111</sup> the Court held that the government's failure to reach a final decision to improve an informal settlement violated residents' rights to adequate housing, but deferred to the government's proposed plan to review and remedy the situation and refused to grant monetary relief to individual claimants.<sup>112</sup> Nonetheless, an exception to this reluctance to grant individual remedies appears to apply where statute expressly provides an individual entitlement, and the entitlement is withheld in a manner deemed to violate a constitutional right. In *Njongi v. Department of Welfare, Eastern Cape* (2008),<sup>113</sup> for example, the Court called the cancellation of a disabled woman's benefits without notice or explanation "devoid of all humanity," and ordered restoration of her benefits.<sup>114</sup>

#### IV. Consequences of Socioeconomic Rights for Constitutional Legitimacy in South Africa and India

Viewed in a historical context, guarantees of socioeconomic transformation were a prerequisite for constitutional legitimacy in both South Africa and India immediately after liberation. Judicial enforcement of these guarantees, however, was not a foregone conclusion and was hotly debated in both countries.<sup>115</sup> Divergent models for framing socioeconomic rights and for judicial interpretation may have implications for enduring perceptions of constitutional legitimacy.

##### A. The Democratic Objection

The first Rawlsian objection to constitutional socioeconomic rights identified by Michelman is the risk that expansive judicial enforcement of socioeconomic rights will restrict the substantive scope for democratic decisionmaking.<sup>116</sup>

The Indian Court's detailed decisions directing social and economic policy, such as the interim orders in the "*Right to Food*" *Litigation*,<sup>117</sup> cer-

111. *Nokotyana v. Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) (S. Afr.).

112. *Id.* at paras. 48-49, 54-57; see also Redson Edward Kapindu, *The Desperate Left in Desperation: A Court in Retreat—Nokotyana v. Ekurhuleni Metropolitan Municipality Revisited*, 3 CONST. CT. REV. 201, 206-212 (2010) (discussing procedural complexities of *Nokotyana*); Keightley, *supra* note 68, at 315.

113. *Njongi v. Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) (S. Afr.).

114. *Id.* at paras. 90, 92(7).

115. *But see* Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 487-90 (1983) (making the compelling argument that civil and socioeconomic rights are not really dichotomous, because minimum socioeconomic standards are required to exercise civil rights).

116. See Michelman, *supra* note 22, at 23; see also Mureinik, *supra* note 4, at 465-67.

117. See *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India) and subsequent interim orders, <http://www.righttofoodindia.org/case/case.html>; Abeyratne, *supra* note 2, at 50-51; see also *Legal Action: Supreme Court Orders, RIGHT TO FOOD CAMPAIGN* (Aug. 19, 2016), <http://www.righttofoodindia.org/orders/interimorders.html> (listing and describing interim orders).

tainly restrict the scope remaining for democratic policymaking in affected areas. Expansive judgments directing policy go to the core of the democratic objection to judicial enforcement of socioeconomic rights. The Court's directives, if enforced in good faith, restrict the ability of the state to make democratic decisions about how to prioritize various aspects of socioeconomic development and assign limited resources. Although access to basic nutrition is clearly of critical importance to a society that values socioeconomic rights, it is not a foregone conclusion that the state's limited resources should be directed towards providing school lunches rather than, for instance, providing clean water and basic sanitation infrastructure. This type of resource allocation is often undertaken by the political branches of government in other countries—and, for the most part, in India. The Indian Court, however, has read the socioeconomic Directive Principles to require minimum priority levels for developmental goals, and has held the state to those constitutional requirements.

However, Professor Rehan Abeyratne suggests that expansive judgments might actually enhance perceptions of democratic and constitutional legitimacy in the unique context of public concerns about government corruption and frustration with persistent poverty in India.<sup>118</sup> The Indian Court's active role in enforcing the government's socioeconomic obligations made it incredibly popular and reassured citizens that the Court would hold their elected officials to account.<sup>119</sup> Far from frustrating democratic decision-making, the Court ensured accountability by enforcing the socioeconomic commitments in the Indian Constitution.

By contrast, the South African Court's approach poses less of an obstacle to democratic decision-making, especially if one adopts a concept of democracy that allows reasonable limitations to the legislature's discretion. Constitutional systems that involve a bill of rights generally limit the discretion of the majority to encroach upon individual civil and political rights. The South African Constitution and the Court's jurisprudence go one step further by limiting policymaking discretion when policy fails to prioritize progressive realization of socioeconomic rights, or where policymaking is procedurally deficient. The South African Court's reasonableness standard allows significant scope for policymaking discretion and prioritization, while requiring progressive realization of socioeconomic rights and procedural steps like public consultation.<sup>120</sup> The Court's reluctance to award individualized relief emphasizes the fact that socioeconomic rights primarily function as constitutionally derived checks on policymaking in South Africa.

## B. The Contractarian Objection

The second Rawlsian objection identified by Michelman is that the achievement of socioeconomic rights is difficult to measure, and therefore

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118. See Abeyratne, *supra* note 2, at 56-58.

119. *Id.* at 71.

120. See Davis, *supra* note 61, at 54-56.

including such rights in a constitution clouds citizens' ability to judge adherence to the state's constitutional obligations.<sup>121</sup> Michelman suggests that the state may overcome this objection as well if the state's obligation is conceptualized as a duty to use best judgment to promote socioeconomic rights within a constitutionally restricted policy space, rather than to meet specific individual entitlements.<sup>122</sup> Rational citizens are capable of assessing the state's fulfillment of its constitutional obligation to act within the policy space restricted by socioeconomic priorities,<sup>123</sup> for example by assessing the state's commitment to and achievement of progressive realization of socioeconomic rights.

The South African Court's reasonableness test seems particularly appropriate to this concept of contractarian legitimacy through policymakers' application of best judgment to the achievement of progressive socioeconomic development.<sup>124</sup> The Court's approach defers to policy choices within constitutionally derived and judicially enforced limits.<sup>125</sup> The Court has invalidated government action only for failing to prioritize those in most desperate need of the state's protection of socioeconomic rights,<sup>126</sup> and has accepted the state's policy choices where the decision-making procedure included engagement with the public.<sup>127</sup> The Court's reading of South Africa's socioeconomic rights enforces the outer bounds of legitimate policy choice, rather than creating concrete but indeterminate obligations that voters would have difficulty assessing as predicted by the contractarian objection.

The Indian Court's expansive judgments might cloud citizens' ability to assess the state's achievement of socioeconomic rights by suggesting the existence of indeterminate but concrete obligations on the part of the state, arising from the Directive Principles in the Indian Constitution.<sup>128</sup> On the other hand, orders like those granted in the "*Right to Food*" *Litigation*<sup>129</sup> create unambiguous and measurable obligations on the part of the state, which reasonable citizens can use to measure the state's achievement of socioeconomic rights.<sup>130</sup> If the Court were to provide such detailed policy directives in all areas touched by the socioeconomic rights enumerated in

121. See Michelman, *supra* note 22, at 23, 35-36.

122. *Id.* at 37-39; see also Abeyratne, *supra* note 2, at 25-26; Mureinik, *supra* note 4, at 467.

123. See Abeyratne, *supra* note 2, at 25.

124. See Fredman, *supra* note 4, at 175-80 (suggesting that judicial deference can serve the purposes of socioeconomic rights by allowing the state to apply positive discrimination to achieve transformative goals).

125. See Abeyratne, *supra* note 2, at 21-22.

126. See, e.g., *Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at para. 41 (S. Afr.).

127. See *Residents of Joe Slovo Community v. Thubelisha Homes* 2010 (3) SA 454 (CC) at para. 117 (S. Afr.).

128. See Abeyratne, *supra* note 2, at 66.

129. See *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India) and subsequent interim orders, <http://www.righttofoodindia.org/case/case.html>.

130. See *Legal Action: Supreme Court Orders, RIGHT TO FOOD CAMPAIGN* (Aug. 19, 2016), <http://www.righttofoodindia.org/orders/interimorders.html> (listing and describing interim orders).



the Indian Constitution, however, it would leave little scope for democratic decision-making and could burden the state with unattainable outcome obligations. The Court's guidance therefore provides measurable criteria for the achievement of some socioeconomic rights but not others.

If the Indian public view the Indian Court as filling the vacuum of socioeconomic achievement left by corruption, however, its intensive oversight could legitimize and help to realize the transformative agenda of the Indian Constitution.<sup>131</sup> In addition to creating and enforcing bounds to the acceptable policy space that voters can use to measure achievement of socioeconomic rights, orders like those in the "*Right to Food*" *Litigation* oblige the state to fulfill its role in leading socioeconomic development, in spite of fears of corruption.

### C. Achievement of Socioeconomic Rights

The South African and Indian Constitutions reflect concerted transformative projects developed during difficult transitions from oppressive regimes to open and democratic societies. The drafting projects in both countries involved debates about how best to structure these transformative projects in their new constitutions so as to guarantee results, or at least oblige the state to seriously pursue the progressive realization of socioeconomic rights.<sup>132</sup> An assessment of the legitimacy of these constitutions and their socioeconomic protections must therefore reflect to some degree the achievement of socioeconomic transformation in each country over the following decades.

Professor Eric Christiansen suggests that we adopt modest expectations for socioeconomic achievements through judicial enforcement.<sup>133</sup> He points out the impossibility of comparing socioeconomic development to the counterfactual: transformation that could have been achieved without the inclusion of socioeconomic rights in a constitution or absent judicial enforcement.<sup>134</sup> He also notes that objections to justiciable socioeconomic rights as intrusions upon legislative competence predict, at most, supplemental and marginal contributions by courts.<sup>135</sup> In fact, a modest contribution by judicial enforcement to the realization of socioeconomic rights would help alleviate one of the Rawlsian objections to constitutional socioeconomic rights by preserving the primary role of the elected branches of government.

With these qualifications in mind, the South African and Indian Courts have achieved several concrete advancements for socioeconomic rights. For example, in *Minister of Health v. Treatment Action Campaign* (2002),<sup>136</sup> the South African Court caused a reversal of policy that resulted in the distribution of antiretroviral drugs to mothers living with HIV, rely-

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131. See Abeyratne, *supra* note 2, at 69-71.

132. See *supra* Part III.

133. See Christiansen, *supra* note 5, at 396-97.

134. *Id.*

135. *Id.* at 397.

136. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

ing on the right to health and the rights of children as protected by Articles 27 and 28 of the South African Constitution.<sup>137</sup> And as Professor Christiansen writes: “At the very least, the [South African] Court’s jurisprudence has been clearly successful on a symbolic level. By hearing claims and evaluating government actions against the backdrop of constitutional social welfare protections, the Court reinforces the South African vision of substantive equality.”<sup>138</sup> The Indian Court has also played a symbolic role in legitimizing the Indian Constitution by enforcing the socioeconomic obligations of the state despite perceptions of corruption.<sup>139</sup> The India Court has contributed to (led, even) concrete, substantial progress towards the achievement of universal access to basic nutrition through its interim orders in the “*Right to Food*” *Litigation*.<sup>140</sup>

## V. Towards a Model for Judicial Enforcement of Constitutional Socioeconomic Rights

One preliminary lesson from the example of the Indian Court’s enforcement of socioeconomic rights is that constitutional language will not necessarily determine the scope and nature of judicial enforcement of socioeconomic rights.<sup>141</sup> The Indian Court found a way to enforce the socioeconomic Directive Principles, despite plain language in Article 37 that they “shall not be enforceable by any court,”<sup>142</sup> by reading into the Fundamental Right to life a right to “live with human dignity” and expanding that substantive standard to include rights protected by the Directive Principles.<sup>143</sup> The Court also undertook significant procedural reforms and revised common law rules of standing to improve access to judicial enforcement of socioeconomic rights.<sup>144</sup> Achieving a system of judicial enforcement of socioeconomic rights is, therefore, as much a project for the courts themselves as it is for constitution drafters.

The Indian Court’s willingness to engage in policy design<sup>145</sup> may seem a dramatic departure from the tradition of judicial restraint, but in a quieter way the South African Court’s socioeconomic rights jurisprudence is equally extraordinary. The South African Court offers deference to reasonable policy choices, but it has gone further than the Indian Court by suggesting process requirements for socioeconomic policy

137. See *id.*; Christiansen, *supra* note 5, at 398–99.

138. Christiansen, *supra* note 5, at 398.

139. See Abeyratne, *supra* note 2, at 56–58.

140. See *supra* notes 98–100 and accompanying text.

141. See Abeyratne, *supra* note 2, at 7.

142. INDIA CONST. art. 37.

143. Francis Coralie Mullin v. Union Territory of Delhi, (1981) 2 SCR 516, 529 (India); Bandhua Mukti Morcha v. Union of India, (1984) 2 SCR 67, 103 (India); see Abeyratne, *supra* note 2, at 7.

144. See *supra* Part IV.A.

145. See PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India) and subsequent interim orders, <http://www.righttofoodindia.org/case/case.html>; *Legal Action: Supreme Court Orders*, RIGHT TO FOOD CAMPAIGN (Aug. 19, 2016), <http://www.righttofoodindia.org/orders/interimorders.html>.

development.<sup>146</sup>

Each system offers distinct benefits. The Indian Court's extension of standing<sup>147</sup> seems especially appropriate for the enforcement of socioeconomic rights. Those who have suffered violations of their socioeconomic rights will very often be the most marginalized members of a society, lacking access to institutional knowledge and resources. Allowing public interest litigation on their behalf is absolutely crucial in any system designed to vindicate socioeconomic rights through judicial enforcement.

The South African Court's reluctance to provide individual remedies<sup>148</sup> appears to be prudent, if frustrating for victims of socioeconomic rights violations. This general rule alleviates some of the concerns about the burden of meeting socioeconomic rights obligations on the state's resources, while requiring policy reforms through regular consultative processes would preserve the separation of powers between the Court and the legislature. There may be exceptions to the general rule, moreover, where justice demands.<sup>149</sup>

From the perspective of the Rawlsian objections to constitutional socioeconomic rights,<sup>150</sup> the South African Court's usual deference to political policy choices ameliorates the concern raised by the democratic objection that judicial interpretation will occupy the field of social and economic policy.<sup>151</sup> Constitutional democracy by its nature presupposes some limits to majoritarian rule, and while constitutional socioeconomic rights may tighten these limits, a general rule of deference to legislative and executive policy-making provides significant space.<sup>152</sup> By contrast, the Indian Court's approach in the "*Right to Food*" Litigation<sup>153</sup> significantly restrains the government's discretion to reach policy decisions regarding the allocation of resources.<sup>154</sup> If the Court were to apply this approach to enforce a wide range of socioeconomic rights, it might run the risk of closing off too much space for political decision-making (and requiring allocation of a significant proportion of the state's resources), undermining political responsiveness and accountability.<sup>155</sup> However, the Indian Court can ameliorate this risk if the Court limits this approach to remedies in egregious cases of government inaction.

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146. *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg* 2008 (3) SA 208 (CC) at paras. 16–22 (S. Afr.).

147. See S.P. Gupta v. President of India, (1982) 2 SCR 365 at para. 17 (India).

148. See, e.g., *Nokotyana v. Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) at para. 54 (S. Afr.).

149. See, e.g., *Njongi v. Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at para. 60 (S. Afr.).

150. See *supra* Part II.B.

151. See *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at para. 29 (S. Afr.); *supra* Part II(b).

152. See Abeyratne, *supra* note 2, at 21–22.

153. See, for example, *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001) (India) and subsequent interim orders, <http://www.righttofoodindia.org/case/case.html>

154. See *Legal Action: Supreme Court Orders, RIGHT TO FOOD CAMPAIGN* (last updated 28 Feb. 2013), <http://www.righttofoodindia.org/orders/interimorders.html>.

155. See Michelman, *supra* note 22, at 32–33.

On the other hand, the Indian Court's hands-on approach in the "Right to Food" Litigation provides a detailed, substantive standard against which citizens can assess the government's achievement of its obligations, alleviating the contractarian objection that socioeconomic rights are too indeterminate for citizens to assess their fulfillment.<sup>156</sup> However, the South African Court's reasonableness standard for reviewing the consistency of policies with socioeconomic rights probably offers a less detailed but sufficient standard against which to assess the state's respect and fulfillment of these rights.<sup>157</sup> The contractarian objection drops away if socioeconomic rights are conceived of as comprehensible limits to the range of legitimate policy choices, rather than achievement requirements.<sup>158</sup> So long as policy falls within this bounded space, government action is sufficiently consistent with its obligations. The South African Court's interpretation of constitutional socioeconomic rights provides precisely such a space for political decision-making, bounded by the limitations of reasonableness in light of the country's constitutional commitments.

The South African Court's insistence on process<sup>159</sup> is intriguing, because it could suggest a process-driven model for judging the consistency of policy with constitutional socioeconomic rights. Instead of measuring policy outcomes against some substantive legal standard for socioeconomic rights, the courts could require procedural safeguards in policy development to ensure that constitutional socioeconomic rights are given their proper weight in the deliberative process. These safeguards could take the form of requiring some form of public consultation in the development of social and economic policy,<sup>160</sup> creating and consulting with expert commissions on socioeconomic rights with a mandate to study policy proposals and make recommendations, and deliberation regarding whether policy will affect vulnerable groups disproportionately.<sup>161</sup>

One final lesson from a study of the South African and Indian experiences with judicial enforcement of constitutional socioeconomic rights is that both Courts have resoundingly disproven concerns about justiciability raised during the constitutional debates. During the certification stage of the South African constitutional project, when the government presented the proposed constitution to the South African Court, two concerns related to the justiciability of socioeconomic rights were raised: first, that judicial enforcement of socioeconomic rights would violate the principle of separa-

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156. See *supra* Part II.B.

157. See *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

158. See *supra* Part II.B.

159. See *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg* 2008 (3) SA 208 (CC) at paras. 16-22 (S. Afr.).

160. In *Joe Slovo*, the South African Court held that the consultative process provided sufficient protection of socioeconomic rights. 2010 (3) SA 454 (CC) at para. 117 (S. Afr.).

161. See *Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at para. 99 (S. Afr.).

tion of powers, and second, that courts are of limited competence to assess policy decisions.<sup>162</sup> Time and experience have vindicated the South African Court's rejection of these concerns.<sup>163</sup> The Court's generally deferential approach poses little threat to the separation of powers, as it restricts itself to reviewing the sufficiency of government action rather than attempting to form policy itself.<sup>164</sup> The Indian Court went further in the "Right to Food" Litigation,<sup>165</sup> but so far has not sought to fill the policymaking space. With regards to the Courts' competence to assess policy, both Courts have proven themselves up to the task of applying judiciable legal standards to the substance and process of social and economic policy.

## Conclusion

The constitutional projects of transitional societies are an opportunity to experiment with aspirational theories of government, but more importantly they serve as a critical step towards establishing the legitimacy of a new regime. Choices about constitutional structure shape the developing relationship between a society and its government. They also shape the role that the judicial system will play in mediating that relationship.

The constitutions of India and South Africa both emerged from popular movements opposed to economically oppressive regimes. Socioeconomic rights in some form were absolute political imperatives in both states post-transition, but the role of these rights in the emerging constitutions, as well as their judicial enforcement, were hardly foregone conclusions. Advocates faced principled opponents to the constitutionalization of socioeconomic rights, who believed that their inclusion would undermine important principles of constitutional democracy. The experience of both countries has demonstrated, however, that such rights can play a crucial role in the transformative agenda of societies emerging from oppression. The Indian and South African experiments with constitutional socioeconomic rights were both symbolic of, and intended to contribute to, social and economic transformation.

A comparison of the divergent ways in which these two countries framed socioeconomic rights and the jurisprudence of the courts may provide lessons for societies considering amendments to more entrenched constitutions as well. Both courts have adopted legal standards and developed practices that give socioeconomic rights the force and predictability of law, while preserving plenty of space for democratic decision-making. The inclusion of socioeconomic rights in both the Indian and South African constitutions also serves as a signal of the political commitment made by the framers to the just and principled use of social and economic policy for future growth.

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162. See *supra* Part III.B.

163. See *supra* Part IV.B.

164. See Abeyratne, *supra* note 2, at 20-22.

165. PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India) and subsequent interim orders, <http://www.righttofoodindia.org/case/case.html>.

