

Socioeconomic Rights and Constitutional Legitimacy in India

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In a forthcoming [article](#), I examine socioeconomic rights in the Indian Constitution and the increasingly central role the Supreme Court plays in their enforcement. As Nilesh Sinha recently [noted](#) on this blog, India's judicial independence has allowed the Court to secure broad socioeconomic justice, despite allegations of corruption and overreach.

The focus of this post, and my article, is the jurisprudential basis for the Court's decisions on socioeconomic rights. The Indian Constitution sets forth "Directive Principles of State Policy" that require the Indian government to pursue socioeconomic justice. In contrast to justiciable fundamental rights, these principles are explicitly non-justiciable,^[1] and were intended to guide elected representatives towards improving socioeconomic conditions. However, the Indian Supreme Court has held that Article 21 of the Constitution – which protects the fundamental right to life – should be read more broadly to encompass a "right to live with dignity." The Court has relied on this interpretation to make many Directive Principles justiciable, including rights to food and education. Recently, the Court even held that a "right to sleep" (which is not mentioned in the Constitution) is essential to human dignity and is protected under Article 21.^[2]

Drawing on the work of Frank Michelman,^[3] I explore two objections to the Indian Supreme Court's decisions in this area.

Both are grounded in Rawlsian political theory. The first objection, a "democratic" objection, contends that constitutional socioeconomic rights excessively constrain representative democracy. Elected officials cannot properly deliberate and legislate on any issue involving resource allocation if the Supreme Court can police their actions to ensure constitutional compliance. The ongoing "Right to Food" litigation in the Supreme Court captures this objection.^[4] What started as a writ petition alleging that six Indian states failed to provide adequate food after a famine has expanded to include all Indian states as respondents. The Court has issued more than fifty interim orders requiring state governments to implement policies concerning not only food, but also urban poverty, the right to employment, and general issues of government accountability and transparency.

Despite such intrusive judicial review, the democratic objection is not convincing. Elected officials in India have failed to make any meaningful progress towards improving the lot of the poor and marginalized since the Constitution's adoption in 1950. This failure is widely attributed to rampant corruption at all levels of government.^[5] The Supreme Court's actions might therefore be justified given that it is one of the few Indian public institutions

that has shown the will and capacity to improve social and economic conditions. Moreover, as David Landau has pointed out, the notion of a legislative space that is out of the judiciary's reach derives from institutional assumptions – such as a legislature that cares about constitutional values and responds to popular will – that often do not apply in the developing world.[6]

A second objection is more difficult to overcome. This “contractarian” objection begins from the premise that a constitution is only legitimate if rational citizens, acting reasonably, can understand its terms and agree to be governed by them. The worry with constitutional socioeconomic rights is that citizens might not be able to determine with any clarity or conviction whether these rights are being met. Because socioeconomic rights require positive action by the government, 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, but Rawlsian theory gets around it by stipulating that decisions of socioeconomic justice that comply with the constraint of public reason are legitimate. That is, legislators, judges and citizens must present clear and transparent reasons to each other for their views on socioeconomic justice and be open to making reasonable accommodations to their views when presented with opposing or divergent evidence.

The Indian Supreme Court does not appear to comport with public reason in its decisions on socioeconomic rights. It neither explains how it gets around the clear textual command in Article 37 that Directive Principles shall not be enforced by the courts, nor provides any limiting principle to the sorts of rights that might be considered part of human dignity.[7] This leaves us with a counterintuitive conclusion: the Court has contributed to making India's system of social ordering more just, but has also undermined the legitimacy of that system.

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[1] See Ind. Const., art. 37 (stating that directive principles “shall not be enforceable by any court.”).

[2] See Dhananjay Mahapatra, *Right to Sleep a Fundamental Right, Says Supreme Court*, Times of India, Feb. 25, 2012, available at <http://timesofindia.indiatimes.com/india/Right-to-sleep-a-fundamental-right-says-Supreme-Court/articleshow/12025358.cms>.

[3] See Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 Int'l J. Const. L. 13 (2003).

[4] For an overview and updates on the right to food litigation, see *Right to Food Campaign*, <http://www.righttofoodindia.org/index.html> (last visited Mar. 24, 2013).

[5] See generally, C. Raj Kumar, *Corruption and Human Rights in India* (2011).

[6] See David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 *Harv. Int'l L.J.* 319 (2010).

[7] See, e.g., *Francis Coralie Mullin v. Union Territory of Delhi*, A.I.R. 1981 S.C. 746, 753 (India); *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 (India).