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Between Starvation and Globalization: Realizing the Right to Food in India

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BETWEEN STARVATION AND GLOBALIZATION: REALIZING THE RIGHT TO FOOD IN INDIA

*Lauren Birchfield**
*Jessica Corsi***

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Being poor almost always means being deprived of full nutritional capabilities, i.e., the capabilities to avoid premature mortality, to live a life free of avoidable morbidity, and to have the energy for work and leisure. The study of poverty is, therefore, very much a study of the people's state of nutrition.

—Osmani, S.R. 1992 Nutrition and Poverty, New York, Oxford University Press of UNU-WIDER

INTRODUCTION

India is starving. While its gross domestic product has been climbing steadily in recent years,¹ its rates of malnutrition and starvation-related disease and death remain staggeringly high.² These numbers are even more surprising when examined in contrast to countries in a similar development position, such as China,³ because such comparisons reveal the paradox of India's increased aggregate wealth combined with its stagnant and in some cases decreasing nutritional intake. The right to food is a vital human right that, if denied, renders human life stunted, painful, or null. Logically, because humans must eat to stay alive, and because they must have adequate nutrition in order to flourish—that is, to undertake

1. See, e.g., WORLD BANK, INDIA COUNTRY OVERVIEW APRIL 2010, <http://www.worldbank.org/india> (follow "Country Overview 2009") (last visited May 31, 2010).

2. With a 2009 Global Hunger Index (GHI) score of 23.9, India ranks 65th out of 84 countries indicating continued poor performance in reducing hunger in India. See KLAUS VON GREBMER ET AL., INT'L FOOD POLICY RESEARCH INST., 2009 GLOBAL HUNGER INDEX 42 (2009), available at <http://www.ifpri.org/sites/default/files/publications/ghi09.pdf>.

3. See Human Development Report 2009—China, http://hdrstats.undp.org/en/countries/data_sheets/cty_ds_CHN.html (last visited May 31, 2010).

the social, economic, cultural, and political activities that define our modern human existence—food security should be treated as a core human right and attended to with commensurate vigor. And yet, people continue to doubt the justiciability of the right to food, or how it might be enforced and realized at a national level. India, however, has taken a different approach, opting not to allow the violation of what it recognizes as a human right to occur without remedy. Rather, India has found the right to food to be both legally justiciable⁴ and deserving of national legislation.⁵ It is this landmark initiative by India to establish and explicate the right to food that is the subject of this paper.

India has demonstrated a commitment to ensuring food security⁶ and to realizing the right to food by legally establishing a basic nutritional floor for all citizens. In a landmark interlocutory opinion in the case of *People's Union for Civil Liberties v. Union of India & Others (PUCL)*, Writ Petition (Civil) No. 196 of 2001 (India) (Nov. 28, 2001 interim opinion), handed down on November 28, 2001, the Indian Supreme Court (Supreme Court) directly addressed food security in the Indian context and explicitly established a constitutional human right to food in India. In this watershed order, the Supreme Court not only held that specific government food schemes constituted legal entitlements under a constitutional right to food,⁷ setting out in detail minimum allocation levels of food grains and supplemental nutrients for India's poor, but also outlined how those government schemes were to be implemented.⁸ With its incorporation of economic and social rights into the Indian constitutional framework, *PUCL* stands as one of the few instances of effective

4. See Francis Coralie Mullin v. Adm'r, (1981) 2 S.C.R. 516, 518 (India); *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India).

5. See Concept Note from Alka Sirohi, Sec'y of the Ministry of Consumer Affairs, Food & Pub. Distribution, Dep't of Food & Pub. Distribution, Gov't of India, to Chief Secretaries of State, Gov't of India, D.O. No. 8-27/2009-BP-III (June 4, 2009), available at http://www.righttofoodindia.org/data/concept_note_on_rtf_act_food_ministry_040709.pdf.

6. While we understand them to be slightly different in meaning, we use the phrases "right to food" and "food security" interchangeably in this paper. We use "right to food" to mean that all people should have the ability to feed themselves in a way that meets their specific nutritional needs. We use "food security" to mean that, at a household level, the household has enough assets to purchase the food they cannot provide for (i.e., grow or raise) themselves. At a national level, food security means that a country must undertake policies to ensure that the supply of food available in the country is adequate to meet the basic nutritional needs of all of its citizens. This paper adopts the position that "if the world's food supply were evenly divided among the people of the world, there would be enough food for everybody," and that the law can and should be used to achieve this goal. HOWARD D. LEATHERS & PHILLIPS FOSTER, *THE WORLD FOOD PROBLEM: TACKLING THE CAUSES OF UNDERNUTRITION IN THE THIRD WORLD* 144 (3d ed., Lynne Rienner Publishers 2004) (interpreting FAO data that the world produces more food in terms of calories than are needed by the entire global population).

7. Francis Coralie Mullin v. Adm'r, (1981) 2 S.C.R. at 518 (India).

8. *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India) (Nov. 28, 2001 interim order).

national adjudication on the right to food, despite the global food, financial, and environmental crises that currently make food availability and the right to food increasingly urgent topics.

The *PUCL* order of November 28, 2001, however, stands as merely one historical moment in the progression of this ongoing trend of Public Interest Litigation (PIL) for the establishment and enforcement of a right to food in India. Initially sparked by a crisis marked by severe drought, hunger, and unemployment in India, *PUCL* was first filed in July 2001 as a PIL in the state of Rajasthan on behalf of the poor who had not received the required employment and food relief as mandated by the Rajasthan Famine Code of 1962.⁹ Resting on constitutional precedent defining the right to life as “the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition,” the petitioners sought enforcement of a constitutional right to food under Article 32 of the Constitution of India in response to inadequate government drought relief measures and failure to provide subsidized food grains to eligible beneficiaries.¹⁰ Nine years later, the PIL currently applies to all state governments and addresses a myriad of issues, including hunger, child nutrition and development, and unemployment.¹¹ At the time of writing, the case remains open, as closing orders have not yet been issued.¹²

This Article evaluates *PUCL* through multiple lenses, examining: (1) the necessary factors that contributed to the success of the PIL and its enforcement and (2) both the implications and limitations of *PUCL* as it relates to India’s larger economic policy framework. We argue that the development and success of the *PUCL* litigation have depended in part on provisions of the Indian Constitution amenable to the incorporation and promotion of economic and social rights as well as on a unique relationship between civil society and judicial institutions. Analyzing the fulfillment of the right to food in the Indian context, we argue that successes achieved by the case are directly attributable both to distinctive aspects of the Indian Constitution and to a unique interaction between

9. Writ Petition ¶ 26, *People’s Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India) [hereinafter Writ Petition].

10. *Id.* at ¶ 26 (quoting *Francis Coralie Mullin v. Adm’r*, (1981) 2 S.C.R. 516, 518 (India)).

11. For a complete set of Supreme Court interim orders from 2001 to 2010, see *Legal Action: Interim Orders in the ‘Right to Food’ Case*, <http://www.righttofoodindia.org/orders/interimorders.html> (last visited May 31, 2010).

12. As of May 31, 2010, the Supreme Court of India’s website lists the writ petition’s status as “pending.” Supreme Court of India, Case Status, http://courtnic.nic.in/supremecourt/casestatus_new/caseno_new.asp (for “Case Type” select “Writ Petition (Civil)”; for “Case No” type in “196”; and for “Year” select “2001”; then click on “Submit”) (last visited May 31, 2010).

civil society, the *PUCL* litigation, and the Commission appointed by the Supreme Court to monitor enforcement of *PUCL* interim orders.

We begin, in Part I, by presenting in further detail the *PUCL* litigation, tracing its development from the original petition to where the PIL and the enumerated entitlements it protects and promotes stand today. In Part II, we commence our analyses of the explication and fulfillment of a right to food in India by defining the right to food and food security and by outlining how this right has been conceptualized in legal frameworks. As the right to food in India has been founded primarily in Indian constitutional law and, specifically, in an Indian constitutional right to life, we devote the majority of our discussion to elements of Indian constitutional law that created the legal authority for the *PUCL* litigation and the reading of a right to food into the Indian Constitution.

In Part III, we introduce the Right to Food Campaign and the appointed Supreme Court Commissioners (cpw 196/2001) (Commission) as critical players in the fulfillment of the right to food. Tracing the development of the *PUCL* litigation from 2001 to the present, this section analyzes how the Campaign and the Commission have contributed to the development and implementation of court orders and how those court orders have in turn influenced the priorities of both the Campaign and the Commission. Part III posits that the *PUCL* litigation and the pending draft food security act would not be what they are today if not for the complementary relationships between the case, the Campaign, and the Commission.

In Part IV, we inquire into the future of the right to food in India, the *PUCL* litigation, and the proposed food security legislation. Recognizing that *PUCL* remains an open case directed to date by interim orders issued by the Supreme Court, this section discusses what a final judgment might mean for the entitlements heretofore protected by court order and for the status of the Commission to the Supreme Court. This section also assesses the right to food litigation within the context of current economic and agricultural policies. Part IV concludes by analyzing the relationship between *PUCL*'s orders and the liberalization of food and agricultural policy in India.

Finally, Part V assesses the recent bill for a national food security act, and analyzes the draft legislation's potential to harmonize the conflicts between Indian economic policy and the *PUCL*'s interim orders issued in a way that ensures the most important aspects of the entitlements thus far protected in the case's interim orders.

We hope that this Article both celebrates the courageous work of Indian lawyers and activists, and articulates a model for other lawyers and

activists who endeavor to make the right to food legally enforceable in their own communities.

I. DEVELOPMENT OF THE CASE AND ITS ENUMERATED ENTITLEMENTS

PUCL was made possible by the introduction of Public Interest Litigation (PIL), a cause of action analyzed and explicated *infra* in Part II, and a constitutional precedent defining the right to life as “the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition.”¹³ The petitioners in *PUCL* sought enforcement of a constitutional right to food under Article 32 of the Constitution of India in response to inadequate government drought relief measures and government failure to provide subsidized food grains to eligible beneficiaries.¹⁴ Originally brought against the Government of India, the Food Corporation of India (FCI),¹⁵ and six state governments on the claim that these bodies had ineffectively managed the public distribution of food grains,¹⁶ the litigation was expanded to apply to all state governments and to address larger, more complex issues of hunger, unemployment, and food security.¹⁷

PUCL, directed to date by a series of interim orders, has yet to be awarded a final, closing judgment and the case remains open at the time of writing. The interim orders issued by the Supreme Court, orders that have directed both the litigation and the legal entitlements they have protected since July 2001, will remain applicable as law for the duration of

13. Francis Coralie Mullin v. Adm’r, (1981) 2 S.C.R. 516, 518 (India).

14. See generally Writ Petition, *supra* note 9.

15. The Food Corporation of India (FCI) is a statutory corporation fully controlled and managed by the Government of India. FCI is the nodal agency for the procurement and storage of foodgrains in India. “The [FCI] was setup under the Food Corporation Act of 1964, in order to fulfill [the] following objectives of the Food Policy: [e]ffective price support operations for safeguarding the interests of farmers[; d]istribution of foodgrains throughout the country for [the] public distribution system[; and m]aintaining satisfactory level[s] of operational and buffer stocks of foodgrains to ensure National Food Security.” Food Corp. of India, http://fciweb.nic.in/Stocks/About_us.htm (last visited Mar. 5, 2010). Distribution of foodgrains through the public distribution system (PDS), however, is jointly managed by the central and state governments. The Department of Food and Public Distribution, a central agency that acts under the authority of the Government of India, directs the distribution of the food grains to fulfill state PDS quotas. The Department of Food and Public Distribution manages India’s food economy and operates to fulfill its dual objectives of ensuring remunerative rates for farmers and supplying food grains at reasonable prices to consumers through the PDS. Writ Petition, *supra* note 9, ¶ 4.

16. Petitioners named the State of Orissa, State of Rajasthan, State of Chattisgarh, State of Gujarat, State of Himachal Pradesh, State of Maharashtra as Respondents. Writ Petition, *supra* note 9.

17. See *supra* note 11.

the case.¹⁸ The final status of the food schemes protected by *PUCL* as legal entitlements ultimately depends on their incorporation into the Supreme Court's closing orders or, alternatively, their codification into law by legislative bodies.¹⁹ On June 4, 2009, the President of India publicly declared her support for such legislation, announcing in her address to the national parliament that her government "proposes to enact a new law—the National Food Security Act—that will provide a statutory basis for a framework which assures food security for all."²⁰ Currently, an Empowered Group of Ministers (EGoM) at the federal level is working on a food security bill, to be formally proposed and debated in Parliament.²¹ This section details the social and economic context in which the writ petition *PUCL* was launched and documents the development of the case through Supreme Court interim orders.

A. *Beginnings: Hunger Amid Plenty*

Analyzing the economic context in which *PUCL* was filed provides valuable insight into the petition's requests and questions of law. At the time of filing, the state of Rajasthan suffered from severe drought, the consequences of which were exacerbated by government failure to provide the required employment and food relief as mandated by its Famine Code of 1962.²² In a memorandum on scarcity published by the state of Rajasthan in 1999, it was estimated that 73.6 percent of villages in the state were affected by drought and in need of relief.²³ At the same time, national health surveys reported malnutrition rates of nearly 50 percent of all children in Rajasthan and estimated that almost half of the state's

18. Regarding the nature of public interest litigation, see *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149 (India).

19. For more information about the case, see COLIN GONSALVES ET AL., *RIGHT TO FOOD: COMMISSIONS REPORTS, SUPREME COURT ORDERS, NHRC REPORTS* (2d ed. 2005).

20. Shrimati Pratibha Devisingh Patil, President of India, Address to Parliament (June 4, 2009), <http://presidentofindia.nic.in/sp040609.html> (last visited May 31, 2010).

21. See Gargi Parsai, *Food Bill Final Draft After BPL Estimates*, *THE HINDU* (New Delhi), Apr. 5, 2010, <http://beta.thehindu.com/news/national/article388901.ece> (last visited May 31, 2010).

22. The Writ Petition identified three requirements imposed by the Famine Code of 1962:

Accordingly, in times of drought, the Code requires the Relief Commissioner to: a. arrange for provision of funds to undertake relief measures; b. to formulate proposals to set-up an organization to deal with the scarcity or famine conditions; and c. to co-ordinate activities of different departments and local bodies to provide effective relief.

See Writ Petition, *supra* note 9, ¶ 30.

23. See RELIEF DEP'T, GOV'T OF RAJASTHAN, *MEMORANDUM ON SCARCITY, SAMVAT 2056* (1999), reprinted in Writ Petition, *supra* note 9, Annexure P-12 at 221.

rural population lived below the poverty line.²⁴ By the third year of drought, 2000–2001, reports of acute hunger and starvation deaths were being covered across the state.²⁵ Despite policy mandating otherwise, employment relief had not been issued, nor had subsidized food been provided to all eligible beneficiaries.²⁶

Government failure to adequately address hunger was particularly egregious in light of the surplus amount of food grains being stored in FCI silos, or “godowns,”²⁷ in the state of Rajasthan. Close to 50 million tons of grain lay unused in FCI storage, an excess of grain substantially higher than the federally required buffer stock.²⁸ Studies undertaken by the petitioners demonstrated inadequate procurement and provision of grain on both national and state levels. Not only had surplus FCI stocks not been released to states requesting them for relief purposes, but state governments had not, in the first instance prior to the drought emergencies, purchased the minimum necessary amount of grain allotted to them under the Public Distribution System (PDS) quota on grounds of financial deficits.²⁹ *PUCI* was subsequently filed as a response to this state and central government failure to address acute hunger and starvation deaths in a time of surplus. The writ petition sought a Supreme Court direction to state and central governments to abide by their common duty to enforce the right to life of all persons by providing effective drought relief and distribution of food grains.³⁰

The writ petition raised questions of law pertaining to whether the right to life under Article 21 of the Constitution of India includes the right to food and whether this right to food, as upheld by the Supreme Court in *Francis Coralie Mullin v. The Administrator*,³¹ implies that the State has a duty to provide food to people who are affected by drought and are not in a position to purchase food.³² The Petitioners argued that the State did have such a duty, that the right to life did include a right to food, and that the state and central governments were therefore duty-bound to start relief

24. GONSALVES, *supra* note 19, at 10.

25. *Id.* at 5.

26. As per the guidelines of the Targeted Public Distribution System, only those families designated as Below Poverty Line (BPL) are eligible to purchase food at subsidized rates. *See id.* at 14-15.

27. Hereinafter, this paper adopts the *People's Union for Civil Liberties* terminology of “godowns” when referencing FCI storage units. *See* Writ Petition, *supra* note 9, ¶¶ 5, 11, 12, 18, 45.

28. *Id.*

29. *Id.* ¶ 14.

30. *See generally* Writ Petition, *supra* note 9.

31. *Francis Coralie Mullin v. Adm'r*, (1981) 2 S.C.R. 516, 518 (India) (“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 . . .”).

32. Writ Petition, *supra* note 9, ¶ 50.

works and distribute grain.³³ As a result, the Petitioners requested that the court issue a writ of mandamus or any other appropriate order to: (1) direct the state and central governments to enforce the Famine Code; (2) direct the Government of India and the FCI to release surplus food grains lying in storage for relief to drought affected areas; and, (3) direct all Respondents to revisit the PDS and “frame a fresh scheme of public distribution for scientific and reasonable distribution of grains.”³⁴

The petitioners issued their requests on the grounds that the respondent governments had already established standards for themselves in the Famine Code, Article 21 of the Constitution, and the Supreme Court precedent explicating a right to life inclusive of the right to food.³⁵ With the Supreme Court’s response, issued on July 23, 2001, *PUCL* was officially opened as a PIL case. Considering the petition not as adversarial litigation between two parties but as government injury to the public interest and therefore a concern for all—as per the nature of PIL³⁶—the first Supreme Court interim order directed respondent governments to submit reply affidavits and, in the meantime, to see that all PDS shops, if closed, were re-opened and functioning.³⁷

B. Development of the Case and Its Interim Orders

Since 2001, subsequent interim orders for *PUCL* have served to define gradually, and with increasing detail, India’s constitutional right to food. While early interim orders mainly addressed the public distribution of foodgrains to families and persons falling below the poverty line,³⁸ the Supreme Court order of November 28, 2001 critically and expansively transformed *PUCL*. In this defining order, the Supreme Court essentially redefined government schemes as constitutionally protected legal

33. *Id.*

34. *Id.*

35. *Id.* ¶¶ 17, 50. See also *Chameli Singh v. State of U.P.*, A.I.R. 1996 S.C. 1051, 1053 (India) (“[The] right to live as a human being . . . is secured only when [a man] is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth.”); *Mullin*, (1981) 2 S.C.R. at 518.

36. Further discussion of the PIL system is included *infra* in Part II.B.

37. The Supreme Court clearly expressed the importance of the PDS to provide foodgrains for those without sufficient access to food:

In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them.

People’s Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (India) (July 23, 2001 interim order).

38. See, e.g., *id.* (Aug. 20, 2001 interim order); *id.* (Sept. 19, 2001 interim order).

entitlements. The Court not only identified which food schemes constituted legal entitlements under the constitutional right to food, but also outlined in detail how those government schemes were to be implemented.³⁹ This order directed the government to implement, in specific manners, the following food-related schemes: (1) the Targeted Public Distribution Scheme (TPDS); (2) *Antyodaya Anna Yojana* (AAY); (3) the Mid-Day Meal Scheme (MDMS); (4) the National Old Age Pension Scheme (NOAPS); (5) the *Annapurna* Scheme; (6) the Integrated Child Development Scheme (ICDS); (7) the National Maternity Benefit Scheme (NMBS); and (8) the National Family Benefit Scheme.⁴⁰ Finally, the order not only established which policies governments were obligated to implement, but also identified whom it would hold accountable in the event of noncompliance.⁴¹

By engaging in something strikingly close to lawmaking, the Supreme Court has, through its series of interim orders, gradually defined the right to food in terms of what policies are required of the state and central governments in order for them to adequately fulfill their constitutional obligation under Article 21. Notable modifications to government schemes (and therefore the right to food) have evolved in subsequent orders, reflecting an interesting display of judicial activism regarding food policy. Notable developments in recent years have included the universalization of the ICDS,⁴² mandated continuance of the MDMS in schools in drought affected areas over summer vacations,⁴³ court directives to neither modify nor discontinue any scheme covered in previous orders without the prior permission of the Supreme Court,⁴⁴ and annual doubled allocation of both cash and food grains for the *Sampoorna Gramin Rozgar Yojana* “food for work” employment program during the months of May, June, and July.⁴⁵ At the time of writing, the most recent

39. *Id.* (Nov. 28, 2001 interim order).

40. *Id.* (Nov. 28, 2001 interim order).

41. Most of the interim orders are comprised of directions to the state and central governments. In the case of the state governments, the Chief Secretary is answerable to the Court on behalf of the government. In regards to the Central Government, the person whom the Court will hold responsible depends on the department or ministry to which it addressed its directions. If an order is addressed to a department or ministry, then the secretary of that relevant department or ministry is responsible for implementation. Should the order be addressed to the Central Government, however, the Attorney General will serve as representative for the Government of India. *See, e.g., id.* (Nov. 28, 2001 interim order); *id.* (Oct. 29, 2002 interim order).

42. *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India) (Apr. 29, 2004 interim order); *id.* (Oct. 7, 2004 interim order).

43. *Id.* (Apr. 20, 2004 interim order).

44. *Id.* (Apr. 27, 2004 interim order).

45. *Id.* (May 2, 2003 interim order); *id.* (Apr. 20, 2004 interim order).

interim order was issued in January 27, 2010;⁴⁶ as the case remains open to date, additional petitions may still be brought and the content of the case may still be expanded.

The case as it stands today entitles all persons to those benefits and government schemes articulated in the order of November 28, 2001, with substantial expansions for some schemes, such as the ICDS and the MDMS, over the last nine years.⁴⁷ While the concrete ramifications of *PUCL* are perhaps somewhat narrow in that the case directs the government to implement schemes it had already enacted for itself, the Supreme Court has, in many ways, been quite radical both in its objective to make justiciable an affirmative right to food and in its means and methods of enforcing that right.

These achievements, however, substantially depended on a particularly ripe legal and political environment and on the contributions of the *PUCL* Commission for the Supreme Court, a federal oversight body appointed by the Court to monitor and enforce the interim orders, and the Right Food Campaign, a network of civil society organizations. We turn now to a discussion of the integral factors, both formal and informal, that contributed to the explication and implementation of the right to food in India.

II. LEGAL FOUNDATIONS FOR THE RIGHT TO FOOD

A. *The Global Context: The International Human Right to Food*

Before beginning our discussion on India's specific jurisprudential progression towards finding and founding a constitutional right to food, it is important to note that adequate legal guarantees to the right to food existed prior to the establishment of a right to food in India. Indeed, the right to food has been enshrined in international legal documents for over half a century and is a part of the modern international human rights framework that has both influenced and been influenced by India.⁴⁸ However, unlike more general international agreements, national action on behalf of the right to food, such as the *PUCL* litigation in India, requires an effort by the state to produce a more detailed development of the right and its contextual operationalization. The domestic contexts in

46. *Id.* (Jan. 27, 2010 interim order).

47. *See, e.g., id.* (Dec. 13, 2006 interim order); *id.* (May 2, 2003 interim order); *id.* (Apr. 20, 2004 interim order).

48. For more information regarding India's involvement with the United Nations and international human rights instruments, see United Nations, Permanent Mission of India to the United Nations, *India and United Nations: Human Rights*, http://www.un.int/india/india_and_the_un_hr.html (last visited May 31, 2010).

which the right is operationalized are sufficiently diverse such that both national and local actions are necessary to adequately respond to the needs on the ground. Moreover, changing national and local situations also necessitates the construction of a more flexible framework of national action so that urgent right to food violations may be quickly addressed. Thus, international human rights law regarding the right to food relies largely on national action for implementation. That being said, the national and the international human right to food interact and inform each other. Progress at one level can be translated into progress at the other, and so it is important to understand the larger international framework in which the Supreme Court case exists.

There is no shortage of international legal documents enshrining the right to food to which India is a party.⁴⁹ Access to food was first declared a right in the United Nations' 1948 Universal Declaration of Human Rights,⁵⁰ and shortly thereafter was enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵¹ to which India is a party.⁵² The Committee on Economic, Social and Cultural Rights has further defined the right to food provided for in the ICESCR in its General Comment 12.⁵³ Other international legal instruments that India has ratified and that further articulate the right to food include the Convention on the Rights of the Child⁵⁴ and the Convention on the Elimination of All Forms of Discrimination Against Women.⁵⁵ In addition to these legal obligations, India has signed up to such political declarations as the 1996 Rome Declaration of the World Food Summit, thereby

49. See Human Rights Library, Univ. of Minn., Ratification of International Human Rights Treaties—India, <http://www1.umn.edu/humanrts/research/ratification-india.html> (last visited May 31, 2010) (providing a list of the human rights treaties that India has ratified).

50. Universal Declaration of Human Rights, G.A. Res. 217 (III), at 76, art. 25, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration].

51. International Covenant on Economic, Social and Cultural Rights art. 11, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

52. See Ratification of International Human Rights Treaties—India, *supra* note 49.

53. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc., and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Adequate Food (Art. 11)*, E/C.12/1999/5 (May 12, 1999) (defining the right to food as realized when “every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement”).

54. Convention on the Rights of the Child arts. 24, 27, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

55. Convention on the Elimination of All Forms of Discrimination Against Women arts. 12 & 14, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. While CEDAW does not explicitly provide for a right to food, it is read in under Article 12 and Article 14. See, e.g., Food and Agric. Org. of the U.N. [FAO], Right to Food Unit, *Women and the Right to Food: International Law and State Practice*, 12 (2008), available at http://www.fao.org/righttofood/publi08/01_GENDERpublication.pdf (prepared by Isabella Rae).

pledging its political commitment to ensuring its citizens access to adequate food.⁵⁶ Despite declaring that such a right exists, none of these legal texts is particularly specific in defining what a state party must do in order to ensure the right to food.⁵⁷ Thus it is particularly important for states, such as India, to give shape to this right through national programs.

Interestingly, while India's right to food has legal precedent in international human rights law and international legal frameworks, most of the work to enforce and fulfill a right to food has not been presented in international human rights language. Rather, the right to food has been framed primarily as a *national* fundamental right, founded on unique principles of Indian constitutional law.⁵⁸ Indeed, India's right to food is reflective of a commitment to ensuring a baseline of nutrition for its constituents through the operationalization of domestic legal institutions and governance structures.⁵⁹ This adherence to domestic human rights norms is perhaps best conveyed in the textual language of both the petitions and interim orders encompassed by the *PUCL* litigation. These draw primarily on arguments founded on domestic legislation and legal precedent and not on India's obligations to uphold or fulfill rights articulated in international human rights treaties and agreements.⁶⁰

India's reliance on domestic law to identify, adjudicate, and implement a constitutional right to food reflects a more general confidence in its own sovereignty and position vis-à-vis international human rights bodies when it comes to espousing and upholding human rights. While the Indian Constitution requires the State to "foster respect for international law and treaty obligations,"⁶¹ greater institutional emphasis is placed on internalizing those norms and strengthening the capacity of national instruments to deliver on them. This commitment to enforcing

56. World Food Summit, Rome, Italy, Nov. 13-17, 1996, *Rome Declaration on World Food Security* (Nov. 13, 1996), available at <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM> ("We pledge our political will and our common and national commitment to achieving food security for all . . ."); World Food Summit, Rome, Italy, Nov. 13-17, 1996, *World Food Summit Plan of Action*, available at <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM> ("Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.").

57. A particularly useful framework for conceptualizing what the right to food should entail is articulated by ECOSOC, *supra* note 53 (explaining that the parties to the ICESCR are obligated to respect, protect, and fulfill this right).

58. Francis Coralie Mullin v. Adm'r, (1981) 2 S.C.R. 516, 518 (India); People's Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (India).

59. People's Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (India).

60. *Id.*

61. INDIA CONST. art. 51.

human rights through domestic means is reflected in India's third periodic report submitted under Article 40 of the International Convention on Civil and Political Rights (ICCPR)⁶² to the Human Rights Committee, which states:

India firmly believes that in the matter of implementation of the provisions of the Covenant, what is of paramount importance is the country's overall performance and its resolve to translate into reality the enjoyment of right by its people, to be viewed from the Constitution and the laws as well as the effectiveness of the machinery it provides for enforcement of the rights.⁶³

India's dedication to its Constitution and laws is illustrated in an analysis by Rajat Rana of 46 Supreme Court decisions regarding human rights from the years 1997–2008, which suggests that the Supreme Court rarely relies on or follows international human rights norms in reaching a decision.⁶⁴ While the justices mention international human rights norms in their opinions, those norms do not regularly play a significant role in reaching a final decision. Rather, emphasis is on the Court's own precedents.⁶⁵ Further analysis of Supreme Court cases suggests that the Court is likely to explicitly follow international human rights norms in reaching a decision only in the absence of any domestic law that provides for effective enforcement of the human rights in question. In *Apparel Export Promotion Council v. A.K. Chopra*,⁶⁶ for example, the Court notes that "courts are under an obligation to give due regard to the International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law."⁶⁷ That India has not signed the Optional Protocol to the ICESCR⁶⁸ is perhaps further evidence of its preferred reliance on domestic mechanisms to protect, promote, and fulfill the right to food and its reluctance to share the authority to do so with external or international adjudicative bodies.

62. International Covenant on Civil and Political Rights art. 40, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

63. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Third Periodic Reports of States Parties Due in 1992*, ¶ 3, U.N. Doc. CPPR/C/76/Add.6 (June 17, 1996) (India).

64. Rajat Rana, *Could Domestic Courts Enforce International Human Rights Norms? An Empirical Study of the Enforcement of Human Rights Norms by the Indian Supreme Court Since 1997* 26 (Univ. of Va. Sch. of Law, Working Paper Series, 2009), available at <http://ssrn.com/abstract=1424044>.

65. See, e.g., *id.*

66. A.I.R. 1999 S.C. 625 (India).

67. *Id.* at 634.

68. See U.N. Treaty Collection, Status of Optional Protocol to the ICESCR, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3-a.en.pdf> (last visited May 31, 2010).

Thus, though subject to the ICESCR and other international legal documents promoting economic and social rights, India relies mostly on domestic law and has devoted the majority of its attention to incorporating human rights, such as the right to food, into the Indian Constitution. Given that the right to food in the Indian context has been founded and fought within a domestic legal framework, it is to this framework that we now direct our discussion.

B. India's Constitutional Provisions for the Right to Food: History and Development

The Constitution of India both explicitly and implicitly provides for a right to food, thereby offering robust national protection that is likely more accessible to Indian citizens than similar safeguards provided by international bodies.⁶⁹ Explicitly, Article 47, located in the Directive Principles section of the Constitution, creates a “[d]uty of the State to raise the level of nutrition and the standard of living and to improve public health.”⁷⁰ Given the aspirational and non-justiciable nature of the Directive Principles, however, most of the development of the right to food has occurred within the context of Article 21, which includes a right to life and is located within the enforceable and justiciable Fundamental Rights section of the Constitution.⁷¹

The fact that *PUCL* transformed food programs into legally enforceable entitlements is particularly significant in light of the origins and framework of the Indian Constitution, as the Constitution emphasizes civil and political rights (CPR) over economic, social, and cultural rights (ESCR), by placing ESCR—such as the right to food—under the heading of non-justiciable “directive principles of state policy.”⁷² Only through judicial orders promulgated through *PUCL* and its preceding litigation have ESCR been made judicially enforceable in India as constitutional rights.

69. In general, domestic institutions are literally more accessible—they are geographically closer and their proceedings are conducted in a similar language to the one of the rights holder. The principle of exhaustion—that rights holders must exhaust domestic remedies before seeking redress and remedy at the international level—also makes domestic institutions a more likely starting point for those pursuing human rights claims.

70. Comment to Article 47 explains:

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

INDIA CONST. art. 47 cmt.

71. INDIA CONST. art. 21. See Writ Petition, *supra* note 9, at ¶ 26.

72. See generally INDIA CONST.

In order to provide a comprehensive analysis of how and why the Supreme Court came to recognize the right to food as a justiciable fundamental right, rather than as an aspirational judicial principle, this section provides a thorough analysis of India's Constitution and judicial traditions, and of the contemporary legal environment immediately preceding and surrounding the original *PUCL* petition, as well.

We begin by briefly tracing the drafting of the Indian Constitution, outlining its journey from colonial independence to its current state as a judicial basis for robust furtherance of social and economic rights. Assessing the Constitution as it functions today, we next examine the right to food's constitutional foundation. Finally, we analyze India's tradition of judicial activism and how the Court has used constitutional interpretation to bypass legislative action. We conclude by looking at how such activism has led to a revolutionary cause of action, the PIL, and discuss how the PIL has made possible a host of social and economic rights claims, including the right to food.

1. A Revolutionary Constitution

The realization of a right to food in India has been largely dependent on revolutionary aspects of the Indian Constitution that provide for comparatively easy incorporation of human rights principles into Indian constitutional law, especially in regards to ESCR. India's constitution was born out of the struggle against colonialism and reflects revolutionary principles⁷³ that appear progressive even today. At the same time, it is also a recognizably twentieth century Cold War Document in that it embodies the conflict between CPR in the "Western" world and ESCR in the Communist world.⁷⁴ The drafting history of the Indian Constitution sheds light on these tensions and the balance between rights that it has achieved.

One reading of India's constitution is that its framers were caught between crafting a constitution appropriate to the Indian context and

73. Granville Austin commented that "[t]he Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement." P.L. MEHTA & NEENA VERMA, HUMAN RIGHTS UNDER THE INDIAN CONSTITUTION: THE PHILOSOPHY AND JUDICIAL GERRYMANDERING 42 (1999) (quoting GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 245 (1966)).

74. This division of two "generations" of rights should be understood in the Cold War context in which it was crafted. India's constitutional drafters worked contemporaneously with and with reference to the drafters of the Universal Declaration, the ICCPR, and the ICESCR. *See, e.g., id.* at 41 ("Most of the Articles of the Universal Declaration of Human Rights, 1948 and two International Covenants are building blocks of human rights jurisprudence in India."). Commentators have noted that "it strikes a peculiar balance between [an individual's] political rights and socio-economic justice." *Id.* at 42.

replicating existing common law constitutions.⁷⁵ Historical accounts indicate that the earliest constitutional movement focused on CPR rather than ESCR.⁷⁶ This emphasis can be explained by the limited models of constitutions available as references at the time. In addition to looking to British rights, India's constitutional drafters turned to the Constitution of the United States,⁷⁷ the Constitution of the Irish Free State of 1921, and the Constitution of Canada.⁷⁸ Thus, India's initial constitutional references were limited to former Commonwealth countries whose constitutions predominantly emphasized CPR.

ESCR do, nevertheless, occupy an important place in the Indian Constitution: India was ultimately established as a social welfare state⁷⁹ and its Constitution has defined and recognized justice as social, economic, and

75. In addition to referencing British rights, India's constitutional drafters turned to the Constitution of the Irish Free State of 1921, the Constitution of the United States, and the Constitution of Canada. SHASHI P. MISRA, *FUNDAMENTAL RIGHTS AND THE SUPREME COURT: REASONABLENESS OF RESTRICTIONS* 27 (1985). Yet, the context in which the Indian Constitution was being drafted was one that prompted a closer look at social and economic rights. "At the time of independence in 1947, India was in the grip of a serious food crisis . . ." S.S. Acharya, *National Food Policies Impacting on Food Security: The Experience of a Large Populated Country—India*, in *FOOD INSECURITY, VULNERABILITY AND HUMAN RIGHTS FAILURE* 3 (Basudeb Guha-Khasnobis et al. eds., United Nations Univ. 2007). The drafting history of Articles 21 and 22 provides records that the drafters discussed the post-colonial nature of the Constitution and their unique post-colonial obligations to protect the rights of the most vulnerable populations. Statements were made admonishing against a repetition of British domination: "[T]his autocracy is in our blood and it is showing signs everywhere We are ruling our people in a manner much less generous than the aliens did; . . . if you want to safeguard the freedom of the people and their liberty, there should be a more radical provision in the Constitution than what has been proposed [in the current draft of Article 21]." B.L. HANSARIA, *RIGHT TO LIFE AND LIBERTY UNDER THE CONSTITUTION: A CRITICAL ANALYSIS OF ARTICLE 21*, at 13 (1993). Drafters also made reference to the need for wider judicial review as providing the flexibility future generations of rights holders would require. "[J.H. Larry] was of the view that if the clause [Article 21] stood as it was, 'the whole Constitution becomes lifeless.' So, unless the amendment was accepted, Larry said, 'You will not earn the gratitude of future generations.'" *Id.* at 9. This indicates that Article 21's drafters contemplated the idea of a "living" constitution sufficiently adaptable to changing conditions so as to continuously provide and protect human rights. *Id.* The resulting original document is thus a blend between the two forces of existing common law constitutions and the unique Indian context.

76. See, e.g., HANSARIA, *supra* note 75, at 7.

77. SHASHI P. MISRA, *supra* note 75, at 26-27 (1985).

78. HANSARIA, *supra* note 75, at 7. The drafters also referenced Articles 31 to 34 of the Japanese Constitution. These articles of the Japanese Constitution were drafted by the United States and enumerated defense rights such as right to counsel. *Id.*

79. The preamble designates India as a "socialist . . . republic." INDIA CONST. pmbl.; MEHTA, *supra* note 73, at 46 ("The directive principles [enunciated in India's constitution] aim at the betterment of the individual as an integrated component of the society. Elimination of inequality of income opportunities and status and securing a just social order, is the philosophical foundation of Part IV, embodying the concept of the welfare state.").

political.⁸⁰ However, after constitution drafting was resumed upon India's independence in 1947, the economic and social rights articulated in the Constitution were distinguished from justiciable civil and political "fundamental rights." The ESCR enumerated in Articles 36 through 51 were labeled "directive principles,"⁸¹ deemed non-justiciable, and accompanied by the instruction that "[t]he provisions contained in this Part shall not be enforceable by any court."⁸²

Though the Indian Constitution is arguably somewhat paradoxical in its incorporation of ESCR but refusal to attach any enforceability to them, this inherent contradiction can be explained by India's holistic understanding of its Constitution and the interdependent relationship between its "fundamental rights" and its "directive principles." Indeed, while the Constitution distinguishes between CPR and ESCR, it also embodies a synthesis of the two.⁸³ The structure and drafting history of the Indian Constitution eschews a strict dichotomy between CPR and ESCR, implying instead an inseparable relationship between the two that is often obscured and misinterpreted due to the difference in the modes of realization that the drafters had envisioned for them. Structurally, the Indian Supreme Court's constitutional construction frequently refers to the equal importance of and relationship between the Preamble, Fundamental Rights, and Directive Principles.⁸⁴ Additionally, the drafting history of the Constitution strongly suggests that the division into judicially and non-judicially enforceable sections was meant to be a temporary deference to India's status as a newly independent state still suffering under the weight of colonialism:

The Non-enforceability clause only provides that the infant state shall not be immediately called upon to account for not fulfilling the new obligations laid down upon it. A state just awakened to freedom with its many pre-occupations might be crushed under

80. Mehta explains the interplay between the social, economic, and political principles enunciated in the Indian constitution:

The Preamble of the Constitution together with the Fundamental Rights and Directive Principles constitute the *Bhagwad Gita* of Indian Sociological Jurisprudence. Its core principles make the people of India the ultimate sovereign, the country socialist, democratic and republican in character in order to secure to all its citizens justice—social, economic and political.

MEHTA, *supra* note 73, at 41.

81. See INDIA CONST. arts. 36-51.

82. *Id.* art. 37.

83. MEHTA, *supra* note 73, at 48.

84. Commentators, such as Subhash C. Kashyap, have noted this essential relationship and stated that "the democratic socialisms spelt out in the Preamble and Directive Principles of our Constitution is meant to provide the rich content in which the fulfillment of the Fundamental Rights has to be achieved." MEHTA, *supra* note 73, at 48.

the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them.⁸⁵

The temporary nature of the distinction and the interdependence between the two sections of the Constitution in turn lends constitutional backing to the more recent judicial dismantling of these barriers, discussed in further detail below.

2. The History of Article 21, The Right to Life

Evidence of constitutional synthesis between CPR and ESCR in the Indian context is perhaps nowhere more apparent than in the Supreme Court's interpretation of and judicial activism with respect to Article 21, a fundamental principle that protects the right to life. Article 21 of the Indian Constitution has been interpreted by the Indian Supreme Court to mean the right to life with dignity.⁸⁶ Most importantly, the Court has further interpreted the right to life with dignity to include the right to food, affirmatively incorporating the right to food—originally a directive principle—into Article 21 and thereby transforming it into a justiciable and enforceable fundamental right.⁸⁷

This act of judicial interpretation is particularly interesting, given that nothing in the plain text of Article 21 indicates that it should be read to include this or any other ESCR. While the drafters worded Article 21's title broadly—"Protection of Life and Personal Liberty"—the text—"No person shall be deprived of his life or personal liberty except according to procedure established by law"—seems focused on judicial safeguards such as protections against arbitrary arrest and detention.⁸⁸ Article 21's location in the Constitution also implies that it was originally constructed as a procedural guarantee against the arbitrary deprivation of liberty. It is sandwiched between Articles 20, "Protection in respect of conviction for offenses," and 22, "Protection against arrest and detention in certain cases," whose titles and text leave little room for more expansive interpretations. However, unlike Articles 20 and 22, which are much more detailed, the drafters wrote Article 21 without any reference to specific criminal procedure.⁸⁹ Article's 21's relatively broad

85. MEHTA, *supra* note 73, at 49 (referencing *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802 (India)).

86. Francis Coralie Mullin v. Adm'r, (1981) 2 S.C.R. 516, 518 (India).

87. *Id.* ("[T]he right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition.")

88. The plain text of Article 21 will be familiar to American readers, as it is modeled on the 5th and 14th amendments of the U.S. Constitution. HANSARIA, *supra* note 75, at 6.

89. See HANSARIA, *supra* note 75, at 10 ("Article 22 is very intimately connected with Article 21. The first two clauses of that article contain very valuable safeguards relating to personal liberty of an individual."). The drafting history of Articles 21 and 22, originally

language thus perhaps affords some judicial latitude when interpreting the right to life.

The drafting history of Article 21 also supports the idea that the drafters intended it as a protection for the rights of the accused. The plain text of Article 21 will be familiar to American readers, as it is modeled on the 5th and 14th amendments of the U.S. Constitution.⁹⁰ Over the two years or so that it took to develop the Indian Constitution, drafters presented various versions of Article 21 and debated the scope of judicial review that would be constitutionally granted to Supreme Court justices. Proponents of more modest judicial review carried the day.⁹¹ At no point did the protracted debate reference ESCR or other types of rights that should be made available under Article 21.⁹² The presence of prolonged debate regarding competing ideas for Article 21 and the absence of reference to broader notions of “life,” together with the decision not to include language supporting broader judicial review, suggests that judicial interpretation has transformed Article 21 into something very different than what was originally envisioned by the drafters.

As *PUCL* demonstrates, the Indian Supreme Court has taken significant strides away from of the original meaning of Article 21. However, the interpretation of Article 21 as including the right to food is not without a constitutional basis. The drafting history of the Constitution is supportive of the flexible, human rights oriented approach to constitutional interpretation embodied by the expansion of Article 21. While jurists of other Commonwealth jurisdictions might recoil at the idea of importing principles located in a section entitled “Directive” and designated as non-justiciable into an Article located in a section denoted as “Fundamental” and judicially enforceable, Indian legal history not only tolerates but upholds this move.

numbered Articles 15 and 15A, also indicates their close relationship: It was due to the intention to protect against arbitrary arrest and detention “that article 15A was introduced ‘making . . . compensation for what was done then in passing Article 15.’ In other words ‘the substance of the law of due process’ was being provided by the introduction of Article 15A.” *Id.* at 11 (quoting Constituent Assembly Debates, Vol. IX, 1497).

90. *See id.* at 6.

91. The drafters that favored more power in the judiciary advocated the inclusion of the phrase “in accordance with due process” so that judges could rule on whether the law was just and fair as opposed to simply applying the black letter of the law. This language was not included in the final text. Its exclusion indicates that a majority of the founders were against wide powers of judicial review, at least in this specific context. *See id.* at 7–10.

92. *See supra* note 75.

3. The Constitutional Basis for Judicial “Activism”: A Human Rights Based Approach to Constitutional Interpretation

The Indian Supreme Court has occupied a key place in the procurement of the Constitution’s guarantees since the Constitution’s drafting. The Constituent Assembly originally described the Court as “the guardian of the social revolution” that they hoped to codify and further in the Constitution.⁹³ As previously mentioned, the Constitution’s drafting history indicates that the non-enforceable nature of the Directive Principles was intended to be temporary and modifiable when the country became ready to enforce them.⁹⁴ As early as 1970, the Supreme Court addressed the Court’s mandate to progressively interpret the Constitution to realize the social and economic justice envisioned at India’s independence:

The provisions of the Constitution are not erected as the barriers to progress. They provide a plan for orderly progress towards the social order contemplated by the preamble to the Constitution. . . . [Part III and Part IV] are complementary and supplementary to each other. . . . The mandate of the Constitution is to build a welfare society in which justice social, economic and political shall inform all institutions of our national life. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met.”⁹⁵

The Court’s ability to independently interpret when society has reached the point at which the Directive Principles should be applied derives from its position as the final arbiter of every aspect of the Constitution, including constitutional amendments. Recent decisions and scholarly writing by judges anchor this judicial activism in the human rights purposes and ideals of the Constitution.⁹⁶ More specifically, the

93. AUSTIN, *supra* note 73, at 169.

94. See *supra* note 85 and accompanying text.

95. Chandra Bhavan Boarding & Lodging v. State of Mysore, (1970) 2 S.C.R. 600, 612 (India) (Hegde, J.).

96. Academics studying the influence of judicial activism on human rights have pointed out:

Let me make clear that the objective for which we are trying to use juristic activism is realization of social justice. Judges in India are not in an uncharted sea in the decision-making process. They have to justify their decision-making within the framework of constitutional values. This is nothing but another form of constitutionalism which is concerned with substantivization of social justice. I would call this appropriately “social activism”—activism which is directed towards achievement of social justice.

P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT’L L. 561, 566 (1985). Justice Reddy provided a clear example of the role judicial activism has played in developing the relationship between Directive Principles and Fundamental Rights:

judiciary has taken up the struggles of “the poor, the weak, and the destitute” that “seek protection of the court against exploitation, injustice and tyranny.”⁹⁷ This constitutional anchor articulates boundaries for judicial activism and should serve to prevent the judiciary from rolling back human rights or acting to preserve the status quo.⁹⁸

The Indian judiciary’s resort to the object and purpose of the Constitution as a whole and the need to review the Fundamental Rights in light of both the preamble and the Directive Principles might be termed the “basic structure principle.” The basic structure principle is a method of constitutional interpretation that relies on the structural relationship between the Preamble, Fundamental Principles, and Directive Principles. The Supreme Court has utilized this principle in combination with the text of the Constitution,⁹⁹ which denotes the Directive Principles as “fundamental.” Referencing Article 37’s imperative that the Directive Principles are “fundamental in the governance of the country and [that] it

Because Fundamental Rights are justiciable and Directive Principles are not, it was assumed, in the beginning, that Fundamental Rights held a superior position under the Constitution than the Directive Principles, and that the latter were only of secondary importance as compared with the Fundamental Rights. That way of thinking is of the past and has become obsolete. It is now universally recognised that the difference between the Fundamental Rights and Directive Principles lies in this that Fundamental Rights are primarily aimed at assuring political freedoms to the citizens by protecting them against excessive State action while the Directive Principles are aimed at securing social and economic freedom by appropriate State action. The Fundamental Rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to Courts. So they are made justiciable It does not mean that Directive Principles are less important than Fundamental Rights or that they are not binding on the various organs of the State.

Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, A.I.R. 1981 S.C. 298, 335 (Reddy, J., concurring).

97. MEHTA, *supra* note 73, at 71.

98. Consider the commentary of Justice Bhagwati, which contemplates that judicial activism not rooted in the service of the poor could result in a preservation of the status quo:

Technical and juristic activism considered in isolation obscures our understanding of the purpose behind such activism. It is important to try to discover why a particular kind of judicial creativity has been adopted and to inquire into the purpose which it seeks to serve. It is the instrumental use of judicial activism that needs to be considered, for judicial activism cannot be divorced from the purpose it serves. It cannot be judged in the abstract: it can be evaluated only in terms of its social objective. Even where the judge adheres to formal notions of justice and claims not to be concerned with the social consequences of what he decides, it is often a thin disguise, for in many such cases his instrumental objective is to preserve the status quo.

Bhagwati, *supra* note 96, at 566.

99. See, e.g., *Akhil*, A.I.R. 1981 S.C. at 335 (Reddy, J., concurring).

shall be the duty of the State to apply these principles in making laws,"¹⁰⁰ judges have reasoned that they must use the Directive Principles as interpretive lenses for understanding both the Constitution and the laws passed by the legislature.¹⁰¹

Thus, the modern Supreme Court has delineated a complimentary relationship between the Fundamental Rights and Directive Principles, the result of which is to engage in a synergistic dialectic between the two. Further, the Supreme Court has stated that Article 21 in particular should be read together with the Directive Principles.¹⁰² This relationship renders the "non-enforceable" Directive Principles properly justiciable in a court of law and instructs the Court to interpret Fundamental Principles, such as Article 21, as including Directive Principles, such as the right to food.

4. The Indian Supreme Court's Use of Constitutional Interpretation to Bypass Legislative Action

The human rights purposes of the Constitution afford the judiciary the power to modify Article 21 without having to wait for legislative action.¹⁰³ The Supreme Court has held that its charge of judicial review gives it the power to nullify on substantive grounds an amendment to the

100. INDIA CONST. art. 37.

101. Judge Reddy remarked in *Akhil* that:

Article 37 of the Constitution emphatically states that Directive Principles are nevertheless Fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It follows that it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws. The Directive Principles should serve the Courts as a code of interpretation. Fundamental Rights should thus be interpreted in the light of the Directive Principles and the latter should, whenever and wherever possible, be read into the former. Every law attacked on the ground of infringement of a Fundamental Right should, among other considerations, be examined to find out if the law does not advance one or other of the Directive Principles or if it is not in discharge of some of the undoubted obligations of the State, constitutional or otherwise, towards its citizens or sections of its citizens, flowing out of the preamble, the Directive Principles and other provisions of the Constitution.

Akhil, A.I.R. 1981 S.C. at 335 (Reddy, J., concurring).

102. *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C 225, ¶ 2070 ("Our decision... must depend upon the postulate of our Constitution which aims at bringing about a synthesis between 'Fundamental Rights' and the 'Directive Principles of State Policy', by giving to the former a pride of place and to the latter a place of permanence. Together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience.").

103. See, e.g., TEHMTAN R. ANDHARYARUJINA, *JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA* 1 (1992) ("Four decades after the Constitution was brought into force, its most conspicuous feature has been the expansion of the Indian judiciary and its pre-eminence over the other two political branches of government viz., the legislature and executive.").

Constitution if the amendment changes “the basic structure or framework of the Constitution,”¹⁰⁴ making it the only Court in the world with the final say over the text and interpretation of the Constitution.¹⁰⁵

The Court’s human rights jurisprudence rests on its ability to review the various branches of government. Justification for such modifications derives from the role of the judiciary as a check on executive and legislative excess together with the role of the judiciary as the protectors of human rights.¹⁰⁶ Indeed, according to Chief Justice Bhagwati, “[t]he object of the Human Rights jurisprudence is to humanize State agencies and to make the State accountable to the use of power only for public good.”¹⁰⁷ The inability of the legislature to violate the Fundamental Principles when making law¹⁰⁸ and

104. *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.R. 225, A.I.R. 1973 S.C. 1461 (India).

105. Nick Robinson states that the Indian Supreme Court has “come to sit as what amounts to a court of good governance over the rest of the government—some say seriously realigning India’s constitutionally envisioned separation of powers.” Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 3 (2009). He describes how at one point the Supreme Court struck down the amendment to the Constitution enacted under Indira Gandhi’s government in 1975 that would have removed judicial challenge to the Election law, thereby demonstrating its ability to have the final say on Constitutional amendments, particularly ones that limit the constitutional power and role of the Court. *Id.* at 31-32 (citing A.I.R. 1975 S.C. 2299, 2340).

106. *See, e.g., Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, A.I.R. 1981 S.C. 298, 335 (Reddy, J., concurring). The role of the Supreme Court in what some would call “law making” or “governing” should not, however, be overstated:

It is unimaginable that any Court can compel a legislature to make a law. If the Court can compel Parliament to make laws then Parliamentary democracy would soon be reduced to an oligarchy of Judges. It is in this sense that the Constitution says that the Directive Principles shall not be enforceable by Courts.

Id. Likewise, the breadth of executive functions inherently limits the capacity of the judiciary to oversee government action:

The executive role of the court is, however, an eyewash. For, no one should hope, as the court itself did not, that it would supervise the routine administration of the country. It simply cannot. What it has succeeded in achieving is to stimulate the conscience of the nation in general and of the government in particular and reminded them of their solemn obligations.

SHRISH MANI TRIPATHI, *THE HUMAN FACE OF THE SUPREME COURT OF INDIA: PUBLIC INTEREST LITIGATION IN THE APEX COURT* 241 (1993).

107. MOOL CHAND SHARMA, *JUSTICE P.N. BHAGWATI: COURT, CONSTITUTION & HUMAN RIGHTS* viii (1995).

108. Laws inconsistent with or in derogation of the fundamental rights.-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

Article 37's command that the legislature must employ the Directive Principles when making law¹⁰⁹ combines with the Supreme Court's power of judicial review and ability to enforce the Fundamental Principles located in Article 32¹¹⁰ and its original jurisdiction over disputes that arise between the federal government and a state/states or between two states. It is this striking power exercised for the realization of the human rights articulated in the Constitution, these being in turn interpreted in light of the existing social context, which makes the Indian judiciary uniquely equipped to implement human rights obligations, such as the right to food.

5. Public Interest Litigation—A Judge-Made Human Rights Mechanism

The development of PIL, the mechanism utilized to litigate *PUC*L, further demonstrates that India's judicial activism is anchored in the realization of human rights as articulated in India's Constitution. In *S.P. Gupta and others v. Union of India and Others* (Judges' Appointment

(3) In this article, unless the context otherwise requires,—

- (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
- (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

INDIA CONST. art 13.

109. *Id.* art. 37 ("The provisions contained in this Part shall not be enforced 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 State to apply these principles in making laws.")

110. Remedies for enforcement of rights conferred by this Part.

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this part.
- (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
- (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Id. art 32. The Constitution grants India's High Courts a parallel power of judicial review. See *id.* art. 226.

and Transfer Case),¹¹¹ Chief Justice Bhagwati addressed the vexing problem of how cases of government injury to the public interest, rather than injury by a private party, can reach the court by creating PIL. The PIL system uniquely addresses situations in which there is compelling evidence of legal injury caused to the public interest but no individual with proper standing to bring a claim.¹¹²

Chief Justice Bhagwati undertook several innovative moves to create the PIL system. First, he removed the standing requirement present in private interest litigation, making it possible for any person to bring a case on behalf of others too impoverished or otherwise prevented by hardship from reaching the court.¹¹³ This move appears radical in light of the historical weight of standing requirements, but it provides a mechanism that is adequately congruent to its end goal of addressing violations that create the social harms that obstruct the most vulnerable classes' access to court. Second, he articulated a "new category of rights in favour of large sections of people," meaning ESCR for the most impoverished, that gives rise to corresponding duties of the State.¹¹⁴ This move created a judicial mandate to use the Directive Principle to review the actions of coordinate branches, thereby changing the Court's scope of review over other governmental branches. In order to perform the Court's new duties on behalf of ESCR, Chief Justice Bhagwati modified the Court's techniques of judicial review regarding administrative action and regulatory agencies by describing as imperative "active intervention of the State and other public authorities" in order to secure ESCR and protect the most vulnerable classes.¹¹⁵ This brings a decision by even a single government official into the scope of judicial review if it has an effect on the public interest.

PUCL has further developed both PIL jurisprudence and constitutional interpretation of Article 21 as the right to life with dignity. Similar

111. *S.P. Gupta v. Union of India*, (1981) Supp. S.C.C. 87, A.I.R. 1982 S.C. 149 (India).

112. *See* TRIPATHI, *supra* note 106, at 61-65.

113. Explaining the grounds for bringing a case under the PIL system:

[W]here a legal wrong . . . is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right . . . and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court and, in case of breach of any fundamental right . . . in this Court under Article 32 seeking judicial redress for the legal wrong.

S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.

114. *Id.* at 524.

115. *Id.* at 525 ("Amongst these social and economic rights are freedom from indigency, ignorance and discrimination as well as the right to a healthy environment, to social security and to protection from financial, commercial, corporate or even governmental oppression.").

to the reasoning behind the PIL system, the Court has cited Article 21 as a mechanism for ensuring and protecting the rights of the most vulnerable classes in its fulfillment of its duty to protect the general social welfare.¹¹⁶ In the same year that Chief Justice Bhagwati created PIL, the Court expanded the meaning of the right to life under Article 21 to mean the right to live with dignity rather than simply the right not to have one's life taken.¹¹⁷ The Court articulated this right as including "necessaries . . . such as adequate nutrition."¹¹⁸ *PUCL* joins a line of Article 21 cases that have found the constitutional right to life with dignity to include, among other things, the right to proper living conditions;¹¹⁹ the right to livelihood;¹²⁰ and the right to health,¹²¹ all of which are closely related to the right to food.

India's constitutional guarantee of a right to food is perhaps not unique amongst the world's constitutions. According to the Food and Agricultural Organization of the United Nations, twenty-two national constitutions explicitly mention a right to food that applies to the entire national population, while several other constitutions provide for a right to food through a right to life with dignity or related social welfare rights.¹²²

116. In *Vikram Deo Singh v. State of Bihar*, A.I.R. 1988 S.C. 1782 (India), the Supreme Court explained the role of Article 21 in protecting the welfare of every Indian citizen:

We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen. And so . . . the State recognises the need for maintaining establishments for the care of those unfortunates, both women and children, who are the castaways of an imperfect social order and for whom, therefore, of necessity, provision must be made for their protection and welfare.

Id. at 1783.

117. The Court expanded Article 21 to include a more comprehensive right to life as follows:

The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival . . .

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.

Francis Coralie Mullin v. Adm'r, (1981) 2 S.C.R. 516, 517-18 (India).

118. *Id.*

119. See generally, e.g., *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473 (India).

120. *Olga Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180, 194 ("Deprive a person of his right to livelihood and you shall have deprived him of his right to life.").

121. *Vincent v. Union of India*, (1987) 2 S.C.R. 468, 477.

122. FAO, Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the

What is significant about the Indian example, however, is that the Supreme Court has taken these general legal obligations and given them teeth by specifically explicating the right in concrete policy terms and by establishing oversight mechanisms for the enforcement of this specific content. *PUCL* takes a great leap forward in advancing the right to food by providing specific definitions of what the right to food entails, clear demarcations regarding who receives the food, the form in which it is received, and, very importantly for purposes of enforcement, which bodies must provide for the right.¹²³ *PUCL* thus sets India apart and makes it a leader amongst nations seeking to legally enforce the human right to food.

III. EXPLICATING AND IMPLEMENTING A RIGHT TO FOOD: THE CAMPAIGN AND THE COMMISSION

Made legally possible by the progressive interpretation of Article 21 of the Constitution and the development of the PIL system, *PUCL* has depended on a symbiotic relationship between the formal judicial system and civil society networks for its continuing success and expansion. Indeed, the respective and collective contributions of the Right to Food Campaign (Campaign) and the Supreme Court-ordered Commission (Commission) to the furtherance of the *PUCL* litigation have been integral to the realization of a right to food in India. Indeed, analyzing the origins and development of the right to food in India requires a thorough chronicling of the extra-judicial institutions that propelled the *PUCL* litigation and greatly influenced the maturity of the entitlements it protects today.

The following section illustrates the respective roles of the Campaign and the Commission in the founding and promotion of a right to food and details the symbiotic growth of the *PUCL* litigation and the Campaign. It analyzes specific examples of how both civil society and the Commission have been instrumental in both developing and implementing *PUCL* and court orders. Beginning with a brief explanation of the individual roles and mandates of the Campaign and Commission, it argues that this unique, interdependent relationship is at the heart of the realization of a right to food in India.

Context of National Food Security, *Information Paper: Recognition of the Right to Food at the National Level*, ¶¶ 25-26, IGWG RTFT INF/2 (Feb. 2004), available at <ftp://ftp.fao.org/docrep/fao/meeting/007/j0574e.pdf>.

123. There is some indication that there is a global trend for the role of courts to shift toward the “good governance” role embodied by the Indian Supreme Court. See Robinson, *supra* note 105, at 59-66. However, even amongst leading human rights courts of the world (e.g., South Africa’s Constitutional Courts), India’s cases remain the most prolific and far-reaching.

A. The Campaign

The Right to Food Campaign is an informal network of organizations and individuals committed to achieving the right to food in India that has its origins in the *PUCCL* petition submitted to the Supreme Court in April 2001.¹²⁴ The Campaign in its current form operates as a decentralized association of independent food security-oriented organizations and is facilitated by a small steering group comprised of designated members of national networks and invited members of local food campaigns.¹²⁵ Aside from an annual convention for Campaign-associated organizations and involved persons, affiliated organizations focus on individualized projects and are not necessarily beholden to Campaign objectives.¹²⁶

124. Aimed at facilitating organized action and participatory decision-making, the Campaign's organizational structure includes an Annual Convention, during which member organizations agree on Campaign priorities that guide Campaign action until the next convention; a Steering Group, which provides direction to Campaign activities; a Secretariat that is responsible for facilitating the annual convention, maintaining the Campaign website, and facilitating communication and coordination with the Campaign; an Advisory Group that oversees and supervises the Secretariat; and Thematic Groups that focus on particular aspects of the Right to Food, such as employment or child nutrition. *See generally* Third Convention on the Right to Food and Work, Apr. 6-8, 2007, *Collective Statement* (Sept. 14, 2008), available at http://www.righttofoodindia.org/data/rtf_campaign_collective_statement09.pdf.

125. Ultimately evolving into the leadership of the Campaign, this steering group originally assembled as an advisory committee to the *People's Union for Civil Liberties* writ petition, *see supra* note 9. The steering group consists of one member from each of the eleven national organizations that convened the first right to food convention in Bhopal in June 2004. These organizations include Bharat Gyan Vigyan Samiit, Human Rights Law Network, Jan Swasthya Abhiyan, People's Union for Civil Liberties, National Alliance of People's Movements, National Campaign for Dalit Human Rights, National Campaign Committee for Rural Worker, National Conference of Dalit Organizations, National Campaign for the People's Right to Information, National Federation of Indian Women, and a former "support group" for the Right to Food Campaign that is no longer functional. *See* Right to Food Campaign, A Brief Introduction to the Campaign, <http://www.righttofoodindia.org/campaign/campaign.html> (last visited May 31, 2010). The other 154 organizations that participated in the Bhopal convention are permanent invitees of the steering group. Right to Food Campaign, Contact Addresses, Steering Group and the Bhopal Convention, <http://www.righttofoodindia.org/contactus.html> (last visited May 31, 2010); Right to Food Campaign, Bhopal Convention Participating Organizations, <http://www.righttofoodindia.org/data/bhopalconventionpeople.doc>.

126. Three Conventions on the Right to Food have been held since 2004, the most recent convention was held in Bodh Gaya in April 2007. *See generally* Third Convention, *supra* note 124. From the Third Convention emerged the specific strategic action points that the Campaign is currently prioritizing. These action points include ensuring full implementation of ICDS as outlined in the Supreme Court judgment of December 13, 2006; building a campaign on the universalization of the public distribution system; paying greater attention in all Campaign activities to disadvantaged and marginalized groups, such as women and disabled persons; and initiating further work on extending employment guarantees to urban areas. *Id.* at 2.

1. Advocating a Right to Food in the Supreme Court

The impact and critical contributions of the Campaign and Commission are evidenced most clearly in both the interlocutory applications filed by or on the behalf of the *PUCL* petitioners and the Supreme Court's interim order responses. As an advisor to the right to food litigation, the Campaign continues to influence the case's direction through both the Supreme Court and state high courts and plays a role in advancing and expanding food related schemes.¹²⁷ Moreover, by acting as petitioners in the litigation and filing interlocutory applications asking for specific modifications, expansions, or ordered implementation of identified provisions, the Campaign continues to directly impact the concrete revision of policy as directed by the Supreme Court.¹²⁸ The Campaign has continuously sought to modify government schemes to meet the needs of the people through its interlocutory applications,¹²⁹ demonstrating a coordinated effort by civil society to create, modify, and improve policy through the courts.

The specificity of the interlocutory applications demonstrates the Campaign's acute understanding of how the poor concretely experience government implementation of court-protected food schemes, as well as its commitment to adjusting food entitlements to directly meet the needs of the poor. While the original writ petition requested a more general order for enforcement of Rajasthan's Famine Code,¹³⁰ the interlocutory applications that followed the first interim order of July 23, 2001¹³¹ are far more detailed in their requests to the Supreme Court and in their demands of the state and central governments. Interlocutory Application No. 8 of 2001 (I.A. No. 8 of 2001), filed in August 2001, identifies specific social security schemes funded by the central government and requests that the Supreme Court direct the respondent governments to fully implement those schemes.¹³² I.A. No. 8 of 2001 notably contains requests for specific implementation of policies outlined in such detail as

127. The Right to Food Campaign both advises the direction of the litigation and sometimes its component organizations, such as the Human Rights Law Network, serve themselves as petitioners in the case by bringing claims in the Supreme Court and in state high courts. Interview with Colin Gonsalves, in Delhi, India (Jan. 2008); interview with Kavita Srivastava, in Rajasthan, India (Jan. 2008). See e.g., Human Rights Law Network, PILs & Cases, http://www.hrln.org/hrln/index.php?option=com_content&view=category&layout=blog&id=126&Itemid=153 (last visited May 31, 2010).

128. To date, the petitioners in the *People's Union for Civil Liberties* litigation have filed over ninety interlocutory applications.

129. See *supra* note 127, 128 and accompanying text.

130. Writ Petition, *supra* note 9, Prayer for Relief.

131. *People's Union for Civil Liberties v. Union of India*, Petition (Civil) No. 196 of 2001, (July 23, 2001 interim order).

132. Interlocutory Application No. 8, *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (India).

to include, for example, provisions for precise caloric amounts and food grain allocations.¹³³ Beginning with the numerous applications filed during the course of the *PUCL* litigation,¹³⁴ the trend of issuing detailed, concrete, and quantifiable requests to the Supreme Court concerning the right to food continues to date.¹³⁵

Campaign commitment to attend to immediate needs and prevent government abuse by recommending policy adjustments to the Supreme Court is perhaps most clearly evidenced in interlocutory applications addressing employment and food for work schemes,¹³⁶ child nutrition programs,¹³⁷ and the food grain PDS.¹³⁸ In response to Campaign-initiated fact-finding reports on government implementation, the petitioners have regularly filed applications requesting court orders relevant to specific issues identified by civil society. In regards to the protection and expansion of child nutrition programs, for example, the Campaign has taken legal action to hold officials responsible in court for failed or inadequate implementation of the Mid-Day Meal Scheme,¹³⁹ to stop the use of contractors for supplying supplementary nutrition to Integrated Child Development Scheme feeding centers,¹⁴⁰ and to prevent government modification or discontinuance of benefit schemes without the prior permission of the Supreme Court.¹⁴¹

In regards to defining the right to food, the involvement of the Campaign in the development of the petition and interlocutory applications has been central to defining a specific and enforceable right. Providing the data necessary to both determine basic nutritional necessities and expose deprivations of those minimum requisites of life, the Campaign

133. *Id.* at 17. The Petition requests, for example, that respondent governments implement the Mid-day Meal Scheme by providing every child in every government assisted school with a prepared mid-day meal with a minimum content of 300 calories and 8–12 grams of protein each day of school for a minimum of 200 days. *Id.*

134. As of January 2008, petitioners, persons, or organizations acting on behalf of the petitioners, and state and central governments have filed over eighty interlocutory applications in *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (India).

135. We base these assertions on interviews and fieldwork we conducted with Colin Gonsalves of the Human Rights Law Network in January 2010. See generally COLIN GONSALVES, *supra* note 19; Legal Action: Introduction, www.righttofoodindia.org/case/case.html (last visited May 31, 2010).

136. Interlocutory Application Nos. 2, 3, 8, 14, 24, 26, 30, 34, 35, 57, *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India).

137. Interlocutory Application Nos. 7, 8, 24, 28, 29, 30, 34, 35, 49, 54, *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India).

138. Interlocutory Application Nos. 1, 24, 25, 29, 30, 41, 45, 51, 53, 55, 58, *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India).

139. See Interlocutory Application No. 7, *supra* note 137.

140. *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India) (Oct. 7, 2004 interim order); Interlocutory Application No. 60, *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India).

141. Interlocutory Application No. 54, *supra* note 137.

has been critical to setting a legal floor for nutrition and food-related entitlements.¹⁴² The credibility of the Campaign has been validated by *PUCL*'s interim orders. Orders pertaining to child nutrition, for example, reflect the caloric and protein allotment and quality recommendations put forth by the petitioners,¹⁴³ and directions for employment and food for work schemes, especially during the months of May, June, and July, have responded closely to specific requests made in interlocutory applications.¹⁴⁴

The Campaign has also played an important role in ensuring that disadvantaged groups, such as children, women, the elderly, and the disabled, are granted due attention in the interim orders. The Campaign has, for example, made certain that nutrition and right to food for children, an issue often absent from the political scene, has been identified and protected as a priority initiative.¹⁴⁵ Finally, in addition to affecting the case through directly filing its own interlocutory applications, the Campaign also indirectly influences development by providing information, accumulated data, and field reports to the Office of the Commissioners and to

142. See, e.g., Interlocutory Application No. 8, *supra* note 136.

143. People's Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006 interim order) (India); *id.* (Oct. 7, 2004 interim order); *id.* (Apr. 20, 2004 interim order); *id.* (Nov. 28, 2001 interim order).

144. *Id.* (May 2, 2003 interim order); *id.* (Apr. 20, 2004 interim order).

145. Relevant Supreme Court interim orders to child nutrition (ICDS, MDMS) include: *id.* (Dec. 13, 2006 interim order) (ordering the government of India to sanction and distribute a minimum number of feeding centers in an even manner starting forthwith, universalizing ICDS); *id.* (Oct. 7, 2004 interim order) (ordering that contractors shall not be used to supply supplementary nutrition [to ICDS]; BPL criteria should not be used as an eligibility condition for a child to use a feeding center; to increase the norm of one rupee to two per child per day; and that the Government of India should ensure funds are used to provide supplementary nutrition without delay); *id.* (Apr. 29, 2004 interim order) (ordering feeding centers be made fully operational immediately and supplementary nutrition to be served for a minimum of 300 days). In its May 2, 2003 interim order, the Court asserted:

The conversion costs for a cooked meal, under no circumstances, shall be recovered from the children or their parents. In appointment of cooks and helpers, preference shall be given to Dalits, Scheduled Castes and Scheduled Tribes. The Central Government shall make provisions for construction of kitchen sheds and shall also allocate funds to meet with the conversion costs of food-grains into cooked mid-day meals In drought affected areas, mid-day meal shall be supplied even during summer vacations.

Id. (May 2, 2003 interim order). The Court also directed state governments and Union Territories to implement the ICDS framework, requiring:

Those Governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all Government and Government aided Primary Schools in half the Districts of the State (in order of poverty) and must within a further period of three months extend the provisions of cooked meals to the remaining parts of the State.

Id. (Nov. 28, 2001 interim order).

state advisors.¹⁴⁶ These documents are incorporated into the reports submitted to the Supreme Court by the Commission; reports that often considerably shape Supreme Court orders.¹⁴⁷

2. Ensuring Government Implementation of the Right to Food Through Social Activism

Beyond its contributions to the development of interlocutory applications and Supreme Court orders, the Campaign has also been integral to the implementation and actual deliverance of the rights and entitlements handed down by the Supreme Court. While the Commission, discussed *infra* in Section B, has focused its interventions on communicating and negotiating with state and central government officials to facilitate improved implementation and provision of benefits, the Campaign has worked to build the civic base and public pressure necessary for compelling implementation and ensuring government accountability.

The key contributions of the Campaign to implementation have been focused on mobilizing people on the ground to know and demand their rights, and on facilitating collective action around the realization of the right to food through a wide range of activities, events, and tactics.¹⁴⁸ To encourage public awareness of entitlements, the Campaign Secretariat prepares and publishes, in both Hindi and English, primers on Supreme Court orders, entitlement schemes, and accessing information from the government.¹⁴⁹ Casting court orders and food scheme policy into layman's terms, the Campaign Secretariat widely distributes these primers, as well as other pamphlets, posters, and information materials, to Campaign organizations and to locales across the country. The Campaign Secretariat also operates a website that posts upcoming and past events, updates on Supreme Court orders, and articles and field reports concerning the right to food and other related issues.¹⁵⁰

146. For campaign materials, see Right to Food Campaign, Campaign Materials: Primers on the Right to Food, http://www.righttofoodindia.org/campaign/camp_primers.html (last visited May 31, 2010). For related research and writings, see Right to Food Campaign, Research and Writings: Field Reports, http://www.righttofoodindia.org/links/field_reports.html (last visited May 31, 2010).

147. Interview with Dipa Singh, Assistant to the Comm'rs, Office of the Comm'rs to the Sup. Ct., in Delhi, India (Jan. 2008).

148. Action oriented Campaign activities include public hearings, fact-finding, and research missions, forums, tribunals, conventions, and social audits. *See, e.g.*, National Health Assembly II, Mar. 23-27, 2007, Bhopal, India; Second National Workshop on Social Audit on NREGA Works, Feb. 14-21, 2007, Udaipur, India; and, People's Tribunal on Right to Food, Sept. 30-Oct. 1, 2006, Varanasi, India (2006); Right to Food Campaign, Campaign Updates, <http://www.righttofoodindia.org/links/updates.html> (last visited May 31, 2010).

149. *See supra* note 146.

150. *See supra* note 146; *see also* Right to Food Campaign, About the Campaign: Secretariat, <http://www.righttofoodindia.org/campaign/secretariat.html> (last visited May 31, 2010)

Successful facilitation of social mobilization and collective action around the right to food has depended in part on two factors: (1) collaboration with other issue-oriented campaigns, such as the National Campaign for the People's Right to Information (NCPRI)¹⁵¹ and (2) execution of pluralistic interventions at all levels of government. Firstly, the NCPRI and its successful lobbying for a codified Right to Information Act (RIA)¹⁵² has played a crucial role in the developing influence of the Right to Food Campaign.¹⁵³ Allowing access by member organizations to government data pertaining to food and social security schemes and to the PDS, the RIA has made possible public awareness hearings on and social audits of government food and work schemes and social security programs.¹⁵⁴ Moreover, it has made the information necessary for crafting compelling interlocutory applications for the *PUCL* litigation available to civil society groups. Likewise, in empowering stakeholders to report on financial aspects of implementation at local and state levels, the RIA has also facilitated the Commission's monitoring of and reporting on government compliance with Supreme Court orders.

Borrowing the tactic of the social audit from the NCPRI, the Campaign has sought to use public hearings to equip the poor with a comprehensive understanding of government food schemes, which has the potential to generate a common demand for government accountability and refusal to accept noncompliance or unresponsiveness.¹⁵⁵ These

(providing a description of the Secretariat's responsibilities); Right to Food Campaign, *Collective Statement* (2009), available at http://www.righttofoodindia.org/data/rtf_campaign_collective_statement09.pdf.

151. Substantial overlap exists between the Right to Food Campaign and the NCPRI in regards to campaign leadership and tactics: several of the founding members of the NCPRI serve on the steering and advisory boards of the Right to Food Campaign, and the Right to Food Campaign has borrowed several of the techniques first exercised by the NCPRI, such as public hearings and social audits. Compare National Campaign for People's Right to Information [NCPRI], Life Members, http://www.righttoinformation.info/member_life.htm (last visited May 31, 2010) (listing the founding members of NCPRI) with Right to Food Campaign, About the Campaign: Secretariat, Advisory Group, <http://www.righttofoodindia.org/campaign/secretariat.html> (last visited May 31, 2010) (listing members of the Advisory Group including individuals involved with NCPRI).

152. The Right to Information Act, No. 22 of 2005; India Code (2005), v. 22, available at <http://righttoinformation.gov.in/rti-act.pdf>.

153. Interview with Aruna Roy, in Rajasthan, India (Jan. 2008); Interview with Jean Dreze, in Rajasthan, India (Jan. 2008).

154. Interview with Aruna Roy, *supra* note 153; see also ARUNA ROY & NIKHIL DEY, FIGHTING FOR THE RIGHT TO KNOW 9, <http://www.freedominfo.org/documents/rtiessay.pdf> (last visited May 31, 2010); Rob Jenkins & Anne Marie Goetz, *Accounts and Accountability: Theoretical Implications of the Right-to-Information Movement in India*, 20 THIRD WORLD Q. 603, 605-06 (1999).

155. Social audits and public hearings on government policies and right to food schemes aim to mobilize the poor to prioritize the right to food as a key element and entitlement in their lives and to empower the masses to understand and demand proper implementation of government policy. Social audits are essentially a collective method for analyzing official information;

hearings have been an effective response to the problem of hunger; acting as a first step towards breaking the cycle of poverty and disempowerment, public hearings are opportunities for people to learn about their entitlements and to voice their demands. Jean Dreze, an architect of the Right to Food Campaign, refers to public hearings as providing “a glimpse of the possibility of change, a sense of . . . collective power, and an opportunity to discuss what can be done.”¹⁵⁶ Exposure of government corruption in public meeting settings has helped to fuel discontent and to generate popular willingness to protest corruption and failed implementation of court-ordered schemes.¹⁵⁷

In addition to its focus on mobilizing collective action and empowering people at the grassroots level, the Campaign also influences the realization of the right to food by intervening at higher levels of government. Beyond pursuing its objectives through the Supreme Court and state high courts, the Campaign interacts directly with government officials and agencies.¹⁵⁸ Several members of the Campaign’s steering group have served on or contributed to the work of federal planning commissions, where they have directly influenced federal programmatic and budgetary plans for upcoming years.¹⁵⁹ Right to Food activists point to this ability to employ pluralistic strategies and work at all levels of government as essential to the Campaign’s success.¹⁶⁰

Future development of the Campaign and its power to affect policy, however, is likely to require greater centralization and a more definitive

detailed accounts of government expenditure records and other supporting documents are read aloud to assembled villagers. Public officials are invited to defend themselves at these hearings. See Jenkins & Goetz, *supra* note 154, at 605-06; see also HARSH MANDER & ABHA JOSHI, THE MOVEMENT FOR RIGHT TO INFORMATION IN INDIA: PEOPLE’S POWER FOR THE CONTROL OF CORRUPTION 8 (1999), <http://www.humanrightsinitiative.org/programs/ai/rti/india/articles/The%20Movement%20for%20RTI%20in%20India.pdf> (last visited June 13, 2010).

156. See JEAN DREZE, RIGHT TO FOOD: FROM THE COURTS TO THE STREETS 5, <http://righttofoodindia.org/data/dreze-courts.pdf>.

157. See Jenkins & Goetz, *supra* note 154, at 605-06.

158. Interview with Vandana Prasad, Senior Volunteer Physician, Jan Swasthiya Abhiyan [JSA], in Delhi, India (Jan. 2008); Interview with Colin Gonsalves, Executive Director, Human Rights Law Network, in Delhi, India (Jan. 2008). For recent examples of Campaign statements to government ministers, see Letter from Steering Group, Right to Food Campaign, to Manmohan Singh, Prime Minister of India (Mar. 22, 2010), *available at* http://www.righttofoodindia.org/data/open_letter_from_right_to_food_campaignagainst_draft_national_food_security_act.pdf, and Joint Statement of the Right to Food Campaign & Breastfeeding Promotion Network of India to the Government of India (Mar. 26, 2010), *available at* http://www.righttofoodindia.org/data/joint_statement_26march.pdf.

159. Interview with Vandana Prasad, Senior Volunteer Physician, Jan Swasthiya Abhiyan, in Delhi, India (Jan. 2008). See generally MINISTRY OF WOMEN AND CHILD DEV., SUB GROUP, GOV’T OF INDIA, CHILD PROTECTION IN THE ELEVENTH FIVE YEAR PLAN (2007-2012) (2006).

160. Interview with Aruna Roy, Mazdoor Kisan Shakti Sangathan [MKSS], in Beawar, Rajasathan (Jan. 2008).

structure. Both activists and members of the Commission agree that the Campaign must find a way to better represent itself, demonstrate a unified strength, and speak with a single, collectively supported voice.¹⁶¹ While fluidity has allowed the Campaign to address a myriad of issues and to incorporate diverse organizations and unions into its existing network, decentralization has also meant that the Campaign is often unable to make quick political decisions or statements.¹⁶² Greater centralization is required if the Campaign is to effectively establish not only political consciousness but political clout, as well. A draft charter created in April 2007 at the Third Convention in Bodh Gaya and finalized in September 2008, which outlines Campaign structure and collectively agreed upon working principles,¹⁶³ is perhaps a first step in the effort to centralize the Campaign and establish political direction.

B. *The Commission*

Equally integral to the development and implementation of *PUCL* is the Commission, (196/2001) created by the Supreme Court in its interim order of May 8, 2002 for the purpose of monitoring the implementation of orders related to the right to food.¹⁶⁴ Under Article 32¹⁶⁵ of the Constitution and in response to the *PUCL* petitioner's appeal for a monitoring body,¹⁶⁶ the orders of May 8, 2002 and May 2, 2003 respectively appointed Dr. N.C. Saxena and Mr. S.R. Shankar to function as

161. Interviews with Vandana Prasad, *supra* note 158; Interview with Colin Gonsalves, *supra* note 158.

162. Interviews with Vandana Prasad, *supra* note 158; Interview with Colin Gonsalves, *supra* note 158.

163. Collective Statement, *supra* note 150.

164. *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (May 8, 2002 interim order); Interlocutory Application No. 8, *supra* note 136.

165. The Supreme Court has used the relaxing of technicalities under PIL to find a Constitutional power to appoint Commissioners. The Court has located this power within Article 32's mandate to enforce the Constitution's Fundamental Rights. In the *Bandhua Mukti Morcha* case, Justice Bhagwati held that the rationale for appointing Commissioners is contained in Clause 2 of Article 32, directing that the Supreme Court will have the power to issue directions, orders, or writ. Justice Bhagwati insisted that the court must actively "forge new tools, devise new method and adopt new strategies" in order to ensure the continued relevance of the Constitution. Justice Sen stated that in order to protect fundamental rights, the Court may need to appoint a commission, and thus appointing commissioners falls within the inherent power of the Court under Article 32. *Bandhua Mukti Morcha v. Union of India*, 1984 2 S.C.R. 67, 73 (India).

166. In Interlocutory Application No. 8, the petitioner requests the Supreme Court to appoint a committee consisting of N.C. Saxena, S.R. Shankar, and others. The Interlocutory Application requests that the Supreme Court authorize the Committee to monitor the implementation of the orders of the court and the various government schemes, to report to the Supreme Court from time to time, and to have the ability to frame a comprehensive scheme to ensure food security for the poor and submit those schemes to the Supreme Court for appropriate directions. Interlocutory Application No. 8, *supra* note 136, at 18.

Commissioners of the Court for the purpose of looking into grievances regarding food entitlement schemes.¹⁶⁷ The orders directed the newly appointed Commissioners to take assistance from reliable persons and organizations to facilitate monitoring, reporting, and working towards effective implementation.¹⁶⁸ In line with court directions, the Commissioners have appointed advisors for each Indian state to facilitate the deliverance of state grievances and appeals to the Office of the Commission.¹⁶⁹ State advisors essentially function as a bridge between the Commissioners, state governments, and civil society. They are responsible for sending the Commissioners regular updates about the situation of the state, conveying to the Commissioner state appeals for intervention, and working towards more effective implementation of schemes and rectification of grievances.¹⁷⁰ Following further court direction in October 2002, assistants to the Commissioners have been appointed to provide support to the Commission's efforts to bring about effective monitoring and implementation of court orders.¹⁷¹

To achieve its primary objective of ensuring the implementation of the Supreme Court's interim orders, the Commission collects, collates, and analyzes state and central government data regarding food and employment schemes.¹⁷² The Commissioners then communicate with the governments to address poor or problematic implementation.¹⁷³ The

167. S.R. Shankar has since retired. In response to the request of the petitioners in Interlocutory Application No. 66, Mr. Harsh Mander has been authorized to support Mr. Saxena as a Special Commissioner. OFFICE OF THE COMM'RS OF THE SUP. CT., About Us, <http://www.sccommissioners.org/aboutus> (last visited June 2, 2010).

168. *Id.*

169. *Id.* The Office of the Commission as it operates today is comprised of court nominated Commissioners, state advisors, and assistants to the commissioners. Also affiliated with the Commissioners are state government appointed nodal officers who act to ensure due implementation of food schemes by providing Commissioners full access to relevant government records. See Right to Food Campaign, *Summary Note: Right to Food: Building Accountability*, http://www.righttofoodindia.org/comrs/comrs_accountability.html (last visited May 31, 2010). State Government/Union Territory administrations are required by the Supreme Court to act upon Commission requests or recommendations for compliance, as well as to cooperate with all persons and organizations identified as assistants to the Commission. *Id.*; Interlocutory Application No. 8, *supra* note 136.

170. Main functions of the advisors include analysis of state performance using macro data; rigorous participatory research; ensuring the functioning of an effective micro-level grievance redressal system; articulating alternative demands regarding state policy, especially on hunger; preparing periodic state reports; establishing a permanent monitoring mechanism for hunger-related issues; and ensuring accountability for failures of state governments. See *Summary Note, supra* note 169.

171. People's Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (Oct. 29, 2002 interim order).

172. See OFFICE OF THE COMM'RS OF THE SUP. CT., Field Reports, http://www.sccommissioners.org/reports/field_reports (last visited May 31, 2010).

173. Interview with Dipa Singh, Assistant to the Comm'rs, Office of the Comm'rs to the Supreme Court, in Delhi, India (Jan. 2008). See generally OFFICE OF THE COMM'RS OF THE

Commission also seeks to inform public opinion, often through the Right to Food Campaign and other civil society groups, on issues pertaining to the *PUCL* litigation and the work of the Commissioners.¹⁷⁴ In addition to monitoring implementation and reporting state compliance to the Supreme Court, the Commission also autonomously mediates and negotiates changes in laws, policies, and programs directly with the state and central governments to achieve improved implementation and to address any elements of state action that exclude marginalized groups.¹⁷⁵

1. Advising the Supreme Court and Influencing Interim Orders

Working under the auspices of the Supreme Court, the Commissioners have contributed to the explication of the right to food through their dual roles of monitoring/reporting and acting as advisors to the Supreme Court. The Commission collects and compiles data on implementation of food and work schemes from both state governments and the federal government and then publishes a comprehensive national report that is submitted to the Supreme Court and circulated to civil society.¹⁷⁶ These reports are based on government data; interviews with key officials of the relevant departments at the state, district, and block levels; and observations or information from the field submitted by civil society organizations. For each food scheme covered, the Commission report provides an overview of the scheme and notes, at both national and state levels, coverage, quality of coverage, financial allocations, and key issues.¹⁷⁷ In addition to its summary of compliance, the report offers the Supreme Court recommendations for scheme-specific actions.¹⁷⁸

The significance of these recommendations and the impact of these reports are evident in explicit recognition of the Commission's work in the interim orders. For example, the order of December 13, 2006, which universalized ICDS to cover all children under six regardless of family poverty status, directly referenced the Commission report dated July 19,

SUP. CT., Correspondence Database, <http://www.sccommissioners.org/correspondence> (last visited May 31, 2010).

174. Memorandum, Office of the Comm'rs to the Sup. Ct., Internal Agenda for Action (2007) (on file with author).

175. *Id.*

176. To date, there have been eight reports submitted to the Supreme Court by the Commission. See OFFICE OF THE COMM'RS OF THE SUP. CT., Reports of the Commissioners Submitted to the Supreme Court, available at <http://www.sccommissioners.org/reports> (last visited May 31, 2010).

177. See, e.g., N.C. SAXENA & HARSH MANDER, NINTH REPORT OF THE COMMISSIONERS OF THE SUPREME COURT (2009), available at <http://www.righttofoodindia.org/data/comm2009ninthreport.pdf>.

178. See, e.g., OFFICE OF THE COMM'RS OF THE SUP. CT., SEVENTH REPORT OF THE COMMISSIONERS OF THE SUPREME COURT (2007), available at <http://www.sccommissioners.org/pdfs/comreports/7threport.pdf>.

2006. The Court quoted the Commissioners verbatim and structured its directions around the report's recommendations concerning the ICDS scheme.¹⁷⁹ The interim order of October 7, 2004, in which the court references the implementation recommendations put forth by the 5th (August 2004) Report of the Commissioners, stands as another example of Supreme Court reliance on Commission data.¹⁸⁰

Finally, the Commission's influence in shaping court decisions has also been manifested in communications concerning preservation of schemes in their present form. According to Campaign activists, protection of the National Maternity Benefit Scheme, for example, was largely attributable to the Commission's bringing to the attention of the Court state attempts to discontinue, modify, or supplant the scheme.¹⁸¹

In terms of defining, unpacking, and explicating the right to food, the Campaign and Commission have been key contributors to the development of the *PUCL* litigation. Gains made in the struggle to define the right to food are attributable to the constant involvement of civil society and to the agency awarded to directly affected persons and groups. Incorporating the people whose rights have been denied has allowed for proper identification of immediate needs and systemic deprivations and has resulted in the construction and authorization of appropriate and effective schemes. Most importantly, perhaps, Campaign and Commission involvement has integrated the public into the knowledge base supporting the right to food, empowering individuals to both identify their rights and to determine how those rights should be realized.

2. Promoting, Monitoring, and Enforcing Implementation

While the Campaign often plays a more traditionally activist role in its drive to facilitate collective action to ensure government accountability and actualization of court-ordered rights, the Commission's effectiveness in achieving implementation often stems from its diplomatic relations with state governments. The Commission seeks open lines of communication to encourage state implementation and to propose modification of food and work policies. The work of the Commission is largely focused on building relationships with state officials and using those successfully forged partnerships to resolve grievances and foster political will for implementation of court orders.¹⁸²

179. People's Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006 interim order).

180. *Id.* (Oct. 7, 2004 interim order).

181. Interview with Colin Gonsalves, *supra* note 158; see *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (India) (Apr. 27, 2004 interim order).

182. Interview with Dipa Singh, *supra* note 147. Once information has been collected from state advisors, the Commission sends each state a copy of its individual data, along with

Thus, while government noncompliance with Commission requests is grounds for intervention by the Supreme Court, court orders are not always the most effective method for engendering government interest in quality deliverance of benefits.¹⁸³ Given the Commission's desire to preserve the strength of its political relationships with state government officials and to encourage open communication between the Commission and state and central governments, the Commissioners have found that autonomous resolution of problematic implementation policies without court involvement best serves implementation objectives.¹⁸⁴

The strength of Commission interventions at the state government level largely rely on the work of ground level advisors and support from civil society.¹⁸⁵ Due to financial constraints, the Office of the Commission must prioritize monitoring the success of large policy issues, such as restructuring the targeted PDS.¹⁸⁶ Unable to deal with ground level grievance redressal, the Commission relies on state-level officials to establish functional mechanisms to address grievances that arise at the local and individual levels.¹⁸⁷ The response of the Commission to de-

communications concerning its status of implementation and requests for policy change. These communications concern findings submitted by state advisors, as well as complaints and grievances that have come up through state redressal systems. Meetings between the Commissioners or state advisors and government officials frequently follow these letters and communication exchanges. *Id.*

183. See, e.g., *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006 interim order) ("The Chief Secretaries of the State of Bihar, Jharkhand, Madhya Pradesh, Manipur, Punjab, West Bengal, Assam, Haryana and Uttar Pradesh shall appear personally to explain why the orders of this Court requiring the full implementation of the ICDS scheme were not obeyed.").

184. Interview with Dipa Singh, Assistant to the Comm'rs, Office of the Comm'rs to the Sup. Ct., in Delhi, India (Jan. 2008).

185. Priority schemes include ICDS, MDMS, PDS, and NREGA/SGRY. See *supra* text accompanying note 38–41; INTERNAL AGENDA FOR ACTION, *supra* note 174. The majority of the Commission's attention is paid to states with histories of poor compliance or where there is high demand for intervention by civil society. See *id.*

186. Interview with Dipa Singh, *supra* note 147; interview with Biraj Patnaik, Principle Advisor, Office of the Comm'rs to the Sup. Ct., in Delhi, India (Jan. 2008). Priority states identified by the Commissioners include: (1) the states of Bihar, Madhya Pradesh, Rajasthan, Orissa, Uttar Pradesh, Chhattisgarh, Jharkhand, and Uttaranchal (states in the northern parts of India that remain in abject poverty as compared to southern states, which have experienced more dynamic financial growth, and are therefore the focus of numerous other government efforts, such as those implemented by the Empowered Action Group of the Ministry of Health and Family Welfare); (2) states where there are active advisors and interventions, such as Maharashtra, West Bengal, Assam, Meghalaya, and Andhra Pradesh; (3) any state where intervention is actively sought by civil society; and, (4) any state with pressing issues of starvation or any other violation of interim orders on food and employment schemes. See INTERNAL AGENDA FOR ACTION, *supra* note 174.

187. Interview with Biraj Patnaik, *supra* note 186. See *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (May 8, 2002 interim order) (appointing the Commissioners to act mainly in response to appeals received from different states through the advisor). According to the Supreme Court, the intervention of the Commissioner

mands made by civil society, as well as the Commission's reliance on civil society for the data collected for reports submitted to the Supreme Court, reflects the manner in which the Campaign and Commission draw on each other to enhance their respective contributions to the realization of the right to food in India.

In the event the Supreme Court renders a final judgment for *PUCL*, the role and authority of the Commission will require reassessment. Appointed by the Court for the purposes of monitoring the implementation of orders in the writ petition, the Commission could cease to function once the Court issues its closing order. However, the Commission could remain important in a similar or a modified form. Both the Commissioners and Right to Food Campaign members have begun to consider options for the future, but no official steps have been taken.¹⁸⁸ There appears to be consensus between Campaign activists and the Commissioners that a permanent redressal system must be established, possibly through the courts.¹⁸⁹ The Campaign and Commission have both identified a need for a monitoring mechanism endowed with the authority to hold scheme functionaries and government officials accountable and to issue defined sanctions for violations and/or noncompliance.¹⁹⁰ Such a mechanism could be established from the district level continuing up to the State and Supreme Courts, allowing for greater accessibility for the people most likely to be affected by food entitlements.¹⁹¹

Regardless of what final form the Commission takes, it is clear that the realization of a legal right to food in India was made possible by the reinforcing triangular relationship between the Campaign and the case, the case and the Commission, and the Commission and the Campaign. The Campaign and Commission complement each other and in so doing support the legitimacy and impact of the case. In turn, the case and interim orders handed down by the Supreme Court provide guidance and direction for the Campaign, channeling Campaign mobilization around specific issues and opening space for pursuit of new modifications to policy. Likewise, the case, through its continuation, not only keeps the

is to be sought only after exhausting other redressal mechanisms. *Id.* The Commissioner, however, is empowered to act on its own initiative. Ensuring state government implementation is, in the first instance, the responsibility of the advisor. The main functions of the advisors include not only analysis of state performance and submission of periodic report to the Office of the Commissioners, but also establishing a functioning, effective grievance redressal and ensuring accountability of state officials. *Id.*

188. Interview with Biraj Patnaik, *supra* note 186; Interview with Dipa Singh, *supra* note 147; Interview with Kavita Srivastava, *supra* note 127.

189. See *supra* note 188.

190. *Id.*

191. Interview with Biraj Patnaik, *supra* note 186; interview with Dipa Singh, *supra* note 147.

Commission in place, but determines the course of Commission interventions, as well. Overall, the realization of the right to food in India sets forth a model that includes the identification of a right, concrete explication of what that right means in terms of policy, and subsequent court-monitored implementation and monitoring of those policies. While *PUCL* defines the right to food, the Campaign and Commission embody the requisite efforts at explication (through influencing interlocutory applications and Supreme Court orders) and implementation (through collective mobilization and diplomatic relations with state and central governments).

Having discussed the origins, development, and progressive implementation of the right to food in India, we look now at the impact of the *PUCL* litigation in the context of India's current agricultural and economic policies, including international trade and international financial obligations. Ultimately, this Article concludes with an inquiry into what the increasing liberalization of Indian food and agriculture might mean for the guarantees afforded and protected by the *PUCL* litigation and its court orders.

IV. *PUCL* IN THE CONTEXT OF INDIA'S ECONOMIC POLICY

The Supreme Court's interim orders in *PUCL* often bring the Court into direct conflict with trade liberalization policies that seek to deregulate and privatize food production and distribution in India. PIL gives the Supreme Court the power to regulate the administrative policies of the state and central governments, and *PUCL*'s interim orders exhibit extensive regulation of India's economic policies as they relate to the distribution of food. At the same time that the Supreme Court is issuing orders on specific government actions, the Government of India (GOI) engages in its own process of national and international food and agriculture regulations, many of which are aimed at precisely the same topics. *PUCL*'s interim orders do not make specific mention of India's economic or trade policies. Rather, they issue orders regarding supply, pricing, and distribution of food grains with an aim to fulfill the existing food and related entitlement schemes.¹⁹² Thus, while *PUCL* and India's economic policies may not be in conversation with each other, they are

192. See e.g., *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (India) (July 12, 2006 interim order) (blocking the Government of India's (GOI) deregulation and privatization efforts include Court imposed controls on the appointment and commission rates to be paid to food dealers); *id.* (July 9, 2007 interim order) (ordering the GOI to open 1.4 million government food distribution shops, and thus curtailing the GOI's efforts to reduce the breadth of the FCI and de-centralize and privatize this market).

certainly in direct contact. The conflict between interim orders that maintain or modify government regulations on foodstuffs and the government's concurrent national and international economic policies calls into question the sustainability of *PUCL*'s directives. The question remains as to whether the right to food as articulated in *PUCL* can survive India's liberalization policies, or whether, in contrast, *PUCL* will have the effect of modifying or reversing these policies.

While this paper does not purport to answer these questions, we do endeavor to provide background information helpful for formulating answers to them. This section aims to highlight the importance of economic policy relative to the realization of the right to food and to remind legal scholars that all legal action will be affected by and in turn influence economic policies. In order to do so, it briefly outlines the most important features of India's "new economic policy" of liberalization, privatization, and globalization, pausing to consider the impacts this has had on agriculture and food. It then offers some examples of *PUCL* court orders that conflict with Indian economic policies. It concludes by suggesting that the guarantees of *PUCL* should be codified by the legislature, thereby offering more secure protections for the right to food.

A. India's New Economic Policy and Its Impact on Food and Agriculture

India has been in the process of undertaking a new economic policy (NEP) since 1991, when its balance of payments crisis led it to seek assistance from the International Monetary Fund (IMF)¹⁹³ and the World Bank (WB). This NEP has focused on the liberalization, privatization, and globalization of the Indian economy,¹⁹⁴ marking a shift from the socialist ideals of equality of income distribution embodied in India's Constitution and underlying PIL cases such as *PUCL* to a new focus on aggregate numbers, such as annual GDP growth or percentage increases in exports.¹⁹⁵ Most notably, given the purpose of this paper, the IMF and WB have supported structural adjustment programs that remove

193. See World Bank, Indep. Evaluation Group, *Structural Adjustment in India*, June 1, 1996, <http://www.worldbank.org/iegl/> (search "Structural Adjustment in India"; then follow "View HTML Page" hyperlink). For IMF economists' perspectives on what led to this crisis, see Valerie Cerra & Sweta Chaman Sexena, *What Caused the 1991 Currency Crisis in India?*, 49 IMF STAFF PAPERS 395 (2002).

194. See generally Montek S. Ahluwalia, *Economic Reforms in India Since 1991: Has Gradualism Worked?*, 16 J. ECON. PERSP. 67 (2002); Geeta Gouri, *The New Economic Policy and Privatization in India*, 8 J. ASIAN ECON. 455 (1997).

195. News articles at the time of the 1991 Structural Adjustment Programs (SAPs) abounded with reference to India's shift from socialism to capitalism. See, e.g., Steve Coll, *S. Asian Reformers Face Tough Hurdles: India, Pakistan Shunning Socialist Ties*, WASH. POST, Sept. 8, 1991, at A31.

government controls on the economy and government regulations of food stuffs.¹⁹⁶ In addition, India is also a founding member of the World Trade Organization (WTO)¹⁹⁷ and has signed onto the WTO's Agreements on Agriculture¹⁹⁸ and Safeguard and Countervailing Measures,¹⁹⁹ two agreements that contain caps on certain government expenditures available for agriculture and subsidies in general.

Given these external obligations, India's NEP clearly interacts with the right to food in several ways. These interactions involve reductions in international trade barriers; deregulation that includes removing food items from domestic legislation privileging food as distinct from general goods (namely, the Essential Commodities Acts);²⁰⁰ and, removals of government controls regarding licensing, distribution, and storage of food grains. These adjustments, taken as part of India's NEP, however, largely do not take into account potential and actual negative effects for the most vulnerable populations in India. As such, these programs are both normatively and positively at odds both with the delivery of the right to food and with the underlying values and specific orders of *PUCL*.

1. Free Trade and the Right to Food in India

"Free" trade, or international trade in which countries agree to specific tariff and other non-tariff trade barrier reductions, has been a risky

196. See, e.g., World Bank, *supra* note 193.

197. On July 8, 1948 India became one of the original twenty-three contracting parties to the General Agreement on Trade and Tariffs (GATT). This treaty was preceded and taken over by the WTO in 1995. See World Trade Organization, *The 128 Countries that had Signed GATT by 1994*, http://www.wto.org/english/thewto_e/gattmem_e.htm (last visited May 31, 2010); General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), *reprinted in* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999) [hereinafter GATT 1994].

198. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 (1994).

199. See generally, Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 (1994), *reprinted in* THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 275 (1999).

200. The Essential Commodities Act, 1955, 16 INDIA A.I.R. MANUAL 599 (4th ed. 1979), available at <http://fcamin.nic.in/Events/EventDetails.asp?EventId=600&Section=acts%20and%20rules&ParentID=0&Parent=1&check=0>. The Act states:

The EC Act, 1955 gives powers to control production, supply, distribution etc. of essential commodities for maintaining or increasing supplies and for securing their equitable distribution and availability at fair prices. Using the powers under the Act, various Ministries/Departments of the Central Government have issued Control Orders for regulating production/distribution/quality aspects/movement etc. pertaining to the commodities which are essential and administered by them.

Id.

engagement for the poorest Indians. In general, free trade in foodstuffs puts low-income countries at risk of increasing poverty and starvation because it floods their markets with highly subsidized—and thus underpriced—goods from the United States and the European Union.²⁰¹ This influx drives endogenous small and medium farmers out of business, thereby increasing poverty and hunger.²⁰² India has been particularly affected by this because the majority of the population (nearly sixty percent) earn a living through agriculture.²⁰³ For this reason, the GOI has protested the agricultural subsidies currently administered within developed countries.²⁰⁴ This inflow process also affects domestic food prices,²⁰⁵ and can create a situation of rural job loss combined with increased food prices. Economic studies suggest that regular intervention by the government is necessary to achieve price stabilization of food and

201. See Ramesh Chand, *International Trade, Food Security, and the Response to the WTO in South Asian Countries*, in *FOOD SECURITY: INDICATORS, MEASUREMENTS, AND THE IMPACT OF TRADE OPENNESS* 262, 280 (Basudeb Guha-Khasnobis, et al. eds., 2007).

202. For general rather than India specific analysis, see FAO, Commodities and Trade Div., Commodity Policy and Projections Service, *Trade Reforms and Food Security: Conceptualizing the Linkages* (2003), available at <ftp://ftp.fao.org/docrep/fao/005/y4671e/y4671e00.pdf>. For a general comment on the effect of rich country agriculture subsidies on the agriculture and livelihoods of poor countries using the EU as a model, see Claire Godfrey, *Stop the Dumping! How EU Agricultural Subsidies are Damaging Livelihoods in the Developing World* (Oxfam Briefing Paper No. 31, 2002), available at <http://www.globalpolicy.org/images/pdfs/10stopdumping.pdf>.

203. See Government of India, Agriculture: General Overview, http://india.gov.in/sectors/agriculture/agriculture_overview.php (last visited May 31, 2010).

204. See, e.g., Press Release, Gov't of India, Dep't of Commerce, Developed Countries Must Reduce Their Agricultural Subsidies if Progress is to be Made in Market Access (Aug. 27, 2003), available at http://commerce.nic.in/PressRelease/pressrelease_detail.asp?id=237.

205. The U.N. Development Programme noted in its 2005 Human Development Report:

In most developing countries, cultivation has been adversely affected by the combination of trade liberalization, world trade patterns and changes in domestic policies towards the rural sector. The basic process has been similar in most of the countries: agriculturalists have placed greater reliance on monetised inputs and faced rising prices of such inputs as domestic explicit and implicit subsidies have been withdrawn; around the same time, various import controls on agricultural products have been withdrawn, so that the level of domestic output prices is increasingly determined by the threat of potential imports if not actual imports; export subsidies as well as export taxes have been reduced or done away with, so that local producers face international markets and volatile world prices in a rather unprotected manner. The consequence is that farmers in all of these countries have been caught in a pincer movement of rising input prices and falling or volatile output prices, which has rendered cultivation more risky and often financially unviable. These difficulties have been compounded by the reduction or withdrawal of various government support systems, ranging from output price support to input and credit provision.

See, e.g., Jayati Ghosh, *Trade Liberalization in Agriculture: An Examination of Impact and Policy Strategies with Special Reference to India* 5 (U.N. Human Dev. Report Office, Background Paper for HDR, 2005) available at http://hdr.undp.org/en/reports/global/hdr2005/papers/hdr2005_ghosh_jayati_12.pdf.

thereby protect the population's access to food.²⁰⁶ *PUCL*'s orders require such regular intervention, a requirement that remains significantly at odds with the deregulation processes undertaken within India's NEP.

Specifically, liberalization and privatization of food markets in India have resulted in the "de-universalization" of public food distribution and an emphasis on removing government regulations of foodstuffs. The emphasis has shifted to letting the "market" control the flow of food and food prices. Proponents in favor of a market-controlled rather than a government-controlled food system argue for the privatization of the FCI, the government body that procures and distributes subsidized food grains under India's food welfare schemes.²⁰⁷ The WB, various bodies within the GOI, and the private sector have all argued for the FCI's privatization and supported intermediate steps towards this end.²⁰⁸ In 1997, for example, "targeting" was introduced to the previously universal PDS for food grains. Under this new program, access to food was no longer universal and instead afforded only to a select, government-designated population. Such "targeting" is a direct result of fiscal "liberalization" policies²⁰⁹ designed to remove the government from the economy.

Other liberalizing or deregulating measures that interact directly with the right to food and *PUCL* orders include the GOI's dismantling of

206. Chand, *supra* note 201, at 277. Discussing the effectiveness of government economic intervention to prevent crop price shocks and the stabilization of prices, Chand observed:

If international price shocks are transmitted to the domestic market, it would destabilize crop patterns and supply, and would cause uncertainty in crop incomes. Based on a comprehensive analysis of international and Indian prices in the last fifty years, Chand and Jha (2001) observe that government intervention has been quite effective in insulating domestic prices from the effect of instability in international prices in developing countries like India. This implies that unregulated and free trade would impart instability to domestic prices and there is strong case to regulate trade to maintain price stability. While domestic production must compete with the trend level of international prices, it must be protected against instability. One way to do so is to impose variable tariffs that restore level of current import prices to a long-term trend.

Id.

207. The current policy of foodgrains procurement addresses itself to food security and welfare schemes. See India Dep't of Food and Public Distribution, Gov't of India, Procurement Policy, http://fcamin.nic.in/dfpd_html/index.asp (follow "Procurement Policy" hyperlink)(last visited Mar. 14, 2010). For more information on FCI objectives to support farmers and procure and distribute grain, see Food Corp. of India, <http://fciweb.nic.in/> (last visited May31, 2010).

208. Madhura Swaminathan, *Strategies Towards Food Security*, 31 SOC. SCIENTIST 58, 78 (2003).

209. See Sonia Bhalotra, *Welfare Implications of Fiscal Reform: The Case of Food Subsidies in India 2* (U.N. Univ., Discussion Paper No. 32, 2002), available at <http://www.ciaonet.org/wps/bhs01/bhs01.pdf>.

the Essential Commodities Act, 1955 (ECA).²¹⁰ The ECA interacts with the PDS and other welfare schemes by regulating licenses for food distribution, appointing Fair Price shop dealers, assigning ration cards, and generally controlling the trade of foodstuffs available to the poor.²¹¹ Dismantling of the ECA was undertaken “in the light of liberalised economic policies”²¹² and because “market” interests take primacy over social welfare concerns. Deregulation measures operate with different goals than *PUCL*’s right to food objectives and directly clash with *PUCL*’s orders for more government action and the reinstatement of dismantled schemes.

B. *PUCL Vis-À-Vis India’s Trade and General Liberalization Policies: A Human Rights Based Approach to Economic Policy*

Indeed, *PUCL* represents a judicial mechanism to push back against the NEP in order to protect the poor. The PIL mechanism has allowed the Supreme Court to directly address the GOI’s economic policies, and to step in when it felt these policies had failed. The GOI’s history of dealing with the impact of trade liberalization policies on its agricultural farmers, and the Indian Supreme Court’s response, illustrates this position.

1. The Need For a Livelihoods Approach to Fulfilling the Right to Food

In 2001, when *PUCL* was making its way to the Supreme Court, India was preparing for WTO negotiations on agricultural issues. In May 2001, less than a month after a WTO dispute panel forced India to lift its quantitative restrictions on agricultural imports,²¹³ Prime Minister Vajpayee declared in a speech at the Conference of Chief Ministers on WTO and Agriculture and Food Management that India would protect Indian national interests.²¹⁴ This declaration directly addressed the practical realities of the WTO’s agriculture policy. By prohibiting government subsidies to

210. The Essential Commodities Act, No. 10 (1955) (India), available at <http://admis.hp.nic.in/ehimapurti/pdfs/eca1955.pdf>.

211. Swaminathan, *supra* note 208, at 82–83.

212. DEP’T OF CONSUMER AFFAIRS, MINISTRY OF CONSUMER AFFAIRS, FOOD AND PUBLIC DISTRIBUTION, ANNUAL REPORT 2002–03 ch. 1, ¶ 5.3 (2003) (India), available at <http://fcamin.nic.in/index.asp> (follow “Annual Report” hyperlink; then follow “Annual Report 2002-03: Chapter - I” hyperlink) (last visited May 31, 2010).

213. “Quantitative restrictions on imports of . . . agricultural products were finally removed on April 1, 2001, almost exactly ten years after the reforms began, and that in part because of a ruling by a World Trade Organization dispute panel on a complaint brought by the United States.” Ahluwalia, *supra* note 194, at 73.

214. Shri Atal Bihari Vajpayee, Prime Minister, India Parliament, Speech at the Conference of Chief Ministers on WTO and Agriculture and Food Management (May 21, 2001) available at http://www.indianembassy.org/special/cabinet/Primeminister/pm_may_21_2001.htm.

agriculture for anything other than food buffer stocks designated for the “poorest” of the population, it blatantly conflicted with achieving food security.²¹⁵ In practice, however, India’s actions at the highest level of international trade negotiations continue to be at odds with the basic components of ensuring the right to food for its domestic population.²¹⁶

This paper adopts a livelihood approach to the right to food, focusing on the household earnings that make it possible to purchase adequate amounts and types of food, and in turn the impact that agricultural imports to India might have on these earnings. The Indian context implies a livelihood approach, given that India produces a food surplus but continues to experience hunger, suggesting that monetary and other barriers exist to accessing food.²¹⁷ Hunger in India closely corresponds to the poverty level²¹⁸ and is further exacerbated by membership in groups that suffer discrimination and inequality.²¹⁹ Malnutrition, in turn, perpetuates poverty, with one World Bank report

215. In general free trade policies for economic growth prohibit agricultural subsidies. See, e.g., *World Bank Says Agriculture Must Take Center Stage in Development*, AGENCE FRANCE PRESSE, Oct. 20, 2007, available at <http://www.globalpolicy.org/component/content/article/220/47371.html>.

216. In 2006, India began importing wheat, lowering its wheat tariffs to zero to facilitate the inflow. *Wheat Imports Undermine India’s Position at the WTO*, THE FIN. EXPRESS, Apr. 24, 2006, <http://www.financialexpress.com/news/Wheat-imports-undermine-India%92s-position-in-WTO/163466/> (last visited May 31, 2010); *Government Resorts to Duty-free Wheat Import—To Curb Rising Prices, STC to Buy 5 Lakh Tones*, HINDU BUSINESS LINE (New Delhi, India), February 2, 2006, <http://www.thehindubusinessline.com/2006/02/03/stories/2006020302820100.htm> (last visited May 31, 2010). In contrast, a human rights perspective that considers the possible harm to an already malnourished population urges caution until India can be sure that its domestic population will not be made vulnerable to market fluctuations.

217. See Christian Romer Lovendal, *Understanding the Dynamics of Food Insecurity and Vulnerability in Orissa*, 2, 7 (Food and Agriculture Organization of the United Nations [FAO], ESA Working Paper No. 07-28, 2007), available at <ftp://ftp.fao.org/docrep/fao/010/ai207e/ai207e00.pdf>.

218. See, e.g., WORLD BANK, HUMAN DEVELOPMENT UNIT, SOUTH ASIAN DIVISION, INDIA: ATTAINING THE MILLENNIUM DEVELOPMENT GOALS 97–98 (2004), available at http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2005/01/07/000090341_20050107091547/Rendered/PDF/302660IN.pdf (explaining the “socioeconomic variations in calorie deficiencies”). See generally International Food Policy Research Institute, *India State Hunger Index: Comparison of Hunger Across States* (Feb. 2009) (prepared by Purnima Menon et al.), available at <http://www.ifpri.org/sites/default/files/publications/ishi08.pdf>.

219. See, e.g., UNICEF In Action, India: Nutrition, <http://www.unicef.org/india/nutrition.html> (noting that children from marginal groups and adolescent girls have pronounced nutritional deficiencies); VICTORIA A. VELKOFF AND ARJUN ADLAKHA, U.S. BUREAU OF CENSUS, WOMEN OF THE WORLD: WOMEN’S HEALTH IN INDIA 6 (1998) (explaining how women and girls in India are often amongst the last to eat and as a result consume less calories than their male counterparts); PLANNING COMMISSION, GOVERNMENT OF INDIA, NATIONAL HUMAN DEVELOPMENT REPORT 2001 120 (2002), available at <http://planningcommission.nic.in/reports/genrep/nhdrep/nhdreportf.htm> (describing how bonded child laborers were fed only one meal a day by their employers).

estimating that inefficiency due to hunger may cost India \$2.5 USD billion annually.²²⁰ Poverty in India is closely linked to a dependence upon agriculture; nearly sixty percent of India's population relies on agriculture for its livelihood,²²¹ and, of this group, most farmers are small landholders or landless laborers.²²² For example, a study by the Food and Agricultural Organization (FAO) conducted in the particularly impoverished Indian Orissa found that two thirds of all people in the state documented as living below the poverty line could be classed as either "marginal and small scale farming households" or "landless (labouring) rural households,"²²³ thereby demonstrating a strong linkage between small hold or landless farming and extreme poverty. This study also demonstrated that India's massive child malnourishment and stunting problem is closely related to livelihood dependence on agriculture, revealing that "[c]hildren of labouring rural households and marginal farming households emerged as the most affected by extreme undernourishment (hunger)."²²⁴ Because the most vulnerable groups are likely to be affected by even slight changes in their income, a price depression caused by agricultural imports could have a serious effect on the right to food in India.

Currently, the majority of India remains dependent on the primarily domestic sale of its agricultural goods for its livelihood and the country as a whole maintains a relatively closed agricultural economy through high agricultural tariffs²²⁵ and minimum price supports for agricultural products.²²⁶ Continued trade liberalization—prescribed by membership in the WTO and undertaken in earnest in the negotiation of such current

220. See MICHELE GRAGNOLATI ET AL., *INDIA'S UNDERNOURISHED CHILDREN: A CALL FOR REFORM AND ACTION 8* (2005), available at <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1147272668285/IndiaUndernourishedChildrenFinal.pdf>.

221. See Government of India, *Agriculture: General Overview*, http://india.gov.in/sectors/agriculture/agriculture_overview.php (last visited May 14, 2010).

222. See Sucharita Sen, Saraswati Raju, *Globalisation and Expanding Markets for Cut-Flowers: Who Benefits?*, *ECONOMIC AND POLITICAL WEEKLY*, June 30, 2006, at 2725, available at <http://epw.in/epw/uploads/articles/365.pdf>.

223. *Understanding the Dynamics of Food Vulnerability*, *supra* note 217, at 17.

224. *Id.* at 8; see Somini Sengupta, *As Indian Growth Soars, Child Hunger Persists*, *N.Y. TIMES*, Mar. 12, 2009, available at <http://www.nytimes.com/2009/03/13/world/asia/13malnutrition.html> (documenting that almost half of India's children under five are stunted from malnutrition).

225. See WTO, *Trade Profiles, India*, <http://stat.wto.org/TariffProfile/WSDBTariffPFView.aspx?Language=E&Country=IN> (last visited May 31, 2010).

226. See Comm'n of Agric. Costs and Prices, *Terms of Reference*, <http://dacnet.nic.in/cacpr2inf/aboutcacpr.htm> (listing "paddy, rice, wheat, jowar, bajra, maize, ragi, barley, gram, tur, moong, urad, sugarcane, groundnut, soyabean, sunflowerseed, rapeseed and mustard, cotton, jute, tobacco and such other commodities as the Government may indicate from time to time" as the current price-supported goods) (last visited May 31, 2010); Directorate of Econ. & Statistics, Gov't of India, *Minimum Support Prices (According to Crop Year)* (Oct. 16, 2008), available at <http://www.dacnet.nic.in/eands/msp/msp-161008.pdf>.

endeavors as the EU-India free trade agreement²²⁷—and agricultural imports have a severe impact on the Indian livelihood. This is particularly problematic given that such livelihood is exemplified by the right and ability to *buy* food. This is not to say that trade causes hunger in India or that the WTO is to blame for India's poverty and nutrition concerns. However, India's hunger problem must be evaluated in relation to its bilateral, regional, and international trade liberalization commitments at the WTO.²²⁸ The GOI continues to state that having to open its borders to cheap agricultural imports would threaten the livelihood of the nearly sixty percent of its population that depends on agricultural income,²²⁹ yet, it simultaneously resists taking a livelihoods approach to fulfilling the right to food and proceeds with the process of expanding trade liberalization agreements.

Another reason that India's right to food commitments require protective trade measures is that Indian farmers are not particularly adaptable to changing market conditions nor very well suited to making a timely transition to alternate sectors or even different crops. Agricultural production in India is notoriously inefficient, making it very vulnerable to import competition. These inefficiencies range from virtually stagnant production levels of staple crops, such as rice and wheat,²³⁰ to lost advantages in fruit and vegetable production due to transportation and other costs.²³¹ Indian farmers are amongst the lowest

227. Reports from the European Parliament predict this agreement will be signed by the end of 2010. See Press Release, Eur. Parliament, EU-India: Free Trade Agreement to be Signed by the End of 2010 say MEPs (March 26, 2009), available at <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20090325IPR52628>.

228. While not necessarily *always* a factor in creating poverty, and actually often a factor in poverty alleviation, the WTO acknowledges that trade can and does play a causal role. See, e.g., Håkan Nordström, *Trade, Income Disparity and Poverty: An Overview*, in WTO, SPECIAL STUDIES 5, at 1, 1 (WTO 1999), available at http://www.wto.org/english/res_e/booksp_e/special_study_5_e.pdf (noting that, despite the fact trade and poverty do not demonstrate linkages as strong as those between poverty and national policies, trade can be a causal factor). For a general commentary on the effects of trade liberalization on India's agriculture sector, see Servaas Storm, *Transition Problems in Policy Reform: Agricultural Trade Liberalization in India*, 7 REV. OF DEV. ECON. 406 (2003).

229. See Government of India, Agriculture: General Overview, http://india.gov.in/sectors/agriculture/agriculture_overview.php (last visited May 31, 2010).

230. See, e.g., SHIKHA JHA ET AL., U.S. DEP'T OF AGRIC., INDIAN WHEAT AND RICE SECTOR POLICIES AND THE IMPLICATIONS OF REFORM 1 (2007), available at <http://www.ers.usda.gov/Publications/ERR41/>.

231. A World Bank Report on Indian horticulture inefficiencies conveys India's lost comparative advantage by noting that "Indian grapes are 40% cheaper than Chile's but by the time they reach the Netherlands, they cost the same." The report lists "high transportation costs, inadequate storage facilities, a fragmented supply chain, and weak quality standards at home" as factors that impede competitiveness. WORLD BANK, A CASE STUDY OF INDIA'S HORTICULTURE: FROM COMPETITION AT HOME TO COMPETING ABROAD (2007), <http://go.worldbank.org/U0Z448Z160> (last visited Mar. 6, 2010).

paid farmers in the world in terms of the percentage of the sale of their products that is remunerated to them: they retain only 1/5 of the price of their product, while in Thailand, U.S. farmers retain 1/3.²³² Indian farmers lose much of their earnings to the many intermediaries that convey their goods to the consumer.²³³ According to WB analysts, “radical reform in services”²³⁴ and other areas outside of India’s actual production is needed in order to ensure higher yields. Because the necessary changes will not happen overnight, India may wish to employ every trade protection tool at its disposal to protect its farmers in the meantime.

Transitioning farmers to non-agricultural livelihoods is an important poverty reduction goal, but cannot be achieved quickly, thus necessitating the protection of this population from the pressures of imports for at least the next several years. Indian unemployment and underemployment is likely to continue in the near future. Figures prepared by the GOI Planning Commission in 2004 estimate that to deal with population increases as well as the already unemployed or underemployed, the country will need to generate around 200 million additional employment opportunities by 2020.²³⁵ Agricultural development strategies aimed at more profitable farming struggle to take off in India due, ironically, to the extremely impoverished state of those who would most benefit from it. A study on Indian floriculture farming for export, an agricultural endeavor which has recently been encouraged by the GOI as an export development strategy, demonstrates that the most impoverished rural farmers have neither the land nor the financial backing to assume the risks of switching from price-regulated, yield-assured crops, such as wheat and rice, to a new crop, the production of which is less certain and the price of which is linked to global fluctuations.²³⁶

Moving to cash crops as a way to increase livelihoods can also mean a reduction in the overall number of jobs, depending on the crop. In Brazil, the switch to a focus on soy has proved profitable in absolute terms, but, because the production method is capital intensive and highly mechanized, it has resulted in a net loss of jobs, a highly negative situation

232. Aaditya Mattoo et al., *Produce and Perish: How India is Failing its Farmers*, THE TIMES OF INDIA, April 26, 2007, para. 2, available at <http://www.worldbank.org.in/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,contentMDK:21316938~pagePK:141137~piPK:141127~theSitePK:295584,00.html>.

233. *Id.* For an overview of agricultural value chains and how they affect a producer’s income, see RUTH CAMPBELL, USAID, BRIEFING PAPER: THE VALUE CHAIN FRAMEWORK (2008), http://www.microlinks.org/ev.php?ID=21629_201&ID2=DO_TOPIC.

234. Mattoo et al., *supra* note 232, paras. 10-12.

235. SANDRA POLASKI ET AL., CARNEGIE ENDOWMENT FOR INT’L PEACE, INDIA’S TRADE POLICY CHOICES: MANAGING DIVERSE CHALLENGES 12 (2008), http://www.carnegieendowment.org/files/india's_trade_policy_choices_final.pdf.

236. See Sen & Raju, *supra* note 222, at 2725-30.

for rural employment.²³⁷ This scenario assumes farmers who would benefit the most from switching to cash crops would be able to do so. For all of the preceding reasons, and many more beyond the scope of this paper, Indian farmers remain vulnerable to price fluctuations, increased competition, and other market changes that come with trade liberalization. A human rights-based approach to trade argues for special protections for these and other marginal groups until they are able to weather the significant changes that come with a more open economy.

2. Available, Yet Unutilized, Protective Measures

The GOI, however, is being too passive in dealing with the impact of trade on its agriculturally dependent poor population. While tariffs are likely to be on a downward progression, India has access to several WTO import-regulating mechanisms available to it in the form of trade remedies, such as anti-dumping duties under the Anti-dumping Agreement and countervailing duties under the Agreement on Subsidies and Countervailing Measures.²³⁸ These duties can help to offset the threat posed by import-caused price depression. India is currently the world's leading user of anti-dumping duties²³⁹ and thus has ample capacity to undertake countervailing duties as well, given the procedural and substantive simi-

237. See MAMERTO PÉREZ ET AL., WASH. OFFICE ON LATIN AM., *THE PROMISE AND THE PERILS OF AGRICULTURAL TRADE LIBERALIZATION: LESSONS FROM LATIN AMERICA 12* (2008), <http://ase.tufts.edu/gdae/WorkingGroupAgric.htm>.

238. Marrakesh Agreement, Apr. 15, 1994, Annex 1A, Agreement on Subsidies and Countervailing Measures, Part V: Countervailing Measures (1994), http://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

239. In the second-half of 2008, India was the global leader in administering anti-dumping actions. *India Leads the Tally of Anti-Dumping Cases: WTO*, BUS. STANDARD, Apr. 16, 2009, <http://www.business-standard.com/india/news/india-leads-tallyanti-dumping-cases-wto/58672/on> ("India topped the table of the countries resorting to anti-dumping investigations between July and December 2008, while Brazil, China and Argentina were other major users of the WTO-compliant trade remedy to protect their domestic industries against cheap imports.") (last visited May 12, 2010). In 1995, its anti-dumping actions comprised a mere 1.5% percent of the global total, but, by 2000, this had increased to nearly 9%, or more than that of Australia and Canada, who, only a few years before, had been amongst the world's top five users of such measures. Brink Lindsey & Dan Ikenson, *Coming Home to Roost: Proliferating Antidumping Laws and the Growing Threat to U.S. Exports*, 14 CATO INST. TRADE POL'Y ANALYSIS 7 (2001), available at <http://www.fretrade.org/pubs/pas/tpa-014.pdf>.

The GOI has boasted "that the time taken by the Anti-dumping Directorate in recommending provisional and final measures against dumped imports compared favourably with those taken by the major trading countries," noting that "[t]he time taken on anti-dumping action in the European Union(EU) was nine months, in Australia seven months and in India, four to six months." Press Release, Dept. of Commerce, Gov't of India, *Anti-Dumping Mechanism Being Further Strengthened*, Nov. 28, 2000, available at http://commerce.nic.in/pressrelease/pressrelease_detail.asp?id=54.

larity to anti-dumping. And yet, India has never levied anti-dumping duties on agricultural products.²⁴⁰

By all appearances, India has ample institutional capacity in order to determine dumping and foreign subsidies and thus to implement successfully the corresponding duties. Turning first to the former, in 2008, India was the global leader in administering anti-dumping actions.²⁴¹ In 1995, its anti-dumping actions comprised a mere 1.4% of the global total, but, by 2000, this had increased to 8.8%—more than that of Australia and Canada, who, only a few years before, had been amongst the world's top four users of such measures.²⁴² India's anti-dumping procedure consists of a single-track determination of injury and dumping administered by the Directorate General of Antidumping & Allied Duties in the Ministry of Commerce.²⁴³ The GOI has boasted "that the time taken by the Anti-dumping Directorate in recommending provisional and final measures against dumped imports compared favourably with those taken by the major trading countries," noting that "[t]he time taken on anti-dumping action in the European Union was nine months, in Australia seven months and in India, four to six months."²⁴⁴

The same institutional capacity is needed—and is thus ready and waiting—for India to undertake countervailing measures to protect its farmers from imports, but, as it has with anti-dumping measures, the GOI has so far failed to use this mechanism to protect its farmers.²⁴⁵

240. See the WTO's website for a comprehensive list of disputes to date. WTO, Chronological List of Disputes Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited May 12, 2010).

241. Press Trust of India, *India Leads the Tally of Anti-dumping Cases: WTO*, BUS. STANDARD, Apr. 16, 2009, available at <http://www.business-standard.com/india/news/india-leads-tallyanti-dumping-cases-wto/58672/on> ("India topped the table of the countries resorting to anti-dumping investigations between July and December 2008, while Brazil, China and Argentina were other major users of the WTO-compliant trade remedy to protect their domestic industries against cheap imports").

242. Brink Lindsey & Dan Ikenson, *supra* note 239.

243. DIRECTORATE GEN. OF ANTI-DUMPING & ALLIED DUTIES, GOV'T OF INDIA, ANTI-DUMPING—A GUIDE 1-7, <http://commerce.nic.in/Anti-Dum.pdf>.

244. Press Release, Dep't of Commerce, Gov't of India, Anti-Dumping Mechanism Being Further Strengthened (Nov. 28, 2000), available at http://commerce.nic.in/PressRelease/pressrelease_detail.asp?id=54.

245. In contrast to the seeming freedom to levy anti-dumping measures on agricultural imports, Article 13 of the Agreement on Subsidies and Countervailing Measures, known as the "Peace Clause," is sometimes cited as having discouraged WTO members from countervailing. While the list of WTO disputes continues to reveal that countervailing duties were sought on agricultural imports, no panels for these disputes were ever constituted, leaving us without jurisprudence to study. The WTO members' inferred reluctance to countervail subsidies might have stemmed from the command from Article 13 of the Agreement on Agriculture to exercise "due restraint" in bringing countervailing duties against subsidized agricultural products for a 9-year implementation period, commencing in 1995 and ending on January 1, 2004. Despite this caution, countervailing subsidies were never expressly prohibited under the Peace Clause. Additionally, it was always clear that the Peace Clause was a temporary compromise rather

India's statements regarding countervailing duties have been mixed. The GOI admits that India has yet to employ the duties but simultaneously reassures that they are being held in reserve. For example, in a written reply sent to Congress in 2003, the then-Minister of State for Commerce explained that:

India has so far not applied countervailing duty on agro-imports from any Member of the World Trade Organisation, including the US and the EU, for the purpose of offsetting subsidy on such imported products. Government will take action to apply countervailing duty on subsidised imported products in accordance with the provisions of the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures of the WTO either based on receipt of a duly substantiated petition from the domestic industry seeking initiation of an investigation leading to such action or based on sufficient evidence of existence of a subsidy, injury and causal link to justify initiation of an investigation.²⁴⁶

The message is thus being sent to the WTO-wary domestic constituency²⁴⁷ that the authorities recognize the utility of duties in the wake of a newly opened and continually opening Indian economy.²⁴⁸ India's state-

than a prevailing principle of the WTO regime. The actions that India might wish to take now that the Peace Clause has expired have thus always been, in large part, permissible. The expiration of the Peace Clause simply means that there are no subsidies that are untouchable by the countervailing duties. This should also mean the WTO members do not have to exercise a heightened level of restraint in initiating countervailing actions.

The "chilling" effect that the Peace Clause has had on the countervailing actions against subsidies—both legally irrelevant and, as a posture that was perhaps held by at least some WTO members, likely to have dissipated given the 5-year time span since its expiry—should not be overstated. While India has yet to initiate a countervailing investigation, let alone final duties, it appears that, paradoxically, it has had an unusually high number of countervailing actions initiated *against* its exports. These actions reveal that the period covered by the Peace Clause was not particularly peaceful. Between January 1995 and June 2008, the WTO recorded 45 countervailing investigations initiated against India. What is interesting is that India has built its anti-dumping capacity to the point where it has become the world's leading user of anti-dumping duties, but that the use of countervailing duties continues to be dominated by the traditional trade remedy giants. When studied by product type, it becomes apparent that agricultural goods are a favorite countervailing target, accounting for almost 20% of initiations between 1995 and 2008.

246. Press Release, Dep't of Commerce, Gov't of India, Countervailing Duties on Subsidized Agro-Imports (Dec. 22, 2003), available at http://commerce.nic.in/pressrelease/pressrelease_detail.asp?id=155.

247. Shishir Priyadarshi, *Decision-Making Processes in India: The Case of the Agriculture Negotiations*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES* 216, 226-28 (Peter Gallagher et al. eds., 2005).

248. See Press Info. Bureau, Gov't of India, Q& A: Trade in Agriculture—Uruguay Round and after: A Brief Glimpse, Q.4, <http://pib.nic.in/focus/foyr2001/foapr2001/aoa1.html> ("Q.4: Supposing import of some articles increases to our detriment, what should

ments at the WTO mirror these sentiments, as it continues to stress its quest for establishing a level playing field in the international agricultural trade regime.²⁴⁹ While these statements are favorable, they are merely just that: statements.

Other trade remedies through the WTO are also available to India to help protect farmer livelihood and thus prevent hunger and starvation. Two types of safeguards, one specific to agriculture and another that applies to all goods including agriculture, are currently available.²⁵⁰ Presently, the WTO deems injury sufficient to invoke safeguards as being set at a much higher threshold than that for anti-dumping and countervailing duties.²⁵¹ India mentions the safeguard devices infrequently in its public statements, focusing instead on a proposed Special Safeguard Mechanism (SSM). It has vigorously promoted the SSM, a WTO remedy still in draft form, as a tool for protecting its farmers from imports, advocating that, in contrast to the current trade remedies, the price de-

we do? Ans: In any case any import surge is noticed or apprehended, Government can suitably calibrate the applied rates of customs duties within the bound rates and can also initiate trade remedial measures including anti-dumping action, imposition of countervailing action or safeguard action under specific circumstances as provided under WTO agreements.”).

249. See, e.g., Fifth Special Session of the Committee on Agriculture, *Statement by India, G/AG/NG/W/102* (Feb. 15, 2001).

250. See WTO Secretariat, *An Unofficial Guide to Agricultural Safeguards: GATT, Old Agricultural (SSG) and New Mechanism (SSM)*, at 3 (Aug. 5, 2008), available at http://www.wto.org/english/tratop_e/agric_e/guide_agric_safeg_e.htm (noting GATT safeguards apply to all products, including agricultural, contingent upon demonstration of injury, and Special Safeguards [SSG] in the Agriculture Agreement apply only to “tariffed” agricultural products, meaning those with quantitative restrictions converted to equivalent tariffs, then cut). India cannot access the SSG because it relied on quantitative restrictions for agricultural imports until 2001. See Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R (adopted Sept. 22, 1999).

251. While the injury test for anti-dumping and countervailing duties uses the term “material injury,” safeguard injuries must be “serious” as opposed to “material.” The WTO Appellate Body has interpreted “serious” as implying a much higher level of injury than “material,” making safeguard mechanisms more difficult to use:

‘[S]erious injury’ in the *Agreement on Safeguards* is a very high one when we contrast this standard with the standard of ‘material injury’ envisaged under the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures* . . . and the GATT 1994. We believe that the word ‘serious’ connotes a much higher standard of injury than the word ‘material.’ Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures

Appellate Body Report, *United States—Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia*, para. 124, WT/DS177/AB/R, WT/DS/178/AB/R (adopted May 1, 2001).

crease and volume surge triggers should be lower and allow greater tariff increases.²⁵²

India's right to food obligations exist in tandem to its WTO and other international and bilateral trade commitments. Treaty law implies that "[a]ny obligations accrued during trade negotiations must not undermine commitments made under human rights treaties agreed to in good faith by states."²⁵³ There is no reason to assume that a conflict exists between India's right to food and its trade obligations, as there is no evidence that it is impossible for India to comply with both at the same time.²⁵⁴ Indeed, in recent years, the WTO Secretariat has made notable efforts to communicate its respect for human life, human health, and food security, insisting that WTO rules do not take priority or come into conflict with them.²⁵⁵

India's frequent statements on this topic clarify that it wishes to protect the right to livelihood and food in relation to any commitments made at the WTO.²⁵⁶ At WTO meetings, India often emphasizes its need and right to protect the "livelihood" and "food security" of its farmers.²⁵⁷ For example, towards the beginning of Doha Round negotiations, in a state-

252. See, e.g., *Indian Minister Says SSM Not to Blame for Stalled Talks*, 12 BRIDGES WKLY. TRADE NEWS DIG. (Geneva, Switz.), Oct. 2, 2008, available at <http://ictsd.net/i/news/bridgesweekly/30163/>.

253. Chris Downes, *Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food*, 47 VA. J. INT'L L. 619, 622, (2007) (citing Articles 26 and 53 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331).

254. See Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 451 (1953) ("A conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible."). This understanding of conflict has been criticized as overly strict, but, for the purposes of this paper, the nuances of addressing conflicts of law are not particularly important. See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 170–71 (2003).

255. For example, the WTO Secretariat undertook a joint study with the WHO to examine the relationship between WTO agreements and health. It addressed the right to food through the lens of food security, but declined to comment on household food intake, focusing instead on national food security. See WHO & WTO, *WTO AGREEMENTS AND PUBLIC HEALTH: A JOINT STUDY BY THE WHO AND WTO SECRETARIAT* ¶¶ 245–59 (2002). This approach is inadequate for addressing India's particular problem. See FAO Orissa Report, *supra* note 217, at 12 ("A significant policy lesson has been that while macro-level food self sufficiency has been achieved . . . this has proved insufficient to ensure micro-level food security for the poor."). In 10 Common Misunderstandings About the WTO, the WTO Secretariat endeavors to make clear that commercial commitments do not override human health and safety, citing the asbestos ruling to emphasize that "WTO agreements give priority to health and safety over trade." WTO SECRETARIAT, 10 COMMON MISUNDERSTANDINGS ABOUT THE WTO 5 (1999), available at http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m05_e.htm.

256. See *infra* Part IV.B.1.

257. See, e.g., Sixth Special Session of the Committee on Agriculture, *Proposal by India—Concluding Statement*, ¶ 3, G/AG/NG/W/102 (Apr. 11, 2001).

ment made at the Sixth Special Session of the Committee on Agriculture in March 2001, India asserted that “[t]he vulnerability of income entitlements of the majority of their population in our countries stems from the uncertainties of their resource-starved agriculture sector.”²⁵⁸ The use of the phrase “income entitlements” underscores India’s conception of the human rights value of income. India further connected income to the right to food in noting that “[a]ny attempt toward hurried and unguarded integration . . . with the segments of the global economy having access to high levels of institutionalized support and subsidies, is feared to pose a serious threat to the food security and livelihood of their farming communities.”²⁵⁹ It emphasized the need for “flexibility in State interventions in the developing world to free their peoples from dehumanising poverty” and to address “food insecurity and malnutrition.”²⁶⁰

In promoting food security at the WTO, India has invoked the Food and Agricultural Organization’s definition of food security as “the physical and economic access for all people at all times to enough food for an active, healthy life with no risk of losing such access and as such is directly connected with livelihood in the developing countries.”²⁶¹ It has also referenced the Bali Declaration of the Non-Aligned Movement and Other Developing Countries’ definition of “access to food for a healthy life by all people at all times.”²⁶² India has emphasized that it makes known to other WTO members “time and again that safeguarding the interest of 650 million agriculture-dependent people would be of paramount importance for India,” calling attention to the fact that it has been singing the same refrain regarding protection and farmer livelihood for years.²⁶³ India thus exhibits an enthusiastic willingness to emphasize right to food concerns when invoking trade protections.²⁶⁴ What is left is for the GOI to turn these statements into action. *PUCL*’s orders help re-focus attention on the obligations the GOI has to its farming population.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Negotiations on WTO Agreement on Agriculture, Proposal by India (Food Security)*, ¶ 1, G/AG/NG/W/102 (Jan. 15, 2001).

262. *Id.*

263. Press Release, Gov’t of India, *supra* note 204.

264. India has continued uninterrupted in this vain to the present day. *See, e.g.*, WTO, Statement by H.E. Mr. Arun Jaitley, Minister of Commerce and Industry and Law and Justice, ¶¶ 8-9, WT/MIN(03)/ST/7 (Sept. 10, 2003). More recently, in bilateral negotiations with Thailand, it continued to call attention to the fact that, for India, “agriculture involves the livelihoods of the poorest farmers who number in the hundreds of millions,” going on to assert boldly that “[t]he poor of the world will not forgive us if we compromise on these concerns” and that “[t]hese concerns are too vital to be the subject of trade-offs.” Press Release, Gov’t of India, Dep’t of Commerce, Statement of Shri Kamal Nath, Minister of Commerce and Indus. (July 25, 2008), available at http://commerce.nic.in/PressRelease/pressrelease_detail.asp?id=2290.

The orders do not resolve tensions between trade and right to food commitments, but they do bolster the latter against the former.

3. The Court Steps In

Where India's trade and finance obligations are in tension with its right to food commitments, the Supreme Court has often stepped in to protect both food entitlements and farmer livelihoods when the GOI has failed to do so. In 1997, in response to the structural adjustment programs imposed beginning in 1991,²⁶⁵ India reduced its universal PDS for delivering food to a *targeted* PDS that excludes large sectors of the population and forces them to buy food at market rather than subsidized prices.²⁶⁶ This development also changed the supply and demand incentives within India by raising prices, decreasing demand, and causing many food distribution shops to close, further restricting the poor's access to food.²⁶⁷ The Supreme Court responded to this chain of events, not by addressing the cause or referencing the WTO, but by ordering the re-opening of all shops²⁶⁸ and by simultaneously freezing any further reductions by the GOI to the poverty rates used to calculate policy and determine adjustments to the number of people addressed by buffer stock subsidies.²⁶⁹ The Court has also addressed itself to the effects of trade on rural employment by ordering government specific expenditures on rural employment, especially agricultural employment.²⁷⁰

PUCL also pushes back against policy adjustments that remove such regulations as licensing restrictions for food suppliers. In recent years, the GOI has adjusted the Essential Commodities Act in the name of "furthering economic growth and liberalisation" in ways that undercut existing food security schemes. For example, in order to "[f]acilitat[e] free trade and movement of foodgrains," the GOI removed licensing requirements for buying, stocking, selling, distributing, and disposing of "wheat, paddy/rice, coarse grains, sugar, edible oilseeds and edible oils[.]"²⁷¹ The Supreme Court responded with orders that regulate licenses with an aim to distribute necessary amounts of food and to

265. See Bhalotra, *supra* note 209, at 2.

266. Swaminathan, *supra* note 208, at 60-61, 67-68.

267. *Id.* at 68-70.

268. The Supreme Court Order of July 23, 2001 cared little for market forces and reduction of government expenditures or involvement in the economy: "By way of an interim order, we direct the States to see that all the PDS shops, if closed, are re-opened and start functioning within one week from today and regular supplies made." *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (July 23, 2001 interim order).

269. See *id.* (Feb. 14, 2006 interim order).

270. See *id.* (May 8, 2002 interim order).

271. DEP'T OF CONSUMER AFFAIRS, *supra* note 212, ch. 4.4.

prevent hunger.²⁷² The Court has also banned the use of contractors for certain food schemes, thereby obstructing government plans for privatization.²⁷³ Further court maneuvers that block the GOI's deregulation and privatization efforts include court-imposed investigations into the appointment of and commission rates paid to food dealers²⁷⁴ and an order to open government food distribution shops,²⁷⁵ thus curtailing the GOI's efforts to reduce the breadth of the FCI and de-centralize and privatize this market. Thus, through *PUCL*, the Supreme Court has invalidated government efforts at privatization and deregulation that interfere with food distribution.

This paper does not suggest that actions by the Court are in direct response to policies such as the WTO policy regarding food buffer subsidies, or that the Court is intending to comment on the deleterious effects of India's trade policies on rural agriculture. However, it is undeniable that the many interim orders in *PUCL* that address themselves to government maintenance and expansion of food distribution for the poor also directly affect the GOI's compliance with WTO policy. In regards to employment, orders for public expenditure on rural employment stand in contrast to the notion of allowing the market to dictate which farmers remain employed and prosperous, and could also be seen as a subsidy to the farmers covered by the order. Thus, *PUCL* could be viewed as a judicial adjustment to India's trade policies, especially in regards to those segments of the population that these policies fail to address.

PUCL addresses itself to the economic policies of India in the sense that it provides a safety net for the most vulnerable Indians in light of a policy that focuses on "growth" but not the equal distribution of gains in employment, trade, investment, and income. The Court, through its mandate to safeguard the most vulnerable persons and deliver upon the Constitution's promise of social and economic rights, focuses on the segments of India's population that have been left behind or harmed by the NEP. India's GDP has been growing at impressive rates following the introduction of the NEP, but this growth has not served the poor. Rather, the position of the segments of the population addressed in *PUCL* has remained relatively unchanged.²⁷⁶ At the same time, both food production and food consumption levels amongst the poor have been declining in

272. See, e.g., People's Union for Civil Liberties, Writ Petition (Civil) No. 196 of 2001 (May 2, 2003 interim order).

273. *Id.* (Oct. 7, 2004 interim order).

274. *Id.* (July 12, 2006 interim order).

275. *Id.* (July 9, 2007 interim order).

276. See BISWA SWARUP MISRA, REGIONAL GROWTH DYNAMICS IN INDIA IN THE POST-ECONOMIC REFORM PERIOD (2007).

recent years.²⁷⁷ A decline in food production might be linked to a decline in government expenditures in support of agriculture.²⁷⁸ Growing income inequality could also be causing the reduction in food intake. Income inequality has a negative impact on food security, whereas redistribution of wealth through programs such as free or subsidized food or agriculture subsidies for low-income farmers serves to improve food intake and nutrition.²⁷⁹

One way to characterize what *PUCL* represents is a floor on India's capitalism, pieced together from the remnants of India's socialism. As such, it might be seen as a human rights-based approach to the economy. When the GOI moved to dismantle a social welfare program developed in India's socialist days, the Supreme Court prevented it from doing so. Further, the Court made small expansions to these programs, such as enlarging the mid-day meal schemes. What the Court is in effect doing is articulating core, constitutionally protected social and economic rights that not even the central government can remove. It would take substantial constitutional amendments to remove the basis for *PUCL*'s pushback on economic liberalization. It is uncertain whether the Court would ever allow such amendments, given their power to strike down amendments contrary to the object and purpose of the Constitution.²⁸⁰ In effect, in order to proceed unfettered in its NEP, the GOI would need to draft an entirely new Constitution. Until this happens, *PUCL* stands for the protections for the poor embodied in that revolutionary document.

Another way to characterize *PUCL*'s relationship to India's NEP is a refusal to allow certain harms caused by economic transition, regardless of whether these harms are short lived. *PUCL* deals with a matter of the utmost urgency: the ability to eat enough food in order to be free from malnourishment and the very real threat of death from starvation. By addressing the urgency of the food situation, the Supreme Court acknowledges realities that the NEP fails to, such as the fact that economic growth takes time while hunger is an immediate problem of the utmost importance; the fact that there is enough food to feed everyone in India and therefore no reason that some should be left to die; and, the fact that hunger itself is a cause of poverty and thus an impediment to the very growth sought by the NEP. The Court thus humanizes and rationalizes India's capitalism: it would be inhumane, and irrational, to let people suffer and die when this is both preventable and unnecessary. Its

277. See Kamal Nayan Kabra, *Disequalising Growth: The Achilles' Heel of Liberalisation*, in ALTERNATIVE ECONOMIC SURVEY, INDIA, 2004–2005, DISEQUALISING GROWTH 13, (Alternative Survey Group, 2005).

278. See Ahluwalia, *supra* note 194, at 77.

279. See LEATHERS & FOSTER, *supra* note 6, at 167–68.

280. See *infra* Part II.B.4.

prevention is necessary both to fulfill economic growth (e.g. create an educated and viable work force) and to fulfill the Constitution's human rights obligations.

Overall, an analysis of the relationship between India's NEP and the Supreme Court's efforts to protect the Indian people's right to food demonstrates the need for coordination amongst branches of government and across multiple sectors. National legislation that enshrines both the principles and the specific guarantees enumerated in *PUCL*'s interim orders would prevent the erosion of the rights and entitlements protected by *PUCL* that might be caused by economic, financial, and trade activities. This would likely require a significant restructuring of India's economic policy, particularly related to food and agriculture. While this task might prove a large one, congruence between *PUCL* and the actions of the GOI and the parliament demand it. True food security requires cooperation between the branches of the Indian government.²⁸¹

Enshrining the right to food in national legislation is necessary in order to give the persons most affected by economic policies a democratic voice and the chance to shape such policies in their interest. The economic decisions made by India's Finance, Commerce, Agriculture, and other Ministries have concrete and often detrimental outcomes for the lives of the most impoverished and their ability to feed themselves. Such decisions are made behind closed doors, at high-level meetings in Delhi, Geneva, and other locations inaccessible to the starving and poor. While the poor cannot access these meetings, they can use democratic channels to shape and constrain relevant economic policies via legislation. From the village level to the national parliament, the poor can use party platforms during election years, community campaigns, lobbying and other forms of political dialogue and pressure to help craft legislation that prioritizes the right to food and, more specifically, organizes the economy in a manner designed to ensure adequate livelihoods and, through this, adequate calories for all, particularly for those living on the margins. For example, right to food legislation could mandate that all trade agreements are submitted to an impact assessment prior to their completion to ensure that they will not undermine the right to food.²⁸² By

281. The FAO urges legislative action and coordination between government branches to secure the right to food. See FAO, Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of Nat'l Food Sec., *Information Paper: Recognition of the Right to Food at the National Level*, ¶ 50, IGWG RTFG INF/2 (2004), <http://www.fao.org/docrep/meeting/007/j0574e.htm>.

282. See generally U.N. Gen. Assembly, Human Rights Council, Mission to the WTO, *Promotion and Protection of all Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/10/5/Add.2 (Feb. 4, 2009) (prepared by

enshrining such tenants in legislation, ordinary citizens are better able to ensure accountability and transparency regarding how economic policies relate to the right to food. The flexibility of the legislative process allows for an adequately evolving parliamentary response to various sectors of government and can empower administrative, legal, and community action for the right to food. Notably, a crucial political opportunity to enact such legislation has recently emerged.

V. PUSHING THE AGENDA FORWARD: DEVELOPMENT OF THE NATIONAL FOOD SECURITY ACT

The interim orders of *PUCL*, the work of the Commission, and the work of the Right to Food Campaign have recently born fruit in the development of national food security legislation that would codify the entitlements set forth in *PUCL*. Civil society, through the Right to Food Campaign, contributed significantly to the development of this food security act by participating in stakeholder roundtables, publishing its own model of a right to food bill,²⁸³ and publicly commenting on developmental versions of the bill. Likewise, the Commission has, as liaison between the Supreme Court and political officials, provided advice to government officials as to the content of the act.²⁸⁴ If devised to include *PUCL* entitlements and food schemes as they currently operate under Court order, a food security act has the potential to bring harmony to the conflict between India's economic policies and Supreme Court's effort to protect and promote the food security for the poor.

Segments of the Indian national government have publicly declared their support for the forthcoming right to food act. On June 4, 2009, the President of India, in her address to the national parliament, announced that her government "proposes to enact a new law—the National Food Security Act—that will provide a statutory basis for a framework which assures food security for all."²⁸⁵ On the same day, the Ministry of Con-

Oliver De Schutter, Special Rapporteur on the Right to Food), available at <http://www.srfood.org/images/stories/pdf/officialreports/or3-hrc-10-5-add2-advancededitedversion-en.pdf>.

283. The Right to Food Campaign Secretariat has held several public consultations regarding the legislation and established a steering committee to produce a draft act. In September 2009, the Right to Food Campaign made its first draft act public and submitted the draft to relevant parliamentarians. See generally Right to Food Campaign, *Draft Right to Food Act* (Sept. 12, 2009), http://www.righttofoodindia.org/data/rtf_act_draft_charter_sept09.pdf.

284. Arati R. Jerath, *Food Security Bill: Face-Off Between Sonia and the Govt?*, TIMES OF INDIA, Mar. 27, 2010, available at <http://timesofindia.indiatimes.com/india/The-stomach-for-a-fight/articleshow/5729782.cms>.

285. Shrimati Pratibha Devisingh Patil, President of India, Address by the Hon'ble President of India, Shrimati Pratibha Devisingh Patil, to Parliament (June 4, 2009), available at <http://presidentofindia.nic.in/sp040609.html>.

sumer Affairs, Food and Public Distribution circulated a concept note laying out a basic framework for this act.²⁸⁶ On June 14, 2009, the Union Minister of State for Food and Civil Supplies stated “that a Food Security Act would be put into place within 100 days.”²⁸⁷ Political parties have also manifested strong interest in the right to food legislation. Adopting a food security act as part of its platform, the Congress party promised enactment of a food security act if the United Progressive Alliance, the party credited with passing other social welfare legislation such as the National Rural Employment Guarantee Act, was elected.²⁸⁸

For the last several months, various ministries, including the Finance Ministry and the Food Ministry, have been working in tandem to contribute to develop the draft act. In March 2010, the Empowered Group of Ministers on Food (EGoM) cleared a draft food security bill for discussion and, on April 5, 2010, met to discuss the bill.²⁸⁹ At the time of this writing, the EGoM had requested additional information from the Food Ministry and was scheduled to reconvene upon receipt of that information towards the end of April 2010.²⁹⁰

While a movement towards codification of the *PUCL* entitlements demonstrates a national commitment to ensuring the realization of the right to food, what remains unresolved is whether the GOI’s proposed food security act will adequately incorporate and protect the food guarantees and programs thus far protected in the *PUCL*’s interim orders. Economists and activists alike question whether the grain allocations and food security programs addressed by the act do enough to ensure a base level of nutritional intake for all citizens. To date, the GOI has circulated two primary frameworks for a food security act, the June 2009 concept note and the March 2010 draft bill, neither of which received endorsements from right to food stakeholders. While the June 2009 concept note sustained criticisms from both food rights activists and food security-oriented economists, the March 2010 draft bill, which incorporates many

286. Sirohi, *supra* note 5.

287. *Minister Promises National Food Security Act in 100 Days*, KHABAR EXPRESS, June 14, 2009, http://www.khabarexpress.com/14/06/2009/Minister-promises-Food-Security-Act-in-100-days-news_88262.html.

288. Biraj Patnaik, *How to Tackle India’s Hunger*, LIVEMINT.COM, July 2, 2009, <http://www.livemint.com/2009/07/02205358/How-to-tackle-India8217s-hu.html>.

289. Jerath, *supra* note 284; *EGoM Meet on April 5 to Discuss Draft Food Security Bill*, THE HINDU, Apr. 2, 2010, <http://beta.thehindu.com/news/national/article381524.ece> (last visited May 14, 2010).

290. Gargi Parsai, *Food Bill Final Draft After BPL Estimates*, THE HINDU, Apr. 5, 2010, <http://beta.thehindu.com/news/national/article388901.ece> (last visited May 14, 2010).

of the provisions set forth in the concept note, has been flatly rejected by the Right to Food Campaign.²⁹¹

Several provisions of the draft bill raise concern, as they actually reduce the scope of *PUCL* food security programs. For example, the draft bill mandates the GOI to provide, through the Targeted PDS, twenty five kg of cheap grain at three Rupees (“Rs”) per kilo a month to Below Poverty Line (BPL) families,²⁹² a reduction from the current *PUCL*-mandated provision of thirty five kg/month to BPL families.²⁹³ While the current price at which this subsidy is provided to BPL families is somewhat higher—rations, under *PUCL*, are available at 4.15 Rs per kg for wheat and 5.65 Rs per kg for rice—the draft act’s provision would significantly reduce the quantity of grain provided.²⁹⁴ Moreover, it has been noted that the federally imposed price of 3 Rs per kg is actually *higher* than the existing price for grain available to BPL families in the states of Andhra Pradesh, Chhattisgarh, Gujarat, Karnataka, Kerala, Orissa, Tamil Nadu, and West Bengal, which account for thirty five percent of the rural population.²⁹⁵

Equally important is the question of who will qualify for the government subsidies. The GOI, estimating in its concept note that 27.5% of the population qualifies as BPL,²⁹⁶ proposed in June 2009 to reduce the number of families eligible to receive grain through the PDS to 60 million, a number based on a 2004–2005 poverty estimate.²⁹⁷ This is somewhat disconcerting given that GOI figures have historically stood in sharp contrast to figures put forth by civil society regarding the percent of population considered to be poor or unable to access adequate levels of food and the number of households that have already been issued BPL or Antyodaya Anna Yojana (AAY)²⁹⁸ cards by state governments. For ex-

291. Letter from Steering, *supra* note 158. For details on the Right to Food Campaign’s essential demands, see Right to Food Campaign, Right to Food Act: Introduction, http://www.righttofoodindia.org/right_to_food_act_intro.html (last visited May 12, 2010).

292. Draft National Food Security Bill, 2010, *available at* http://www.righttofoodindia.org/data/egom_draft_bill2010.pdf (last visited May 14, 2010).

293. Sirohi, *supra* note 5, at 11-12.

294. Devinder Sharma, Op-Ed., *Food for All? Not Through the NFSA*, INDIA TOGETHER, July 17, 2009, <http://www.indiatogether.org/2009/jul/dsh-nfsa.htm>.

295. Himanshu, *Cheaper Grain’s Only One Part of a Food Security Act*, LIVEMINT.COM, July 24, 2009, <http://www.livemint.com/Articles/2009/06/23195210/Cheaper-grain8217s-only-one.html>.

296. Sirohi, *supra* note 5, at 12.

297. Udit Misra, What’s Holding Back the Hand That Feeds?, FORBES INDIA, Sept. 22, 2009, *available at* <http://www.business.in.com/article/real-issue/whats-holding-back-the-hand-that-feeds/4092/0>.

298. Regarding Antyodaya Anna Yojana Cards, the Commissioners to the Supreme Court note:

ample, while the Government assesses the BPL population to be at 27.5%, the National Sample Survey Organization (NSSO) reports a far high number of persons unable to access a basic nutritional intake.²⁹⁹

To address current disparities between federal BPL estimates and actual poverty levels, states have been allocating funds from state budgets to provide for additional subsidies.³⁰⁰ A positive element of the transition from the framework proposed in the June 2009 concept note to the March 2010 draft bill is a removal of language that might have restricted states' ability to do so. While the concept note appeared to advocate for depriving states of their capacity to "(1) fix the numbers of those who are BPL in their respective states; (2) decide the amount of foodgrain to be given to them, and (3) fix the rate at which these shall be provided,"³⁰¹ no such language exists in the current version of the bill.³⁰² Rather, the draft bill allows a state government "to extend its support . . . to certain additional families in the State over and above" those identified by the Central Government, so long as that state does so through separate identification of those families, uses its own budgetary resources, and does not "reduce the scale of distribution of wheat and/or rice or food security allowance payable in lieu thereof to each identified BPL family as provided by the Government of India under the TPDS."³⁰³ This transition in language regarding BPL eligibility is significant, given that centralization of decisions such as BPL eligibility and quantity of grain allocation would have had particular impact on states such as Tamil Nadu, Andhra Pradesh, and Karnataka, where subsidized schemes are nearly universal.³⁰⁴ Finally, while the concept note proposed that BPL eligibility be

The aim of the Antyodaya Anna Yojana scheme, launched in 2000, is to provide special food-based assistance to destitute households. These households are given a special ration card (an 'Antyodaya card'), and are entitled to special grain quotas at highly subsidised prices. Against each Antyodaya card, beneficiary household or individuals are entitled to 35kg. of subsidized rice or wheat per month from the designated local ration shop. The subsidized price charged is Rs. 2/- per kg. for wheat and Rs. 3/- per kg. for rice. Under no circumstance a FPS dealer should charge any additional charges above this price.

Comm'rs to the Sup. Ct., Anyodaya Anna Yojana Scheme, <http://www.sccommissioners.org/schemes/aay> (last visited June 2, 2010).

299. See Nat'l Sample Survey Org., Ministry of Statistics & Programme Implementation, Gov't of India, *Perceived Adequacy of Food Consumption in Indian Households 2004-2005*, Report No. 512 (61/1.0/5), at 29 (Feb. 2007).

300. Himanshu, *supra* note 295.

301. Kathyayini Chamaraj, *Food Insecurity in Incredible India*, INFOCHANGE INDIA, Sept. 2009, <http://infochangeindia.org/200909037917/Agriculture/Analysis/Food-insecurity-in-Incredible-India.html>.

302. Draft National Food Security Bill, *supra* note 292.

303. *Id.*

304. Himanshu, *supra* note 295.

reassessed every five years,³⁰⁵ the draft bill does not include a reassessment provision, but instead notes that reassessment of BPL eligibility, to be undertaken by state governments, will take place at intervals prescribed by regulation.³⁰⁶

Notably, it remains to be seen how the various schemes, such as Annapoorna Yojana, the Integrated Child Development Scheme (ICDS), Mid-Day Meal Scheme (MDMS), and programs benefiting pregnant and lactating mothers, currently protected by *PUC*L will fare under the new food security act. The concept note originally proposed to bring many of the food security schemes under the single TPDS,³⁰⁷ and a glaring hole in the March 2010 draft bill is the absence of any provision that speaks directly to any of the nutrition-related *PUC*L-protected schemes, such as the ICDS and MDMS.³⁰⁸ As written, the draft bill does not include any of these schemes as entitlements.³⁰⁹ Given certain barriers to access and control over food that are specific to women and children, failing to codify programs that target women and children as entitlements could be a step back in terms of ensuring a right to food and basic nutritional intake for the most vulnerable. Notably, the exclusion of specific provisions or allocations of budgetary resources for infants and children, amongst other identified vulnerable groups, has been the subject of Right to Food advocacy actions and protests.³¹⁰ Entitlements such as mid-day meals and ICDS services, such as feeding centers for children, nutrition, healthcare and education, should be incorporated into the proposed food security act as such if the act is to fulfill the guarantees set forth by *PUC*L interim orders.

Other outstanding questions regarding the proposed food security act concern: (1) whether it includes adequate mechanisms to ensure effective enforcement and implementation of the benefits it codifies into law and (2) whether it is sufficiently comprehensive in its approach to the promotion and progression of food security in India. As mentioned, under the *PUC*L litigation, the Commission is currently tasked to carry out formal monitoring, evaluation, and implementation duties. However,

305. Sirohi, *supra* note 5.

306. Draft National Food Security Bill, *supra* note 292.

307. Sirohi, *supra* note 5.

308. Draft National Food Security Bill, *supra* note 292.

309. *Id.*

310. See Joint Statement by Annie Raja, Nat'l Fed. of Indian Women, et al., Joint Statement Calling for Food Rights of Infants (First Year of Life) (Mar. 26, 2010), available at http://www.righttofoodindia.org/data/joint_statement_26march.pdf; letter from Jean Drèze et al., Right to Food Campaign, to Manmohan Singh, Prime Minister, Government of India (Mar. 22, 2010), available at http://www.righttofoodindia.org/data/open_letter_from_right_to_food_campaignagainst_draft_national_food_security_act.pdf; *Activitists Protest Against Food Security Bill*, DAILY INDIA, Apr. 15, 2010, <http://www.dailyindia.com/show/370150.php>.

the Commission is unable to impose sanctions and is under-resourced to capacitate widespread or individual grievance redressal. Lessons from the recently enacted National Rural Employment Guarantee Act in India, which failed to provide for sufficiently strong and transparent enforcement and implementation mechanisms and thereby resulted in poor administration and disparate implementation, suggest that successful realization of a socio-economic right necessitates, at the very least, either some manifestation of an independent oversight body that would hold government accountable to the people or an effective and efficient means for people to bring their claims to court.³¹¹ Ideally the food security act would include an enforcement apparatus equipped to do both: to exercise the authority to impose firm penalties and to maintain a redressal system that allows individuals to make demands for the satisfaction of their right and receive compensation when denied the benefits they are due.

The fact that the draft act's principal focus is the targeted public distribution of foodgrains further intensifies the need for thorough monitoring of implementation mechanisms. Currently, the PDS suffers from corruption, siphoning from food stocks, and misplaced funds. A 2005 GOI Planning Commission study showed that as much as fifty eight percent of PDS-allocated grains did not reach BPL beneficiaries due to problems such as the aforementioned corruption and errors in determining eligibility.³¹² While problems in deliverance of subsidized grains could be partially alleviated by improving determining factors for BPL eligibility and digitizing PDS operations to allow for more systematic tracking, ensuring implementation of entitlements likely requires a monitoring commission or administrative body that has the authority to administer penalties and sanctions to hold government officials and approved PDS suppliers and retailers accountable.

Concerning remedies for violations of the act or noncompliance, the draft bill puts responsibility for "expeditious and effective redressal of grievances"³¹³ in the hands of the state governments, directing them to "set up effective institutional mechanisms" at the block level in addition to an appellate mechanism at the District level.³¹⁴ The language of the draft bill mirrors that of the June 2009 concept note, which also gave responsibility for enforcement and redressal to state governments.³¹⁵ The

311. See Posting of Nick Robinson to Law and Other Things: A Blog About Indian Law, the Courts, and the Constitution, <http://lawandotherthings.blogspot.com/2009/07/right-to-food-and-implementation-act.html> (July 11, 2009, 20:46 GMT).

312. Ashok Gulati, *Food Security: Time to Change Track?*, LIVEMINT.COM, June 30, 2009, <http://www.livemint.com/2009/06/29214539/Food-security-time-to-change.html>.

313. Draft National Food Security Bill, *supra* note 292.

314. *Id.*

315. Sirohi, *supra* note 5, at 19.

draft bill gives little detail as to the structure or jurisdiction of these courts, noting only at these “mechanisms” must be in accordance with subsequent regulations.³¹⁶ Interestingly, the draft bill does direct state governments to set up “Vigilance Committees” to oversee “fair price shops” (FPS) responsible for distributing TPDS grains and submit “monthly certification of confirmation of delivery of allocated foodgrains to FPS and their subsequent delivery to identified BPL families.”³¹⁷ Further, the bill also makes provision for periodic social audits of fair price shops and the TPDS.³¹⁸

While the draft bill contains important language regarding the monitoring and evaluation of the TPDS and implementation of the benefit generated by the draft bill, the benefit is limited and the remedy restricted to few. In extending standing only to identified BPL families for redressal of grievances pertaining to distribution of foodgrains through the TPDS, the draft bill provides for a narrow entitlement and makes clear that the legislation is codifying a right to a specific grain allocation and not to basic nutrition.

Civil society activists flag inadequate enforcement mechanisms as a cause for concern and advocate for the inclusion of judicial remedies in the draft act.³¹⁹ Suggestions for a more robust grievance redressal system include mirroring the Right to Information Act, which provides a procedure for complaints and appeals,³²⁰ as well as “harsh penalties for administrators who unlawfully withhold information.”³²¹ Modeling a system of constitutional torts has also been suggested, whereby denial of a codified welfare benefit, such as food entitlements, is considered a property infringement by the government. If a complainant succeeds in his or her litigation, he or she is not only awarded the benefit due, but public officials may be sanctioned, as well. Moreover, successful litigants may also be awarded attorney’s fees and other damages, which can help create incentives amongst advocates to bring these types of cases.³²²

Finally, it is important to note that effective implementation will require coordination amongst the many facets of government affected by the passing of a food security act. Currently, “nine programmes, run by five ministries, along with agencies such as the [FCI], are the respondents” before the Supreme Court, meaning they are accountable for implement-

316. Draft National Food Security Bill, *supra* note 292.

317. *Id.*

318. *Id.*

319. Robinson, *supra* note 311.

320. Right to Information Act, *supra* note 152, § 19.

321. Robinson, *supra* note 311.

322. *Id.*

ing the entitlements protected in the *PUCL* interim orders.³²³ Codifying these entitlements will necessitate comprehensive coordination amongst these key stakeholders. Crucial to delivering on the benefits included in the food security act will be the GOI's ability to bring together the many sectors, federal and state specific, affected by the right to food—such as health, agriculture, child nutrition and development, and labor—within a single implementation strategy. While no such strategy is outlined in either the June 2009 concept note or the draft act, representatives of the Office of the Commission have noted that the state government of Delhi, for example, has begun to draft strategies that address this necessity of convergence and coordination.³²⁴

In addition to potential problems related to enforcement and implementation, activists and analysts have also criticized a lack of comprehensiveness in the food security act concerning fundamental components and root causes of food security. With heavy emphasis on food subsidies, the proposed act fails to consider other essential factors of hunger alleviation, such as rural development and income security. As noted by economist Jean Dreze, hunger and malnutrition in India “have deep roots, not only in economic insecurity but also lack of education, gender inequality, social discrimination, skewed property rights and lack of basic amenities.”³²⁵ According to Dreze, a food security act, at a minimum, needs to include provisions that address these roots, such as programs that ensure direct nutritional support for children, special entitlement programs for vulnerable groups, and cash pensions for the elderly.³²⁶ The draft act's focus on the TPDS only and its exclusion of the ICDS, Antyodaya Ann Yojana, and MDMS from the codified benefit appears particularly problematic, as the draft act fails to target specific causes of hunger or barriers to food security or to protect groups most vulnerable to extreme hunger and starvation.

Disproportionate attention on the distribution of subsidized resources at the expense of developing programs that address underlying causes of hunger, such as investments in agricultural and rural development and inclusive growth, could weaken the impact of the food security act if passed in its currently proposed form. Devinder Sharma argues that “extending the same failed PDS to more families, or introducing a revamped PDS is . . . unlikely to make any meaningful difference to the

323. Patnaik, *supra* note 186.

324. *Id.*

325. Jean Drèze, *A Grain of Good Sense*, *OUTLOOK*, July 20, 2009, available at <http://www.outlookindia.com/article.aspx?250480>.

326. *Id.*

plight of the hungry and malnourished³²⁷ and that ensuring actual food security requires reviving agriculture and assisting farmers with minimum monthly income.³²⁸ Other economists have likewise expressed the necessity of livelihood remuneration, stressing that, “[t]he generation of adequate purchasing power is . . . a crucial means to ensure food security in a market economy, which India increasingly is.”³²⁹ A comprehensive food security act thus likely requires inclusion of development programs, such as those falling under the National Rural Employment Guarantee Act, which contribute to “a generalised increase in opportunity.”³³⁰ To exclude such protective measures is to render the food security act “an essential means but an ultimate irrelevance.”³³¹

Several other key features should be included in the act to ensure that it serves its objective of securing the right to food. First, it should more clearly articulate right to food principles, which requires an elaboration of the human right to food. In keeping with *PUC*L, these principles would emphasize how and why the right to food is a part of the right to life. Building on this human rights framework, the act should emphasize the active and democratic participation of society and particularly those most affected by right to food violations.³³² For example, it can (as other countries have done) establish or recommend the establishment of community level consultations and either sketch or recommend the establishment of community representation schemes designed to harness grassroots participation in the administrative mechanisms established by the act.³³³ To assist in converging and coordinating all relevant bodies

327. Sharma, *supra* note 294 (arguing that the current situation in India demonstrates the ineffectiveness of the PDS).

328. *Id.*

329. Rahul Lahoti & Sanjay G. Reddy, *Right to Food: Essential but Inadequate*, HINDU, July 28, 2009, available at <http://www.thehindu.com/2009/07/28/stories/2009072855140900.htm>.

330. *Id.*

331. *Id.*

332. FAO, *Legal and Institutional Settings for Monitoring the Right to Food*, in METHODS TO MONITOR THE HUMAN RIGHT TO ADEQUATE FOOD (2008).

333. As a potential model, Ecuador has successfully implemented a community representation scheme regarding the right to food. Its national Food Sovereignty Law 2009 created a democratic structure and work plan for the Consultative Council, the composition of which is balanced between civil society and members of the executive branch. The civil society composition is focused on representation from the groups most affected by right to food violations, such as indigenous and peasant groups. The process for selecting the six civil society members was delegated to the Council for Citizen Participation and Social Control (Consejo de Participacion Ciudadana y Control Social), a body established by the 2008 Constitution to promote citizen participation, create public discussion, ensure transparency in government and fight corruption. The process of selecting the civil society members of the Consultative Council is democratic and transparent. Thus, both the civil society half of the Council and the process through which it is comprised uphold human rights and rule of law principles, and more specifically target and ensure the input of the groups most vulnerable to right to food

within the government under a unified food security platform, the act should name specific actors and agencies and describe how they are to work together or assign the development of a coordination plan.³³⁴ Similarly, relevant laws and policies should be converged under a unified platform. Goals, benchmarks, and timeframes must be clearly articulated in the act in order to ensure that progress is made in reaching tangible steps towards the overarching goal of eradicating hunger.³³⁵ And finally, the act should call for adequate funding for its contents or designate a source(s) of funding, generally or for specific elements of the act.

CONCLUSION

By regularly issuing interim orders, *People's Union for Civil Liberties v. Union of India & Others* has gradually explicated and implemented the right to food. In addition to defining government schemes as legal entitlements, these interim orders have directed the government to fulfill previously enacted food entitlements, restated aspirational objectives as entitlements, directed modification and expansion of schemes in response to recommendations by the Commissioners and civil society, and strengthened the quality of the services and entitlements delivered to eligible beneficiaries. However, while *PUCL* has established the right to food as a constitutionally protected entitlement requiring affirmative government action to ensure its fulfillment, protection, and promotion, it remains an open case and its entitlements have not yet been secured in a final judgment. The scope of the case has expanded significantly over the last seven years in terms of both content

violations. See Ley de Soberanía Alimentaria [Law of Food Sovereignty] arts. 32-34 (2009) (Ecuador); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [Constitution] art. 208 (Ecuador). See generally the process and progress of the Consultative Council at http://www.participacionycontrolsocial.gov.ec/index.php?option=com_content&task=view&id=1495&Itemid=87.

334. FAO, *supra* note 332, at 34.

335. *Id.* Ecuador, for example, has had great success using timed benchmarks to effectuate the goals of its national right to food act. A uniquely powerful aspect of Ecuador's Constitutional right to food is that the Constitution compelled the further development of a right to food legal framework. The Constitution set out an exact timeframe for the promulgation of a food sovereignty law, requiring that such a law be drafted within 120 days of the Constitution's entry into force (Disposiciones Transitorias, Primeras, 2008 Constitution). This exact timeframe prompted action by the Asamblea Nacional, which adhered to this deadline, swiftly producing the new law, which came into effect in February 2009. In designating a precise timeframe the Constitution also assigned the development of the law to the Asamblea Nacional, thereby instructing the process through which it would be promulgated. In keeping with the effective use of exact timeframes and the specific assignment of responsibilities and actions, the Food Sovereignty Law in turn employs time sensitive deadlines and creates the Consultative Council, whose work is designed to elaborate and implement the contents and principles of the Food Sovereignty Law.

and the demands placed on government, but the form that the case and the Commission will take once a final judgment is rendered is unclear. The capacity and effectiveness of the proposed food security act remain open questions as well. The longevity of the entitlements identified and explicated in interim orders thus rests in either their inclusion in the final judgment for the *PUCCL* litigation or their codification into law.

The case likely will end with the rendering of a final judgment, in which case the multitude of interim orders issued by the Supreme Court to date will likely be important for interpreting the entitlements guaranteed in *PUCCL*'s closing order. These interim orders embody the unique and important function of PIL to combat governmental failings. The PIL's focus on the government's commission (or causation through omission) of harm to the public interest has changed the perception of the relationship between adjudication, legislation, and administration.³³⁶ Because the PIL was premised in part on the idea that the court has a duty to provide redress for human rights violations where the legislature has failed to do so³³⁷ and because this reasoning is in turn based on the idea that the legislature cannot provide the average citizen with adequate redress, the interim orders occupy an important position as the preeminent mechanisms for safeguarding the right to food. The preeminence of these interim orders resonates in Justice Bhagwati's stated belief that if the courts remain inactive, "the new social collective rights and interests created for the benefit of the deprived sections of the community [become] meaningless and ineffectual."³³⁸ The significant role played by each interim order should therefore be taken into account when evaluating the content of *PUCCL*'s closing order. The closing order may not articulate every right, remedy, duty, or procedure delineated in the interim orders, although it could confirm them all. Even if the closing order does not do so, the role the interim orders have played in articulating and giving effect to the right to food suggests the utility of their continued use in some form. Important to remember, however, is that the right articulated by and encased within the *PUCCL* litigation may also be ultimately defined not only in closing orders, but also in the codification of the proposed food security act.

PUCCL and the right to food in India is the story of democracy and civil society in action, of the strength that a social movement can lend to

336. See, e.g., TRIPATHI, *supra* note 106, at 63.

337. Bhagwati, *supra* note 96, at 566 ("The modern judiciary cannot afford to hide behind notions of legal justice and plead incapacity when social justice issues are addressed to it. . . . [A] modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice.").

338. TRIPATHI, *supra* note 106, at 65 (quoting *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149, 192 (India)).

a court case, of the fortitude that court orders can lend to a civil society campaign, and of the potential for collaboration between civil society and government. On the other hand, realization of a right to food in India also tells the story of the conflict between globalization and a human rights-based approach to food. While market economics view food as a commodity to be traded, the Indian Supreme Court and right to food civil society movement see it in terms of child nutrition, maternal health, strength to live a fully human life, and provision of an essential building block for growth and development. While there are many unique domestic features to the Indian right to food case and its corresponding civil society campaign, these aspects are fundamentally indicators of a social refusal to discard safety nets for the most vulnerable in an economically liberalized world.

Currently *PUCL*'s orders directly collide with India's NEP and its international trade and financial commitments. The present financial climate could provide India with the necessary aperture for navigating these commitments in a way that allows it to codify the most important of *PUCL*'s protections. Whether or not these changes will take place, however, cannot diminish the legal significance of *PUCL* or the significance it has had both to India's hungry and starving and to other states, as well. *PUCL*'s status as a Supreme Court case has facilitated favorable right to food decisions in lower courts throughout India.³³⁹ The precedent of *PUCL* has allowed lawyers to file dozens of similar claims in India's high courts,³⁴⁰ thereby expanding the availability of judicial remedy and the possible content of judicial orders for action. This branching out to cases in lower courts has made judicial remedies more geographically accessible and has helped to build a truly national network of right to food activists. Expanding the redressal of right to food violations in lower courts has also resulted in a more widely disseminated understanding of the legal entitlements of the right to food.

PUCL's impact extends beyond the borders of India, as well, and India currently stands as a model for other states endeavoring to explicate and implement food security as a human right. The realization of a right to food in India provides a paradigm for how legal, political, and civil society initiatives can collaborate to push such an agenda forward. Additionally, the Food and Agricultural Organization of the United Nations

339. For examples of the Human Rights Law Network—an important member organization to the Right to Food Campaign—acting as a petitioner in the *People's Union for Civil Liberties* litigation and bringing cases in state courts for grievance redressal and/or to force implementation of schemes, see, for example, Human Rights Law Network, PILs and Cases, *supra* note 127.

340. *Id.*

cites India as an example of how states can develop an effective monitoring system to sustain an established right to adequate food.³⁴¹

Indeed, *PUCL* has already motivated a similar—and successful—constitutional right to food PIL in the Supreme Court of neighboring Nepal.³⁴² Similar to *PUCL*, lawyers working in a public interest law organization filed a case on behalf of persons suffering from right to food violations who were not able to directly petition the court.³⁴³ The Nepalese right to food case explicitly cites *PUCL* and related Indian court cases.³⁴⁴ Thus, *PUCL* has set off a cascade of judicial action both within India and in its neighboring states and made India a model for how states can effectively implement economic and social human rights norms through domestic legal and administrative mechanisms. As this Article has documented, India's successful promotion, fulfillment, and current protection of the human right to food is due to its constituent parts: constitutional and judicial receptiveness; an engaged, mobilized civil society equipped with effective ways to organize people at the ground level; and the political will to maintain baseline food entitlements despite countering pressure by international trade and financial interests. Hopefully, with time, we will see other similar judicial and legislative actions regarding the right to food taking place.

The core meaning of *PUCL* is clear: the human right to life includes a legal right to food and an entitlement to basic nutritional intake. The case also demonstrates that the articulation of legal entitlements for the poor alone is not enough. To fully ensure the realization of the right, various well functioning institutional mechanisms, a highly skilled corps of public interest lawyers, a robust civil society campaign, and political buy-in from the local to the highest levels are all needed. But identifying, explicating, and taking steps to fulfill the right is the organizing principle that galvanizes the creation of institutions, the action of the lawyers and civil society, and the commitment of politicians. The right itself is the bedrock of these actions, institutions, mechanisms, and process and it is the loadstone against which they are all evaluated. The right is the framework for action and it is the lens of analysis. And thus, the right to food is a powerful, meaningful tool that can have a positive impact on the lives of the starving and hungry.

341. FAO, *supra* note 332, at 34.

342. Prakash Mani Sharma and Others on Behalf of Forum for Protection of Public Interest (Pro Public) v. Prime Minister and Office of Council of Minister and Others, Writ Petition No. 0065-w0-149 of 2065 BS (2008).

343. *Id.*

344. *Id.*