Enforcing Socioeconomic Rights in Neoliberal India

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Abstract

This Article challenges the conventional narrative on fundamental rights adjudication in India. The narrative goes like this: The Indian judiciary, led by the Supreme Court, produced several transformational decisions in the 1980s. These decisions, among other things, loosened procedural rules to permit fundamental rights petitions on behalf of poor and marginalized groups and also recognized an array of socioeconomic rights, such as rights to work and shelter. In the 1990s, however, the Court retrenched its fundamental rights jurisdiction. It has since been limited to ensuring good governance and adjudicating within neoliberal economic constraints. The Article calls this narrative into question in two ways. First, by providing a forum for civil society activism toward greater socioeconomic justice, it shows how the Court played a pivotal role in leading the Indian Parliament to pass comprehensive socioeconomic legislation that, inter alia, entrenched the rights to food and education in India. Second, though the Court issued fewer landmark judgments on socioeconomic rights, it would be mistaken to equate this with a lesser judicial role. To the contrary, the Article demonstrates how the Court took on a more substantial, governance role in which it dictated how large-scale public schemes would operate. The Court's interventions led to numerous interim orders – as opposed to a few landmark judgments – that contained detailed policy instructions to state and national governments. The Article acknowledges that some of the Court's interventions on the rights

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to food and education have been heavy-handed and ineffective. However, it also argues that the Court can still play a useful monitoring and enforcement role if it reorients its approach in a few ways.

INTRODUCTION

A. BACKGROUND

New and emerging democracies tend to adopt "thick" constitutions.[1] Such constitutions generally entrench socioeconomic guarantees or principles and designate a specialized constitutional court or supreme court as the final authority on constitutional interpretation. These constitutional design choices signal that ordinary politics will not significantly improve socioeconomic conditions and invite strong judicial intervention.[2] Moreover, these choices reflect the aspirational values of new democracies. Their constitutions do not merely set forth basic rules of governance; they also aim to be transformative.

Thus, unlike the U.S. Constitution, which is a concise document that comprises of seven articles, the Constitution of India is a sprawling document of more than 300 articles and twelve schedules.[3] India is not unique in this respect. Take, for instance, the Constitutions of South Africa and Colombia. Adopted in 1996, the South African Constitution includes a comprehensive Bill of Rights.[4] Sections 26–29 provide for justiciable rights to housing, healthcare, food, water, social security, and education that are subject to progressive realization.[5] Each of these Sections provides that the state "must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the relevant right]."[6] The 1991 Colombian Constitution goes a step further. It not only provides for justiciable socioeconomic rights, but also through a doctrine of "fundamental rights by connection," the Constitutional Court has provided for their *immediate* enforcement in certain cases to protect against

1. David Bilchitz, *Constitutionalism, the Global South, and Economic Justice*, *in* CONSTITUTIONALISM IN THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1, 42 (Daniel Bonilla Maldonado ed., 2013); Kim Lane Scheppele, *Democracy by Judiciary: Or, Why Courts Can be More Democratic than Parliaments*, *in* RETHINKING THE RULE OF LAW AFTER COMMUNISM 25, 37–38 (Adam Czarnota et al. eds., 2005).

2. David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501, 1515 (2014).

3. U.S. CONST.; INDIA CONST.

4. S. AFR. CONST. 1996, ch. II.

5. *Id.*

6. *Id.*, § 26(2).

violations of fundamental rights such as life, physical integrity, and dignity.[7]

In India, the framers of the Constitution (1950) did not include justiciable socioeconomic rights but, instead, set forth a detailed list of Directive Principles of State Policy ("DPSPs"), which are non-binding guidelines intended to guide the government, among other things, towards improving socioeconomic conditions.[8] These principles are explicitly non-justiciable; Article 37 of the Constitution states that they "shall not be enforceable by any court."[9] One of the reasons that the DPSPs are non-justiciable is that they represent aspirational long-term goals of the state that are not suited for judicial review.[10] For instance, Article 38(2) declares, "The State shall, in particular, strive to minimise the inequalities in income," while Article 39(1) requires the state to "direct its policy towards securing . . . that the citizens, men and women equally, have the right to an adequate means of livelihood."[11]

The DPSPs were placed in Part IV of the Indian Constitution. Part III, entitled "Fundamental Rights," includes, among other things, the rights to life, liberty, and equality that courts may enforce.[12] This bifurcated approach between justiciable rights and non-justiciable directive principles seeks to avoid concerns involving judicial competence and separation of powers. Thus, Part IV should give elected representatives the flexibility to pursue these goals progressively and, in light of resource constraints, without having the courts police them for constitutional compliance.

The judicial role in socioeconomic rights enforcement was transformed in the 1980s. In that decade, the Indian Supreme

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7. Bilchitz, *supra* note 1, at 65; Magdalena Sepúlvada, *Colombia: The Constitutional Court's Role in Addressing Social Injustice*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 144, 145–48 (Malcolm Langford ed., 2008).

8. INDIA CONST., Part IV. *Cf.* Tarunabh Khaitan, *Directive Principles and the Expressive Accommodation of Ideological Dissenters*, 16 INT'L J. CONST. L. 389 (2018) (arguing that the DPSPs played an important role in getting illiberal, populist groups who would otherwise opt out of a liberal Constitution to support its adoption).

9. INDIA CONST., art. 37.

10. *See* Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Political Constitutionalism*, 82 MODERN L. REV. 603, 614–16 (2019) (describing DPSPs as "obligatory telic norms" whose full realization is deferred to a future date).

11. INDIA CONST., arts. 38(2), 39(1).

12. *Id.*, Part III.

Court ("Supreme Court" or "the Supreme Court") expanded the meaning of a justiciable fundamental right—the right to life in Article 21 of the Constitution—to encompass the "right to live with human dignity."[13] This broader right brought within the judicial ambit a range of socioeconomic rights, which include workplace protections,[14] health,[15] education,[16] food,[17] and shelter,[18] among others. At the same time, the Supreme Court introduced procedural changes that made large-scale socioeconomic rights litigation possible. These changes are collectively known as public interest litigation ("PIL").[19]

Led by Justices Bhagwati and Krishna Iyer, the Supreme Court in the 1980s transformed every stage of litigation through PIL.[20] Pre-trial standing rules and filing formalities were dispensed with, allowing public-spirited citizens or NGOs to file writ petitions directly to the Supreme Court or High Courts, alleging fundamental rights violations on behalf of poor or marginalized groups.[21] Judges began to institute PILs on their own in response to newspaper articles or letters from prison inmates.[22] Evidentiary rules and the burden of proof were altered to even the playing field; socio-legal commissions of inquiry would find facts for the court and petitioners were relieved of the burden of proving their rights were violated.[23] Finally, post-trial remedies and enforcement mechanisms were molded to fit the circumstances, which often resulted in detailed instructions to state authorities to rehabilitate victims of fundamental rights violations.[24]

For the Supreme Court, and the higher judiciary generally,

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13. INDIA CONST., art. 21; Francis Coralie Mullin v. Union Territory of Delhi, (1981) 1 SCC 608 (India).

14. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (India).

15. Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37 (India).

16. Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 (India).

17. PUCL v. Union of India, Writ Petition (Civil) No. 196 (2001) (India) [hereinafter *Right to Food Case*].

18. Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545 (India).

19. For a comprehensive account and critique of PIL, *see* Surya Deva, *Public Interest Litigation in India: A Critical Review*, 28 CIV. JUST. Q. 19 (2009).

20. *See* Rehan Abeyratne, *Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy*, 39 BROOK. J. INT'L L. 1, 42–47 (2014).

21. INDIA CONST., arts., 32, 226; Deva*, supra* note 19, at 23.

22. *See* P.N. BHAGWATI, MY TRYST WITH JUSTICE 77 (2013).

23. *See* Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (India).

24. *Id.*

to assume such a substantial role in Indian political life, the political branches had to be willing to cede some authority. The Indian Parliament was initially unwilling to surrender any ground to the judiciary, particularly on the constitutional amendments power.[25] A battle for supremacy ensued between Parliament and the Supreme Court.[26] In *Kesavananda Bharati v. Union of India* (1973), the Supreme Court adopted the basic structure doctrine to be able to hold constitutional amendments unconstitutional.[27] Following this judgment, Prime Minister Indira Gandhi sought to alter the composition of the Supreme Court bench.[28] The day after the judgment's release, Mrs. Gandhi went against the tradition of seniority in judicial appointments and recommended the pro-government Justice A.N. Ray over three more senior justices (Shelat, Hegde, and Grover) who had formed part of the *Kesavananda* majority.[29] A few years later, when Justice Ray was retiring, Mrs. Gandhi passed over Justice Khanna, who had opposed a number of her administration's initiatives, for the pro-government nominee, Justice Beg.[30] In this period, Mrs. Gandhi's administration also punitively transferred judges from one High Court to another for ruling against government programs.[31]

However, the Supreme Court has since gained the upper hand on the judicial appointments process as well. Article 124(2) of the Constitution empowers the President to appoint Supreme Court justices, but requires that the Chief Justice of India be consulted.[32] In a series of cases between 1982 and 1999, known as the "Judges' cases", the Court has gradually shifted this power in favor of the judiciary, such that a small group of judges, led by the Chief Justice, has the final word on judicial appointments.[33]

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25. *See* Rehan Abeyratne, *Rethinking Judicial Independence in India and Sri Lanka*, 10 ASIAN J. COMP. L. 99, 107–10 (2015).

26. *Id.*

27. Kesavananda Bharati v. State of Kerala, (1973) SCC 225 (India).

28. Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 482 (2003).

29. GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 278–83 (1999).

30. Neuborne, *supra* note 28.

31. Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J. INDIAN L. INST. 302, 316 (1994).

32. Abeyratne, *supra* note 25, at 109.

33. *See* S.P. Gupta v. President of India, AIR (1982) SC 149 (India); Supreme Court Advocates-on-Record Association v. Union of India, AIR 1994 SC 268 (India); In re: Appointment and Transfer of Judges, AIR 1999 SC 1

The judiciary's socioeconomic rights jurisprudence fits within this broader judicial takeover of legislative and executive functions. A useful theoretical framework to draw on here is Bruce Ackerman's notion of "constitutional moments."[34] For Ackerman, popular sovereignty is expressed most clearly at times of constitutional crisis. In these moments, the "people" exercise their sovereignty to enact legitimate constitutional change, even though such change may take place outside formal amendment processes.[35] Sarbani Sen has applied Ackerman's theory in the Indian context, noting that the battle over the constitutional amendments power was a "transformative moment in the Indian constitutional tradition."[36] Sen argues that the repercussions of this controversy, including the Emergency (1975–77) and landmark post-Emergency cases such as *Minerva Mills*, stirred "public debate and prolonged [public] engagement" that transformed the amendment power under Article 368 of the Constitution.[37]

Building on Sen's account, two aspects of this transformation are relevant in the context of socioeconomic rights. First, the moment of popular sovereignty that transformed the amendments power also shifted the locus of popular legitimacy from Parliament to the judiciary. Second, and as a direct consequence of this new legitimacy, the judiciary vastly expanded its institutional authority to take over legislative and executive functions in the name of the "people". Innovations, such as relaxed standing rules, special commissioners, and continuing mandamus not only democratized the judicial process and catalyzed social movements, but also signaled that popular legitimacy has

(India); Supreme Court Advocates-on-Record Association v. Union of India, Writ Petition (Civil) No. 13 (2015) (India); *see also* Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49 GEO. WASH. INT'L L. REV. 569 (2017), for a detailed account of appointments to the higher judiciary in India.

34. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993).

35. *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1757 (2007) ("Since 1776, each rising generation has looked up the political heights to find that the government of the day was hell-bent on oppression. Time and again, the same response: organize an oppositional movement in the political wilderness, reclaim corrupt government in the name of We the People, and redefine America's constitutional future.").

36. SARBANI SEN, THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS 174 (2007).

37. *Id.* at 190.

shifted to the judiciary.[38] Moreover, the fact that the Supreme Court could essentially administer large socioeconomic programs on behalf of millions of people shows the extent to which this shift in legitimacy has been broadly accepted by both central and state governments.[39] Elected representatives might not effectively enforce judicial orders due to corruption or capacity-related reasons, but they also do not seriously challenge the Court's authority to issue detailed orders or to reprimand negligent government officials.[40]

In sum, a transformative shift occurred in the 1970s to confer substantial authority on the Indian higher judiciary, particularly the Supreme Court. The Court's expanded authority is no longer seriously contested, either by the public or by elected representatives.[41] What accounts for this decline in institutional conflict? On some accounts, the higher judiciary has usurped power from elected officials.[42] While there is some truth to this, total usurpation would be difficult to maintain unless elected representatives ceded some ground. Perhaps they acquiesced to this new institutional arrangement because the Supreme Court so effectively channeled "the people" in its PIL judgments to confer legitimacy on its judgments.[43] Political representatives may also have ceded authority to the courts for strategic reasons. For instance, they might have wanted to avoid the political costs of deciding matters of constitutional importance.[44]

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38. *Id.* at 181–89.

39. *See infra* Parts III and IV.

40. *See* SEN, *supra* note 36, at 189–91.

41. *See id.*

42. *See* Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, J. DEMOCRACY, Apr. 2007, at 72 ("[T]he [Supreme] Court has helped itself to so much power—usurping executive functions, marginalizing the representative process—without explaining from whence its own authority is supposed to come.").

43. *See* ANUJ BHUWANIA, COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA 28–31 (2017) (arguing that the Indian Supreme Court in the 1980s was able to justify departures from ordinary constitutionalism and procedures by invoking "the people" in judicial discourse).

44. This phenomenon is not limited to India. *See generally* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007) (arguing that political leaders throughout U.S. history have willingly acquiesced to judicial supremacy to avoid responsibility for constitutional interpretation on controversial issues).

B. SOCIOECONOMIC RIGHTS IN THE NEOLIBERAL ERA

Whatever the reason, this shift in the 1980s saw the higher judiciary acquire broad supremacy – supremacy that permits it to issue incredibly broad and far-reaching judgments on socioeconomic rights without substantial resistance from the elected branches of government. After the Indian Supreme Court established its supremacy and issued some of its most far-reaching socioeconomic rights judgments, including *Morcha*[45] and *Olga Tellis*,[46] the conventional wisdom is that a period of judicial retrenchment followed in the 1990s until the present day.[47] This current era is often referred to as the judiciary's "neoliberal" phase in which the Supreme Court, in particular, turned away from the needs of the poor and disadvantaged sections on society and focused, instead, on good governance and economic development.[48] This judicial turn, as the narrative goes, mirrors economic reforms that moved India from a socialist to a market-based economy, and from Nehru-Gandhi dynastic rule towards more complex and unstable coalition politics.[49]

In this Article, I challenge this conventional narrative on two grounds. First, by providing a forum for civil society activism toward greater socioeconomic justice, the Court played a pivotal role in leading Parliament to pass comprehensive socioeconomic legislation that, *inter alia*, entrenched the rights to food and education in India. Second, while the Court issued fewer landmark judgments on socioeconomic rights, it would be mistaken to equate this with a lesser judicial role. I argue that the Court took on a more substantial, governance role in which it dictated how large-scale public schemes would operate. The Court's interventions led to numerous interim orders—as opposed to a few landmark judgments—that contained detailed policy instructions to state and national governments. As I will show, some of the Court's interventions on the rights to food and education have been heavy-handed and ineffective, but these missteps have resulted from too much judicial intervention

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45. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, ¶ 2 (India) (recognizing the right to fair and safe working conditions).

46. Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545 (India) (recognizing the rights to shelter and livelihood).

47. *See* Manoj Mate, *Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India*, 28 TEMP. INT'L & COMP. L. J. 361 (2014).

48. *See id.*, at 363.

49. *See* Theunis Roux, THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW: A COMPARATIVE ANALYSIS 176–80 (2018).

rather than a neoliberal retrenchment. Indeed, I argue that in adjudicating both these rights, the Court can play a useful monitoring and enforcement role, if it reorients its approach.

The Article has four main parts. Part I looks at the apparent shift in judicial attitudes towards socioeconomic rights in the 1990s and the new millennium towards neoliberalism. The precise nature of this shift and its cause are the subject of dispute. The prevailing view is that the higher judiciary retrenched its socioeconomic rights enforcement, mirroring the concomitant neoliberal reforms in Indian politics. On a related note, some empirical studies suggest that successful PILs increasingly emanate from petitions filed by middle-class and more privileged groups, and less so by NGOs on behalf or marginalized and disadvantaged groups. Moreover, petitions to hold government policies unconstitutional with respect to key socioeconomic rights such as health and education appear to have been less successful since the 1990s. In recent years, however, the higher judiciary has also taken on socioeconomic rights cases on a truly staggering scale, most notably on the rights to food and education.

Part II describes the Supreme Court's role in mobilizing civil society towards passing comprehensive socioeconomic rights legislation. Citizen-led campaigns on the right to food and education, among others, found the Court to be a useful forum to coordinate and magnify their advocacy. This advocacy channeled through the Court and given judicial recognition, culminated in the passage of The Right of Children to Free and Compulsory Education Act ("RTE Act") and the National Food Security Act ("NFSA").[50] Part II also explains and defends the Court's intervention in these matters drawing from David Law's theory of judicial review,[51] Lani Guinier and Gerald Torres's theory of "demosprudence,"[52] and the emerging field of constitutionalism in the Global South.[53]

Part III examines the right to food in detail. In *PUCL v.*

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50. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India); The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), htttps://indiacode.nic.in/.

51. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L. J. 723 (2009).

52. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740 (2013–14).

53. *See, e.g.*, CONSTITUTIONALISM IN THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Daniel Bonilla Maldonado ed., 2013).

Union of India (2001) ("*Right to Food Case*"), the Supreme Court recognized a constitutional right to food and, in a PIL that lasted until 2017, issued several interim orders aimed at improving government food schemes.[54] Over the course of sixteen years, this litigation produced more than 50 interim orders that affected hundreds of millions of people.[55] The Court, through such interim orders, sought to address inefficiencies in the Public Distribution System ("PDS") that provides food rations to millions of people across India.[56] In 2013, Parliament enacted the NFSA, which codified much of the Court's jurisprudence and further streamlined the PDS.[57] Part III concludes by discussing drawbacks in the present legal framework and suggesting how the judiciary might be able to reorient food policy towards providing higher quality food to those most in need.

Part IV looks at judicial recognition and enforcement of the right to education. It traces the jurisprudential development of this right from the landmark judgment in *Unni Krishnan v. State of Andhra Pradesh* (1993),[58] to the Eighty-Sixth Amendment to the Constitution (2002),[59] and the RTE Act (2009),[60] which entrenched the right of children (aged 6–14) to receive a free education. It also examines recent case law and empirical studies that reveal significant gaps in educational quality and minority group attendance.[61] Part IV ends with a discussion of how the Supreme Court might usefully redirect government policy towards improving the quality of education for students and ensuring that children from disadvantaged (lower caste) groups can attend school.

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54. *Right to Food Case*, *supra* note 17.

55. *Legal Action: Supreme Court Orders*, RIGHT TO FOOD CAMPAIGN http://www.righttofoodindia.org/orders/interimorders.html (last visited Mar. 8, 2019).

56. *Right to Food Case*, *supra* note 17.

57. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India); *see* THE RIGHT TO FOOD DEBATES: SOCIAL PROTECTION FOR FOOD SECURITY IN INDIA (Harsh Mander et al. eds., 2018) for a comprehensive account of the debates leading up to the passage of the NFSA and a critique of its implementation.

58. Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 (India).

59. INDIA CONST., art. 21-A, *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002.

60. The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), htttps://indiacode.nic.in/.

61. *See, e.g.*, Envtl. & Consumer Prot. Found. v. Delhi Admin., 2012 INSC 584 (2012) (India); Jayna Kothari & Aparna Ravi, *A Battle of Rights: The Right to Education of Children Versus Rights of Minority Schools*, 16(2) OXFORD U. COMMONWEALTH L. J. 195, 210 (2016).

The Article builds on my previous work on socioeconomic rights in India, which addressed democratic and contractarian legitimacy concerns with the Supreme Court's jurisprudence.[62] By focusing on enforcement, this Article takes a more functional approach. It seeks to evaluate the Supreme Court's major interventions in practical terms and to suggest that, despite missteps and lingering concerns over the legitimacy of these interventions, the Court remains a vital institution in the delivery of socioeconomic justice.

I. A NEOLIBERAL TURN?

The neoliberal turn in India's fundamental rights jurisprudence is thought to coincide with a corresponding shift in economic policy. P.V. Narasimha Rao became Prime Minister in 1991.[63] Though he was a member of the dominant Congress Party, which had shepherded India to independence and instituted a socialist economy, Rao led India in a different direction. He launched the New Economic Policy, which aimed to deregulate India's economy, including the privatization of state-owned enterprises and liberalization of government licensing regimes.[64] In this new capitalist phase, India's middle class expanded, and social programs were redesigned in light of the market-based development policies of the Washington Consensus.[65]

The verdict on the higher judiciary in this period is that it, likewise, turned away from the poor and marginalized constituents that it championed in the 1980s.[66] There is evidence to support this position. For instance, the Supreme Court has generally upheld privatization schemes and ruled in favor of corporations vis-à-vis their employees. In *BALCO Employees Union v. Union of India*, the Court upheld the sale of a state-owned aluminum corporation to a private company, holding that economic policies would be adjudicated under a deferential

62. *See* Abeyratne, *supra* note 20.

63. *See* Roux, *supra* note 49, at 178.

64. Manoj Mate, *Globalization, Rights, and Judicial Review in the Supreme Court of India*, 25 WASH. INT'L L. J. 643, 649 (2016).

65. Roux, *supra* note 49, at 178–80; Mate, *supra* note 47, at 421–23.

66. *See, e.g.*, Roux, *supra* note 49, at 179–80; Balakrishan Rajagopal, *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective,* 18 HUM. RTS. REV. 157, 168 (2007).

rational-basis review standard.[67] The Court also held that union employees did not enjoy the right to a hearing before the sale of the corporation and noted that PILs challenging economic policies should be limited.[68] As Manoj Mate has pointed out, however, the Court in this period was willing to strike down government policies that were clearly illegal or showed evidence of corruption.[69]

More broadly, the Court shifted towards a monitoring and oversight role with a focus on upholding good governance principles. Nick Robinson has shown how Parliament, in the 1990s, as part of its neoliberal reform package, created several independent regulatory bodies including the Security and Exchange Board of India ("SEBI") and the Competition Commission in response to concerns about corruption and dysfunction in India's representative institutions.[70] The higher judiciary followed suit by acting as another independent, non-elected institution to improve governance standards.[71] As Robinson said, "What we are witnessing is not a simple struggle between the judiciary and representative bodies. Rather, it is a reconfiguration of decision-making authority more generally, as various unelected bodies use good governance principles to take on a more central role in governing."[72]

A. Exemplar Cases

Such neoliberal judicial decision-making—marked by a preference for economic development, good governance, and a lack of empathy for the poor—is most evident in cases involving environmental protection and urban slums. In the *Narmada* case, for instance, the Supreme Court permitted the construction of a large-scale dam, even though it would displace 40 million people without a clear resettlement plan.[73] For the Court, this heavy price was worth the developmental benefits of a dam, noting, "It is a fact that people are displaced by projects from their ancestral homes. Displacement of these people would

67. BALCO Employees' Union v. Union of India, (2002) 2 SCC 333 (India).

68. *Id.* at 363, 381; Mate, *supra* note 64, at 653–54.

69. Mate, *supra* note 64, at 654.

70. Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 18 (2009).

71. *Id.* at 15.

72. *Id.* at 19.

73. Narmada Bachao Andolan v. Union of India, (2000) INSC 518 (India).

undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for [sic] larger good."[74]

This "larger good" has largely been defined by a few activists, whose prominence grants them better access to the higher judiciary and greater success on some issue-driven PILs.[75] Thus, as Usha Ramanathan put it, the "public" has been taken out of public interest litigation.[76] One of the most effective petitioners has been the environmental activist M.C. Mehta, who filed four landmark PIL cases in the mid-1980s that were litigated for decades thereafter.[77] In the *Delhi Vehicular Pollution Case*,[78] Mehta filed a PIL in the Supreme Court claiming that environmental laws obligated the government to take steps to reduce air pollution in Delhi in the interest of public health. Through a range of unstructured and ad hoc orders beginning in the 1980s, the Supreme Court intervened to modify India's environmental policy substantially.[79] In 1990, the Court observed that heavy vehicles, including trucks, buses, and defense vehicles, were the primary contributors to air pollution.[80] In 1996, the Court held that all commercial transport vehicles in the city should be converted to compressed natural gas ("CNG").[81] This shift to CNG increased public transportation costs and had a disproportionately negative impact on poor commuters.[82]

The Court also authorized the establishment of the Environment Pollution (Prevention and Control) Authority ("EPCA") under the Environment (Protection) Act, 1986 for the

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74. *Id.*

75. Nivedita Menon, *Environment and the Will to Rule: Supreme Court and Public Interest Litigation in the 1990s*, *in* THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA 63–65 (Mayur Suresh & Siddharth Narrain eds., 2014); Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness, and Sustainability*, 19 J. ENVTL. L. 293, 306 (2007).

76. Usha Ramanathan, *In the Name of the People: The Expansion of Judicial Power*, *in* THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA 41 (Mayur Suresh & Siddharth Narrain eds., 2014).

77. BHUWANIA, *supra* note 43, at 50–51.

78. M. C. Mehta v. Union of India, AIR 2002 SC 1696 (India).

79. *See* Roux, *supra* note 49, at 181.

80. M. C. Mehta v. Union of India, AIR 2002 SC 1696 (India) (order dated 14 Nov. 1990).

81. *Id.* (order dated 26 Apr. 1996).

82. Rajamani, *supra* note 75, at 308–09.

National Capital Region.[83] The EPCA, which was created to provide technical and policy guidance, provided a series of reports to the Court in which it considered various clean fuels and eventually recommended CNG, a fuel that could not be adulterated, as the best option for India (since fuel adulteration is widespread in India but difficult to notice).[84] Taking judicial notice of this recommendation, the Supreme Court in 1998 ordered that the entire Delhi bus fleet be converted from diesel to CNG by March 31, 2001.[85] In several subsequent orders, the Supreme Court reprimanded the Delhi government for failing to implement the Court's orders with regard to the CNG conversion and discredited claims that CNG was not technically or economically feasible. 75 percent of the bus fleet could no longer legally operate due to the Court's intervention.[86] As Theunis Roux argues, "While it could be argued that the Court's firm stance was required to drive a necessary conversion to greener technologies, the time-frame the Court set caused great hardship to poor commuters, while leaving middle-class car drivers (who accounted for the bulk of the pollution) largely unaffected."[87]

Perhaps the most notorious example of the higher judiciary's disregard for the poor is the *Almitra Patel* case, in which the Supreme Court ordered slums in Delhi to be cleared without any regard for the livelihood or other socioeconomic rights of the slum residents.[88] The case was brought by middle-class resident welfare and trade associations,[89] who were able to convince the Court that Delhi's excess buildup of solid waste was caused by the increasing slum population. Despite publicly available evidence showing that slum residents produced less

83. Ajay Modi, *EPCA's Rise to Prominence*, BUS. STANDARD (Apr. 1, 2017), https://www.business-standard.com/article/companies/epca-s-rise-to-prominence-117040100980_1.html.

84. Rajamani, *supra* note 75, at 299.

85. M. C. Mehta v. Union of India, AIR 2002 SC (India) (order dated 28 July 1998).

86. Rajamani, *supra* note 75, at 300.

87. Roux, *supra* note 49, at 181.

88. Patel v. Union of India, (2000) 1 SCALE 568 (India); Patel v. Union of India, (2000) 8 SCC 19 (India); Patel v. Union of India, (2000) 2 SCC 166 (India).

89. Gautam Bhan, *"This is no Longer the City I Once Knew": Evictions, the Urban Poor and the Right to the City in Millennial Delhi*, 21 ENV'T & URBANIZATION 127, 128 (2009); Shreya Atrey, *Constitutional Castaway to Constitutional Mainstay: Situating the Poor in Social Rights Adjudication* (draft on file with author).

waste than their more affluent neighbors,[90] the Court ruled that the slums should be demolished and callously referred to slum residents as "pickpockets" and "waste-generating" "encroachers."[91]

In his recent book, *Courting the People*, Anuj Bhuwania puts forth a scathing critique of public interest litigation, including a chapter entitled "PIL as a Slum Demolition Machine."[92] He describes how the number of people living in slums declined from 3 million living in 1,100 *jhugi-jhumpri* clusters in 1998 to 2 million living in 665 such clusters in 2011, according to an official count.[93] The main source of this decline was the Delhi High Court, which, acting in its PIL jurisdiction, ordered municipal authorities to demolish "unauthorized construction" and to "cleanup" the city's street vendors, beggars, and cycle-rickshaw drivers.[94] As Bhuwania explains, the Delhi High Court would use PIL to intervene on a particular matter of public policy—say, air pollution or excess road traffic—and then leave the case open to deal with a range of other problems as they arose.[95]

In *Hemraj v. Commissioner of Police*, for instance, a PIL concerning goods traffic in a particular neighborhood led the Delhi High Court to demolish a slum, finding that its occupants "have buffalos and other animals" that create "unhygienic conditions" and slow the flow of commuter traffic.[96] In a later order, the Court directed the government not to licence any more cycle rickshaw drivers in Delhi to reduce traffic, which affected the livelihoods of 600,000 rickshaw drivers.[97] Bhuwania refers to these cases as "Omnibus PILs" and criticizes the higher judiciary for taking over urban governance by exploiting the unbounded and discretionary nature of PIL.[98] What is most relevant for our purposes, however, is the neglect of socioeconomic rights of poor and marginalized communities in the name of economic development. The High Court in *Hemraj* never permitted residents of urban slums to be heard before the

90. Rajamani, *supra* note 75, at 302.
91. Patel v. Union of India, (2000) 2 SCC 166 (India).
92. BHUWANIA, *supra* note 43, at 80.
93. *Id.*
94. *Id.* at 80–82, 99.
95. *Id.* at 52–53, 81.
96. WP(C) No. 3419 of 1999 (India); BHUWANIA, *supra* note 43, at 96.
97. BHUWANIA, *supra* note 43, at 96.
98. *Id.* at 9–10, 94–97.

demolition of their homes.[99] More broadly, in all these cases, "'[illegal]' citizens were not even made party to the proceedings. All problems were blamed on the conspicuous urban poor, who were seen as obstructing the neat solutions proposed to make the city come up to scratch as a 'global city.'"[100]

B. Mixed Empirical Findings

The cases above cast the higher judiciary in an elitist, anti-poor light. However, because of their exemplary—and potentially exceptional nature—it is not clear that they are representative of how higher courts in India have adjudicated cases involving socioeconomic rights or the interests of the poor more broadly since the 1990s. Several scholars have conducted large empirical studies to determine whether the neoliberal shift occurred and, more specifically, whether judges have become less receptive to cases filed by low income or marginalized groups. Varun Gauri examined the Supreme Court's docket from 1988–2007 to assess the extent to which the Court favored disadvantaged groups in PIL and fundamental rights litigation.[101] The study examined four samples of cases: 2,800 cases that the Court itself classified as "PILs", 86 fundamental rights cases concerning women's or children's rights, 180 fundamental rights cases involving Scheduled Castes and Scheduled Tribes ("SCSTs") or Other Backward Classes ("OBCs"), and 44 remaining cases from the *Manupatra* database that the Court explicitly referred to PILs.[102]

Gauri's study revealed several important aspects of the Court's fundamental rights jurisprudence. First, PIL constitutes a minuscule part of the docket – only an average of 0.4 percent of all Supreme Court cases fell within the PIL framework.[103] Second, the data showed that the number of claimants from "advantaged classes" steadily increased from the 1960s through the 2000s, though this increase corresponds with an increase in

99. *Id.* at 96

100. *Id.* at 95.

101. Varun Gauri, *Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving?*, *in* THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA 79, 89 (Mayur Suresh & Siddharth Narrain eds., 2014).

102. *Id.* at 89.

103. *Id.* at 91.

the total number of cases filed.[104] This suggests that "class bias concerns . . . are not as pronounced as some have feared."[105] Finally, in terms of case outcomes, Gauri's data reveals that "advantaged" claimants were less likely than other claimants to prevail in fundamental rights cases until the late 1980s.[106] However, since then, "advantaged" claimants have been significantly more successful.[107] In the 1990s, 68 percent of such claimants prevailed in their cases compared to 47 percent of non-advantaged claimants; from 2000–2008, the ratio was 73 to 47 percent.[108] The findings, therefore, suggest a clear neoliberal turn towards favoring more powerful interests at the expense of poor and marginalized groups.

Shylashri Shankar conducted a similar study that focused on two socioeconomic rights: the right to health and the right to education.[109] Examining all the Supreme Court and High Court cases from 1950–2006, Shankar identified 382 cases—out of more than a million—that dealt with one of these rights.[110] Her findings show that judges were more likely to rule against the state in both health and education related cases.[111] Claimants were particularly likely to succeed on matters of medical reimbursement and access to HIV medications in the health context but were less likely to prevail on public health issues.[112] On education, plaintiffs arguing for student-related issues were more likely to prevail than those bringing cases on teacher and tenure-related questions.[113] In both contexts, NGOs were substantially more successful in their claims than unions or private individuals and institutions.[114]

Despite these positive findings, Shankar concludes that the higher judiciary had a limited impact in influencing health and

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104. *Id.* at 94–95

105. *Id.* Gauri defined the "advantaged classes" as comprising members of professions (doctors, teachers, armed services), landowners, businesspeople, and those "otherwise in the global middle class". Those in the not advantaged classes include peasants, laborers, and members of SCST and OBC groups.

106. *Id.* at 98

107. *Id.*

108. *Id.* at 98–99.

109. SHYLASHRI SHANKAR, SCALING JUSTICE: INDIA'S SUPREME COURT, SOCIAL RIGHTS, AND CIVIL LIBERTIES 129 (2009).

110. *Id.* at 134, 203.

111. *Id.* at 142–43.

112. *Id.* at 142.

113. *Id.* at 143.

114. *Id.* at 142, 140–43.

educational outcomes.[115] In her words, "The dominant pattern emerging from our models is that a Supreme Court judge negotiated with the laws, political configurations, institutional, and societal concerns to construct judgments that were perceived as legitimate by these elements."[116] She also echoed Gauri in describing a shift in judicial attitudes over time. Specifically, she noted a "trend towards conservatism by the Supreme Court after 1993", as judgments issued after that date were 16 percent less likely to favor a beneficial outcome for citizens' health and education, and judges appointed before 1993 were significantly more likely to rule in citizens' favor.[117]

Sudhir Krishnaswamy and Madhav Khosla have questioned Shankar's findings, noting, among other things, that her study does not consider the reasons for particular decisions.[118] They posit that the high rejection rate of the right to health and education claims "may well be a result of the admission of a higher number of cases which are poorly drafted or pleaded."[119] Recently, a team of researchers from the National Law University, Delhi and the University of Chicago Law School decided to "build on this intuition" from Krishnaswamy and Khosla that the Supreme Court "may be taking weaker cases from certain groups and that is why those groups have a lower win rate."[120] Unlike the studies conducted by Gauri and Shankar, which focused on PIL and fundamental rights, this study focused on the Court's discretionary appellate jurisdiction. It examined every Supreme Court case published from 2010–2014 to determine the types of cases prioritized for appellate review.[121] The study found that the Court favors access for comparatively less powerful actors in three distinct areas: individuals over the government in civil cases, defendants over the prosecution in criminal cases, and claimants in constitutional cases over non-constitutional claimants.[122] Crucially, the authors draw the opposite conclusion to previous

115. *Id.* at 165–66.

116. *Id.* at 166.

117. *Id.* at 144.

118. Sudhir Krishnaswamy and Madhav Khosla, *Social Justice and the Supreme Court*, *in* THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA 109, 111 (Mayur Suresh & Siddharth Narrain eds., 2014).

119. *Id.*

120. Aparna Chandra et al., *The Supreme Court of India: A People's Court?*, 1(2) INDIAN L. REV. 145, 162 (2017).

121. *Id.* at 146.

122. *Id.* at 147.

studies, such as Gauri's, with respect to win rates.[123] They point out that the Supreme Court does not hear every case on the merits; rather, it selects a small subsection of the 60,000 appellate cases it accepts every year for a full hearing.[124] Thus, they argue that lower win rates for less advantaged claimants (such as criminal defendants and those alleging constitutional violations) suggest preferential treatment at the admissions stage.[125] In other words, the Court is admitting relatively weaker cases for merits review in these categories because of its greater receptivity to those claimants.

The upshot of these conflicting empirical studies is that the higher judiciary's turn to neoliberalism is contested and is inconsistent across different areas of the judicial docket. In the socioeconomic context, this shift is even less apparent for two reasons. First, at an empirical level, broad quantitative studies tend to focus on final judgments. This is significant because the most impactful socioeconomic rights cases from the 1990s and 2000s involved numerous interim orders. Thus, while the right to food litigation might count as a single case in a large quantitative study, it actually encompassed more than 50 interim orders, many of which had far-reaching policy effects.[126] Second, even if the higher courts have recognized fewer new rights since the 1990s, they have played a more substantial role in shaping socioeconomic policy by monitoring government compliance with legislation and, in some instances, spurring Parliament to enact new laws to realize particular socioeconomic rights at a national level.[127]

The higher judiciary, therefore, shifted to a supervisory and governance role, rather towards neoliberalism *per se*. All the hallmarks of the much-criticized neoliberal jurisprudence—antipathy towards the poor, a preference for economic development over the rights of affected communities, and a general retrenchment from rights protection—are notably absent in the right to education and right to food jurisprudence of the past twenty years. To the contrary, as the next Part shows, the Court has served a useful role in channeling civil society

123. *Id.*

124. *Id.*

125. *Id.*

126. *See Right to Food Case*, *supra* note 17; Right to Food Campaign, *Legal Action: Supreme Court Orders*, http://www.righttofoodindia.org/orders/interimorders.html (last updated Feb. 28, 2013).

127. *See* Part II(A), *infra*.

activism towards the passage of comprehensive socioeconomic legislation.

II. THE SUPREME COURT SPURRING SOCIOECONOMIC LEGISLATION

A. The Court as a Catalyst for Legal Change

The Supreme Court's socioeconomic rights adjudication over the past two decades has contributed to the passage of significant legislation. In declaring that rights to education and food are protected under the right to life in Article 21 of the Constitution, the Court has mobilized popular support and social movements to prompt elected representatives to enact the Right of Children to Free and Compulsory Education Act (2009) ("RTE Act"), and the National Food Security Act (2013) ("NFSA").[128] The Court has also intervened selectively after the passage of such laws to ensure compliance with their provisions, and to give full effect to these new constitutional rights.[129]

Before discussing the RTE Act and NFSA, it is worth noting that these are not the only pieces of socioeconomic legislation to build on Supreme Court precedent. Take, for instance, the National Rural Employment Guarantee Act (2005) ("NREGA"), which came into effect in 2005.[130] It has been referred to as the largest social protection programme in the world in terms of the number of households it covers, guaranteeing 100 days of paid employment per year to approximately 50 million rural households.[131] It also gives legislative approval to a robust and meaningful right to work/livelihood that the Supreme Court had

128. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India); The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), htttps://indiacode.nic.in/; *Right to Food Case*, *supra* note 17; Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 (India).

129. *See generally* Rehan Abeyratne & Didon Misri, *Separation of Powers and the Potential for Constitutional Dialogue in India*, 5(2) J. INT'L & COMP. L. 363, 367–83 (2018) (discussing the Court's intervention following the enactment of laws to ensure State compliance).

130. National Rural Employment Guarantee Act, 2005, No. 42, Acts of Parliament, 2005 (India); The Mahatma Gandhi National Rural Employment Guarantee Act, 2009, No. 46, Acts of Parliament, 2009 (India) (renaming the original act).

131. *Mahatma Gandhi National Rural Employment Guarantee Act: Review of Implementation*, PRS LEGISLATIVE RESEARCH, https://www.prsindia.org/theprsblog/mahatma-gandhi-national-rural-employment-guarantee-act-review-implementation (last updated Sep. 23, 2013).

previously recognized in the *Bandhua Mukti Morcha* and *Olga Tellis* cases from the 1980s. *Morcha* established that bonded labor in unsafe and unsanitary working conditions was unconstitutional,[132] while *Olga Tellis* made clear that the right to live with human dignity encompasses a meaningful right to livelihood.[133] As Chief Justice Chandrachud said in *Olga Tellis*, "If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life."[134] In that spirit, the NREGA not only guarantees employment to rural households, but also imposes a minimum wage, guarantees that work is provided within 15 days of being requested, and ensures that work sites have drinking water, crèches, and medical facilities.[135]

A few years later, the RTE Act (2009) was promulgated following landmark judicial decisions on the right to education.[136] A division bench of the Supreme Court first recognized a fundamental right to education in *Mohini Jain v. State of Karnataka* (1992).[137] Shortly thereafter, in *Unni Krishnan v. State of Andhra Pradesh* (1993),[138] a constitutional bench of the Supreme Court confirmed that the right to education falls within the ambit of the right to life under Article 21 of the Constitution.

The *Unni Krishnan* judgment would later be codified through the Eighty-Sixth Amendment Act (2002). This Constitutional Amendment, enacted by Parliament, inserted Article 21-A to Part III (Fundamental Rights) of the Constitution.[139] It declares, "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."[140]

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132. *See* Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, 168 (India).

133. *See* Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545, 546 (India).

134. *Id.* at 573.

135. National Rural Employment Guarantee Act, 2005, No. 42, Acts of Parliament, 2005 (India), at sched. II.

136. *See* The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), htttps://indiacode.nic.in/.

137. Mohini Jain v. State of Karnataka, (1992) AIR 1992 SC 1858 (India).

138. Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 (India).

139. INDIA CONST., art. 21-A, *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002.

140. *Id.*

Seven years later, Parliament enacted the RTE Act, which reiterates the fundamental right to education as stated in Article 21-A of the Indian Constitution and entrenches the provision that every child aged six to fourteen has the right to free and compulsory education.[141] Another important provision in the Act requires the state to reserve at least 25 percent of its seats for children belonging to the "weaker section and disadvantaged group [sic] in the neighbourhood."[142]

The NFSA, meanwhile, came into effect in 2013 and similarly built on prior judicial decisions.[143] On November 28, 2001, the Supreme Court issued an interim order in the *Right to Food Case*, which held that the right to food is a fundamental right under Article 21 and directed central and state government to enact a range of schemes related to food production and distribution.[144] The *Right to Food* litigation remained open until 2017, as the Court passed more than fifty interim orders that have addressed issues with the Public Distribution System (PDS) and more broadly tried to tackle issues of leakage and corruption.[145]

The NFSA aims to provide for "food and nutritional security" to ensure "access to adequate quantity of quality food at affordable prices."[146] Building on the *Right to Food Case*, the Act declares that such access is for "people to live a life with dignity."[147] It, therefore, acknowledges that the right to food is part of the right to life. The Act has 13 Chapters that provide for reforms in existing government schemes and introduces new measures to progressively realize the right to food in India.[148] For instance, Chapter II covers entitlements to eligible/priority households under existing schemes, while Chapter V of the Act focuses on reforms to the PDS and includes measures to curb corruption, such as doorstep delivery of food grains to PDS shops

141. The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), htttps://indiacode.nic.in/.

142. *Id.* § 12(1)(c); *see also infra.* Part IV.

143. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India).

144. *Right to Food Case*, *supra* note 17 (Nov. 28 2001 interim order).

145. Right to Food Campaign, *Legal Action: Supreme Court Orders*, http://www.righttofoodindia.org/orders/interimorders.html (last updated Feb. 28, 2013).

146. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), at pmbl.

147. *Id.*

148. *Id.* at ch. I-XIII.

and computerized record-keeping.[149]

Overall, judicial interventions on socioeconomic rights in recent decades have had far-reaching, positive effects. Landmark Supreme Court judgments on the rights to livelihood, education, and food have mobilized broad-based civil society activism and have led to comprehensive legislation that aims to secure each of these rights for millions of people. While the turn to neoliberalism may have occurred in other parts of the higher judiciary's docket—notably on environmental and urban planning issues—and has negatively affected the right to housing of slum dwellers, such a shift did not occur on the rights to work, food, and education. These rights received judicial recognition and, as we shall see, the Supreme Court assumed a policymaking, supervisory role over national programs aimed at fulfilling these rights.

B. Justifying the Court's Expansive Role

To make sense of the Indian higher judiciary's expanded—and traditionally undemocratic—role in enforcing socioeconomic rights and catalyzing social change, we need to move beyond the standard separation of powers framework. Constitutional theory has traditionally assigned a limited role to the judiciary. The conventional view is that the legislature should play a more prominent role because of its greater legitimacy.[150] Such legitimacy derives from the fact that legislators are popularly elected and from certain institutional advantages. This is particularly true in the realm of socioeconomic rights, as legislatures can respond more swiftly to changing circumstances and have a broader understanding of policy issues and resource constraints.[151]

We might, therefore, ask why judges who are not popularly elected but nonetheless exercise judicial review over the legislative and executive action. Alexander Bickel famously called this the "counter-majoritarian difficulty," and it has been a cornerstone of constitutional theory ever since.[152] As we will

149. *Id.* at ch. II, V; *see also infra.* Part III.

150. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 1999; Cass R. Sunstein, *Against Positive Rights*, (1993) 2/1 E. EUR. CONST. REV. 35 (1993).

151. *See* Sunstein, *supra* note 150, at 36.

152. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16 (1986).

see, however, this concern is not convincing in the Indian context and does not militate against the Indian judiciary assuming such a robust role in socioeconomic rights adjudication.

The changing role of the Indian judiciary, led by the Supreme Court, must be understood on its own terms. To that end, this section explores three recent theories of constitutionalism and judicial review. Each of these theories offers some insights on the socioeconomic rights jurisprudence in India, and, together, provide both an explanation and a justification for the higher judiciary's approach on these matters.

The first theory, set forth by David Law, provides a broad theoretical challenge to the counter-majoritarian difficulty. He argues that judicial review has been misconceived as "countermajoritarian and anti-democratic" when it, in fact, "underpins and reinforces the power of the people over their government."[153] Specifically, constitutional courts perform "monitoring, signaling, and coordination functions that facilitate the exercise of popular control over the government."[154] Law posits that a principal-agent problem is at the core of constitutional systems grounded in popular sovereignty. Representative government in these systems should act as an agent or fiduciary of the people.[155] However, it is difficult to ensure that the government will operate within the bounds of its delegated authority. The people will have imperfect information on governmental activity, which makes it difficult for them to act as direct monitors. Law also draws insights from game theory to argue that the people will face coordination and collective action problems: only strategic, collaborative efforts to challenge the government will succeed, but individuals are unlikely to mobilize in the absence of assurances that others will do the same.[156] Thus, faced with this principal-agent problem, Law suggests that constitutional courts can mitigate both the informational and coordination concerns.[157] Courts can collect, digest, and explain legal information to the public much more effectively than individual citizens could themselves.[158] Thus, courts perform a "monitoring function" by identifying and

153. Law, *supra* note 51, at 730.
154. *Id.*
155. *Id.* at 731.
156. *Id.* at 739–44.
157. *Id.* at 754.
158. *See id.* at 744.

publicizing government misconduct, particularly constitutional violations.[159] By adjudicating specific cases, courts also perform a "coordinating function."[160] The judgments arising out of cases are binding and, as Law puts it, they "enable large numbers of people to behave the *same* way, at the *same* time, and for the *same* reason."[161] All told, constitutional courts enhance representative governance by facilitating coordinated opposition to the government.

Lani Guinier and Gerald Torres' theory of demosprudence goes further to show how courts can be positive drivers of social change.[162] They describe demosprudence as a "democracy-enhancing" jurisprudence or a "jurisprudence of social movements."[163] In other words, it is a set of legal practices that are specifically aimed at social movements and bringing about social change. The term "demosprudence" describes judicial decisions in which courts draw on the collective "wisdom of the people" and gain "a new source of democratic authority when its members engage ordinary people in a productive dialogue."[164] While Guinier and Torres developed this theory in the context of U.S. constitutional law, and within the tradition of American popular constitutionalism,[165] it has been applied to other jurisdictions, including South Africa and India.[166] Upendra Baxi even went so far to claim that the Supreme Court of India "*discovered* demosprudence much before American constitutional scholars *invented* the term!"[167] As Baxi correctly points out, PIL in the Indian context is dialogical and is aimed

159. *Id.* at 754–55.

160. *Id.* at 755.

161. *Id.* (emphasis in original).

162. Guinier & Torres, *supra* note 52, at 2756; Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 142 (2007).

163. *Id.*

164. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545 (2009).

165. *See* Lani Guinier, *Foreword: Demosprudence through Dissent*, 122 HARV. L. REV. 6, 57 (2008) (citing Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R. C.L. L. REV. 373 (2007)) (noting that Demosprudence examines the judge's role similarly to Post and Siegel's "democratic constitutionalism").

166. *See* Brian Ray, *Demosprudence in Comparative Perspective*, 47 STAN. J. INT'L L. 111, 139–40 (2011); Upendra Baxi, *Demosprudence Versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, 14 MACQUARIE L. J. 3 (2014).

167. Baxi, *supra* note 166, at 8 (emphasis in original).

at democratizing the legal process itself.[168] This is particularly true with India's socioeconomic rights jurisprudence, where civil society activists are encouraged to bring cases to the courts' notice through relaxed standing requirements as well as to aid in fact-finding and the delivery of justice through an iterative process of continuing mandamus.[169]

All three pieces of legislation discussed in the previous section—the NREGA, RTE Act and NFSA—came about through civil society activism that was channeled through the courts. Particularly influential was the civil society movement in Rajasthan that brought the Right to Food litigation in response to a famine.[170] A "Right to Food" Campaign built up around this case and played an important role not only in keeping the litigation going but also in advocating for the National Food Security Act (2013) to more fully realize the right to food.[171] The Right to Food litigation also saw demands for a right to employment for rural communities. Civil society activists ensured that these demands were placed within the election manifesto of the United Progressive Alliance ("UPA"), led by the Indian National Congress, before the 2004 general elections.[172] This alliance, which would ultimately form a majority in Parliament from 2004–2014, was based on the National Common Minimum Programme ("NCMP")—a joint statement of intent.[173] The NCMP reflected the UPA's commitment to socioeconomic justice within its broader vision for economic growth and development.[174]

Following its victory in the 2004 elections, the new UPA government established a National Advisory Council ("NAC") to

168. *Id.* at 19–20.

169. *Id.* Both Guinier's demosprudence and the Indian experience with PIL also share an aversion to legal formalism. As in the Indian PIL context, demosprudence is not concerned "primarily with the logical reasoning or legal principles that animate and justify a legal opinion." *See* Guinier, *supra* note 165, at 16.

170. *About*, RIGHT TO FOOD CAMPAIGN, http://www.righttofoodcampaign.in/about (last visited Mar. 8, 2019).

171. *See National Food Security Act*, RIGHT TO FOOD CAMPAIGN, http://www.righttofoodcampaign.in/food-act (last visited Mar. 8, 2019).

172. NATIONAL COMMON MINIMUM PROGRAMME OF THE GOVERNMENT OF INDIA (2004) [hereinafter NCMP].

173. *Id.*; *see also* Deepta Chopra, *Policy Making in India: A Dynamic Process of Statecraft*, 84(1) PAC. AFF. 89, 96 (2011).

174. S. Japhet, *Inclusive Development, Civil Society and Socio-Economic Rights: Legislative Initiatives and Judicial Decisions*, 1(2) JINDAL J. PUB. POL'Y 64, 65 (2013).

implement the NCMP.[175] The NAC was comprised of several individuals who supported an employment guarantee act.[176] This allowed civil society activists more direct access to policymakers and led them to submit a draft National Rural Employment Guarantee Bill ("Act") to the NAC in its first meeting.[177] The final Act, developed by the Ministry of Rural Development, drew substantially from this draft bill.[178]

Two other laws—the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act (2014) and the Mines and Minerals (Development and Regulation) Bill (2011)—were aimed at securing the right to livelihood for specific populations.[179] The NAC assisted in the drafting of the Street Vendors Act, which grants licenses to street vendors and designates vending zones for them to carry out their business.[180] The Mines and Minerals Bill, which lapsed in 2014 and never passed into law, sought to allocate 26 percent of mining profits to affected and tribal communities.[181] The conservative National Democratic Alliance ("NDA") Government enacted the Mines and Minerals (Development and Regulation) Amendment Act in 2015, but this Act is aimed at improving the system of allocating mining licenses rather than securing the right to livelihood of those affected by mining activities.[182]

The RTE Act, and, more specifically, a commitment to inclusive, NGO-driven educational initiatives, were also part of the progressive NCMP vision.[183] Civil society activism spurred by the Supreme Court's judgments on the right to education played a crucial role in both the passage of this legislation and

175. Chopra, *supra* note 173, at 96.

176. *Id.*

177. *Id.*

178. *Id.*

179. Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014, No. 7, Acts of Parliament, 2014 (India); Mines and Minerals (Development and Regulation) Act, 2011, No. 110, Acts of Parliament, 2011 (India).

180. *Id.*

181. Sujay Mehdudia, *Mineral Bill Providing Share in Profit All Set to Lapse*, THE HINDU DIG. (Feb. 5, 2014), http://www.thehindu.com/business/mineral-bill-providing-share-in-profit-all-set-to-lapse/article5656839.ece.

182. In fact, this law might harm local communities and the environment. *See* CTR. FOR SCI. AND ENV'T, POLICY BRIEF: MINES AND MINERALS (DEV. & REGULATION) AMENDMENT ORDINANCE, 2015 5 (2015), http://www.fmar.in/attachment/Mining-Policy-Brief%20Dated%2012.01.2015.pdf.

183. NCMP, *supra* note 172, at 2–3, 6–7; Japhet, *supra* note 174, at 65.

the Eighty-Sixth Amendment to the Constitution. For instance, the National Alliance on the Fundamental Right to Education ("NAFRE"), which includes 2,400 civil society organizations spread over 15 Indian states, and the Forum for Create and Child Care Services ("FORCES") organized campaigns and other advocacy efforts to keep the issue of Constitutional amendment alive in Parliament after some failed attempts.[184] The UPA-led government finally passed the RTE Act in 2009 and devoted significant resources to improve educational capacity. Per capita spending on education increased from Rs. 888 in 2004–05 to Rs. 2,985 in 2011–12.[185]

To help secure their re-election in 2009, the UPA included a comprehensive Food Security Bill in its electoral mandate.[186] The Bill was supported by the NAC and the Right to Food Campaign.[187] Summing up the UPA position, Congress Party President Sonia Gandhi stated, "The question is not whether we have enough resources or not or whether it benefits farmers or not. We have to arrange resources for it. We have to do it."[188] The UPA retained parliamentary control in 2009 and followed through on their electoral promise to enact the NFSA.[189]

Despite the importance of civil society in bringing about these changes, the theory of demosprudence is not wholly apposite or useful in the Indian context. As an initial matter, it does not envision such a prominent role for the courts in bringing about social change. Guinier first coined the term "demosprudence" in an article about the importance of dissenting opinions.[190] She places special emphasis on dissents read from the bench (oral dissents) because of their rhetorical

184. GLOBAL EDUCATION REVIEW, LINKAGES BETWEEN LOCAL, NATIONAL AND INTERNATIONAL WORK ON EDUCATION 58 (2002), https://www.actionaid.org.uk/sites/default/files/doc_lib/140_1_global_ education_review.pdf.

185. N. Muthu, *Central Government Expenditure on Education in India During 11th Five-Year Plan*, 3(2) J. INT'L ACAD. RES. FOR MULTIDISCIPLINARY 160, 161 (2015).

186. MANIFESTO OF THE INDIAN NATIONAL CONGRESS 11 (2009), http://incmanifesto.a-i.in/manifesto09-eng.pdf.

187. Ravi S. Jha, *India's Food Security Bill: An Inadequate Remedy?*, THE GUARDIAN (July 15, 2013), https://www.theguardian.com/global-development-professionals-network/2013/jul/15/india-food-security-bill.

188. *Sonia's Ambitious Food Bill Wins LS Vote; UPA Gets Its 'Game-Changer'*, HINDUSTAN TIMES (Aug. 27, 2013), http://www.hindustantimes.com/delhi/sonia-s-ambitious-food-bill-wins-ls-vote-upa-gets-its-game-changer/story-8ru5xVabnB3P4fjYjxbQWN.html.

189. *Id.*

190. Guinier & Torres, *supra* note 52.

force and their willingness to converse with the broader public.[191] These opinions eschew formalist language and may be expressed "poetically" or in a "dramatic tone" so that they can be understood by ordinary people and galvanize social movements to advocate for reform through democratic processes.[192] Guinier also contrasted dissenting and concurring opinions with majority opinions, as majority opinions purport to settle legal issues decisively and therefore do not engage the public in discussion.[193] The goal of a demosprudential approach is to catalyze social change through non-judicial mechanisms.[194] This does not comport with the Indian template, which has been to make courts the fulcrum of social change and to rely on majority opinions—not concurring or dissenting opinions—to advance social justice.

More fundamentally, demosprudence is primarily a descriptive and advocacy-oriented rather than a normative theory. While certain elements of demosprudence—particularly the dramatic, non-formalist tone—describe the Indian judiciary's approach to socioeconomic rights adjudication, it does justify such an approach. Instead, it seeks to analyze how social mobilization can find expression in the law and to engage a broader community in rethinking the relationship between law and social movements.[195] We must, therefore, look elsewhere for a normative account of the Indian judiciary's rise, particularly to theories that focus on the judicial role and the Global South.

To that end, a literature on "constitutionalism of the Global South" is emerging.[196] David Bilchitz, within this framework, has analyzed the effects of socioeconomic rights jurisprudence on this new form of constitutionalism.[197] He notes the "express engagement with questions of distributive justice" in the constitutions of countries such as India, South Africa, and Colombia, which differentiates them from older, Northern constitutions.[198] As a result, Bilchitz identified two distinctive

191. Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B. U. L. REV. 560 (2013).

192. Guinier, *supra* note 165 at 49.

193. *Id.* at 52.

194. *Id.* at 108.

195. *See* Guinier & Torres, *supra* note 52, at 2752–56.

196. *See, e.g.*, Maldonado, *supra* note 53; CESAR RODRIQUEZ-GARAVITO & DIANA RODRIQUEZ-FRANCO, RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM OF SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH (2015).

197. *Id.* at 42.

198. *Id.*

elements of this new constitutionalism. First, socioeconomic rights are more than constitutional ideals – they must be operationalised in the form of "concrete entitlements to the poor."[199] Second, courts might have to "assume roles that are not traditional" to effectively fulfill socioeconomic rights.[200]

Along similar lines, there is David Landau's *Dynamic Theory of Judicial Role*.[201] Drawing from the judicial experiences in Colombia, South Africa, and India, Landau ventures past separation of powers formalism to defend a robust judicial role.[202] Landau's theory emerges from the observation that courts in these countries "have developed tools to protect democracies from erosion from within, to ameliorate defects in different kinds of party systems, and to build up civil society and constitutional cultures."[203] Like Guinier and Torres, he focuses on how judicial decision-making can empower civil society.[204] Thus, for Landau, the key question is not whether courts are exercising a "strong" or "weak" form of judicial review, but whether the judicial strategies employed have positive effects on democracy and political institutions.[205] As he puts it, "Aggressive interventions like those involved in the Indian case might be justifiable if they help to build up the strength of civil society, the density of constitutional culture, and the capacity of the bureaucracy."[206]

The value of this "dynamic theory" is that it accounts for the creativity and innovation that the Indian Supreme Court has shown in its socioeconomic rights jurisprudence. Such judicial methods are justified contextually, as a response to institutional and cultural challenges in countries like India. Landau is also careful to tie this justification to results; if an expanded or unorthodox judicial role fails to improve institutional and

199. *Id.* at 91–93.

200. *Id.* at 91; *see also* UPENDRA BAXI, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of Injustice*, *in* FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 168 (S.K. Verma Kusum ed., 2000) ("[N]otions of what judges may, and ought to reform are thus liable to be held within the dominant North juristic traditions. South judicial activism breaks that theoretical mould.").

201. Landau, *supra* note 2.

202. *Id.* at 1503.

203. *Id.*

204. *Id.* at 1504.

205. *Id.*

206. *Id.* at 1538.

cultural conditions, then it is not warranted.[207] This sort of practical, consequentialist reasoning is useful insofar as it sets clear standards and seeks to hold the Indian higher judiciary accountable for its (often intrusive) uses of judicial review.

Together, these theories help to reconceive and justify the role of the judiciary in adjudicating constitutional rights, including socioeconomic rights. Guinier's theory of demosprudence explains the rhetorical and jurisprudential moves that enabled India's higher judiciary to intervene so forcefully on behalf of "the people" in socioeconomic rights cases.[208] Landau's account of the judicial role adapting to endogenous institutional and cultural factors, along with Law's conception of courts as monitors and coordinators of public opposition, provides both theoretical and empirical support for the higher judiciary's interventionist approach against the separation of powers traditionalists.[209]

With this background and theoretical framework established, the following two Parts will discuss the Supreme Court's interventions on the right to food and education in detail to demonstrate (1) the high degree of judicial oversight and governance and (2) how such interventions can be reoriented towards more just and productive ends.

III. THE RIGHT TO FOOD

The Indian Supreme Court has recognized a justiciable fundamental right to food under the right to live with human dignity in Article 21 of the Constitution.[210] In the *Right to Food Case*, the Court not only conferred constitutional status on the right to food but also has proceeded to issue several interim orders aimed at improving government schemes to deliver food to the poor.[211]

This Part analyzes the legal framework that has developed around the right to food in India. It is divided into three subsections. Section A summarizes the Supreme Court's jurisprudence in this area and highlights some of the most

207. *Id.*

208. Guinier, *supra* note 191.

209. *See* Landau, *supra* note 2, at 1529. ("The Indian Supreme Court deliberately undertook a campaign of public interest litigation and as part of that campaign made access to the courts extremely easy.").

210. *Right to Food Case*, *supra* note 17.

211. *Id.*

important interim orders issued in the *Right to Food* litigation. Section B analyzes the NFSA, and how it both codified and improved upon the Supreme Court's orders. Finally, Section C considers some of the shortcomings within the present legal framework and suggests how the Court might be able to redirect food policy towards providing higher quality food to those most in need.

A. Background and Right to Food Litigation

The right to food is not explicitly guaranteed in the Indian Constitution.[212] As with other socioeconomic rights, the Supreme Court has recognized a fundamental right to food within the broad ambit of the "right to live with human dignity" under Article 21.[213] The Court has not explained how the right to food fits within Article 21, but the Directive Principles of State Policy ("DPSPs") provide some guidance.[214] They direct the government to guarantee a minimal level of nutrition to its citizens.[215] For instance, Article 39 requires the government to "direct its policy towards securing . . . that the citizens . . . have the right to an adequate means of livelihood", while Article 47 provides that the government "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."[216]

It is important to note that Article 47 is concerned not solely, or even primarily, with the availability of food supplies or food distribution, but with the nutritional quality of food.[217] As we shall see, however, the government's approach to securing the right to food, as well as the Supreme Court's interventions in this area, focus almost exclusively on food quantity and distribution, which fails to address the most pressing food-related issue in India: malnutrition.

India has a long and tragic history with hunger and malnutrition.[218] When Indira Gandhi took over as Prime Minister in 1966, she inherited a weak and troubled economy.[219]

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212. *See* INDIA CONST.
213. *Right to Food Case*, *supra* note 17 (2 May 2003 interim order).
214. INDIA CONST., art. 47.
215. *Id.*
216. *Id.*, arts. 39, 47.
217. *Id.* art. 47.
218. *Right to Food Case*, *supra* note 17.
219. Ashely Archer, Navigating the Double Bind: Exploring the Relationship

A food crisis that led to many famines plunged India into the sharpest recession since Independence.[220] To deal with chronic food shortages, Prime Minister Gandhi launched the Green Revolution in 1966, with a special emphasis on increasing agricultural output.[221] Her government also launched special packages to provide for people who were suffering from malnutrition.[222]

Alongside the Green Revolution, state-level political leaders initiated other food schemes. For instance, in the 1960s, Tamil Nadu Chief Minister K. Kamaraj introduced the Mid-Day Meal Scheme in schools.[223] The Tamil Nadu Government realized that for children to develop into healthy and productive adults, the state must protect them from childhood hunger and incentivize enrolment and attendance in school.[224] The Mid-Day Meal Scheme provides two cooked meals per day to every child in primary schools, between the age group of six to fourteen.[225] This

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Between Gender, Political Ideology, and Human Rights (2018) (unpublished B.A. thesis, Georgia Southern University) (on file with the University Honors Program, Georgia Southern University) ("[Gandhi] had inherited a weak and troubled economy upon assuming office and spent much of her efforts working towards alleviating this situation.").

220. *See generally*, M.L. Dantwala, *Agricultural Policy: Prices and Public Distribution System*, *in* 4 UNDERSTANDING INDIA'S ECONOMIC REFORMS, THE PAST, THE PRESENT AND THE FUTURE! 290, 290 (Raj Kapila & Uma Kapila eds., 2004).

221. Archer, *supra* note 219 ("[Gandhi] spearheaded what was referred to as The Green Revolution. This environmental revolution addressed the chronic food shortages that affected the poor Sikh farmers of the Punjab region, Gandhi spurred growth through the introduction of high-yield seeds and irrigation.").

222. Raj Sekhar Basu, *Understanding the Poverty Amelioration Programmes of the Congress: the Narratives from the Jawaharlal Nehru and Indira Gandhi Years*, 4(2) SOCIETAL STUD. 361, 388 (2012).

223. A. Shrikumar, *The Meal that Fed Millions*, HINDU (July 27, 2018), https://www.thehindu.com/life-and-style/food/behind-the-midday-meal-scheme-that-is-reproduced-across-the-country-today-is-madurais-century-old-sourashtra-boys-higher-secondary-school-and-its-rich-legacy-of-nutritious-food/article24529495.ece.

224. DEP'T OF SOCIAL WELFARE & NMP GOV'T OF TAMIL NADU, NATIONAL PROGRAMME OF MID-DAY MEAL IN SCHOOLS ("MDMS") ANNUAL WORK PLAN & BUDGET 2012–13 3 (2012).

225. *See id.* ("On 1st July 1982, the Puratchi Thalaivar MGR Nutritious Meal Programme was introduced and initially implemented in Child Welfare Centres for pre-school Children in the age group of 2 to 5 years and to the primary school children in the age group of 5 to 9 years in rural areas. The programme was subsequently extended to Nutritious Meal Centres in urban areas from 15th September 1982 and later extended to school students of the age group of 10 to 15 years from September 1984.").

scheme has since been adopted by all Indian states.[226]

Over the past two decades, India has made significant progress concerning food distribution. As discussed, in the *Right to Food Case*, the People's Union of Civil Liberties ("PUCL"), a non-governmental organization based in the state of Rajasthan, filed a writ petition before the Supreme Court in April 2001, requesting relief for victims of a famine in Rajasthan.[227] The petition argued, first, that the right to food was an essential component of the right to life (Article 21 of the Indian Constitution), and, second, that the response of central and state governments to the Rajasthan famine violated this fundamental right.[228]

The petition included the Food Corporation of India ("FCI") as a respondent for its mismanagement of food grain stocks.[229] The FCI had left thousands of tonnes of food grains to rot in silos, unavailable for distribution or consumption.[230] The petition also brought to light central and state government failures in the formulation and implementation of the PDS and the Rajasthan government's failure to provide adequate relief to famine victims.[231]

On November 28, 2001, the Supreme Court issued an interim order that expanded the scope of the right to life and recognized certain food schemes as legal entitlements under Article 21.[232] However, the Court did not end its inquiry there. As in *Morcha*,[233] it exercised "continuing mandamus" and kept the litigation open to retain some oversight on government food policy.[234] In some instances, the Court did not simply judge the validity of government schemes, but issued directives to the central and state governments on how schemes should be operated.

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226. *Id.* at 4.

227. *Right to Food Case*, *supra* note 17.

228. *Id.*

229. *See id.* ("[T]he case was brought against the Government of India, the Food Corporation of India (FCI), and six state governments, in the specific context of inadequate drought relief.")

230. *Id.*

231. *Id.*

232. *Id.* (28 Nov. 2001 interim order).

233. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 (India).

234. RIGHT TO FOOD CAMPAIGN, SECRETARIAT, SUPREME COURT ORDERS ON THE RIGHT TO FOOD: A TOOL FOR ACTION (Biraj Patnaik et al. eds., 2d ed. 2008) ("Supreme Court hearings on various aspects of the right to food have been held at regular intervals.").

The November 2001 Order required states and union territories to implement the Mid-Day Meal Scheme that was originally developed in Tamil Nadu.[235] State governments were also ordered to implement the National Maternity Benefit Scheme by paying all pregnant women, who were below the poverty line, Rs. 500 through the village sarpanch (leader) 8–12 weeks before delivery for each of the first two births.[236] States were also directed to implement the National Fertility Benefit Scheme in which a below the poverty line ("BPL") family would receive Rs. 10,000 within four weeks if the family's primary breadwinner died.[237]

On May 2, 2003, in a separate order, the Court asked the Government of India to evolve a system to ensure that all eligible poor families were correctly identified as falling BPL.[238] It also ordered the cancellation of licenses to ration shop dealers if they did not open on time, overcharged their customers, retained ration cards, made false entries, or engaged in the black market.[239]

As these orders show, the *PUCL* case expanded in scope dramatically beyond the initial writ petition. Though it began in response to the Rajasthan famine, it grew to cover all Indian states.[240] This was largely due to the efforts of civil society activism led by the Right to Food Campaign that built up around this case. It played a vital advocacy and monitoring role, resulting in the Supreme Court issuing more than 50 interim orders in the *PUCL* case.[241] The Campaign is also responsible for the case remaining open until 2017, as it fought to ensure that central and state governments take permanent and concrete measures to combat hunger and malnutrition across India.[242]

B. The National Food Security Act (2013)

As discussed, the Campaign's efforts to improve food security in India translated to political promises and, eventually,

235. *Right to Food Case*, *supra* note 17 (28 Nov. 2001 interim order).
236. *Id.*
237. *Id.*
238. *Id.* (2 May 2003 interim order).
239. *Id.* at 12.
240. *See* RIGHT TO FOOD CAMPAIGN, *supra* note 55.
241. *See id.*
242. *See id.*

comprehensive legislation.[243] The National Food Security Act ("NFSA") came into force on 10 September 2013.[244] It reaffirmed India's commitment to a fundamental right to food and codified the Supreme Court's ruling to that effect in the *Right to Food Case*. The NFSA is one of the largest government-sponsored food distribution programs in the world, covering 75 percent of the rural population and 50 percent of the urban population of India.[245]

The NFSA is divided into 13 Chapters that not only provide for reforms in existing government schemes but also introduce new measures to progressively realize the right to food in India.[246] Chapter II covers entitlements to eligible/priority households under existing schemes.[247] The scope of eligible households is vast. They constitute 50 percent of the urban population and 75 percent of the rural population of India.[248] These households are entitled to receive five kilograms of food grains per month under the Targeted Public Distribution System ("TPDS").[249] Certain households are entitled to receive 35 kilograms of food grains per month, at a subsidy, under the Antyodaya Anna Yojana ("AAY") scheme.[250]

Chapter V of the NFSA focuses on reforms to the TPDS. These include: (1) doorstep delivery of food grains to TPDS shops; (2) computerized record keeping; and (3), the use of "aadhar" cards to ensure greater transparency throughout the system.[251] The aadhar system is supposed to ensure that eligible

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243. *See supra* Part II.

244. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), at intro.

245. MANDER ET AL., *supra* note 57, at 1.

246. *See generally* The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India).

247. *Id.* at ch. II.

248. MANDER ET AL., *supra* note 57, at 1.

249. *Id.*

250. AAY was launched by the Prime Minister of India on December 25, 2000. *Antyodaya Scheme: Many States Yet to Identify Poor*, FINANCIAL EXPRESS (Nov. 1, 2004), https://www.financialexpress.com/archive/antyodaya-scheme-many-states-yet-to-identify-poor/118030/. Under the AAY, target groups are provided with ration cards and food grains at a subsidized price. The target groups consist of the poorest of the poor, the bottom 5% of the population that cannot get two meals a day; *see id.*

251. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), at ch. V. Aadhar cards are national identity cards containing biometric and demographic data that the Government of India aims to provide to all citizens. *Aadhaar: Everything You Need to Know About It*, THE ECON. TIMES (Oct. 9, 2014), https://economictimes.indiatimes.com/wealth/personal-finance-

households are accurately identified and targeted.[252]

Meanwhile, computerized record-keeping and doorstep delivery should ensure that food grains are not diverted to other locations, but instead, reach eligible households while being fully traceable.[253] Chapter XI of the Act seeks to improve the transparency and accountability of the TPDS.[254] It provides for periodic audits of fair price shops, as well as that all records are accessible to the public.[255]

Another important TPDS reform in the Act is that the state governments must now prioritize local bodies like Panchayats,[256] women's collectives, and self-help groups when determining who should manage fair price shops.[257] This is intended to prevent external fair price shop license holders from exploiting eligible families under the TPDS.[258]

The Act also contains several provisions aimed at women and children. Section 4 of the NFSA requires the government to provide pregnant women and lactating mothers with one free meal a day throughout their pregnancy and for six months afterward.[259] Schedule II specifies nutritional requirements that must be met.[260] These women are also entitled to receive a minimum of 6,000 rupees as a maternity benefit.[261]

Chapter VI focuses on women's empowerment. Section 13(1) provides that the State shall consider the oldest woman in every eligible household (over eighteen years of age) as the "head of the household" when issuing ration cards.[262] If the oldest woman is under eighteen years of age, Section 13(2) provides that the oldest man shall be considered as the head of the household until

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news/aadhaar-everything-you-need-to-know-about-it/articleshow/60173210.cms?from=mdr.

252. *Aadhaar: Everything You Need to Know About It*, *supra* note 251.

253. *See* The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), at ch. V.

254. *Id.* at ch. XI.

255. *Id.*

256. *Id.* Panchayats are institutions of local self-governance at the village level in India. *Panchayats*, ENCYC. BRITANNICA, https://www.britannica.com/topic/panchayat (last visited Oct. 3, 2019).

257. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), § 12(2)(e).

258. *See id.* at ch. V.

259. *Id.* § 4.

260. *Id.* at sched. II.

261. *Id.*

262. *Id.* § 13(1).

the woman turns eighteen.[263] By placing women in positions of responsibility, the Act aims to empower woman and to make them less vulnerable to exploitation.[264] The provisions that target pregnant women and lactating mothers should also ensure that they receive adequate nutrition, even if they are not eligible to receive subsidized food grains under the TPDS.[265]

With respect to children, Section 5 of the NFSA provides all children up to age fourteen with a free mid-day meal (the Mid-Day Meal Scheme) every day with a special emphasis on children between six months and six years of age, who are entitled to a free daily meal through their local *anganwadi*.[266] Schedule II further specifies the nutritional standards these meals must meet.[267] State governments are responsible for identifying malnourished children and providing them with free meals through the local *anganwadi*.[268]

C. Limitations in the Right to Food Legal Framework

Despite these efforts, however, chronic hunger and malnutrition continue to plague India. In 2018, India ranked 103rd out of 119 qualifying countries in the Global Hunger Index ("GHI").[269] In 2016, approximately 15 percent of India's total population suffered from malnutrition, almost 40 percent of children under five were stunted, and 15 percent of children

263. *Id.* § 13(2).

264. *See National Food Security Act 2013: Moving from Exclusion to Inclusion*, OXFAM INDIA (Apr. 12, 2016), https://www.oxfamindia.org/policybrief/national-food-security-act-2013.

265. *See id.*

266. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), § 5. In 1975, the Government of India initiated the Integrated Child Development Service ("ICDS") with the goal of addressing the health issues of small children all over the country. Under ICDS, one trained person—the Anganwadi worker—is chosen from the community to undergo four months of training to bridge the gap between village and organized healthcare. Anganwadi centers provide supplementary nutrition, non-formal pre-school education, nutrition and health education, immunization, health check-ups and referral services. *See generally*, Ministry of Women and Child Development, *ICDS Mission: The Broad Framework for Implementation*, GOV'T OF INDIA, https://www.bpni.org/WBW/2013/Broad-Framework-of-Implementation-ICDS-Mission.pdf (last visited Mar. 8, 2019).

267. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), at sched. II.

268. *Id.* at ch. IX.

269. *India*, GLOB. HUNGER INDEX, https://www.globalhungerindex.org/india.html (last visited Mar. 8, 2019).

were "wasted" (acutely malnourished).[270] While India has improved in recent years on these metrics,[271] the situation is still dire. The central government has acknowledged the scale of this crisis and its failure to make substantial progress in this area. In 2010, the Indian Government's Central Statistics Office stated:

> While India has been moderately successful in reducing poverty, the same cannot be said for combating hunger. Poverty Headcount Ratio projected to reach 18.6% by 2015 is likely to miss our target by about 3.5 percentage points. Proportion of population with dietary energy consumption below 2100/2400 kcal has risen from 64% in 1987–88 to 76% in 2004–05. Proportion of underweight children below 3 years declined only marginally during 1998–99 to 2005–06, from about 43% to about 40%.[272]

These statistics make for depressing reading. They also highlight two major shortcomings of the Supreme Court's jurisprudence on the right to food. First, the Court's interim orders have focused primarily on food distribution with little regard for the nutritional quality of the food. Second, while the Court has made some efforts to direct state resources towards those most in need, it has been unable to ensure that those resources actually reach intended beneficiaries. The NFSA, which largely codified the Court's orders, suffers from the same deficiencies.

1. Quantity at the Expense of Quality?

Much of the Supreme Court's jurisprudence on the right to food has focused on improving the much-maligned Targeted Public Distribution System ("TPDS") in India.[273] The TPDS is an

270. Global Hunger Index, INDIA: MAKING FOOD A RIGHT FOR ALL (2016), https://www.globalhungerindex.org/case-studies/2016-india.html (last visited Mar. 8, 2019).

271. *Id.*

272. Smt. S. Jeyalakshmi et al., *Millennium Development Goals: States of India Report 2010 (Special Edition)*, GOV'T OF INDIA CENT. STATISTICS OFFICE, MINISTRY OF STATISTICS AND PROGRAMME IMPLEMENTATION (2010), http://mospi.nic.in/sites/default/files/publication_reports/MDG_2010_18oct11_1.pdf (last visited Mar. 8, 2019).

273. *See* Ankita Aggarwal et al., *Malnutrition*, *in* THE RIGHT TO FOOD DEBATES, *supra* note 57, at 247.

extensive food distribution system that provides subsidized food grains to impoverished families across India through an expansive network of Fair Price Shops ("FPSs").[274] It has been a targeted system since 1997, with only families Below the Poverty Line (also called "BPL families") eligible to receive subsidized food grains.[275] BPL families are entitled to receive a certain quota (in kilograms) of grain every month at a low cost.[276] Central and State Governments are jointly responsible for implementing the scheme, with the latter obligated to identify BPL families, issue BPL identity cards to these families, and distribute grains through FPSs.[277]

The writ petition in the *Right to Food Case* listed several shortcomings of the TPDS: the failure of State Governments to uniformly identify BPL families, a lack of infrastructure that impeded the supply and distribution of grains, and high levels of corruption among FPS owners.[278] The Supreme Court responded to these complaints by passing three important interim orders relating to the TPDS.

First, the Court directed State Governments to complete the identification of BPL families, issue identification cards, and commence distribution of 25 kilograms of grain per family.[279] The Court also set deadlines to hasten the process.[280] Second, the Supreme Court made FPSs more accessible by directing authorities to see that all the FPSs, if closed, were reopened and started functioning within a week.[281]

Finally, the Supreme Court passed an order to make TPDS dealers more accountable.[282] The order mandated that authorities strictly instruct TPDS shopkeepers to keep their shops open throughout the stipulated period and to sell grain

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274. *See Public Distribution System: Introduction*, RIGHT TO FOOD CAMPAIGN, http://www.righttofoodindia.org/pds/pds_intro.html (last visited Mar. 8, 2019).

275. WORLD FOOD PROGRAMME, TARGETED PUBLIC DISTRIBUTION SYSTEM: BEST PRACTICE SOLUTION 5 (2014), https://documents.wfp.org/stellent/groups/public/documents/newsroom/wfp267097.pdf?_ga=2.185194913.921217990.1552031091-1429257047.1552031091 (last visited Mar. 8, 2019).

276. *Id.*

277. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), at ch. IX.

278. *See generally Right to Food Case*, *supra* note 17.

279. *Id.* (28 Nov. 2001 interim order).

280. *Id.*

281. *Id.* (23 July 2001 interim order).

282. *Id.* (2 May 2003 interim order).

strictly at BPL rates and no higher.[283] The Court also ordered authorities to cancel FPS dealers' licenses immediately if they engaged in any black market or corrupt activities.[284]

The Court has also directed states to meet basic nutritional standards within specific schemes. For instance, the 28 November 2001 interim order required state governments to provide every child with a mid-day meal that contains a minimum of 300 calories and 8–12 grams of protein for at least 200 days per year.[285] The order also directed the FCI and State Governments to jointly inspect the food grains used for mid-day meals periodically to ensure quality and safety.[286] The same order also suggested extending the mid-day meal scheme until the tenth grade, thus serving children up to 15–16 years of age.[287]

In the same order, the Court further directed states to implement the Integrated Child Development Scheme ("ICDS").[288] This scheme would ensure that every ICDS disbursing center provides 300 calories and 8–10 grams of protein for each child up to 6 years of age and 500 calories and 20–25 grams of protein for all adolescent girls.[289] Every pregnant woman and nursing mother would be given 500 calories and 20–25 grams of protein and every malnourished child would get 600 calories and 16–20 grams of protein.[290]

Schedule II of the NFSA codifies these requirements. It prescribes nutritional standards for children, pregnant women, and lactating mothers.[291] The standards are consistent with the Mid-Day Meal Scheme and the ICDS scheme for children between six months and six years of age.[292] Schedule II requires these meals to contain 450 to 700 calories and 12 to 20 grams of protein.[293] Malnourished children are to receive meals that contain 800 calories and 20 to 25 grams of protein.[294] Pregnant

283. *Id.*
284. *Id.*
285. *Id.* (28 Nov. 2001 interim order).
286. *Id.*
287. *Id.* (20 Apr. 2004 interim order)
288. *Id.* (28 Nov. 2001 interim order).
289. *Id.*
290. *Id.*
291. The National Food Security Act, 2013, No. 20, Acts of Parliament, 2013 (India), at sched. II.
292. *Id.*
293. *Id.*
294. *Id.*

women and lactating mothers' meals must contain 600 calories and 18 to 20 grams of protein.[295]

These provisions represent important steps towards ensuring basic nutritional quality. Malnourished children and pregnant or lactating women are particularly disadvantaged groups that the NFSA should target. However, even these provisions are limited.[296] They do not seek to meet the overall dietary needs of individuals within these groups, who require more than a basic caloric intake and protein to live healthy, dignified lives.[297] Moreover, neither the Supreme Court's interim orders nor the NFSA addresses the dietary needs of the millions living below the poverty line. BPL families are entitled to a ration of food grains, which, on its own, does not constitute a healthy or balanced diet.[298]

The Supreme Court should shift the focus in the current Indian legal framework on the right to food towards providing more nutritious food that meet the dietary needs of all intended beneficiaries. This shift would also reorient the legal framework to conform with the state's obligations under Part IV of the Constitution, particularly Article 47's directive that 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."[299] At present, neither the general recipients (BPL families) nor the more targeted groups (malnourished children and pregnant or lactating women) have access to food supplies of sufficient quality to meet their overall nutritional needs.

2. Directing Resources Where Most Needed

A second shortcoming of the current right to food framework in India is that it does not effectively deliver food supplies to those most in need.[300] Existing schemes within the TPDS aim to target the most vulnerable segments of society, but they have

295. *Id.*

296. *See* Ankita Aggarwal et al., *Malnutrition*, *in* THE RIGHT TO FOOD DEBATES, *supra* note 57, at 258–60.

297. *Id.* at 252.

298. *Id.*

299. INDIA CONST., art. 47.

300. *See* Ankita Aggarwal, *Selection for Targeted Entitlements in* THE RIGHT TO FOOD DEBATES, *supra* note 57, at 136–42.

not been able to deliver consistent results across India.[301] This section explores how the TPDS functions, where it runs into enforcement difficulties, and how it can be more effectively enforced going forward.

At its core, the TPDS aims to identify BPL families and ensure they receive set quantities of food grain at subsidized prices.[302] The process through which grains are procured and distributed is complicated and therefore vulnerable to leakage and corruption. The Food Corporation of India ("FCI") purchases food grains and sells them to state governments at a uniform issue price to be distributed through the TPDS.[303] State governments can then further subsidize TPDS foods or offer additional foods through the FPSs, where the TPDS grains are sold.[304] States are charged with identifying households that qualify for BPL rations.[305] States may choose to allocate additional food grains to families above the poverty line ("APL") at slightly higher prices.[306]

Within the TPDS, there is a separate programme to cater to the "poorest of the poor" called Antyodaya Anna Yojana ("AAY").[307] The Supreme Court has taken steps to address the needs of this most vulnerable group. Its order of May 2, 2003 held that six priority groups were entitled to AAY cards as a matter of right.[308] These groups were:

> (1) Aged, infirm, disabled, destitute men and women, pregnant and lactating women, destitute women; (2) widows and other single women with no regular support; (3) old persons (aged 60 or above) with no regular support and no assured means of subsistence; (4) households with a disabled adult and no assured means of subsistence; (5)

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301. *Id.*

302. *See* Dipika Jain & Brian Tronic, *Implementation of the Public Distribution System: An Empirical Analysis of the Right to Food in an Urban Slum*, 12 J. FOOD L. & POL'Y 53, 57–58 (2016).

303. Raghbendra Jha et al., *Food Subsidy, Income Transfer and the Poor*: *A Comparative Analysis of the Public Distribution in India's States*, 35 J. POL'Y MODELING 887, 888 (2013).

304. SAKSHI BALANI, FUNCTIONING OF THE PUBLIC DISTRIBUTION SYSTEM: AN ANALYTICAL REPORT 6 (2013).

305. *Id.*

306. *Id.*

307. *Antyodaya Scheme: Many States Yet to Identify Poor*, FINANCIAL EXPRESS (Nov. 1, 2004, 5:30 AM), https://www.financialexpress.com/archive/antyodaya-scheme-many-states-yet-to-identify-poor/118030/.

308. *Right to Food Case*, *supra* note 17 (May 2, 2003 interim order).

> households where due to old age, lack of physical or mental fitness, social customs, need to care for a disabled [sic], or other reasons, no adult member is available to engage in gainful employment outside the house; (6) primitive tribes.[309]

In an October 2004 order, the Court directed state governments to complete the identification of AAY families and the distribution of AAY cards by the end of that year.[310]

The TPDS reaches approximately 40 million BPL families and 24 million AAY families.[311] Partly due to its enormous scope, however, the TPDS has not functioned efficiently. The most serious concern is corruption (leakage), as a significant portion of the designated food grains are diverted to the black market. In 2004, the prominent economist and right to food activist Jean Dreze estimated that more than 50 percent of the TPDS food grains fall into the black market.[312]

When food grains reach their intended beneficiaries, further problems arise.[313] TPDS beneficiaries are regularly overcharged, provided with low-quality grains, or provided less than their full share.[314] In addition, large numbers of potential beneficiaries are excluded from the TPDS altogether.[315] This is due to significant errors in the BPL census—a central government initiative to target the correct beneficiaries. An expert group, convened in 2009 to advise the Ministry of Rural Development on its BPL census methodology, estimated that approximately 61 percent of the eligible population was not counted within the BPL category, while 25 percent of non-poor families were included.[316]

It is important to note here that the effectiveness of the TPDS varies greatly among states. Andhra Pradesh, for instance, has experienced relatively low levels of leakage (less

309. *Id.*

310. *Id.* (Oct. 17, 2004 interim order).

311. BALANI, *supra* note 304, at 4.

312. Jean Dreze, *Democracy and the Right to Food*, 39 (17) ECON. & POL. WKLY. 1723, 1727 (2004) ("[A]bout half of the grain meant for distribution to poor households through the PDS seems to end up in the black market, rising to 80 per cent in Bihar and Jharkhand.").

313. *See* Jain & Tronic, *supra* note 302, at 57–58.

314. *See* Jean Dreze & Reetika Khera, *Understanding Leakages in the Public Distribution System*, 50(7) ECON. & POL. WKLY. 39, 42 (2015).

315. *Id.*

316. BALANI, *supra* note 304, at 7.

than 10 percent of grains) and exclusion (less than 20 percent of eligible families excluded), while Assam has been significantly less effective in both areas, losing more than 30 percent of grains through leakage and excluding more than 20 percent of eligible families.[317] Thus, the TPDS has had mixed results.

A recent study shows that the TPDS has become more effective over the past few years.[318] It surveyed nine states grouped into three categories: the first category (Andhra Pradesh, Himachal Pradesh, and Tamil Nadu) has well-functioning food distributions systems; the second (Chhattisgarh, Orissa, and Uttar Pradesh) has "reviving" systems; and the third category (Bihar, Jharkhand, and Rajasthan) consists of "languishing" states.[319] The overall findings of this study suggest that the TPDS is a viable mechanism for food distribution and is not, as some have alleged, "irreparably dysfunctional."[320] Overall, 84–88 percent of the respondents surveyed received their designated food entitlement.[321]

The study highlighted several positive trends in the operation of the TPDS across all three categories of states. First, it noted the increased political interest in the TPDS over the past decade.[322] This has led, among other things, to a reduction in food grain prices, greater amounts of grain in the FCI silos that some states have used to provide larger rations to beneficiaries, and the supply of additional commodities (such as oil/kerosene, dal, and sugar) to beneficiaries in several states.[323] Second, the study found that the TPDS has become more regular, predictable, and accessible in its delivery of food grains. Several states have fixed dates for the distribution of food rations, and these dates are widely publicized.[324] Moreover, 91 percent of respondents reported that they lived within 3 kilometers of the nearest FPS—a remarkable level of accessibility given the scale of the program and India's large geographic size.[325] Finally, some of the reforms instituted by the NFSA appear to have been

317. *Id.*

318. *Cf.* Reetika Khera, *Revival of the Public Distribution System: Evidence and Explanations*, 44 & 45 ECON. & POL. WKLY. 36 (2011).

319. *Id.* at 37.

320. *Id.* at 36.

321. *Id.*

322. *Id.* at 38.

323. *Id.* at 38–39.

324. *Id.* at 42.

325. *Id.* at 39–40.

effective. The study shows that computerized record keeping, ration cards that allow beneficiaries to claim their entitlements and keep track of their purchases, and the publication of BPL family lists in some states have significantly improved the system's transparency and could potentially reduce corruption and leakage.[326]

The study also identified several problems with the TPDS, particularly in the "languishing states."[327] It found "enormous exclusion errors" in the BPL lists for Bihar, Jharkhand, and Uttar Pradesh resulting from sampling errors in the two BPL censuses (1997 and 2002) that have been conducted to date.[328] These states also suffered disproportionately from sub-standard food grains. Only 38 percent of all respondents in the study reported receiving "good quality grain."[329] In some of the "functional states," such as Andhra Pradesh, there were few complaints of poor quality grains.[330] However, close to one-third of the respondents in Bihar reported that they received poor quality grains in their last FPS purchase.[331] Concerning nutritional quality, there was again a disparity between states. The study generally found that there was "not much dietary diversity" among BPL families, but an "alarmingly high" number of respondents in Bihar and Rajasthan reported eating only rice or roti for the previous day's evening meal.[332]

3. A Continuing Role for the Supreme Court

The Supreme Court can play a useful role in bringing to light these discrepancies and holding authorities in the "languishing" or backward states accountable for their failures. By realigning food policy towards nutritional quality and the dietary needs of those most in need, the Court could intervene selectively to ensure that higher quality grains are distributed to all TPDS beneficiaries, that a wider variety of commodities, including oil and lentils, are delivered to BPL and AAY families throughout India, and that backward states undertake their own

326. *Id.* at 46–47.
327. *Id.* at 37.
328. *Id.* at 40 (internal quotation marks omitted).
329. *Id.* at 42.
330. *Id.*
331. *Id.*
332. *Id.* at 43 ("The figures for Bihar and Rajasthan are alarmingly high – 13% and 29% respectively.").

BPL censuses to improve their targeting and delivery systems. In this role, the Court would highlight shortcomings in the central and state governments' execution of the schemes provided within the NFSA, and require governments to comply with statutory requirements.

The Court had the opportunity to perform this function in *Swaraj Abhiyan v. Union of India* (2016).[333] The case emerged from a writ petition filed by an NGO under Article 32 of the Constitution in response to a drought affecting twelve Indian states.[334] While nine of these states officially declared that there was a drought in some of their districts, three states—Bihar, Gujarat, and Haryana—did not do so."[335] The petitioner asked the Court, among other things, to direct those states to declare a drought and to provide "essential relief and compensation" to affected communities.[336] It also requested directions to the central government and the impugned states to enforce existing legislation that would provide food grains to those harmed by the drought.[337]

Before proceeding to the merits, the Court explained the scope and nature of PIL. It said that PIL "presents the Court with an issue-based problem concerning society and solutions need to be found within the legal framework."[338] It added that sometimes, "the cause of the problem is bureaucratic inactivity and apathy," while in other instances the cause is "executive excesses" or the "ostrich-like reaction of the executive."[339] Perhaps anticipating criticism against its intervention, the Court went on to say that its actions are "often pejoratively and unfortunately described as judicial activism."[340] It dismissed these concerns, noting that "those who benefit from judicial activism shower praise and those who are at the receiving end criticise it. *C'est la vie!*"[341]

In subsequent orders, the Court focused on the

333. Swaraj Abhiyan v. Union of India, (2016) 7 SCC 498 (India).
334. *Id.* at 507–08.
335. *Id.* at 508.
336. *Id.*
337. *Id.*
338. *Id.* at 510.
339. *Id.*
340. *Id.*
341. *Id.* at 511; Rehan Abeyratne & Didon Misri, *Separation of Powers and the Potential for Constitutional Dialogue in India*, 5(2) J. INT'L & COMP. L. 363, 382 (2018).

implementation of the NFSA within drought-affected areas.[342] It noted that many states had not implemented some of the NFSA's key provisions.[343] It ordered all states named in the petition to establish internal grievance mechanisms within one month and state food commissions within two months of the order."[344] It also required Bihar, Uttar Pradesh, and Haryana to provide adequate eggs, milk, and other nutritional substitutes to children under the Mid-Day Meal Scheme.[345]

At the end of its judgment, the Court stressed the importance of its continuous mandamus jurisdiction, calling it "an integral part of our constitutional jurisprudence."[346] It ruled that the case would be kept open "to monitor the implementation of its orders and . . . monitor investigations into alleged offences" when the government "stonewall[s]."[347]

Despite the problematic aspects of this judgment,[348] the Supreme Court can continue to enhance representative democracy in India through collecting, digesting, and disseminating information to the public, and monitoring government compliance.[349]

IV. THE RIGHT TO EDUCATION

The right to education is a constitutionally protected right in India. In *Unni Krishnan v. State of Andhra Pradesh* (1993), the Indian Supreme Court declared that the right to education comprises part of the fundamental right to life under Article 21 of the Indian Constitution.[350] In 2002, through the Eighty-Sixth Amendment Act, the Indian Parliament amended the Constitution to insert a fundamental rights provision, Article 21-A.[351] It requires the state to provide free and compulsory

342. Swaraj Abhiyan v. Union of India, at 534; Abeyratne & Misri, *supra* note 341, at 382–83.

343. Swaraj Abhiyan v. Union of India, at 535–36; Abeyratne & Misri, *supra* note 341, at 383.

344. Swaraj Abhiyan v. Union of India, at 543.

345. *Id.*

346. *Id.* at 564.

347. *Id.*; Abeyratne & Misri, *supra* note 341, at 383.

348. *See* Abeyratne & Misri, *supra* note 341, at 383–84, for a full discussion of the problematic aspects of this case.

349. *See* Law, *supra* note 51, at 730–55.

350. Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645, 654–55 (India).

351. *Right to Education*, MINISTRY OF HUMAN RES. DEV., GOV'T OF INDIA

education to all children aged 6–14 in such a manner as the state may determine.[352] In 2009, the Indian Parliament enacted the Right of Children to Free and Compulsory Education Act ("RTE Act") to give the central and state governments specific directions on how to fully realize the constitutional right to education.[353]

This Part analyzes judicial enforcement of the right to education in India. It has four subsections. Section A overviews the Supreme Court judgments that recognized the right to education as a justiciable constitutional right, which led to a constitutional amendment within Article 21 of the Constitution. Section B discusses the RTE Act (2009) and its major provisions, while Section C examines some of the litigation brought before the Supreme and High Courts to enforce the Act. Section D explores how the judiciary might usefully monitor the right to education, while not overextending itself in light of institutional capacity constraints.

A. Background and Major Litigation

The Indian Constitution ("Constitution") contains several education-related provisions. Part III of the Constitution includes fundamental rights that prohibit the state from discriminating against minorities in education.[354] Article 29 states that no citizen may be denied admission into a state-run or state-funded educational institution on the grounds of religion, race, caste or language.[355] Article 30 grants all minorities the right to establish and administer their own educational institutions whether based on religion or language.[356]

Article 45, one of the DPSPs in Part IV of the Constitution, provides, "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."[357] It is worth noting that this provision, unlike most other DPSPs, was originally time-bound—the state was expected to fulfill its obligation to provide free education for all

(Feb 11, 2019, 2:55 PM), https://mhrd.gov.in/rte.

352. *Id.*
353. *Id.*
354. INDIA CONST., pt. III.
355. INDIA CONST., art. 29, cl. 2.
356. INDIA CONST., art. 30, cl. 1.
357. INDIA CONST., art. 45.

children in ten years.[358]

The first case that declared a "positive" right to education under the Indian Constitution was *Mohini Jain v. State of Karnataka* (1992).[359] Mohini Jain, a non-Karnataka student, applied for admission to a private medical college in Karnataka.[360] Her admission was conditioned on payment of a "capitation fee"—a fee based on the number of persons to whom a service is provided—rather than the actual cost of providing a service, and was imposed on those who wanted to enter a private medical school and were not admitted to the "government seats."[361] Government seats were reserved for Karnataka residents as well as Scheduled Tribes, Scheduled Castes, and other Backward Classes.[362] Ms. Jain challenged the constitutionality of this capitation fee before a two-judge Division Bench of the Supreme Court.[363] She argued, among other things, that the Constitution confers a fundamental right to education and that this fee violates Article 14's guarantee of the right to equality as the fee was arbitrary, unfair and unjust.[364] Relying on Article 21 and several DPSPs (including Article 45), the Division Bench held that there is a right to education under the Constitution as this right flows directly from the right to live with dignity originally recognized under Article 21 in the *Francis Coralie* case.[365] It held, therefore, that the capitation fee charged to Ms. Jain was unconstitutional under Article 14 and prohibited the state government from charging such a fee to students in private colleges.[366]

The following year, in *Unni Krishnan v. State of Andhra Pradesh* (1993), a Constitutional Bench of the Supreme Court reexamined the *Mohini Jain* judgment.[367] Justice B.P. Jeevan

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358. The Constitution was amended in 2002 to insert the right to education as a fundamental right with no time limitation. *See* INDIA CONST., art 21-A, *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002.

359. Mohini Jain v. State of Karnataka and Ors, AIR 1992 SC 1858 (India).

360. *Id.* at 6.

361. *Id.* at 6.

362. *Id.* at 7.

363. *Id.* at 1.

364. *Id.* at 7.

365. *Id.* at 9.

366. *Id.* at 13.

367. Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 (India). Article 145(3) of the Constitution requires at least five justices to adjudicate "a substantial question of law as to the interpretation of [the] Constitution." INDIA CONST., art. 145(3).

Reddy, writing for the Court, mostly upheld the prior judgment, but limited it in important ways. The Court held that the right to education is implicit within the fundamental right to live with dignity under Article 21 of the Constitution.[368] The Court emphasized that the parameters of this right must be understood in the context of the DPSPs, particularly Article 45, which required the state to provide free and compulsory education to all children under fourteen within ten years.[369] As 44 years had passed since the enactment of the Constitution, and universal primary education had not been instituted in India, the Court ruled that Article 45 had been effectively converted from a DPSP into a fundamental right.[370]

However, the Court made clear that the right to education only applied to children until the age of fourteen.[371] For secondary and higher education, the right would be subject to the limits of economic capacity and development of the state as per Article 41 of the Constitution.[372] The Court lent support to this argument by citing Article 13 of the International Covenant on Economic, Social and Cultural Rights, which requires states to take steps to the maximum of its available resources to progressively realize of the right of education.[373]

Thus, while it was narrower than the *Mohini Jain* judgment, the Constitutional Bench's decision in *Unni Krishnan* made clear that the Indian Constitution recognizes a fundamental, enforceable right to education to all children until the age of fourteen.[374] The *Unni Krishnan* judgment was entrenched less than a decade later through the Eighty-Sixth Amendment Act (2002).[375] This constitutional amendment inserted Article 21-A to Part III (Fundamental Rights) of the Constitution and provides, "The State shall provide free and

368. Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645, 655 (India).

369. *Id.* at 656.

370. *Id.*

371. *Id.* at 657.

372. *Id.*

373. INDIA CONST., art. 21-A, *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002.

374. *See* Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645 (India).

375. For a detailed analysis of the process that led to this constitutional amendment, *see* Philip Alston & Nehal Bhuta, *Human Rights and Public Goods: Education as a Fundamental Right in India*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT (Philip Alston & Mary Robinson eds., 2005).

compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."[376]

B. The RTE Act

To operationalize and give substance to this right, Parliament enacted the RTE Act in 2009.[377] The RTE Act came into effect on 1 April 2010.[378] Section 3 of the Act sets out its broad objective to provide free and compulsory education to all children from ages six to fourteen.[379]

Section 12(1)(c) requires the state to reserve at least 25 percent of its seats for children belonging to the "weaker section and disadvantaged group [sic] in the neighbourhood."[380] The Act also contains important prohibitions on schools. Section 13, for instance, prevents schools from charging any capitation fee and from subjecting children to screening procedures for admission.[381] Section 14 prevents the denial of admission for lack of age proof, while Section 16 prohibits schools from expelling or holding back students in any class until the completion of elementary education.[382] Finally, Section 17 provides that no child shall be subjected to physical punishment or mental harassment.[383]

The Act divides implementation responsibilities among the central government, state governments, and local authorities. Section 6 states, "the appropriate Government and the local authority shall establish . . . a school, where it is not so established, within a period of three years from the commencement of this Act."[384] Section 8 provides that the

376. INDIA CONST., art. 21-A, *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002. Following the passage of the 86th Amendment, the BJP-led National Democratic Alliance (NDA) government initiated the *Sarva Siksha Abhiyan* (SSA) program in 2001. SSA aimed to achieve universal elementary education as the 86th Amendment envisioned. While the SSA remains in force today, the RTE Act is the principal legislation on the right to education in India). *See* S.K. DAS, INDIA'S RIGHTS REVOLUTION: HAS IT WORKED FOR THE POOR? 250–51 (2013).

377. The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), htttps://indiacode.nic.in/.

378. *Id.* § 1(3).

379. *Id.* § 3.

380. *Id.* §§ 2(n), 12(1)(c).

381. *Id.* § 13.

382. *Id.* §§ 14(2), 16.

383. *Id.* § 17.

384. *Id.* § 6.

"appropriate Government" shall provide free and compulsory elementary education to all children.[385] This includes ensuring compulsory admission, attendance, and completion of elementary schooling in addition to providing the proper infrastructure, teacher training facilities, and quality control.[386] Section 9 gives every "local authority" similar responsibilities including, *inter alia*, ensuring that every child gets a free, compulsory elementary education, ensuring that children belonging to "weaker" sections are not discriminated against, and providing infrastructure, teacher training, and quality control of curricula.[387]

The phrase "appropriate government" refers to state and union territory governments except in union territories without a legislature or in instances where a school is established, owned, or controlled by the central government.[388] In those cases, the central government is the "appropriate government."[389] "Local authority" refers to any municipal government or panchayat that has administrative control over a school or a local municipality.[390] Thus, in most cases, it is the responsibility of state governments and town/village level governments to ensure that the core objectives of the Act—to provide free, compulsory elementary education to all children—are fulfilled.

Since the RTE Act was enacted in 2009, all state governments have issued RTE Rules or adopted the Central RTE Rules.[391] Several states have issued instructions/notifications in order to (a) ban capitation fees, corporal punishment, detention and expulsion, and private tuition by school teachers; (b) specify working days/instructional hours; and (c) constitute the State Commission for the Protection of Child Rights ("SCPCR") or Right to Education Protection Authority ("REPA").[392]

The central government has also taken several steps towards implementing the RTE Act. Under Section 33(1), a

385. *Id.* § 8.
386. *Id.*
387. *Id.* § 9.
388. *Id.* §§ 2(a), 6, 8.
389. *Id.* § 7(6).
390. *Id.* §§ 2(h), 6, 9.
391. *State-Wise Information*, RIGHTTOEDUCATION.IN, http://righttoeducation.in/resources/states (last visited Mar. 9, 2019).
392. Chanchal Chand Sarkar, *Right of Children to Free and Compulsory Education Act, 2009 and Its Implementation*, INDIA INFRASTRUCTURE REP. 2012 38 (2013) (India), http://www.idfc.com/pdf/report/2012/chapter_3.pdf.

National Advisory Council was to be established to advise the central government on implementing the Act. This Council was created on 29 March 2010.[393] Also, the National Council for Teacher Education ("NCTE") and the National Council of Educational Research and Training ("NCERT") have been notified as the academic authorities under Sections 23(1) and 29(1) of the RTE Act respectively.[394] This means that they are responsible for appointing teachers as well as determining curricula and evaluation procedures for elementary education. The NCTE has set forth the minimum qualifications for teaching appointments in schools.[395]

C. Litigation After the RTE Act

The Supreme Court has heard several cases on the right to education since the passage of the RTE Act. These include challenges to the constitutionality of the Act and enforcement actions to ensure government compliance with several of the Act's provisions. The Court has upheld the Act's constitutionality and has sought to hold government actors, particularly state government actors, responsible for its proper enforcement.

As we will see, however, the RTE Act, and the Court's interpretations of it, focus largely on ensuring universal primary education and equal access for disadvantaged groups. There is little attention paid to educational quality or the provision of secondary and higher education, while disadvantaged children still face substantial obstacles to attend school.

1. Reservations under Section 12(1)(c)

The constitutionality of Section 12(1)(c), which requires schools to reserve at least 25 percent of their seats for children belonging to "weaker section and disadvantaged group [sic] in the neighbourhood," was challenged in *Society for Un-Aided Private Schools of Rajasthan v. Union of India* (2012).[396] A three-judge bench of the Supreme Court had to determine, among

393. *Id.* at 37.

394. *Id.* at 38.

395. *Id.*

396. *See generally* Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1 (India).

other things, whether this provision violated the Constitution as applied to minority educational institutions. These institutions were considered "schools" under Section 2(n) of the Act and, therefore, subject to all of its provisions.[397]

In a previous landmark case, *T.M.A. Pai Foundation v. Union of India* (2002), the Supreme Court had ruled that Article 19(1)(g) of the Constitution protects the right to establish private educational institutions.[398] Article 19(6) limits the scope of Article 19(1)(g), permitting the government to legislate in the "interests of the general public" and to place "reasonable restrictions" on this right.[399] *T.M.A. Pai* also established the right of minority groups to form educational institutions under Article 30(1) of the Constitution, though this right was also not absolute. It may be regulated subject to "the national interest."[400]

In *Society for Un-Aided Private Schools*, the issue before the Court was whether Section 12(1)(c) of the RTE Act permissibly limited the right of minority groups to establish and administer educational institutions under Article 30(1) of the Constitution.[401] The Court distinguished between aided (government funded or supported) and unaided (private) minority schools. It said that, in private schools, reserving a quarter of the seats for children from "weaker and disadvantaged" backgrounds "would result in changing the character of the schools."[402] Since the purpose of private minority schools is to preserve the "language, script or culture" of a particular group, the reservation was held unconstitutional as applied to these schools.[403] However, the Court noted that Article 29(2) of the Constitution, which guarantees all citizens the right to be admitted to any state educational institution, applies to government (aided) schools.[404] Thus, Section 12(1)(c) of the RTE Act was constitutionally valid as applied to these

397. The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India) at ch. 1, § 2(n), htttps://indiacode.nic.in/.

398. *See also* INDIA CONST., art. 19(1)(g) (providing for the freedom to "practice any profession . . . occupation, trade, or business"); *see generally* T.M.A. Pai Foundation v. Karnataka, (2002) 8 SCC 481 (India).

399. INDIA CONST., art. 19(6).

400. *T.M.A. Pai Foundation*, (2002) 8 SCC at 563.

401. *See generally* Society for Unaided Private Schools of Rajasthan, (2012) 6 SCC 1 (India).

402. *Id.* at 43.

403. *Id.*

404. *Id.*

schools.[405]

This case was later referred to by a Constitutional Bench of the Supreme Court in *Pramati Educational & Cultural Trust v. Union of India*.[406] *Pramati* upheld the *Society for Un-Aided Private Schools* judgment insofar as it held that the RTE Act violated the Article 30(1) right of unaided minority schools to administer themselves.[407] However, the Constitutional Bench overturned the Division Bench's judgment as to government-funded minority schools. *Pramati* declared that religious and linguistic minorities have a "special constitutional right" under Article 30(1) to establish and administer schools of their choice and that "the State has no power to interfere."[408] Though the state may issue regulations, it cannot "force admission" of non-minority students that would "affect the minority character" of these institutions.[409] Thus, Article 21-A of the Constitution, which inserted a fundamental right to education, limited the Article 30(1) right to minorities, whether private or government-funded.[410]

Both *Society for Un-Aided Schools* and *Pramati* display admirable respect for the right of minority institutions to protect their own linguistic, religious, and cultural traditions. However, they fail to reconcile the interests of "minority groups" under Article 30(1) with the broader societal interests Parliament sought to advance through the RTE Act.[411]

Section 12(1)(c) RTE Act sought to realize the right to education for the "backward classes."[412] Rather than accommodate the needs of these marginalized communities, the Court simply ruled in favor of the minority institutions in both cases.[413] Perhaps the Court wanted to avoid the constitutional

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405. *Id.*

406. Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1, 2–3 (India).

407. Rehan Abeyratne, *Privileging the Powerful: Religion and Constitutional Law in India*, 13 ASIAN J. COMP. L. 307, 328 (2018).

408. Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC at 269 (India).

409. *Id.*

410. *See id.* at 270.

411. For a detailed analysis on this point, *see* Abeyratne, *supra* note 407, at 326–30 (2018).

412. The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), § 12(1)(c), htttps://indiacode.nic.in/.

413. *See* Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1 (India); Society for Unaided Private Schools of Rajasthan, (2012) 6 SCC 1 (India).

dilemma of balancing Article 21-A with Article 30(1). Still, it could have followed *TMA Pai* in declaring that Article 30(1) is not an absolute right and must abide by regulations advancing the national interest, which is precisely what the RTE Act seeks to do.[414]

Pramati is likely to have a disproportionate impact on these disadvantaged students. The judgment fails to provide criteria or guidelines to clarify what constitutes a minority educational institution, which has led to "significant abuse of the RTE Act's exemption for minority schools."[415] Many schools have opportunistically sought the minority institution exemption to avoid their responsibility to admit and educate students from the "weaker" and "disadvantaged" segments of society.[416] In light of such evidence, the Court should reconsider its judgment in *Pramati*, and seek to ensure the fair application of the RTE Act to students most in need.

2. Directions to Improve School Infrastructure

In *Environmental and Consumer Protection Foundation v. Delhi Administration* (2012), a registered charitable society filed a writ petition before the Supreme Court requesting several directions to improve school infrastructure.[417] The petition was originally filed in 2004, five years before the enactment of the RTE Act (2009).[418] However, the Court issued its judgment on 3 October 2012, holding that the right to education encompasses the provision of school infrastructure.[419] It ordered states to provide basic infrastructural needs, such as toilets, drinking water, and working classrooms, to ensure a healthy learning environment for students.[420] The Court directed states to comply with these directions within six months from the date of the judgment.[421] It further clarified that these directions would apply to all schools, including private (unaided) and minority

414. *See* T.M.A. Pai Foundation v. Karnataka, (2002) 8 SCC 481 (India).

415. Kothari & Ravi, *supra* note 61, at 210.

416. *Id.* at 200; The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), § 12(1)(c), htttps://indiacode.nic.in/.

417. *See* Envtl. & Consumer Prot. Found. v. Delhi Admin., (2012) Writ Petition (Civ.) No. 631 of 2004 (India).

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.* at ¶ 9.

schools.[422] Before this judgment, the Court issued a series of interim orders in 2011 and 2012 that required states to ensure proper toilet facilities, including permanent facilities wherever possible, were installed in all schools.[423]

The Court further directed all states to file affidavits on the sanitary conditions within their schools.[424] Many states failed to do so, while others filed affidavits attesting to the fact that many of their schools lacked proper toilet facilities.[425] The Court stated that if its directions were not followed, individuals or concerned groups could file petitions seeking appropriate relief.[426]

In a subsequent order, the Supreme Court also directed states to report on teaching and administrative vacancies in their schools.[427] The results were troubling. Delhi, for instance, reported that its schools suffered from the following vacancies: 5,302 posts for trained graduate teachers, 216 posts for school principals, and 143 posts for vice-principals.[428] Other states reported similar results. Chhattisgarh had 15,206 headmaster posts vacant in its primary schools and an additional 6,710 vacancies in its upper primary schools.[429] Chhattisgarh upper primary schools also had 9,947 teaching posts lying vacant.[430] The Supreme Court summed up the situation and directed the relevant authorities as follows:

> The situation in the State of Chhattisgarh is extremely alarming and unless all the vacancies are filled up on priority basis and basic infrastructural facilities are provided in the schools, the State would not be able to preserve and protect the fundamental rights of the

422. *Id.*

423. *See, e.g.*, Envtl. & Consumer Prot. Found. v. Delhi Admin., (2011) 13 SCC 16 (India) (directing states to ensure that drinking water, toilets, and electricity are provided in all schools); *see also* Envtl. & Consumer Prot. Found. v. Delhi Admin., 13 SCC 1 (India) (issuing specific directions to governments of several states in response to their affidavits on school infrastructure and noting that 11 states had failed to file affidavits).

424. *See Envtl. & Consumer Prot. Found.*, Writ Petition (Civ.) No. 631 of 2004.

425. *Id.*

426. *Id.*

427. *See* Envtl. & Consumer Prot. Found. v. Delhi Admin., (2011) 7 SCC 55 (India).

428. *Id.*

429. Envtl. & Consumer Prot. Found. v. Delhi Admin., (2011) 13 SCC 1, 3 (India).

430. *Id.*

> children guaranteed under Article 21-A of the Constitution of India. We, therefore, direct the State to take immediate steps to fill up the vacancies and ensure that basic infrastructural facilities are augmented within three months from today.[431]

In a similar case, *State of Uttar Pradesh* v. *Shiv Kumar Pathak*,[432] the Allahabad High Court directed Uttar Pradesh to fill its vacant teaching posts. Before the final judgment, the Court passed an interim order directing state authorities to fill assistant teacher positions within 12 weeks.[433] The scale of the vacancy crisis was immense—72,825 teaching posts were vacant in Uttar Pradesh.[434]

The state failed to fill these posts within the short timeline that the High Court provided, which led the Court to issue a full judgment.[435] The Court directed the state to appoint candidates who achieved a mark of 70 percent in the Teacher Eligibility Test to the vacant posts, along with candidates from various "backward" classes or with physical handicaps who obtained a 65 percent mark.[436] The Court also ordered a compliance report from the competent authority in the state government.[437] It warned that the government would be subject to legal consequences if this report was not filed.[438]

D. Reorienting Judicial Interventions

Overall, India has made great strides towards realizing universal primary education through the RTE Act. In 2000, approximately half of India's population was illiterate, and 58 million out of 185 million children aged 5–14 were not in school.[439] In 2003, the Indian Government reported that only 71 percent of children in rural areas were enrolled in school and girls were enrolled at a 16 percent lower rate than boys.[440] School

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431. *Id.* at 4.
432. *See* Uttar Pradesh v. Shiv Kumar Pathak, (2014) 15 SCC 606 (India).
433. *Id.* at 607.
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.* at 609.
438. *Id.*
439. Alston & Bhuta, *supra* note 375, at 250.
440. *Id.*

enrolment has increased significantly with the passage of the RTE Act. Enrolment in government schools increased from 126 million in 2006–07 to 130 million in 2010–11.[441] The gender gap in enrolment has also narrowed, particularly with respect to upper elementary education.[442]

Despite these positive steps, many challenges remain in fully realizing the right to education in India. The principal challenges include bringing out-of-school children into schools and improving the quality of education. Improving school attendance is a complex problem that has at least two dimensions. First, in the primary school years, poor families, particularly in rural areas, may not be willing to send their children to school if they could provide useful labor. Here, the importance of educational quality is paramount. As Philip Alston and Nehal Bhuta have noted, "[a] major problem identified by numerous studies, and a strong disincentive to impoverished parents to bear the opportunity cost and the real cost of sending children to school, is the poor quality of schooling provided."[443] A second problem is that a large number of children, predominantly from "backward" groups, drop out of school before completing upper primary or secondary school.[444]

What is needed, therefore, is a reorientation in the legal framework and approach to the right to education in India. Thus far, both judicial interventions and legislation in this area have been focused on providing universal primary education. As a result, the courts have sought to improve school infrastructure, fill vacant teaching and administrative posts, and increase primary school enrolment. While these are important first steps towards India meeting its constitutional obligations on the right to education, those obligations also presuppose a minimum quality of education. India also needs to address secondary and higher education more systematically towards the progressive realization of the right to education for all children, not simply

441. Sarkar, *supra* note 392, at 40.

442. *Id.*

443. Alston & Bhuta, *supra* note 375, at 258; *see also* Rukmini Banerji, *Poverty and Primary Schooling: Field Studies from Mumbai and Delhi*, 35(10) ECON. & POL. WKLY. 795 (2000) (discussing the need for a new, flexible approach to education for the urban poor); CONFEDERATION OF INDIAN INDUS. & KPMG, ASSESSING THE IMPACT OF RIGHT TO EDUCATION ACT 4 (2016) ("[A]n area of concern is the loss of focus on providing quality education, with the current focus and emphasis majorly targeted towards enrollment numbers and improving infrastructure standards of schools.").

444. Sarkar, *supra* note 392, at 42.

those aged 6–14. On a related note, the Supreme Court should reconsider its judgment in *Pramati* and require minority educational institutions to reserve 25 percent of their seats for the "backward classes" as envisioned in the RTE.[445]

Such a reorientation will not emerge spontaneously. The judiciary, led by the Supreme Court, can be of great value here. As Alston and Bhuta noted with respect to *Unni Krishnan*, "[T]he Court's initiative had a huge impact in terms of mobilizing civil society, legitimating demands for the right to education, and unleashing extensive pressures on the government to formally amend the Constitution[.]"[446] Now that universal primary education is the *de jure*, if not *de facto*, standard in India, civil society should move the judiciary to address the right to education in more holistic terms that emphasize educational quality as well as secondary and higher education. The courts, as they have in the past, can usefully serve as a forum to coordinate and mobilize civil society and to monitor governmental compliance with the RTE.[447]

CONCLUSION

This Article has demonstrated how the Indian higher judiciary, led by the Supreme Court, continues to play a vital role in socioeconomic rights adjudication. Contrary to the conventional narrative of the Court retrenching in its fundamental rights jurisprudence and succumbing to the market-based approach of neoliberalism since the 1990s, this Article has shown that the Court has played an active part in advancing the rights to food and education.[448] The Court has done so in two broad ways.

First, by coordinating and providing a forum for civil society mobilization, the Supreme Court galvanized social movements for food security and universal education.[449] It further provided legal recognition to justiciable rights to food and education

445. The Right of Children to Free and Compulsory Education Act, No. 35 of 2009 (India), § 12(1)(c), htttps://indiacode.nic.in/; *see also* Pramati Educ. & Cultural Tr. v. Union of India, (2014) 8 SCC 1 (India).

446. Alston & Bhuta, *supra* note 375, at 253.

447. Law, *supra* note 51, at 754–55; *see also* Guinier & Torres, *supra* note 52, at 2756 ("[T]he recursive relationship between social movements and law can expand the field in which [courts] function most effectively as democracy-enhancing venues.").

448. *See supra* Part I.

449. *See supra* Part II.

within the right to live with human dignity in Article 21 of the Constitution. This, in turn, amplified and gave greater legitimacy to the related social movements, which resulted in the passage of two landmark pieces of legislation: the RTE and the NFSA.[450]

Second, the Supreme Court, using its power of continuing mandamus and in judgments on various cases, continues to monitor government compliance with the RTE and NFSA, and fine-tune specific programs and policies within those Acts. As discussed in Parts III and IV, these interventions have not always been helpful and, in fact, largely focus on the wrong issues: food quantity rather than quality, the provision of universal primary education rather than the quality of education, the provision of higher education, and school infrastructure.[451] These issues, however, do not call for a wholesale abandonment of judicial intervention; rather, they call for the Court to intervene selectively to fill gaps and to guard against noncompliance.[452]

More broadly, this Article advances a more nuanced approach to studying the Indian judiciary: one that takes into account the unique role that the Supreme Court plays in Indian legal and political life. Rather than castigate the Court for being undemocratic or for acting in ways that transgress traditional separation of powers boundaries, this Article has sought to understand the Court on its own terms, within the context of the Global South and in interpreting a transformative constitution.[453] In so doing, it has taken a practical, consequentialist approach that aims to reorient the Court's jurisprudence towards promoting greater justice in socioeconomic outcomes.

450. *Id.*
451. *See supra* Parts III & IV.
452. *Id.*
453. *See supra* Part II(B).