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## INDIA: A MODEL FOR THE ENFORCEMENT OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

*Lawrenz Fares*



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## INDIA: A MODEL FOR THE ENFORCEMENT OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

*Lawrenz Fares\**

### ABSTRACT

Under the modern international human rights regime, all people are entitled to two categories of rights: civil and political rights and economic, social, and cultural rights. While the judicial enforcement of civil and political rights is commonly accepted in virtually every country in the world, there is a significant degree of hostility towards the judicial enforcement of economic, social, and cultural rights. Critics have long held that the enforcement of these rights in the courtroom would be inherently undemocratic and unmanageable. This belief, and the general aversion to the judicial enforcement of these rights, is primarily rooted in the fact that the enforcement of these rights would require compelling the government to spend vast sums of money in the form of welfare programs. However, India has overcome these criticisms and emerged as a model for the enforcement of these rights. The following paper will serve to lay a foundational understanding of the modern international human rights regime, look to the functionality of both sets of rights, and examine how Indian jurisprudence has come to allow the enforcement of economic, social, and cultural rights in the courtroom. From there, this paper will examine *PUCL v. Union of India*, the landmark case that recognized the right to food in India, the impact this case has on the lives of the Indian people, and the economic impact of protecting the right to food in an attempt to demonstrate that the judicial enforcement of these rights is not only possible, but can also be done in an effective manner.

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\* Lawrenz is a 3L at the University of Pittsburgh School of Law, Candidate for J.D., May 2019.

## TABLE OF CONTENTS

I. Economic, Social, and Cultural Rights: A Brief Background.....	283
II. The Indian Constitution and Judicial Enforcement.....	288
III. <i>People's Union of Civil Liberties v. Union of India: Economic, Social, and Cultural Right Jurisprudence in Action</i> .....	292
IV. Aftermath of the Interim Orders .....	296
IV. Conclusion .....	299

## I. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A BRIEF BACKGROUND

Today's international human rights regime is governed by a body of documents that has come to be known as the "International Bill of Human Rights" ("IBHR").<sup>1</sup> In its current form, the IBHR consists of the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), and the International Covenant on Civil and Political Rights ("ICCPR") and the ICCPR's two Optional Protocols.<sup>2</sup> The UDHR, the IBHR's foundational component, was drafted and intended to be a representation of the "universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone."<sup>3</sup> The UN's then 48 members unanimously adopted the UDHR in 1948 in recognition of the "necessity of transforming human rights into legally binding obligations."<sup>4</sup> However, the UDHR, consisting of a preamble and thirty articles, contained only broad references to now commonly accepted fundamental rights such as the right to life, liberty, and security, as well as other rights that would later come to be recognized as either civil and political or economic, social, and cultural rights.<sup>5</sup> As commentators have noted, the UDHR went "little beyond the bare declaration of rights to provide."<sup>6</sup>

In light of the generalized nature of the UDHR, many pro-human rights thinkers came to the realization that additional treaties and covenants would be required to properly address the vast variety of human rights issues the world faced.<sup>7</sup> However, it would be a long eighteen (18) years before the ICCPR and ICESCR were adopted by the U.N. and then another ten (10) years

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<sup>1</sup> Office of the United Nations High Comm'r for Human Rights, Fact Sheet No.2 (Rev.1), The International Bill of Rights (1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> [hereinafter UN Fact Sheet].

<sup>2</sup> *Id.*

<sup>3</sup> *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (last visited Feb. 23, 2018).

<sup>4</sup> Elif Gozler Camur, *Civil and Political Rights vs. Social and Economic Rights: A Brief Overview*, 6 J. BITLIS EREN U. SOC. SCI. 206, 207 (2017); DAVID A. SHIMAN, *ECONOMIC AND SOCIAL JUSTICE: A HUMAN RIGHTS PERSPECTIVE* 3 (1999).

<sup>5</sup> SHIMAN, *supra* note 4, at 3.

<sup>6</sup> PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 159 (2013).

<sup>7</sup> Camur, *supra* note 4, at 206.

before both covenants entered into effect.<sup>8</sup> Commentators have credited this temporal gap, as well as the underlying ideological differences between the two documents, to the Cold War and the international struggle between Communism and Capitalism.<sup>9</sup>

In shaping the international human rights regime, the Capitalist West “aimed to reduce human rights to the traditional concept of civil and political rights.”<sup>10</sup> Civil and political rights are seen as “negative rights.”<sup>11</sup> These kinds of rights are those that limit a government’s ability to act in some manner.<sup>12</sup> One may think of the right to freedom of speech as such a negative right. That right, as commonly understood, prohibits governmental entities from interfering with an individual’s right to express himself as he sees fit. In this light, negative rights are a freedom *from* something. With regards to the right to free speech, it is a freedom *from* unwarranted restrictions on one’s ability to express themselves. As a result of this understanding, negative rights are often thought of as “free” rights.<sup>13</sup> That is to say, the government incurs virtually no economic cost in protecting negative rights as these rights do not require the government to take any sort of affirmative action but rather *avoid* taking certain actions that would infringe on what the right in question protects.

The Socialist East, on the other hand, sought to further a system based predominantly on economic, social, and cultural rights.<sup>14</sup> These rights stand in stark contrast to civil and political rights. They are seen as “positive” rights and, in terms of functionality, can be fairly viewed as the polar opposite of negative civil and political rights.<sup>15</sup> Positive rights may be understood not as a freedom *from* something but an affirmative right *to* something. For instance, take the ICESR’s right to “an adequate standard of living” found in Article 11.<sup>16</sup> Under ICESR, this right includes the right to “adequate food,

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<sup>8</sup> UN Fact Sheet, *supra* note 1.

<sup>9</sup> See Camur, *supra* note 4, at 206; see also SHIMAN, *supra* note 4, at 5.

<sup>10</sup> Camur, *supra* note 4, at 206.

<sup>11</sup> Linda M. Keller, *The Indivisibility of Economic and Political Rights*, 1 HUM. RTS. & HUM. WELFARE 9, 10 (2001).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Camur, *supra* note 4, at 206.

<sup>15</sup> Keller, *supra* note 11, at 10.

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights, art. 11(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESR] (entered into forced Jan. 3, 1976).

clothing and housing, and to the continuous improvement of living conditions.”<sup>17</sup> Theoretically, to protect the right to an adequate standard of living, a country must thus expend significant financial resources to ensure that all of its citizens are adequately clothed, fed, and sheltered. It is for this reason that economic, social, and cultural rights are “seen as enormously costly, requiring massive state-provided welfare.”<sup>18</sup>

These differences in the economic cost of enforcing these rights impact the manner through which each set of rights is implemented.<sup>19</sup> Although commonly seen as “free,” civil and political rights still require the government to maintain an adequate court system filled with qualified judges to apply the laws and a professional police force to enforce them.<sup>20</sup> Nonetheless, these costs are seen as minimal in comparison to the implementation of economic, social, and cultural rights. Thus, many argue that “the obligations under the ICCPR [are] absolute and immediate and that, therefore, a State could only become a party to the ICCPR after, or simultaneously with, its taking the necessary measures to secure those rights.”<sup>21</sup> In other words, civil and political rights are expected to be implemented immediately through the adoption of domestic laws which enshrine these rights and the development of an adequate court system to apply said laws as virtually all countries, to some extent, have the resources available to do so with relative haste.<sup>22</sup>

A more progressive approach is taken in regard to implementing economic, social, and cultural rights.<sup>23</sup> Under Article II of the ICESR:

Each State Party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technically to the *maximum of its available resources*, with a view to achieving *progressively* the full realization of the rights recognized in the present covenant

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<sup>17</sup> *Id.*

<sup>18</sup> Keller, *supra* note 11, at 10.

<sup>19</sup> *See id.*

<sup>20</sup> Camur, *supra* note 4, at 207.

<sup>21</sup> DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 12 (1991).

<sup>22</sup> *See id.*; *see also* Camur, *supra* note 4, at 207.

<sup>23</sup> Keller, *supra* note 11, at 10.

by all appropriate means, including particularly the adoption of legislative measures.<sup>24</sup>

Making the implementation of economic, social, and cultural rights contingent on the resources available to a given nation “reflects [the UN’s] recognition that the realization of these rights can be hampered by a lack of resources and can be achieved only over a period of time.”<sup>25</sup> Indeed, as Aryeh Neier, a co-founder of Human Rights Watch, has noted, the implementation of economic, social, and cultural rights effectively requires “a broad redistribution of society’s resources [and/or] its economic burdens.”<sup>26</sup> Such a redistribution cannot be realistically undertaken in a short period of time, thus this progressive approach provides developing nations with a path to full implementation while not, strictly speaking, violating their obligations under the ICESR.

However, implementation is only half the battle. Once a nation has implemented all or some of the rights contained in the ICESR, they must still develop a method of enforcement. Unlike civil and political rights, which are commonly enforced in courts the world over, the justiciability of economic, social, and cultural rights frequently comes under fire.<sup>27</sup> According to commentators, this is largely due to the fact that “very few western legal systems have made provision for the enforcement of economic, social, and cultural rights such as the right to health or housing.”<sup>28</sup> Criticism concerning the justiciability of these rights typically takes one or both of the following forms: 1) judicial enforcement of economic, social, and cultural rights is inherently undemocratic; or 2) courts lack the expertise to interpret and enforce these rights.<sup>29</sup>

Neier, a vocal opponent of the judicial enforcement of economic, social, and cultural rights, does well to encapsulate the criticisms that fall into the

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<sup>24</sup> ICESR, *supra* note 16, art. II(e) (emphasis added).

<sup>25</sup> *Key Concepts on ESCRs—What are the Obligations of States on Economic, Social, and Cultural Rights?*, OFFICE OF THE HIGH COMM’R ON HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/ESCR/Pages/WhataretheobligationsofStatesonESCR.aspx> (last visited Feb. 28, 2018).

<sup>26</sup> Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF, Jan. 2006, at 1, 1.

<sup>27</sup> See generally JOHN TOBIN, *ECONOMIC, SOCIAL, & CULTURAL RIGHTS AND THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES—A FRAMEWORK FOR DISCUSSION* 7 (2010).

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 14.

first category.<sup>30</sup> Neier maintains that rights such as the rights to housing, education, social security, a job, and to healthcare are within the territory of a democratic nation's legislature.<sup>31</sup> Accordingly, he believes these rights are "unmanageable through the judicial process" and that their justiciability would "[intrude] fundamentally into an area where the democratic process ought to prevail."<sup>32</sup> This argument is rooted in Neier's belief that "the purpose of the democratic process is essentially to deal with two questions: public safety and the development and allocation of a society's resources."<sup>33</sup> Thus, these matters, he argues, must be questions for public debate.<sup>34</sup> To him, granting courts jurisdiction over such matters "is to carve the heart out of that process."<sup>35</sup>

Criticisms in the second category build on this position and typically advance an argument along the lines of: "courts do not have access to the relevant information and/or lack the expertise to examine the complex issues that arise from the development of social policy and the allocation of scarce resources."<sup>36</sup> Implicit in this position is the belief that courts are arbitrators of law and the enforcement of such rights would call for the court to reach *beyond* the letter of the law and into matters of social policy when crafting a remedy that will more likely than not entail the reallocation of the society's resources. In so doing, the court is entering an area where, typically, among Western states, the legislature is considered the most competent governmental organ.

However, some countries, such as India, have developed models for the judicial enforcement of economic, social, and cultural rights through significant judicial activism that arguably overcome the criticisms commonly thrown at the justiciability of these rights.

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<sup>30</sup> See Neier, *supra* note 26, at 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> TOBIN, *supra* note 27, at 10.



## II. THE INDIAN CONSTITUTION AND JUDICIAL ENFORCEMENT

The Constitution of India was adopted on November 26, 1949, one (1) year after the adoption of the UDHR, and sixteen (16) years prior to the adoption of both the ICCPR and ICESR.<sup>37</sup> Because the drafting of the Constitution occurred alongside the international deliberations concerning the UDHR, the international human rights movement heavily influenced the structure and function of the Indian Constitution.<sup>38</sup> One should note, however, the Constitution's visionary nature. Even without any guidance in regard to enforcement mechanics for positive rights from the UDHR, and the complete absence of ICESR, India managed to create a model to implement both negative civil and political and positive economic, social, and cultural rights on its own, although, initially, the Constitution itself did not allow for judicial enforcement of economic, social, and cultural rights.<sup>39</sup>

The path to enforcement began with the drafters of the Constitution dividing the two categories of rights into two separate parts: Part III, governing what are known in India as "Fundamental Rights" and Part IV, which contains what are called "Directive Principles of State Policy" (DPSP).<sup>40</sup> Included in these Fundamental Rights are the civil and political rights to equality, freedom, life (a right of particular import to future jurisprudence), the right against exploitation, freedom of religion, and rights protecting the interests of minorities and their access to educational institutions.<sup>41</sup> Article thirty-two (32) of the Constitution expressly makes these rights justiciable, stating, in pertinent part:

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs . . . for the enforcement of any of the rights conferred by this Part.<sup>42</sup>

Part IV, the DPSP's, contains the economic, social, and cultural rights such as the rights to a minimization of inequality in income, an "adequate

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<sup>37</sup> PR VISHNU, HUMAN RIGHTS AND THE INDIAN CONSTITUTION 204–05 (2014).

<sup>38</sup> *Id.* at 204.

<sup>39</sup> *Id.*

<sup>40</sup> Jayna Kothari, Commentary, *Social Rights and the Indian Constitution*, 2 L., SOC. JUST. & GLOBAL DEV. J. (2005), [https://warwick.ac.uk/fac/soc/law/elj/lgd/2004\\_2/kothari](https://warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/kothari).

<sup>41</sup> CONSTITUTION OF INDIA Jan. 26, 1950, arts. 14, 19, 21, 23, 25, 29.

<sup>42</sup> CONSTITUTION OF INDIA Jan. 26, 1950, art. 32(1)–(2).

means of livelihood,” health, humane working conditions and maternity relief, and the preservation and improvement of agriculture and animal husbandry.<sup>43</sup> However, Article thirty-seven (37), Part IV’s second article, explicitly states that:

The provisions contained in this Part *shall not be enforceable by any court*, but the principles therein laid down are nevertheless *fundamental in the governance of the country* and shall be the duty of the State to apply these principles in making laws.<sup>44</sup>

Although the Constitution made economic, social, and cultural rights non-justiciable, the drafters of the Constitution made clear that they are “fundamental to the governance” of India and imposed upon the Indian government a “duty” to ensure these rights were considered in the legislative process.<sup>45</sup> This commitment was reaffirmed in Article thirty-eight (38) of the Constitution, which reads:

The State shall *strive* to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform all the institutions of national life.<sup>46</sup>

Note that, with a great deal of foresight, the drafters of the Indian Constitution recognized, just as the drafters of the ICESCR would a decade and a half later, the best way to implement these rights would be through a “progressive realisation [*sic*] of rights.”<sup>47</sup>

However, as has already been noted, the enforcement of economic, social, and cultural rights were still seen as beyond the scope of judicial authority.<sup>48</sup> The proponents on non-justiciability voiced criticisms that fall in line with Neier’s view, arguing that allowing the courts to deal in such matters would be undemocratic.<sup>49</sup> Specifically, they questioned “the legitimacy of empowering the judiciary to overrule the popular will as expressed through legislative activity.”<sup>50</sup>

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<sup>43</sup> CONSTITUTION OF INDIA Jan. 26, 1950, arts. 38(2), 39(a), 39(e), 42.

<sup>44</sup> CONSTITUTION OF INDIA Jan. 26, 1950, art. 47 (emphasis added).

<sup>45</sup> *See id.*

<sup>46</sup> CONSTITUTION OF INDIA Jan. 26, 1950, art. 38(1).

<sup>47</sup> Kothari, *supra* note 40.

<sup>48</sup> *Id.*

<sup>49</sup> *See id.*; *see also* Neier, *supra* note 26, at 1.

<sup>50</sup> Kothari, *supra* note 40.

This view remained prominent in Indian jurisprudence until the late 1960's when a new jurisprudential philosophy known as "judicial populism" emerged in India's Supreme Court.<sup>51</sup> The Justices that adhered to and developed this philosophy "sought to mold the constitutional interpretation and doctrine in unmistakable and emotionally surcharged people-oriented ways."<sup>52</sup> A prominent example of early judicial populist rhetoric can be found in the matter of *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, a landmark decision which granted the Indian Supreme Court the power to review parliamentary constitutional amendments.<sup>53</sup> In *Kesavananda*, the Court focused on the struggles of the "poor, starved and mindless millions who need the Court's protection for securing to themselves the enjoyment of human rights."<sup>54</sup> In regards to securing this enjoyment of human rights, the Court stressed the importance of the economic, social, and cultural rights embodied in Part IV of the Constitution.<sup>55</sup> The Court stated that:

the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a Court of law in case the State fails to implement its duty but, nevertheless, they are fundamental in the governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives.<sup>56</sup>

Thus, while still being barred from declaring DPSP's justiciable by Article thirty-seven (37), the Court recognized that they, too, were bound by the DPSP's and that these principles would have to play an increasingly important role in Indian jurisprudence as the Court pivoted to a more people-centric jurisprudence.<sup>57</sup>

These philosophical underpinnings would take Indian jurisprudence by storm in the aftermath of the 1975–76 national state of emergency.<sup>58</sup> The state

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<sup>51</sup> Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 111 (1985).

<sup>52</sup> *Id.*

<sup>53</sup> Leila Choukroune & Michael Faure, *Environmental Democracy and Access to Justice: A Comparative Law and Society Approach*, 17 E. & CENT. EUR. J. ON ENVTL. L. 94, 97 n.247 (2012); see generally *Kesavnanda Bharati v. State of Kerala*, (1973) 4 SCC 225 (India).

<sup>54</sup> *Kesavnanda Bharati v. State of Kerala*, (1973) 4 SCC 225, 948–49 (India).

<sup>55</sup> *Id.* at 949.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* at 949; see also CONSTITUTION OF INDIA Jan. 26, 1950, art. 37.

<sup>58</sup> See Baxi, *supra* note 51, at 107.

of emergency began after then Prime Minister Indira Gandhi was put under significant political pressure by her political opposition to resign for alleged abuses of the electoral system in the previous election.<sup>59</sup> In response to this pressure, Gandhi declared a national state of emergency that empowered her to arrest vast numbers of her political opponents, impose government censorship on the press, and postpone elections.<sup>60</sup> Numerous human rights violations were also carried out during this period, including the infamous forced sterilization of some 3.7 million people.<sup>61</sup>

In light of the atrocities committed during the state of emergency, the Court sought to position itself as “the last resort for the oppressed and bewildered.”<sup>62</sup> Holding true to the people-centric nature of judicial populism, the post-emergency Court tried to deal with the severe deprivation of rights seen during the emergency by focusing its attention on placing greater legal import on DPSP’s. The pivotal moment for the future of these rights presented itself two years after the end of the emergency in *Maneka Gandhi v. Union of India*. In *Maneka*, the Court turned its attention to Article twenty-one’s (21) negative right to life found in Part III.<sup>63</sup> The Article reads:

No person shall be deprived of his life or personal liberty except according to procedure established by law.<sup>64</sup>

The *Maneka* Court read this provision to be akin to the American doctrine of due process and “embraced a broad, purposive approach to the enunciation and enforcement of fundamental constitutional rights that verges on natural law.”<sup>65</sup> Most importantly to the ends of this examination, the adoption of a due process approach enabled the Court to start “expanding the guarantee of the Right to Life in Article 21 to include within it and recognize [*sic*] a whole gamut of *social rights*.”<sup>66</sup> And, indeed, over the course of the next two

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<sup>59</sup> RICHARD F. NYROP, *INDIA: A COUNTRY STUDY* 550 (1986).

<sup>60</sup> *Id.*

<sup>61</sup> ANATTH V. KRISHNA, *INDIA SINCE INDEPENDENCE: MAKING SENSE OF INDIAN POLITICS* 173 (2010).

<sup>62</sup> Baxi, *supra* note 51, at 109 (quoting *State of Rajasthan v. Union of India*, (1977) 3 SCC 634 at 70 (India)).

<sup>63</sup> See generally *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621 (India); see also CONSTITUTION OF INDIA Jan. 26, 1950 art. 21.

<sup>64</sup> CONSTITUTION OF INDIA Jan. 26, 1950 art. 21.

<sup>65</sup> See A.H. Hawaldar, 2 *Evolution of Due Process in India*, 2 BHARATI L. REV. 107, 117 (2014); Burt Neuborne, *The Supreme Court of India*, 1 INT’L J. CONST. L. 476, 480 (2003).

<sup>66</sup> Kothari, *supra* note 40 (emphasis added).

decades, the Indian Supreme Court recognized the economic, social, and cultural rights to “live with human dignity,” shelter, privacy, health and medical care, and to live in a pollution free environment as being incorporated into the justiciable right to life.<sup>67</sup> Thus, in *Maneka*, the Court opened the door for individuals to bring claims to enforce their economic, social, and cultural rights against the government through Article 21.<sup>68</sup>

### III. *PEOPLE’S UNION OF CIVIL LIBERTIES V. UNION OF INDIA: ECONOMIC, SOCIAL, AND CULTURAL RIGHT JURISPRUDENCE IN ACTION*

With our foundational understanding of economic, social, and cultural rights and Indian jurisprudence in place, we may now turn to an analysis of the practical judicial application and enforcement of these positive, welfare-minded rights. The subject of this analysis will be the matter of *People’s Union of Civil Liberties v. Union of India*, (2003) 2 S.C.R. 1136, or, as it is more commonly known, the “Right to Food” case.<sup>69</sup> While the Court has not yet passed its official judgment in this matter, it has been steadily issuing interim orders since 2001 that have gradually defined India’s constitutional right to food and methods of enforcement.<sup>70</sup>

The matter arose out of the increasing starvation deaths of Indian citizens in the state of Rajasthan.<sup>71</sup> At the time, the population was starving while Rajasthani officials kept excess grain in storage to be used only in the event of an officially decreed famine.<sup>72</sup> Reports at the time were indicating that much of the grain in storage was rotting.<sup>73</sup> Moreover, the citizens were not receiving “the required employment and food relief mandated by the

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<sup>67</sup> See *Francis Coralie v. Union Territory of Delhi*, (1981) 1 SCC 608 (India); see also *Olga Tellis v. Bombay Municipal Corp.*, AIR (1985) 3 SCC 545 (India); *Kharak Singh v. State of UP*, (1964) 1 SCR 332 (India); *Parmananda Katara v. Union of India*, (1989) 4 SCC 286 (India); *Doon Valley Rice, LTD. v. State Bank of India*, AIR (1988) SC 111 (India).

<sup>68</sup> Kothari, *supra* note 40.

<sup>69</sup> *People’s Union of Civil Liberties v. Union of India*, (2003) 2 S.C.R. 1136 (India).

<sup>70</sup> *People’s Union for Civil Liberties v. Union of India & Ors, In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001*, International Network for Economic, Social, and Cultural Rights, <https://www.escri-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original> (last visited Mar. 1, 2018).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *People’s Union of Civil Liberties v. Union of India*, (2003) 2 S.C.R. 1136 (India).

Rajasthan Famine Code of 1962” and other government programs.<sup>74</sup> Thus, in 2001, the People’s Union of Civil Liberties (“PUCL”) filed a petition with the Indian Supreme Court seeking the enforcement of an economic, social, and cultural right to food under Article twenty-one (21) against both the state and federal government.<sup>75</sup>

In their writ to the Supreme Court, the PUCL raised three “questions of law of public importance” which they asked the Court to address:

- 1.) Does the right to life mean that people who are starving and who are too poor to buy food grains ought to be given food grains free of cost by the State from the surplus stock lying with the State, particularly when it is reported that a large part of it is lying unused and rotting?
- 2.) Does not the right to life under Article 21 of the Constitution of India include the right to food?
- 3.) Does not the right to life which has been upheld by the apex Court imply that the State has a duty to provide food especially in situations of drought to people who are drought affected and are not in a position to purchase food?<sup>76</sup>

In an order issued on July 23, 2001, the Court wrote:

In our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existent leading to mal-nourishment, starvation and other related problems.<sup>77</sup>

Although not using any explicit language to this effect, commentators believe that this passage serves as the Supreme Court’s response to the PUCL’s

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<sup>74</sup> Lauren Birchfield & Jessica Corsi, *The Right to Life is the Right to Food: People’s Union for Civil Liberties v. Union of India and Others*, 17 HUM. RTS. BRIEF 15, 15 (2010).

<sup>75</sup> *Id.*

<sup>76</sup> Kothari, *supra* note 40.

<sup>77</sup> People’s Union of Civil Liberties v. Union of India, (2003) 2 S.C.R. 1136 (India) (Interim Order dated July 23, 2001).

second question and therefore stands for the proposition that the right to food does in fact fall under the protection of Article 21.<sup>78</sup>

Just four months later, the Supreme Court released another interim order on November 28, 2001, that “critically and expansively transformed PUCL by identifying which [state and federal] food schemes were to be considered legal entitlements<sup>79</sup> under the constitutional right to food.”<sup>80</sup> Interestingly, in this order, the Court showed no hesitation in directing how both the state and federal government should run food distribution programs.<sup>81</sup> The order specifically identified three food-related government programs which, following the order, citizens would have a legal right to participate in.<sup>82</sup> These three programs included the Targeted Public Distribution Scheme (“TPDS”), the Integrated Child Development Scheme (“ICDS”), and the Mid-Day Meal Scheme (“MDMS”).

The TPDS is a program “through which grains are delivered to people of extreme poverty.”<sup>83</sup> While the order stated that the Court found full compliance on behalf of the federal government in regard to the allotment of food, the Court still directed the federal government to take all necessary actions to bring state governments in compliance if they were found to be violating the terms of the program.<sup>84</sup> Additionally, the Court directed the federal government to ensure that TPDS applications were freely available to those in need and required that they be both given and received free of charge to the citizen in question.<sup>85</sup>

The second program, MDMS, according to India’s Ministry of Human Resource Development, is a program originally founded in 1925 “[w]ith a view to enhancing enrollment, retention, and [school] attendance while simultaneously improving nutritional levels among children.”<sup>86</sup> Again, the

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<sup>78</sup> Kothari, *supra* note 40.

<sup>79</sup> A term, which, in this context, is synonymous with “legal rights.”

<sup>80</sup> Birchfield & Corsi, *supra* note 74, at 15.

<sup>81</sup> People’s Union of Civil Liberties v. Union of India, (2003) 2 S.C.R. 1136 (India) (Interim Order dated November 28, 2001).

<sup>82</sup> *Id.*

<sup>83</sup> Birchfield & Corsi, *supra* note 74, at 15.

<sup>84</sup> People’s Union of Civil Liberties v. Union of India, (2003) 2 S.C.R. 1136 (India) (Interim Order dated November 28, 2001).

<sup>85</sup> *Id.*

<sup>86</sup> *About the Mid Day Meal Scheme*, MINISTRY OF HUM. RESOURCE DEV., <http://mdm.nic.in> (follow “About MDM” hyperlink) (last visited Feb. 21, 2018).

Court found full compliance on behalf of the federal government but instructed them to take action against non-compliant state governments.<sup>87</sup> The Court then required that every state government in India “implement the Mid-Day Meal Scheme by providing every child in every Government and Government assisted Primary Schools with a prepared mid day meal . . . for a minimum of 200 days.”<sup>88</sup> Lastly in regard to the MDMS program, the Court directed both federal and state governments to take action to ensure that the quality of grains provided under this scheme was satisfactory.<sup>89</sup>

Lastly, the Court required the full universalization of the ICDS, a program aimed at improving the health, nutrition, and development of Indian children by offering health and nutrition programs to mothers, preschool education to children, and “supplementary feeding for all children and pregnant and nursing mothers.”<sup>90</sup> Thus, under the Court’s order, all Indian children and mothers would have access to these services at an ICDS feeding center.<sup>91</sup>

However, the actions taken by the Supreme Court in the November order pale in comparison to the directives handed down by the Court in yet another interim order dated October 7, 2004. There, more so than ever before, the Court directly engaged in what Neier called the “broad redistribution of society’s resources [and/or] its economic burdens.”<sup>92</sup> In that order, the Court directly required the Indian government to allocate the requisite funding to the ICDS to raise the total financial allotment per child from one rupee<sup>93</sup> to two.<sup>94</sup> Although the move only required the government to raise the allotment from roughly one and a half U.S. cents (\$0.015 USD) to three U.S. cents

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<sup>87</sup> *People’s Union of Civil Liberties v. Union of India*, (2003) 2 S.C.R. 1136 (India) (Interim Order dated November 28, 2001).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *India—Integrated Child Development Services*, UNICEF, [https://www.unicef.org/earlychildhood/files/india\\_icds.pdf](https://www.unicef.org/earlychildhood/files/india_icds.pdf) (last visited Feb. 21, 2018).

<sup>91</sup> Birchfield & Corsi, *supra* note 74, at 15.

<sup>92</sup> See Neier, *supra* note 26, at 1; *People’s Union of Civil Liberties v. Union of India*, (2003) 2 S.C.R. 1136 (India) (Interim Order dated October 7, 2004).

<sup>93</sup> *Id.* The one rupee allocation had been put in place and maintained at that level since 1991.

<sup>94</sup> *Id.*



(\$0.03 USD), the mandate essentially required the doubling of the ICDS budget just three years after the program's full universalization.<sup>95</sup>

#### IV. AFTERMATH OF THE INTERIM ORDERS

The implementation of these orders has been viewed widely successful from a humanitarian standpoint, however, the orders have also significantly strained the Indian economy and its trade policies.<sup>96</sup> Proponents of the actions of the Court have particularly spotlighted the improvements seen in the MDMS program following the Court's intervention.<sup>97</sup> Prior to the start of *PUCL*, the program was considered "poorly implemented, reaching only a handful of states throughout the country."<sup>98</sup> Moreover, the program only provided uncooked grains to students rather than fully-cooked, nutritionally-sound meals.<sup>99</sup> The fact that the MDMS program only provided uncooked grains also subjected food storages to "leakages" of food grain in the form of theft in order to sell the said grains on the black market.<sup>100</sup> At the time of the drafting of the writ, only two Indian states properly implemented the program.<sup>101</sup>

Then, the Court's intervention "set off a spark that completely reversed the non-implementation of the MDMS in other states."<sup>102</sup> By making the program a legal entitlement and placing the responsibility to ensure this program functioned properly on both the federal and state governments, the Court created a program that was not only better organized and funded, but also more difficult to corrupt and more supportive of the nutritional needs of Indian children.<sup>103</sup> Additionally, because the Court mandated that the program be free of charge, the program has since acted as a large incentive "for impoverished families to enroll their children in school and for children

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<sup>95</sup> See *id.*; *People's Union of Civil Liberties v. Union of India*, (2003) 2 S.C.R. 1136 (India) (Interim Order dated November 28, 2001).

<sup>96</sup> Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 732 (2010) [hereinafter Birchfield & Corsi, *Starvation*].

<sup>97</sup> Birchfield & Corsi, *supra* note 74, at 17.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

to attend at least the morning session prior to the meal, if not the full day” to ensure that their children are properly fed.<sup>104</sup> As a direct result of the Court’s actions, the MDMS “has begun to be implemented more uniformly throughout India, and the nutritional content of the meals has greatly improved.”<sup>105</sup>

Although the actions of the Court have positively impacted the food scheme programs and the lives of the individuals who use them, the interim orders have also strained a number of Indian economic policies.<sup>106</sup> While the Court’s economic, social, and cultural right jurisprudence has given “the Supreme Court the power to regulate the administrative policies of the government as they relate to the distribution of food,” one must also recognize that the Court is simultaneously “issuing orders on specific government actions, [all the while] the Government of India engages in its own process of national and international food and agriculture regulations, many of which are aimed at precisely the same topics.”<sup>107</sup>

Even though the interim orders in no way specifically mention Indian economic and trade policies, opting instead to focus on the supply and distribution of food, the country’s policies and the Court’s orders “are certainly in direct contact.”<sup>108</sup> This has created an awkward dichotomy as the Court, fighting for the human-centric principles of judicial populism, is pulling these policies in the opposite direction of a government, who, since 1991, has made “a shift from the socialist ideals of equality of income distribution embodied in India’s Constitution and underlying [economic, social, and cultural] cases such as *PUCL* to a new focus on aggregate numbers such as annual GDP growth.”<sup>109</sup>

The government of India has been striving to do so through, not the universalization of food schemes as the Court has ordered, but rather a process of liberalization, privatization, and de-universalization of public food distribution with an aim at removing government regulations on all

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Birchfield & Corsi, *Starvation*, *supra* note 96, at 732.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 732–33.

<sup>109</sup> *Id.* at 733 (citing Steve Coll, *S. Asian Reformers Face Tough Hurdles: India, Pakistan Shunning Socialist Ties*, WASH. POST., Sept. 8, 1991, at A31).

“foodstuffs.”<sup>110</sup> In so doing, the government is motivated by a belief that highly government-subsidized food distribution, in fact, increases poverty and starvation by flooding Indian markets with underpriced food goods.<sup>111</sup> India, the government believes, would be highly susceptible to these negative impacts of food subsidization as roughly 60% of the country’s population derives its income predominantly through agriculture.<sup>112</sup> Thus, from the government’s economic perspective, the *PUCL* orders are directly at odds with what is needed for the economic health of the country.<sup>113</sup> And, indeed, these “[d]eregulation measures operate with different goals that *PUCL*’s right to food objectives and directly clash with *PUCL*’s orders for more government action and the reinstatement of [previously] dismantled schemes.”<sup>114</sup>

However, contrary to the government’s stance, the universalization and budgetary increases mandated by the Supreme Court may have had a large, positive impact on the Indian economy.<sup>115</sup> As one World Bank report has indicated, malnutrition also perpetuates poverty.<sup>116</sup> Specifically in regards to India, the World Bank has found that the malnutrition of its citizens and the inefficiency hunger produces in the labor force, including the agricultural workers the government seeks to protect, may have cost India upwards of \$2.5 billion USD each year.<sup>117</sup> Thus, by continuing to abide by the *PUCL*’s interim orders, the Indian government may in turn see not only improved economic output, but also reduced financial waste in their governing.<sup>118</sup>

Yet, as it stands now, “[t]he question remains as to whether the right to food as articulated in *PUCL* can survive India’s liberalization policies, or whether, in contrast, *PUCL* will have the effect of modifying or reversing

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<sup>110</sup> *People’s Union of Civil Liberties v. Union of India*, (2003) 2 S.C.R. 1136 (India) (Interim Order dated November 28, 2001); see also Birchfield & Corsi, *Starvation*, *supra* note 96, at 736.

<sup>111</sup> Birchfield & Corsi, *Starvation*, *supra* note 96, at 736.

<sup>112</sup> *Id.* at 735 (citing Press Release, Gov’t of India, Dep’t of Commerce, Developed Countries Must Reduce Their Agricultural Subsidies if Progress is to be Made in Market Access (Aug. 27, 2003)).

<sup>113</sup> *Id.* at 736.

<sup>114</sup> *Id.* at 737.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 738–39 (citing MICHELE GRAGNOLATI ET AL., INDIA’S UNDERNOURISHED CHILDREN: A CALL FOR REFORM AND ACTION 8 (2005)).

<sup>117</sup> *Id.*

<sup>118</sup> See *id.*

these policies.”<sup>119</sup> Moreover, “while *PUCL* has established the right to food as a constitutionally protected entitlement requiring affirmative government action to ensure its fulfillment, protection, and promotions, it remains an open case and its entitlements have not yet been secured in a final judgment.”<sup>120</sup> Fortunately for the effected Indian citizens, commentators and observers of the matter have indicated that it is likely that the case will end in the rendering of a final judgment that will not only enshrine the right to food in India, but also bind the government to continued observation of said right.<sup>121</sup>

## V. CONCLUSION

The first and most obvious conclusion to draw from *PUCL* and Indian jurisprudence is that judicial enforcement of the economic, social, and cultural rights articulated domestically in the Indian Constitution and internationally in the ICESCR is, in fact, possible. The manner through which India has progressed towards judicial enforcement also goes a long way to undermine the criticisms commonly thrown at the notion that economic, social, and cultural rights do not belong in the courtroom alongside civil and political rights.

Although Neier claims that granting courts jurisdiction over positive rights amounts to “carv[ing] the heart out of [the democratic] process,” the Indian model shows that, at times, doing so may in fact serve to supplement failures in the democratic, legislative process.<sup>122</sup> As they stand now, the interim orders “embody the unique and important function of [economic, social, and cultural rights litigation] to combat governmental failings.”<sup>123</sup> In fact, when viewed as a whole, because the Indian system for the enforcement of positive rights was premised on judicial populism and “the idea that the court has a duty to provide redress for human rights violations where the legislature has failed to do so and because this reasoning is in turn based on the idea that the legislature cannot provide the average citizen with adequate

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<sup>119</sup> *Id.* at 733.

<sup>120</sup> *Id.* at 761.

<sup>121</sup> *Id.* at 762.

<sup>122</sup> *See id.* at 762; *see also* Neier, *supra* note 26, at 1.

<sup>123</sup> *Id.* (citing P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L., 561, 566 (1985)).

redress,” the Indian model may fairly be viewed as effectuating the will of the people when those elected have failed to do so.<sup>124</sup> If one of the “purpose[s] of the democratic process” is to ensure “the public safety,” then it would be difficult to argue that the judicial enforcement of the right to food in *PUCCL* runs contrary to said purpose.<sup>125</sup>

Furthermore, tracking the transformation of Indian food schemes such as the MDMS from the complete state of disarray they were in prior to the beginning of the *PUCCL* litigation to their current efficient and effective operation, critics may have difficulty in arguing that the Supreme Court was not competent and lacked “the expertise to examine the complex issues that arise from the development of social policy and the allocation of scarce resources.”<sup>126</sup> While it is true that *PUCCL* has been disruptive to India’s prior economic policies, and, should a final judgment be issued, require significant changes to said policies, “[w]hether or not these changes will take place . . . cannot diminish the legal significance of *PUCCL* or the significance it has had . . . to India’s hungry and starving.”<sup>127</sup>

While the status of India as a pioneer of economic, social, and cultural rights should be acknowledged, so too should its potential to be a model for the enforcement of these rights for the now one hundred sixty-six (166) countries<sup>128</sup> that have ratified and accepted the legal obligations of the ICESCR.<sup>129</sup> Truthfully with regards to the right to food articulated in the ICESCR at Article 11(1), the Indian model may serve more developed and industrialized countries better than it served India itself as the governmental subsidization of food distribution should, if the government of India’s position is to be accepted, have less of an economic impact on countries whose citizens derive their wealth from means other than agriculture.<sup>130</sup>

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<sup>124</sup> Birchfield & Corsi, *Starvation*, *supra* note 96, at 762.

<sup>125</sup> Neier, *supra* note 26, at 1.

<sup>126</sup> Birchfield & Corsi, *supra* note 74, at 15; Tobin, *supra* note 27, at 10.

<sup>127</sup> Birchfield & Corsi, *Starvation*, *supra* note 96, at 763.

<sup>128</sup> A notable exception to the countries that have accepted the ICESCR as legally binding is the United States. The United States is one of only four countries to have not done so.

<sup>129</sup> *Status of International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en) (last visited Feb. 23, 2018).

<sup>130</sup> ICESCR, *supra* note 16, art. XI(1); Birchfield & Corsi, *Starvation*, *supra* note 96, at 735 (citing Press Release, Gov’t of India, Dep’t of Commerce, Developed Countries Must Reduce Their Agricultural

If the world wishes to hold true to the foundational belief of the UDHR, the “universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone,” then it must recognize that the citizens of the world must have access to the courts to ensure that *all* of their rights are protected.<sup>131</sup> If the world’s courts remain open only to one set of rights, negative, civil and political rights, then the people of the world are effectively deprived of *half* of the rights that they are entitled to under the IBHR. The importance of civil and political rights should not be minimized or overlooked, but neither should the importance of economic, social, and cultural rights. A person’s right to food, water, shelter, and a decent living are the rights that quite literally ensure their survival. If the courts of the world are to remain a tool for people to ensure that their rights are protected, then these indispensable rights must find their place in the courtroom.

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Subsidies if Progress Is to be Made in Market Access (Aug. 27, 2003), <http://comerce.nic.in/PressRelease/pressrelease-detail.asp?id=237>.

<sup>131</sup> *The Foundation of International Human Rights Law*, *supra* note 3.