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Rights-based Approach to Development

Lessons from the Right to Food Movement
in India

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Abstract

In April 2001 People's Union for Civil Liberties (PUCL) approached the Supreme Court of India arguing that the government has a duty to provide greater relief in the context of mass hunger. The litigation has now become the best known precedent on the right to food internationally. This paper reviews the litigation with a view to understand various strategies used by the litigants to create and enforce far-reaching entitlements in a near legal vacuum on the right to food. This is followed by a discussion on the lessons from this case for rights based approach to development at large.

Keywords: Right to food, rights based approach to development, public interest litigation, food policy, law and development.

JEL classification: H11 Structure, Scope and Performance of government, H3 Fiscal policies and behaviour of agents, H4 Publically provided goods, H53 Government expenditure and welfare programmes, I12 Health Production: Nutrition, Mortality,

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Acronyms

AAY	<i>Antyodaya Anna Yojana</i>
AWCS	<i>Anganwadi Centres</i>
BPL	Below Poverty Line
FCI	Food Corporation of India
GoI	Government of India
ICDS	Integrated Child Development Scheme
NFIW	National Federation of Indian Women
SGRY	<i>Sampoorna Gramin Rozgar Yojana</i> (rural umbrella employment programme)
PDS	Public Distribution System
PTGs	Primary Tribal Groups
PUCL	People's Union for Civil Liberties
UPA	United Progressive Alliance government

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1 Introduction

The study has one basic purpose: to illustrate how courts could be used in the context of right to food. Despite the fact that most constitutions of the world make a reference to the right to food, there are only a few instances where these provisions have been used judicially. The right to food litigation in the Supreme Court of India is among the most significant litigations on this subject. This study begins by examining it in detail. The case is subsequently used to discuss the right to food, rights-based approach at large and the role of courts in a rights-based approach.

Section 2 of the study presents the background to the litigation and leads to the first and the most important direction in the litigation so far. Section 3 presents the proceedings in the case on various 'core issues'. Section 4 deals with 'non-core issues' and illustrates the width of issues covered. Section 5 deals with the significance of the litigation to rights-based approach at large.

2 The petition and the first big break

In 2001 Rajasthan faced its third consecutive year of drought resulting in a wave of hunger and loss of livelihood. This led to a series of protests by citizens' organizations for increased provision of drought relief, particularly of employment. The genesis of the right to food litigation lies in these protests. In April 2001 People's Union for Civil Liberties (PUCI), Rajasthan, a leading constituent of the protests, filed a petition in the Supreme Court arguing that the government should take responsibility to alleviate hunger, specially in times of distress. A legal team was formed under the aegis of *Human Rights Law Network* with Colin Gonsalves as the senior advocate and an informal 'support group' to guide the case. Most lawyers in the legal team believed that the petition was an abortive venture since courts do not typically entertain 'petitions of this nature'.¹ The lone support for the petition came from Colin Gonsalves who argued that little will be lost by filing a petition. It was with much reluctance that the petition (that was sure to be rejected) was filed in April 2001. Taking everyone by surprise, the Court not only accepted the petition, but it extended the scope of the petition to cover all parts of the country.² The 'gamble' by the senior advocate had paid off.

The Supreme Court asked all state governments³ (henceforth 'states'), government of India (GoI) and the Food Corporation of India (FCI) to respond to the petition. GoI argued that a large number of schemes were already being implemented by the government to alleviate hunger, and specifically referred to eight major 'centrally sponsored schemes'. After examining these schemes, the legal team pointed out that the schemes were inadequate, and even these were not being implemented fully. This thread of argument finally led to a landmark 'interim order' on 28 November 2001 where the

¹ There are no explicit legal provisions on the obligations of the government with respect to right to food. The litigation relies almost completely on Article 21, i.e., the fundamental right to life. The absence of explicit provisions makes the process of acceptance of public interest litigations on socioeconomic issues by the court highly subjective and unpredictable.

² The petition covered only six drought areas that were declared drought hit in April 2001.

³ 'State governments' in this study also denotes the union territories.

Supreme Court directed the government⁴ to fully implement all the eight schemes that they claimed to implement on paper (see Box 1).

This direction had profound implications. It converted the schemes into a legal entitlement making it obligatory for the government to implement them. It now became possible for 'eligible beneficiaries' to demand their benefits and approach the court if their entitlements were not honoured. The implication of this direction is illustrated in case of midday meals and integrated child development scheme (ICDS) in section 2.

Box 1
INTERIM ORDER OF 28 NOVEMBER 2002: HIGHLIGHTS

The most significant direction in the litigation so far came on 28 November 2001. The direction covered eight major 'centrally sponsored schemes'. Highlights of the direction is given below.

Annapurna (scheme for provision of 10 kg of free grain to aged destitute who are not getting a pension): eligible beneficiaries should be identified and provision of grains should be started without delay.

Antyodaya Anna Yojana (a scheme of highly subsidized grain for the poorest of poor): Eligible beneficiaries should be identified and supply of grains should be started immediately.

Integrated child development scheme (an integrated programme looking at health, nutrition and education of children under six. Pregnant women, lactating women and adolescent girls are also covered in this programme): prescribed minimum norms for food to be given daily to children, adolescent girls, pregnant and lactating women. Also directed that there should be an *anganwadi* (a childcare centre) in each settlement and all existing centres should be made fully functional immediately.

Midday meal scheme (school meal programme for children in government and aided primary schools): all children in all government and government aided primary schools should be provided fresh cooked meals on all working days and for at least 200 days in an year.

National family benefit scheme: Compensation of Rs 10, 000 should be provided to the family in case of death of the primary breadwinner. Compensation should be provided no later than four weeks after the death.

National maternity benefit scheme: all poor women (BPL) should be provided Rs 500 by their 12th week of pregnancy up to their first two live births.

National old age pension scheme (social security pension for aged destitute): all eligible beneficiaries should be identified and social security pensions should be provided monthly no later than seventh of each month.

Targeted public distribution scheme (a scheme for moderately subsidized grain for poor people): Eligible beneficiaries should be identified, ration cards provided and supply of grains should be started without delay.

Other directions: wide publicity should be given to this direction and to the schemes covered therein. The direction was addressed to Gol, states, local governments and also the state-run radio and television.

3 In search of far-sighted directions

When the petition was filed, it was seen as a complement to the grassroots struggle for drought relief that was going on in Rajasthan. But the positive stand by the Supreme Court and specially the landmark direction of 28 November 2001 presented an

⁴ 'Government' in this study stands for government of India, state governments and administrations of union territories. Specific reference is made if the direction pertains to any one tier of the government.

unanticipated opportunity. The support group started discussing the possibility of pursuing a bold strategy in the court. There was, on the one hand, a desire to ask for far-sighted directions from the court. At the same time, there was a need to be strategic in taking up issues that the court is likely to accept. Several discussions were held on the issues that could be prioritized, which resulted in a new course for the litigation.⁵

There was a broad agreement in the group that employment would be the most significant step towards alleviating hunger. The group decided to make a pitch for a 'national employment guarantee scheme'. This was to be complemented by the demand for a social security mechanism for the destitute, particularly for those who may not be able to take up casual manual labour. Strengthening the public distribution system (PDS) was suggested as another major agenda to be taken up with the court.

The support group also decided to sustain the pressure on the states to implement the direction to provide cooked meals in primary schools. On 28 November 2001 the court directed the government to provide one functional *anganwadi* (childcare centre) in each settlement. Given the importance of early childhood for nutritional interventions, integrated child development scheme (ICDS) was also taken up as a major agenda. In sum, employment, grain-based social security mechanism for the destitute, public distribution system, midday meals and ICDS were taken as core issues to be pursued vigorously in the court. A brief account of developments on each of these issues is presented below.⁶

3.1 Midday meals

The midday meal scheme has been one of the biggest success stories of the right to food litigation. By January 2005 midday meal was being provided almost universally across India.⁷ This has come as a result of a protracted struggle within the court and in the public domain. The Supreme Court has consistently exerted pressure on the governments to implement the midday meal scheme. It also gave additional directions to ensure that basic measures are taken to design a reasonable midday meal programme. The sequence of directions is given below.

On 28 November 2001 the Supreme Court directed the states to start providing cooked meals in primary schools. By February 2002 it became clear that states would resist this direction vehemently. Only Rajasthan, a northern state, complied with the deadline imposed by the Supreme Court.⁸ Other states failed to comply.⁹

⁵ One of the authors was involved in the support group. His internal notes and minutes of the support group meetings have been used to identify the legal strategy. There is no strategy paper or a position paper as such that has been made for the case.

⁶ Employment is not discussed in the paper since the new United Progressive Alliance government itself introduced the Employment Guarantee Act in November 2004, making it redundant in the court.

⁷ The framework of the scheme since its inception in 1995 did not include Jammu and Kashmir. Further a few states including Bihar were slow in putting up the required infrastructure.

⁸ Gujarat, Kerala and Tamil Nadu had universal cooked meals programme before the directive.

States started highlighting a host of problems and requested the court to revoke the direction. Most of them cited financial constraints and claimed that the direction was financially impossible to implement. This was juxtaposed with other problems, e.g., logistical problems, the fear of food poisoning, and even ‘midday meals is not a part of our eating habit’.

The petitioner as well as the commissioners¹⁰ rose to the challenge posed by the states. To begin with, close monitoring was done with the help of grassroots networks and media. The progress on implementing this order was given to the court in almost every hearing. This ensured that the states could not ignore the direction without the fear of being identified. The commissioners on their part have featured midday meals prominently in all their reports and have consistently urged the court to ensure the implementation of this order. Since 28 November 2001, the court has reinforced its direction in three interim orders.¹¹ On 20 April 2004, for example, it said, ‘It is a constitutional duty of every state and union territory to implement in letter and spirit the directions contained in the order dated 28th November 2001’. The court also verbally reinforced its directions on other occasions, even when further directions were not given.¹²

The Supreme Court remained unmoved by arguments by various states that they cannot implement the direction due to ‘financial constraint’. But other issues such as possibility of food poisoning posed serious threats against the midday meal scheme. The support group argued that following certain quality norms is essential to implement the direction on midday meals in its true spirit. A survey was organized to examine the experience of states that had initiated cooked midday meals.¹³ The results clearly demonstrated that a safe midday meal programme is feasible if certain quality norms were adhered to:

As things stand, midday meal programmes have many flaws, but the way to go is forward and not backward. With adequate resources and quality safeguards, midday meals can play a major role in improving school attendance, eliminating classroom hunger and fostering social equity (Drèze and Goyal 2004: 4681).

⁹ States were directed to submit affidavits on compliance to the Supreme Court. A few states mentioned that they plan to start the scheme from the next academic year, but most states did not outline any concrete plan for introducing cooked meals.

¹⁰ On 8 May 2002 the Supreme Court appointed Dr N C Saxena and Mr S R Sankaran as commissioners to monitor the implementation of its directions on behalf of the court. The commissioners are also to advise the court on further directions through periodic reports.

¹¹ Interim orders are dated 2 May 2002, 20 April 2004 and 17 October 2004.

¹² On various occasions, requests from states to revoke the directive or to defer it have not been accepted by the court. These do not feature in the interim orders. But the constant feedback to the government about the seriousness of the court in this direction added significantly to the pressure on the states to implement the directive.

¹³ With consistent pressure a few states started providing cooked meals by June 2002. The survey was done in three states that had introduced cooked meals that year: Chhattisgarh, Karnataka and Rajasthan.

The commissioners used the survey in their reports to the Supreme Court to argue that if essential facilities were provided, it is possible to run an effective midday meal programme. Convinced by this, the Supreme Court gave another direction on 20 April 2004: 'The central government shall make provisions for construction of kitchen sheds and shall also allocate funds to meet with the conversion costs of food-grains into cooked midday meals. It shall also periodically monitor the low takeoff of the foodgrains'. The survey also noted that Dalit cooks are discriminated against in several states, which goes against one of the important merits of the programme: socialization.¹⁴ The commissioners recommended that Dalits should be appointed as cooks in at least half the schools. This was incorporated in the 20 April 2004 direction: 'In appointment of cooks and helpers, preference shall be given to Dalits, scheduled castes and scheduled tribes'.

The directions of the court also served to build pressure on the government indirectly. Media attention on midday meals increased and violation of the direction by the states got sustained coverage. Various citizens' organizations also took up the cause and organized various forms of protests against the non-implementation of the direction.¹⁵ With sustained pressure from the court, civil society and the media implementation of midday meals gradually increased. By the academic session of 2004/5, most states were implementing the direction. By June 2004 a new government was formed in the centre by United Progressive Alliance (UPA). The coalition promised a universal midday meal scheme financed by the government of India. In its interim budget in June 2004, the government imposed an 'education cess' out of which one rupee per child per day has been allotted for conversion costs in midday meal scheme. The court welcomed this step and noted in its direction of 17 October 2004:

Now, the government of India ... has informed all concerned that the central government had taken a decision to augment central assistance under midday meal scheme by providing at the rate of Re1/- per child per school day to meet cooking cost as from 1st September 2004. The letter also refers to further assistance such as increasing transport subsidy. In this view, at present, without going into the past non-implementation, we see no reason why midday meal scheme, read with the directions issued in the order dated 28th November 2001, for supply of cooking meal, shall not be implemented forthwith in letter and spirit.

Warning the states, 'We make it clear that it would not be open to the state government/union territories to delay the implementation of the scheme'. The court set January 2005 as the final extended deadline for providing cooked midday meals to all children in government assisted primary schools in India.

The midday meal programme illustrates the level of detail the court can get into to ensure that a programme is implemented in its true spirit. It started with the direction that fresh cooked meals should be provided to all children on all working days, and subsequently gave a set of directions to ensure that a 'reasonable programme' is created.

¹⁴ Socialization in the form of learning to eat food cooked by a Dalit and learning to sit with children from other social backgrounds is an important merit of the programme.

¹⁵ The right to food campaign organized a 'day of action on midday meals' on 9 April 2002 on a national scale. This was followed by periodic local action by different organizations.

These include directions for ensuring basic infrastructure, ensuring that class routine is not disturbed due to cooking, appointment of Dalit cooks, provision of cooked meals even during vacation in drought affected areas and provision of adequate finances for ‘conversion costs’. The case illustrates the importance of continued supervision by the court till its directions are implemented in their true spirit.

3.2 Destitution

In the core strategy a social security mechanism for the destitute was seen as an essential complement for employment guarantee. It sought to address those households with no regular source of income that also tend to be left out of existing welfare mechanisms. An interim application was filed asking for the modification of *Antyodaya Anna Yojana* (AAY)—a programme of giving highly subsidized grains to destitute families. The main modifications suggested were: (i) expanding the programme to cover at least ten per cent of the rural population,¹⁶ (ii) raising *Antyodaya* entitlement to 50 kg per family per month from 35 kg per family per month,¹⁷ (iii) maintaining the programme for an initial period of ten years and revising it later based on an independent expert review, (iv) maintaining the prices in the initial period of ten years, (v) and most importantly providing *Antyodaya* cards to households belonging to certain priority groups as a matter of right.¹⁸

The Supreme Court accepted the principle and directed the government to cover all people in certain priority groups¹⁹ under the *Antyodaya* category:

We direct the government of India to place on AAY category the following groups of persons: (i) aged, infirm, disabled, destitute men and women, pregnant and lactating women, destitute women;(ii) widows and other single women with no regular support; (iii) old persons (aged 60 or above) with no regular support and no assured means of subsistence; (iv) households with a disabled adult and assured means of subsistence; (v) households where due to old age, lack of physical or mental fitness, social customs, need to care for a disabled, or other reasons, no adult member is available to engage in gainful employment outside the house; and (vi) primitive tribes.

¹⁶ As there is no information on the proportion of population belonging to different types of destitute households, the application argued that 10 per cent is the minimum coverage required.

¹⁷ This provision was to reduce the likelihood of a household being exposed to destitution and hunger despite possessing an *Antyodaya* card.

¹⁸ Making *Antyodaya* an entitlement for people belonging to certain social categories has important advantages: first, it prevents such households from being excluded due to predetermined ‘ceilings’ on total number of beneficiaries or by competition from other groups of people. Second, having clearly specified entitlement makes it possible to monitor if these groups are receiving the benefits, and provides much scope for public action. The direction to issue *Antyodaya* cards to ‘priority groups’ has been violated by almost all states as of January 2005 (Fifth Report of the Commissioner). But given the legal entitlement, various grassroots organizations have been able to protest with the administration and ensure that the direction is honoured in their districts. This form of monitoring would be nearly impossible if the programme were merely expanded in numbers, without creating entitlements to any specified group.

¹⁹ The priority groups finally identified in the order is slightly different from those suggested in the application. The authors were not able to trace where the impetus for this choice of groups came from.

Subsequent to the direction, the government of India has covered ten million additional families under the *Antyodaya* category, doubling the number of families covered originally. But like other directions of the court, this direction too has not been fully implemented by the government. During the first round of expansion (of five million additional families), many state governments did not even issued guidelines incorporating the court's direction for identifying people belonging to the priority groups. A large number of people in priority groups were denied *Antyodaya* cards since they were not identified as 'below poverty line' in the BPL Census.²⁰ Grassroots organizations brought this to the notice of the commissioners, who incorporated these in their report to the Supreme Court. Taking note of this the court issued an order on 20 April 2004 stating that possessing BPL card should not be necessary for a family to be eligible for *Antyodaya*. Since most states had not identified and issued cards to these beneficiaries, the court reiterated this order in this hearing and once again on 17 October 2004.

To date there is no report confirming that all people in these social groups have been identified and issued cards. Field reports indicate that in many states including Uttar Pradesh, district administration is often not even aware of this direction by the Supreme Court. The most important impact of the direction so far is the doubling of *Antyodaya* coverage. Some citizens' organizations used the direction in their local areas to ensure full coverage of primitive tribes in their areas.²¹ The response of the government indicates that, like in the case of midday meals, pressure from civil society and the Supreme Court would be required for this direction to be fully implemented.

3.3 Integrated child development scheme (ICDS)

Early childhood is the most crucial period to tackle malnutrition. This period is also crucial since it forms the foundation for a healthy, educated and confident individual. In India, the only major scheme that targets this age group is the Integrated child development scheme (ICDS). The scheme seeks to address health, nutrition and education of the young child through a network of childcare centres called *anganwadis*. Child rights activists closely associated with the campaign pointed out that the best way of addressing malnutrition is to strengthen ICDS.

²⁰ *Antyodaya* has been described as a scheme for the 'poorest of the poor'. Government of India had made it mandatory that a person should have been identified as 'below poverty line' to be eligible for *Antyodaya*. This condition is problematic due to highly flawed identification in the BPL process. Further, the direction of the court mandates that all people belonging to these group should be brought under the *Antyodaya* category irrespective of their BPL identification.

²¹ Citizens' groups in Madhya Pradesh, Maharashtra and Chhattisgarh have taken up the issue of distribution of *Antyodaya* cards to primitive tribes. After intervention the government of Madhya Pradesh included all primitive tribal people in the state automatically in the BPL list (to make them eligible for *Antyodaya* according to old GoI guidelines). It was reported that AAY cards were distributed to all Sahariyas in Shivpuri District from where the intervention originated. The government of Chhattisgarh, to our knowledge, is the only state that has announced a policy of distributing *Antyodaya* cards to all PTGs. This came after sustained intervention by the advisor to the commissioners in the state. Following the intervention of the commissioner, Mr S R Sankaran, Katkari tribes were covered fully in one block. National Federation of Indian Women (NFIW) recently took an intervention on behalf of widows in six districts of Madhya Pradesh.

The 28 November 2001 direction required an *anganwadi* to be set up in each settlement (see Box 1). The support group considered having an *anganwadi* within each settlement crucial since easy physical and social access²² are both important for the young child to use the *anganwadi*. It was decided to press for universalizing ICDS in terms of having an *anganwadi* in each settlement. Based on the education survey data, it was estimated that 1.4 million *anganwadis* would be required in rural areas compared to the existing 600,000 *anganwadis* in rural and urban areas combined. This was taken up with the court but GoI did not file a reply in time and just made a verbal representation in the Court agreeing that fourteen *lakh anganwadis* would be required to cover all habitations.²³ It requested further time for a concrete response from the government. The court noted in its order, 'In absence of the affidavit, we could have straightway issued directions for the sanction of the remaining AWCS ... but having regard to the totality of the circumstances, we grant one final opportunity to the central government to file affidavit within a period of two weeks...'

Apart from coverage, some issues pertaining to the functioning of ICDS were taken up with the court. These included low utilization of allotted finances (and consequent loss to beneficiaries), sanctioned childcare centres not being operational, low allotment for supplementary nutrition and large-scale presence of dysfunctional *anganwadis*. The interim order of 29 April 2004 directed the states to ensure that all sanctioned *anganwadis* were to be opened and functional immediately, 'In respect of sanctioned AWCS, we direct that the same shall be made fully operational by 30th June 2004'.

An order on the issue of enhanced allocation for supplementary nutrition was deferred at the request of government of India. It is expected to be taken up soon.

The interim order of 28 November 2001 also directed the government to provide supplementary nutrition to all children, pregnant and lactating women, and adolescent girls (see Box 1). Interventions have been made by the commissioners asking states to ensure that these groups are covered, but no further direction has been given by the court on this issue since 2001.

Implementing a direction on coverage will lead to at least eight million more childcare centres in rural areas. Another challenge would be to see if the court is able to affect the functioning of *anganwadis*, many of which are operated poorly. Like in the case of midday meals, the attention by the Supreme Court has given a slap to civil society action on ICDS. In the budget of 2004/5, GoI almost doubled the allocation for ICDS. What further impact all of this has on ICDS remains to be seen.

3.4 Public distribution system

The public distribution system is widely considered to be the key measure of government of India to ensure food security. Right from the beginning, issues pertaining to PDS have been taken up with the court, and various directions have been obtained. These are summarized below.

²² Various studies on ICDS had pointed out caste discrimination in ICDS that made it difficult for Dalit and Adivasi children to use the *anganwadi*, which are often located in upper caste areas.

²³ This is referred to in the direction of 7 October 2004.

The first direction on PDS came in the first substantial hearing (23 July 2001). The petitioner pointed out that a large number of PDS shops were closed and this was causing misery to people, particularly in the context of drought. The court directed that all shops that are closed be opened and become functional within one week, 'All the PDS shops, if closed, are [to be] re-opened and [should] start functioning within one week from today and regular supplies [should be] made'.

PDS was also addressed in the landmark direction of 28 November 2001. The court directed that all poor families should be identified immediately, cards should be issued and grains should be supplied to them regularly according to norms (see Box 1). The court further directed that:

In order to ensure transparency in the selection of beneficiaries and their access to these schemes, the *gram panchayats* will also display a list of all beneficiaries under the various schemes. Copies of the schemes and the list of beneficiaries shall be made available by the *gram panchayats* to members of public for inspection.

The government of Delhi was directed to provide application forms free of charge, given the widespread complaint that charges were being levied on people even to apply.

Given the persistent complaints that shops were still kept closed or were opening at erratic times, the court reiterated its order on 8 May 2002, 'The respondents shall ensure that the ration shops remain open throughout the month, during fixed hours, the details of which will be displayed on the notice board'. This was again reiterated more strongly on 2 May 2003. The court directed that licences of PDS shops should be immediately cancelled if they were not kept open at stipulated times, if they failed to provide grains, overcharged, made false entries in records, or engaged in black marketing. Poor households that live day at a time often had to forgo their monthly rations since they were unable to mobilize the cash to buy 35 kg in one go. The court directed, 'to facilitate the supply of the grain, we issue the following directions: ... (2) Permit the BPL household to buy the ration in instalments'.

The directions above pertained largely to grassroots-level problems of the public distribution system. PDS is also plagued by a number of systemic problems. The approach of the support group to these problems has been tentative. While several problems pertaining to the system were well known, there were no established solutions. Some members of the support group argued that the court should not be approached unless there are reasonably established solutions to the problems. Further, not all solutions could be directed by the court.²⁴ The support group had prolonged debates on which aspects should be taken up with the court. By January 2005 several applications have been filed addressing different components of public distribution system.²⁵

²⁴ For example delivery of grains to the state of Jharkhand involved the complex logistical problem involving rail and road transport, warehousing, time-management, etc. A broad direction such as 'ensure regular and adequate supply grains to Jharkhand' could be obtained from the court, 'but we believe that a detailed order charting our logistical arrangements will be impossible, and undesirable'.

²⁵ An interim application has been filed in mid-2005 arguing for some systemic changes to the public distribution system.

An issue closely linked to PDS (by not limited to it) is 'BPL identification'. To target subsidies to poor people, the government started the process of identifying people living below poverty line. In 1997 PDS was converted into a 'targeted scheme', where subsidized grain would be given only to people identified as BPL. Though the targeting system was initiated in 1997, sixteen states had not completed the exercise of identification by July 2001, depriving a large number of people of their entitlements in many states. On 3 Sep 2001 the court directed all states to complete identification exercise immediately. A fortnight later, it reiterated the direction to states that had not started this exercise.²⁶

The first round of BPL identification has been highly criticized for excluding a large number of poor people, thus cutting their access to the public distribution system. Taking cognisance of this issue, the court directed the government to 'frame clear guidelines for proper identification of BPL families'. By 2002 the second BPL census took place using a complex questionnaire. This was accompanied by a drastic slashing of the number of people who could be identified by each state as poor. In Rajasthan, for example, the number of people below poverty line was halved over five years. This led on one hand to questions of flawed method of identification, and also to questions such as 'how poor is poor', 'receding welfare state', etc. The support group decided to challenge the method of identification, as well as the system of linking PDS to BPL identification. An application was filed accordingly. On 5 May 2003 the court directed the government not to 'delete any name from the BPL list' until this issue is resolved. The court has since been occupied with other issues, and this has not been taken up as of January 2005.

The petitioner also pointed out that the government of India had appointed a 'high level committee on long-term grain policy'. The committee had gone into issues pertaining to PDS and had suggested various reforms. The court asked the government of India for its stand on the report: 'The high level committee was appointed by the government of India. It gave its report in July 2002. Ten months have passed. We do not know what consideration the report has received, if at all it has been considered by the government'. The court directed the government to file its response to the report, and to mention the timeframe for implementing it: 'The affidavit shall also state the timeframe within which the government proposes to implement the recommendations of Abhijit Sen Committee in respect whereof the modalities have been discussed with the concerned ministries and planning commission'. This is a good example of how the courts can be used as a platform to make the government spell out its policies transparently. While the court did not restrict the options of the government,²⁷ it mandated the government to place transparently its considerations so as to allow these to be questioned, and tested to determine if they fulfil constitutional objectives.

Further applications have been filed recently on issues of accountability and are pending hearing. The directions so far have led to some important results. To begin with, 16 states that had failed for many years to identify the BPL population completed the exercise. Grassroots organizations, in Rajasthan in particular, reported that fair price

²⁶ Interim order of 17 September 2001.

²⁷ On 2 May 2003 the court gave a direction for doubling the allocations for SGRY as suggested by the committee. But it mentioned that it is willing to reconsider the direction if GoI gave suitable response as to why it is not desirable.

shops were opening more regularly.²⁸ But beyond this there is little documented impact of the directions on PDS. Most of the directions on PDS empower grassroots organizations to make fair price shops accountable. The impact of such directions depends on grassroots organizations taking them up in a large scale.

3.5 Final note on core strategy

The issues discussed above have been the core of the litigation. While the core strategy raises substantial issues, it cannot be taken as a vision to eradicate hunger and malnutrition. The demands, among other things, have been limited by the need to achieve a strategy that suits the court. The issues, too, have evolved over time. Beyond the core issues, a number of issues have been covered in the litigation.²⁹ An account of these is given in the section below.

4 Prolusion of issues

The right to food litigation is remarkable for the depth and the breath of issues it covers. The eight schemes mentioned in the 28 November 2001 order cover maternity benefits, childcare, school meals, social security pensions, assistance in case of death of primary breadwinner and provision of subsidized grain. Employment and destitution were added in later directions. Apart from covering various schemes, the litigation has covered several associated issues, particularly pertaining to governance. The litigation has also covered several local issues. This section gives an outline of other issues that have been covered in the litigation.

4.1 Governance

The litigation includes several directions on the right to information, accountability and other issues that are closely allied with the right to food. The first such direction was given on 28 November 2001, in which the court directed that the names of all beneficiaries must be displayed in prominent locations in the village such as the *panchayat*, schoolbuilding in order to maintain transparency in the selection of beneficiaries.³⁰ On the same day the state-run radio and television channels were directed to provide wide publicity to the directions of the court and the schemes.

In response to a complaint from a grassroots organization that the administration was resorting to underhand tactics to deny access to documents relating to public works, the court directed that copies of any documents relating to employment programmes should

²⁸ One PDS dealer told the petitioner that he has to keep the shop open regularly, '*nahi tho "contempt of court" ho jaye gi*', i.e., it will lead to contempt of court.

²⁹ We do not imply that 'non-core' issues are less important than 'core' issues. They have been distinguished by the fact that 'core' issues have stemmed from a conscious strategy while other issues have evolved along the way.

³⁰ Beneficiaries of various programmes often are not aware that they are 'receiving' benefits that are in the meanwhile being swindled.

be made available on demand at no more than cost price of copying the documents.³¹ *Gram sabhas* were empowered to conduct social audits of all food and work related schemes on 8 May 2002. The same order directed the administration to ensure that all information is provided to the *gram sabha* to conduct social audits.

On 8 May 2002 various directions were given to empower Panchayati Raj institutions to establish employment works of their choice, monitor the selection of beneficiaries and disbursement of benefits, and to conduct social audits. This was followed on 17 October 2004 with a directive in which the administration was directed to ensure regular conduct of *gram sabhas* and to provide all information necessary for monitoring various schemes.

Directions have also been given on procedural issues to ensure that people needing the schemes are able to access them. One example discussed earlier is the poor selection of 'BPL families'. Reacting to a suggestion that the process of applying for schemes was often cumbersome which made it impossible for the poorest to access them, the court directed the government to simplify procedures.³²

Recognizing that private contractors in rural development programmes are often corrupt,³³ the court directed that no contractors should be used in employment programmes³⁴ and specifically with regard to ICDS, 'Contractors shall not be used for supply of nutrition in *anganwadis* and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals'. In the same spirit, when government of Delhi requested the court to permit it to give biscuits and other precooked food in midday meal scheme, the court denied it permission to do so.³⁵

4.2 Famine codes

'Famine codes' deal with the identification and declaration of famines, and specify the measures that should be taken to prevent and tackle famines. Most states have a famine code, but these are merely administrative guidelines that are not mandatory. These codes are the only norms for the government's response to famine conditions. This gave the famine codes some value despite the fact that they are woefully outdated and limited. Recognizing this, the petitioner demanded the enforcement of famine codes. Considering the merit and the limitation of the famine codes, the court directed:

³¹ This appeared in the interim order dated 20 April 2004. Adivasi Mukthi Sangathan, the complainant, was asked to pay an exorbitant sum of over 20,000 Rs to get documents on three relief works. This charge was almost twenty times the normal cost of per-page photocopying.

³² Interim order of 27 April 2004.

³³ That contractors were banned due to corruption in the institution is a 'reasonable conjecture'. This reason is NOT mentioned in any direction, or were explicit references made in the proceedings of the court.

³⁴ Interim order of 8 May 2002.

³⁵ This has not issued as an interim order, as the request by government of Delhi was to vacate the direction to provide fresh cooked meals, the court refused to do so.

Under the circumstances, we direct the implementation of the Famine Code for the period May, June and July, 2003 as and when and where situation may call for it, subject to the condition that if in subsequent schemes the relief to be provided and preventive measures to be undertaken, during famine and drought, are better than the one stipulated by the famine code, the same may be implemented instead of famine code.

Efforts are now being undertaken by some civil society groups to develop a modern famine code. This has the potential to change the system of relief in the event of drought, flood and even man-made calamities that result in hunger and starvation.

4.3 Local issues and other issues

Various local issues have also been taken up in litigation. Widespread hunger in the abandoned teagardens of West Bengal was brought to the notice of the court. The petitioner pointed out that the state was not implementing the directions of the court in this region. Though no directions were passed in this regard, the state government machinery set into motion immediately after the application to provide relief was filed.³⁶ Irregularities in the implementation of employment programmes in the Barwani District of Madhya Pradesh, corruption in the public distribution system in Delhi, hunger deaths in the Baran district of Rajasthan, and other local issues have also been addressed in this litigation.

Other issues addressed by the court include payment of minimum wages in employment programmes, banning the use of labour-displacing machines in employment programmes, 'The state governments/union territories are directed to pay minimum wages to the workers under the scheme and shall stop use of labour displacement machines'. Collectors and chief secretaries were made responsible for hunger deaths within their regions³⁷ and the commissioners were appointed to oversee the implementation of directions and of all food and employment schemes.³⁸

The purpose of this section is not to provide an exhaustive account of the issues addressed, but to illustrate the range of issues that could be taken up by a court in the context of the right to food. The prolusion of issues has made the right to food litigation jurisprudentially relevant in a large number of contexts.

5 Litigation, the right to food and rights-based approach

For long, the issue of human rights was divided into civil and political rights that are justiciable and socioeconomic rights that are non-justiciable. Similarly, the Indian Constitution has 'directive principles' which are considered *principles of governance* but these are judicially non-binding. Since late 1970s, the Indian judiciary has issued

³⁶ It is reported that the relief provided by the government was very temporary, and that interest in this application had died in the meanwhile.

³⁷ Interim order of 29 October 2002.

³⁸ Interim order of 8 May 2002.

broad interpretations on justiciable* rights, particularly the *right to life* and *right to non-discrimination*. By interpreting the directive principles with these fundamental rights, the judiciary started to give binding directions on various socioeconomic rights to the government. Since the 1970s, there has been litigation on a range of issues including education, environment, hunger, shelter, etc. Today Indian courts are considered the most progressive in taking up socioeconomic issues. Internationally, too, the division of rights over the last two decades has been questioned and there is a growing agreement on the justiciability of socioeconomic rights. But jurisprudence on this issue is growing slowly. Despite the fact that most constitutions of the world make a direct or indirect reference to the right to food, litigation on this issue is scant. The right to food litigation is highly significant in this context.

5.1 Relevance of the litigation internationally

The litigation is important in two ways: as a legal precedent, and as a practical guide to approaching socioeconomic litigations. They are discussed below.

The court has asserted the principle of the right to food and that the government has a duty to ensure that people do not go hungry or malnourished. The litigation has also set an important legal precedent on various aspects of right to food by covering various programmes (childcare, school meals, employment, social security pension, provision of subsidized grains, maternity benefit, etc.), different groups (children, aged destitute, highly vulnerable groups, pregnant women, adolescent girls, etc.) and associated issues (governance, right to information and right to work).

The litigation is also a practical guide on how issues relating to the right to food can be taken up with the judiciary. The legal basis for the right to food is often broad and does not deal with *specific measures* that need to be taken to achieve the right to food. The legal basis for the right to food litigation in India, for example, is Article 21 of the Indian Constitution, i.e., the fundamental right to life. The lack of explicit laws on the right to food acts as a deterrent to the judiciary in taking up issues relating to this principle. This reluctance is compounded by the fact that socioeconomic issues are often considered ‘policy issues’ that are in the realm of the legislative, and not the judiciary.³⁹ In this context, the right to food litigation was successful in securing far-reaching intervention of the court. By asking the government to implement its own promises, the court skilfully avoided ‘dictating policy options’ to the government. At the same time, the legal team crafted a successful strategy of bringing important changes to existing programmes by questioning them from a rights perspective (e.g., arguing for provision of *anganwadis* in each settlement so that each child has access to it; arguing for quality norms in midday meal scheme to make it a ‘reasonable programme’; questioning BPL identification based on its ‘arbitrary’ nature, etc.).

³⁹ When asked if ‘Indian courts interfere excessively in governmental policymaking and resource allocation’, Justice Krishna Iyer (retired) of the Supreme Court of India replied: ‘It is not a case of interfering in policymaking. That whole conception is mistaken. You have certain fundamental rights, human rights, basic rights: rights to association, to speech, to food, etc. When these rights are infringed, by action or inaction, the court must take action. But it only protects the fundamental rights’.

5.2 Right to food and the rights-based approach

This litigation is a landmark, not just on the issue of the right to food, but on rights-based approach in general. It has set an important precedent on justiciability of socioeconomic rights. In the rights-based approach, there are three main players:⁴⁰ (i) holders of entitlements, (ii) those with the corresponding duty, typically the government, and (iii) a neutral institution that can enforce the right in case of any violation. Considering socioeconomic rights non-justiciable left a void in the rights-based approach by removing the power of enforcement from a neutral institution. Not being justiciable made the socioeconomic rights merely ‘pious declarations’.⁴¹ The binding directions by the Supreme Court fill a key gap, making it important to the rights-based approach at large. This litigation and the growing jurisprudence in other parts of the world on various socioeconomic issues will give a new meaning to the rights-based approach on socioeconomic issues.

Second, the right to food litigation is a rare example of how a court can have a far-reaching impact on an aspect of socioeconomic policy by requiring it to adhere to constitutional principles. This litigation differs from other landmark litigations such as *Grootboom vs. State of South Africa* by getting into programmatic details. The *Grootboom Judgement*, for example, laid out the principles for a ‘reasonable policy’.⁴² But it did not directly become involved into enforcing a policy correction in light of the principle outlaid.⁴³ In this respect, the right to food litigation is an important precedent, not just on the right to food but also for socioeconomic rights.

6 Conclusion

The study has a number of limitations. To begin with, the study has one narrow purpose: to illustrate how courts can be used in the context of the right to food. It would have been useful to examine critically the role of judiciary and look at the right to food in a larger politico-legal context, which we have been unable to do in this study.

Some commentators pointed out that the study is uncritical of the directions obtained and about the role of the judiciary in ‘policy issues’. While we believe that the court can have positive impact, we are not uncritical of it. A critical approach to the role of judiciary would have taken into account problems such as poorly informed decisions,

⁴⁰ We are taking a narrow legalistic view of the ‘rights-based approach’ in this study since we are looking primarily at litigation. A broader and more sound view of the rights-based approach would include political issues.

⁴¹ Dr Ambedkar, the founding father of Indian Constitution, argued that such principles still served an important purpose by acting as ‘instruments of instruction’ and by their power to mobilize public opinion and action.

⁴² It must be rational, inclusive of all significantly at risk groups in society, coherent, coordinated, flexible enough to respond to both short- and longer-term needs, and effectively implemented.

⁴³ Though the *Grootboom Judgement* did not directly get into policy correction, some follow-up action happened in light of the judgement. Further, it has created the scope to approach the court at a later stage if adequate policy corrections do not take place; in fact it has created the space for litigation on a large number of socioeconomic issues (though *Grootboom* deals only with housing).

class bias of the judiciary, its potential to stifle political movements, and a range of other issues. This study merely seeks to illustrate the kind of directions that could be obtained from the court and does not get involved with the merit of the directions. Similarly, the mobilization potential of the court's directions, its impact on public discourse on hunger, etc., have not been discussed adequately. Similarly international experience points out the importance of political mobilization for the directions of the court themselves to be implemented. This has not been discussed in the study.

Within these and other limitations, we believe that the study serves the purpose of documenting a landmark litigation and discussing lessons from it on a basic issue concerning people in most parts of the world.

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