

Holding the State Accountable for Hunger

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The proposed legislation on food security has the potential to serve as a catalyst for action and it is an opportunity for the State to define the scope of the right to food and mandate robust protection for this right. It can cement the gains made by litigation, but it should not be restricted to that. It is an opportunity to draw upon domestic practice and jurisprudence, international law, and legislation in other jurisdictions to comprehensively codify the right to food. Most importantly, a new law is an opportunity to provide accessible administrative and legal remedies for individuals whose right to food is violated.

India ranks 66th out of 88 developing countries on the Global Hunger Index. It trails sub-Saharan countries like Cameroon and Sudan, where the per capita income is much lower than in India (IFPRI 2009: 7). Clearly, India's impressive growth has not translated into eradicating hunger, and the State needs to take concerted, urgent steps to secure the right to food for its citizens. The new government is considering legislation on food security and nutrition. If well drafted, such legislation has the potential to serve as a catalyst for action, as a bargaining tool to pressure state machinery, and as practical recourse for those whose right to food is violated. It is an opportunity to delineate the scope of the right to food, and mandate robust protection for this right.

In Section 1, I examine the normative content of the right to food, as it has developed in international law. In Section 2, I discuss some implications of how this right is now understood, including its interaction with other socio-economic rights and civil and political rights. In the third section, I describe how the right to food has been articulated in India through public interest litigation, and the strengths and limits of this articulation. Finally, in Section 4, I ask what a law on the right to food might bring to the fulfilment of this right in India, and examine what the core content of such a law might be.

1 International Law

The right to food is a part of the founding human rights texts of the post-world war II era, the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1976 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1976¹ (ICESCR). Other international legal instruments that incorporate the right to food include human rights treaties

on the rights of women,² children,³ refugees,⁴ disabled persons,⁵ and instruments relating to the conduct of states during armed conflict.⁶

The most basic provision on the right to food is in Article 25(1) of the UDHR, which states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, *including food*, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (emphasis added).

Article 11(2) of the ICESCR hones in on the most basic aspect of the right to food, the right to be free from hunger, and enjoins States to take steps to address and prevent hunger, saying, *inter alia*:

The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;

The ICESCR's prescriptions on hunger are programmatic, long-term, and manage to be both ambitious and rather vague. They reflect the consensus at the time that economic and social rights were amenable only to progressive realisation, and could not be enforced by an individual, administratively or in a court of law, in the way that civil and political rights could be. This view is reflected in the Indian Constitution as well, where the right to food is included as a Directive Principle of State policy, rather than a fundamental right.⁷

In the decades since, this view has shifted, largely as the result of civil society advocacy in domestic and international forums, and efforts to realise this right on the ground (for civil society efforts on the right to food see Kent 2005: 42-45, 54-55 and Eide 2005). International human rights law and an increasing number of States frame that the right to food and socio-economic

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rights, more generally, are justiciable and enforceable by individuals. For example, some countries, including Bolivia, Guyana, Ecuador, Haiti, Nicaragua and South Africa, recognise the right to food as a fundamental right in their respective constitutions (FAO 2009: 35). Belarus and Moldova recognise it as a part of the constitutional right to an adequate standard of living (ibid:36).

Recent international legal instruments also emphasise accountability and enforceability. In 1999, the Committee on Economic, Social and Cultural Rights (CESCR), the United Nations (UN) body supervising implementation of the ICESCR has elaborated on these aspects of the right to adequate food in General Comment No 12 ("GC 12").⁸ The Special Rapporteur on the right to food has further clarified how this right is justiciable (Ziegler 2002), and how it should be enforced in different situations, for example, large-scale land acquisition and the global financial crisis. In 2004, the Food and Agricultural Organisation (FAO) Council adopted voluntary guidelines on the right to food (FAO 2004) which offer governments practical help on designing policies and legislation to secure this right.

In light of the above, what is the core content of the right to food? As with all human rights, the rights holder is the individual. The right to food encompasses two levels of entitlement. The first is the right to be free from hunger, enshrined as "fundamental" in the ICESCR, which means that a State has an urgent, immediate obligation to ensure freedom from hunger regardless of its level of development. The CESCR says that a State "in which any significant number of individuals is deprived of essential foodstuffs is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*" (CESCR 1999: para 10). The second level is the right to adequate food, which is broader, and covers, inter alia, quality of nourishment, availability and ease of access – physical, economic and social. The GC 12 states that the right to adequate food is realised "when every man, woman and child, alone or in community with others, has physical and economic access at all

times to adequate food or means for its procurement".

The right to food, like any other human right, imposes three types or levels of obligations on States: the obligations to respect, to protect and to fulfil. The obligation to respect is a negative obligation, and requires the State to refrain from any measure that prevents individuals from accessing food. For example, an embargo on food supplies to a particular area would be a violation of the obligation to respect the right to food. The obligation to protect requires the State to ensure that the actions of third parties do not deprive individuals of their access to adequate food. The obligation to fulfil encompasses the obligations to facilitate and to provide. Facilitation means taking positive steps that strengthen people's access to food and access to resources that enable better nutrition, including, inter alia, land, schooling, jobs and markets. The obligation to provide means direct provision by the State to those who do not have the wherewithal, for reasons beyond their control, to secure adequate food on their own (CESCR 1999: para 15).

The GC 12 and the various submissions of the special rapporteur emphasise that progressive realisation also requires setting concrete targets, measuring and monitoring whether those targets are met, and providing remedies through which individuals can hold the government accountable for any violation of the right to food.

2 Implications of Food Being a Right

The call of the UDHR is not simply for food, but for an adequate standard of living. The right to food is one amongst several rights, including the rights to shelter, education and health, that need to be fulfilled in order to achieve this, and must be viewed as part of a cluster of mutually reinforcing socio-economic rights.

Further, this cluster of socio-economic rights must be understood as tied to and reliant upon the range of civil and political rights (Kent 2005: 47). The right to food entails an entitlement on the part of the citizen, an obligation on the part of the state, and the ability to sue the State when it fails to meet its obligations. This, in turn, implies the existence of certain civil

and political rights such as freedom of expression and association, and institutional structures such as an independent judiciary and freedom of the press.

It is important to clarify that illiberal regimes which do not guarantee basic civil rights and lack an independent judiciary can and have successfully tackled chronic hunger (Dreze and Sen 1989: 258-59). Their successful implementation of social security measures may be instrumental, intended to improve workforce productivity and stimulate growth, for instance, or benevolent and paternalistic. However, where social security measures are discretionary rather than obligatory, where citizens cannot demand these measures, or publicly critique state policy, the rights to food, to health, shelter, or education are not being respected, protected and fulfilled.

One can convincingly argue that being fed, clothed and silenced is vastly preferable to protesting on an empty stomach – better a Lee Kuan Yew autocracy than Indian-style democracy. It is important to recognise, however, that in a non-democratic context what is given can be taken away, and that those who are deprived of it have little recourse.

As an example, in colonial India the British government codified measures to counter hunger in legally binding Famine Codes, but, unaccountable to its subjects, dispensed with these measures when they were inconvenient. In the devastating Bengal famine of 1943, the Governor of Bengal wrote to the Viceroy of India explaining that a famine had not been declared to avoid the relief measures mandated by the Famine Codes. In democracies with a free press and free elections, the media exposes extreme hunger, and governments fear retribution at the ballot box if they ignore it (ibid 211-14). The British could choose when to be bound by the Famine Code, but in independent India, this was not an option. However inefficiently, Indian democracy did move to prevent the famines that had been a regular feature of pre-independence India. The last significant famine occurred four years before independence in 1943 (ibid: 212).

Thus, we could say that basic democratic institutions and protections such as a free press and elections are necessary to secure

the fundamental core of the right to food – preventing extreme hunger. However, as Dreze and Sen argue, these basic protections have proved far less successful at generating the political will to tackle endemic hunger, which is not headline-grabbing or politically controversial, but kills many times more people than extreme, episodic famines (ibid: 214-15, 261). Across the developing world the right to food is “violated more comprehensively and systematically than probably any other right” (Alston and Tomasevski 1984 qtd in Kent 2005: 49). In India, chronic hunger is the norm for many millions. Estimates of general undernourishment are twice as high in India as in sub-Saharan Africa (Sen 2003; Right to Food Campaign website). Successive Indian governments have failed to build the socio-economic safety net needed to ensure minimum standards of health, nutrition and education.

Endemic hunger is a far more complex phenomenon than famine, arising out of deeply entrenched socio-economic systems. Consequently, eradicating it demands more from the State and from civil society than the focused interventions required to avert starvation. It requires extensive, cross-sectoral public provisioning by the State that goes well beyond securing food intake, to securing and enhancing access to the full complex of basic necessities that influence a human being’s ability to live without undernourishment. These include shelter, clean water, sanitation, adequate healthcare and education. It also requires citizens to pay attention not only to spectacular and extreme forms of suffering, but to quotidian violations of the right to food, and demand accountability for these routine failures. The State and civil society have these imperatives particularly in countries like India that have a vast infrastructure intended to promote food security, but which fails to deliver because of shoddy implementation, corruption and a lack of accountability.

The quest for accountability requires civil society to delve deeper into the democratic toolbox, to creatively deploy formal guarantees and existing institutions to push State programmes to deliver upon their promises. Increasingly, in countries where unconscionable hunger coexists with formal democratic guarantees, civil

society is insisting upon a hard-edged notion of the right to food, one that is justiciable and enforceable. Many governments, in turn, have begun to take the right to food more seriously.

In recent years, a number of countries have begun drafting legislation designed to realise the right to food. Draft bills on the right to food are making their way through the legislative process in South Africa, Nicaragua, Mexico, Peru and Uganda (FAO 2009: 66-68). In 2005, Guatemala became the first country in Latin America to pass a law incorporating the right to food. Brazil has followed, passing the Federal Law on Food and Nutritional Security in 2006 (ibid:67). In India, civil society has successfully petitioned the Supreme Court to enforce the government’s commitments under various food and nutrition schemes. The government is now in the early stages of drafting a law protecting the right to food. In Section 3, I examine the gains made by litigation, as well as its limitations.

3 Litigating the Right to Food

In April 2001, the People’s Union of Civil Liberties (PUCIL), Rajasthan, filed a writ petition in the Supreme Court of India demanding that the huge stocks of food grain in government granaries be deployed immediately, to protect people who had been so impoverished by three years of drought that they could no longer afford food. The Right to Food Campaign – a network of organisations that includes non-governmental organisations (NGOs), trade unions, and grass roots movements from across India – crystallised around this Supreme Court petition.⁹ Respondents to the petition included the central government, the state governments of Rajasthan and Maharashtra, and the state-owned Food Corporation of India.

The petition argued that starvation deaths in northern and eastern India were a result of the respondents’ decision to let unused grain go to waste rather than distribute it to the hungry. It argued that the right to life under Article 21 of the Constitution of India included the right to food, which implied a duty on the part of the State to “provide food especially in situation of drought ... to people who are not in a position to purchase food”. It critiqued

the public distribution system (PDS), the paucity of drought relief works, the non-implementation of food welfare schemes, and demanded food-aid and employment for drought-affected households.

The petition drew on the principle established by the Supreme Court in *Mazdoor Samiti v West Bengal*,¹⁰ where it held that with respect to something as crucial as emergency medical treatment, the state could not cite financial constraints to limit its constitutional obligation to protect the right to life. The petition thus drew a parallel between emergency medical treatment and averting starvation, as core obligations with regard to the right to life. It is worth noting that, at this stage, the petition focused on what the GC 12 has described as the fundamental right to be free from hunger rather than the broader right to adequate food.

The petitioner’s argument that the right to food is inherent in the right to life drew on well-established Supreme Court jurisprudence. Socio-economic rights are not articulated as fundamental rights in the Indian Constitution. They are included, instead, as Directive Principles of State Policy – as goals the State must realise progressively. Over the course of several cases through the 1980s, the Supreme Court read these socio-economic goals into the right to life guaranteed by Article 21 of the Constitution, effectively giving them the legal status of fundamental rights.¹¹ Through these cases, the Court had established that the right to life, to be meaningful, must be interpreted to include the right to food, water, shelter, education, medical care and a decent environment. In *Francis Coralie Mullin vs Union Territory of Delhi*, Justice Bhagwati described this conception of the right to life:

We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about.... and co-mingling with fellow human beings.

In keeping with this jurisprudence, the Supreme Court concurred with the petitioners in *PUCIL vs Union of India* that the right to food was a part of the fundamental

right to life. In its first order, the Court added more state governments as respondents and asked them for reports on the implementation of food welfare schemes.¹² Through subsequent interim orders, the Supreme Court converted the benefits of nine nutrition-related programmes into legal entitlements;¹³ directed measures to ensure public awareness and transparency in implementing these programmes;¹⁴ expanded coverage of the midday meal scheme in primary schools; and universalised coverage of the integrated child development scheme. In May 2002, the Court appointed commissioners to monitor the implementation of its orders, who can highlight specific violations as well as macro-level policy flaws. As the case progressed, the petitioner's demands and the Court's orders went beyond the bare minimum right not to go hungry, and aimed to secure broader access to adequate food for vulnerable groups. Eight years after it was initiated, the public interest litigation (PIL) continues, with the Court using periodic interim orders to monitor and respond to progress by the respondents rather than reaching a final judgment laying out its interpretation of the right to food.

The right to food case falls firmly within the established conventions of PIL in India. It has, however, managed to evade some of the weaknesses that characterise such litigation. In many PIL cases, the Supreme Court's pronouncements have had little practical impact.¹⁵ Some cases have developed into a fraught contest between the judiciary, seeking to impose its orders, and the executive, resenting judicial incursion on policymaking.¹⁶ More fundamentally, PIL can generate the illusion of access to justice for the poor, without actually providing such access. Galanter (1989: lxvii) has observed that the poor's access to the Court through PIL is mediated by elite allies; the issues raised and solutions proposed might reflect the sympathies of these elite petitioners rather than resonating with those whom the PIL is intended to benefit.

In the right to food case, the Supreme Court largely demanded that the executive fulfil the detailed commitments it had made in various welfare programmes. So the Court's orders were practical, and compliance was measurable, avoiding the

high rhetoric but low impact of many PILs. The presence of Right to Food Campaign members across many states allowed the Campaign to monitor government compliance with Court orders, and supplement the efforts of the commissioners in this regard. Finally, the roots of the Campaign in grassroots politics in Rajasthan and elsewhere arguably kept it tied to ground level realities.

That said, like any top-down project of social justice, the right to food case has serious limitations. The nature of litigation, where gaps between hearings can be long and the hearings themselves highly compressed, necessarily generates a partial reckoning with the right to food. In this case, it has meant that links between implementing the right to food and other social security entitlements, such as the National Rural Employment Guarantee Act (NREGA) have not been adequately explored. As discussed earlier, the right to food is closely interlinked with other socio-economic rights, and cross-sectoral analysis and coordination is crucial. In addition, as with any PIL, the Court can monitor implementation only to a limited extent. Most importantly, a PIL cannot effectively address individual grievances regularly and on a large-scale. Day to day accountability for violations of the right to food remains remote.

4 Legislating the Right to Food

A new law on the right to food can cement the gains made by litigation, but it should not be restricted to that. It is an opportunity to draw upon domestic practice and jurisprudence, international law, and legislation in other jurisdictions to comprehensively codify the right to food.¹⁷ A law on the right to food can give a precise definition of the scope and content of this human right, codify the obligations of different levels of government, and establish institutional mechanisms for setting targets, measuring whether targets are met, monitoring progress and cross-sectoral coordination. It can lay down principles to guide administrative and judicial interpretation of the right to food. A law that defines the State's obligations correspondingly clarifies what constitutes a violation, which helps citizens to react when a violation occurs. Perhaps most importantly, a

new law is an opportunity to provide accessible administrative and legal remedies for individuals whose right to food is violated. In a country with 200 million food-insecure people – the largest number of hungry people in the world (IFPRI 2009:9) – this is urgently needed.

NOTES

- 1 India ratified the ICCPCR and the ICESCR in 1979.
- 2 Convention on the Elimination of All Forms of Discrimination against Women 1979.
- 3 Convention on the Rights of the Child 1989.
- 4 Convention Relating to the Status of Refugees 1951.
- 5 Convention on the Rights of Persons with Disabilities 2006.
- 6 Convention of 1949 relative to the Protection of Civilian Persons in Time of War; Article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and Articles 69 and 70 of the Protocol Additional to the Geneva Conventions, of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).
- 7 Article 47 of the Constitution of India.
- 8 General Comments are expert interpretations of human rights instruments – treaties or covenants – issued by the UN body supervising the implementation of that particular instrument
- 9 See <http://www.righttofoodindia.org/> for information on the Right to Food Campaign, and copies of the writ petition, Supreme Court Orders and reports by Court-appointed commissioners.
- 10 *Paschim Bangal Khet Mazdoor Samity vs State of West Bengal* (1996) 2 SCC 549.
- 11 See, for example, *Chameli Singh vs State of Uttar Pradesh* (1996) 2 SCC 549; *Francis Coralie Mullin vs Union Territory of Delhi* (1981) 1 SCC 608; *Olga Tellis vs Bombay Municipal Corporation*, 1985 (3) SCC 545
- 12 Order of 23 July 2001.
- 13 *Ibid.*
- 14 The Court directed that copies of Court orders be prominently displayed in the local language at every village council, government school building and PDS shop across the country. It also directed village councils to display in public the list of the beneficiaries selected under each scheme. It further ordered that members of the public at the village level were entitled to initiate social audits of these schemes.
- 15 See Shourie (2001) on the *Bandhua Mukti Morcha* case.
- 16 Sait (2003: 80) has recounted in detail how recalcitrant state governments retaliated by formally complying with Court orders, while resisting any substantive compliance in *PUCL vs Tamil Nadu*.
- 17 See FAO Guide on Legislating for the Right to Food (2009) for a detailed analysis on the content of a law on the right to food.

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