Note: This paper grew out of a presentation at the Second APU Law and Development Conference held in August 2013. It is scheduled to be part of a book on Welfare Rights in India, which is being edited by Malini and Sudhir, and will hopefully be published with OUP India later this year. As will be evident, this is still work-in-progress, though the central claims are hopefully clear. A multi-disciplinary group such as ours will allow me to test how legible and persuasive my claims are. Given that much of the focus of the paper is the Indian Supreme Court’s case-law, it has to be doctrinal and technical in parts. However, I hope to also reach broader audiences beyond lawyers and would value your inputs on how this can be achieved.

Given the nature of this paper, I will not make a full fledged presentation of its contents. I will, instead, present a brief overview of this paper in about 10 minutes or so. I request those attending to read the paper in advance so that I can seek to address substantive queries, criticisms and comments at length in the Q and A.

Characterising and evaluating Indian social rights jurisprudence into the 21st century

Arun K. Thiruvengadam

1. Introduction

This chapter seeks to assess the record of the Indian judiciary in implementing socio-economic (“social”) rights, focusing in particular on trends in the first decade and a half of the new century. The Indian judiciary has had to confront the issue of enforcing social rights (some of which were enshrined in the non-justiciable Directive Principles of State Policy) almost from the inauguration of the constitutional republic in 1950. However, the record shows that it began engaging with the implementation of social rights in earnest only since the early 1980s. Most of the prominent social rights cases occurred in the 1980s and 1990s, and much of the existing scholarly literature focuses on this period of the Court’s record. There has been relatively little scholarly attention paid to social rights cases in more recent times, especially since the turn of the century. The argument I advance in this chapter, taken together with the remaining analyses in this volume, seek to address this gap.

The principal argument that I pursue is that the Indian Supreme Court’s approach to social rights has been in a state of continuous evolution from the time it had to first confront cases where individual litigants invoked the relevant constitutional provisions. This evolution has continued into the more recent cases that have been decided in the new century. Given this, attempts to analytically characterise the social rights jurisprudence of the Indian judiciary in categorical terms may be less helpful, given its fluid and ever-changing character. What may be more constructive, instead, would be studies that focus on the complexities within this

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* I thank Douglas MacDonald, Tarunabh Khaitan, Arvind Elangovan, Malini Bhattacharya and Sudhir Krishnaswamy for their inputs on drafts of this paper.
broad tent, being alive to differences in how the Courts have evolved and implemented specific rights (such as the right to education, or the right to livelihood) over time. Following from what has been set out earlier, the focus of the chapter is on more recent cases and trends, but the overall attempt is to map the different phases of the evolution of the jurisprudence and to identify the particular characteristics as well as judicial strategies and preoccupations during each phase.

The task of seeking to categorise the evolution of social rights by the Indian Supreme Court is a hazardous one for several reasons, two of which require special mention. First, as is well known but not always appreciated, the Indian Supreme Court is not a single institution. One any given day, the thirty one judges on the Court sit in benches of two or three judges, with upto ten such benches adjudicating cases simultaneously. The Indian Supreme Court is thus literally a polyvocal court and it struggles with ironing out the differences and contradictions that inevitably arise as a direct consequence of its structure.\(^1\) This apart, the output of the Court is difficult to characterise along any linear trajectory as its structure causes the law to evolve in fits and starts with steps backwards and forwards (depending on one’s viewpoint). Any periodization claims are subject to the critique that within each phase, cases pointing to different trends can be highlighted. My attempt in this paper must be understood against this factual backdrop.

My claim is that the evolution of constitutional jurisprudence of social rights by the Indian judiciary is best understood as progressing across three separate phases. In the first phase, which lasted roughly from 1950-1980, the struggle was to establish a constitutional foundation for social rights in India. As is well known, the Constitution of India contains a set of Directive Principles which encourage the Indian state to pursue several social welfare goals. While these are declared to be ‘fundamental in the governance of the country’ they are nevertheless housed in a part of the Constitution which is textually mandated to be unenforceable by the Judiciary. For nearly a quarter century after the adoption of the Constitution, judges of the Indian Supreme Court interpreted this to mean that the Directive Principles had a secondary status to the Fundamental Rights which were seen as more clearly within the ambit of the judicial role. From the mid-70s onwards, judges of the Supreme Court began seeking to address the tensions between the Directive Principles and Fundamental Rights. This led, first, to attempts to construe them harmoniously and as this movement progressed, to attempts to integrate their interpretation. The literature on Indian social rights has focused on this phase quite extensively, and for reasons also of space, this will not be the focus of this particular essay. My focus here will be more on the second and third phases outlined below.

\(^1\) While this issue is widely known in the legal community, there are few writings which grapple with all the complexities involved insightfully. Nick Robinson’s many works are an exception to this general trend. See in particular, Nick Robinson, Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts, 61, American Journal of Comparative Law (2013), pp. 101=38.
Once the initial hurdle of judicially construing Directive Principles was crossed, in the second phase which lasted roughly from 1980-2000, there were difficult and intricate questions about what exactly followed once there was a judicially recognised social right. The Supreme Court grappled with these questions in a series of cases involving the rights to work, shelter, health, education and food across this period. The process was not linear and there were several missteps and failures along with successes and accomplishments. In a succession of cases, the Supreme Court grappled with how much deference to grant to the executive and legislative authorities involved, especially on questions of budgetary allocation of funds for particular social rights. The Supreme Court tended to evolve a case-by-case approach to particular social rights, extending greater scrutiny to one right or one set of cases at time than to other rights and categories of cases. It is difficult, therefore to identify a consistent approach to social rights cases in this and other phases, particularly because of the role of individual judges which became exacerbated in the Indian system where judges sit in benches of two or three and their decisions are regarded as representing the entire Supreme Court.

The third phase, which extends from 2000 till the present, has witnessed the judiciary being much more confident about its authority to rule on social rights issues. This has led the Court, by and large, to be more focused on questions of implementation of its orders in social rights cases, and with ensuring their monitoring. As I seek to show, particularly in the final sections of this chapter, this is an ongoing process and activists and judges need to be mindful of lessons both from previous Indian cases and from the experiences of judges in other jurisdictions who confront similar challenges.

To flesh out my argument, I use as a foil some recent literature on social rights that challenges the conventional understanding in the existing Indian literature on social rights. In a 2010 article, Madhav Khosla argues that the Indian jurisprudence on social rights has been mischaracterised and misunderstood by both Indian and foreign scholars as representing what he terms as the ‘systemic approach’ to social rights. Under this approach, according to Khosla, the nature of the right recognised by the Court is not conditional upon state action, and leads to individualized remedies upon a showing of violation. Khosla asserts that much of Indian scholarship on social rights has assumed that the Indian judiciary has secured for its citizenry such systemic rights, whereas, the true picture is that what the Indian judiciary has carved out for Indian citizens is a group of social rights that are properly characterised as conditional. For Khosla, a ‘conditional’ social right is one which instead of focusing on the inherent measures that ought to be undertaken by the State, focuses on the governmental actions already taken to implement a right, making the right conditional upon state action. Khosla argues that it is important to recognise this hitherto neglected fact, as it helps appreciate the Indian judiciary’s social rights jurisprudence in its proper and correct context. Khosla’s argument is that the Indian Supreme Court’s jurisprudence is not as robust or expansive as is generally assumed, and is in fact rather more modest, conservative and also

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limited in its impact. Exhibiting a similar scepticism about the robustness of the record of the Indian judiciary on social rights, Farrah Ahmad & Tarunabh Khaitan have recently advanced the virtue of ‘constitutional avoidance’ and have urged courts in India to use resources from administrative rather than constitutional law to secure social rights.3 Both articles canvass a range of important social rights cases drawn from the 1980s to 2014 to undergird their arguments.

As I will argue, there is much to commend in Khosla’s analysis, because it forces scholars and judges to engage deeply with the actual record and details of the Supreme Court’s caselaw on social rights, and makes insightful claims about that record. I nevertheless conclude that Khosla’s argument, while advancing the literature, misconceives the nature of the Indian Supreme Court’s record and ignores some important elements, while also drawing overly sharp analytical distinctions between categories. Similarly, I believe that Ahmad & Khaitan are motivated by laudable goals but their preferred solution – of using administrative law remedies – has the disadvantage of being underdeveloped in Indian conditions.

What is puzzling about both accounts of social rights cases is that they ignore the Right to Food case which was initiated in 2001 and is not mentioned in either analysis despite being recognised as a landmark decision. The trajectory of that and more recent cases that I seek to draw attention to in this chapter, have important implications for Khosla’s central argument as well as a proper understanding of the Indian Supreme Court’s contemporary approach to social rights cases.

The structure of this essay is as follows. Beyond engaging with the arguments of Khosla and Ahmad-Khaitan in Section 2, Section 3 of this essay seeks to analyse how the Indian Supreme Court’s more recent and contemporary record on social rights now differs from its earlier approach. Due to constraints of space and time, this essay will focus on only two specific cases: the aforementioned Right to Food case, and an April 2014 judgment of the Delhi High Court in Mohd. Ahmed v. Union of India4 which displayed a novel and innovative approach to the right to health guaranteed by the Constitution of India. Section 4 will also contain a brief comparative reference to the jurisprudence of the Colombian Constitutional Court, focusing specifically on its decision in relation to its internally displaced peoples. I will seek to argue that the Colombian Constitutional Court’s approach in that case in particular (as well as in some other cases) is strikingly similar to that of the Indian Supreme Court’s approach in recent cases. Both judicial institutions have learned from previous experiences of failures in implementing social rights to evolve more innovative approaches that involve sophisticated modes of monitoring, leading to better results and greater impact on the ground. The concluding section of the essay, Section 5, will seek to


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summarise the arguments made in this essay about the evolution of social rights jurisprudence in India.

2. Understanding and characterising the Indian Judiciary’s initial steps towards achieving social rights (1980-2000)

The record of the Indian Supreme Court on social rights has been extensively documented and analysed in the literature that has evolved around this issue. Rather than repeating that narrative here, I will engage with Khosla’s analysis to both recapitulate the major phases of evolution of this jurisprudence and analyse its particulars.

Khosla’s central argument is that courts across the world have typically tended to take what he calls a systemic approach to social rights. This consists of treating constitutionalised social rights as systemically guaranteed, and not dependent on actions or policies adopted by the state. Khosla relies on debates within South African constitutional jurisprudence to assert that systemic rights in turn are of two types: the first being the ‘minimum core’ standard, which ensures and individualized remedy to those invoking the right; and the second being a ‘reasonableness’ standard, where the remedy is non-individualized but posits that the measures taken to achieve a reasonable standard have not been undertaken. Khosla provocatively argues that the Indian judiciary’s approach to social rights has been misconceived by commentators (and perhaps even by the judges involved) to be a systemic one. Khosla argues, instead, that the proper way of understanding the Indian judicial approach to social rights is to characterise it as conditional. Khosla defines this category as follows:

“Rather than focusing on the inherent nature of measures undertaken by the state, the conditional social rights approach focuses on their implementation. No judicial review is conducted on the former question, making the right conditional upon state action.”

Thereafter, Khosla conducts a close examination of leading social rights decisions of the Indian Supreme Court across a range of issues: the right to livelihood and housing (where he examines the Olga Tellis and Ahmedabad Municipal Corporation cases), the right to education (focusing on the Mohini Jain and Unnikrishnan cases), and finally, cases dealing with the right to health (Vincent Panikurlangara, Rakesh Chandra Narayan, Consumer Education and Research Centre, and Paschim Banga Khet Mazdoor Samity). His principal argument is that in each of these cases, which are perceived as having established the basis for individualised social rights, the Supreme Court adopted a conditional approach, which led to very limited remedies and had a limited impact.

In what follows, I briefly examine Khosla’s analysis of each of these leading cases. I will also seek to engage with Khosla’s analysis of these cases to develop my own argument in dialogue and in response to his claims. The first case that Khosla targets for his analysis is

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5 cite leading works.
the Olga Tellis case. This was a case initiated by a journalist who filed a petition on behalf of several pavement-dwellers in Bombay. These pavement-dwellers had been subjected to forcible eviction proceedings by the Bombay Municipal Corporation pursuant to its decision to build a freeway on the site occupied by them. The pavement-dwellers argued that since they would be deprived of their livelihood if they were evicted and deported to rural areas, the eviction amounted to a deprivation of their right to livelihood and was therefore unconstitutional. The Court partly accepted this argument and held that the right to life included the right to livelihood. However, it also held that the State could not be compelled to provide means of subsistence to all its citizens, and set much store by this reasoning. It issued an injunction halting evictions for four months and directed the government to hear the pavement-dwellers before taking action against them. However, by doing so and by adopting a timid approach, the Court gave the government a way out of the situation and ultimately the pavement dwellers had to vacate the site as they could not find alternate housing.

Khosla is highly critical of the Olga Tellis case, and notes that while it is understood as a decision recognising and guaranteeing a right to livelihood, the judgment did not elaborate on the content of this right. For him, the real issue in the case was whether there is a right to shelter, since the pavement dwellers and squatters who had approached the Court were seeking to resist being evicted from their dwellings. Khosla notes that Olga Tellis did not provide for an individualised right to shelter; nor did it hold that the state was obliged to take reasonable measures to provide for shelter. Instead, Khosla argues, the Court’s focus was on ensuring that a proper procedure for eviction was followed. Khosla places much emphasis on the fact that “[t]he only persons to whom the Court provided shelter were those who had been promised the same under a state scheme; persons who were entitled to shelter under a government policy.”

For Khosla, this demonstrates that the approach of the Court was conditional because “[t]he Court’s remedy did not flow from a systemic right to shelter, but rather from the state’s failure to follow through on its decision to allot land for slum dwellers.” The fact that the Court did not provide any remedy to the slum dwellers who were not covered by the government’s scheme is viewed as evidence by Khosla to categorise Olga Tellis as establishing a conditional rather than systemic right to shelter.

I believe that Khosla is right to criticize the ruling in Olga Tellis. As I have argued earlier, in line with the critique offered by Khosla, the decision was correctly regarded as disappointing by social rights activists for not having “gone so far as to declare that a right to housing was

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6 Khosla, p. 748.

7 Khosla analyses the other leading case on the right to shelter, Ahmedabad Municipal Corporation, in similar terms. He notes that the Court allowed only those who squatters who had been in possession of the land for a long time, and were eligible under a government scheme, to stay on the property, while denying the claim of others who did not fit these criteria. Khosla cites this also as exhibiting a conditional approach since it was dependent on state action. Khosla, pp. 748-9.
That being so, my own view is that the problem with the approach in Olga Tellis is not so much that the Court adopted a conditional approach, but that it lacked the courage to force the government to take measures to back up its analysis of the social rights in questions. While the Court was assertive in laying out the constitutainal foundation of the right to livelihood and shelter, it did not follow through on this logic when it came to implementing this in the facts of the case before it. Perhaps the Court was of the view that by enunciating the law clearly on the issue, it was being activist enough (given that the DPSPs are considered non-justiciable) and that it would be prudent to leave it to the government to decide how the right should be enforced in individual cases. Since at the time Olga Tellis was decided, in the early 80s, the idea that the DPSPs could be judicially pronounced upon was still relatively new, this conservatism on the part of the Court is easier to understand in hindsight. As we shall see, however, the Court did abandon this restraint as it became evident in case after case that the government would not actually enforce the pronouncements which established different social rights. This would cause the Court to take more expansive efforts in later cases. So, in my view, the problem with the Court’s approach was not that it chose a ‘conditional’ approach over a ‘systemic one’ but that it lacked the courage to follow through on its impulse. This is less an analytical problem than a sociological one.

Khosla’s analysis of the leading cases on the right to education – Mohini Jain⁹ and Unni Krishnan¹⁰ - leads him to find confirmation of his views, although he notes that in these cases, “the employment of [the conditional rights] model is less easy to discern.”¹¹ In these cases, the Supreme Court interpreted Articles 41 and 45 to hold that the Indian state had an obligation to provide free education to children below the age of fourteen; thereafter, the state’s obligation to provide for free education would be subject to its financial constraints. Khosla argues that though on its face, this could be interpreted as an articulation of a systemic social right, reading the details of the decisions reveals that the Court only granted a conditional right. In Khosla’s reading:

[All Unni Krishnan required from the state is that it cannot charge for education for education for children below the age of fourteen years; the imparting of education till this age must be free. The decision implies that when education is imparted, it must be free, but does not require that the state must in fact provide education to all children.¹²

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11 Khosla, p. 749.

12 Id, p. 751.
Khosla emphasises that the Supreme Court in these cases did not seek to create new institutions. As he notes, “the existence of insufficient schools was not considered a violation of the right to education; just as in the earlier cases, inadequate housing was not considered a violation of the right to shelter.” In both categories of cases, Khosla argues, “the existence of a violation is conditional upon state action.”

Once again, while Khosla is correct to criticize these decisions, his criticism may be slightly off the mark. Khosla ignores the fact that in the years following the Unnikrishnan case, the Supreme Court tried to take over the process of admissions in engineering and medical colleges by exhibiting scepticism about the decisions of the bodies charged with supervising medical and engineering education. The Supreme Court’s efforts to act as a substitute for those bodies were ineffective and it had to accept this over time. While the Court was restrained in some respects, it was overly activist in trying to micro-manage the process of admissions in other respects. Another point to be considered, to which I will return later, is that the Court’s attempt to prod the government to remember the call of the constitution to provide free education served to revive and galvanise debate over this issue. This ultimately led to a constitutional amendment to provide for a fundamental right to free and compulsory education in 2002 and a statute that sought to implement this right through the Right to Compulsory Education Act, 2009. The Court’s role in spurring these developments was not insignificant and is not considered adequately by Khosla in his discussion of the “expressive function of social rights.”

Khosla does acknowledge that the Supreme Court’s interventions in social rights cases has led to a change in the discourse of social rights as it has led to a change in the social meaning of these rights. However, as I will seek to argue later, this underestimates the indirect and ripple effects of the Court’s interventions.

Turning to the right to health cases, Khosla once again demonstrates that in none of the leading cases did the Court order the construction of new hospitals; nor did it review the budgetary allocation towards healthcare. Khosla argues that while these decisions involved strong remedial approaches, such as the setting up of committees to administer hospitals, they did not have much institutional impact: the courts seem loathe to require the State to make new allocations for health facilities and only limit themselves to ensuring that when the state decides to spend a certain amount on healthcare, it fulfils that obligation (in satisfaction of its constitutional duty to do so).

Khosla argues that because India is not just a poor country, but also a poorly governed one, courts are far more proactive in responding to executive and legislative inertia and thus are much more prone to taking on the judicial supervision of bureaucratic management practices.

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13 Id.

14 Khosla, pp. 760-763.

15 Id. at p. 753.
In this sense, Khosla argues, the conditional social rights model contains “a more intense form of judicial review” than the systemic rights model (in this one narrow respect) as it “involves courts being far more proactive in responding to legislative and executive inertia.”\textsuperscript{16} To illustrate this as well as his claim that the Indian Supreme Court’s actions resemble that of constitutional tort actions, Khosla cites the approach employed in two cases: Consumer Education and Research Centre v. Union of India, (“Consumer Education”)\textsuperscript{17} and Paschim Banga Khet Samity v. State of West Bengal.\textsuperscript{18} In Consumer Education, the affected individuals were workers in the mining industry who had been exposed to asbestos. The petition sought to impose safe working conditions for workers in the industry generally and sought compensation for those who had possibly been affected by exposure to asbestos. The applicable statutory law only applied to existing employees and some of the affected workers had long since retired. A three judge bench of the Supreme Court, speaking through Justice Ramaswamy, held that under Article 21 of the Constitution, read with Articles 39(e), 41, 42, and 48A, workers had a fundamental human right to health and medical aid required to protect her right to health. The Court issued a series of directives intended to protect approximately 11,000 workers in the asbestos industry in nine Indian states. It ordered the industries to keep records of health workers up to 15 years beyond retirement, so that their exposure to asbestos could be tracked and remedied. All factories were required to provide compulsory health coverage to workers, regardless of the existing coverage under the applicable statutes. Most importantly, the Court directed the government of the State of Gujarat (which was where the first petition originated from before the Court extended its application to the entire country) to send all the workers for re-testing, following which those found affected by asbestos were directed to be awarded a sum of Rupees one lakh each within three months of diagnosis.

Khosla notes that the adoption of an immediate, individualised remedy is evidence of the “strong remedial approach” adopted by the Court. He also emphasises that the Court, in doing so, went beyond the statutory framework to award compensation to those who workers who had retired, thereby going beyond the existing legislative remedies. However, for Khosla, the case “confirms the conditional social rights thesis because the primary motivating factor for the Court’s remedy was the inadequate statutory framework in operation.”\textsuperscript{19} It appears that for Khosla, if courts pay attention to existing executive and legislative schemes in operation, this precludes the adoption of a systemic rights approach. Despite Khosla’s assertions in this respect, Consumer Education makes for an odd test case for this theory, given that in Consumer Education, the Court’s directives, while responding to the existing legislative framework, went far beyond them, requiring the factories and state and Central governments to take on new and fairly onerous obligations. These obligations do have characteristics of what Khosla would call systemic features.

\textsuperscript{16} Id. at p. 754.

\textsuperscript{17} (1995) 3 SCC 42.

\textsuperscript{18} (1996) 4 SCC 37.
A similar omission is apparent in Khosla’s analysis of the Paschim Banga case. The petitioner in that case fell from a train and sustained severe head injuries. He was successively taken to a series of hospitals, but was turned away until eventually he received treatment at a private hospital. He approached the courts arguing that the denial of treatment to him at government hospitals violated his right to life under Article 21. The Supreme Court, in the course of the proceedings, constituted a Commission to inquire into the incident. That Commission concluded that there had been a series of administrative failures at each of the hospitals which resulted in a denial of treatment to the petitioners, and set out recommendations to avoid a recurrence of such failures in the future. The Supreme Court accepted the Committee’s findings, held that they amounted to a violation of the right to health of the petitioner under Article 21 of the Constitution, and awarded compensation of an amount that exceeded his expenses at the private hospital. Khosla argues that the facts of the case are to be distinguished from a situation where the Court orders the creation of entirely new emergency facilities. For Khosla, the approach of the Court is conditional because “[l]ike in Rakesh Chandra Narayan, the Court focused on the state’s inability to effectively run hospitals than on the creation of new hospitals.”

This analysis is a bit too stark because, as Khosla himself notes, the Court did add to the Committee’s recommendations and issued fresh directions of its own, many of which required the creation of new systems and facilities, including a centralised communication system and an ambulance system for transporting patients between hospitals. The Court directed that facilities at Primary Health centres and hospitals be upgraded and increased to accommodate the clearly spelt out need evident in the Committee’s findings. What is more striking is the fact that the Court directed that the ambit of the directions be expanded beyond the State of West Bengal where the case originated from, and required the Central government to ensure that the Court’s directions are implemented across the nation.

Khosla appears not to have appreciated the significance of the Court’s clear ruling on the issue of the financial costs involved. Acknowledging these financial costs, the Court nevertheless held, relying on prior precedents, that “it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people” and further held that “[i]n the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view.”

I am sympathetic to Khosla’ criticism of the case because the Court should have anticipated that the wide-ranging directions it issued would have to be monitored and enforced, and the Court’s failure to focus on the enforcement aspects of its ruling undermines a lot its rhetoric. By 1996, when Paschim Banga was decided, it was widely known that enforcement of PIL rulings was a big issue, and the Court’s ignorance of this aspect seems inexplicable. It is this aspect of the Paschim Banga ruling as well as of the other cases that form the subject of

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19 Khosla, p. 755.

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Khosla’s analysis, that justifiably lead him to characterise the record of Indian social rights adjudication as “disappointing”.\textsuperscript{21} However, the Indian judiciary has learned from such experiences. As we will see, subsequent litigation campaigns and judges in social rights cases that followed were far more alive to this dynamic.

Returning to Khosla’s analysis, his insistence that only directions that call for the creation of entirely new systems pass muster seems a rather onerous requirement, such that very few jurisdictions may currently meet the requirements of Khosla’s conception of systemic rights. The South Africa constitution is currently regarded as having the strongest constitutional protections for social rights, and it is worth emphasising that while that Constitution was path-breaking in treating social rights on part with civil and political rights in making both justiciable, one qualification appended to each social right in the South African constitution is the proviso that the State’s capacity to provide the social right in question is a relevant factor. So, even in South Africa, Courts cannot mandate that a social right be immediately institutionalized regardless of factors such as availability of resources.

Khosla’s analysis does cover the South African constitution and some of the leading decisions of the South African Constitutional Court on social rights, including the Grootboom and the Treatment Action Campaign cases. Khosla notes that in both these cases, the Constitutional Court of South Africa refused to provide individualized relief, and rejected the “minimum core” approach. Khosla argues that the Court “only inquired whether the state had undertaken reasonable measures to fulfill its constitutional duty.”\textsuperscript{22} Khosla then surveys the debate over the rights-remedies issue occasioned by the South African Constitutional Court’s approach, but seems to take for granted that the South African approach in these cases is a weak-form review. As I have argued elsewhere,\textsuperscript{23} and other commentators have also noted, although the standard of review used in both the Grootboom and Treatment Action cases was the same, i.e. reasonableness review, the Court adopted substantially different approaches in both cases, especially as to remedies, and the impact of both cases was therefore significantly different. The Grootboom case was not litigated with the support of a strong social movement which is in part why the post-decisional monitoring was poor, and why it had much less impact. By contrast, the Treatment Action Campaign case was supported by a strong social movement organisation, which assiduously monitored the post-decisional progress of the case, ensuring that the case had a much greater impact on the ground. By not paying attention to such factors, Khosla fails to appreciate the important role of other factors beyond characterising the approach of the court and focusing on issues of rights and remedies, in assessing the significance of social rights cases. This limits the significance of his otherwise important focus on the details of the social rights cases in India.

\textsuperscript{21} Khosla, p. 765.

\textsuperscript{22} Khosla, p. 758.

\textsuperscript{23} OUP SER piece.
These issues became salient when considering the Indian cases that are analysed in the next section.

In the conclusion, I will return to other gaps in Khosla’s analysis. For now, I conclude this discussion of Khosla’s important contribution by acknowledging that his work has served important purposes, principally in forcing scholar to re-evaluate the nature, character and actual achievements of the social rights jurisprudence of the Indian judiciary. Khosla’s critique help to clear up some confusions and misunderstandings in the existing Indian literature, and his work provides the basis for a more thorough analysis of the details of this extremely important body of law. However, by adopting a single analytical category, Khosla in turn misses some important elements of the complex picture that Indian social rights jurisprudence represents.

3. The Indian Supreme Court’s approach to SER cases in the new century (2000-14)

In this section, I focus on two cases that were initiated in this century and reveal the Indian judiciary’s more recent approach to social rights cases, which has continued to evolve over the years. I do not claim that these cases are representative of social rights cases; indeed, they have been chosen because they show different approaches to different fact situations even as they have some underlying similarities. The point here is to show how the judiciary and PIL campaigners have, especially in more recent cases, learned from previous experiences and failures to focus more acutely on remedial and enforcement aspects. While a quantitative study of cases since 2000 may possibly reveal insights of the actual numbers of such cases, I believe that a qualitative analysis of two specific cases also reveals important details about the development of the Indian judiciary’s evolving approach to social rights.

3.1 The Right to Food case

As Alyssa ____’s chapter in this volume documents, the Right to Food case is an extremely significant case that has a continuing impact on the provision of food to poor and underprivileged sections of Indian society. S. Muralidhar’s authoritative survey of social rights in India notes that the 2001 case that this section describes was not the first time the Supreme Court’s intervention to remedy the issue of recurrent famines in drought-prone areas of India. In 1989, a PIL was filed in relation to starvation deaths in some of the poorest districts in the State of Orissa. The Supreme Court’s reaction at the time, in keeping with its cautious approach in other social rights cases from the 80s that we have noted earlier, was to defer to the subjective judgment of the executive government that the problems on the ground were being handled effectively and to refuse to make interventions of its own. However, by the time the Right to Food case arose in 2001, as we have noted, the Supreme Court had


jettisoned its restrained attitude in other social rights cases. Still, the extent to which it would go in pursuit of the right to food was extraordinary.

The *Right to Food case* arose out a petition filed by the People’s Union for Civil Liberties (PUCL), an organisation that emerged as a response to the excesses of India’s Emergency (1975-77) and has become a leading NGO that focuses on human rights issues. In April 2001, PUCL filed a PIL in the Supreme Court challenging the inaction of governments to remedy starvation across several states in India, but focusing on the situation in the State of Rajasthan.26 The State of Rajasthan was in the grip of a severe drought and many of its people were dealing with starvation. What made this paradoxical was that the state had, despite having 50 million tonnes of food stocks, failed to provide minimum food provision to the drought-stricken populace.

The Supreme Court’s series of orders passed over a decade and a half in this case have resulted in a wide range of changes, leading to attention being focused on the impact of the case both nationally and internationally. The Supreme Court at least initially took pains to emphasise that it was only requiring the implementation of pre-existing governmental schemes and policies. This may give the impression that the Court was adopting, to use Khosla’s term, a conditional rights approach to the issues involved. (This may also explain why Khosla did not focus on this case). However, upon closer examination, it turns out that there were many audacious steps taken by the Court which amount also to adopting elements of what could be called a systemic approach. Going beyond this distinction between these two approaches, the Court adopted some innovative monitoring mechanisms which vastly improved the implementation of its orders, and require recognition separately.

In two of its first orders issued in the long-running case, the Supreme Court extended the case to every State and Union Territory in the nation and also involved other agencies of government beyond the government of India and the Food Corporation of India, who were the initial respondents.27 This had the effect of making what was a local/regional problem into one of national scope and consequence.

In the first phase of the case, through an order issued on July 23, 2001, the Supreme Court held that “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.”28 State governments were directed to ensure that all the Public Distribution System (“PDS”) shops were reopened, and

26 People’s Union for Civil Liberties v. Union of India, (2001) 5 SCALE 303.

27 People’s Union for Civil Liberties v. Union of India, 2001 SCALE (PIL) 126 (Order dated July 23, 2001); and PUCL v. Union of India, 2001 SCALE (PIL) 144 (Order dated Sep 3, 2001).

28 PUCL v. Union of India, 2001 SCALE (PIL) 126, at 127.
they were also required to conduct studies and reports to identify the below poverty line (BPL) families in a time-bound schedule.

A few months later, on September 17, 2001, the Supreme Court directed that a total of 9 pre-existing schemes of the Central Government were to be implemented by all the States and Union Territories, and also asked for reports on implementation so that this could be monitored by the Court.29 This order of the Court combined with a subsequent order issued in November 2001 gave new life and meaning to the schemes by judicially mandating that they be enforced. While Khosla’s categorisation would render this a conditional approach, by reviving and explaining what had become moribund policies, the Court was adopting aspects of a systemic approach to the right to food. Its orders also had the effect of converting governmental schemes into entitlements. The November 2001 order also directed state governments to provide cooked midday meals for all children in government and government assisted schools. Strikingly, the Court also specified the minimum quantities of food and nutrition that had to be made available. So, under the Targeted PDS scheme, state governments were required to disburse 25 kgs of grain, per month to every eligible family latest by January 2002. Under the midday meal scheme, the Court directed that following minimum requirements: each child up to the age of 6 years was to receive 300 calories and 8-10 grams of protein; each adolescent girl 500 calories and 20-25 grams of protein; each malnourished child 600 calories and 16-20 grams of protein. In so doing, the Court was putting into place the “minimum core obligations” that several social rights activists and academics (particularly in South Africa) have been advocating for over a long period. The Court sought to improve the implementation record of its orders by directing governments to ensure public awareness and transparency for such programmes.

What made the Right to Food case different from the Supreme Court’s previous efforts at enforcing socio-economic rights was the strategic focus of the Court on implementation of its orders and the elaborate structure it set up for monitoring such implementation. In May 2002, the Supreme Court issued an order directing that two retired public servants (NC Saxena and SR Shankaran) were to be appointed as “Commissioners” for monitoring the implementation of interim orders passed by the Court in the Right to Food case. These two Commissioners continued to take proactive steps to monitor implementation, also by involving activists, academics, NGO representatives and members of the broad-based coalition within the rapidly growing Right to Food campaign. In their first Report filed before the Court in October 2002, the Commissioners indicated that they had recruited a further 11 individuals from diverse organisations to act as Assistant Commissioners to aid in implementing the Court’s orders.30 This 21-page report noted many failures of implementation while also recording instances where the Court’s orders had been followed. The Commissioners continued to file reports at regular intervals, which were compiled and

29 PUCL, 2001 SCALE (PIL) 150.

uploaded onto a website for public access. As the process wore on over the decade, SR Shankaran retired as Commissioner, to be replaced by Harsh Mander, also a retired public servant. Over time, the Commissioners became a tight-knit group that became a sophisticated monitoring authority. As their website details:

The expanding authority and accountability of the Commissioners led to a creation of a Secretariat in New Delhi where the office is now situated. Advisers were also nominated at state level to provide a groundwork support to Commissioners. The Central Government and the State Governments were directed by the high court to provide assistance to the Commissioners. They were obliged to appoint Assistants to Commissioners and Nodal Officers ensuring the implementation of the interim orders

The reports of the Commissioners document a remarkable account of how coordinated action among a series of actors, drawn from government, academia, activism and the NGO sector led to a series of incremental steps that over time amounted to dramatic results.

To get a sense of the dramatic nature of these results, I rely on Brierly’s analysis of material success of the Right to Food case. One measure of success is the rate of utilisation of the governmental schemes that the Court sought to implement. The most outstanding success has been in relation to the Midday meal scheme. The relevant scheme was initiated in the early 1990s, had covered 3.4 million children in 1995-97, and extended to 9.75 children in 1998-99. After the Court began to focus on the scheme and the Commissioners together with their team began to monitor its implementation, the scheme had, by 2012-13, covered 100 million children.

Brierly’s figures and analysis of another scheme, the Integrated Child Development Scheme (ICDS), are equally astonishing. Launched in 1975 to prevent the ill health effects of malnutrition experienced by infants and children, ICDS provided services to children aged 0-6 through Aanganwadi Centres (ACWs). Before the Right to Food case, the scheme did not have universal application. However, the Court mandated that ACWs be set up in every settlement in the nation. Pursuant to the Court’s orders, ACWs began to be established across the country – in the 2003-04 fiscal year, there were 522,276 ACWs, which had increased to 13.80 lakh ACWs in 2009 and to 1,338,732 ACWs by 2013. Similarly, the number of children and mothers covered by the scheme also saw dramatic improvement: in 2003-04, 34,174,000 children and 7,450,000 mothers were covered under the ICDS programme. By 2013, the number of children had increased to 77,404,279 children (a 126.5% increase), and that of mothers had increased to 18,207,985 (a 114.4%). After providing similar figures for several other governmental programmes, Brierly cautions that

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31 See the list of Reports and documents available at: http://www.sccommissioners.org/Reports/commissioners.html.

32 Brierly, p.

33 Id. at pp.
this should not lead to a sense of inflated optimism, because severe challenges remain as a huge proportion of people are still beyond the reach of the programmes. This only serves as a reminder of the immense challenges of hunger and starvation that confront vast segments of the population in India. Still, these facts do go to show the enormous impact that the Supreme Court’s actions in the Right to Food case have had on the ground.

[Focus also on the strength of the RTF campaign and how this ties in with the TAC campaign analysis.]

3.2 The Orphan Drugs case (Mohd. Ahmed v. Union of India)

On April 17, 2014, the Delhi High Court issued a judgment which has the potential of being a landmark ruling. The case involved Mohd. Ahmed, a seven year old child, who suffered from a rare genetic condition called Gaucher’s Disease which resulted in his body being unable to process fat, resulting in accumulation of fat around vital organs. Left untreated, this would eventually lead to death, which is what happened to three of his older siblings. Since this was a rare disease, very few pharmaceutical companies invested in producing medicines for it, and those that were available were very expensive. Treatment for the condition consists of administering these expensive drugs to the patient on a monthly basis for the rest of his life. The cost of the drug, at six-seven lakhs per month, made the treatment unaffordable for all but the extremely affluent. Ahmed’s father, a rickshaw puller, was at the opposite end of that spectrum in Delhi society, which is also why Ahmed’s three older siblings had perished while suffering from the same condition.

Ahmed’s case was brought to the court, not as a PIL, but as a writ petition filed directly by his father on his behalf. The case was heard and decided by a bench consisting of a single judge of the Delhi High Court, Justice Manmohan. In its decision, the Court adopted a strong comparative approach, and held that cases such as those involving Ahmed, termed ‘orphan drug cases’ were unfortunately quite common, and noted that several nations had developed policies to tackle the human and medical costs involved. The Court emphasised that the government of India had not yet developed a suitable policy, but also recognised that it could not direct the government or legislature to formulate the relevant policy.

It then proceeded to conduct a survey of important precedents decided by the Supreme Court of India which had held that the right to health and access to health care are constitutionally guaranteed rights in India. The cases cited by the Delhi High Court included some of the cases we have analysed earlier, including Parmandand Katara, Paschim Banga Khet Mazdoor Samity, Consumer Education, etc. The Delhi High Court also cited relevant international law principles, including General Comment no. 14 issued by the United Nations Committee on Economic, Social and Cultural Rights to support its conclusion that every person in India has

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34 Id. at pp.

35 W.P. (C) 7279/2013,
“a fundamental right to quality health care that is affordable, accessible and compassionate.”

Having said this, the Delhi High Court also recognised that “courts cannot direct that all inhabitants of this country be given free medical treatment at state expense” as there was neither the infrastructure nor finance available for such a direction to be implemented.

Where the Delhi High Court’s approach broke new ground was in its emphatic holding that “core obligations under the right to health are non-derogable.” In so holding, the Delhi High Court explicitly endorsed the “minimum core” standard by going on to observe that while the “minimum core is not easy to define” it includes “at least the minimum decencies of life consistent with human dignity.”

In the context of Mohammed Ahmed, the Court held that “no government can wriggle out of its core obligation of ensuring the right of access to health facilities for vulnerable and marginalised sections of society, like the petitioner by stating that it cannot afford to provide treatment for rare and chronic diseases.” The Court therefore directed the Government of Delhi “to discharge its constitutional obligation and provide the petitioners with enzyme replacement therapy at the AIIMS (All India Institute of Medical Sciences, a government hospital) free of charge and when he requires it.”

What is striking about the Delhi High Court’s approach is that, to use Khosla’s terminology, it explicitly adopts a systemic approach. In so doing, the Court first considered taking a conditional approach, where it analysed closely the policy framework in place. It is only after concluding that the government’s framework was non-existent that the Court advanced further to direct a systemic remedy, of ordering that the government provide the patient “with enzyme replacement therapy ... free of charge as and when he requires it.” Interestingly, the Court suggests that this remedy was less “activist” than ordering the government to formulate a policy on orphan drugs and dealing with patients such as Mohd. Ahmed.

The relief granted in Mohd. Ahmed’s case may be unusual in the Indian context, but fits a pattern of decided cases that has become quite familiar in social rights cases across several jurisdictions in Latin America. David Landau has analysed cases from Brazil and Colombia (among others) to term this type of case an “individualised enforcement model” where courts give a single remedy to a single individual plaintiff for treatment, pension or subsidy, but tend

37 Para 63.
38 Para 67.
39 Para 69.
40 Para 89.
to deny systematic remedies that would affect larger groups. Landau is critical of this type of enforcement of social rights cases, because, as his analysis shows, this leads to a record of enforcement that is “heavily titled toward middle class and upper income groups rather than poor plaintiffs” because the former groups are “more likely to know their rights and to be able to navigate the expense and intricacies of the legal system.” Landau’s critique does not apply to the Mohd. Ahmed case, however, because the Court took care to emphasise that the reason it was ordering an individualised remedy was precisely because the circumstances of the patient were such that he could not otherwise gain access to the life-saving treatment. And, the Right to Food case is a contrasting example to show that Indian courts have addressed broader systemic concerns and have sought to intervene to enable the effects of their actions to be targeted at broader sections of the people, beyond the middle classes who may also benefit from social rights cases.

The cases examined in this section – the Right to Food case and Mohd. Ahmed – showcase new trends in social rights cases decided by the Indian judiciary in more recent years. They have adopted new approaches in structuring remedies and monitoring the implementation of their orders, and represent an evolution of prior approaches in this respect.

4. **Comparative trends in Colombia that resemble recent Indian trends**

In this section, I focus on cases decided by the Colombian Constitutional Court which show a similar trajectory to the Indian casework where a judiciary has sought to learn from its own previous experiences in structuring relief and adopting practices that appear to increase the chances and effectiveness of enforcement of social rights.

The current Constitutional Court of Colombia was established pursuant to the Constitution adopted in 1991. This Constitution, which has been termed “remarkably progressive,” has the advantage of also being recently drafted. Consequently, it contains several explicitly guaranteed economic, social and cultural rights (articles 42-77). Pursuant to article 93 of the Constitution, international human rights treaties signed by Colombia take precedence over domestic law, which enables rights recognised, for instance, by the International Covenant on Economic, Social and Cultural Rights to be taken into account since Colombia is a party to this treaty. However, the greatest factor in favour of the recognition and application of social rights in Colombia has been the proactive attitude of the Constitutional Court of Colombia,

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42 Id. at 412.

which has, over two and a half decades, established a reputation for being one of the most progressive and active courts in the region.\textsuperscript{44}

My focus is on the social rights jurisprudence of the Court which has developed considerably over the last two decades. In a trend that is similar to the Indian judiciary’s approach over a much longer period, the Colombian Constitutional Court has also adapted and evolved its approach to issues such as the identification and definitions of social rights, the structuring of remedies and the monitoring of enforcement over time.\textsuperscript{45} Magdalena Sepulveda’s comprehensive survey of the Colombian Constitutional Court’s social rights jurisprudence details how it has intervened in cases involving the rights to work, social security, adequate housing, health and education. This has led to improvements in the lives of disparate groups of people including marginalised persons such as persons with disabilities, pregnant women and newborns, persons with HIV/AIDS, indigenous peoples, prisoners and detained persons and internally displaced persons.\textsuperscript{46} While this body of work has been hailed, critics have, as in India, noted several problems with the conceptualisation of the social rights and their implementation over time.

To demonstrate the evolution of the Constitutional Court’s approach to social rights in terms that are similar to the Indian judiciary’s experience, I rely upon Rodriguez-Garavito’s analysis of three pivotal cases and their differing impact. Rodriguez-Garavito focuses on three decisions of the Colombian Constitutional Court: T-025 of 2004, where the Constitutional Court took on the issue of internally displaced peoples (“IDP case”); T-153 of 1998 which saw the Constitutional Court tackle the problem of detainees in overcrowded prisons (“Prison reform case”); and T-760 of 2008 where the Constitutional Court intervened to effect reforms in the health care system (“Health care reform case”). In each of these three cases decided across a decade, the Constitutional Court sought to tackle deep-seated issues in a complex system. Rodriguez-Garavito argues that while the Prison reform case and Health-care reform case were motivated by similar concerns, the Constitutional Court did not undertake a well thought out monitoring scheme to implement its orders, and they had relatively less impact. His argument is that the IDP case, by contrast, had a significant impact and focuses his analysis on that case to draw lessons that other judiciaries can also use for successful implementation of social rights.

The IDP case arose as a result of the internal armed conflict in Colombia which has led to the displacement of over two million individuals who are unable to return to their homes because

\textsuperscript{44} For a historical overview of the establishment of the Court and its major doctrines across a range of constitutional issues, see Manuel José Cepeda-Espinosa, \textit{Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court}, 3 Wash. U. Global Stud. L. Rev. 529 (2004), available online at: \url{http://openscholarship.wustl.edu/law_globalstudies/vol3/iss4/2}.


\textsuperscript{46} See generally, Sepulveda, supra note _._
of the violence. This has resulted in Colombia having the world’s second largest (after Sudan) IDP population in the world.\footnote{Sepulveda, supra note _ at p. 159.} Most IDPs are forced to migrate to the main cities, and live in conditions of extreme deprivation and poverty. In 2004, the Constitutional Court combined constitutional complaints of 1,150 displaced families and tackled them together. It held that the humanitarian emergency caused by the displacement constituted an “unconstitutional state of affairs” and issued a series of structural measures – directing the government to adopt both short term and long term policies - to address the massive human rights violations of the IDP populace. Rodriguez-Garavito’s analysis focuses on three distinctive aspects of the judgment: i) the categorical declaration of rights; ii) the structuring of innovative remedies; and iii) the use of ingenious monitoring devices to ensure the implementation of the ruling.\footnote{Rodriguez-Garavito, supra note _ at 1697.} He notes that in an extraordinary set of events, the Constitutional Court issued “more than 280 judicial orders, [held] about 15 public hearings, a dozen technical sessions and [created] a chamber within dedicated to monitoring the process.”\footnote{Cesar Rodríguez-Garavito and Diana Rodríguez-Franco, Judicial Activism and Forced Displacement: Lessons from the Colombian Paradox, Int’l J. Const. L. Blog, June 25, 2014, available at: http://www.icnnectblog.com/2014/06/judicial-activism-and-forced-displacement-lessons-from-the-colombian-paradox/ at p. 1.}

Rodriguez-Garavito asserts that the Constitutional Court engaged in what he terms “dialogic activism” through two institutional mechanisms. The first of these involved setting broad goals and clear implementation paths through deadlines and progress reports, while leaving substantive decisions and detailed outcomes to government agencies. Secondly, the Court encouraged participatory follow-up mechanisms – public hearings, court-appointed monitoring mechanisms, and invitations to civil society to participate in court-led discussions, which deepened democratic deliberation and improved the impact of the Court’s actions.

As a result of these actions, the Constitutional Court’s interventions have had a striking impact on the conditions of IDPs. Rodriguez-Garavito argues that there has been a “broad range of effects, from direct material ones, to indirect and symbolic ones.”\footnote{Cesar Rodríguez-Garavito and Diana Rodríguez-Franco, supra note _ at p. 1.} Among the former, are the fact that “the budget for program[mes] for the displaced has multiplied tenfold, laws have been issued to improve emergency assistance, and coordination mechanisms between governmental agencies were reactivated.”\footnote{Ibid.} This has resulted in a high visibility for the topic of IDP in the media and on the government’s agenda. That visibility in turn has led to a considerable improvement in education and health coverage for the displaced and a
decrease in annual displacement rates, dropping from half a million people in 2002 to a hundred thousand in 2013.\textsuperscript{52}

Rodriguez-Garavito argues that the literature on social rights does not focus adequately on issues relating to monitoring and enforcement of social rights cases. He criticizes mainstream scholars for focusing exclusively on issues relating to the content of social rights and the remedies that should be issued to achieve them, and for neglecting a focus on monitoring of judicial decisions, which is “factually and analytically distinct from remedies.”\textsuperscript{53} He says that this leads to a neglect of the full range of effects of court rulings. Rodriguez-Garavito argues that “in addition to the direct material outcomes that courts and analysts tend to focus on, judicial impact includes a broader array of indirect and symbolic effects that can be as consequential for the fulfilment of [social rights] as those directly stemming from court orders.”\textsuperscript{54} His analysis on this score is strikingly similar to claims by activists and supporters of the Right to Food case in India.\textsuperscript{55}

5. Conclusion


\textsuperscript{52} Ibid. at p.2.

\textsuperscript{53} Rodriguez-Garavito, supra note _ at p. 1691.

\textsuperscript{54} Ibid. at p. 1697.

\textsuperscript{55} Interestingly, Rodriguez-Garavito’s analysis focuses on and draws support from Indian judicial enforcement of social rights and draws parallels between the Right to Food case and the IDP case. See, R-G at p.