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## Constitutionalizing an Enforceable Right to Food: A Tool for Combating Hunger

Michael J. McDermott

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# CONSTITUTIONALIZING AN ENFORCEABLE RIGHT TO FOOD: A NEW TOOL FOR COMBATING HUNGER

MICHAEL J. McDERMOTT\*

**Abstract:** Although international treaties recognize a right to food, few nations have established a domestic, legally enforceable right to food. A justiciable national right to food can provide a basis for legal redress, national food policies, and state aid programs. India, South Africa, and Brazil provide insight and lessons that can be applied to other nations, like Mexico, to identify effective means for creating a national right to food. This Note compares effective national right to food efforts and identifies essential elements underlying a justiciable national right to food. By evaluating the development of a right to food within in the international and national systems it is clear that the right to food is most effective when national constitutions provide justiciable means for legal redress and enforcement of that right.

*When millions of people die in a famine, it is hard to avoid the thought that something terribly criminal is going on. The law, which defines and protects our rights as citizens, must somehow be compromised by these dreadful events . . . . In seeking a remedy to this problem of terrible vulnerability, it is natural to turn towards a reform of the legal system, so that rights of social security can be made to stand as guarantees of minimal protection and survival.*

—Jean Drèze & Amartya Sen<sup>1</sup>

## INTRODUCTION

From 1997 to 2002, serious droughts threatened the lives of fifty million people in the northwest Indian state of Rajasthan.<sup>2</sup> In early

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<sup>1</sup> JEAN DRÈZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION 20 (1989).

2000, almost seventy-four percent of Rajasthan's villages were affected by drought, nearly fifty percent of all children in the state were malnourished, and half the state's rural population lived below the poverty line.<sup>3</sup> Despite the drought, Rajasthan's food crisis was not entirely caused by a lack of food, but rather by a failure to distribute national surplus grain stocks to the region.<sup>4</sup> In response to government inaction, the People's Union for Civil Liberties (PUCL), a non-governmental Indian civil liberties organization, utilized "Public Interest Litigation" standing, to sue the Indian government for endangering the Rajasthani's "right to life" by violating their "right to food."<sup>5</sup> PUCL argued that India's inaction violated the Rajasthan Famine Code of 1962 and prior case law that recognized a constitutional right to life with human dignity, and demanded access to adequate nutrition.<sup>6</sup> After ten years of litigation, the *People's Union for Civil Liberties* case has produced interim court orders demanding the release of national stocks of surplus food-grains to famine stricken communities, nationally sponsored lunch programs, and judicial enforcement of a constitutional "right to food."<sup>7</sup>

Although international treaties recognize a right to food, few nations have established a domestic enforceable right to food.<sup>8</sup> And fewer

<sup>2</sup> See Basudeb Guha-Khasnobis & S. Vivek, *The Rights-Based Approach to Development: Lessons from the Right to Food Movement in India*, in FOOD INSECURITY, VULNERABILITY AND HUMAN RIGHTS FAILURE 308 (Basudeb Guha-Khasnobis et al. eds., 2007); Mike Wooldridge, *Drought Threatening Livestock*, BBC NEWS (May 1, 2000), [http://news.bbc.co.uk/2/hi/south\\_asia/732548.stm](http://news.bbc.co.uk/2/hi/south_asia/732548.stm).

<sup>3</sup> See Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 697-98 (2010).

<sup>4</sup> See *id.* at 698; see also Press Release, Rajasthan People's Union for Civil Liberties, Rajasthan PUCL Writ in Supreme Court on Famine Deaths (Nov. 2001), available at <http://www.pucl.org/reports/Rajasthan/2001/starvation-writ.htm>. The Indian national government refused to release any of the fifty million tons of surplus grains stored in government silos. See Birchfield & Corsi, *supra* note 3, at 698.

<sup>5</sup> See *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (May 2, 2003) (interim order) (India), available at [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=401033](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=401033); Birchfield & Corsi, *supra* note 3, at 698.

<sup>6</sup> See Birchfield & Corsi, *supra* note 3, at 694, 697.

<sup>7</sup> See LIDIJA KNUTH & MARGRET VIDAR, FOOD & AGRIC. ORG. OF THE U.N., CONSTITUTIONAL AND LEGAL PROTECTION OF THE RIGHT TO FOOD AROUND THE WORLD 6-7 (2010), available at [http://www.fao.org/righttofood/publi11/constitutional\\_2011.pdf](http://www.fao.org/righttofood/publi11/constitutional_2011.pdf); Birchfield & Corsi, *supra* note 3, at 694; Guha-Khasnobis & Vivek, *supra* note 2, at 308-09.

<sup>8</sup> See KNUTH & VIDAR, *supra* note 7, at 2, 13; see, e.g., International Covenant on Economic, Social and Cultural Rights art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (requiring states party to ICESCR to respect, protect, and fulfill the international right to food); Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 25(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (declaring that every person has a right to an adequate standard of living, including access to food).

have even begun to implement the international right to food established in these agreements, such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR) basic obligation of each nation to report its progress in protecting and preserving the right to food.<sup>9</sup> Without national legal enforcement mechanisms, an international right to food fails to serve as an effective tool for combating hunger.<sup>10</sup> Like India, some nations have recognized a justiciable right to food as South Africa's post-apartheid constitution provides a right to food and Brazil's recently amended constitution explicitly grants the right to food.<sup>11</sup> Applying the Indian, South African, and Brazilian experiences with a national right to food, it is clear that Mexico is beginning to experience the gradual progression towards a nationally recognized right to food.<sup>12</sup>

This Note compares effective national right to food efforts and identifies essential elements underlying a justiciable national right to food. Part I of this Note provides historical background of the internationally recognized right to food and an overview of national responses to this right. Part II discusses the right to food as a constitutional provision, and details how the right has been created, defined, and enforced in South Africa, India, and Brazil. Additionally, Part II identifies the foundational movements within Mexico progressing towards a national right to food. Finally, Part III applies the insight from South Africa, India, and Brazil to Mexico's efforts to ensure the right to food through national policies and grassroots social movements. This Note concludes that the right to food is most effective when national constitutions provide justiciable means for legal redress.

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<sup>9</sup> See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12*, ¶ 2, E/C.12/1999/5 (May 12, 1999) [hereinafter *Comment 12*].

<sup>10</sup> *Cf. id.* ¶ 21 (opining that the most appropriate means for implementing the right to food is at the national level through legal and social policy mechanisms).

<sup>11</sup> See S. AFR. CONST., 1996, § 27; Emenda Constitucional no. 64, de 4 de fevereiro de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.2.2010 (Braz.) (amending Article 6 of the Brazilian Constitution to include the right to food).

<sup>12</sup> See FOOD & AGRIC. ORG. OF THE U.N., RIGHT TO FOOD, RIGHT TO FOOD IN THE CITIES: FOCUS ON MEXICO LEGISLATION I (2009) [hereinafter *FAO, MEXICO*], available at [http://www.fao.org/righttofood/publi10/RTF\\_cities\\_Mexico\\_legislation.pdf](http://www.fao.org/righttofood/publi10/RTF_cities_Mexico_legislation.pdf) (documenting local efforts to recognize the right to food, identifying the prevalence of food insecurity in Mexico City, and noting some national governmental efforts to promote and demonstrate the right to food).

## I. BACKGROUND

Prior to the 1940s, the right to food was not recognized, or even discussed, in international or national laws.<sup>13</sup> During World War II, however, leaders and humanitarians began to envision social and economic rights that would provide basic needs and a healthy life for all.<sup>14</sup> Throughout the early 1940s, organizations like the American Law Institute and the Americans United for World Organization proposed an international Bill of Human Rights that included the right to food.<sup>15</sup> A 1946 draft proposed that “[e]veryone has the right to food and housing,”<sup>16</sup> and the creation of a duty for states “to take such measures as may be necessary to ensure that all its residents have an opportunity to obtain these essentials.”<sup>17</sup>

At the conclusion of World War II, nations participating in the initial drafting conferences for the Universal Declaration of Human Rights (UDHR) generally agreed that there should be a social and economic right to food, but disagreed about imposing a positive obligation on states.<sup>18</sup> Consequently, the final language of Article 25, of the UDHR, only required states to “respect, protect, and fulfill” a right to an adequate standard of living, without requiring states to create positive, enforceable laws.<sup>19</sup>

The right to food received relatively little further attention until 1976, when Article 11 of the ICESCR recognized the right “to an adequate standard of living . . . including adequate food” and called on states party to ICESCR to ensure “the realization of this right.”<sup>20</sup> Additionally, ICESCR recognized “the fundamental right of everyone to be free from hunger” and urged states to establish programs improving

<sup>13</sup> See U.N. CTR. FOR HUMAN RIGHTS, REPORT ON THE RIGHT TO ADEQUATE FOOD AS A HUMAN RIGHT, ¶¶ 84–85, 86 n.29, 87, U.N. DOC. E/CN.4/Sub.2/1987/23, U.N. Sales No. E.89.XIV.2 (1989) (“[The submission of a 1946 draft recognized that] food has not been dealt with in constitutional instruments hitherto.”).

<sup>14</sup> See President Franklin D. Roosevelt, The Annual Message to the U.S. Cong. (Jan. 6, 1941), in 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1940 WAR—AND AID TO DEMOCRACIES 672 (1969); U.N. CTR. FOR HUMAN RIGHTS, *supra* note 13, ¶¶ 84–87.

<sup>15</sup> See Asbjørn Eide, *Article 25, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 385, 390 (Asbjørn Eide et al. eds., 1992).

<sup>16</sup> See *id.*; Ams. United for World Org., *The Statement of Essential Human Rights, in 48 INTERNATIONAL LAW PAMPHLET COLLECTION* art. 14 (1944).

<sup>17</sup> See Ams. United for World Org., *supra* note 16; see also U.N. CTR. FOR HUMAN RIGHTS, *supra* note 13, ¶ 86; Eide, *supra* note 15, at 390.

<sup>18</sup> See Eide, *supra* note 15, at 385.

<sup>19</sup> See *id.* at 386, 387–88.

<sup>20</sup> See ICESCR, *supra* note 8, art. 11(1).

the production and distribution of global food supplies.<sup>21</sup> Despite ICESCR's clear recognition of a right to food and subsequent international attempts to further entrench the right to food, many nations have failed to implement or even report on their progress in implementing Article 11.<sup>22</sup> On the eve of the 1996 World Food Summit, Asbjørn Eide, a United Nations sub-commission's Special Rapporteur on the Right to Adequate Food, lamented the limited political will for enforcing the right to food and highlighted the need for states to ensure the enjoyment of the right to adequate food.<sup>23</sup>

The right to food received increased international diplomatic attention in the late 1990s, as international organizations attempted to further clarify the right to food, propose additional obligations, and create more comprehensive enforcement mechanisms.<sup>24</sup> In 1999, states party to ICESCR were put on notice that they were obligated to "respect, to protect, and to fulfill" the right to adequate food when the United Nations Committee on Economic, Social and Cultural Rights (UN Committee) published "Comment 12" to ICESCR.<sup>25</sup> Comment 12's clarifications responded to the "disturbing gap . . . between the standards set in [ICESCR] Article 11 . . . and the situation prevailing in many parts of the world," that had contributed to the chronic hunger of 840 million people worldwide.<sup>26</sup>

The "obligation to respect" is a negative obligation preventing states from reducing any existing access to food.<sup>27</sup> In contrast, the "obligation to protect" requires states to actively prevent third parties from interfering with access to food.<sup>28</sup> Finally, the "obligation to fulfill" means that states must "pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security" and act on behalf of individuals who need assistance to enjoy their right to adequate food.<sup>29</sup> The obligations

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<sup>21</sup> See *id.* art. 11(2).

<sup>22</sup> See *Comment 12, supra* note 9, ¶ 2.

<sup>23</sup> See Asbjørn Eide, *The Human Right to Adequate Food and Freedom from Hunger*, in *THE RIGHT TO FOOD IN THEORY AND PRACTICE* 2, 5 (1998); see also Chris Downes, *Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food*, 47 *VA. J. INT'L L.* 619, 671–72 (2007) ("Although the obligation to respect the right to food may be broadly established . . . there are numerous examples of states failing to adhere to this obligation . . . States regularly fail to criticize state behavior that neglects this obligation.").

<sup>24</sup> See Downes, *supra* note 23, at 669–70.

<sup>25</sup> See *Comment 12, supra* note 9, ¶ 15.

<sup>26</sup> See *id.* ¶ 5.

<sup>27</sup> See *id.* ¶ 15.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

“to protect” and “fulfill” place affirmative duties on states to implement and strengthen the right to food within their borders.<sup>30</sup>

Despite the recognition and recent clarification of a right to food in international law, there are few instances when the right to food has been invoked successfully, or even invoked at all.<sup>31</sup> The International Court of Justice’s (ICJ) sole discussion of the international right to food was provided in its advisory opinion regarding Israel’s construction of a wall in the Occupied Territory of Palestine.<sup>32</sup> In its decision, the ICJ concluded that Israel violated its ICESCR obligations because the wall “aggravated food insecurity,” thereby impeding the Palestinians’ ability to achieve an adequate standard of living.<sup>33</sup> Although the ICJ identified an international right to food, it qualified this right by stating that some national security concerns could justify interference with access to food and water.<sup>34</sup> Nevertheless, the opinion is important because it discusses the right to food and recognizes that impeding access to fertile farm land, drinking water, or food supplies may be national violations of a right to food.<sup>35</sup>

The weakness of the international right to food is further exemplified by the U.N. Human Rights Council’s impasse on a three-year-old non-binding resolution, introduced by sixty-seven nations, expressing “grave concern” about the world food crisis.<sup>36</sup> The resolution urges states to establish “mechanisms and processes which ensure participation of rights-holders, particularly the most vulnerable, in the design and monitoring” of national strategies.<sup>37</sup>

Because international treaties only require states to respect, protect, and fulfill the international right to food, a truly effective right to food relies on action and implementation in national legal systems.<sup>38</sup>

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<sup>30</sup> See Downes, *supra* note 23, at 673–76.

<sup>31</sup> See Guha-Khasnobis & Vivek, *supra* note 2, at 308 (“[T]here are only a few instances where these provisions have been employed judicially . . .”).

<sup>32</sup> See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 133 (July 9).

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* ¶¶ 133, 135.

<sup>35</sup> See *id.*

<sup>36</sup> See G.A. Res. A, U.N. Human Rights Council, *Draft Resolution*, U.N. Doc. A/HRC/9/L.15, ¶¶ 2, 11 (Sept. 18, 2008).

<sup>37</sup> See *id.* ¶ 3.

<sup>38</sup> See KNUTH & VIDAR, *supra* note 7, at 3 (“However, in order for [the right to food] to be effective for individuals . . . national legislation must reflect the right in such a way as to make it applicable. This may take place through its incorporation into the constitution and through framework laws and sectoral laws. In some countries, international treaties are directly applicable; thus the right to food could be protected even without being recognized specifically in the constitution or law.”).

Constitutional or legislative language can provide a justiciable national right to food.<sup>39</sup> Constitutional recognition of the right has been minimal, however, as only 11 of the 160 nations that are party to ICESCR<sup>40</sup>—Belarus, Bolivia, Brazil, the Democratic Republic of the Congo, Ecuador, Guyana, Haiti, Malawi, Nepal, Nicaragua, and South Africa—explicitly provide a constitutional right to adequate food for all persons.<sup>41</sup> Other nations recognize a more limited right to food in constitutional or legislative language.<sup>42</sup> They either restrict the populations that can rely on the right, like the young, sick, or imprisoned, or by refer to the right as a mere directive principle to guide legislators and national policy.<sup>43</sup>

Currently, most nations overlook the right to food established by international treaty and acknowledge it only as symbolic of the global hunger concerns plaguing the poorest populations.<sup>44</sup> As exemplified by the ongoing *People's Union for Civil Liberties* litigation, this essential socio-economic right will have no actual impact until states recognize a justiciable national right to food, providing legal redress and facilitating the application and enforcement of this right.<sup>45</sup>

## II. DISCUSSION

The right to food in international treaties does not establish clearly defined obligations for states.<sup>46</sup> A justiciable national right to food can provide a basis for legal redress, national food policies, and state aid programs.<sup>47</sup> Three nations provide instructive examples of domestic approaches to an enforceable right to food: South Africa, India, and

<sup>39</sup> See *id.*

<sup>40</sup> See *International Covenant on Economic, Social and Cultural Rights*, UN TREATY COLLECTION: STATUS TREATIES (Jan. 18, 2011), <http://treaties.un.org/doc/Publication/MTDSG/Volume I/Chapter IV/IV-3.en.pdf>.

<sup>41</sup> See KNUTH & VIDAR, *supra* note 7, at 22, 23–25. Other commentators state that twenty-two to twenty-four nations have constitutions explicitly recognizing a right to food for some population. See *id.* at 22; Downes, *supra* note 23, at 669. If those twenty-two to twenty-four nations are included, fifty-six national constitutions implicitly or explicitly provide a right to food. See KNUTH & VIDAR, *supra* note 7, at 22.

<sup>42</sup> See KNUTH & VIDAR, *supra* note 7, at 22.

<sup>43</sup> See, e.g., CONSTITUCIÓN DE 1949, Nov. 8, 1949, Art. 82 (Costa Rica) (“The State shall provide food and clothing for indigent pupils, according to the law . . .”); INDIA CONST. art. 47 (including the right to food in the directive principles section of the constitution).

<sup>44</sup> See Press Release, U.N. Dep’t of Pub. Info., Gen. Assembly President, Opening Interactive Thematic Dialogue, U.N. Press Release GA/10819 (Apr. 6, 2009), available at <http://www.un.org/News/Press/docs/2009/ga10819.doc.htm>.

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

<sup>46</sup> See U.N. CTR. FOR HUMAN RIGHTS, *supra* note 13, ¶ 95.

<sup>47</sup> See Marc J. Cohen & Mary Ashby Brown, *Access to Justice and the Right to Adequate Food*, 6 SUSTAINABLE DEV. L. & POL’Y 54, 55 (2005).



Brazil. Additionally, Mexico's current social and political movements supporting a right to food indicate the foundations underlying a right to food.

A. *South Africa: Constitutional Emphasis on Socio-Economic Rights,  
Including the Right to Food*

South Africa's experience with apartheid resulted in a national constitution, in 1996, that explicitly addresses justiciable social and economic rights, including rights to healthcare, social security, social assistance, water, and food.<sup>48</sup> Section 27 of the post-apartheid constitution provides the right to access "sufficient food and water."<sup>49</sup> The constitution requires the state to take reasonable legislative measures to "achieve the progressive realization . . . of these rights."<sup>50</sup> Emphasizing the importance of childhood nutrition, the constitution guarantees every child the right to "basic nutrition."<sup>51</sup> To better interpret these socio-economic rights, South African courts have looked beyond national laws and incorporated international law.<sup>52</sup>

1. An Analogous Judicial Interpretation of the Constitutional Right to Water

The South African Constitution's social and economic rights are legally enforceable, providing victims of hunger an avenue for legal redress.<sup>53</sup> To date, no case has been initiated against the government claiming a violation of the right to food under section 27.<sup>54</sup> There are, however, cases providing legal redress for the section 27 rights to water that suggest how South African courts would treat similar claims to enforce the right to food.<sup>55</sup>

In *City of Johannesburg v. Mazibuko*, the South African Supreme Court of Appeal, the country's intermediate appellate court, held that

<sup>48</sup> See Margit Tveiten, *Justiciability of Socio-Economic Rights: Reflections on Norwegian and South African Debate and Experience*, in 1 FOOD AND HUMAN RIGHTS IN DEVELOPMENT 163, 168, 169, 170 (Wenche Barth Eide & Uwe Kracht eds., 2005); Cohen & Brown, *supra* note 47, at 55.

<sup>49</sup> S. AFR. CONST., 1996, § 27(1)(b).

<sup>50</sup> *Id.* § 27(2).

<sup>51</sup> See *id.* § 28(1)(c).

<sup>52</sup> See, e.g., *Mazibuko v. Johannesburg* 2010 (4) SA 1 (CC) para. 17 (S. Afr.).

<sup>53</sup> See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at 736 para. 25 (holding that socio-economic rights are clearly justiciable).

<sup>54</sup> See Cohen & Brown, *supra* note 47, at 55.

<sup>55</sup> See *id.*; see, e.g., *Mazibuko*, 2010 (4) SA 1 paras. 7–10.

the city violated section 27(1) of the constitution when it restricted water usage in the impoverished community of Phiri to twenty-five liters per day.<sup>56</sup> The city relied on national regulations when it determined that twenty-five liters “ensure[d] sufficient water and an environment not harmful to health.”<sup>57</sup> Despite the city’s reliance on national regulations, the court held that the local government could not simply rely on national minimums and must evaluate local needs and situations to determine what would provide an adequate standard of living.<sup>58</sup> The Court of Appeal ordered the city to provide forty-two liters of free water per day for each indigent resident, which was interpreted as adequately meeting the constitutionally required right to sufficient water.<sup>59</sup>

*Mazibuko* is instructive because it indicates how the South African courts might treat a similar claim for sufficient food.<sup>60</sup> It establishes that section 27 of the constitution requires national and local governments to enact and enforce policies that feasibly guarantee a minimum enjoyment of social and economic services.<sup>61</sup> Section 27 also requires local governments to evaluate and establish their own minimum levels of social and economic services, rather than depend solely on nationally established minimums.<sup>62</sup> Finally, it recognizes that an individual’s section 27 rights to food, water, and health services are not unlimited, but rather are subject to resource availability and the financial constraints facing each level of government.<sup>63</sup> This resource-based limita-

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<sup>56</sup> See *Mazibuko*, 2010 (4) SA 1 para. 62.

<sup>57</sup> See Water Services Act 108 of 1997 §§ 2(a), 3(3) (S. Afr.); *Mazibuko*, 2010 (4) SA 1 paras. 9, 10.

<sup>58</sup> See *Mazibuko*, 2010 (4) SA 1 paras. 13–14.

<sup>59</sup> See *id.* para. 62. To determine the “adequate” amount of water required for Phiri residents, the Court reviewed both parties’ affidavits, which calculated the minimum water necessary for a Phiri resident to replace fluids, prepare food, bathe, and have waterborne sanitation (to clean pit latrines because the community lacks flush toilets). See *id.* paras. 21–22. The court held that forty-two liters of water provided an adequate standard of living, because it included three liters for drinking, fourteen liters for bathing and washing, about nine liters for food preparation, and fifteen liters for waterborne sanitation. See *id.* paras. 21–22, 24.

<sup>60</sup> Cf. Cohen & Brown, *supra* note 47, at 55 (looking to various South African cases interpreting economic and social rights, because no South African court has addressed the right to food).

<sup>61</sup> See *Mazibuko*, 2010 (4) SA 1 paras. 5, 62.

<sup>62</sup> See *id.* paras. 13, 14.

<sup>63</sup> See *id.* paras. 26–27, 30. The Court noted that the Constitutional Court held, in *Soobramoney v. Minister of Health*, that state obligations under sections 26 and 27, establishing numerous social and economic rights, are dependent on resources being available and that rights can be limited if resources are lacking. See *id.* para. 26 (quoting *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para. 11).

tion is essential to ensuring that everyone, not just the indigent, has access to sufficient water.<sup>64</sup>

The court based its holding on section 27's purpose of providing citizens with a dignified human existence.<sup>65</sup> To support its conclusions, the court referenced the 2002 General Comment 15 of the UN Committee, that states that "[the] human right to water is indispensable for leading a life in human dignity" and a "prerequisite for the realization of other human rights."<sup>66</sup> Consequently, the nationally calculated minimum failed to provide a volume of water that is "adequate" for human dignity and life in Phiri.<sup>67</sup>

## 2. Prioritizing the Right to Food and Other Socio-Economic Needs

Even though a right to food in South Africa would be limited by available resources, a 2004 suit brought by traditional "artisanal" fisherman indicates that a right to food would supersede other policy objectives.<sup>68</sup> In *West Coast Rock Lobster Ass'n v. Minister of Environmental Affairs & Tourism*, a commercial fishermen's association sought to prevent the South African government from exempting artisanal, subsistence fishermen from legislation prohibiting offshore and near shore fishing of certain maritime species.<sup>69</sup> The court upheld the agreement between subsistence fishermen and the South African government to allow these subsistence fishermen to catch lobsters and fish to provide for themselves and their dependents, as an exemption to the commercial fishing law.<sup>70</sup> One argument the subsistence fishermen advanced to receive the exemption was that they relied on their traditional fishing

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<sup>64</sup> See *id.* para. 27.

<sup>65</sup> See *id.* para. 17.

<sup>66</sup> See *Mazibuko*, 2010 (4) SA 1 para. 17 (referencing ECOSOC, Comm. on Econ., Soc. Cultural Rights, *General Comment 15*, ¶ 1, E/C.12/2002/11 (Nov. 26, 2002)).

<sup>67</sup> See *id.* para. 62.

<sup>68</sup> See ANNIKEN SKONHOFT & AMBRA GOBENA, FOOD & AGRIC. ORG. OF THE U.N., FISHERIES AND THE RIGHT TO FOOD 27 (2009), available at [http://www.fao.org/righttofood/publi09/Fisheries\\_en.pdf](http://www.fao.org/righttofood/publi09/Fisheries_en.pdf).

<sup>69</sup> See *West Coast Rock Lobster Ass'n v. Minister of Envtl. Affairs & Tourism* 2008 ZAWCHC 123, paras. 1, 2, 4, 5 (Western Cape High Court, Cape of Good Hope Provincial Division) (S. Afr.), available at <http://www.saflii.org/za/cases/ZAWCHC/2008/123.html> (upholding the unpublished Equality Court case *George v. Ministers of Environmental Affairs and Tourism*). Marine Living Resources Act 18 of 1998 (MLRA) had established fishing limitations to protect threatened marine species. *Id.* paras. 4, 8–10.

<sup>70</sup> See *id.* paras. 6, 8–10.

practices for their livelihood and to support their families.<sup>71</sup> The Minister of Environmental Affairs and Tourism explained that the exemption was granted to address “real social-economic” needs of this fishing community.<sup>72</sup> The court confirmed that the government must identify those traditional fishermen affected by the MLRA and allow them to catch a limited number of fish and lobsters.<sup>73</sup>

*West Coast Rock Lobster Ass’n* illustrates how the South African government and courts balance the right to basic subsistence with other policy goals.<sup>74</sup> The case articulates that it is reasonable to allow a poor community, historically depending on maritime resources for survival to be exempted from other national policy objectives.<sup>75</sup>

### B. India: Judicial Activism Providing an Enforceable, Constitutional Right to Food

Similar to apartheid’s impact on South Africa’s constitution, India’s history of colonization resulted in a progressive constitution that provides a foundation for a justiciable right to food.<sup>76</sup> Article 47 establishes the guiding principle that the state should raise the “level of nutrition and the standard of living of its people.”<sup>77</sup> Additionally, Article 21 provides a justiciable right to life that India’s highest court has interpreted to include inherent rights to food and water.<sup>78</sup>

Unlike the South African Constitution’s right to food, Article 47 of the Indian Constitution’s “right to food” is a directive principle providing non-judicially enforceable rights, which was originally intended only to guide governmental policies.<sup>79</sup> The drafting history to these

<sup>71</sup> See *id.* para. 8; SKONHOFT & GOBENA, *supra* note 68, at 27. Additionally, the fishermen argued that the Marine Act violated the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. See *West Coast Rock Lobster* 2008 ZAWCHC 123 para. 9.

<sup>72</sup> See *West Coast Rock Lobster* 2008 ZAWCHC 123 para. 11.

<sup>73</sup> See *id.* paras. 10, 53.

<sup>74</sup> See *id.* paras. 10–11, 47.

<sup>75</sup> See *id.* paras. 11, 53, 55.

<sup>76</sup> See Special Rapporteur on the Right to Food, *The Right to Food, Report by the Special Rapporteur on the Right to Food, Mission to India*, ¶¶ 19, 20, E/CN.4/2006/44/Add.2 (Mar. 20, 2006).

<sup>77</sup> INDIA CONST. art. 47.

<sup>78</sup> See *Mullin v. Adm’r*, (1981) 2 S.C.R. 516, 529 (India).

<sup>79</sup> See 2 DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA 311–12 (5th ed. 1965). The Indian Supreme Court has held that “Directive Principles should serve the Courts as a code of interpretation” rather than as enforceable, justiciable rights. See 2 P. CHANDRASEKHARA RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW 125 (Ko Swan Sik ed., 1993) (quoting *A.B.S.K. Sangh (Rly.) v. India*, A.I.R. 1981 S.C. 298, 335 (India)).

directive principles indicates that their unenforceability was intended to be temporary, because these directive principles allowed the newly independent state to begin governing before facing the burdens of fulfilling all constitutional obligations.<sup>80</sup> Paralleling the history of the directive principles, in *People's Union for Civil Liberties*, the court has elevated the right to food as now being enforceable against the government.<sup>81</sup>

### 1. A Right to Food Is Inherent in the Constitutionally Enforceable Right to Life

*People's Union for Civil Liberties*, ordering state governments to provide nutritional assistance program, has converted a constitutional directive principle into an enforceable right to food.<sup>82</sup> *Mullin v. Administrator* justifies the court's interim orders in *People's Union for Civil Liberties*.<sup>83</sup> *Mullin* examined whether the preventative detention of a British national violated her right to life.<sup>84</sup> The Court examined the legal effect of Article 21, which prevents the executive from depriving life beyond procedures established by law, and broadly defined the term "life" as more than "mere animal existence."<sup>85</sup> The court opined, "[w]e 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."<sup>86</sup> Similar to the South African court in *Mazibuko*, the *Mullin* court recognized a governmental responsibility to provide for some adequate level of survival.<sup>87</sup> Additionally, both courts recognized that any obligation on the government to provide food, water, or other necessities of life, is proportional to the nation's level of economic development.<sup>88</sup>

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<sup>80</sup> See Birchfield & Corsi, *supra* note 3, at 708–09.

<sup>81</sup> See, e.g., Mayank Bhardwaj, *PM Says Malnutrition Continues, Eyes Food Rights Bill*, REUTERS, Feb. 10, 2011, available at <http://in.reuters.com/article/2011/02/10/idINIndia-54797520110210>.

<sup>82</sup> See Birchfield & Corsi, *supra* note 3, at 709.

<sup>83</sup> See *Mullin*, (1981) 2 S.C.R. at 520, 528–29; Birchfield & Corsi, *supra* note 3, at 709–10.

<sup>84</sup> See *Mullin*, (1981) 2 S.C.R. at 520, 528–29.

<sup>85</sup> See *id.* at 528–29.

<sup>86</sup> See *id.* at 529.

<sup>87</sup> Compare *id.*, with *Mazibuko*, 2010 (4) SA 1 paras. 26–27 (showing that both courts discussed governmental responsibility to provide for human survival).

<sup>88</sup> Compare *Mullin*, (1981) 2 S.C.R. at 529, with *Mazibuko*, 2010 (4) SA 1 paras. 26–27 (recognizing that a right to food, water, or other socio-economic rights can be limited by the economic realities facing the government).

Another case that explains the recent constitutional interpretation evinced in *People's Union for Civil Liberties v. Jagannath v. India*, where the Supreme Court of India read together Article 21's right to life and Article 47's right to nutrition and public health to establish a government obligation to ensure adequate nutrition and public health.<sup>89</sup> In *Jagannath*, the petitioner sued the national government on behalf of rural, impoverished, coastal communities seeking a court order requiring the government to adhere to its coastal and environmental laws and protect the ecologically fragile coastal areas essential to these communities.<sup>90</sup> The court examined national environmental laws and ruled that the government must require those industries violating coastal regulations and polluting fishing communities to pay for environmental cleanup and compensate those harmed.<sup>91</sup> To support its ruling, the court stated that such "polluter pays principles" fall within the government's constitutional duties to ensure the "right to life" and "raise the level of nutrition and the standard of living to improve public health."<sup>92</sup> Read together, Article 21 and Article 47 provide legal redress for communities facing nutritional insecurity due to the government's failure to protect the environment.<sup>93</sup>

Related to the right to food and the minimum nutritional resources required for a dignified life, *Pattnayak v. State of Orissa* discussed what governmental action was required in response to human starvation claims.<sup>94</sup> The case consolidated two separate petitions. The first asked the Supreme Court of India to give direction to the state government to prevent starvations, while the other challenged a District Court judge's factual findings denying the existence of starvation deaths in the district of Kalahandi.<sup>95</sup> The petitioners alleged that the residents were so impoverished that they had to sell their children and endure extreme exploitation to prevent starvation.<sup>96</sup> They further argued that, in light of the extreme poverty, the government had a legal duty to take "immediate steps to prevent starvation deaths."<sup>97</sup> Although there was no reference to constitutional rights, the Supreme Court confirmed that the State of Orissa must investigate all starvation cases and ensure that relief

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<sup>89</sup> See *Jagannath v. India*, (1997) 2 S.C.C. 87, 145–46 (India).

<sup>90</sup> See *id.* at 91–92.

<sup>91</sup> See *id.* at 145–46, 147–48.

<sup>92</sup> See *id.* at 145–46.

<sup>93</sup> See *id.*

<sup>94</sup> See *Pattnayak v. State of Orissa*, (1989) 1 S.C.R. 57, 65–66 (India).

<sup>95</sup> See *id.* at 60–61.

<sup>96</sup> See *id.* at 60.

<sup>97</sup> See *id.* at 61.

measures fully adhere to the Orissa Relief Code.<sup>98</sup> The court found that the state met its duty by implementing programs to mitigate starvation in Kalahandi after the petitions had been filed.<sup>99</sup> The programs provided nutritional assistance to 20,000 people, funded irrigation construction projects to provide access to drinking water, initiated agricultural assistance, and set a government-fixed price for surplus paddy (a rice-based dietary staple) to be sold in Kalahandi markets.<sup>100</sup>

## 2. Current Litigation and Public Debate About the Court's Interim Orders Establishing an Enforceable Right to Food

The Supreme Court of India's interpretations and orders in the ongoing *People's Union for Civil Liberties* case stem from a growing recognition that the state is obligated to ensure the right to life by preventing hunger and starvation.<sup>101</sup> Although the court's decision seems remarkable because the court relied on a nonjusticiable directive principle to require the government to provide food aid, the court's current interpretations and orders simply expand previous interpretations regarding a dignified life and preventing starvation and nutrition.<sup>102</sup> The case's impact has expanded over time, as a petition to seek effective management of the public distribution of food grains in six states has evolved into a revolution of the nation's approach to hunger and nutritional assistance; 108 court orders have created or bolstered nutritional assistance programs and triggered a national food movement.<sup>103</sup>

For example, in December 2006, the court held that the government failed to implement a youth nutritional assistance program and ordered all state governments to increase funding for and actually implement the program.<sup>104</sup> The court held that "huge amounts of money

<sup>98</sup> See *id.* at 62.

<sup>99</sup> See *id.* at 65–66.

<sup>100</sup> See *Pattnayak*, (1989) 1 S.C.R. at 64–65.

<sup>101</sup> See, e.g., *id.* at 64–65.

<sup>102</sup> See *Birchfield & Corsi*, *supra* note 3, at 698, 709.

<sup>103</sup> See *Guha-Khasnobis & Vivek*, *supra* note 2, at 308–09; *Case Status, People's Union for Civil Liberties v. India*, SUP. CT. INDIA (Feb. 21, 2011), <http://courtnic.nic.in/courtnicsc.asp> (follow "Case Number" hyperlink; then select Case Type as "Writ Petition (Civil)" and enter Case No. as "196" and select Year as "2001"; then follow "Click Here for Archive Orders" hyperlink).

<sup>104</sup> See *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001, at \*8 (Dec. 13, 2006) (interim order) (India), *available at* <http://judis.nic.in> (follow "Supreme Court of India" hyperlink; then follow "Case No." link; then select Case Type as "Writ Petition (Civil)" and enter Case No. as "196" and select Year as "2001" and select Reportable as "all"; then follow link for decision dated "13/12/2006") (expanding

is [sic] being left unspent and the rightful beneficiaries are being denied critically needed supplementary nutrition.”<sup>105</sup> Consequently, recognizing that the right to food is enforceable, the court ordered the state and national governments to allocate two to three rupees to each person per day for supplementary nutrition for malnourished children under three years and for pregnant and nursing mothers.<sup>106</sup> This December 2006 order reiterated the court’s recognition of a legally enforceable right to food and established a national spending minimum to support a program that ensured the realization of the right.<sup>107</sup>

Even though the Supreme Court’s interim orders in *People’s Union for Civil Liberties* only offer a temporary solution to India’s hunger and malnourishment problems, the litigation has stimulated more enduring legislative action.<sup>108</sup> In June 2009, the president of India announced the National Food Security Act (NFSA), which would provide a statutory basis for food security programs and codify many of the interim orders in *People’s Union for Civil Liberties*.<sup>109</sup> Despite a year and a half of drafting and debate, state governments continue to evaluate the NFSA.<sup>110</sup> Critics debate the successes of the current court ordered programs, the size and feasibility of the NFSA, and whether the statute recognizes all of the food security schemes currently included under *People’s Union for Civil Liberties* interim orders.<sup>111</sup> Despite the slow legislative drafting process and the continued pendency of *People’s Union for Civil Liberties*, the Indian Constitution’s right to food is being supported by national courts and politicians that have resulted in national programs that ensure the enjoyment of a right to food.<sup>112</sup>

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the Integrating Child Development Scheme in all states and territories to provide higher levels of funding and full implementation).

<sup>105</sup> See *id.* at \*5.

<sup>106</sup> See *id.* at \*4.

<sup>107</sup> See *id.*

<sup>108</sup> See Birchfield & Corsi, *supra* note 3, at 752.

<sup>109</sup> See *id.*

<sup>110</sup> See *Centre Consulting States on Food Bill: Patil*, HINDU (New Delhi) (Feb. 21, 2011), <http://www.thehindu.com/news/national/article1476832.ece>. As of November 2011, the bill was slated to be finalized in the 2012 session with budgetary provisions indicating preparation to begin certain programs in 2013. See Subodh Ghildiyal & Nitin Sethi, *National Food Security Act Set for Pre-Poll Rollout*, TIMES INDIA (New Delhi) (Nov. 9, 2011), [http://articles.timesofindia.indiatimes.com/2011-11-09/india/30377221\\_1\\_national-food-security-bill-priority-category-nac](http://articles.timesofindia.indiatimes.com/2011-11-09/india/30377221_1_national-food-security-bill-priority-category-nac).

<sup>111</sup> See *Centre Consulting States on Food Bill: Patil*, *supra* note 110.

<sup>112</sup> See *id.*; Ghildiyal & Sethi, *supra* note 110.



### C. Brazil: A Policy Approach to Constitutionalizing a National Right to Food

The government of Brazil recently recognized the right to food and has actively pursued both international and national policies to protect and bolster this right.<sup>113</sup> As a civil law nation with a monistic approach to international law, the government must adhere to ICESCR because the treaty's obligations have been incorporated into the national legal system when Brazil ratified the treaty in 1992.<sup>114</sup> Accordingly, a right to food inheres in the constitutional rights to non-discrimination, social assistance, and life.<sup>115</sup> In addition to recognizing an international right to food, the Brazilian constitution was amended in 2010 and now explicitly provides a national right to food.<sup>116</sup>

#### 1. Social Movement and Politics Establishing the Right to Food

Prior to Brazil's explicit recognition of a right to food in 2010, citizens led an anti-hunger campaign, *Acao Cidadania contra a Fome e Miseria e pela Vida* (Citizens' Action Against Hunger and Poverty and For Life), that mobilized thirty million citizens to participate in public health and nutrition programs and called on the government to recognize their right to food.<sup>117</sup> In the early 1990s, this campaign eventually led to the establishment of the *Conselho Nacional de Seguranca Alimentar e Nutricional* (National Council on Food and Nutritional Security) (CONSEA),

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<sup>113</sup> See Flavio Luiz Schieck Valente, *The Human Right to Food Movement in Brazil*, in 2 FOOD AND HUMAN RIGHTS IN DEVELOPMENT, *supra* note 48, at 181, 181–82.

<sup>114</sup> See Cohen & Brown, *supra* note 47, at 56; Jacob Dollinger, *Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 22 CAP. U. L. REV. 1041, 1092 (1993). States embracing monism, typically civil law countries, apply international law within the national legal order simply upon ratification of the international treaty. See KNUTH & VIDAR, *supra* note 7, at 15. This allows citizens to rely upon treaty obligations in national courts. See *id.* Dualists, including all common law and some civil law nations, distinguish between international and national legal orders and require domestic legislation to incorporate international law within the national system. See *id.* at 16. The difference between monism and dualism is that while a monistic state recognizes only one legal order (encompassing international and national law), the dualistic state requires that domestic legislation explicitly recognize and incorporate international treaty rights and obligations into the national system. See *id.* at 15–16. A nation's acceptance of monism or dualism can affect a citizen's ability to rely on an international right within the national legal system. See *id.* at 15.

<sup>115</sup> See Special Rapporteur on the Right to Food, *The Right to Food, Report by the Special Rapporteur on the Right to Food, Mission to Brazil*, ¶¶ 17, 19, E/CN.4/2003/54/Add.1 (Jan. 3, 2003) [hereinafter *Mission to Brazil* (2003)].

<sup>116</sup> See Emenda Constitucional no. 64, de 4 de fevereiro de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.2.2010 (Braz.) (amending Article 6 of the constitution to include the right to food).

<sup>117</sup> See Valente, *supra* note 113, at 188.

which works to investigate and prevent hunger and malnutrition.<sup>118</sup> During its first year, CONSEA created the first National Food Security Conference, a forum for discussing the promotion of food security as a national priority.<sup>119</sup> Unfortunately, President Fernando Cardoso disbanded CONSEA in 1995, bending to external pressure from international finance and corporate organizations.<sup>120</sup>

In 2004, CONSEA was resurrected to advise the president on establishing a national policy for food and nutritional security.<sup>121</sup> Through CONSEA, the government initiated discussions of *Sistema Nacional de Segurança Alimentar e Nutricional* (National Food and Nutritional Security System) (SISAN), and bolstered monitoring activities related to a right to food.<sup>122</sup> For example, discussions in CONSEA have increasingly included other human rights and public services-related ministries in order to establish a national commission responsible for investigating and proposing remedies for right to food violations.<sup>123</sup>

The 2004 reinstatement of CONSEA was just one of the poverty focused initiatives initiated by President Luis Inacio Lula da Silva, who replaced President Cardoso.<sup>124</sup> President Lula, sworn into office in 2003, created the *Program Fome Zero* (Zero Hunger Program) to provide government-sponsored initiatives to assist in fighting hunger.<sup>125</sup> In 2006, the food and nutritional discussions initiated by CONSEA culminated in the creation of SISAN to implement food and nutritional security.<sup>126</sup>

<sup>118</sup> See *Mission to Brazil* (2003), *supra* note 115; Valente, *supra* note 113, at 188–89.

<sup>119</sup> See Valente, *supra* note 113, at 189.

<sup>120</sup> See *id.*

<sup>121</sup> See Decreto No. 5.079, de 11 de maio de 2004, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.5.2004 (Braz.) (reinstating CONSEA as an advisory body to the President).

<sup>122</sup> See Valente, *supra* note 113, at 202–03.

<sup>123</sup> See *id.*

<sup>124</sup> See THAÍS FRANCESCHINI ET AL., FOOD & AGRIC. ORG. OF THE U.N., EXIGIBILIDADE: MECHANISMS TO CLAIM THE HUMAN RIGHT TO ADEQUATE FOOD IN BRAZIL 12–13 (2010), available at [http://www.fao.org/righttofood/publi10/Exigibilidade\\_Dec-2010.pdf](http://www.fao.org/righttofood/publi10/Exigibilidade_Dec-2010.pdf).

<sup>125</sup> See Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on the right to Food, Mission to Brazil*, ¶ 33, A/HRC/13/33/Add.6 (Feb. 19, 2009) [hereinafter *Mission to Brazil* (2009)]; Jen Ross, *Brazil Makes Headway in Bid for “Zero Hunger,”* CHRISTIAN SCI. MONITOR, Sept. 11, 2006, available at <http://www.csmonitor.com/2006/0911/p04s01-woam.html>; *Fome Zero, Concieto*, PRESIDÊNCIA DA REPÚBLICA FEDERATIVA DO BRASIL, <http://www.fomezero.gov.br/o-que-e> (last visited May 18, 2012) (the Zero Hunger Program supports initiatives, like family food aid and school lunch programs, which are now coordinated by CONSEA).

<sup>126</sup> See Lei No. 11.346, de 15 de septiembre de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 18.9.2006 (Braz.) (establishing SISAN); FRANCESCHINI ET AL., *supra* note 124, at 13.

Additionally, Brazil's Federal Prosecutor's Office, a branch of the Public Ministry, has the constitutional mandate to investigate government actions and ensure constitutional compliance.<sup>127</sup> The Public Ministry provides public hearings to identify possible violations of the right to food and improper implementation of nutritional programs, like the National School Feeding Program.<sup>128</sup> It also has the ability to propose changes and reparations that local public authorities should institute to ensure the realization of social and economic rights.<sup>129</sup>

The UN Special Rapporteur on the Right to Adequate Food recognized these policy and institutional advancements as positive steps by the Brazilian government towards the realization of a national right to food.<sup>130</sup>

## 2. Establishing the Right to Food Through Constitutional Amendment

Most importantly, on February 3, 2010, the Brazilian legislature amended the national constitution to clearly express the right to food.<sup>131</sup> The amendment expands Article 6 of the Brazilian Constitution to recognize a national right to food.<sup>132</sup> Article 6 of the 1988 constitution provided "education, health, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute" as social rights protected by the constitution.<sup>133</sup> The 2010 amendment includes "food" as one of these social rights.<sup>134</sup> The impact of "food" as a social right is that the malnourished and hungry can now do more than just claim that they "need" food; they can rely on a constitutional right and hold their government account-

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<sup>127</sup> See *Mission to Brazil (2003)*, *supra* note 115, ¶ 21; see also FRANCESCHINI ET AL., *supra* note 124, at 7 (describing Brazilians' ability to bring claims before public institutions to prevent the violation of their constitutional rights, as well as citizens' rights to a timely response and appropriate government action to remedy any violation of constitutional rights).

<sup>128</sup> See Valente, *supra* note 113, at 204.

<sup>129</sup> See *id.*

<sup>130</sup> See *Mission to Brazil (2009)*, *supra* note 125, ¶¶ 2, 14.

<sup>131</sup> See *id.* ¶ 16.

<sup>132</sup> See Emenda Constitucional no. 64, de 4 de fevereiro de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.2.2010 (Braz.) (amending Article 6 of the constitution to include the right to food); see also Olivier De Schutter, *Right to Food as a Constitutional Right in Brazil*, YouTube (Feb. 5, 2010), <http://www.youtube.com/watch?v=SbZeICLdd6Q>.

<sup>133</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6 (Braz.).

<sup>134</sup> See Emenda Constitucional no. 64, de 4 de fevereiro de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.2.2010 (Braz.) (amending Article 6 of the constitution to include the right to food).

able for the enforcement and implementation of nutritional assistance programs.<sup>135</sup>

The amendment was the result of years of sequential social movements and political initiatives developing and expanding national support for governmental programs addressing hunger and malnutrition.<sup>136</sup> In his video address applauding Brazil's constitutional amendment, the UN Special Rapporteur on the Right to Food, Olivier De Schutter, identified the amendment's many foundational factors.<sup>137</sup> Specifically, the years of political efforts to establish nutritional assistance programs and the growing global recognition of the right to food, like in India and South Africa, provided the constitutional amendment with necessary social and political support.<sup>138</sup> The existence of national projects, like the federal prosecutors compliance efforts, also provided tangible examples of the usefulness of a legally enforceable right to food.<sup>139</sup> Consequently, this constitutional amendment, which provides a legally enforceable right to food, is the culmination of previous social movements and political activism that had already begun to establish a nationally recognized right to food.<sup>140</sup>

Even with Brazil's constitutional amendment and recent national food security policies, the right to food has not yet been fully realized in Brazil. International observers have noted that politics and fiscal instability still threaten the funding and implementation of national programs ensuring and protecting the right to food.<sup>141</sup> Over the past decade Brazil has achieved great progress in recognizing and enforcing the right to food within its legal system, but almost forty percent of the Brazilian population continues to face food insecurity.<sup>142</sup>

#### *D. Mexico: Social and Political Movements Supporting a Right to Food*

Mexico's social and political movements provide the foundations for the establishment of an enforceable right to food.<sup>143</sup> For example,

<sup>135</sup> See Schutter, *supra* note 132.

<sup>136</sup> See FRANCESCHINI ET AL., *supra* note 124, at 11–14.

<sup>137</sup> See Schutter, *supra* note 132.

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> See *Mission to Brazil (2009)*, *supra* note 125, ¶ 51.

<sup>142</sup> See FRANCESCHINI ET AL., *supra* note 124, at 14.

<sup>143</sup> See FAO, MEXICO, *supra* note 12 (recognizing the Federal District's affirmation of an enforceable right to food as one local, decentralized action progressing towards a national right to food); Annette Aurélie Desmarais, *La Via Campesina*, in *RURAL SOCIAL MOVEMENTS IN LATIN AMERICA* 33, 37, 47 (Carmen Diana Deere & Frederick S. Royce eds., 2009) (identi-

*La Vía Campesina* is a global movement that is active in Mexico providing the requisite social and political pressure to establish a Mexican constitutional right to food.<sup>144</sup> This movement, that coordinates peasant organizations' efforts to promote agricultural reforms to ensure national food security, has ties to the Mexican National Union of Regional Autonomous Peasant Organizations, a body that continues to have a strong political impact in Mexico today.<sup>145</sup>

### 1. Mexican Legislative and Constitutional Language Provides the Foundation for a National Right to Food

Recent legislation, in Mexico's Federal District, indicates political support to recognize a right to food.<sup>146</sup> On August 17, 2009, the legislative assembly of the Federal District of Mexico enacted the "Food Security and Nutrition System of the Federal District," which created a food security program that promotes the right to food by funding and evaluating nutritional assistance programs.<sup>147</sup> The United Nations Food and Agriculture Organization lauded the efforts of the legislative assembly, because the Federal District's food security initiative provides tangible legal and social resources for the malnourished in Mexico City and indicates progress towards achieving a national right to food.<sup>148</sup>

Additionally, the Mexican Constitution already provides socio-economic rights that could be interpreted to establish or support a justiciable national right to food.<sup>149</sup> Five separate articles of the Mexican

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fyng Mexico as one of the many birth places of *La Vía Campesina* movement, which promotes agrarian reform and food sovereignty).

<sup>144</sup> See Desmarais, *supra* note 143, at 38–39.

<sup>145</sup> See *id.* at 37. *La Vía Campesina* pursues governmental policy changes that protect rural communities through agriculture and nutrition reforms, believing globalization has worsened the economic viability and food security of rural communities. See Peter Rosset, *Agrarian Reform and Food Sovereignty*, in *RURAL SOCIAL MOVEMENTS IN LATIN AMERICA* 55, 55, 60 (Carmen Diana Deere & Frederick S. Royce eds., 2009). The movement recognizes a right to food and urges improved access to "healthy, nutritious, affordable, culturally appropriate, and locally produced food." *Id.* at 60.

<sup>146</sup> See FAO, MEXICO, *supra* note 12 (recognizing the Federal District's affirmation of an enforceable right to food as one local, decentralized action progressing towards a national right to food).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> Compare Constitución Política de Los Estados Unidos Mexicanos, arts. 2(B)(III) & (VIII), 3, 4, 18, 27 (Mex.), with CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 6 (Braz.) (prior to the addition of the right to food by constitutional amendment in 2010), INDIA CONST. arts. 21 & 47 (prior to the judicial transformation of a "guiding principle" into a justiciable right), and S. AFR. CONST., 1996, § 27(1)(b) (comparing relevant lan-

Constitution discuss socio-economic rights that either recognize or are related to food and nutrition.<sup>150</sup> The most explicit references to a right to food are provided in Articles 2(B)(III) & (VIII), which require federal, state, and municipal authorities to promote effective access to health services for indigenous and children populations by providing nutritional and social support programs.<sup>151</sup> Article 4 provides everyone with the right to health protection and specifically provides children with the right to food, health, and education.<sup>152</sup> Article 18 requires the government to develop a penal system that prepares prisoners for reintroduction into society by providing not only access to educational opportunities, but also by protecting prisoners' health.<sup>153</sup> Finally, Article 27 recognizes that the nation's land and water resources are essential for agricultural production and for the survival of population centers.<sup>154</sup> Together, these articles suggest an implied right to food for all citizens and establish an explicit right to food and nutrition for children.<sup>155</sup>

## 2. Active National Courts Provide the Opportunity for a Judicial Interpretation Establishing the Right to Food

Mexico's courts have previously directed and shaped public policy on social and political issues.<sup>156</sup> The capacity of the Mexican Supreme Court to engage in judicial activism, including the power to declare governmental actions unconstitutional, emerged from judicial reforms instituted by President Ernesto Zedillo, in 1994.<sup>157</sup>

Since these judicial reforms, the Supreme Court has begun to use its new judicial oversight to revise outdated codes and limit governmental actions.<sup>158</sup> In 2005, the court tested its new oversight, when it estab-

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guage in the Mexican constitution to other national constitutional language that has established constitutionally based socio-economic rights).

<sup>150</sup> See Constitución Política, arts. 2(B)(III) & (VIII), 3, 4, 18, 27 (Mex.).

<sup>151</sup> See *id.* art. 2(B)(III) & (VIII).

<sup>152</sup> See *id.* art. 4.

<sup>153</sup> See *id.* art. 18.

<sup>154</sup> See *id.* art. 27.

<sup>155</sup> See *id.* arts. 2(B)(III) & (VIII), 3, 4, 18, 27.

<sup>156</sup> MATTHEW M. TAYLOR, *JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL 1* (2008) ("Courts are playing an increasingly important role in shaping public policy in contemporary Latin America . . . and in Mexico, courts have had a hand in fashioning policies ranging from public sector pension reform to industrial expropriation.").

<sup>157</sup> See Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidentialism*, 4 INT'L J. CONST. L. 411, 421 (2006).

<sup>158</sup> See *id.* at 421–22.

lished the unprecedented power for the Mexican congress to constitutionally reject presidential additions to the federal budget.<sup>159</sup> Another example of the court's new powers to affect social policy is found in *Ley Robles*, a case in which the court confirmed the constitutionality of certain abortions.<sup>160</sup> In *Ley Robles*, the court held that a Mexico City law decriminalizing abortions for women who were raped or when the pregnancy created a health risk was constitutional, despite staunch opposition and a range of criminal laws prohibiting abortion.<sup>161</sup> A constitutional right to an abortion was again confirmed by the Mexican Supreme Court, in 2006, when it deemed criminal laws and health codes unconstitutional if they prevented access to abortions in certain medical or rape situations.<sup>162</sup> The Mexican Supreme Court's power to rule on the constitutionality of legislation and government conduct in social, economic, and politically influenced cases indicates that the court has the judicial activism and jurisdiction required to infer a national right to food from constitutional text.<sup>163</sup>

### III. ANALYSIS

The insight from South Africa, India, and Brazil's experiences with developing and enforcing a right to food provide guidance for Mexico's right to food movement. This insight suggests that Mexico has the constitutional foundation, activist judiciary, social movements, and political progress required for the establishment of a justiciable national right to food.<sup>164</sup>

Certain key similarities among South Africa, India, Brazil, and Mexico permit Mexico to learn from the experiences of the former three countries. All four nations are newly industrialized countries experiencing economic growth, a widening middle class, and a transition away from a large agriculture sector, while still facing the hardships of

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<sup>159</sup> See *id.* at 422.

<sup>160</sup> See Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. L. 715, 769 (2004) (describing the abortion case, *Ley Robles*, as an example of recent judicial activism by the Mexican Supreme Court).

<sup>161</sup> See Alejandro Madrazo, *The Evolution of Mexico City's Abortion Law: From Public Morality to Women's Autonomy*, 106 INT'L J. GYNECOLOGY & OBSTETRICS 266, 267 (2009).

<sup>162</sup> See *id.* at 268–69; Joe Shaulis, *Mexico Supreme Court Upholds First-Trimester Abortion Law*, JURIST (Aug. 29, 2008), <http://jurist.law.pitt.edu/paperchase/2008/08/mexico-supreme-court-upholds-first.php>.

<sup>163</sup> See Kossick, *supra* note 160, at 770.

<sup>164</sup> See generally FAO, MEXICO, *supra* note 12 (documenting local efforts to recognize the right to food, identifying the prevalence of food insecurity in Mexico City, and noting some national governmental efforts to promote and demonstrate the right to food).

poverty, hunger and malnutrition.<sup>165</sup> Additionally, all four nations have active courts that have interpreted social and economic rights in ways that have enforced, expanded, or created national social policies or social welfare programs.<sup>166</sup> Most importantly, South Africa, India, Brazil, and Mexico were each shaped by histories of colonialism, democratization, and inequality, with all four adopting constitutions in the twentieth century that explicitly provide social and economic rights.<sup>167</sup>

### A. *Legal Foundation for a Justiciable National Right to Food*

#### 1. Weak International Law Obligations Explain Need for National Right to Food

A nation's approach to the supremacy of international law within its own legal order can partly explain the attention, or lack of attention, given to the internationally recognized right to food.<sup>168</sup> As a civil law

<sup>165</sup> See PHILIP McMICHAEL, *DEVELOPMENT AND SOCIAL CHANGE* 76–79 (3d ed. 2004) (describing the characteristics of Mexico and Brazil that indicate their inclusion as newly industrialized countries (NICs)). Various sources provide conflicting lists of the NICs, but both India and South Africa have economic growth and industrialization indicating their inclusion in the NIC classification; both have been recognized as a NIC in an academic or professional publication. See, e.g., GAY W. SEIDMAN, *MANUFACTURING MILITANCE: WORKER'S MOVEMENTS IN BRAZIL AND SOUTH AFRICA* 44 (1994).

<sup>166</sup> See HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA* 143–44 (2010) (recognizing South African courts' willingness to scrutinize governmental programs to ensure the protection of socio-economic rights); TAYLOR, *supra* note 156, at 1 ("Courts are playing an increasingly important role in shaping public policy in contemporary Latin America. In Brazil, the judiciary has molded policy initiatives governing everything from political party representation to privatization . . . and in Mexico, courts have had a hand in fashioning policies ranging from public sector pension reform to industrial expropriation."); Birchfield & Corsi, *supra* note 3, at 713–14 (describing India's unique judicial oversight of constitutional interpretation and human rights jurisprudence).

<sup>167</sup> See 2 BASU, *supra* note 79, at 310–12 (describing the 1949 Indian Constitution's inclusion of directive principles as reflecting the drafters' intent to create a welfare state promoting social welfare and the common good and including references to the impact of British colonialism on the constitution); KLUG, *supra* note 166, at 21, 132 (identifying the influence that colonialism, apartheid, exploitation, social and economic depravity, and democratic struggles had on the inclusion of socio-economic rights in the 1996 South Africa Constitution); TAYLOR, *supra* note 156, at 158–61 (acknowledging that the 1988 Brazilian Constitution instituted democratic reforms after years of political inequality and military coups); STEPHEN ZAMORA ET AL., *MEXICAN LAW* 78–79 (2004) (describing the 1917 Mexican Constitution as a socially revered document for its provisions relating to Mexican society and social welfare and the influence of Mexico's political history and civil law tradition); see also ASBJØRN EIDE ET AL., *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 172 n.17 (2d ed. 2001) (recognizing that Mexico was the first country to include economic, social, and cultural rights in its constitution, even before the Universal Declaration of Human Rights).

<sup>168</sup> See KNUTH & VIDAR, *supra* note 7, at 15–16.



nation, Mexico, like South Africa, takes a dualist approach to international law.<sup>169</sup> Under Mexico's dualist approach, national and local governments are not required to give effect to international treaty obligations unless the treaty is self-executing and does not conflict with national law or has been incorporated through national legislation.<sup>170</sup>

The impact of a dualist system, like in Mexico, is shown by the South African right to water case law where simply signing an international treaty does not establish grounds for citizens to demand domestic enforcement of an international treaty obligation.<sup>171</sup> In *Mazibuko*, when requiring the Johannesburg government to provide an increased volume of water to indigent residents of Phiri, the court referred to, but did not rely on, the United Nations General Comment 15 stating that Article 11 or 12 of ICESCR provides an international right to water.<sup>172</sup> The court merely recognized the existence of the international right to water to bolster its order against Johannesburg.<sup>173</sup>

The limited impact of an international right to food in Mexico is further exemplified by Mexico's failure to "respect, protect, and fulfill" other socio-economic rights established by ICESCR.<sup>174</sup> Like Brazil, In-

<sup>169</sup> See *Tratados Internacionales, Se ubican jerárquicamente por encima de las leyes federales y en un segundo plano respecto de la Constitución Federal, Pleno de la Suprema Corte de Justicia [SCJN][Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo X, noviembre de 1999, Tesis P. LXXVII/99, página 46–47 (Mex.)*; see also Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 *UCLA L. REV.* 35, 121 n.490 (2003) (describing Mexico's dualist approach to international law) ("The Court determined that Article 68's implicit limitation to recognition of only one union contradicted the broad freedom to organize guaranteed by the Convention. It determined under Constitution Article 133 that the Convention, as a treaty ratified by Mexico, trumped the conflicting federal statute.")

<sup>170</sup> Cf. Del Duca, *supra* note 169, at 122–24 (discussing the effect of dualism on Mexico's ratification of the North American Free Trade Agreement (NAFTA), highlighting that the Mexican Constitution remains supreme and that NAFTA was ratified within Mexico's constitutional framework, and further noting that while it conflicts with some national and local legislation, it does not conflict with constitutional language). The South African Constitution recognizes that international law supersedes national law only when the international law does not conflict with the constitution and is either a self-executing treaty or has been subsequently addressed by the national legislative branch. See *S. Afr. Const.*, 1996, §§ 231, 232.

<sup>171</sup> See *Mazibuko v. Johannesburg* 2010 (4) SA 1 (CC) para. 17.

<sup>172</sup> See *id.*; see also OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS, FACT SHEET 35, THE RIGHT TO WATER 4 (2010) (explaining that General Comment 15 incorporated the right to water in ICESCR Articles 11 and 12).

<sup>173</sup> See *Mazibuko*, 2010 (4) SA 1 para. 17.

<sup>174</sup> See U.N. ECON. & SOC. COUNCIL, COMM. ON ECON., SOC., & CULTURAL RIGHTS, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLES 16 AND 17 OF THE COVENANT: MEXICO, ¶¶ 15, 36, E/C.12/1/Add.41 (Dec. 8, 1999) [hereinafter CONSIDERATION OF REPORTS (1999)].

dia, and South Africa, Mexico is party to ICESCR and has been criticized for its failure to fully comply with ICESCR obligations.<sup>175</sup>

In 1994, ICESCR's monitoring mechanism, the UN Committee, chastised Mexico for failing to comply with Art. 11(1), because the government did not provide inexpensive rental housing, allowed large-scale evictions, and failed to ensure access to adequate housing.<sup>176</sup> The UN Committee also recognized that constitutional language without further governmental action or enforcement would not satisfy international socio-economic obligations.<sup>177</sup> The UN Committee criticized Mexico for its failure to comply with ICESCR's adequate housing obligations despite the Mexican Constitution's explicit recognition of a right to housing and the creation of a federal housing program.<sup>178</sup> In 1999, the UN Committee's follow-up report criticized Mexico for failing to address the previous report's discussion of forced evictions and housing shortages, but no longer stated that Mexico was not complying with Art. 11(1).<sup>179</sup>

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<sup>175</sup> See *International Covenant on Economic, Social and Cultural Rights*, UN TREATY COLLECTION: STATUS TREATIES (Jan. 18, 2011), <http://treaties.un.org/doc/Publication/MTD SG/Volume I/Chapter IV/IV-3.en.pdf> (indicating that India ratified on April 10, 1979; Mexico on March 23, 1981; Brazil on January 24, 1992; and South Africa signed on October 3, 1994); see, e.g., CONSIDERATION OF REPORTS (1999), *supra* note 174, ¶ 36; U.N. ECON. & SOC. COUNCIL, COMM. ON ECON., SOC., & CULTURAL RIGHTS, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLES 16 AND 17 OF THE COVENANT: MEXICO, ¶ 13, UN DOC. E/C.12/1993/16 (Jan. 5, 1994) [hereinafter CONSIDERATION OF REPORTS (1993)] ("The Committee also recommends the increased construction of rental housing, as well as adoption of other measures to enable Mexico to comply fully with its obligations under article 11 . . .").

<sup>176</sup> See CONSIDERATION OF REPORTS (1993), *supra* note 175, ¶¶ 9, 10, 13, 14.

<sup>177</sup> Compare Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 4, Diario Oficial de las Federación [DO], 5 de febrero de 1917 (Mex.), with CONSIDERATION OF REPORTS (1993), *supra* note 175, ¶¶ 9, 10, 13, 14 (comparing the language in the Mexican Constitution with the UN Economic and Social Council report on socio-economic rights in Mexico).

<sup>178</sup> See Constitución Política [C.P.], art. 4 (Mex.); CONSIDERATION OF REPORTS (1993), *supra* note 175.

<sup>179</sup> See CONSIDERATION OF REPORTS (1999), *supra* note 174, ¶ 27. International criticism may highlight the weakness of international law in securing a socio-economic right, but it does not indicate that the nation has failed to take any action to secure that right within its national legal order. See, e.g., *Mission to Brazil (2009)*, *supra* note 125, ¶ 51. For example, in 2010, after the UN Special Rapporteur on the Right to Food visited Brazil to examine its efforts to comply with the international right to food, including ICESCR Article 11(1), he identified numerous areas that the Brazilian government should improve to comply fully with the right to food, even though Brazil had just enacted its constitutional amendment. See *id.*

## 2. Constitutional Language Implying a Right to Food

South Africa's, India's, and Brazil's justiciable national rights to food were derived from constitutional language granting general socio-economic rights; the existence of similar language in Mexico's constitution offers the same opportunity to establish a right to food.<sup>180</sup> Constitutional language recognizing socio-economic rights is a foundational element for establishing a justiciable national right to food.<sup>181</sup>

India's justiciable right to food relies on a combined reading of Article 21's right to live with human dignity and Article 47's directive principle instructing the government to raise the level of nutrition of its people.<sup>182</sup> In *Mullin*, the court used the Article 47 directive principle to define "life" in Article 21, concluding that the constitution requires that the government ensure a life with human dignity, which includes basic necessities like nutrition.<sup>183</sup>

South Africa's constitution more explicitly recognizes the right to food in three separate sections, most predominantly in section 27(1) (b), which gives everyone the right to have access to "sufficient" food.<sup>184</sup> Although there has been no South African case law further defining the right to sufficient food, it is clear, from cases like *Mazibuko*, that the national and local governments must take feasible steps to protect socio-economic rights ensuring a life with human dignity.<sup>185</sup> It is also clear that constitutional socio-economic language will not be read in a vacuum as such rights are interlinked and interdependent.<sup>186</sup> For example, when evaluating the economic and environmental rights and laws related to the fishing industry, in *West Coast Rock Lobster Association*, the

<sup>180</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6 (Braz.) (prior to the addition of the right to food by constitutional amendment in 2010); INDIA CONST. arts. 21 & 47 (prior to the judicial transformation of a "guiding principle" into a justiciable right); Constitución Política [C.P.], art. 4 (Mex.); S. AFR. CONST., 1996, § 27(1) (b).

<sup>181</sup> See, e.g., *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006) (interim order) (India), available at <http://judis.nic.in> (follow "Supreme Court of India" hyperlink; then follow "Case No." link; then select Case Type as "Writ Petition (Civil)" and enter Case No. as "196" and select Year as "2001" and select Reportable as "all"; then follow link for decision dated "13/12/2006") (requiring all state governments to expand nutritional assistance programs to ensure the right to food as implied by the constitutional right to life and "directive principle" on the right to food).

<sup>182</sup> See INDIA CONST. arts. 21 & 47.

<sup>183</sup> See *Mullin v. Adm'r*, (1981) 2 S.C.R. 516, 529 (India).

<sup>184</sup> See S. AFR. CONST., 1996, § 27(1) (b); see also *id.* §§ 28(1) (c) & 35(2) (e) (providing every child the right to basic nutrition and detained persons a right to adequate nutrition, respectively).

<sup>185</sup> See, e.g., *Mazibuko*, 2010 (4) SA 1 para. 17.

<sup>186</sup> See Danie Brand, *The Right to Food*, in *SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA* 153, 163 (Danie Brand & Christof Heyns eds., 2005).

court recognized the connection between the economic and actual livelihood of subsistence fishermen and the right to food.<sup>187</sup>

Brazil's constitution provides the most explicit recognition of a right to food through the 2010 amendment that relied heavily on the constitution's enumeration of closely related rights.<sup>188</sup> Article 6 of the Brazilian Constitution originally included ten social rights, such as a right to health, a right to motherhood, and a right to childhood.<sup>189</sup> Constitutional amendment advocates successfully argued that the inclusion of similar socio-economic rights indicated that constitutional drafters were concerned with the holistic health of the population, which requires a justiciable right to food.<sup>190</sup>

The Mexican Constitution already contains language similar to the constitutions of India, South Africa, and Brazil that could be interpreted to establish or support a justiciable national right to food.<sup>191</sup> Five separate articles of the Mexican Constitution discuss socio-economic rights that either recognize or are intertwined with food and nutrition.<sup>192</sup> Although not explicitly articulated, the right to food could be inferred from the requirements that the government provide health services and educational programs and also the recognition that land and water resources are essential to the development of communities.<sup>193</sup> Both the Indian and South African courts, in *Mullin* and *Mazibuko* respectively, have relied on similar considerations of health, the necessities for human life, and the societal and nutritional importance of natural resources when establishing and prioritizing their respective rights to food.<sup>194</sup> An analogous interpretation of Articles 2(B) (III), 3 and 27 of

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<sup>187</sup> See *West Coast Rock Lobster Ass'n v. Minister of Envtl. Affairs & Tourism* 2008 ZAWCHC 123, paras. 8–10 (Western Cape High Court, Cape of Good Hope Provincial Division) (S. Afr.), available at <http://www.saflii.org/za/cases/ZAWCHC/2008/123.html>.

<sup>188</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6 (Braz.).

<sup>189</sup> See *id.*

<sup>190</sup> Cf. *id.*; Daniela Sanches Frozi, *Campaigning for the Right to Food in Brazil*, TEARFUND INT'L LEARNING ZONE (Jan 13, 2011), <http://tilz.tearfund.org/Publications/Footsteps+81-90/Footsteps+83/Campaigning+for+the+right+to+food+in+Brazil.htm> (discussing that the arguments used to advocate for a right to food included relying on the original socio-economic rights provided by Article 6).

<sup>191</sup> See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6 (Braz.) (prior to the addition of the right to food by constitutional amendment in 2010); INDIA CONST. arts. 21 & 47 (prior to the judicial transformation of a "guiding principle" into a justiciable right); Constitución Política [C.P.], art. 4 (Mex.); S. AFR. CONST., 1996, § 27(1) (b).

<sup>192</sup> See Constitución Política [C.P.], arts. 2(B) (III) & (VIII), 3, 4, 18, 27 (Mex.).

<sup>193</sup> See *id.* arts. (2) (B) (III), 3, 27.

<sup>194</sup> See, e.g., *Mullin*, (1981) 2 S.C.R. at 529; *Pattnayak v. State of Orissa*, (1989) 1 S.C.R. 57, 61 (India); *Mazibuko*, 2010 (4) SA 1 paras. 9, 10; *West Coast Rock Lobster*, 2008 ZAWCHC paras. 8, 10, 11.

the Mexican Constitution would support a similar implied right to food.<sup>195</sup>

Like the Indian court's interpretation, in *Mullin v. Administrator*, that the Indian Constitution provides a prisoner's right to life with human dignity, Article 18 of the Mexican Constitution requires the penal system to protect the health of the prisoner.<sup>196</sup> For example, in *Mullin*, the Indian court recognized that Article 21 demands that a prisoner in India be provided the basic necessities of life, including adequate nutrition, clothing, shelter, and facilities for reading and writing.<sup>197</sup> In Mexico, Article 18 requires the federal and state governments to develop a penal system that prepares prisoners for reintroduction into society by providing access to educational opportunities and protecting the prisoners' health.<sup>198</sup> This constitutional language, especially the reference to the prisoner's health, suggests that the Mexican courts would similarly interpret Article 18 to establish a prisoner's right to receive the basic necessities for life, including food.<sup>199</sup>

Finally, the Mexican Constitution contains provisions granting access to natural resources that are analogous to the constitutional provisions that the South African and Indian courts relied on to recognize rights to access life-sustaining natural resources and secure food.<sup>200</sup> In *Jagannath*, the Indian court relied on its previous interpretation of Article 21, providing a right to life with human dignity, and Article 47, directing the government to improve nutrition and public health, when it required polluting fishing corporations to pay for the socio-economic and environmental damage they caused to coastal communities that relied on coastal natural resources for their livelihood.<sup>201</sup> Similarly, Article 27 of the Mexican constitution explicitly recognizes that natural resources are essential for the development of population centers supports.<sup>202</sup> The third paragraph of Article 27 provides that public interest in the protection of agricultural and nutritional resources can justify

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<sup>195</sup> See *Mullin*, (1981) 2 S.C.R. at 529; *Pattnayak*, (1989) 1 S.C.R. at 61; *Mazibuko*, 2010 (4) SA 1 paras. 9, 10; *West Coast Rock Lobster*, 2008 ZAWCHC paras. 8, 10, 11.

<sup>196</sup> Compare Constitución Política [C.P.], art. 18, ¶ 2 (Mex.), with *Mullin*, (1981) 2 S.C.R. at 529.

<sup>197</sup> See *Mullin*, (1981) 2 S.C.R. at 528–29.

<sup>198</sup> See Constitución Política [C.P.], art. 18, ¶ 2 (Mex.).

<sup>199</sup> See *id.*

<sup>200</sup> Compare Constitución Política [C.P.], art. 27, ¶ 3 (Mex.), with *Jagannath v. India*, (1997) 2 S.C.C. 87, 145–46 (India), and *West Coast Rock Lobster*, 2008 ZAWCHC paras. 8, 10, 11 (identifying language within the Mexican constitution that is similar to constitutional language relied on by municipal courts in India and South Africa).

<sup>201</sup> See *Jagannath*, (1997) 2 S.C.C. at 91, 145–46.

<sup>202</sup> See Constitución Política [C.P.], art. 27, ¶ 3 (Mex.).

limitations on private property rights.<sup>203</sup> Additionally, just as the South African court in *West Coast Rock Lobster* stated that subsistence fishermen should be allowed to catch very limited quantity of protected fish and crustaceans to provide for their socio-economic needs, Mexico's Article 27 recognizes that natural resources are fundamental to the socio-economic needs of the Mexican population.<sup>204</sup> Together these cases indicate that Article 27's could be interpreted to grant top priority to the protection of access to these natural resources when a person's socio-economic or nutritional needs depend on that natural resource.

### B. *Judicial Activism and Interpretive Powers: Establishing a Justiciable National Right to Food*

In South Africa, India, and Brazil, constitutional language implying justiciable socio-economic rights would have remained dormant, but for their activist national judiciaries.<sup>205</sup> Like these three countries, Mexico has an active judiciary that has already shaped governmental programs and policies related to socio-economic rights, which indicates that the court has the authority to interpret or enforce a justiciable national right to food.<sup>206</sup>

Examples of judicial activism regarding socio-economic rights are found in India's ongoing *People's Union for Civil Liberties* litigation and South Africa's *Mazibuko* case.<sup>207</sup> In *People's Union for Civil Liberties*, the court first recognized an enforceable right to food in the constitution, and subsequently relied on that interpretation to justify court orders requiring national and state governments to establish or bolster nutritional assistance programs.<sup>208</sup> Similarly, in *Mazibuko*, the South African court interpreted the constitutional right to water to be a universal guarantee of access to enough water to provide a life with human dignity.<sup>209</sup> This led the court to order Johannesburg to provide indigent residents of Phiri with at least forty-two liters of water per person per

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<sup>203</sup> See *id.*

<sup>204</sup> Compare Constitución Política [C.P.], art. 27, ¶ 3 (Mex.), with *West Coast Rock Lobster* 2008 ZAWCHC paras. 8, 10, 11.

<sup>205</sup> See, e.g., *Mullin*, (1981) 2 S.C.R. at 529; *Pattmayak*, (1989) 1 S.C.R. at 61; *Mazibuko*, 2010 (4) SA 1 paras. 9, 10; TAYLOR, *supra* note 156, at 1 (identifying the judiciaries of Mexico and Brazil as using judicial decisions to influence policy-making).

<sup>206</sup> See TAYLOR, *supra* note 156, at 1.

<sup>207</sup> See *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006) (interim order) at \*4; *Mazibuko*, 2010 (4) SA 1 paras. 9, 10.

<sup>208</sup> See *People's Union for Civil Liberties*, Writ Petition (Civil) No. 196 of 2001 (Dec. 13, 2006) (interim order) at \*4.

<sup>209</sup> See *Mazibuko*, 2010 (4) SA 1 paras. 17, 21.

day, rather than the nationally established minimum volume of twenty-five liters of water.<sup>210</sup>

Although Brazil's courts have been relatively silent on the right to food, Brazil's judiciary actively participates in the political system and policy-making.<sup>211</sup> The judiciary's effect on policy deliberations is evident not just in its decisions, but in the parties and cases the judiciary favors.<sup>212</sup> For example, from 1996 to 1999, the Supremo Tribunal Federal, Brazil's highest court, enjoined legislative attempts to reform the nation's pension system and voiced staunch opposition to any further social security reforms.<sup>213</sup>

Like the three former judiciaries, Mexico's courts have directed and shaped public policy, and thus have the potential to take similar steps towards an enforceable right to food.<sup>214</sup> Although the Mexican Supreme Court has had strong judicial oversight for less than three decades, it has repeatedly engaged in judicial activism, declaring governmental actions unconstitutional and shaping policy.<sup>215</sup> The Mexican Supreme Court's power to rule on the constitutionality of government codes and actions in social, economic, and political cases proves that it has the judicial activism and jurisdiction required to infer a national right to food from constitutional text.<sup>216</sup>

### C. *Social and Political Support for a Justiciable National Right to Food*

Every expression of the right to food, whether international or national, has emerged from a vocal and persuasive social or political movement.<sup>217</sup> The international right to food emerged from civil society's response to the devastation of the World Wars and was introduced in the Universal Declaration of Human Rights.<sup>218</sup>

After Brazil emerged as a democracy following years of military rule, civil society organizations and political movements focused on socio-economic reforms to combat corruption, hunger, poverty and

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<sup>210</sup> See *id.*

<sup>211</sup> See TAYLOR, *supra* note 156, at 159.

<sup>212</sup> See *id.* at 160, 163.

<sup>213</sup> See *id.* at 58, 61–62.

<sup>214</sup> See *id.* at 1.

<sup>215</sup> See Zamora & Cossío, *supra* note 157, at 421; see also *supra* text accompanying notes 21–22.

<sup>216</sup> See Kossick, *supra* note 160, at 770.

<sup>217</sup> See, e.g., Valente, *supra* note 113, at 188 (describing Citizens' Action Against Hunger and Poverty and For Life, an anti-hunger campaign that was instrumental in the constitutional recognition of the right to food).

<sup>218</sup> See Eide, *supra* note 15, at 390.

inequality.<sup>219</sup> In 1993, the social movement was catalyzed by the creation of Citizenship Action Against Hunger, Poverty and Life (Citizenship Action), an organization that eventually grew to 7,000 local committees involving more than 30 million Brazilians.<sup>220</sup> These committees, which engaged more than half the country's population, established local social and capacity-building efforts, such as creating urban vegetable gardens, supporting the agrarian reform movement, and assisting in food distribution.<sup>221</sup> As Citizenship Action grew, it joined with the National Food Security Council and developed national food security policies throughout the 1990s that culminated with the recognition of the Brazilian right to food.<sup>222</sup>

In India, nutrition and food assistance have always been recognized as a national priority, even when a constitutional right to food was unenforceable.<sup>223</sup> More recently, in light of the temporary court orders creating nutritional assistance programs, in *People's Union for Civil Liberties*, there has been growing political support for national legislation codifying the temporary orders.<sup>224</sup> Despite the ongoing debate about the feasibility and scope of these nutritional assistance programs, the national consensus is that the government must enforce and protect its citizens' right to food.<sup>225</sup>

Like India and Brazil, Mexico has experienced social and political movements that provide the foundation for a right to food.<sup>226</sup> *La Vía Campesina's* activities in Mexico provide the requisite social or political pressure to establish a Mexican constitutional right to food.<sup>227</sup> Further, the recent legislation in Mexico's Federal District also indicates that Mexico is socially and politically ripe for the constitutional recognition of the right to food.<sup>228</sup> Even the United Nations Food and Agriculture Organization recognized that the Federal District's food security initiative provides tangible legal and social resources for the malnourished

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<sup>219</sup> See Valente, *supra* note 113, at 187–88.

<sup>220</sup> See *id.* at 188.

<sup>221</sup> See *id.*

<sup>222</sup> See FRANCESCHINI ET AL., *supra* note 124, at 20; Valente, *supra* note 113, at 188.

<sup>223</sup> See BASU, *supra* note 79, at 310–11, 324.

<sup>224</sup> See Birchfield & Corsi, *supra* note 3, at 752.

<sup>225</sup> See *id.* at 758–59.

<sup>226</sup> See FAO, MEXICO, *supra* note 12 (recognizing the Federal District's affirmation of an enforceable right to food as one local, decentralized action progressing towards a national right to food); Desmarais, *supra* note 143, at 37, 47 (identifying Mexico as one of the many birth places of the *La Vía Campesina* movement, which promotes agrarian reform and food sovereignty).

<sup>227</sup> See Desmarais, *supra* note 143, at 38–39.

<sup>228</sup> See FAO, MEXICO, *supra* note 12.



in Mexico City and indicates progress towards achieving a national right to food.<sup>229</sup>

### CONCLUSION

India, South Africa, and Brazil provide insight and lessons that can be applied to other nations, like Mexico, to identify effective means for creating a national right to food. Since 1947, international organizations and treaties have repeatedly recognized the right to food. Unfortunately, hundreds of millions remain hungry or malnourished because the international right to food is often treated simply as an unenforceable, symbolic gesture. In light of the international legal system's failure to address world hunger, national legal systems provide an effective forum to develop the legal foundation required to eradicate hunger. Brazil, South Africa, and India's recent recognition of a national, justiciable right to food proves that legal enforcement of this right can result in positive steps to prevent starvation and hunger.

This Note has identified three essential elements that lay the foundation for the development of a justiciable right to food in Mexico. First, a national right to food is supported and bolstered by the socio-economic rights already existing in a Mexico's constitution. Second, Mexico has the active and empowered judiciary required to define and enforce the right to food. Finally, the country's supportive social and political movements facilitate the development of a Mexico's national right to food. Mexico's legal system, alone, will not eradicate hunger, but a justiciable national right to food provides the underrepresented and malnourished with the ability to seek legal remedies preventing hunger, ensures a life with human dignity, and guarantees those minimal protections required for survival.

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<sup>229</sup> *See id.*