The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights

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Abstract: The jurisprudence of the Supreme Court of India is generally celebrated in the academic literature for its creative use of constitutional interpretation to read in certain socioeconomic rights into the 'right to life' provision despite their textual absence from the Constitution. However, this line of case law made the obtainment of a judicial remedy highly *conditional* upon an extant scheme or law, was necessarily *piecemeal*, *deferent* to the executive, and incapable of fixing precise accountability upon a violation or addressing issues of systemic material insufficiency. Much of this had to do with the absence of a rights-based legislative framework. The enactment of the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA) and the National Food Security Act, 2013 (NFSA) presented major developments in the livelihood and food security regimes in India, and a leap forward for legislated social rights. These legislations consolidated, expanded and entrenched a number of existing rights which had come into being through judicial decisions. In this paper, I examine the antecedents of social rights in India, and show the afterlife of disagreements over appropriateness, practicality and affordability, which resulted in the adoption of the Directive Principles of State Policy (DPSP) in the Indian Constituent Assembly, persist in legislative design and judicial reasoning. In this paper, I analyse judicial treatment of these laws and propose a novel theoretical framework for better understanding them. The theoretical framework has *discursively antagonistic* and *discursively catalytic* components, and sheds light on the *inter-branch institutional dynamic* which arises when NFSA and MGNREGA based public interest litigation (PIL) is activated. I suggest that such PIL and the kinds of complex, dialogic remedies which result from them have effects in the political, legal, and social fields. These remedies result in a form of *hybridized politico-legal accountability* that enables the Supreme Court of India to safeguard its institutional capital, while also being able to better engage with concerns such as polycentricity, democratic legitimacy, lack of expertise, federalism, and the separation of powers.

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A. Introduction

The social rights jurisprudence of the Supreme Court of India is generally feted in the academic literature.[1] However, the Constitution of India, drafted in 1949, did not contain a justiciable social right until 2002, when a constitutional amendment included the right to education into the chapter on Fundamental Rights.[2] The absence of justiciable social rights and the inclusion of social provisions as unenforceable directive principles in the Constitution can be attributed to disagreements between members of the Constituent Assembly on the *appropriateness, practicality, and affordability* of their inclusion[3]. There was, however, some consensus on the moral salience of the vision of society which these provisions would seek to achieve.[4]

Due to the absence of textually entrenched judicially enforceable social rights, the jurisprudence of the Supreme Court of India on social rights was based on 'reading in' a number of social rights into the 'right to life' provision. Constitutional interpretation filled the vacuum which textual inclusion had omitted. The jurisprudence which resulted from the period in the 1980s till the time when there was social rights legislation was piecemeal, based on an underdeveloped administrative standard of review[5], conditional upon existing government schemes (legislation or executive orders)[6], usually deferent to government action, and also contingent upon a set of complex, one-off remedial orders that were difficult

1 See, for example, generally, *Oscar Vilhena, Upendra Baxi and Frans Viljoen* (eds.), Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa, Johannesburg 2013; *Daniel Bonilla Maldonado*, Introduction: Toward a Constitutionalism of the Global, in: Daniel Bonilla Maldonado (ed.), Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia, Cambridge 2013, p. 1.

2 In 2002, through The Constitution (Eighty-sixth Amendment) Act, 2002, Article 21A was inserted into the Constitution which stated that "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine". For a fascinating story of the genesis of the right and its subsequent interpretations in court told from an inter-disciplinary perspective, see *Florian Matthey-Prakash*, The Right to Education in India: The Importance of Enforceability of a Fundamental Right, New Delhi 2019.

3 *Niraja Gopal Jayal*, Citizenship and its discontents: An Indian History, Cambridge Mass. 2013, p. 138; *Granville Austin*, The Indian Constitution: Cornerstone of a Nation, Oxford, New York 1999, p. 76-78; Both of these preceding references are general accounts, for a more specific historical account, see *Neera Chandhoke*, The Chequered History of Social Rights in India, in: Olle Törnquist and John Harriss (eds.), Reinventing Social Democratic Development: Insights from Indian and Scandinavian Comparisons, Copenhagen 2016, p. 189.

4 *Tarunabh Khaitan*, Constitutional Directives: Morally-Committed Political Constitutionalism, The Modern Law Review 82(4) (2019), p. 603.

5 *Farrah Ahmed and Tarunabh Khaitan*, Constitutional Avoidance in Social Rights Adjudication, Oxford Journal of Legal Studies 35(3) (2015), p. 623-25.

6 *Madhav Khosla*, Making social rights conditional: Lessons from India, ICON 8(4) (2010), p. 739.

to replicate and incapable of addressing systemic injustice.[7] Three additional features are notable in the case law of the court on social rights: concerns around accountability, separation of powers, and the division of responsibilities between central, state, and local government in the federal scheme.

Actor accountability and the judicial ability to identify it, which is an essential element for the development of a coherent body of case law, as well as the rule of law and predictability of judicial outcomes, was largely absent, while also being mired in the complexity of the federal system of governance in India. The Court's approach to the principle of separation of powers, which is of central concern in the judicial treatment of social rights[8], was uneven. The affixing of accountability was also a key concern, with different levels of government being variously responsible for the underlying cause of action.

However, in the period between 2004-14, when the Congress-led United Progressive Alliance (UPA) was in power, there was a renewed focus on turning legislative energies toward the enactment of a number of laws aimed at securing the right to livelihood[9], food security, and education. These enactments were said to have ushered in India's new 'rights agenda',[10] having cross-partisan legislator support, primarily because no party wanted to appear opposed to such an ostensibly pro-poor tilt.[11] In this paper, I examine the dynamic between the Supreme Court, and the Parliament and Executive which arises during the judicial treatment of cases brought on the basis of these legislations. I argue that while some of the cases led to greater coordination between different tiers of government and catalysed civil society, there are shades of an incremental approach to the adjudicative enterprise which displays continuity with the modes of engagement with previously existing concerns such as the separation of powers and the institutional place of the judiciary.

Part I of the paper provides a brief introduction to the MGNREGA and the National Food Security Act, including their legislative and judicial histories. Part II of the paper introduces the concept of the judicial role conception and its significance in understanding the inter-institutional dynamic, as well as its significance in the political and social spheres. In

7 *Rohan J. Alva*, Continuing Mandamus: A Sufficient Protector of Socio-Economic Rights in India, Hong Kong L.J. 44 (2014), p. 207; *Mihika Poddar and Bhavya Nahar*, Continuing Mandamus - A Judicial Innovation to Bridge the Right-Remedy Gap, NUJS L. Rev. 10 (2017), p. 555.

8 *David Bilchitz*, Towards a defensible relationship between the content of socio- economic rights and the separation of powers: conflation or separation?, in: David Bilchitz and David Landau (eds.), The Evolution of the Separation of Powers Between the Global North and the Global South, Cheltenham 2018, p. 57, 60.

9 See the Mahatma Gandhi National Rural Employment Guarantee Act 2005 (MGNREGA).

10 *Sanjay Ruparelia*, India's New Rights Agenda: Genesis, Promises, Risks, Pacific Affairs 86(3) (2013), p. 569.

11 See *James Chiriyankandath, Diego Maiorano, James Manor, Louise Tillin*, The Politics of Poverty Reduction in India: The UPA Government, 2004 to 2014, Hyderabad 2020, p. 44, "Whenever a party in government takes a populist stand like this, there are huge pressures on other parties to fall in line." (quoting Baijayant 'Jay' Panda, a Biju Janata Dal Member of Parliament (MP) from Orissa).

Parts III and IV of the paper, I offer a novel framework for understanding the dynamic between the executive government and the judiciary in the way that it relates to the enactment and enforcement of legislation relating to economic and social rights. I suggest that there are at least two models of such dynamic which are relevant for understanding the UPA period, which I classify as *inter-institutional discursive catalysis* and *inter-institutional discursive antagonism*. These two models of inter-institutional dynamic reveal that for the representative branches, constitutional text matters little without the existence of strong political pressure, which is usually undergirded by well-organized, coherent social movements. Judicial intervention in each of these cases shows a heightened awareness of the Court's position in the institutional scheme so as to not invite separation of powers concerns. However, many decisions continue to be plagued by doctrinal incoherence which manifests itself in some of its reasoning and the instances it chooses to intervene judicially.

These models of inter-institutional dynamic do not exhaust the possibilities of the existence of other kinds of dynamic even within the rights under study, nor when it comes to instances like the right to education which was constitutionally enshrined and legislated upon in the same period under consideration, despite being declared a part of the right to life in 1992.[12] Part V of the paper concludes by discussing the upshot of an approach to understanding social rights through the prism of inter-institutional dynamics and what such an approach means for the future of a rights-based framework which the legislation under discussion inaugurated.

B. A Brief History of the MGNREGA and the National Food Security Act

The National Food Security Act and the MGNREGA both have a storied history. While the National Food Security Act originated in litigation before the Supreme Court, the MGNREGA was a result of sustained grassroots activism and legislative isomorphism[13] which began to find salience in the broader public imagination and was co-opted by the political elite to advance an ostensibly pro-poor agenda. It is important to provide here a brief history of the two laws to understand the inter-institutional dynamic they would come to produce in their interface with the judiciary.

As mentioned earlier, the issue of food security came up before the Supreme Court in the Right to Food (RTF) litigation, which began in the SCI, quite characteristically, with a series of PILs filed by the People's Union of Civil Liberties (PUCL) to force judicial attention to starvation deaths across the country, especially in areas affected by drought.[14] The

12 See Unnikrshnan v. State of Andhra Pradesh AIR 1993 SC 217.

13 The MGNREGA was itself based on state-based legislation such as rural employment guarantee schemes in states like Rajasthan. See *Rob Jenkins and James Manor*, Politics and the Right to Work: India's National Rural Employment Guarantee Act, Oxford, 2017, p. 35.

14 People's Union for Civil Liberties v. Union of India, (2001) 5 SCALE 303. Note: The orders in these series of cases were staggered over time and multi-fold – the citation here refers to the first

SCI delivered a judgment in response to a series of petitions[15] by the Peoples' Union of Civil Liberties seeking "*that the right to food should be recognised as a legal right of every person in the country, whether woman or man, girl or boy*."[16] What followed was a series of orders, which were not intended to be completely dispositive of the original petition and the relief sought. These orders converted eight federal government-run schemes of relating to food, livelihood and social security, into an entitlement. Moving beyond the scope of the original relief sought, one of the orders from the case in 2008 set up a Commissionerate "to track side-by-side hunger and the implementation of interim orders relevant to the Right to Food Case across the country."[17] A commentator, who had been appointed as one of the Commissioners in the case, hailed it as having "*paved the way for an enforceable right to food for the first time, preventing governments from removing or diluting these schemes, under pressures to reduce fiscal burdens.*"[18] Additionally, the orders also set up a monitoring mechanism comprising the appointment of a Commissioner to oversee the implementation and performance of several government schemes. Over time, the Commissioners began to make a number of recommendations which the court sought to impose not only on the federal government but also on several state governments who had been impleaded into the case. The SCI ordered these states to identify "vulnerable groups under their respective jurisdiction and ensure that these groups are informed as to the way in which their right to food may be satisfied." Strategic litigation of this kind was only one limb of the organizational matrix of the social movements which coalesced around the case, along with the burgeoning use of a grammar of constitutional rights.

What ties the NFSA and NREGA together in their institutional dynamics is how their ideation may have arisen through strategic litigation, yet their final form was the result of a combination of well-articulated demands by social movements and the weight of political will that was thrown behind the passage of the law. The stated goal of the NFS Act, passed eventually in late 2013, was 'to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to

public interest litigation filed by the People's Union for Civil Liberties in the Supreme Court in 2001.

15 People's Union for Civil Liberties v. Union of India & Others (PUCL), Writ Petition (Civil) No. 196 of 2001 (India).

16 *Harsh Mander*, Food from the Courts: The Indian Experience, IDS Bulletin 43(S1) 2012, p. 17.

17 See *Poorvi Chitalkar and Varun Gauri*, India: Compliance with Orders on the Right to Food, in: Malcolm Langford, César Rodríguez-Garavito, and Julieta Rossi (eds.), Social Rights Judgments and the Politics of Compliance: Making it Stick, Cambridge 2017, p. 298: "The commissioners are empowered to enquire into any violation of the court's orders and to demand compliance. They analyse central and state governments' data to monitor the implementation of various food and employment schemes, receive complaints of non-compliance from grassroots organisations and set up enquiry committees for verification purposes. They also work with governments to address obstacles to implementation."

18 *Mander*, note 16, p. 18.

people to live a life of dignity.'[19] The central plank of the legislation was to enact into law what had become legal entitlements due to the Right to Food litigation discussed in the previous paragraph. However, there was a further reduction in the prices at which foodgrains were being sold at public distribution shops, while also providing for cooked meals at Anganwadi centres for pregnant women and lactating mothers, and children under the age of six, which was a key ingredient of the Integrated Child Development Scheme, the provision of meals to school children under the Midday Meals scheme, and a maternity benefit of Rs 6,000 per month for every pregnant woman. The law was described as having tapped into 'newly crystallising political fissures over how to align or balance the expanding welfare commitments that had been symbolised by new programmes such as the MGNREGA in the UPA's first term with the pro-market sensibilities of a reform lobby which sought to reduce rather than entrench what they saw as the price distortions entailed by food and agricultural subsidies'.[20]

The MGNREGA, 2005 was enacted to provide for the "enhancement of livelihood security of households, primarily in rural areas, by providing at least one hundred days of guaranteed wage employment [for] every household whose adult members volunteer to do unskilled manual work"[21]. Employment guarantee schemes that had come before the MGNREGA like the Jawahar Grameen Yojana at the national level or the Employment Guarantee Scheme in Maharashtra were plagued by leakages, inadequate employment generation, and a lack of guaranteed on-demand employment.[22] The MGNREGA sought to change that by introducing certain key changes like a rights-based framework for wage employment[23], a time limit for fulfilling the legal guarantee of providing employment[24], an unemployment allowance in case of inability to fulfil the guarantee[25], a shared fiscal burden between the Centre and the State[26], and extensive inbuilt transparency and accountability safeguards.[27]

19 Statement of Objects and Reasons, NFS Act, 2013.

20 *Chiriyankandath, Maiorano, Manor and Tillin*, note 11, p. 42.

21 See Statement of Objects and Reasons, National Rural Employment Guarantee Act, 2005 (later renamed Mahatma Gandhi National Rural Employment Guarantee Act, available at https://nrega.nic.in/amendments_2005_2018.pdf (last accessed on 10 September 2020) (hereinafter MGNREGA 2005).

22 *S.K. Das*, India's Rights Revolution: Has It Worked for the Poor?, New Delhi 2013, pp. 107-108; Centre for Environment and Society, The National Rural Employment Guarantee Act (NREGA) Opportunities and Challenges 2 (2008), http://www.indiaenvironmentportal.org.in/files/NREGA_Policy_Paper_2008.pdf (last accessed on 10 September 2020).

23 Section 3, MGNREGA 2005.

24 Section 7(1), MGNREGA 2005.

25 Section 7, MGNREGA 2005.

26 Sections 20 and 21, MGNREGA 2005; *Das*, note 22.

27 Centre For Environment & Food Security v. Union Of India (16 December, 2010) (CEFS I); Centre For Enviornment & Food Security v. Union Of India (12 May 2011) (CEFS II).

Shortcomings in the Act began to be discovered through the working of the law[28], but it was generally agreed that the design of the law was sound.[29]The design of the law has been described as being an iterative blending of top-down and bottom-up approaches to policy-making'[30], with the role of the Left parties and pressure from radical civil society movements (a few of whose leading activists like Aruna Roy from the Mazdoor Kisan Sangathan Sangh in Rajasthan, were included in the National Advisory Council) being central to helping to formulate its provisions.

C. The Judicial Role Conception and Two Types of Inter-institutional Dynamic

In a parliamentary democracy like India, the Constitution is both a document which seeks to allocate, channel, and mediate powers between the three branches of government, while also providing mechanisms to ensure that there isn't a concentration of power in one branch.[31] The concentration of power in one branch is avoided through constitutional design by typically using accountability mechanisms like an independent judiciary, which ensures that the elected branches remain accountable to, and responsible for, violations of constitutionally and statutorily entrenched rights which is achieved through litigation based on Part III of the Constitution. If we are to accept that judicial pronouncements had achieved a sufficient level of coherence and clarity upon the delineation of a right, as was understood to be the case in social rights, it follows that accountability for the violation of the right can be fixed upon an actor in the legal system. This, however, was largely not the case, with accountability for social rights violations in the case law being incapable of being fixed due to the particularities of the division of power between the different levels of government in a federal system.

The Indian Supreme Court treads a careful line by operating in a setting where they have to think carefully about their limited institutional capital and whether to expend it at a showdown with the coordinate branches over complex, polycentric issues which social rights claims originate from.[32] It has been argued that the representative branches can better

28 See *Das*, note 22: "…lack of guaranteed employment on demand wages paid were inadequate and often below the minimum wage levels of employment generated were below the amount needed."

29 *Jean Dreze*, Employment Guarantee and the Right to Work, in: Niraja Gopal Jayal and Pratap Bhanu Mehta (eds.), The Oxford Companion to Politics in India, New Delhi 2011.

30 *Chiriyankandath, Maiorano, Manor and Tillin*, note 11, p. 45-46.

31 See *Ruma Pal*, The Separation of Powers, in: Sujit Choudhary, et. al. (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016.

32 For a careful analysis of the political dimensions of judicial review as it developed in India, see *Upendra Baxi*, The Indian Supreme Court and Politics, Lucknow 1980 (the classic text which inaugurated a rich tradition of studying Supreme Court doctrine as being deeply immersed in political reality); for a more recent, political science based treatment, see *Theunis Roux*, The Politico-Legal Dynamics of Judicial Review. A Comparative Analysis, Cambridge 2018, p. 148-150; also, *Theunis Roux*, Losing faith in law's autonomy: a comparative analysis, in: Erin F. Delaney and Rosalind Dixon (eds), Comparative Judicial Review, Cheltenham 2018, p. 204; *James Manor*, The

address concerns of democratic legitimacy and the lack of information and expertise which plague rights cases of these kinds.[33] Therefore, courts engage in strategic behaviour of the kind seen in the Swaraj Abhiyan cases in India (discussed below), which is best described as being catalytic in "order to lower the political energy that is required to change the protection of economic and social rights, or at least the way in which the government responds to the protection of economic and social rights", by seeing itself as being "in productive interaction with other political and legal actors."[34] These courts are also institutional actors that are plagued by a unique set of problems – often operating in settings of policy paralysis and chronic institutional failure[35]. They are often beset by situations where they have been appointed by the executive, are dependent upon it for staff, salaries and infrastructure; but are expected to rule against the government in social rights cases, which can often improve their public legitimacy, but leave them open to charges of interference with budgetary allocations. In some instances, they become part of a project, "focused on political incorporation and economic equality against an oligarchical elite, neoliberal populists who passed privatizations and structural economic reforms by arguing against corrupt state elites, and radical populists who have emphasized political participation, socioeconomic justice, and inclusion of traditionally excluded political groups against an elite of privileged insiders who have controlled economic and political power."[36]

Landau argues for an understanding of the judicial role in countries in the 'Global South', like India, South Africa, and Colombia, which is 'dynamic' in nature, which 'aim[s] to improve the performance of political institutions through time' while remaining uncon-

Interplay of Law and Politics in India, in: Salman Khurshid, et. al. (eds.), Judicial Review: Process, Powers, and Problems (Essays in Honour of Upendra Baxi), Cambridge 2020, p. 27.

33 There are different variations on this argument which approach the issue from a variety of disciplinary and ideological perspectives. See *Frank B. Cross*, The Error of Positive Rights, UCLA Law Review 48 (2001), p. 857 (arguing that positive rights do not belong in constitutions); *Mark Tushnet*, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law, Princeton 2008, p. 231 (arguing that judicial treatment of social rights produces uneven and uncertain results, and arguing for more robust democratic engagement with such rights).

34 *Katharine G. Young*, Constituting Economic and Social Rights, Oxford 2012, ch. 5; *Katharine Young*, Introduction, in: Katharine Young (ed.), The Future of Economic and Social Rights, Cambridge 2019, p. 1.

35 *David Landau*, Institutional failure and intertemporal theories of judicial role in the global south, in: David Bilchitz and David Landau (eds.), The Evolution of the Separation of Powers Between the Global North and the Global South, Cheltenham 2018, p. 33; see also *Arun K. Thiruvengadam*, Revisiting The Role of the Judiciary in Plural Societies (1987). A Quarter-Century Retrospective on Public Interest Litigation in India and the Global South, in: Sunil Khilnani, Vikram Raghavan, and Arun K. Thiruvengadam (eds.), Comparative Constitutionalism in South Asia, Oxford 2013, p. 363 ("typically, courts are required to confront the problem of sick, failing, or recalcitrant institutions in PIL cases.").

36 *David Landau*, Populist Constitutions, University of Chicago Law Review 85(2) (2018), p. 521, 524.

cerned with the "classic counter-majoritarian difficulty or the dilemma of courts imposing on democratic space and taking on legislative roles."[37] Rodriguez-Garavito identifies that old problems regarding democratic legitimacy and polycentricity keep cropping up even in current discourses[38], and proposes a mode of adjudication where courts serve as "catalysts of processes of public reasoning and institutional innovation". In his model, there is a robust articulation of the normative demands posed by SER provisions, a "means-oriented, moderate approach to judicial remedies that leaves to public deliberation and collective problem solving the details of SER content beyond the minimum core", along with a "strong, court-orchestrated monitoring mechanisms".[39] With these theoretical commitments in mind, we can now proceed to understanding how courts conceive of themselves in a state of productive interaction with the other branches of governments in order to produce a set of idiosyncratic inter-institutional dynamics in social rights cases.

I. The Importance of Inter-Institutional Dynamics and its Effects on the Legal, Social and Political Spheres

The legal scholarship on social rights in India (with some notable exceptions[40]), has thus far been far too doctrinal, focusing completely on the judgments of the Supreme Court, but paying little attention to the ways in which such a doctrine is used by a range of actors across the social and political spheres. While paying close attention to judicial pronouncements, it is also important to track the reactions it produces from the coordinate branches, and what the effects of this inter-institutional dynamic are on the legal, social and political spheres. A focus on inter-institutional dynamic helps us get a fuller and more meaningful picture of the current state and future directions of social rights in India. It also aids in understanding how judicial decisions are influenced by a range of extra-textual considerations like the principle of the separation of powers, the judiciary's place in the constitutional scheme, its institutional feature of a lack of expertise in arriving at answers to questions

37 *David Landau*, A Dynamic Theory of Judicial Role, B.C.L. Rev. 55 (2014), p. 1501.

38 *Cesar Rodriguez Garavito*, Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication, in: Katharine Young (ed.), The Future of Economic and Social Rights, Cambridge 2019, p. 240 ("…regarding courts' lack of democratic legitimacy to resolve large-scale distributive disputes, and the second regarding courts' lack of institutional capacity to promote structural changes, including those necessary for the fulfillment of SERs in contexts of radical deprivation." "…Democratic experimentalists have formulated a third critique, pointing to the fact that the implementation of socioeconomic policy (and courts' decisions in this realm) is polycentric in nature, in that to reach the multiple actors and processes at issue, it requires interaction and coordination among state and non-state actors at different levels. They argue that the 'centralist egalitarian' approach of normativist courts and scholars misses this crucial aspect of implementation of SERs.").

39 Ibid, p. 235.

40 Notable recent exceptions include, *Florian Matthey-Prakash*, The Right to Education in India: The Importance of Enforceability of a Fundamental Right, New Delhi 2019; *Anindita Mukherjee*, The Legal Right to Housing in India, Cambridge 2019.

which arise out of polycentric issues that have contested factual and scientific dimensions. The inter-institutional dynamics are influenced by time, the nature of the political party in power at the Central and State Governments, the durations of their rule, and the nature of the relationship between the Centre and the State. Since both the MGNREGA and NFS Act 2013 are new legislations, of a kind which has not been seen in Indian political practice before, the cases which involve them are also likely to be new[41], perhaps even unfamiliar to the judiciary, and the way that they are interpreted will likely vary over time. This will likely have an effect on the inter-institutional dynamic, which continues to be influenced by the nature, political alliances, political practice and ideologies of the government at the Central and State levels. Further, these dynamics are not likely to be static and will also be influenced by the issues which confront contemporary federalism practices, including, but not limited to, the relationship between the government in power at the federal and state levels.[42] The dynamic, catalytic nature of the Supreme Court of India, which engages in a form of empowered participatory jurisprudence by strategically catalyzing and antagonizing the coordinate branches, often prescribing complex remedies when they are being inattentive incompetent or intransigent[43], helps us to better understand the nature of the recent social rights jurisprudence which has emerged from the rubble of its previous, rhetorical judgments in the 1980s.

In the next sections, I define two kinds of inter-institutional dynamics which are seen between the different coordinate branches when it comes to the judicial approach to legislated social rights and then provide examples of some cases where these dynamics can be seen.

41 I base this understanding on Fowkes' account of the phenomenon of the 'newness' of socioeconomic rights in the Constitution of South Africa, 1996: "*Law that is new in this sense is law that is not accompanied by settled understandings, familiar expectations and institutional frameworks with established procedures and officials who are accustomed to them*." See *James Fowkes*, Building The Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa, Cambridge 2016, p. 131.

42 For example, the gap between different states' capacities to implement social welfare delivery. See *Yamini Aiyar and Avani Kapur*, The centralization vs decentralization tug of war and the emerging narrative of fiscal federalism for social policy in India, Regional & Federal Studies 29(2) (2019), p. 187.

43 I borrow this typology from *Kent Roach and Geoff Budlender*, Mandatory Relief And Supervisory Jurisdiction: When Is It Appropriate, Just And Equitable?. South African Law Journal 122 (2005), p. 325-351. See also, for a practical perspective based on decades of litigation, *Steven Budlender, Gilbert Marcus and Nick Ferreira*, Public interest litigation and social change in South Africa: Strategies, tactics and lessons, online 2014, https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf (last accessed on 10 September 2020).

D. Inter-institutional discursive antagonism: The Right to Rural Livelihood Security and the MGNREGA

I. Characteristics of discursive antagonism

Inter-institutional dynamic between the judiciary and the (usually) fused Union legislature and executive in the area of legislation like the MGNREGA, 2005, meant to secure the right to livelihood is best described as *discursive antagonism*. Unlike the other social welfare legislation examined in this article, the genesis of the MGNREGA had little to do with decisions of the SCI, but in the period following its enactment, the Court entertained public interest litigation (PIL)[44], the thrust of which was governance issues which arose while implementing the legislation.

I characterize the inter-institutional dynamic as discursively antagonistic because the Court in the cases examined is reliant upon an external actor, usually, the petitioner in the PIL, to provide evidence of mis-governance or malfeasance in administering the MGNREGA on the part of the Central Government or a State Government. The Court, in partnership with the petitioner, then requires action from either the Central Government or a State Government (who are also looking for evidence to evade responsibility and blame each other for the situation) to remedy the situation presented. The Central and State Governments display remarkable amounts of coordination between one another in order to appear responsive to orders from the Court. This results in an iterative cycle of antagonism from the Court, charged with the rhetoric of outrage[45], which usually invites critical attention from national media[46] in response to which there is a period of flurried activity to alter existing practices of governance in the MGNREGA schemes. It is usually the case that the dispute is not conclusively disposed of but continues to remain on the Court's roster (the exception being *Swaraj Abhiyan (VI)*), awaiting further orders. In both of the cases I discuss, the Court takes some effort to justify intervention on account of leakages and government intransigence in administering the essential provisions of the Act (in CEFS I and II); budgetary allocations and delays in wage payments (in Swaraj Abhiyan III and VI). The Court is clearly alive to its institutional position and does not want to overextend its institutional capital in matters which may not be popular, or which may not enjoy broad public support (corruption is a notable exception) or is in the domain of the coordinate branches (like bud-

44 Centre for Environment & Food Security v. Union of India, (2011) 5 SCC 676; Swaraj Abhiyan (VI) v. Union of India Writ Petition (Civil) No. 857 of 2015.

45 See for example Centre for Environment & Food Security v. Union of India, (2011) 5 SCC 676: "*The findings of CEFS survey are shocking, scandalous and outrageous…Our survey findings have revealed that there is participatory loot, plunder and pillage in Orissa's rural job scheme*..."

46 See Press Trust of India, Orissa NREGA scam: Supreme Court pulls up Centre, NDTV, 14 March 2011, https://www.ndtv.com/india-news/orissa-nrega-scam-supreme-court-pulls-up-centre-449974 (last accessed on 10 September 2020); Press Trust of India, MGNREGA compensation delayed by Centre or states in around 50% cases: study, Livemint, 4 August 2017, https://www.livemint.com/Politics/wVH3yGzVq94juZiogGDEtL/MGNREGA-compensation-delayed-by-Centre-or-states-in-around-5.html (last accessed on 10 September 2020).

get allocations). This helps explain its antagonistic actions in CEFS I and II, which concerned corruption in the administration of MGNREGA in the state of Orissa and a lack of activity on the part of other states to set up implementation mechanisms under the Act. Activists point to the importance of the Swaraj Abhiyan cases in facilitating attention to the questions of delayed wage payments to workers[47]. However, they were dissatisfied about the Court taking the Government's arguments about the labour budget and disbursal of funds[48] at face value, without a proper look at the underlying issue of states demanding funds over the labour budget and being denied it, thus making it difficult to generate muster rolls or provide employment.

The cases I use in the next sections to illustrate this inter-institutional dynamic are ones where macro-governance issues (which have an impact on the underlying right) find redress in the SCI. This may be on account of the failure of political accountability to take hold in India, something I discuss in Section IV. While the two cases represent significant differences[49], the Court is able to allude rhetorically to the Directive Principles while making such interventions which may be seen in some quarters as judicial overreach. The interventions in this case comprise a clear articulation of the legal obligations involved, a clear identification of the actors involved in the performance of these obligations (dispersed over different levels of government), as well as directions which facilitate productive interaction, problem-solving, and plan formulation between these levels of government in order to make the legal obligations a reality for the holders of the rights. While the discursively antagonistic inter-institutional dynamic results in outcomes that are far from perfect, it continues to have important effects on the legal and political spheres.[50]

II. Effects of discursive antagonism in the legal and political spheres

In the legal field, *discursive antagonism* permits reimagining new conceptions for the role of rights, the constitution and courts. Legislations which are imagined at a scale like that of the MGNREGA often do not provide legal mechanisms (other than grievance redress, which is capable of engaging with micro-violations) for citizen intervention in case of misgovernance or executive malfeasance. The SCI is able to fill this vacuum by entertaining PILs which deal with such issues, and often employ DPSPs as a rhetoric device to build

47 *Nikhil Dey*, Monumental failures in implementing MGNREGA, The Telegraph, 30 January 2019, https://www.telegraphindia.com/opinion/monumental-failures-in-implementing-mgnrega-by-narendra-modi-s-bjp-led-government/cid/1683121 (last accessed on 10 September 2020).

48 The Wire, Activists Unhappy With SC Judgment on Centre 'Curbing' MGNREGA Budget, 21 May 2018, https://thewire.in/labour/activists-unhappy-with-sc-judgment-on-centre-curbing-mgnrega-budget (last accessed on 10 September 2020).

49 In CEFS, the Court is concerned with mis-governance and leakages, the concern in Swaraj Abhiyan is with the causes for the delays in wage payments.

50 I draw this framework from *Daniel Brinks and Sandra Botero*, A Matter of Politics: The Impact of Courts in Social and Economic Rights Cases, in: Malcolm Langford and Katharine G. Young (eds.), Oxford Handbook of Economic and Social Rights (forthcoming).

greater legitimacy for interventions[51] like examining Centre-State budgetary and coordination practices, and then providing a fairly detailed set of interventions like formulating a plan for the timely release of delayed wage payments which the parties have to report back to the Court with. Such rhetorical invocations are necessitated due to the specific feature of the legislative design that opts for ineffectual internal grievance redress mechanisms and attempts to precludes judicial intervention. This can be sidestepped by using judicial processes like the PIL where there is usually a burden to show that there is a matter involving the *public interest* is at stake.

These cases also have a discursive effect of transforming matters of policy into rights matters, as can be seen in the reasoning of the SCI in ordering the release of wage payments in Swaraj Abhiyan[52]. As a result of the ostensibly coercive nature of the orders in the two cases, there are also organizational effects in requiring coordination between the Central and State governments in producing information in the form of affidavits before the court to record compliance or a lack thereof.

In the political field, *discursively antagonistic inter-institutional dynamics* present an instance where the Central and State governments are forced to reconsider their fiscal and coordination obligations under the MGNREGA legislation in light of judicial decisions, while also being responsive to their electoral popularity. Records from the Ministry of Rural Development indicate a flurry of executive activity in response to the judgments in Swaraj Abhiyan (III) and Swaraj Abhiyan (VI), as well as meetings and coordination mechanisms put into place in order to implement parts of the judgments relating to the delayed payment of wages[53].

51 See Swaraj Abhiyan (I), para 13: "Public interest litigation is necessary in certain circumstances particularly in a welfare State such as ours."; "Public interest litigation presents the Court with an issue based problem concerning society and solutions need to be found to that problem within the legal framework."

52 Swaraj Abhiyan: "The law requires and indeed mandates payment of wages not later than a fortnight after the date on which the work was done by the worker or labourer. Any reason for the delay in receiving wages is not at

all the concern of the worker."

53 Letter dated 16 May 2016 (providing principal secretaries a copy of the Swaraj Abhiyan judgment); Letter dated 30 May 2016 (titled '*Payment of Compensation for delayed payment of wages to the workers in compliance with the Judgement passed by the Hon'ble Supreme Court of India in the Writ Petition(C) No.857 of 2015(Swaraj Abhiyan-(III) vs Union of India & Ors*.') sent to all states' principal secretaries in charge of MGNREGA); Letters dated 13th May 2016 and 7 June 2016 (sent to principal secretaries of states informing them of video conferring about implementation of delayed wage payment section of the judgment) (in respect of Swaraj Abhiyan III); Letter dated 7 June 2018 to principal secretaries (or equivalent) in charge of MGNREGA (titled '*Meeting to devise action plan on the directions of Hon'ble Supreme Court in its judgement dated 18th May 2018*). The Ministry of Rural Development also organized a 'Workshop to Strategize Timely Payments & Compensation for Delay' on 27 June 2018 in order to make officials better acquainted with methods on how to implement the directions of the Court in Swaraj Abhiyan VI, all available on https://nrega.nic.in/netnrega/circular_new.aspx. (last accessed on 10 September 2020).

III. Examples of Discursive Antagonistic Inter-Institutional Dynamic Framework

The cases discussed here were filed as public interest litigations by a non-governmental organization, the Centre for Environment and Food Security (CEFS) and a political party (Swaraj Abhiyan). CEFS had conducted a number of surveys[54] in the state of Orissa (which subsequently formed part of the judgment) which showed gross misutilization of funds and extensive leakages, helped in part by Central disbursement of funds without a framework to administer it. CEFS sought directions for the formation of appropriate schemes and proper utilization of funds, as well as a direction that the social audits which were mandated were actually conducted.[55] While CEFS I did not attract much media coverage, the 2011 order was covered quite extensively.[56] The Swaraj Abhiyan case was part of a series of petitions filed by the non-governmental organization, which is often described as a political party, in order to force judicial intervention into relief for drought-stricken areas of India within the framework of existing legislation.[57] The original Swaraj Abhiyan petition in respect of the MGNREGA had sought for the timely payment for employment of 150 days[58] under the Act to the drought-affected people.[59] There had been extensive negative press coverage of the Swaraj Abhiyan case; activists and the government were trading allegations[60] and refutations[61] on the timely release of Central funds to drought-hit states.

54 See *Parshuram Rai*, Performance Audit of Food Security Schemes in Orissa and UP, Centre for Environment and Food Security, New Delhi 2011, http://www.indiaenvironmentportal.org.in/files/performance%20audit%20of%20food%20security.pdf (last accessed on 10 September 2020); *Parshuram Rai*, Dalits of Bundelkhand: Living with Hunger and Dying of NREGA Mafia, Centre for Environment and Food Security, 2010, http://www.indiaenvironmentportal.org.in/files/dalits%20of%20bundelkhand.pdf (last accessed on 10 September 2020).

55 CEFS I, note 27.

56 ET Bureau, Supreme Court to direct centre on NREGA probe, Economic Times, 14 December 2010, https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-to-direct-centre-on-nrega-probe/articleshow/7096308.cms?from=mdr (last accessed on 10 September 2020).

57 *Ajith. S*, SC issues notice to Central Govt and 11 states on Swaraj Abhiyan's PIL seeking relief & compensation to drought affected citizens, LiveLaw, 17 December 2015, https://www.livelaw.in/sc-issues-notice-to-central-govt-and-11-states-on-swaraj-abhiyans-pil-seeking-relief-compensation-to-drought-affected-citizens/ (last accessed on 10 September 2020).

58 This is over and above the 100 days of employment guaranteed under the Act.

59 Written Submissions filed on behalf of Swaraj Abhiyan in W.P. 857 of 2015 (on file with author), p.14.

60 Press Trust of India, MGNREGA a huge public interest project, Centre tells SC, The Economic Times, 14 March 2018, https://economictimes.indiatimes.com/news/politics-and-nation/mgnrega-a-huge-public-interest-project-centre-tells-sc/articleshow/63305467.cms?from=mdr (last accessed on 10 September 2020).

61 Press Trust of India, Govt tells SC no delay in releasing MGNREGA funds for drought-hit farmers, Business Standard, 10 December 2017, https://www.business-standard.com/article/economy-policy/govt-tells-sc-no-delay-in-releasing-mgnrega-funds-for-drought-hit-farmers-117121000070_1.html (last accessed on 10 September 2020).

The holdings of the Court in the Swaraj Abhiyan[62] and CEFS cases, can be classified into five headings: 1. PIL jurisdiction establishment, 2. substantive directions, 3. governance directions, 4. separation of powers engagement, 5. coordinative federalism engagement. I discuss each in turn.

1. PIL jurisdiction establishment

The Court in CEFS I states that the MGNREGA converted the right to livelihood, which is part of the unenforceable DPSP[63], into a legal right.[64] The Court noted that in light of the evidence of gross levels of leakages in the State of Orissa, it would direct the formation of schemes for the proper utilization of funds but does not engage with whether there is any element of public interest raised in the case. Although it may well be argued that the public interest is affected by misutilization of funds, the Court may have done well to establish this more explicitly, which could have led to a clearer delineation of the kinds of PIL cases where the Court can legitimately intervene. Such an approach is different from the Court's approach in Swaraj Abhiyan, where it treats the existence of drought-like conditions as necessitating its intervention on account of "bureaucratic inactivity and apathy", "executive excesses", and the "ostrich-like reaction of the executive"[65]. However, while Swaraj Abhiyan I was the omnibus petition filed for intervention in the drought-hit states, the Swaraj Abhiyan VI case dealing with the MGNREGA implicates all states without a clear account of the reason why.

2. Substantive Directions

Three issues in Swaraj Abhiyan were extensively argued before the Court: a) the failure to disburse funds by the Central Government in cases where states or Union Territories (UT) exceeded the 'approved labour budget' formulated by approximating the wage demands or projections made by the state or UT and their respective performance, b) the cap on funds which occurred as a result of a), and c) the delays in payment of wages and unemployment allowances to beneficiaries. The Court held the approved labour budget was a valid manner of disbursing funds to the states which were based on projections and states' past perfor-

62 Swaraj Abhiyan (VI) v. Union of India (18 May 2018).

63 Article 39 of the Constitution of India: "The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood".

64 The Supreme Court here explains that a combined reading of the judgments of the Supreme Court which had progressively expanded the right to life to include a number of unenumerated right, as well as the legislative formulation to a rights-based rural livelihood guarantee indicated that the MGNREGA had in fact enshrined a limited right to livelihood which could be claimed under certain conditions.

65 Swaraj Abhiyan I, para. 15.

mance. However, it also stated that the delayed release of wages was a violation of section 3 of the MGNREGA. In the event of the occurrence of such a violation, it was the combined responsibility of the state and Central government concerned to ensure that it was be remedied through unemployment allowances.

3. Governance Directions

The Court in CEFS I (2010) ordered compliance reports from the Central Government and the State of Orissa in respect of fund release and utilization, social audits, and actual employment provided with the funds disbursed by the Centre to the state. By the time it heard CEFS II (2011), it was convinced that it would require a CBI probe in order to get a measure of accountability. In Swaraj Abhiyan, the Court held that the delays in payment of wages for work already done was a violation of the Act, and that the Central Government in consultation with the State Governments would need to prepare an "urgent time bound mandatory program to make the payment of wages and compensation to the workers."[66]

4. Separation of powers engagement

The Court in CEFS I and II is primarily concerned with the question of corruption in administering MGNREGA disbursals in the State of Orissa and the lack of Central Government oversight mechanisms. It has no hesitation in ordering a CBI probe into the financial irregularities it had discovered in CEFS II, upon finding a lack of accountability for the leakages. In Swaraj Abhiyan, the Court is alive to its institutional position and does not question the wisdom of the Central Government practice in using the 'approved labour budget' formula (which is based on the states' projections and past performance in fund utilization) to allocate its resources. This move has been criticized by activists, who felt that the Court could have pushed for greater levels of accountability with greater input from states when taking the budgetary allocation into account.[67] Since cases involving socioeconomic rights implicate decisions regarding the allocation of government resources which fulfil these guarantees, these courts are often confronted with the decision of whether these are best left to the branches of government which have been elected by the people. In such cases, courts are often seen to be guided by its lack of democratic legitimacy, the polycentricity of social welfare problems, and its lack of expertise. These factors clearly play a very important role in this case, but often remain unacknowledged in the reasoning of the Court, while also constraining the kinds of outcomes which petitioners can hope to achieve with cases brought on the basis of legislated social rights.

66 Swaraj Abhiyan VI, note 62, para 45.

67 The Wire, Activists Unhappy With SC Judgment on Centre 'Curbing' MGNREGA Budget, 21 May 2018, https://thewire.in/labour/activists-unhappy-with-sc-judgment-on-centre-curbing-mgnrega-budget/ (last accessed on 10 September 2020).

5. Coordinative Federalism Engagement

Coordinative federalism, for the purpose of my argument, is the contingent organization and renegotiation of the relationship between the federal and state governments - especially when it comes to determining their respective rights and obligations - in the field of legislated social rights. The Court deals with coordinative federalism at two levels, primarily in the Swaraj Abhiyan case: first, it states that the manner of determining the labour budget for each state through the inputs of the state and its past performance was valid, and in the event of any reduction in funds available to a state, it would be the state that had the standing to raise the issue.[68] Second, the Court is concerned with coordination mechanisms between the Central and State Governments, the lack of which it states is the reason for the delay in payment of wages under the Act. In response, the Court orders that the Ministry of Rural Development, in consultation with the State Governments and Union Territory Administrations, has to prepare an urgent time bound mandatory program to make the payment of wages and compensation to the workers.[69] Under the MGNREGA, while the Central government disburses funds for the works to be undertaken, in the event of a failure to pay, it is the state government which has to disburse compensation for non-unemployment. This indicates an instance where an issue of inter-governmental horizontal coordination and accountability has fiscal implications, and the Court intervenes to play a role which is akin to that of an umpire who is able to get various government departments to coordinate with one another, instead of imposing top-down orders which often can be hard to implement. As mentioned earlier, courts are well aware of their institutional position and the attendant issues of information, expertise, and democratic legitimacy that come with it. Therefore, this kind of dialogic remedy, where the Court antagonistically engages various levels of government to coordinate with one another in response to what can be largely seen as failures of governance and weak state capacity is usually desirable.

E. Inter-institutional Discursive Catalysis: The Right to Food Security and the National Food Security Act

I. Characteristics of discursive catalysis

Inter-institutional dynamic between the judiciary and the (usually) fused Union legislature and executive in the area of legislation like the NFS Act 2013, which is meant to "secure food and nutritional security by ensuring access to adequate quantity of quality food at affordable prices"[70], is best described as being *discursively catalytic*. It is also important to see the inter-institutional dynamic in this case being made up of two distinct phases. The first is when a well-organised petitioner with a high level of grassroots organisational ca-

68 Swaraj Abhiyan VI, note 62, para 24.

69 Swaraj Abhiyan VI, note 62, para 45.

70 See Statement of Objects and Reasons, NFS Act, 2013.

pacity is able to approach the Court for directions in response to an ongoing socioeconomic crisis, even in the absence of a rights-based legislative framework. The second phase occurs when there is a legal framework in place which is legislatively devised and coalesces around directives and benchmarks from judicial decisions. However, there still exists a need for catalytic engagement in order to ensure that the necessary institutional infrastructure has been set up in order to operationalize the legislation. This next phase of catalytic engagement occurs through cases like Swaraj Abhiyan. While the Right to Food litigation is an example of the catalytic role in the first phase, the Swaraj Abhiyan case which I discuss as well is an example of the latter stage.

Discursively catalytic inter-institutional dynamics which pivot around legislation of this kind sought to crystallize and go beyond the existing entitlements made into rights by the Right to Food litigation.[71] This process was led by the Court in partnership with strategic litigants like the People's Union of Civil (the lead petitioner who was helping organize a set of social movements including the MKSS under the Right to Food banner). There are extensive accounts[72] of the manner in which the Court had set up an extensive implementation framework using a novel commissionerate as well as their separation of powers implications[73]. Central and State Governments are usually catalyzed into action as a result of litigation, perhaps on account of the (erstwhile) electoral salience of issues like hunger and malnutrition deaths. Following the enactment of the NFS Act 2013, the Court, along with the petitioners, who had a strong grassroots support structure, collaborated in order to catalyze both Central and State Governments into action to mobilize the setting up of institutional structures. The dynamic is *not antagonistic* but rather seeks to catalyse the implementation of existing provisions. It is discursive because of the nature of litigation involving SER, which requires monitoring and follow-up. The discursively catalytic dynamic helped 'increase[...] the visibility of civil society groups and their leverage over the state', resulting in a stronger and more organized civil society presence in these sectors'[74] which eventually led to their being able to win political victories through other routes, including the enactment of the food security legislation. This kind of dynamic also shows how courts can, under some circumstances, be receptive to a popular outcry about crises of maladmin-

71 *Chiriyankandath, Maiorano, Manor and Tillin*, note 11, p. 41.

72 *Lauren Birchfield and Jessica Corsi*, Between Starvation and Globalization: Realizing the Right to Food in India, Mich. J. Int'l L. 31 (2010), p. 691.

73 *Sandra Fredman*, Comparative Human Rights Law, Oxford 2018, p. 97-100; *Steven Friedman and Diego Maiorano*, The limits of prescription: courts and social policy in India and South Africa, Commonwealth & Comparative Politics 55(3) (2017), p. 353.

74 *David Landau*, Courts and Support Structures: Beyond the Classic Narrative, in: Erin F. Delaney and Rosalind Dixon (eds.), Comparative Judicial Review, Cheltenham 2018, p. 226.

istration, corruption, or political stasis[75], especially if the underlying issue has broad national salience.

II. Effects of discursive catalysis in the legal and political spheres

The Right to Food litigation was undergirded by the articulation of a coherent set of demands from existing social movements like the MKSS, which helped facilitate their entry into the realms of policymaking in the National Advisory Council. This process, which culminates in the enactment of the NFS Act 2013, had the ideational capacity of reimagining the role of the Court in adopting these demands to convert what were discretionary benefits into legal rights through the process of *discursive catalysis*. The Swaraj Abhiyan cases, in its engagement with the legitimacy of judicial intervention through the use of DPSP and its extensive content-based and governance-based directions, signal the ideation of a role for the judiciary in umpiring *politico-legal accountability*. The cases also have an *organizational* impact, with the Court playing a catalytic role in the coordinating institutional arrangements at the Central and State levels, while also framing the question of state government intransigence in purely constitutional terms.

In the political field, the Swaraj Abhiyan cases show how the Centre and States are forced to respond to a judicialization of what earlier may have been a purely political matter. This is for two reasons. The first is that the governance reform of the public distribution system, which forms the backbone of public food security provisioning in India, had been highly contingent and responsive to the election cycle.[76] This meant that the reform or good functioning of these systems was discretionary, and it was this case which catalysed it into a rights base vocabulary. The second is that after the enactment of the NFS Act, 2013, different levels of government have to coordinate in order to ensure that the legal entitlements contained therein are capable of being realised, even if it sometimes takes judicial oversight. The tussle between Central and State governments and their failures of coordination in the Indian federal scheme is key here. For starters, centralization of welfare funding has always been contentious in Indian political practice[77], and while there has been some degree of devolution to states in the last few years[78], new challenges in intra-state equity in terms of financing and state capacity have emerged. One of the ways to address this is to

75 *Robert A. Kagan, Diana Kapiszewski and Gordon Silverstein*, New judicial roles in governance, in: Erin F. Delaney and Rosalind Dixon (eds.), Comparative Judicial Review, Cheltenham 2018, p. 144.

76 *Das*, note 22, p. 156.

77 *Yamini Aiyar*, The Opportunities and Challenges confronting India's welfare architecture, in: Centre for Policy Research, Policy Challenges 2019 – 2024: The Key Policy Questions for the New Government and Possible Pathways, https://www.cprindia.org/sites/default/files/Policy%20Challenges%202019-2024.pdf (last accessed on 10 September 2020).

78 *Chanchal Kumar Sharma and Wilfried Swenden*, Continuity and change in contemporary Indian federalism, India Review 16(1) (2017), p. 1.

ensure that states are able to plan, design and implement social policy programs as national policy frameworks while improving its technical and implementation capacity in deliberative spaces for Centre-State dialogues.[79] It may well be that cases like Swaraj Abhiyan provide such spaces, while also helping develop judicially manageable standards for adjudicating violations of social rights in legislation.

The upshot of seeing the inter-institutional dynamic as discursively catalytic is that it enables us to have a better sense of the judiciary's role conception, while also appreciating that there is a great degree of coordination which goes into the funding and delivery of welfare programs, even if it is rights-based or mapped onto existing infrastructure. The SCI helped *catalyze* legislative and social movement energy behind the NFS Act 2013, yet its engagement with it till date continues to display signs of catalysis. This is because in cases like Swaraj Abhiyan and others[80], the Court has sought to accelerate the process of setting up accountability mechanisms while also helping formulate standards for judicial intervention even in cases which are not as pressing as petitions for intervention in drought-affected states. It is also far from clear whether the orders about kinds of structures which were sought to be created in the NFS Act, 2013 or the Swaraj Abhiyan V case were in fact complied with, with fresh SCI[81] and High Court[82] petitions in 2019 triggering precisely the same questions, while also raising questions of the manner of identifying beneficiaries.

III. Examples of Discursively Catalytic Inter-Institutional Dynamic Framework: Food Security and the NFS Act

The Swaraj Abhiyan case arose out of the same petition which formed the cause of action in the MGNREGA case[83], which came in the backdrop of a declaration of drought in sever-

79 *Aiyar*, note 77.

80 The case which I have not discussed in detail here is *Vaishnorani Mahila Bachat Gat v. State of Maharashtra* (Civil Appeal No._2336 of 2019 (Arising From SLP(C) No.10103 of 2016)) (19 February 2019), where the SC annulled contracts awarded to private contracts for the provision of freshly cooked meals to Anganwadi Centres. which was in violation of its RTF litigation order to give preference in awarding such contracts to local, women-led self-help groups. See *Arefa Johari*, Women's groups win as Supreme Court cancels anganwadi contracts worth Rs 6,300 crore in Maharashtra, Scroll, 11 March 2019, available at https://scroll.in/article/916022/womens-groups-win-as-supreme-court-cancels-anganwadi-contracts-worth-rs-6300-crore-in-maharashtra (last accessed on 10 September 2020).

81 *Prabhati Nayak Mishra*, Right To Food: SC Issues Notice To All States On Establishment Of Grievance Redressal Mechanism To Ensure Food To All, LiveLaw, 9 December 2019, https://www.livelaw.in/news-updates/right-to-food-sc-sends-notice-to-all-states-150626 (last accessed on 10 September 2020).

82 *Nitish Kashyap*, Bombay HC Directs Govt. To Set Up Food Commission Under National Food Security Act,

LiveLaw, 19 September 2019, https://www.livelaw.in/news-updates/ood-commission-under-national-food-security-act--148226 (last accessed on 10 September 2020).

83 Swaraj Abhiyan (I) v. Union of India.

al Indian states.[84] While seeking to spur the government into more efficacious action in response, the original petition prayed for the issuance of "any writ or direction, to immediately make available food-grains as specified under National Food Security Act, 2013 to all the rural people in drought-affected areas irrespective of any classification".[85] In addition to the fulfilment of existing obligations under the NFSA, the petition also prayed for interim directions to the Central Government to provide an additional quota of 2 kilograms of lentils per month at Rs. 30 per kilogram and one litre of edible oil per month at Rs. 25 per litre through the Public Distribution System per Ration Card or equivalent identity document in drought-affected districts.[86] The petitioners also sought directions that children in affected states be provided one egg or 200 gm of milk per day (6 days a week) under the Mid-Day Meal Scheme, which they sought to be made operational even during school recess periods.[87] It is also important to note that these highly detailed prayers which Swaraj Abhiyan sought in this case was clearly motivated by the emergent situations of drought existing in a number of Indian states and were seeking suitable directions from the Court in response. Both of these prayers, while being specific, are marginally above and beyond the statutory requirements according to the National Food Security Act. In response, the Court, likely quite alive to the separation of powers concerns which would be triggered if it were to grant such an order, chose a less confrontational route. It appears to be uncomfortable altering substantive requirements under the Act but chose to relax the eligibility criteria for obtaining rations and food-grain.

While a discussion of the sociology of PIL litigants is beyond the scope of this paper, there is good reason to believe that Swaraj Abhiyan, which was founded as a non-govern-

84 See *Written Submissions filed on behalf of Swaraj Abhiyan in W.P. 857 of 2015* (on filed with author), citing the declaration of drought in Uttar Pradesh, Madhya Pradesh, Karnataka, Andhra Pradesh, Telangana, Maharashtra, Odisha, Jharkhand and Chhattisgarh. The written submissions also urge judicial recognition of drought like circumstances in "the states of Bihar, Gujarat and Haryana have not yet declared a drought despite recording rainfall deficit of 28%, 14% and 38% respectively" (para 4.2).

85 Ibid, at page p.14. This relief was requested from the Court on account of the targeted (as opposed to universal) nature of foodgrain provision in the NFSA through the Public Distribution System: "Section 3. **Right to receive foodgrains at subsidized prices by persons belonging to eligible households under Targeted Public Distribution System.** *Every person belonging to priority households, identified under sub-section (1) of section 10, shall be entitled to receive five kilograms of foodgrains per person per month at subsidised prices specified in Schedule I from the State Government under the Targeted Public Distribution System…".*

86 See *Written Submissions for Interim Relief filed on behalf of Swaraj Abhiyan in W.P. 857 of 2015* (on filed with author).

87 The NFSA provides for a minimum nutritional value for meals made available under the Mid Day Meal Scheme to children between the ages of 6 and 14 in all schools run by local bodies, Government and Government aided schools except on school holidays. See section 5(1)(b) and Schedule II (Nutritional Standards), NFS Act, 2013.

ment organization[88] (that went on to form a political outfit[89]) following the expulsion of Yogendra Yadav and Prashant Bhushan from the Aam Aadmi Party in 2015[90], was seeking to insert itself prominently into the salient public discourse of farmers' rights. PILs provide such a path, while also implicating and co-opting other institutions like the SCI, which similarly seeks broader public legitimacy by attaching itself to popular causes like government inaction in response to droughts. The nature and extent of orders passed by the SCI in *Swaraj Abhiyan V* (2017), which I discuss in the next section, as already mentioned, altered the eligibility criteria and methods by which beneficiaries under the Act could claim their due, something which had not been sought in the original petition. This may confirm recent hypotheses about the unwieldy, legally unbound, and whimsical nature of the SCI's PIL jurisdiction.[91] The Swaraj Abhiyan PIL filed in December 2015 eventually led to 6 judgments from the SCI across nearly two years, out of which 4 pertained to the NFSA. In order to comprehend their full import, it is prudent to classify the holdings in these judgments into five headings: 1. PIL jurisdiction establishment, 2. substantive directions, 3. governance directions, 4. separation of powers engagement, 5. coordinative federalism engagement. I discuss each in turn.

1. PIL jurisdiction establishment

There has been academic[92] and judicial[93] disquiet about the extensive nature of judicial orders which have the capacity to reorient the balance of powers between the three branches

88 Among its aims, Swaraj Abhiyan lays claim to the goal of launching a "*nation-wide movement will be built up for the plight of farms and farmers, to prevent the loot of 'Jal', 'Jangal' and 'Jameen', where tribals, non-tribal land lords, landless tenant farmers, sharecroppers, unorganized agricultural labors, fishermen, milk producers can be included*." See Swaraj Abhiyan, What is Swaraj Abhiyan?, https://www.swarajabhiyan.org/vision-english/ (last accessed on 13 September 2020).

89 NDTV, Prashant Bhushan, Yogendra Yadav Launch Political Party 'Swaraj India', 2 October 2016, https://www.ndtv.com/india-news/prashant-bhushan-yogendra-yadav-launch-political-party-swaraj-india-1469242 (last accessed on 13 September 2020).

90 *Sonal Mehrotra*, Yogendra Yadav, Prashant Bhushan Expelled From Aam Aadmi Party, NDTV, 21 April 2015, https://www.ndtv.com/india-news/yogendra-yadav-prashant-bhushan-expelled-from-aam-aadmi-party-sources-756694 (last accessed on 13 September 2020).

91 *Anuj Bhuwania*, Courting the People: Public Interest Litigation in Post-Emergency India, New Delhi 2016; *Anuj Bhuwania*, Courting the people: The rise of Public Interest Litigation in post-emergency India, Comparative Studies of South Asia, Africa and the Middle East 34(2) (2014), p. 314.

92 See, for example, *Nick Robinson*, Expanding Judiciaries: India and the Rise of the Good Governance Court, Wash. U. Global Stud. L. Rev. 8(1) (2009), p. 49-52; see generally, *Anuj Bhuwania*, Public Interest Litigation as a Slum Demolition Machine, Projections: MIT Journal of Planning 12 (2016), p. 67; *Anuj Bhuwania*, The case that felled a city: Examining the politics of Public Interest Litigation through one case, SAMAJ: South Asia Multidisciplinary Academic Journal 17 (2018).

93 See for example, the observations of Justice Katju in Divisional Manager, Aravali Golf Club v. Chander Hass (2008) 1 SCC 683 (para. 24): "*Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. . . . [I]t is*

of government, triggering concerns about the separation of powers, judicial accountability, and judicial power grabs. The Court engages with some of these concerns in *Swaraj Abhiyan I*, first by establishing the *humanitarian*, as opposed to the *political,* nature of the petition. This is a semantic and largely meaningless binary – likely influenced by a particular understanding of these terms – and likely motivated by the Court's desire to preserve institutional capital while seeming to remain above the fray of ordinary politics. It does so by taking comfort in the fact that the petitioner was not a political party (at the time) and that the issue of government inaction (and its effect on people and livestock) in response to conditions of drought was a universal matter of concern.[94]

Second, it emphasizes the necessity of PIL in "a welfare state such as ours", which is bound to the principle of *parens patriae* to protect of its citizens as "parent particularly when citizens are not in a position to protect themselves"(sic).[95] It does so by a conjoined reading of the preambular text, as well as the DPSPs,[96] to establish its duty to act in instances such as this. The Court's use of the Directive Principles of State Policy to justify PIL based intervention in some cases rhetoric reflects the dynamics of these choices. The provisions' avoidance of identifying institutional responsibility for their fulfilment permits their use across a range of temporal setting by both political and institutional actors like the government and the judiciary.

Third, the Court states that the contours of public interest and its intervention in Swaraj Abhiyan are established by "bureaucratic inactivity and apathy", "executive excesses", and the "ostrich-like reaction of the executive".[97]

2. Substantive Directions

The Court in Swaraj Abhiyan V granted relief to the petitioners based on existing mechanisms in the NFSA but modified some of the conditions under which benefits could be claimed under the Act. The directions can be classified as relating to a conditional universalization of existing entitlements, the modification of the temporal availability of existing entitlements, and modification of eligibility criteria for obtaining existing entitlements.

First, the Court modified the targeted nature of the entitlements, stating that the monthly entitlement of food grains in terms of the NFS Act 2013 be provided regardless of

not the business of this Court to pronounce policy. [The Court] must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic".

94 Swaraj Abhiyan v. Union Of India And Ors on 11 May, 2016, at para 5.

95 Swaraj Abhiyan I, at para. 13.

96 Id.: "*Preamble to the Constitution, read with directive principles, under Articles 38, 39 and 39- A enjoins the State to take all protective measures to which a social welfare State is committed*."

97 Swaraj Abhiyan I, at para. 15. The reference to the flightless bird is likely due to the states of Haryana, Bihar and Gujarat denying the existence of drought-like conditions within their territories.

whether they fall in the category of priority household or not.[98] Second, the Court stated that these foodgrains should not be denied on account of not having a Ration Card, which shows engagement with the question of beneficiary identification, which is a significant faultline in contemporary discourses on social welfare delivery.[99] The Court also ordered that Mid-Day meals be served to children in public schools even during holidays.

3. Governance Directions

Directions regarding governance occur in the Swaraj Abhiyan II and V decisions and aim to catalyze Central and State governmental action on the implementation of the NFS Act. The directions in Swaraj Abhiyan II were handed down on 13th May 2016 and required the constituting of State Food Commissions[100](SFC) and District Grievance Redress Committees[101] (DGRC) in the states affected by drought. In Swaraj Abhiyan V, which was handed down on 21 July 2017, the Court, observing state government inaction by the concerned states, expanded the scope of its orders to include *all* states where SFC and DGRC had not been constituted, while also requiring the setting up of vigilance committees and the conduct of social audits, all of which are requirements under the NFS Act 2013.[102]

4. Separation of powers engagement

The Court in Swaraj Abhiyan II is mindful of its institutional position and attempts to tread a delicate line between judicial restraint and overreach. It does so by rebuffing the petitioner's prayer for directions to grant entitlements over and above what is contained in the NFS Act, 2013, even in the presence of emergency circumstances like the drought. The manner in which it goes about is very instructive in better understanding the Court's role conception and self-understanding in terms of positive obligations and legislated social rights. The Court states that it could not compel State Governments to provide anything which was not a statutory entitlement within the Act while grounding this reasoning on what appears to be a slippery slope justification[103]. It also states that in terms of "financial issues and prioriti-

98 See Swaraj Abhiyan II, at para 30.

99 See for instance, *Vishnu Padmanabhan*, Has Aadhaar improved welfare delivery?, LiveMint, 21 April 2019, https://www.livemint.com/news/india/has-aadhaar-improved-welfare-delivery-15558 61461316.html (last accessed on 13 September 2020).

100 State Food Commissions are meant to have a role in overseeing implementation, as well as advising State Governments, and handling complaints of entitlement denials under the NFS Act. See section 16, NFS Act, 2013.

101 See section 14 and 15, NFS Act, 2013. See Swaraj Abhiyan V, at para 42.

102 Swaraj Abhiyan V, at para 42.

103 See Swaraj Abhiyan V, at para 13: "Today, Swaraj Abhiyan prays for the supply of dal/lentil and edible oils; tomorrow some other NGO might pray for the supply of some other items. This might become an endless exercise and would require us to go beyond what Parliament has provided. While this Court or any other constitutional court can certainly intervene, to a limited extent, in

zation of finances, it "should defer to the priorities determined by the State, unless there is a statutory obligation that needs to be fulfilled"[104].

The above approach of the Court confirms that the conditional approach[105] is alive and well, where the adequacy of an existing government measure is tested against an indeterminate constitutional standard which has not been adequately established. In the present case, it is not the substantive content of the right to food obligation which is being tested, but rather the barriers to access and universalization of entitlements in the face of emergency conditions.

5. Coordinative and Fiscal Federalism Engagement

The constitutional envisioning of responsibility in the field of social welfare is a cooperative one, since both states and the Central Government share legislative competence in this field.[106] However, most of the expenditure and regulatory infrastructure continues to be at the state level[107], even though the trajectory of Indian federalism, even in the last few years[108], has tended toward fiscal centralization.[109] Coordination between the Centre and States in the field of welfare delivery has always been contentious, with greater centralization having the capacity to dampen states' innovation and augmentation of existing protection.[110] While NFS Act 2013 was a legislation which was designed to map onto existing public food distribution networks and infrastructure, it had sought to create new institutional arrangements like the SFC which could "invent new ways of facilitating the participation of states in the formulation of national policies and motivating them for effective implementation".[111]

issues of governance it has also to show judicial restraint in some areas of governance, and this is one of them."

104 Swaraj Abhiyan V, at para 17.

105 *Madhav Khosla*, Making social rights conditional: Lessons from India, ICON 8(4) (2010), p. 739; *Farrah Ahmed and Tarunabh Khaitan*, Constitutional Avoidance in Social Rights Adjudication, Oxford Journal of Legal Studies 35(3) (2015), p. 607, 615-17.

106 See Concurrent List to the Constitution of India, Article 246 (2), Constitution of India.

107 *Rajeshwari Deshpande, K. K. Kailash and Louise Tillin*, States as laboratories: The politics of social welfare policies in India Journal, India Review 16(1) (2017), p. 85, 90.

108 *Indira Rajaraman*, Continuity and change in Indian fiscal federalism, India Review 16(1) (2017), p. 66.

109 *Avani Kapur*, Federalism and social policy, Seminar # 717: The Union and the States: a symposium on the changing federal dynamic in India (May 2019); see generally, *Yamini Aiyar and Louise Tillin*, The Problem, Seminar # 717: The Union and the States: a symposium on the changing federal dynamic in India (May 2019).

110 Aiyar and Tillin note that "*The provisions in the National Food Security Act (NFSA), for instance, were far less ambitious than practices followed in states like Chhattisgarh and Tamil*", *Aiyar and Tillin*, note 109.

111 *Balveer Arora*, India's Experience with Federalism: Lessons Learnt and Unlearnt, presented at an international seminar on 'Constitutionalism and Diversity in Nepal' in Kathmandu, Nepal (Au-

In the Swaraj Abhiyan II and V cases, the Court engages with this problem by framing the inadequacy of enforcement infrastructure for the NFS Act 2013 in terms of article 256[112] of the Constitution. While in Swaraj Abhiyan II, the Court directed a time-bound period within which to constitute SFC and DGRC in the drought-affected states[113], it goes a step further in Swaraj Abhiyan V to also order the creation of these structures in all states in India which had not done so, while also ordering the conduct of social audits and the setting up of vigilance committees. Unlike in the Swaraj Abhiyan case relating to the MGNREGA, the Court did not engage extensively with fiscal federalism but held that a lack of resources would not be a valid argument in the face of existing statutory duties.

F. Postscript: Approaching a Culture of Justification in Legislated Social Rights

Social rights in India have been stuck between an inchoate, uneven judicial approach, and a lack of legislative initiative. Courts have wavered between varying standards of review for different kinds of rights, confusion between individual and systemic relief, and a lack of predictability of outcomes for petitioners. Legislation of the kind relating to the right to livelihood and food security discussed here are new, both in form and content. They offer a rights-based framework for the realization of the kinds of goals set out in the DPSP, but also suffer from the near absence of grievance redress structures and courts being primarily engaged with issues with these legislations which often do not have a direct bearing on the content of the right involved[114]. However, the crucial question of affixing accountability in this framework has largely been left unattended. In a limited way, there is an attempt to affix micro-level legal accountability which takes the form of either mechanisms of grievance redress[115], or ways in which claimants can approach courts to enforce their claims. Indian social rights legislation usually embed these into their design but are plagued by a lack of

gust 2007), https://www.uni-bielefeld.de/midea/pdf/Balveer.pdf (last accessed on 13 September 2020).

112 Article 256. Obligation of States and the Union: "*The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose*" See Swaraj Abhiyan V.

113 Swaraj Abhiyan II, at para 30.

114 See, for example, judicial engagement with NFS Act 2013 cases involving appointment of officers in Anganwadi Centres (AWC) (State of West Bengal v. Kaberi Khastagir, on whether supervisors of AWCs were to be considered government employees), or the eligibility criteria for contractor appointments under the NFS Act 2013 (Dipitimayee Parida v. State Of Orissa on 20 October, 2008).

115 See for example, grievance redress mechanisms (or lack thereof) set up under the MGNREGA and the NFS Act 2013, sections 19 and 15 respectively.

implementation of grievance redress structures[116], barriers of access to justice[117] and a lack of awareness regarding the existence of such mechanisms.

In this article, I presented two modes of inter-institutional dynamics which are seen in the judicial interventions into two legislation which seek to erect a rights-based framework under which the social rights to rural livelihood and food security can operate. A mode of analysis which takes into account the inter-institutional dynamic has several distinct upshots. It includes its ability to go beyond the bounds of doctrinal legal analysis to examine the ways in which judicial pronouncements can structure, influence and direct actions from the coordinate branches of government, while also telling a story of how social movements and civil society can coalesce around.

The models of discursive catalysis and discursive antagonism for the legislation provide an insight into the ways in which legislated social rights are treated by the judiciary and the responses which it evokes from the government. By taking into account the Court's engagement with separation of powers and federalism concerns, a picture emerges of an institution that has come to embrace its interventionist impulses but is also mindful of spreading its institutional capital too thin, or directly taking on an elected Central government[118] in the socioeconomic realm. Can its call for accountability in legislated social rights, undergirded by the rhetoric of DPSP, help restore some of its legitimacy? Perhaps, but it is too early to tell whether the practice of SCI interventions which force a dialogic interaction between the coordinate branches and civil society will continue.

116 *Nick Robinson*, Closing the Implementation Gap: Grievance Redress and India's Social Welfare Programs, Columbia Journal of Transnational Law 53 (2015), p. 321; *Arun Sivaramakrishnan, Dolashree Mysoor, and Malini Bhatacharjeee*, RTE Grievance Redress in Karnataka, Economic and Political Weekly 49(3) (2014).

117 *Jayanth K. Krishnan, et. al.*, Grappling at the Grassroots: Access to Justice in India's Lower Tier, Harvard Human Rights Journal 27 (2014).

118 This may help explain its relative antagonism toward State, rather than Central governments, notwithstanding the greater devolution of implementing power to States in the recent past.