

## An Overview of the Constitutional Right to Food under the South African Constitution

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### Abstract

*This article focuses on the right of everyone, including children and detained persons to have access to food. The State is obliged in terms of the Constitution to take reasonable legislative steps and other measures, within its available resources to achieve the progressive realization of each of these rights in terms of section 27 of the Constitution of the Republic of South Africa of 1996. The discussion will be historical in approach, commencing with the legacy of apartheid on the right to food. It will also examine the country's obligations under international law. Lastly, the right to food as entrenched in the South African Constitution and the different ways in which it has been, and can in future be given concrete expression in South African law, through legislation and judicial decisions, will be elucidated. In the process, this article will briefly consider the extent to which the South African government's existing responses to the country's food security problems meet its constitutional duties in the light of current status of national food security.*

**Keywords:** *Right to food, Food insecurity, Poverty, Malnutrition, Impact and Effect*

### 1. Introduction

Food is a basic human need which everyone needs to survive (Streeten, 1981, Riche, 2002). Undoubtedly, hunger can lead to death (Tanumihardjo, et al 2007). People also need food to live healthy and active lives ( McGinnis et al. 2002). Everyone needs food to be able to grow, learn, and perform physical activities and work (Collins et al. 1992). Malnutrition is responsible for most "children's deaths because it affects a child's life, health, physical, mental well-being and development" (Dowlerand Caraher, 2003). Children who experience malnutrition in early childhood are usually unable to pay attention in school and may not progress in their studies and eventually drop out of school and become burden to their parents and the society (Leslie and Jamison, 1990). As a result of this, they may also find it difficult to secure employment when they are older because of lack of skills or wherewithal. Food is also needed for healthy and productive lives (Welch and Graham, 1999).

Many people in South Africa are deprived of the basic right of access to food (Bonti-Ankomah, 2001) due to many factors ranging from unemployment, lack of opportunity, non-availability of arable land to farm and produce food, impact of severe weather events and the global climate change (Ziervogel and Ericksen, 2010). It has been estimated that almost fourteen million people in South Africa are food insecure, meaning that they either do not have enough food, access to food or quality food (Maxwell, 1996). This figure has recently increased as a result of economic recession and high inflation rates, which has also caused the increase of food price (Cat, 2010).

### 2. The Right to Food in General: The National Context

The right to food is often called the most basic right (Drèze, 2004). The realization of all other rights depends on the right to food (Oshaug et al. 1994). One cannot live, learn, vote, speak, think or move around freely if one is hungry (George, 1977). At the same time, the right to food depends on the realization of many other rights (George, 1977). Access to food is controlled by access to land, water, economic life, education and political power (Maxwell, 1999). The right to food therefore becomes holistic and the implication is that if there is food deprivation, it will impact on other rights (Oshaug et al. 1994). According to Dobbert (1979:185) "to claim the right to food as a natural right, is inseparably connected with the right to life. As physical survival of man has at all times been dependent on food, one would assume that this right should

have been recognized as soon as man began to indulge in the luxury of philosophical thought and reflections on law." However, the right to food is subject to the qualifier of progressive realization within the State's available resources (Heyns and Brand, 1998).

Currently, South Africa has a number of flagship feeding or food support programmes including the Primary School Feeding Scheme and the Infant and Young Child Feeding Scheme (Heyns and Brand, 1998). In addition there are a number of other programmes aimed at creating an environment which will promote people's ability to provide their own food security (Kende, 2003). Such schemes include the Community Based Nutrition Project and the Broadening of Access to Agricultural Thrust (Liebenberg and Pillay, 2000). These programmes are administered by a number of different departments, including Agriculture, Health and Education. In addition, the Department of Public Works Community based public works schemes including an emphasis on food gardens to promote sustainable access to self-produced food (Frye and Sash, 2003).

Ironically, a large proportion of the South African population do not have enough or the right kind of food to eat (Clover, 2003), despite the fact that the country produces more than enough food to feed its people (Bailey, 2011). It has been reported that "more than 30 percent of the people living in South Africa suffer from hunger and malnutrition, a situation that is stratified along racial and class lines" (Brand, 2002). For example, "it is estimated that 38 percent of rural South Africans goes hungry at least once a month as opposed to 0 percent of their rural white counterparts" (Brand, 2002).

Liebenberg and Pillay (2000) have expressed the view that "in so far as sufficiency is concerned, it has been opined that certain notions must be taken into account. In this regard, food must be, culturally acceptable to a particular community, sufficient for nutritional needs in both quality, quantity and cleanliness (free from toxins)." Accessibility on the other hand entails that food must not only be available but also affordable (Mubangizi, 2006:137). This requires that the government must play an important role in the regulation of food prices. This is particularly pertinent in the South African context, for it is not the lack of food which is an issue but the lack of access to it (Mubangizi, 2006:137). It is submitted that although no constitutional challenge specifically addressing the right to sufficient food has come before the South African courts, in light of successful adjudication of enforcement of other socio-economic related cases, if anything to go by, the courts will not hesitate to require the State to meet its constitutional obligation in honoring the right to food.

It is an axiomatic fact that the right to food is one of the most important rights which needs to be taken into account to ensure that the people of South Africa live a better life (Agbakwa, 2000). Till date, it seems right to say that the South African Human Rights Commission has not yet received complaints for violation of this right (McClain-Nhlapo, 2003). This does not mean that people are having access to this right but it means that there is a need for awareness of this right.

While the commitment of the State to rolling back the frontiers of poverty is acknowledged, "the government's focus appears to be almost exclusively on the longer-term structural transformation of our society, at the expense of programmes and policies targeted to meet immediate needs" (Samara, 2003). Notwithstanding the successful achievement of greater fiscal stability and economic growth and development witnessed over the past years, the failure of the "trickle down effect" promised by the macroeconomic policies of Growth, Education and Reconstruction (GEAR) to alleviate the plight of the poor in South Africa is widely acknowledged by economists and social commentators but a lot of people have not benefitted from it (Mbuli, 2009).

### **3. The Legacy of Apartheid on Food Security**

South Africa's history provides an example of the close relationship between the right to food and other rights (Liebenberg and Goldblatt, 2007). During apartheid years, laws such as the Land Act 27 of 1913 and the Group Areas Act 36 of 1966 made it illegal for black South Africans to own and cultivate land in almost every part of the country (Skweyiya, 1989). These laws destroyed black South Africans access to agricultural background and many were unable to produce food for themselves and others as they did before, resulting in hunger and malnutrition (Wylie, 2001). Violations of the land rights of black South Africans led inexorably to violation of their rights to food (Scott and Macklem, 1992).

### **4. Migrant Labour System and its Impact on Subsistence Agriculture**

South Africa experienced high levels of poverty as a result of a complex interface of causes (Bhorat and Cassim 2004). Apartheid policies that deliberately reserved skills training and employment for a racial minority have created major

obstacles to accessing income productive assets for majority of black people (Cheru, 2001). The country has suffered at least three generations of deliberate racial under-developmental government policies (Liebenberg, 2001).

The encampment of the majority of people in overpopulated and unproductive reserves ensured that families in these reserves had no source of income and sustainability and had to become dependent on cash remittances from young men who were employed to work on the mines (Walker, 2005).

The migrant labour system "drove the South African industrial revolution, but destroyed the fabric of families and societies, and cut off people from the modes of production on which they had hitherto been dependent" (Sparks, 2003). Dispossessing people of ways of producing sustainable livelihoods ensured a constant supply of cheap labour to the mines but this seems to be proving unsustainable in view of the constant labour strikes in the mining sectors (Li, 2010).

According to Hogan, 2008 "whatever level of sustainability was inherent in this system of dependence on cash remittances from migrant workers was unable to survive the closure of many mines caused by the international recession of the 1970's." During Apartheid South African era, "the iniquitous act of taking people off the land and rendering them dependent on cash transfers from migrant workers lies in the heart of the current levels of social marginalization, poverty and food insecurity experienced by the vast majority of people in South Africa today, especially in the rural and semi-rural areas." (Mathekga, 2009).

## 5. International Law Perspective

It is trite that the meaning of the right to food is enshrined in many different international instruments (Mechlem, 2004). These instruments are important sources of obligations for South Africa about the right to food. Some of these international instruments are legally binding on South Africa because the South African government has agreed to be bound by them. Others are helpful in interpreting the right to food in the Constitution (Khoza, 2004).

Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESR, 1966), places a duty on States Parties to recognize the right of everyone to adequate food. The meaning of this right is interpreted in General Comment No 12 (1999) of the Committee on Economic, Social and Cultural Rights (CESCR). This document gives important information about the minimum duties under the right to adequate food, what would be possible violations of the right, and also outlines strategies and requirements for the implementation of the right to food. As pointed out earlier, South Africa has not yet ratified the ICESR but they have signed it. As such, they are compelled to pass legislation or adopt policies which realize this right.

Article 25 of the Universal Declaration of Human Rights, 1948 provides that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food. This really indicates that the right to food is also recognized internationally. This Declaration is not binding on South Africa; however it is an inspirational to the country hence the government should take all reasonable steps to implement it to the benefit of the citizens.

The Convention on the Rights of the Child, 1989 also provides for food rights. Article 26 stipulates that "every child has the right to benefit from social security." This convention is aimed at protecting the rights of the most vulnerable, the children to be provided with food by their parents. In case their parents are unable to support them, they are to be assisted by the State (Bentley, 2005).

Furthermore, regarding the issue of vulnerability, The United Nations Standard Minimum Rules for the Treatment of Prisoners of 1957 requires that prisoners "be provided...with food of nutritional value, adequate for health and strength, of wholesome quality, well-prepared and served." The implication of this is that food deprivation should not be used as means of punishing offenders under the custody of correctional facilities (Malcolm et al. 1992).

The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), 1929 provides for the right to adequate nutrition (This convention has been ratified by South Africa.1979. Article 12 (2) reads as follows "States Parties shall ensure to women, adequate nutrition during pregnancy and lactation"). South Africa is a State party to a number of instruments that protect the right to food in cases of armed conflict (Article 8 (2) (b) (xxv) of the Rome Statute of the International Criminal Court (1998). Similarly, in cases of natural disasters and with respect to refugees South Africa has an obligation in terms of UN General Assembly Resolutions 2816 (xxvi) of 14 December 1971 and 36/225 of 17 December 1981 to provide assistance and protect the right of the vulnerable who have been disposed by terrible disasters. The Universal Declaration on the Eradication of Hunger and Malnutrition has also provided for the right to food (Adopted at the first World Food Conference, held in Rome, 1974 See para 1 of the Declaration). In addition, the right to food has been read into human rights instruments of general scope where it is not explicitly proclaimed, for example, article 6 (the right to life) of the International Covenant on Civil and Political Rights (ICCPR, 1966) (This covenant has been adopted by South Africa in 1966) has been interpreted by the Human Rights Committee, in its General Comment

No. 6, to impose a duty on State Parties to take measures to 'reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics (Human Rights Committee General Comment No. 6 (1982) The right to life (art 6). South Africa is a State Party to the ICCPR.

At the regional level, the right to food is, as a rule, not explicitly protected. Neither the European Convention on Human Rights (adopted in 1950), nor the European Social Charter (adopted in 1961), nor the African Charter on Human and Peoples' Rights 1981 (ratified by South Africa) explicitly guarantee this right. However article 12(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 provides that "everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development." Article 12(2) provides that "In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies."

However, the right to food has also been read into the African Charter (Mbazira, 2004) in the case of Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria Communication 155/96, where the African Commission on Human and Peoples' Rights interpreted the right to life, to health and to development in such a way as to require States Parties not to interfere with access to food and to protect access to food from interference by powerful third parties (Mbazira, 2004).

## 6. The Position of Vulnerable Groups

Certain groups of people in South Africa are in a weaker position than others when it comes to food. Black people, rural people, women and children suffer more from hunger and malnutrition than whites, city people, men and adults because special political, economic and social problems block their access to food (Olufemi, 2000).

Even prisoners' fall under the category of vulnerable groups since their right of movement is limited, so they cannot feed themselves and they have to rely on the State for food (Sykes, 2007). The State has a duty to make sure that prisoners have the right of access to food (Ward and Birgden, 2007). In South Africa, no complaints have been received so far which suggests that prisoners are not getting sufficient food. However, in others countries like Zimbabwe, it has been reported through the media that prisoners are sleeping at night without having eaten since the government of the Republic of Zimbabwe is not fulfilling its responsibility of feeding them (Bird and Prowse, 2008). It has also been reported that in Zimbabwe, it is not only prisoners who are not having access to sufficient food, but also ordinary citizens (Laakso, 1996).

By providing for the right of access to sufficient food, the Constitution recognizes the need to 'improve the quality of life of all citizens' as espoused in the Preamble to the Constitution. It also recognizes the necessity 'to secure nutritional well-being for a life to be lived in dignity (Mubangizi, 2004).

The State has the obligation to "respect, protect and fulfil" the right of everyone's access to food. Secondly, the State must protect everyone from being deprived of such access in any way; and thirdly, when anyone is without adequate food, the State must proactively create an enabling environment where people become self-reliant for food or, in the situation where people are unable to do so, must ensure that it is provided (Osmani, 2000).

The Constitution stipulates that everyone has the right of access to food and basic nutrition (Drèz, 2004). To this end, every sentenced prisoner has the right to adequate nutrition at the State's expense (Heyns and Brand 1998). Although each of these rights is for a specific group of people (everyone, children and detained persons), this article discusses them as interrelated and intertwined (Woods, 2003).

The duties to protect, to promote and fulfil the nutritional rights of children and detainees, by contrast, are not subject to the same qualification, creating the impression that those duties in respect of these rights are more direct than in respect of section 27 right of "everyone."

The Constitutional Court has acknowledged this in respect of children's rights in the case of Treatment Action Campaign v Minister of Health 2002 (10) BCLR 1033 (CC), although it as not yet explained what the implication is in practical terms. Most likely it will mean that the State's efforts to protect, to promote and fulfil the nutritional rights of children and of prisoners are of a higher standard of scrutiny than its efforts to do the same in respect of the right of everyone to adequate food (Kent, 2005). Specifically the proportionality test required by the general limitation clause, section 36(1) of the Constitution, will apply in cases where it is found that the realization of these rights has failed; it will be more difficult for the State to justify a failure in giving effect to the right to basic nutrition of prisoners than a failure to give effect to the right to have access to food for everyone (Kende, 2003).

The right of everyone to have access to sufficient food is qualified in two ways, it is a right of "access" to food, which means that the State does not always have to give everyone food (Maxwell and Smith, 1992), but rather make it possible for people to get food for themselves and it must only be implemented by the State over a period of time and to the extent that there are adequate resources to do so (De Waal et al. 1999).

Because children and prisoners specifically are not in a position to provide food for themselves, their right to food is given stronger constitutional protection than the general right of everyone to have access to food (Eide et al. 1991). Parents have the first duty to make sure that their children receive proper nutrition (Liao, 2006). However, if they are not able to, or do not fulfil this duty, the State must ensure that these children receive basic nutrition (Sloth-Nielsen, 2004).

Access to sufficient food means that the cost of getting enough food of sufficient quality must not be so high that it becomes impossible for an ordinary person or family to buy food (Brunso et al, 2002). In other words, the food that people need must not be too expensive for ordinary people to afford (Johnston and Baker, 2005). The government must also help people who cannot afford to feed themselves by providing food for them (Andrews, 2000). The government must provide food subsidies or decreases Value Added Tax so that people can be able to afford food (Besley and Kanbur, 1988).

In *Kishman Pattanayak and Others v State of Orissa*, Civil Writ Petition Case No 1284 of 1985, the Indian Supreme Court decided that the State government had failed in its duty to raise the level of nutrition (under the Indian Constitution) because it did not prevent people dying from starvation in Orissa State.

The Court ordered the State government to appoint specifically, qualified people from civil society on its committee to deal with the problem of starvation, to make the committee more effective. The court further ordered the committee to try to solve the problems of poverty which caused the famine in the first place, rather than just focusing on immediate disaster relief.

The lessons learned from this case is that South Africa has to attract qualified people in civil society to drive their policies on food security and also monitor the implementation of the policies relating to food security (Gillespie and Kadiyala 2005). Corruption is one of the core problems which are driving South Africa backward when it comes to delivery of basic social-economics goods and services mandated by the constitutions and other related laws and policies.

## 7. Duties Linked to the Right to Food

The State's basic duty in respect of the right to food, in section 27(2) of the Constitution, is to the effect that it must take reasonable steps, within its available resources, to realize the right to food over time (Bilchitz, 2003). When people go hungry or are exposed to malnutrition, there are many possible reasons why they are food insecure and many ways in which to ensure that they become food secure again (Hamelin et al. 2002). This is why it is not possible to say that the State must do specific things to meet its duties relating to the right to food.

To meet these duties, the State must simply use whichever measures it sees fit that will lead to food security (Maxwell and Smith, 1992). Although it is not possible to say specifically which steps the State must take, it is possible to say which kinds of things it must do. In broad terms, the State must take steps to ensure that all of the aspects of food security are in place (Poulton et al. 2006).

### 7.1 Availability of food

The State must take steps to ensure that enough food for everyone is available (Narula, 2005). In turn this obligation entails that the state:

- "must facilitate food production by farmers so that enough food is produced for the country.
- must manage the importation of food if the country does not produce enough food for domestic consumption
- must ensure that natural resources needed to produce food, like land and water, are used in a way that they are not exhausted.
- must monitor the food supply in the country so that it can know when it is necessary to act in the event of food shortage to avoid a crisis" (Liebenberg and Pillay, 2000).

### 7.2 Accessibility to food

The State must take steps to ensure that available food is accessible (Robertson, 1994). This in turn entails:

- "that the State must ensure that food is not too expensive for ordinary people to afford. For example, the State

can exempt basic foodstuffs such as maize flour and bread from Value Added Tax, subsidize the production of these foodstuffs or introduce price-control.

- It should take steps to enable people produce food for themselves, for example, sponsor community food gardens and support small farmers through subsidies and through providing access to land.
- Where people are unable to buy food for themselves, the State should step in directly. Inability of people to purchase food for themselves can be because of a natural disaster such as a flood, because people are too old or too young to work and earn money or they are too poor to buy food and are unable to find employment. The State could provide food directly to people in such situations or provide money so that people can buy food (for example, through food stamps or through social assistance grants)" (Liebenberg and Pillay, 2000).

### 7.3 Sufficient, safe and acceptable food

The State must take steps to ensure that available food is sufficient, safe and acceptable (Horton, 1998).

- "It must ensure that producers of basic foodstuffs, such as maize flour and bread supplement or fortify their products with vitamins and minerals.
- It must introduce basic standards for producing, preparing and storing food to prevent loss of valuable nutrients, contamination and spoilage
- It must put in place systems to monitor the safety and nutritional value of food" (Liebenberg and Pillay, 2000).

Although, it is true that the State's basic duty is not absolute and precise, the State must take steps to realize the right to food (Narula, 2005). It can only be expected to do what is reasonable within the limits of resources and time (Sohn, 1982). This does not mean that the State can get away with doing nothing. The State must have a plan in place to realize the right to food, a plan that addresses all the different aspects of food security (Allen, 1999). The State must put in place cogent and concrete plan and actually carry out the plan and be able to show progress in implementing the plan (Martin et al. 2009). The UN's CESCR suggests that States must adopt "national strategies", described in national "framework laws" in which they set out their plans for realizing the right to food (Backer, 2013).

## 8. Conclusion

Lack of access to food is a huge challenge in South Africa, there are many factors that are responsible for this such as poverty, unemployment, previous racial division and denial of allowing black South African in engaging in agricultural activities by the past apartheid regime. It is expected that by becoming a democratic state in 1994, the situation will improve. This is not the case despite that there have been some interventions. This lack of improvement is majorly as a result of corruption and non-compassionate activities of the people who are responsible in making food available to the people. The poor and the indigent are the most affected because they are being denied a lot of basic social amenities that will improve their standard of living.

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