

Food Security SA
Working Paper Series:

#003

Accountability and the right to food: A comparative study of India and South Africa

Authors:

Ebenezer Durojaye

Enoch MacDonnell Chilemba



DST-NRF
Centre of Excellence
in Food Security

DST-NRF Centre of Excellence in Food Security

Food Security SA Working Paper Series

©DST-NRF Centre of Excellence in Food Security (CoE) is an initiative of the Department of Science and Technology – National Research Foundation. The mission of the CoE is to examine how a sustainable and healthy food system can be achieved, to realise food security for poor, vulnerable and marginal populations. Our goal is to fill knowledge gaps by undertaking research that is of strategic and policy importance. We also seek to contribute to capacity building efforts and dissemination of information, to make our Centre the leading hub of knowledge production on Food Security and Nutrition in Africa.

The CoE is jointly hosted by the University of the Western Cape and the University of Pretoria. This *Working Paper Series* is designed to share work in progress. Please send suggestions or comments to the corresponding author.

Email: coeinfo@gmail.com

Website: www.foodsecurity.ac.za

Series Editor: Stephen Devereux

Design and Layout: Mologadi Makwela

Accountability and the right to food: A comparative study of India and South Africa

May 2018

#003

AUTHOR DETAILS

AUTHOR'S NAME	INSTITUTION
Ebenezer Durojaye	Dullah Omar Institute, University of the Western Cape, Robert Sobukwe Road, Bellville, Western Cape, South Africa Email Address: edurojaye@uwc.ac.za
Enoch MacDonnell Chilemba	Dullah Omar Institute, University of the Western Cape, Robert Sobukwe Road, Bellville, Western Cape, South Africa

Suggested Citation

Durojaye, E. and Chilemba, E.M. (May 2018), "Accountability and the right to food: A comparative study of India and South Africa" *Food Security SA Working Paper Series No. 003*. DST-NRF Centre of Excellence in Food Security, South Africa.

Some parts of this research have been accepted for publication in the *Commonwealth Law Bulletin* (2018).

AUTHOR BIOGRAPHY

Ebenezer Durojaye is Associate Professor and head of the Socio-Economic Rights Project at the Dullah Omar Institute, University of the Western Cape.

Enoch MacDonald Chilemba is a lecturer at University of Malawi and Post-doctoral fellow Dullah Omar Institute, University of the Western Cape.

ACKNOWLEDGEMENTS

Financial support for this project was provided by the Centre of Excellence in Food Security (CoE). The authors are grateful for the assistance received from Gladys Mirugi-Mukundi and Keathelia Sapto during the preparation of this research. Thanks also go to the reviewers, Serges Djoyou Kamga and Stephen Devereux, for their very useful comments.

ABSTRACT

It remains a great source of concern that, as richly endowed as the world is, each day millions of people go to sleep hungry and almost 870 million people, particularly in developing countries, are chronically undernourished. Also, every year, 6 million children die, directly or indirectly, from the consequences of undernourishment and malnutrition – that is, 1 child every 5 seconds. The international community at various forums in the last twenty years or so have committed to ending undernourishment in the world. The right to adequate food is guaranteed in a number of international and regional human rights instruments.

Despite these developments, many countries have not lived up to their obligations to realise this right. South Africa and India provide an interesting comparison. On one hand, South Africa has a progressive constitution that explicitly guarantees the right to food, while the Indian Constitution does not recognise the right to food as justiciable right. Yet the Indian courts have developed rich jurisprudence to hold the government accountable for failing to realise the right to food of the people. Indeed the courts have played key roles in ensuring the judicialisation of the right to adequate food in India in the wake of the fact that the Constitution does not expressly set out the right.

This report shows that South Africa can learn from the Indian experience by using litigation as a tool for holding the government accountable to its obligation under international and national laws. Besides litigating the right to food to hold the government accountable, it is noted that chapter 9 institutions such as the South African Human Rights Commission (SAHRC), the Gender Equality Commission and the Public Protector all have important roles to play in holding the government accountable to the realisation of the right to food. This is because these institutions are constitutionally empowered to monitor and report on the measures and steps taken by the government towards the realisation of socioeconomic rights, including the right to food under the Constitution.

The report concludes by noting that civil society groups in South Africa will need to be more active in monitoring steps and measures adopted by the government to realise the right to food. It also notes that, where necessary, litigation can be employed as a useful strategy to hold the government to account for its obligation to realise the right to food.

KEYWORDS

Accountability, right to food, judicialisation, South Africa, India

Word count: 17,006 words

ACRONYMS

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Children Charter	African Charter on the Rights and Welfare of the Child
African Women's Protocol	Protocol to the African Charter on the Rights of Women
Committee on ESCR	Committee on Economic, Social and Cultural Rights
CEDAW	Convention on Elimination of All forms of Discrimination against Women
CRPD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
ECJ	European Court of Justice
FCI	Food Corporation of India
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICN	International Conference on Nutrition
IFS	Integrated Food Security Strategy
PDS	Public Distribution System
PUCL	People's Union for Civil Liberties
SANHANES	South African National Health and Nutrition Examination Survey
UDHR	Universal Declaration of Human Rights
UN	United Nations

CONTENTS

INTRODUCTION	1
THE RIGHT TO ADEQUATE FOOD UNDER INTERNATIONAL HUMAN RIGHTS LAW	1
The meaning of the right to food	1
Soft law instruments and the right to adequate food	7
Decoding the normative standards for the right to food	8
JURISPRUDENCE ON THE RIGHT TO FOOD BY INTERNATIONAL AND REGIONAL HUMAN RIGHTS BODIES.....	13
Decisions of UN human rights treaty bodies	13
Decisions from the African Commission	13
Decisions from the European Human Rights System.....	14
Decisions from the Inter-American Court on Human Rights/Commission.....	15
JUDICIAL APPROACH TO THE RIGHT TO FOOD AT THE NATIONAL LEVEL: THE INDIAN EXPERIENCE.....	16
Judicialisation of food as a significant tool for realising the right to adequate food	16
Constitutional framework on right to food in India.....	17
The Supreme Court of India and the ‘Right to Food case’	19
Background to the case	20
The legal arguments/issues raised in the petition	21
The findings of the Supreme Court so far	22
The Interim Orders	23
The Supreme Court and other food cases	24
Other right to food cases	25
Observations on the judicialisation of the right to food in India.....	27
Impact of the PUCL case	28
JUDICIAL APPROACH TO THE RIGHT TO FOOD AT NATIONAL LEVEL: LESSONS FOR SOUTH AFRICA	29
CONCLUSION.....	33
REFERENCES	34

INTRODUCTION

It remains a great source of concern that, as richly endowed as the world is, millions of people each day go to sleep hungry and almost 870 million people, particularly in developing countries, are chronically undernourished.¹ Also, every year, 6 million children die, directly or indirectly, from the consequences of undernourishment and malnutrition – that is, 1 child every 5 seconds.² The international community at various forums in the last twenty years or so have committed to ending undernourishment in the world. This is exemplified in the 1996 Rome Declaration on World Food Security and the Plan of Action of the World Food Summit, where it was pledged to halve the number of undernourished people in the world by 2015.³ This commitment has been severely threatened by 2008 global economic meltdown. While it can be said that the proportion of undernourished people decreased considerably in the 1990s, the situation has deteriorated since 2008. The situation is even more dire for some regions such as the Horn of Africa, where the food crisis has worsened.

THE RIGHT TO ADEQUATE FOOD UNDER INTERNATIONAL HUMAN RIGHTS LAW

The meaning of the right to food

The right to adequate food is guaranteed in a number of international human rights instruments.⁴ The right to food should be understood as the entitlement of all human beings as food consumers to have regular access, directly or by means of procurement, to adequate and sufficient food in terms of its quantity and quality which should also ensure a dignified life of the consumer. This elucidation has been deduced from the definition given by the UN Special Rapporteur on the right to food and from the conceptualisation of the right by the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR). The UN Special Rapporteur has defined the right to food as:

the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear.⁵

¹ The Food and Agriculture Organisation (FAO) *State of Food Insecurity in the World* (2012) 4.

² Ibid.

³ World Food Summit, 13-17 November 1996, Rome, Italy.

⁴ The instruments are discussed from 2.2 through 2.6 below.

⁵ See Office of the High Commissioner for Human Rights (OHCHR) 'The Special Rapporteur on food' <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx> (accessed on 28 April 2018); OHCHR *The right to adequate food* (Fact Sheet No 32) 2.

He further defines the right to food to include the right to be helped if one cannot take care of oneself, but it is, above all, "*the right to be able to feed oneself in dignity*".⁶ It also includes access to resources and to the means to ensure and produce one's own subsistence: access to land, to security and to prosperity; access to water and to seeds, to credit, to technology and to local and regional markets, including (and especially) for groups that are vulnerable and subject to discrimination; access to traditional fishing areas for fishing communities that depend on such areas for their subsistence; access to a level of income sufficient to enable one to live in dignity, including for rural and industrial workers, as well as access to social security and to social assistance for the most deprived.

It is noteworthy that the Committee on ESCR, which is the monitoring body for the Covenant on Economic, Social and Cultural Rights (CESCR) has outlined the core elements of the right to adequate food in General Comment No 12 (discussed below).⁷ The outlined elements also give insights into what the right to adequate food entails. Amongst others, the Committee on ESCR has stated that the realisation of the right to adequate food is achieved 'when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement'.⁸ For this reason, the Committee has cautioned against interpreting the right to adequate food 'in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients'.⁹ The fact that the Committee expects every person to access adequate food at 'all times' imposes an obligation on states parties to the CESCR, which recognises the right to food (as will be highlighted below), to 'take the necessary action to mitigate and alleviate hunger even in times of natural or other disasters'.¹⁰ This can be identified as a core obligation that is not subject to progressive realisation, although the right to adequate food broadly as a socio-economic right should be realised progressively.¹¹ Hence, situations of hunger that are not mitigated or alleviated will be inconsistent with the conceptualisation of the right to adequate food under international human rights law.

It can be observed that the Committee's explanation of the right to adequate food bears close resemblance with the definition of the right given by the UN Special Rapporteur on the right to food. Indeed, the definition by the UN rapporteur has captured and restated the core

⁶ Ibid.

⁷ Committee on ESCR, General Comment No 12 'The right to adequate food' (1999). Further discussion of the Committee and the General Comment is contained in 2.7 below.

⁸ See Committee on ESCR, General Comment No 12 (1999) para 6.

⁹ See Committee on ESCR, General Comment No 12, para 6.

¹⁰ See Committee on ESCR, General Comment No 12, para 6.

¹¹ See e.g. General Comment No 12, para 6.

elements of the right as outlined by the Committee. For example, the Committee mentions the entitlement to have access to adequate food at all times; whilst the Rapporteur mentions the entitlement to have regular and permanent access to quality and sufficient food. Similarly, the Committee emphasises that every person should have physical access to adequate food or the means of its procurement; whilst the Rapporteur stresses the need to ensure that every person has the means to access adequate food directly or through means of financial purchases. Therefore, the right to food can be briefly understood as the right of every person as a consumer to have access at all times, directly or by means of purchase, to adequate food that fosters a fulfilling life of dignity.

The right to food is recognised in article 11 of the Universal Declaration of Human Rights – the first human rights instrument. This is followed by the provisions of the International Covenant on Economic, Social and Cultural Rights. Article 11 of the CESCR¹² contains a framework for the recognition of the right to adequate food.¹³ In terms of this provision, every person has the right to an adequate standard of living for themselves or their families, including adequate food and the right to the continuous improvement of living conditions.¹⁴ In addition, the provision recognises the right of every person to be free from hunger.¹⁵ The provision imposes obligations on states parties to take necessary measures, including specific programmes, aimed at ensuring improved methods of production, conservation and distribution of food;¹⁶ and ensuring an equitable distribution of world food supplies in relation to need.¹⁷ It can be observed that the drafting of the provision suggests that the Covenant envisages a situation of food security at all times as it requires a hunger-free

¹² Adopted on 16 December 1966, entered into force on 3 January 1976.

¹³ Art 11 provides as follows:

1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.

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

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

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

¹⁴ CESCR, art 11(1).

¹⁵ Art 11(2).

¹⁶ Art 11(2)(a).

¹⁷ Art 11(2)(b).

environment in addition to emphasising the need to ensure improved and sustainable food production and equitable food distribution responsive to need.

As will be discussed in more detail below,¹⁸ the Committee on ESCR has elaborated on the right to adequate food under article 11 of the Covenant. As highlighted above, the Covenant recognises the right to adequate food within the broad right to adequate standard of living; whilst also recognising the right to freedom from hunger. The right to adequate food is broad.¹⁹ This is because, amongst others, 'it implies the existence of such an economic, political and social environment that will allow people to achieve food security by their own means'.²⁰ On its part, freedom from hunger is a minimum core obligation that is more immediate.²¹ Freedom from hunger could also be construed from reduced numbers of people facing malnutrition or starvation. On the other hand, the right to adequate food goes beyond ensuring the absence of malnutrition or starvation and has within its scope 'the full range of qualities associated with food, including safety, variety and dignity, in short all those elements needed to enable an active and healthy life'.²² Lastly, the drafting of the CESCR's provision on food shows that the Covenant takes the view that freedom from hunger would depend on matters relating to production; the agriculture and global supply; and hence, it would require measures taken individually and through international cooperation.²³

Under the CEDAW, there exist provisions which protect the right of women to equal access of land, work, credit, income and social security essential for women's enjoyment of their right to food. More specifically, article 14 of CEDAW contains useful provisions aimed at eliminating discrimination against women in rural areas through the creation of an enabling environment for women in order to enable them enjoy their right to food. Also, article 12 of the Convention provides that women should be assured adequate nutrition during pregnancy and lactation.

Other international human rights instruments such as the Convention on the Rights of the Child (CRC) and the Disability Convention also have provisions relating to the right to food. For instance article 24 of the CRC which relates to the right to health also requires states to combat malnutrition through, amongst others, the application of readily available

¹⁸ 2.7 below.

¹⁹ Food and Agricultural Organisation of the United Nations (FAO) *The right to food: Guide on legislating for the right to food* (2009) 15.

²⁰ Ibid 15.

²¹ See Committee on ESCR, General Comment No 3 'The nature of states parties obligations' (1990) para 10; FAO *The right to food: Guide on legislating for the right to food* (2009) 14 & 23.

²² See Rajasthan State Human Rights Commission JAIPUR 'Project on right to food'.

²³ Art 11(2).

technology and through the provision of adequate nutritious foods and clean drinking water in realising the right of every child to the enjoyment of the highest attainable standard of health.²⁴ Also, article 28 of the UN Convention on the Rights of Persons with Disabilities (CRPD)²⁵ contains specific provision on the right to food of persons with disabilities.²⁶ The drafting of the pertinent provision shows that the right to food falls within the broad right to an adequate standard of living, as is the case with the CESCR, discussed above. In terms of the CRPD stipulation, every person with a disability has the right to adequate food and to continuous improvement of living conditions for themselves and for their families. The Committee on the Rights of Persons with Disabilities (CRPD Committee) has elaborated on the provision on adequate standard of living, which includes the right to food, in its concluding observations made after examining reports submitted by states parties. However, the elaborations thus far have been made with respect to the broad right to adequate standard of living and not the right to adequate food specifically.²⁷

At the regional level, the right to adequate food is implicitly or explicitly recognised in the major human rights instruments of the African union. While the African Charter on Human and Peoples' Rights does not expressly recognise the right to adequate food,²⁸ the African Commission on Human and Peoples' Rights has noted that the right to food is 'linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation'.²⁹ The African Commission has indicated that states parties to the African Charter can be guilty of violating the right to food when the Charter is read with other pertinent international human rights instruments.³⁰ It further listed certain core elements of the right, discussed below.³¹ Therefore, the right to food exists under the Charter.

²⁴ Art 24(2)(c).

²⁵ Adopted on 13 December 2006, entered into force on 3 May 2008. The applicable treaties are discussed below. Nevertheless, this paper focuses on the CRPD.

²⁶ See art 28(1), which is couched as follows: 'States Parties recognise the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability.'

²⁷ On this account, a discussion of the concluding observations does not fall within the scope of this article.

²⁸ Adopted on 26 June 1981, entered into force on 21 October 1986.

²⁹ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 65.

³⁰ *SERAC v Nigeria* (2001) para 66.

³¹ See 3.2 for a discussion of the right to food jurisprudence of the African Commission.

Also, article 14 of the African Charter on the Rights and Welfare of the Child (African Children Charter)³² contains provisions relevant in realising the right to food of children. It provides that states parties have the obligation to ensure provision of adequate nutrition for all children in realising the right of every child to enjoy the best attainable state of physical, mental and spiritual health.³³ Hence, the Africa Children's Charter recognises the right to adequate nutrition within the broad right to health. It is noteworthy that in the absence of the realisation of the right to food, one of the end results is malnutrition. From this provision it is clear that the right to food is implicit in the right to adequate nutrition, even though the right to adequate food is broader than the right to nutrition. A similar provision is found in article 16 of the African Youth Charter, where states are required to provide food security for people living with HIV/AIDS in realising the right to enjoy the best attainable state of physical, mental and spiritual health.³⁴

Unlike the African Charter, the African Children's Charter and the African Youth Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)³⁵ expressly sets out the right to food security.³⁶ The provision identifies the right as the entitlement of all African women 'to nutritious and adequate food'.³⁷ In terms of the provision, states parties to the Protocol are obliged to take measures that include providing women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;³⁸ in addition to establishing adequate systems of supply and storage to ensure food security.³⁹

Under the Inter-American system, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador)⁴⁰ recognises the right adequate nutrition.⁴¹ The Protocol requires that the implementation of the right must guarantee 'the possibility of enjoying the highest level of physical, emotional and intellectual development'.⁴² On the contrary, the European human rights system does not take this approach; instead the right to food has to be read into other substantive rights such as the right to life.

³² Adopted on 11 July 1990, entered into force on 29 November 1999.

³³ Art 14(2)(c).

³⁴ Art 16(1) & (2)(h).

³⁵ Adopted by the African Union on 11 July 2003, entered into force on 25 November 2005.

³⁶ Art 15.

³⁷ Sec 15(1).

³⁸ Sec 15(2)(a).

³⁹ Sec 15(2)(b).

⁴⁰ Adopted on 17 November 1988, OAS Doc. OAS/Ser.L/V/I.4 rev. 13.

⁴¹ Art 12. The marginal heading identifies this right as the right to food.

⁴² At 12(1).

Soft law instruments and the right to adequate food

A number of declarations relating to the right to adequate food have been adopted; whilst world conferences on food have also been held. These declarations, despite constituting soft laws, have aided the understanding and elaboration of the right to adequate food in addition to making states commit to taking measures for realising the right.⁴³ First, the Universal Declaration of Human Rights (UDHR) (1948)⁴⁴ provides that every person has the right to a standard of living adequate for the health and well-being of himself/herself and his/her family, including food.⁴⁵ This provision is significant as it demonstrates that as early as 1948, the UN regarded adequate food as a human right falling within the broad right to a decent standard of living. Secondly, the Universal Declaration on the Eradication of Hunger and Malnutrition (1974)⁴⁶ states that '[e]very man, woman, and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties'.⁴⁷

Thirdly, the Rome Declaration on World Food Security (1996)⁴⁸ reaffirms 'the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger'.⁴⁹ Fourthly, the Plan of Action of the World Food Summit (1996) seeks to 'clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger' and 'to give particular attention to the implementation and full and progressive realisation of this right as a means of achieving food security for all'.⁵⁰ Fifthly, the Declaration of the Rights of the Child (1959)⁵¹ declares the right of every child 'to adequate nutrition, housing, recreation and medical services' and 'to be among the first to receive relief in all circumstances'.⁵² Sixthly, the Declaration on the Protection of Women and Children in Emergency and Armed Conflicts (1974)⁵³ pronounces that women and children finding themselves in armed conflict in the

⁴³ It is not within the scope of this article to provide a detailed discussion of these soft laws.

⁴⁴ Adopted by GA Res 217A (III) on 10 December 1948.

⁴⁵ Art 25.

⁴⁶ Adopted on 16 November 1974 by the World Food Conference.

⁴⁷ Preamble, para 1.

⁴⁸ See Population Council 'The Rome Declaration on World Food Security' (1996) 22 *Population and Development Review* 807-809.

⁴⁹ Art 1.

⁵⁰ See Objective 7.4.

⁵¹ Adopted unanimously by all 78 Member States of the United Nations General Assembly in Resolution 1386 (XIV) of 20 November 1959.

⁵² Principles 4 & 8.

⁵³ Adopted by UN General Assembly resolution 3318 (XXIX) of 1974.

struggle for peace, or who live in occupied territories, shall not be deprived of shelter, food, medical aid or other inalienable rights.⁵⁴

Seventhly, the World Employment Conference (1976)⁵⁵ observed that adequate food and safe drinking water constitute certain minimum requirements of a family for private consumption as two elements of 'Basic needs', as understood in the Programme of Action.⁵⁶ Eighthly, the Declaration of Principles of the World Conference on Agrarian Reform and Rural Development (1979)⁵⁷ states that the eradication of poverty, hunger and malnutrition is the primary objective of world development.⁵⁸ Ninthly, the Codex Alimentarius Commission of the Code of Ethics for International Trade (1979) recognises that adequate, safe, sound and wholesome food is a vital element for the achievement of acceptable standards of living.⁵⁹ The Code applies to all food introduced into international trade and establishes standards of ethical conduct to be applied by all those concerned with international trade in food.

Lastly, states represented at the International Conference on Nutrition (ICN) World Declaration on Nutrition (1992) pledged to act in solidarity to ensure that freedom from hunger becomes a reality, bearing in mind the right to an adequate standard of living including food, contained in the UDHR.⁶⁰ It is noteworthy that it could be argued that the right to adequate food is now part of international customary law, on the grounds that there are many international pronouncements on the right.⁶¹

Decoding the normative standards for the right to food

The Committee on ESCR, the UN Special Rapporteur on the right to food and other pertinent institutions have elaborated on the international normative standards relating to the right to food. However, the most instructive clarification on the right to food is made by the Committee on ESCR in its General Comment 12. The General Comment commences with the Committee stressing the significance of the right to adequate food by stating that it is

⁵⁴ Art 6.

⁵⁵ Held in June 1976.

⁵⁶ See Headline 2 of the World Employment Conference.

⁵⁷ Resulted from the World Conference on Agrarian Reform and Rural Development, held on 12 -20 July 1979 in Rome, Italy.

⁵⁸ Art 1(7).

⁵⁹ Art 2(1) & 2(2).

⁶⁰ See FAO & World Health Organisation (WHO) *World declaration and plan of action for nutrition: International Conference on Nutrition (ICN)* (1992).

⁶¹ See S Narula *The right to food: Holding global actors accountable under international law* (2006) 78-82.

'inseparable from social justice' and requires states to adopt appropriate economic, environmental and social policies that are 'oriented to the eradication of poverty and the fulfilment of all human rights for all'.⁶² The Committee provides the normative standards of the right to food and notes that the right is subject to progressive realisation.⁶³ This comes as no surprise since socio-economic rights are generally expected to be realised progressively.⁶⁴ However, the Committee explains that taking necessary measures in order to alleviate or mitigate hunger (ensuring freedom from hunger),⁶⁵ even in times of natural or other disasters, constitutes a core obligation of the right to food.⁶⁶

Furthermore, the Committee singles out the broad principal standard of ensuring the 'adequacy and sustainability of food availability and access' namely; acceptability, availability, accessibility, adequacy, sustainability, freedom from adverse substances; and fulfilling, or responsiveness to, dietary needs.⁶⁷ According to the Committee, 'adequacy' is largely determined by prevailing social, economic, cultural, climatic, ecological and other conditions; whilst 'sustainability' embodies long-term availability and accessibility.⁶⁸ With regard to adequacy, the Committee observes that this concept requires states to ensure that particular foods or diets that are accessible have to be considered the most appropriate under given circumstances.⁶⁹ For this reason, the Committee regards adequacy as 'particularly significant' in relation to the right to food.⁷⁰ Regarding sustainability, the Committee highlights that this concept implies 'food being accessible for both present and future generations' with the effect that sustainability is inherent in ensuring adequate food or food security.⁷¹

It is noteworthy that the Committee has explained the core content of the right to adequate food under the CESCR.⁷² According to the Committee, the core content of the right to food includes 'availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture';⁷³ whereby

⁶² Committee on ESCR, General Comment No 12, para 1.

⁶³ Committee on ESCR, General Comment No 12, para 6.

⁶⁴ See generally Committee on ESCR, General Comment No 3 'The nature of states parties obligations' (1990) para 9.

⁶⁵ See CESCR, art 11(2), explained in 2.2 above.

⁶⁶ Committee on ESCR, General Comment No 12, para 6.

⁶⁷ See General Comment No 12, paras 7-13.

⁶⁸ General Comment No 12, para 7.

⁶⁹ General Comment No 12, para 7.

⁷⁰ General Comment No 12, para 7.

⁷¹ General Comment No 12, para 7.

⁷² General Comment No 12, para 8.

⁷³ General Comment No 12, para 8.

the accessibility of such food must be 'in ways that are sustainable and that do not interfere with the enjoyment of other human rights'.⁷⁴ In order to comply with the aspect of satisfying dietary needs, states might need to take measures to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns; whilst at the same time 'ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake'.⁷⁵

The Committee explains that the aspect of ensuring freedom from adverse substances 'sets requirements for food safety'.⁷⁶ This aspect requires a range of protective measures to prevent contamination of foodstuffs through adulteration, bad environmental hygiene, or inappropriate handling at different stages throughout the food chain.⁷⁷

In order to adhere to the aspect of ensuring cultural or consumer acceptability, states are expected to take into account 'perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies'.⁷⁸ On its part, the aspect of ensuring availability has two dimensions. First, it expects states to ensure that possibilities exist for persons to feed themselves directly from productive land or other natural resources.⁷⁹ Secondly, it expects the existence of well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.⁸⁰ These dimensions must be available to every person to choose from either of them.⁸¹

The Committee further explains that accessibility implies ensuring both economic and physical accessibility to food.⁸² To comply with the aspect of economic accessibility, states must ensure that personal or household financial costs associated with the purchase of food for an adequate diet should be at a level that does not threaten or compromise the attainment and satisfaction of other basic needs.⁸³ States must also ensure that any acquisition pattern or entitlement through which people procure their food must adhere to this aspect.⁸⁴ The aspect further expects states to take measures that pay particular

⁷⁴ General Comment No 12, para 8.

⁷⁵ General Comment No 12, para 9.

⁷⁶ General Comment No 12, para 10.

⁷⁷ General Comment No 12, para 10.

⁷⁸ General Comment No 12, para 10.

⁷⁹ General Comment No 12, para 12.

⁸⁰ General Comment No 12, para 12.

⁸¹ General Comment No 12, para 12.

⁸² General Comment No 12, para 13.

⁸³ General Comment No 12, para 13.

⁸⁴ General Comment No 12, para 13.

attention to vulnerable groups through special programmes to ensure economic accessibility.⁸⁵

On its part, compliance with the dimension of physical accessibility will expect states to ensure that adequate food is 'accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill'.⁸⁶ The dimension might further expect states to pay special attention, and in certain cases, give priority consideration with respect to accessibility of food, to specially disadvantaged groups such as victims of natural disasters and people living in disaster-prone areas.⁸⁷ The Committee singles out the need to pay special attention to particular vulnerability 'of many indigenous population groups whose access to their ancestral lands may be threatened' when ensuring physical accessibility.⁸⁸

As regards the nature of states obligations, the Committee reiterates that the right to adequate food imposes three types or levels of obligations, namely, to respect, to protect and to fulfil, as is the case with all other human rights.⁸⁹ It also explains that the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.⁹⁰ Since the right to adequate food is a socio-economic right, every state party to the CESCR is required, as a principal obligation, to take steps to achieve progressively the full realisation of the right by moving as expeditiously as possible towards that goal.⁹¹ At the same time, each state party is required to ensure that every person under its jurisdiction has access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.⁹² This would seem to confirm that this obligation constitutes the minimum core content of the right to food (as explained above).⁹³ Hence, the obligation to ensure freedom from hunger is to be realised immediately.⁹⁴ Similarly, the obligation not to discriminate against any person in the enjoyment of the right to adequate food is of

⁸⁵ General Comment No 12, para 13.

⁸⁶ General Comment No 12, para 13.

⁸⁷ General Comment No 12, para 13.

⁸⁸ General Comment No 12, para 13.

⁸⁹ General Comment No 12, para 15.

⁹⁰ General Comment No 12, para 15.

⁹¹ General Comment No 12, para 14.

⁹² General Comment No 12, para 14. The drafting/phrasing suggests that this obligation constitutes the minimum core content of the right.

⁹³ See 2.2 above.

⁹⁴ FAO *The right to food: Guide on legislating for the right to food* (2009) 23.

immediate effect.⁹⁵ Therefore, the right to adequate food imposes certain obligations that should be discharged immediately and others that should be discharged progressively.

Furthermore, the Committee observes that a violation of the right to adequate food occurs when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.⁹⁶ In addition, any discrimination that impairs the enjoyment of the right to adequate food constitutes a violation of the right and the CESCR.⁹⁷ It is noteworthy that the Committee acknowledges that whilst the state is the primary duty bearer, all members of society, individuals, families, local communities, non-governmental organisations, civil society organisations, and the private business sector have responsibilities in the realisation of the right to adequate food.⁹⁸ In this regard, the Committee expects the state to provide an environment that facilitates implementation of these responsibilities by these non-state actors.⁹⁹

With regard to national implementation measures, the Committee expects states to take legislative and other measures for realising the right. For example, the Committee mentions the enactment of benchmark framework legislation,¹⁰⁰ adoption of national strategy,¹⁰¹ and formulation of policies.¹⁰² Nonetheless, whatever implementation measures are taken, they must be 'necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food'.¹⁰³ It is noteworthy, for purposes of this article,¹⁰⁴ that the Committee expressly recognises judicialisation of the right to adequate food as one of the implementation measures to be taken by states.¹⁰⁵ As will be explained in more detail below,¹⁰⁶ judicialisation is a significant implementation measure as far as the realisation of the right to adequate food is concerned.¹⁰⁷

⁹⁵ FAO *The right to food: Guide on legislating for the right to food* (2009) 23.

⁹⁶ General Comment No 12, para 17.

⁹⁷ General Comment No 12, para 18.

⁹⁸ General Comment No 12, para 20.

⁹⁹ General Comment No 12, para 20.

¹⁰⁰ General Comment No 12, paras 29 & 30.

¹⁰¹ General Comment No 12, para 21.

¹⁰² General Comment No 12, para 21.

¹⁰³ General Comment No 12, para 20.

¹⁰⁴ As explained in the introduction in 1 above, the article focuses on judicialisation.

¹⁰⁵ General Comment No 12, paras 32-35.

¹⁰⁶ The discussion on judicialisation as an implementation measure is contained in 4 below, specifically in the introductory part.

¹⁰⁷ See discussion in 1st para in 4 below. See also discussion in 4.3 below.

JURISPRUDENCE ON THE RIGHT TO FOOD BY INTERNATIONAL AND REGIONAL HUMAN RIGHTS BODIES

Decisions of UN human rights treaty bodies

It should be noted that no communications directly relating to the right to food have been brought before any of the United Nations treaty monitoring bodies. The reason for this could be that the Committee on ESCR responsible for monitoring the ICESCR – which has a specific provision on the right to food – could not receive individual communications until May 2013, when the Optional Protocol to the ICESCR came into force. However, in some of their concluding observations to states, treaty monitoring bodies have tended to shed more light on the meaning and significance of the right to food. For instance, the Human Rights Committee, which monitors the International Covenant on Civil and Political Rights (1966), has explained that the protection of the right to life requires States to adopt positive measures, such as measures to eliminate malnutrition.¹⁰⁸ Similarly, the Committee against Torture, which monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), has pointed out that lack of adequate food in prisons may be tantamount to inhuman and degrading treatment.¹⁰⁹

Decisions from the African Commission

As noted above, the right to adequate food is not explicitly recognised in the African Charter. However, the African Commission on Human and Peoples' Rights has interpreted the right to food as being implicitly protected under the African Charter on Human and Peoples' Rights (1981) through the right to life, the right to health, and the right to economic, social and cultural development. In the celebrated case of *Social and Economic Rights Action Centre and another v Nigeria*.¹¹⁰ In this case the complainants lodged a complaint against the government of Nigeria for human rights violations perpetrated against the Ogoni people of Delta area of the country. It was alleged that oil exploration activities carried out by Shell with the permission of the Nigerian government has resulted in pollution and destruction of means of livelihoods of the Ogoni. In this case, and for the first time, the African Commission concluded that the government of Nigeria was under obligation to recognise and protect the right to food of the Ogoni people, including protecting that right from violation by national and transnational companies. For the Commission:

¹⁰⁸ Human Rights Committee General Comment 6 on the Right to Life.

¹⁰⁹ Conclusions and Recommendations of the Committee against Torture (2004) CAT/C/CR/33/1, para. 6(h).

¹¹⁰ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 65.

"...the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.... The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government..., hence, is in violation of the right to food of the Ogonis."

The significance of this case is that a government is not only to ensure the enjoyment of the right to food but must also protect citizens from deprivation of this right by a third party.

Decisions from the European Human Rights System

The right to food has not been a major focus of decisions before the European Court of Human Rights and the Commission. However, the Court of Justice of the European Union has handed down a few decisions relating to the enjoyment of the right to food. For instance, in the *European Commission v Italy*,¹¹¹ an action was instituted against Italy for failure to comply with obligations as laid down in two Directives regarding labelling of cocoa and chocolate products. The Italian government had adopted a legislation, which purported to make a distinction between chocolate and chocolate products that do not contain vegetable fat other than cocoa butter. Consequently, the Italian government adopted a law, which allows the use of the adjective 'pure' and or the words 'pure chocolate' to the labelling of chocolate products that do not contain vegetable fat other than cocoa butter. The European Court of Justice held that the Chocolate Directive bars member states from adopting national legislation that is inconsistent with it. It therefore held that the law adopted by Italy is inconsistent with its obligations under the Directive.

In another decision the Court of Justice was called upon to determine whether a rule of national law allowing information to be issued to the public in the event that food is unfit for consumption, is compatible with article 10 of the General Food Law.¹¹² The German government during several inspections of the product of a company involved in the production of meat found that some of the products were unfit for human consumption and thus unsafe. The government then held a press conference to inform the public about this fact. The company brought an application challenging the action of the government and claimed that its reputation and business had been adversely affected. The ECJ held that the

¹¹¹ 2011/ C-47/09 25 November (Court of Justice of the European Union).

¹¹² *Reference for a preliminary ruling from the Landgericht München I (Germany) in the proceedings of Karl Berger v Freistaat Bayern (Karl Berger)* 2013/ C-636/11 11 April (Court of Justice of the European Union).

government had the duty to inform the public about the safety or otherwise of food products. It, therefore, found that the government's action was consistent with laid down law.

Decisions from the Inter-American Court on Human Rights/Commission

The only way for victims of violations of the right to food to obtain a hearing before the Inter-American Commission is to use civil and political rights to have their right to food respected. This is what happened in 1990, when a petition presented to the Commission in the name of the indigenous Huaorani people, living in the Oriente region in Ecuador, asserted that the activities of the Ecuadorian national oil company, Petro-Ecuador, and Texaco were contaminating their drinking water supply as well as the lands they cultivated to feed themselves.¹¹³ In November 1994, following the publication of a report by the Center for Economic and Social Rights (United States), the Inter-American Commission undertook a trip to Ecuador. In its final report, presented in 1997, it concluded that access to information, participation in the decision-making and right to judicial redress (hence civil and political rights) had not been guaranteed to the Huaorani people, and that the oil companies' activities in Ecuador were not sufficiently regulated to the indigenous peoples. Texaco, like Shell in Nigeria, ended up leaving Ecuador.

Also, in 2006, the Inter-American Court of Human Rights decided that the Government of Paraguay had violated the right to life of members of the Sawhoyamaxa indigenous community by failing to ensure them access to their ancestral lands, which provided the natural resources directly related to their survival capacity and the preservation of their ways of life.¹¹⁴ It was recognised that the denial of access to land and the traditional means of subsistence had led the community to extreme poverty, including deprivation of access to a minimum of food, and thus threatened its members' right to life. The Court ordered Paraguay to take the necessary measures, within three years, to guarantee the members of the community tenure over their traditional lands or, if impossible, make over alternative lands. The Court also ordered that, while the community remained landless, the State should adopt measures to deliver basic services to its members, including sufficient quantity and quality of food.

¹¹³ The Inter-American Commission on Human Rights 'The human rights situation of the inhabitants of the interior of Ecuador affected by development activities available at <http://www.cidh.org/countryrep/ecuador-eng/chaper-8.htm> (accessed on 28 April 2018).

¹¹⁴ See discussion of *Comunidad Indígena Sawhoyamaxa v. Paraguay* in Luisa Cruz, FAO Right to Food Team, Responsible Governance of Land Tenure: An Essential Factor for the Realisation of the Right to Food (Land Tenure Working Paper 15, FAO) (2010).

JUDICIAL APPROACH TO THE RIGHT TO FOOD AT THE NATIONAL LEVEL: THE INDIAN EXPERIENCE

Judicialisation of food as a significant tool for realising the right to adequate food

It is noteworthy that one of the necessary measures to be taken in implementing socio-economic rights, including the right to adequate food, is ensuring the justiciability or judicialisation of the right(s). This implies that individuals should be able to obtain judicial redress and remedies for acts threatening or violating the right to adequate food and other rights. On their part, the courts, in dealing with right to food cases, should issue orders that give effective remedies; whilst also elaborating the state obligations for realising the right. In this way, the judicialisation of the right to adequate food will, amongst others, ensure accountability on the part of the government. Borrowing from FAO, judicialisation (justiciability) can be explained as:

the possibility of a human right, recognised in general and abstract terms, to be invoked before a judicial or quasi-judicial body that can: first, determine, in a particular concrete case presented before it, if the human right has, or has not, been violated; and second, decide on the appropriate measures to be taken in the case of violation.¹¹⁵

It is noteworthy that the requirement for ensuring judicialisation of human rights is well settled in international human rights law.¹¹⁶ In addition, a number of domestic, regional and international instruments already provide the basis for judicialisation of the right to food. For example, the UDHR recognises the right of every person to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law.¹¹⁷ On its part, the Committee on CESCR has emphasised the need to put in place appropriate means of redress, or remedies, to any aggrieved individual or group and appropriate means of ensuring governmental accountability.¹¹⁸ In this regard, the Committee has indicated that a person or group of persons constituting 'a victim of a

¹¹⁵ See FAO Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security, *Justiciability of the right to food: Information Paper*, (FAO Document IGWG RTFG/INF (2004) 7; FAO *Legal developments in the progressive realisation of the right to adequate food* (2014) 10.

¹¹⁶ See generally Committee on ESCR, General Comment No 3 'The nature of states parties obligations' (1990) para 4; Committee on ESCR, 'Reporting Guidelines' (2008), Annex para 3, sub-para (e); CRC Committee, General Comment No 5 'General measures of implementation of the Convention on the Rights of the Child' (2003) paras 24 & 25.

¹¹⁷ Art 8.

¹¹⁸ Committee on ESCR, General Comment No 9 'The domestic application of the Covenant' (1998) para 2.

violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels',¹¹⁹ which should include quasi-judicial mechanisms.¹²⁰

In reiterating the need to ensure judicialisation, the Committee on ESCR has explained that judicialisation, coupled with the domestic incorporation of the Covenant, will result in courts being empowered to adjudicate on violations of the core content of the right to food by direct reference to obligations under the Covenant'.¹²¹ The Committee also emphasises that 'judges and other members of the legal profession' are expected to 'pay greater attention to violations of the right to food in the exercise of their functions'.¹²² Hence, the Committee envisages the crucial role that judicialisation would play in realising the right to adequate food. In illustrating the role that the judicialisation of the right to food can play in realising food rights, this part analyses the food rights jurisprudence emanating from the Supreme Court of India and other Indian courts.

Constitutional framework on right to food in India

The Constitution of India¹²³ has a number of Parts that include a section dedicated to directory principles of the state (Directory Principles of State Policy);¹²⁴ and a part dedicated to substantive human rights (Fundamental Rights).¹²⁵ The Constitution does not expressly recognise the substantive right to adequate food in Part III containing fundamental human rights. Similarly, Part IV setting out state directives does not contain an express obligation to realise adequate food. Nonetheless, the Constitution has a number of provisions in both the Part containing state directives and the Part setting out fundamental rights that are relevant in realising the right to adequate food.¹²⁶ The directive principles have provisions directly linked to the right to adequate food. For example, the directives impose a duty on the state to raise the level of nutrition and the standard of living and to improve public health.¹²⁷ In addition, the directives expect the state to ensure that all citizens 'have the right to an

¹¹⁹ Committee on ESCR, General Comment No 12 (1999) para 32.

¹²⁰ FAO *Legal developments in the progressive realisation of the right to adequate food* (2014) 10.

¹²¹ Committee on ESCR, General Comment No 12 (1999) para 33.

¹²² General Comment No 12, para 34.

¹²³ As modified up to 1 December 2007.

¹²⁴ Part IV.

¹²⁵ Part III.

¹²⁶ The provisions are discussed hereafter.

¹²⁷ Art 47.

adequate means of livelihood'.¹²⁸ As explained above, the obligation to improve nutrition is an element of the right to adequate food.

Similarly, the right to an adequate standard of living also includes the right to adequate food – a position taken by both the CESCR and the CRPD.¹²⁹ In the same vein, the CRC, the African Children's Charter and the African Youth Charter take the position that incorporates the right to food into the broad right to health (as explained above).¹³⁰ It must however, be pointed out that like most Common law jurisdiction, Directive principles are not usually regarded as hortatory and are not legally enforceable. With regard to the Part III (of the Indian Constitution) on fundamental rights, it is the right to life that comes closest to including the right to adequate food,¹³¹ amongst others, because no persons can enjoy the right to life without enjoying the right to food.¹³²

However, it is submitted (by the authors) that in the light of the two provisions in the Indian Constitution, it is the obligation to improve nutrition, adequate standards of living and public health that has more direct nexus to the right to adequate food than the right to life although, as will be explained below, the Supreme Court of India has taken the position that the right to food is included in the right to life.¹³³ The courts might have taken this position since in terms of the Constitution, the state directives 'are not enforceable by any court'.¹³⁴ Hence the safest way for the courts might have been to include the right to food in the enforceable right to life. In reinforcing the argument that the obligation to improve nutrition is closely linked to the right to food, FAO has listed India as one of the countries that take the approach of recognising the realisation of adequate food (alongside attaining adequate

¹²⁸ Art 39(a).

¹²⁹ See 2.2 above.

¹³⁰ See 2.2 & 2.3 above.

¹³¹ The right to life is set out in art 21.

¹³² See FAO *The right to food: Guide on legislating for the right to food* (2009) 14.

¹³³ Art 21 on the right to life provides that: 'No person shall be deprived of his life or personal liberty except according to procedure established by law'; whilst art 47 setting out the obligation to raise nutrition and improve health provides as follows: 'The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health'. (Further discussion of the courts decisions and orders is contained in 4.3 below.)

¹³⁴ Indian Constitution, art 37. See also N Deval 'Rajasthan State Human Rights Commission: JAIPUR Project on right to food' <<http://www.rshrc.nic.in/Project/18.%20RIGHT%20TO%20FOOD%20IN%20INDIA.pdf>> 2 & 3; R Abeyratne 'Socioeconomic Rights and Constitutional Legitimacy in India' (2013) <<http://www.iconnectblog.com/2013/04/socioeconomic-rights-and-constitutional-legitimacy-in-india/>> (accessed on 2 May 2018).

nutrition) as a state obligation; whilst not setting it out as a substantive human right.¹³⁵ FAO has observed that such countries do not have a 'a corresponding right in the human rights section of their constitutions', despite setting out a clear obligation in sections that outline state obligations to realise adequate food.¹³⁶ As explained above, the practical avenue for the courts to take might have been to include the right to food into the enforceable right to life.

As will be discussed immediately below, the Supreme Court of India through a number of its decisions and orders has indeed held that the right to life recognised by the Constitution also includes the right to food.¹³⁷ As a result, individuals, groups of individuals and entities or organisations can enforce the right to adequate food before the Indian courts. However, despite the Indian courts stating this position in a number of instances, the judicialisation of the right to food in India had not been enforced until 2001.¹³⁸ Therefore, it can be argued that since the Constitution of India does not expressly recognise the right to adequate food, it is the Indian courts that have played a key role in ensuring the judicialisation of the right.

It is thus relevant to explore further this key role played by the Supreme Court of India and other Indian courts.¹³⁹

The Supreme Court of India and the 'Right to Food case'

The celebrated case of *People's Union for Civil Liberties vs Union of India & Others* (Right to Food case),¹⁴⁰ which is a public interest litigation case, before the Supreme Court of India is a good example of the approach of the Indian court to the right to adequate food under its Constitution.¹⁴¹ It was originally grounded in starvation deaths that were occurring in areas affected by drought, but it eventually developed into a case addressing various matters

¹³⁵ See e.g. FAO *Legal developments in the progressive realisation of the right to adequate food* (2014) 4.

¹³⁶ *ibid.*

¹³⁷ The position of the courts was that the right to life in art 21 implies to live in its true meaning includes the basic right to food, clothing and shelter. See generally Right To Food Campaign 'Supreme Court Orders on the right to food: A tool for action' (2008); 1 & 2; Deval 'Rajasthan State Human Rights Commission: JAIPUR Project on right to food' (n 136 above) 9.

¹³⁸ See Deval 'Rajasthan State Human Rights Commission: JAIPUR Project on right to food' (n 136 above) 9.

¹³⁹ The discussion of the cases relating to food that follows is not exhaustive as it focuses on discussing a few of the cases that had direct relevance to the substantive right to adequate right to food, as understood under international human rights law. The discussion does not include cases relating to food contamination or adulteration, and other similar cases.

¹⁴⁰ Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001 (Supreme Court of India).

¹⁴¹ See e.g. FAO *Legal developments in the progressive realisation of the right to adequate food* (2014) 11.

relating to the right to food. The Supreme Court through the case also confirmed that the right to life guaranteed in article 21 of the Constitution of India, discussed above, 'includes the right to food and other elements needed for a dignified life'.¹⁴² It is noteworthy that the petition was filed during the period when the country's food stocks reached high levels whilst hunger in drought-affected areas had intensified. The case was initially brought by the PUCL petition of 16 April 2001 against the Government of India, the Food Corporation of India (FCI), and six State Governments, in the context of inadequate drought relief.

Subsequently, the case was extended to the larger issues of chronic hunger and under-nutrition, and all the State Governments were added to the list of 'respondents'. The public interest litigation arising from the PUCL petition is known as the 'right to food case'. It is yet to conclude and Supreme Court is yet to pronounce final judgment. For the past 14 years since the commencement of this litigation, the Supreme Court has issued a number of interim orders from the 71 interlocutory application made by 2011. In addition, about 427 affidavits had been lodged in the case. Currently, the scope of the litigation has broadened and it covers a wide range of issues relating to the right to food, including the implementation of food-related schemes, urban destitution, the right to work, starvation deaths, maternity entitlements and even broader issues of transparency and accountability.¹⁴³

Background to the case

The Food Corporation of India (FCI) operated 'godowns' (reserves) for storing grains. By 2001, the godowns had about 60 million tonnes, whereas the required buffer stocks were supposed to be about 20 million tonnes. Hence, the government had about 40 million tonnes above the required buffer stock. It transpired that grains were kept outside the godowns and the rain that was falling had fermented the grain, with the effect that it was rotting. There was a village in Rajasthan State, situated about 5 kilometres from the reserves. The people in the village were facing starvation and there were deaths due to this. Close to half of the rural population was living below the poverty line. At the time, the people in the village were reportedly eating in rotation (rotation eating or rotation hunger), whereby certain members of a family could eat on one day and the remaining members could eat on the other day. Hence, despite having the reserves overflowing with stocks with about 40 million tonnes above the required buffer stocks, the people were dying of starvation.

¹⁴² See e.g. FAO *Legal developments in the progressive realisation of the right to adequate food* (2014) 7.

¹⁴³ The discussion of the case is limited to the aspects of the litigation directly relevant to the right to food.

Furthermore, it was reported that the amount of food being wasted outweighed the amount needed to assure food security. Yet the government paid the expense of storage instead of distributing it to those in dire need. The starvation situation was not specific to the village alone as starvation posed a threat to many persons across the country as a result of lack of purchasing power, massive unemployment, and natural disasters such as drought, amongst others. The government's data showed that there were thirty-six crore people living below the poverty line, whilst more than five crore people were facing starvation.¹⁴⁴ As a result of this, the People's Union for Civil Liberties (PUCL) filed a 'writ petition' that came before the Supreme Court on 16 April 2001. The principal purpose of the petition was to seek the recognition (and enforcement) of the right to food, which, as explained above, is not expressly guaranteed in the Constitution.

The development relating to starvation deaths came about despite India having a public distribution system (PDS) that is said to be the largest in the world and it would constitute the most comprehensive structure to protect food security for the nation. Amongst others, the PDS manages the large-scale procurement and distribution of grain; allocates a reasonable price to farmers to maintain production levels of cereals; and provides a medium of distributing food grain and other basic commodities at subsidised prices to families that qualify. The PUCL petition argued that the distribution of foodstuffs was irregular and was often non-existent. In 1997, the PDS requirements took a targeting approach with the effect that it allocated different entitlements to households who lived below the poverty line (BPL) and to those living above the poverty line (APL). In practice, the PSD was largely restricted to BPL households, as the APL rate was beyond the means of most families. However, the amount given to BPL families was insufficient to fulfil the basic nutritional needs of a family.

The PUCL petition pointed to the State and Central governments' negligence in executing their responsibilities. It transpired that despite the epidemic of hunger, statistics showed that food production had increased in the 1990s, whilst availability of food had declined.

The legal arguments/issues raised in the petition

The basic argument of this petition was that, since food is essential for survival, the right to food is an implication of the fundamental 'right to life' contained in article 21 of the Indian Constitution. It thus argued that Central and State Governments had violated the right to food by failing to respond to the drought situation explained above and, in particular, by accumulating colossal food stocks while people were starving. The petition further

¹⁴⁴ 1 crore represents a figure of 10 million or a unit of value equal to ten million.

highlighted two specific aspects of state negligence: the breakdown of the PDS, and the inadequacy of drought relief works. In terms of the reliefs sought in the final 'prayer', the petition implored the Supreme Court to issue orders directing the government to do four tasks, namely: to provide immediate open-ended employment in drought-affected villages; to provide 'gratuitous relief' to persons who were unable to work; to raise food entitlements under the PDS; and lastly, to provide subsidised foodgrain to all families and the central government to supply free foodgrain to these programmes.

The petition posed three major questions for determination by the Supreme Court. The issues can be reproduced as follows: First, noting that starvation deaths were a nationwide problem whilst there was a surplus stock of foodgrains in government godowns, whether the right to life meant that since people who were starving and were too poor to buy food grains, the state had to provide grains from the surplus stock the state had, particularly when such stock was lying unused and rotting. Second, whether the right to life under the Constitution's article 21 include the right to food. Lastly, whether the right to food as upheld by the highest court implies the state's duty to provide food, especially in situations of drought to people affected by the drought and who were not in a position to buy food.¹⁴⁵

The findings of the Supreme Court so far

The Supreme Court affirmed the right to food as necessary to uphold article 21 of the Constitution of India, which guarantees the fundamental right to 'life with human dignity.' It directed that all the PDS shops, if closed, were to be re-opened within one week. The Court ordered the Food Corporation of India (FCI) to ensure that foodgrains should not go to waste. It further imposed on the different states of the Union the responsibility over implementation of the following schemes: the Employment Assurance Scheme (EAS); the Mid-day Meal Scheme (MMS) (where school children were provided with a meal at school at mid-day); the Integrated Child Development Scheme (ICDS); the National Benefit Maternity Scheme for BPL pregnant women; the National Old Age Pension Scheme for destitute persons of over 65 years; the Annapurna Scheme; Antyodaya Anna Yojana; National Family Benefit Scheme; and Public Distribution Scheme for BPL & APL families. In addition, the Court highlighted issues of chronic scarcity and man-made droughts and famines as major areas of concern.

¹⁴⁵ G Kent 'The human right to food in India' (2008) 2.

The Interim Orders

As can be deduced from the foregoing discussion, the Right to Food case is a massive litigation whose complexity increases every year, with close to 500 affidavits having been submitted by PUCL and the respondents; and nearly 100 'interim applications' having been filed; and about 49 'interim orders' having been issued.¹⁴⁶ For example, the Court had issued an interim order that directed government to provide cooked Mid-Day Meals in primary schools (as mentioned above). It is relevant to briefly discuss at least five interim orders in order to give insights into, and illustrate, the nature of the interim orders given by the Supreme Court and the role that such orders could play in realising the right to food.

First, in the Order of 28 November 2001 relating to PDS, the Court directed the states of the Union of India to complete the identification of BPL families; the issuing of cards; and commencement of distribution of 25 kilograms of grain per family per month. It also ordered the Delhi Government to ensure that PDS application forms were freely available and were given and received free of charge and there was an effective mechanism in place to ensure speedy and effective redress of grievances. Secondly, in the Order of 29 October 2002, the Supreme Court reaffirmed the previous orders it had given and it further issued certain broad points following the order. Amongst others, the Court declared that Chief Secretaries were to be held responsible if starvation deaths were established in their states. In addition, the Court directed that each state of the Union had to appoint one officer as an assistant to the commissioner. The 'commissioners' were part of the institutional mechanisms set up by the Court, independent of the Executive, to monitor and report on the implementation of Court orders, and to suggest ways to promote food security rights of the poor.¹⁴⁷

Thirdly, in the Order of 2 May 2003, the Court ordered the implementation of the Famine Code, which dealt with, amongst others, the steps to be taken as preventive measure before famine and drought; and with declaration of distress and commencement of relief setting out in detail the reliefs and the officers responsible thereof. The Court ordered the implementation of the Famine Code for the period between May, June and July 2003, 'as and when and where the situation may call for it'. It is noteworthy that the enforcement of the Code was one of the reliefs claimed in the PULC petition. In delivering the Order, the Court also stressed its resolve to protect the right to food, by stating in unequivocal terms that the

¹⁴⁶ It is not feasible within the scope of this article to discuss all these orders. As such it discusses a few interim orders directly relevant to the right to food.

¹⁴⁷ See S Hassan 'Rights, activism and the poor in India: Supreme Court and the 'Right to Food case' paper presented at International Conference: 'Social Protection for Social Justice' Institute of Development Studies, UK (13–15 April 2011) 4.

government had the responsibility to ensure that food reaches the people. In this regard, the Court observed as follows:

what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them. In case of famine, there may be shortage of food, but here the situation is that amongst plenty there is scarcity. Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existing leading to malnutrition, starvation and other related problems. The anxiety of the Court is to see that poor and the destitute and the weaker sections of the society do not suffer from hunger and starvation. The prevention of the same is one of the prime responsibilities of the Government – whether Central or the State. Mere schemes without any implementation are of no use. *What is important is that the food must reach the hungry.*¹⁴⁸

Fourthly, the Order of 7 October 2004, with regard to the ICDS, raised measures such as increasing the number of 'anganwadis' (child-care and mother-care centres) from six lakhs to fourteen lakhs;¹⁴⁹ increasing the norms for supplementary nutrition; abolition of contractors in provision of food; provision of detailed information on ICDS in the website; and ensuring full utilisation of available finances. Lastly, according to the Order of 29 April 2004, also relating to the ICDS, the court expressed concern and directed that all children should be covered by the ICDS programme. The Court had further directed the Government of India to provide a plan of action to expand the number of 'anganwadis' to cover all settlements, July 2014. The Court also directed all states of the Union to file a report on eligible number of children vis-a-vis number covered under the ICDS programme.

The Supreme Court and other food cases

In other cases, the Supreme Court has made significant statements pertaining to the right to food. For example, in *Francis Coralie v Administrator, Union Territory of Delhi and Others*,¹⁵⁰ the Court stated as follows:

We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the

¹⁴⁸ (Emphasis added).

¹⁴⁹ A lakh is a unit in the Indian numbering system equal to 100,000.

¹⁵⁰ (1981) 1 SCC 608.

matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self.

Similarly, in *Shantistar Builders v Narayan Khimalal Totame*,¹⁵¹ the Supreme Court stated: 'The right to life is guaranteed in any civilised society. That would take within its sweep the right to food...' Likewise, in *Chameli Singh v State of U.P.*,¹⁵² the Supreme Court reiterated the same position by emphasising that right to life guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter.

Lastly, in *Ekta Shakti Foundation v Government of NCT of Delhi*,¹⁵³ the Supreme Court was called upon to resolve the confusions relating to food distribution that were attributable to malpractices adopted by contractors. The 'mess' resulted in the benefits of ICDS not reaching the targeted beneficiaries; and hence not reaching the affected children. The Supreme Court ordered that no contractor should be involved in supplying food and nutrition. Apparently, certain contractors got an NGO registered in the name of Ekta Sakti Foundation and tried to obtain the supply orders. The government of Delhi discovered these practices and refused to supply Supplementary Nutrition Products (SNP) to them.

Other right to food cases

A number of cases decided by Indian courts (other than the Supreme Court) are also relevant to the realisation of food rights. For example, in *Amit Kumar Jain v State of Rajasthan*,¹⁵⁴ the petition complained that the Rajasthan State authorities had given undue power to the tender committee, causing a breakdown in the food distribution system. The High Court ordered that lactating mothers and children were meant to receive nutritious food from the Anganwari centres and that village communities, Mahil Mandals and self-help groups were to be responsible for buying grains and preparing food. In *Sh. Ved Prakash Gupta v State of Punjab & others*,¹⁵⁵ Ved Prakash Gupta filed a petition under article 226/227 of the Constitution over the inability of the government to implement its own schemes aimed at ensuring the right to food of vulnerable sections who could not afford food required for their minimum subsistence. The non-implementation of the schemes had reportedly caused hazards in children, pregnant women and nursing mothers. The High Court granted the order sought by the petitioner requiring government to implement the schemes.

¹⁵¹ (1990) 1 SCC 520.

¹⁵² (1996) 2 SCC 549.

¹⁵³ Writ Petition (Civil) 232 of 2006.

¹⁵⁴ D.B Civil Writ (PIL) Petition No 4777 of 2005 (High Court of Rajasthan).

¹⁵⁵ <<http://www.hrln.org/hrln/right-to-food/pils-a-cases/569-sh-ved-prakash-gupta-vs-state-of-punjab-a-others-.html>> (accessed on 2 May 2018).

Furthermore, in *Pradeep Pradhan v State of Orissa and Others*,¹⁵⁶ the Petitioner (the Convenor for the Right to Food Campaign in Orissa), with the support of the Human Rights Law Network (HRLN) lawyers, sought the issue of a writ of mandamus to compel the Respondents to ensure compliance with directives of the Supreme Court concerning implementation of programmes aimed at ensuring food security in Orissa. The Respondents were the responsible authorities, namely: State of Orissa, Ministry of Food and Civil Supplies; Ministry of Rural Development; and Food Corporation of India (FCI). However, the Court dismissed the public interest litigation after the judge had stated that the only remedy available to the Petitioner would be to file an appropriate contempt petition before the Supreme Court, as provided for by the Constitution of India. Nonetheless, the decision demonstrates that the courts acknowledged that the failure by government to implement food security programmes as ordered by the Supreme Court would constitute contempt of court.

On its part, the public interest litigation case of *Doaba Utthan Evam Vikas Samiti v Union of India & others*¹⁵⁷ was launched after it transpired that around 16 July 2011, about 40,000 quintal of wheat was rotting in rain under the open sky in the yard of the Naini Railway Station near Allahabad. A team of four members prepared a report after they had visited the Naini railway yard and met the concerned FCI officials. The litigation was commenced with the report as its basis. In the case involving HRLN Arunachgal,¹⁵⁸ it was reported that almost 12,000 people living in the Dibang Valley district of Arunachal Pradesh were facing a severe insecurity of food and essential commodities, whilst being forced to pay a heavy price for scarcity or starving. The HRLN Arunachgal unit filed a petition before the Gauhati High Court bench of Itanagar. The Court ordered the air-lifting of all essential commodities. It was reported that 21 sorties were made by the Air Force Helicopters to supply the scarce commodities until the Border Roads Organisation had restored road links.

In another case,¹⁵⁹ the Human Rights Law Network (HRLN) and Movement for Peace and Justice challenged the non-implementation of the National Food Security Act. It transpired that an ad hoc committee, as opposed to the legally required state food commission, had been functioning since January and no steps had been taken to constitute the commission.

¹⁵⁶ CRLMC No 597 of 2008 in G.R. Case No168 of 2005 (High Court of Orissa).

¹⁵⁷ Public Interest Litigation No. 39849 of 2011.

¹⁵⁸ *Sri Kaheka Pralo v The State of Arunachal Pradesh* Writ Petition (Civil) Appeal No 376 of 2012 (High Court of Gauhati).

¹⁵⁹ See NRHL 'Govt rapped for delay in setting up food commission' <<http://www.hrln.org/hrln/right-to-food/pils-a-cases/1662-govt-rapped-for-delay-in-setting-up-food-commission.html> (accessed on 2 May 2018).

On 2 December 2014, the High Court took the state to task for the delay in setting up the commission and instead appointing an ad hoc committee of bureaucrats to function as the commission. The judicial officers were not amused after also observing that the committee included secretaries of food and civil supplies, women and child development, law and judiciary and social justice and special assistance departments. However, the commission that was supposed to be established under the National Food Security Act would comprise a chairperson, five other members and a member-secretary not below the rank of joint secretary and all should have experience in law, human rights, social service, nutrition, health, food policy and public administration. The Bombay High Court ordered the state to constitute a state food commission, as it had opined that the provisions of the Act would not be implemented properly without the existence of such a commission. In this regard, the Court stated that:

We direct the appropriate officer of the state government to file a report on when the commission will be established. Also, provide an outer limit when infrastructure will be given for setting it up keeping in mind the importance of the commission. Unless it is constituted, there will be no proper implementation of the provisions of the Act.

Observations on the judicialisation of the right to food in India

The Indian Courts, especially the Supreme Court, have played key roles in ensuring the judicialisation of the right to adequate food in India, in the wake of the fact that the Constitution does not expressly set out the right. Indeed, the Court has been commended for this with the effect that it is regarded as having 'directed nationwide food distribution to the poor while it mulls whether India's constitution guarantees a right to food' for a period of over 13 years.¹⁶⁰ For example, the PULC case, which is still ongoing, has demonstrated that states should be held to their responsibility of ensuring food rights. In addition, litigation in the case continues – seeking to further strengthen the formulation and implementation of food and other related social security schemes.¹⁶¹ The PUCL case is said to have contributed significantly in the consolidation and expansion of the National Campaign on the Right to Food in India and has also led to improvements in government food programmes.¹⁶² The

¹⁶⁰ Jurisprudence, The law, lawyers, and the court (C Sethi) 'The Supreme Court of India's shockingly bad gay-rights decision: A surprising disappointment from judges with a progressive record' 13 December 2013 @ 11:15.

http://www.slate.com/articles/news_and_politics/jurisprudence/2013/12/kaushal_v_naz_foundation_the_supreme_court_of_india_s_shockingly_bad_gay.html(accessed on 2 May 2018).

¹⁶¹ 'PUCL vs. Union of India & others' <<http://www.hrln.org/hrln/right-to-food/pils-a-cases/255-pucl-vs-union-of-india-a-others-.html>> (accessed on 2 May 2018).

¹⁶² 'People's Union for Civil Liberties v. Union of India & Ors, In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001' <http://www.escribnet.org/docs/i/401033>*accessed on 1 May 2018).

combined action of a people's campaign and the courts is said to have resulted in positively impacting millions of poor in India. Indeed, the impact of the PULC case must not be understated. In essence it can be argued that Indian courts have been proactive in holding the government accountable to its obligation to realise the right to adequate food.

Impact of the PUCL case

The litigation of the PUCL case and the many interim orders pronounced by the Supreme Court brought forth profoundly significant beneficial impact on the right to food in India. Amongst others, it triggered the enactment of food specific legislation – the National Food Security Act, 2013. The National Food Security Act, 2013 incorporated many elements of most of the interim orders issued by the Supreme Court.¹⁶³ It further established 'a legal framework for programmes that previously had been run without clear entitlements and rights for beneficiaries'.¹⁶⁴ Lastly, it has been highlighted that the Act 'creates entitlements to food-related assistance and also establishes grievance mechanisms, which is one of the essential elements for the realisation of the right to adequate food'.¹⁶⁵

Furthermore, the interim orders issued by the Supreme Court thus far in the case have been hailed as 'a tool for action' and it has been highlighted that experience has proved it.¹⁶⁶ First, it has been observed that the case provides an opportunity to hold the state accountable. For example, reports of starvation deaths in a particular area, or the absence of food in the ration shops, or if the State Government fails to provide cooked Mid-Day Meals in primary schools, it has been stated that the Supreme Court orders could be used to demand prompt action from the concerned authorities. Lastly, it has been pointed out that the Supreme Court orders could also be used to raise awareness and understanding by the people of their 'entitlement' to certain forms of public support as a matter of right. For example, all primary school-going children in India are entitled to a nutritious, cooked Mid-Day Meals. Similarly, every hamlet is supposed to have an active 'Anganwadis' for children under the age of six. It has been opined that people are more likely to claim these facilities and insist on adequate quality if they perceive the facilities as a matter of right.¹⁶⁷ Accordingly, the judicialisation of

¹⁶³ See e.g. FAO *Legal developments in the progressive realisation of the right to adequate food* (2014) 7.

¹⁶⁴ See e.g. FAO *Legal developments in the progressive realisation of the right to adequate food* (2014) 11.

¹⁶⁵ See e.g. FAO *Legal developments in the progressive realisation of the right to adequate food* (2014) 11. It is not within the scope of this article to provide a detailed discussion of this Act.

¹⁶⁶ See Right to Food Campaign, Secretariat 'Supreme Court Orders on the right to food: A tool for action' (2008).

¹⁶⁷ Right to Food Campaign, Secretariat, 'Supreme Court Orders on the right to food: A tool for action' (2008) Preface.

the right to food is a significantly useful tool in realising food rights, as the Indian courts approach has demonstrated.

JUDICIAL APPROACH TO THE RIGHT TO FOOD AT NATIONAL LEVEL: LESSONS FOR SOUTH AFRICA

In comparison to the position in India, the South African Constitution explicitly guarantees the right to adequate food and nutrition. The Constitutional provisions on the right to food can be found in three sections, namely; section 27 (1) (b) everyone has a right of access to sufficient food; section 28 (1) (c) every child has a right to basic nutrition and section 35 (2) (e) every detained person and prisoner has a right to adequate nutrition. In addition, South Africa has agreed to various international and regional human rights instruments that recognise the right to adequate food. Government has made efforts to enact laws, develop policies and programmes to realise the right to adequate food and ensure food security. Key examples are the social security programme, the Household Food Production programme – One Home, One Garden – and the Integrated Food Security Strategy (IFSS) of 2002, National Policy on Food and Nutrition Security, National School Nutrition Programme and Food for All Programme.

However, the enjoyment of the right to adequate food remains illusory for millions of South Africans. Government's efforts do not prevent a significant number of South Africans, especially children and rural dwellers, from being food insecure, malnourished and experiencing hunger. Studies have shown that a significant number of children are stunted or undernourished. For instance, South African National Health and Nutrition Examination Survey (SANHANES-1) 2013, finds that almost 25% of South Africans were at risk of hunger and another 25% experienced hunger.¹⁶⁸ It has further been noted that 15.3% of children in South Africa in 2012 lived in households that reported hunger. 'African' children were identified as the most likely to be living in households reporting hunger (16.9%) and the lowest percentage was amongst Indian children in 2012 (0.6%).¹⁶⁹

During his visit to South Africa in 2010, the UN Special Rapporteur on the right to food did observe that there exist myriad of laws and policies on the right to food in South Africa, but the greatest challenge is poor implementation. He therefore urged the South African

¹⁶⁸ Shisana, O, *et al.* 2013. South African National Health and Nutrition Examination Survey (SANHANES-1). Cape Town: HSRC Press. Available at: [www.hsrc.ac.za/uploads/pageNews/72/SANHANES-launch%20edition%20\(online%20version\).pdf](http://www.hsrc.ac.za/uploads/pageNews/72/SANHANES-launch%20edition%20(online%20version).pdf). (accessed on 28 April 2018).

¹⁶⁹ *Ibid.*

government to develop an effective accountability mechanism to ensure that the right to adequate food is properly realised in the country.¹⁷⁰ Some of the challenges militating against the realisation of the right to food in South Africa include lack of specific legislation dealing with food, poor funding and lack of skilled human resources to execute the various policies and programmes. Moreover, the fact that issues relating to food are covered by various government departments, including health, agriculture, social development and education, makes it difficult to coordinate all the efforts of these departments. Thus, there is often fragmentation of activities and policies.

It should be noted that unlike in the case of India, few attempts have been made to litigate the right to adequate food in South Africa. Given the wide gap between policy formulation and implementation, it remains unclear why few attempts have been made to challenge government's failure to realise the right to food as guaranteed in the Constitution. The few cases so far instituted in courts are indirectly related to the enjoyment of the right to adequate food and not specifically challenging the provision on the right to adequate food. For instance in *Kenneth George and Others vs. the Minister of Environmental Affairs and Tourism*¹⁷¹, a group of individuals and organisations representing 5,000 artisanal fishers filed a case at the Equality Court in Cape Town, claiming that the Government had failed to provide them fair access to fishing rights which resulted in the violation of a number of basic socio-economic rights, most notably the right to food. Also, the complaint related to a law on marine resources (*Marine Living Resources Act*), which was introduced in 1998, establishing a system of quotas through which the totality of fishable resources in a given year was divided into commercial licenses. It was alleged that the specific needs of traditional fishing communities were not taken into account by the law and that the quota licensing procedures were complex and burdensome, thereby excluding, *de facto*, traditional fishermen. As a result of the implementation of this law, the entire fishing communities lost their access to the sea, and their nutritional status deteriorated significantly.

In 2004 an action was commenced at the High Court alleging the violation of the right to food. After months of negotiations, the fishing communities and the Ministries of the Environment and Tourism reached an amicable agreement. According to the agreement, nearly 1,000 traditional fishermen, who had demonstrated their historic reliance on fishing as their primary means of subsistence, obtained a fishing authorisation and the right to fish and sell their products. The Court ratified the agreement, authorising the fishermen to petition the body in the event the agreement was breached.

¹⁷⁰ See the report of the Special Rapporteur on the right to food mission visit to South Africa 2011.

¹⁷¹ 2007 (EC 1/05) at paras 1-7, 10.

In addition, the Court ordered that the policy framework developed by the Government on the allocation of fishing rights must accommodate the socio-economic rights of artisanal fishers and ensure their equitable access to marine resources, based on South Africa's international and national legal obligations. The Court also struck down the law and ordered the government to draft a new legislative and policy framework, with the full participation of the traditional fishing communities, in order to ensure the realisation of their rights. This is perhaps the first judicial pronouncement on the right to food in the country.

The second relevant case, *Wary Holdings v Stwalo*¹⁷², dealt with the legality of subdividing and selling land classified as 'agricultural land' under the Agricultural Land Act. In its judgment the Constitutional Court acknowledged that the government had a responsibility not to violate anyone's right to food, but did not make a specific ruling as to whether any particular approach to land ownership would undermine this right. Rather the Court noted as follows:

As far as section 27(1)(b) of the Constitution specifically is concerned (the fundamental right of everyone to have access to sufficient food and water), the question is not whether large or small agricultural units are preferable for food production, a question debated during argument but on which there is no evidence before this Court. The questions are rather whether an interpretation which, as indicated in paragraph 81 above, accords a role to national government in the administration of 'agricultural land' through the provisions of the Agricultural Land Act, is one which would promote the spirit, purport and objects of the Bill of Rights or, if necessary, one which would better promote those considerations.

Based on this, the Court held that provisions of the Act complied with the Constitution, and that the purchase of the land in question was invalid, not because it affected anyone's right to food but because the necessary consent required by law was never obtained. Although the thrust of this case did not relate to the right to food, however, given that access to land is essential in realising the right to adequate food, it can be said that the Constitutional Court missed a golden opportunity to clarify the nature of state obligation regarding the right to adequate food in the Constitution.

In another case before the Constitutional Court, *Mukudamm v Pioneer Foods Ltd and others*,¹⁷³ the applicant, who engages in the business of distributing bread in the Western Cape, brought a class action against the respondents who are bread manufacturers, following the

¹⁷² CCT78/07 [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

¹⁷³ [2013] ZACC 23.

findings of the Competition Commission against them. It was alleged that the respondents colluded to cause an increase the prices of bread to the detriment of the consumers and the applicant. This necessitated an investigation by the Competition Commission in 2006. Premier Food sought leniency from the Commission and in line with the rules of the Competition Act was rewarded with a leniency fine. Another bread manufacturer, Tiger Brand, was implicated and entered into a settlement arrangement with the Commission which led to a fine of about R99 million. Pioneer Food did not negotiate any settlement and hence its investigation was referred to the Competition Tribunal. After a protracted trial it was found guilty of anti-competitive practices and a fine of about R196 million was imposed as penalty.

Consequently, the applicant together with two other persons sought to bring a class action against the respondents in the High Court. This was opposed by the respondents. In deciding whether to grant certification or not, the High Court focused on two requirements only. First, it considered whether the cause of action identified by the applicants raised triable issues. But in this regard the High Court looked at only two of the three causes of action mentioned in the applicants' papers. With regard to the claim for damages based on section 22 of the Constitution, the High Court held that the section affords protection to individual citizens and not corporates. The matter was subsequently appealed to the Supreme Court. Both the High Court and the Supreme Court refused to grant the application for a class action. The applicants thus appealed to the Constitutional Court. The Constitutional Court set aside the decisions of the High Court and Court of Appeal and asked that the case be remitted to the High Court in order for the applicants to establish their case for a class action. This case did not specifically address the human rights implications of the actions of the respondents.

Despite the continued deprivation of the right to food in South Africa, none of the cases discussed above relates specifically to clarifying the nature of the government's obligations regarding this right as enshrined in the South African Constitution. This contrasts sharply with the situation in India. It is interesting to note that in a jurisdiction such as South Africa where the right to food is explicitly recognised in the constitution, little attempt has been made to litigate on this right. While on the other hand, in India where the right to food is not explicitly recognised, civil society groups through advocacy and class action have made attempts to hold the government accountable to realise this right. What can be deduced from this is that the right to food campaign would seem to be stronger in India than in South Africa. While it is noted that some organisations do work and engage in some advocacy in relation to food in South Africa, little attention has been given to the potential of litigation as a tool to hold the government accountable. On the other hand, some organisations in the country have been very active in litigating on issues relating to housing, health, water and

sanitation. This accounts for the reason why the Constitutional Court over the years has developed an impressive body of jurisprudence on these sets of rights. Given the persistence of hunger and stunting in the country and the inability of government's policies and programmes to adequately address this, perhaps the time has come for a class action to hold the government accountable to its obligation under national and international law to realise the right to adequate food.

Besides litigating the right to food to hold the government accountable, it is noted that chapter 9 institutions such as the South African Human Rights Commission (SAHRC), the Gender Equality Commission and the Public Protector all have important roles to play in holding the government accountable to the realisation of the right to food. This is because these institutions are constitutionally empowered to monitor and report on the measures and steps taken by the government towards the realisation of socioeconomic rights, including the right to food under the Constitution. The SAHRC can conduct research or public hearings to highlight failures of the government to fulfil its obligations to realise the right to food under the Constitution. Moreover, it can also detail failure to fulfil this right in its annual report to the parliament. This can lead to a situation where the parliament engages with the relevant Departments and institutions responsible for the realisation of the right to food.

CONCLUSION

This paper has shown that the right to adequate food is recognised in numerous international, regional and national documents. It has also demonstrated that clarifications about the content of this right have been made by international treaty monitoring bodies and regional human rights bodies. More importantly, attempts have been made at the national level to enforce the right to adequate food. In this regard, the article examined the Indian and South African experience. It reveals that though the right to food is not legally enforceable in India, the courts have been called upon to clarify the nature of the government's obligation in this regard. Indian courts have been very creative by invoking other provisions of constitution such as the rights to life and dignity to hold the government accountable for its failure to prevent hunger. South African civil society groups can learn from the Indian experience, by establishing a campaign on the right to food and filing of test cases to hold government accountable for its failure to realise the right to food. As shown from the Indian experience, public interest litigation can galvanise the government to act and be more alive to its obligation to realise the right to adequate food, as guaranteed in international and national law.

REFERENCES

Abeyratne, R (2013) 'Socioeconomic Rights and Constitutional Legitimacy in India' <<http://www.iconnectblog.com/2013/04/socioeconomic-rights-and-constitutional-legitimacy-in-india/>> (accessed on 28 April 2018).

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) adopted on 17 November 1988, OAS Doc. OAS/Ser.L/V/II.4 rev. 13

African Charter on Human and Peoples' Rights, adopted on 26 June 1981, entered into force on 21 October 1986 (OAU Doc CAB/LEG/67/3 rev.3)

African Charter on the Rights and Welfare of the Child, adopted on 11 July 1990, entered into force on 29 November 1999 (OAU Doc CAB LEG/24.9/49 (1990))

African Youth Charter, adopted on 2 July 2006, entered into force on 8 August 2009 <<http://www.refworld.org/docid/493feob72.html>> (accessed 1 May 2018)

Codex Alimentarius Commission of the Code of Ethics for International Trade (1979) (Doc CAC/RCP 20-1979)

Committee on ESCR, General Comment No 3 (1990) 'The nature of states parties obligations' (UN Doc E/1991/23, annex III at 86)

Committee on ESCR, General Comment No. 5 (1994) 'Persons with disabilities' (UN Doc E/1995/22)

Committee on ESCR, General Comment No 9 (1998) 'The domestic application of the Covenant' (UN Doc E/C.12/1998/24)

Committee on ESCR, General Comment No 12 (1999) 'The right to adequate food' (UN Doc E/C.12/1999/5)

Committee on ESCR, General Comment No 14 'The right to the highest attainable standard of health' (UN Doc E/C.12/2000/4)

Committee on ESCR, 'Guidelines on treaty-specific documents to be submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' (2009), Annex (UN Doc E/C.12/2008/2)

Convention on the Rights of the Child, GA Res 44/25, annex, 44 UN GAOR Supp (No 49) at 67, adopted on 20 November 1989, entered into force on 2 September 1990 (UN *Treaty Series*, vol. 1577; UN Doc A/44/49 (1989))

Convention on the Rights of Persons with Disabilities, adopted on 13 December 2006, entered into force on 3 May 2008 (UN Doc A/61/611)

International Covenant on Economic Social and Cultural Rights, adopted on 16 December 1966, entered into force on 3 January 1976 (UN Treaty Series, vol. 993.

CRC Committee, General Comment No 5 (2003) 'General measures of implementation of the Convention on the Rights of the Child' (UN Doc CRC/GC/2003/5)

Declaration of Principles of the World Conference on Agrarian Reform and Rural Development (1979) emanated from the World Conference on Agrarian Reform and Rural Development held 12 to 20 July 1979 in Rome, Italy

Declaration on the Protection of Women and Children in Emergency and Armed Conflicts (1974) adopted by UN General Assembly resolution 3318 (XXIX) of 1974, 29 U.N. GAOR Supp. (No. 31) at 146, (U.N. Doc. A/9631) (1974).

Declaration of the Rights of the Child, adopted unanimously by all 78 Member States of the United Nations General Assembly in Resolution 1386 (XIV) of 20 November 1959.

Deval, N 'Rajasthan State Human Rights Commission: JAIPUR Project on right to food'

<<http://www.rshrc.nic.in/Project/18.%20RIGHT%20TO%20FOOD%20IN%20INDIA.pdf>> (accessed 1 May 2018)

Food and Agricultural Organisation of the United Nations (FAO) (2004) Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security Justiciability of the right to food: Information Paper, (FAO Document IGWG RTFG/INF.

Food and Agricultural Organisation of the United Nations (FAO) & World Health Organisation (WHO) (1992) *World declaration and plan of action for nutrition: International Conference on Nutrition (ICN)* Rome: FAO & WHO.

Food and Agricultural Organisation of the United Nations (FAO) (2009) 'The right to food: Guide on legislating for the right to food' Rome: FAO.

Food and Agricultural Organisation of the United Nations (FAO) (2014) 'Legal developments in the progressive realisation of the right to adequate food' Rome: FAO.

Hassan S 'Rights, activism and the poor in India: Supreme Court and the 'Right to Food case' paper presented at International Conference: 'Social Protection for Social Justice' Institute of Development Studies, UK (13–15 April 2011)

Jurisprudence, The law, lawyers, and the court (Sethi, C) 'The Supreme Court of India's shockingly bad gay-rights decision: A surprising disappointment from judges with a progressive record' 13 December 2013 @ 11:15
<http://www.slate.com/articles/news_and_politics/jurisprudence/2013/12/kaushal_v_naz_foundation_the_supreme_court_of_india_s_shockingly_bad_gay.html> (accessed 1 May 2018).

Kent G (2002) 'The human right to food in India' University of Hawaii <http://www.earthwindow.com/grc2/foodrights/>.(accessed on 2 May 2018.

Narula, S (2006) 'The right to food: Holding global actors accountable under international law' *Columbia Journal of Transnational Law*, Vol. 44, pp: 691-800.

NRHL 'Govt rapped for delay in setting up food commission' <<http://www.hrln.org/hrln/right-to-food/pils-a-cases/1662-govt-rapped-for-delay-in-setting-up-food-commission.html>> (accessed 1 May 2018).

Office of the High Commissioner for Human Rights (OHCHR) 'The right to adequate food (Fact Sheet No 32)

Office of the High Commissioner for Human Rights (OHCHR) 'The Special Rapporteur on food' <<http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx>> (accessed 1 May 2018).

'PUCL vs. Union of India & others' <<http://www.hrln.org/hrln/right-to-food/pils-a-cases/255-pucl-vs-union-of-india-a-others-.html>> (accessed 2 May 2018).

Population Council (1996) 'The Rome Declaration on World Food Security' 22 *Population and Development Review* 807-809.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the African Union on 11 July 2003, entered into force on 25 November 2005 (CAB/LEG/66 6/Rev 1).

Universal Declaration of Human Rights, adopted by GA Res 217A (III) on 10 December 1948 (UN Doc A/18/810) <http://www.un.org/en/documents/udhr/> (accessed 1 May 2018).

Universal Declaration on the Eradication of Hunger and Malnutrition (1974) adopted on 16 November 1974 by the World Food Conference convened under General Assembly resolution 3180 (XXVIII) of 17 December 1973; and endorsed by General Assembly resolution 3348 (XXIX) of 17 December 1974.

Cases

Amit Kumar Jain v State of Rajasthan D.B Civil Writ (PIL) Petition No 4777 of 2005 (High Court of Rajasthan).

Chameli Singh v State of U.P (1996) 2 SCC 549.

Ekta Shakti Foundation v Government of NCT of Delhi Writ Petition (civil) 232 of 2006.

Francis Coralie v Administrator, Union Territory of Delhi and Others (1981) 1 SCC 608.

People's Union for Civil Liberties vs Union of India & Others Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001 (Supreme Court of India).

Pradeep Pradhan v State of Orissa and Others CRLMC No 597 of 2008 in G.R. Case No168 of 2005 (High Court of Orissa).

Sh. Ved Prakash Gupta v State of Punjab & others <<http://www.hrln.org/hrln/right-to-food/pils-a-cases/569-sh-ved-prakash-gupta-vs-state-of-punjab-a-others-.html>> (accessed 1 May 2018).

Shantistar Builders v Narayan Khimalal Totame (1990) 1 SCC 520

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001).

Sri Kaheka Pralo v The State of Arunachal Pradesh Writ Petition (Civil) Appeal No 376 of 2012 (High Court of Gauhati).