

# Chapter 56C

## Food

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### 56C.1 Introduction\*

In their seminal book, *Hunger and Public Action*, Jean Drèze and Amartya Sen explore the role of law and legal rights in relation to problems of starvation, hunger and malnutrition.<sup>1</sup> The law is, in the first place, at least partly responsible for these social ills:

The legally guaranteed rights of ownership, exchange and transaction delineate economic systems that can go hand in hand with some people failing to acquire enough food for survival.<sup>2</sup>

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1 J Drèze & A Sen *Hunger and Public Action* (1989).

But, so Drèze and Sen argue, the very complicity of law in starvation, hunger and malnutrition also points to law's role in its solution. For if the law indeed maintains starvation and hunger, the most obvious 'remedy to this problem of terrible vulnerability', is 'to turn towards a reform of the legal system, so that rights of social security can be made to stand as guarantees of minimal protection and survival.'<sup>13</sup>

Despite the fact that there is enough food in South Africa to meet the population's nutritional needs,<sup>4</sup> the 'terrible vulnerability' to which Drèze and Sen refer is disturbingly prevalent. Some 14.3 million people in South Africa are vulnerable to food insecurity.<sup>5</sup> 21.6% of children under nine are stunted, 10,3% are underweight and 3,7% experience wasting.<sup>6</sup> At the same time, South Africa has taken the first step toward the reform of its legal system that Drèze and Sen identify as part of the solution. The Final Constitution<sup>7</sup> entrenches a right of everyone to have access to sufficient food,<sup>8</sup> a right of children to basic nutrition<sup>9</sup> and a right of detained persons to adequate nutrition.<sup>10</sup> These constitutional rights are in the process of being translated into concrete legal claims that the 14.3 million people

\* My thanks to Len de Vries and Etienne Fourie for research assistance, to Annette Christmas and Moeniba Isaacs for answering questions about security of tenure and subsistence fishing and to Stuart Woolman for expert editorial comment. Mistakes are my own.

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2 Ibid at 20.

3 Ibid.

4 Department of Agriculture *Integrated Food Security Strategy for South Africa* (2002) 19–20. See M de Klerk, S Drimie, M Aliber, S Mini, R Mokoena, R Randela, S Modiselle, B Roberts, C Vogel, C de Swardt & J Kirsten *Food Security in South Africa: Key Policy Issues for the Medium Term* (2004) 3:

Despite its comparatively unfavourable natural resource base, [South Africa] is a net exporter of agricultural commodities. Its *per capita* income is high for a developing country. It does not have a tight foreign exchange constraint. It is not landlocked. Its transport infrastructure is generally good ... Clearly, food ought always to be available in South Africa.

5 Food Pricing Monitoring Committee *Final Report* (2003) i (Report relies on data from Statistics South Africa). Food insecurity means that a person does not enjoy regular access to sufficient food.

6 D Labadarios (ed) *The National Food Consumption Survey* (1999) 167–169. *Underweight* indicates a weight-for-age ratio under two standard deviations from the norm; *stunting* a height-for-age ratio under two standard deviations from the norm; and *wasting* (an indicator of severe current malnutrition) a weight-for-height ratio under two standard deviations from the norm.

7 Constitution of the Republic of South Africa Act 108 of 1996 ('Final Constitution' or 'FC').

8 FC s 27(1)(b).

9 FC s 28(1)(c).

10 FC s 35(2)(e).

in South Africa who experience the 'daily terrorism of hunger' can use to secure regular access to sufficient food.<sup>11</sup> This chapter assesses the progress of this South African translation. After first describing how the right to food is protected in international law and is entrenched in the Final Constitution, I provide an overview of existing legislation and case law through which this right has been given effect in South Africa.

## 56C.2 The right to food in International law

International law is an important source for the interpretation of the right to food. This is so not only because FC s 39 requires courts to have regard to international law on the right to food, or because the way in which the right to food is entrenched in the Final Constitution closely tracks the way in which it features in international law. It is, rather, a function of the fact that the right to food is not explicitly protected in other domestic constitutions. As a result, there is very little relevant foreign jurisprudence available.<sup>12</sup>

The right to food is entrenched in a range of international treaties, declarations, resolutions and plans of action.<sup>13</sup> The most important instrument remains the International Covenant on Economic, Social and Cultural Rights ('ICESCR').<sup>14</sup> Article 11 of the ICESCR proclaims a right of everyone to adequate food and to freedom from hunger.<sup>15</sup>

### (a) Content

The United Nations Committee on Economic, Social and Cultural Rights ('Committee on ESCR') — the authoritative interpreter of the ICESCR — describes the content of the right to food in international law as follows:

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- 11 'Address of Constitutional Court Justice Madala' *International Workshop on the Right to Food* (January 2001)(unpublished manuscript on file with author).
- 12 While the right to food is not generally protected in domestic legal systems, it is sometimes recognised indirectly through the interpretation of other rights or application of broader legal norms. In Germany, price control regulations were upheld against a freedom of competition-based constitutional challenge because the State, in terms of the 'social state' principle, was held to be obliged to combat high food prices. See *Milk and Butterfat Case* 18 BVerfGE 315 (1965) 317. In India, the right to basic nutrition has been read into the right to life. See *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516, 529. See also *People's Union for Civil Liberties v Union of India Writ Petition [Civil]* 196 (Supreme Court of India 2002)(Interim orders in case over which Supreme Court retains jurisdiction) available at [www.righttofoodindia.org/mdm/mdm\\_scorders.html](http://www.righttofoodindia.org/mdm/mdm_scorders.html), (accessed on 15 December 2004).
- 13 For a relatively comprehensive list of the different instruments at international law that recognise the right to food, see D Brand 'The Right to Food' in D Brand & CH Heyns (eds) *Socio-economic Rights in South Africa* (2005) 155, 156–163.
- 14 South Africa has signed, but not ratified the ICESCR. It is not legally bound by its specific provisions, but may not act in a way contrary to the general tenor of the document.
- 15 General Comment 12 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Adequate Food' (Article 11 of the Covenant)(20th session, 1999) UN doc.E/C.12/1999/5 ('GC 12') at para 15. This document provides a particularly useful elaboration of the content of the right to food and the duties that it imposes.

The *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; [and] ... the *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>16</sup>

By distinguishing between the availability and the accessibility of food, the Committee recognises that people do not usually go hungry because there is not enough food available. They go hungry because they have no claim to the food that is available.<sup>17</sup> Achieving food security therefore depends both on the existence of a sufficient supply of food and on the ability of people to acquire that food.

*Availability* of food refers to *national food security*. National food security requires (a) the existence of a national supply of food sufficient to meet the nutritional needs of all the people in the country; (b) distribution networks to make this supply physically available to everyone; and (c) the existence of opportunities for production of food by individuals, families and communities for their own use.<sup>18</sup>

*Accessibility* of food, in turn, refers to *household food security*. Household food security requires that people be able to acquire the food that is available or to make use of available opportunities to produce food for own use. This capacity exists if people exercise some entitlement over food or its means of production. That is, they must be able to earn income by selling labour or other commodities which they then, in turn, may use to buy food; or they must have an entitlement to monetary or in-kind social assistance from the State with which they then acquire food; or they must own, or exercise some other form of legal control over, means of food production (land, implements, water etc) so that they can produce food for their own consumption.<sup>19</sup> In the words of the Committee on ESCR:

[A]ccessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food.<sup>20</sup>

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For the right to food to be realised, availability and accessibility of food must be sustainable. Food must be available for and accessible to future generations.<sup>21</sup>

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16 GC 12 (supra) at para 8 (my emphasis).

17 A Sen *Poverty and Famines: An Essay on Entitlement and Deprivation* (1981) 1. See also R Ravindran & A Blyberg (eds) *A Circle of Rights. Economic, Social and Cultural Rights Activism: A Training Resource* (2000) 222; GC 12 (supra) at para 5.

18 GC 12 (supra) at para 12.

19 Drèze & Sen (supra) at 20 ('[C]ommand over food can be established by ... growing food oneself and having property rights over what is grown, or selling other commodities and buying food with the proceeds. The third alternative ... is to receive free food or supplementary income from the state.')

20 GC 12 (supra) at para 13 (GC 12 distinguishes between *economic* and *physical* accessibility. Economic accessibility refers to entitlements self-sufficient people require to gain access to food (income, control of means of food production). Physical accessibility refers to those who are not self-sufficient and have to receive State assistance to gain access to food. The distinction emphasises that States must both facilitate access to food for those who are reasonably self-sufficient and provide food or the means to acquire it directly to those who are not.)

The Committee further emphasises that all persons may claim availability of and access to *adequate food* — food of a certain quality, quantity and nature. This means, in the first place, that people have an entitlement to food that is *nutritionally adequate* — that possesses the requisite amounts and balance of nutrients 'for physical and mental growth, development and maintenance, and physical activity ... in compliance with human physiological needs ... throughout the life cycle.'<sup>22</sup> This definition of adequate food has been leveraged so as to ensure that everyone has access to *safe* food. In short, food must also be free from harmful agents or contaminants.<sup>23</sup> The Committee on CESCR has, finally, read the right to adequate food to embrace an entitlement to food that is *culturally adequate*.<sup>24</sup>

## (b) Duties

The overarching duty that the right to food imposes on states in international law is described in article 2(1) of the CESCR: the duty to take steps, to the maximum of available resources, progressively to achieve the full realisation of the right.<sup>25</sup> This duty mandates conduct rather than result. The State must act in a certain way — such as to ensure that, over time, and within its resource limitations, a sufficient supply of nutritionally adequate, safe and culturally acceptable food is made available and accessible to everyone on a sustainable basis. More specifically, the Committee on ESCR has said this means the right to food must be *respected, protected, and fulfilled*:<sup>26</sup>

- To respect the right to food, the State must refrain from impairing existing access to adequate food. It must, where such impairment is unavoidable, take steps to mitigate its impact. It must likewise refrain from placing undue obstacles in the way of people gaining or enhancing access to food.
- To protect the right to food, the State must take steps to protect people's existing access to food and their capacity to enhance their existing access to food and newly to gain access to food, against third party interference.

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- To fulfil the right to food the State must take steps to create access to food where none exists and to enhance access where it is currently insufficient. The Committee distinguishes between a duty to fulfil as *facilitation* — which

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21 GC 12 (supra) at para 7.

22 Ibid at para 9.

23 Ibid at para 10.

24 Ibid at para 11. The cultural turn of the General Comment fits the willingness of the Committee to view compliance with the Covenant in light of the particular conditions of a country. Adequacy, access, nutrition and safety are simultaneously necessary and relative conditions. They are relative to such factors as climate, endemic disease, prevalent body type of population and traditional dietary patterns. Ibid at para 7; A Eide 'The Right to Adequate Food and to be Free from Hunger' (1999) E/CN 4/Sub 2/1999/12 at para 49.

25 See Committee on ESCR, General Comment No 3, 'The Nature of States Parties' Obligations' (1990) ('GC 3')(Describes duty in general terms.)

26 GC 12 (supra) at para 15.

requires the State to enhance the opportunities for self-sufficient people to gain or to enhance access to adequate food — and a duty to fulfil as *provision* — which requires the State to take steps to make it possible for people who are not self-sufficient to gain access to food. A duty to provide requires the State to supply food directly or to give people the actual means with which to acquire it.

According to the Committee on CESCR, the right to food does not require States to adopt specific measures to achieve its realisation:

The most appropriate ways and means of [respecting, protecting, promoting and fulfilling] the right to adequate food will inevitably vary significantly from one State party to another [and] [e]very State will have a margin of discretion in choosing its own approaches.<sup>27</sup>

States must adopt those measures that will lead to both the availability and accessibility of adequate food under the specific conditions that obtain in their countries. However, States must adopt measures that in some manner address *all* elements of food security.<sup>28</sup> This means that the State must create programmes to ensure: (1) the creation and maintenance of a sufficient supply of food (agricultural production planning and subsidisation, food import and export planning and sustainable management and use of natural and other resources for food production); (2) that standards of nutritional adequacy, safety and cultural acceptability of food are maintained (nutritional supplementation of basic foodstuffs and regulation pertaining to toxicity, storage and handling of foodstuffs); (3) facilitation of access to food (tax zero-rating of basic foodstuffs, food-price monitoring, market regulation, subsidisation or actual price control); (4) provision of food in conditions of deprivation (programmes to provide food directly to disaster victims; food stamp or other social assistance programmes to help indigent people gain access to food); (5) that food policies are informed by meaningful information about the country's nutritional situation; (6) that access to food is not marked by discrimination;<sup>29</sup> and (7) that vulnerable groups secure food even under conditions in which the State faces severe resource constraints.<sup>30</sup>

The Committee suggests that States adopt a 'national strategy'<sup>31</sup> set out in a 'framework law'<sup>32</sup> to achieve the realisation of the right to food. This national strategy should ensure the proper coordination of functions and responsibilities between different sectors and levels in government and must contain measures addressing all issues related to food security identified above.<sup>33</sup> The strategy should

27 GC 12 (supra) at para 21.

28 Ibid at para 25.

29 Ibid at para 26.

30 Ibid at para 28.

31 Ibid at para 21.

32 Ibid at para 29.

33 Ibid at para 22.

also be developed by way of a transparent and participatory political process and should ensure transparency and accountability in its implementation.<sup>34</sup>

As we have already seen, the States' duty to achieve the realisation of the right to food under the ICESCR is subject to the proviso that it need be done only 'progressively' and 'to the maximum of available resources'. These two conditions on the duty ensure that the intended beneficiaries of the right cannot assert a legal claim to a good that simply does not exist. However, in article 11, by referring both to a right to adequate food and a right to freedom from hunger, the ICESCR distinguishes two different kinds of duties that flow from two different kinds of deprivation. The first engages inadequate access to food. The second addresses hunger as starvation.<sup>35</sup> The Committee on ESCR has made clear that the duty to avoid hunger as starvation takes priority. The failure to meet this duty will attract heightened scrutiny. The Committee writes that:

when a state fails to ensure the satisfaction of the minimum essential level required to be free from hunger [it] has to demonstrate that *every effort* has been made to use *all the resources at its disposal* to satisfy, *as a matter of priority*, those minimum obligations.<sup>36</sup>

### 56C.3 The right to food in the final constitution

The right to food appears in three different provisions in the Final Constitution. FC s 27 reads, in relevant part: '(1) Everyone has the right to have access to ... sufficient food ... and water; and (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right[s].' FC s 28 reads in relevant part: '(1) Every child has the right ... to basic nutrition.' FC s 35 reads in relevant part: '(2) Everyone who is detained, including every sentenced prisoner, has the right ... (e) at state expense, ... [to] adequate ... nutrition.'

#### (a) Content

The right to food is protected in the same way as the other socio-economic rights in the Final Constitution. The right does two things.

First, it creates duties. All three food-related provisions are given content by FC 7(2). The State must 'respect, protect, promote and fulfil' them. As at international law, this requirement means that the State must refrain from interfering

34 GC 12 (supra) at paras 23 and 24.

35 This distinction tracks that made in a scientific context between *nutritional deprivation* (a condition of not receiving enough food to avoid stunting, wasting and other serious health risks) and *under-nourishment* (a condition of not receiving enough food to live a normal, active working life, without, however, facing serious and long-term health risks). See Drèze & Sen (supra) 35. This is — politically, ethically and analytically — a difficult distinction to make. See K Van Marle 'No Last Word' — Reflections On The Imaginary Domain, Dignity and Intrinsic Worth' (2002) 13 *Stellenbosch LR* 307; Drèze & Sen (supra) 35–45.

36 GC 12 (supra) at para 17 (my emphasis).

with the exercise of these rights, must adopt measures to protect against interference in the exercise of the rights by private sources, and must take steps to extend access to them to everyone.<sup>37</sup>

Second, it creates standards of justification or standards of scrutiny. When it is shown that the State has violated the duties imposed by the right to food — that, for example, it has interfered with existing access to food; that it has failed adequately to protect against interferences in access to food; or that it has taken insufficient steps to fulfil the right to food — the state must justify its conduct. The right to food then poses a standard of scrutiny that courts use to assess the justification proffered by the State.

Depending on which of the three food-related provisions and which of the duties to respect, protect, promote and fulfil are at issue, the standard of scrutiny that the State is required to meet in this respect will vary. In principle, a failure by the State to meet any of the four different duties in respect of any of the three rights is subject to the proportionality standard of scrutiny in terms of FC s 36(1), the general limitation provision.<sup>38</sup> However, with respect to the latter three of the s 7(2) duties (the 'positive' duties to protect, to promote and to fulfil the right to food as opposed to the 'negative' duty to respect), FC s 27(1)(b) — the right of everyone to sufficient food — offers only a *qualified* right. FC s 27(2) states that in order to comply with the duties to protect, promote and fulfil the FC s 27(1)(b) right, the State must take *reasonable steps, within available resources, to achieve the progressive realisation* of the right of everyone to have access to sufficient food. This qualification has been interpreted by the Constitutional Court — in the context of the rights to adequate housing,<sup>39</sup> health care services<sup>40</sup> and social assistance<sup>41</sup> — as an internal limitation, applying to the duties to protect, promote and fulfil the rights in question. This means that, should the State fail to protect, promote or fulfil a socio-economic right subject to this internal limitation (a right such as the FC s 27(1)(b) right of everyone to have access to sufficient food), its conduct must be justified in terms of a special reasonableness test, distinct from the FC s 36(1) standard of justification. This 'reasonableness' standard of justification usually operates at the intermediate level of a means-end effectiveness test,<sup>42</sup> rising

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37 GC 12 (supra) at para 15. See § 56C.2(b) supra.

38 Proportionality analysis requires that the public interest advanced by the limitation of a right be weighed up against the harmful impact the limitation has on the general exercise of the right and the claimants before the court and that a court consider whether means are available to achieve the purpose of the limitation that are less restrictive of the right and the interests of the claimants. See, generally, S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition OS, August 2005) Chapter 34.

39 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('Grootboom').

40 *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('TAC').

41 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('Khosa').

42 *Grootboom* (supra) at paras 39–45; *TAC* (supra) at paras 38 and 123. See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC), 1997 (12) BCLR 1696 (CC) ('Soobramoney') at paras 27 and 29 (Court applied an even more lenient rationality standard of scrutiny.)

only in exceptional cases to the level of a proportionality inquiry.<sup>43</sup> As a rule, this reasonableness standard does not allow courts to prescribe specific measures to the state to remedy its breach of the socio-economic right in question. However, the courts can, and must, require the State to put in place a comprehensive programme that is capable of achieving the realisation of the rights in question over time, subject to the resources at the State's disposal.<sup>44</sup>

The duties to protect and to promote and fulfil the FC s 28(1)(c) nutritional rights of children and the FC s 35(2)(e) nutritional rights of detainees, by contrast, are not subject to the same internal limitation as the FC s 27 right of everyone to have access to sufficient food. FC ss 28(1)(c) and 35(2)(e) are unqualified. The absence of an internal limitation in these rights leaves the impression that the duties to protect, promote and fulfil in respect of these rights are more direct than those found in FC s 27 right of everyone. These two rights appear to entitle individuals to claim specific, concrete relief from the state. But appearances may be deceptive. While FC ss 28(1)(c) and 35(2)(e) may not be subject to an internal limitation test (such as that required by FC s 27(1)(c)), the State will still have an opportunity to justify the laws or conduct intended to discharge its duties under the proportionality test grounded in FC s 36(1). The absence of the internal limitation simply means that a failure by the State adequately to protect and to promote and fulfil the nutritional rights of children and of prisoners is, as a rule, subject to a higher standard of scrutiny than is a failure to protect, promote or fulfil the right of everyone to sufficient food. Put slightly differently, the absence of an explicit fiscal out in FC ss 28(1)(c) and 35(2)(e) means that the State will have greater difficulty in justifying any *prima facie* infringement of the right to basic nutrition of children or the right to adequate nutrition of prisoners.<sup>45</sup>

The two-stage analysis that applies to the positive State duties in FC ss 28(1)(c) and 35(2)(e) applies also to the 'negative' duties to respect *all* three food-related rights in FC ss 27(1) 28(1)(c) and 35(2)(e). The negative duty to respect grounded

in FC s 27(1) is not subject to FC s 27(2)'s internal limitation. If the state fails to comply with that duty, then it must satisfy the more stringent requirements of FC s 36(1).<sup>46</sup>

43 See *Khosa* (supra) at paras 65 and 82. The Constitutional Court confirmed a High Court ruling that the exclusion of permanent residents from social assistance benefits violated the right to have access to social assistance, FC s 27(1)(c). The measures were found unreasonable because the purpose of the exclusion (to prevent people immigrating to South Africa from becoming a burden on the State) could be achieved through means less restrictive of permanent residents' rights (stricter control of access into the country) and because 'the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has far outweighs the financial and immigration considerations on which the state relies.' *Ibid* at para 82.

44 *Grootboom* (supra) at para 41; *TAC* (supra) at para 38; *Khosa* (supra) at para 43.

45 The absence of an internal limitation in FC ss 28(1)(c) and 35(2)(e) places the onus on the state to make its case for justification of its conduct. It must demonstrate that it does not have the requisite resources with which better to give effect to the right in question. Where a FC s 27(2) type of internal limitation applies, however, the onus remains on the claimant to show that the state's conduct is unjustifiable, and particularly to show that the state has the requisite resources to give effect to the right in question.

## (b) Duties and violations

The concrete legal duties that the Final Constitution's nutritional rights impose on the State and others and the concrete entitlements it creates for poor people can most usefully be elucidated by following the framework established in FC s 7(2). FC s 7(2) identifies duties to respect, to protect and to promote and to fulfil the rights found in chapter 2. An overview of the various existing statutory and other entitlements that give expression to these duties, together with an indication of the instances in which these duties are *prima facie* infringed, illustrate the different ways in which the right to food can be used as a practical legal tool.

Apart from the three food-related constitutional rights, the right to food is given little explicit expression in our law. The reason for this may be the extent to which the right to food is inextricably linked with other rights. The right to food both depends on and makes possible the enjoyment of other rights, and other rights can be used to protect or advance the enjoyment of the right to food.<sup>47</sup> To acquire food, one needs access to land, to education, to employment and income generation and, in some instances, to social security or assistance. Food does not, in our day, just fall from trees. It has to be produced or acquired through exchange. The ability to produce food or to acquire it through exchange depends on realising these other rights to land, education, employment and social security. Similarly, research has shown that a person's ability to be nourished by food physically acquired and ingested 'depends crucially on characteristics of a person that are influenced by such non-food factors as medical attention, health services, basic education, sanitary arrangements, provision of clean water [and] eradication of infectious epidemics.'<sup>48</sup> So, a person suffering from a simple disease such as diarrhoea, caused by contaminated water, is unable to ingest the nutrients and calories of food eaten. The right to food is thereby compromised by deficiencies in the realization of the right to water. A person who suffers from malaria requires, among other things, additional quantities of iron. State failures in the

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provision of health care that result in extended malaria morbidity thereby undermine State efforts intended to provide access to sufficient food. Likewise, state failure with respect to the provision of education will result in people being unable to obtain the full benefit of food acquired because they lack the requisite knowledge about optimal storage and preparation of food. The right to equality and the prohibition on unfair discrimination (FC s 9) and the administrative justice rights (FC s 33) are also

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46 *Jaftha v Schoeman* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) ('*Jaftha*') at paras 32-34.

47 Although rights are often characterized as interdependent, the right to food is particularly dependent upon the interpretation and realization of other socio-economic rights. Eide notes a trend in international law to see the right to food, with the rights to education and health care, as elements of a broader right to nutrition, which is again a component of a right to an adequate standard of living. See Eide (*supra*) at para 44. In the Convention on the Rights of the Child (CRC), the right to food is not guaranteed as a free-standing right, but in conjunction with the rights to health care and education. Article 24(2)(c) requires State Parties to take 'measures to combat disease and malnutrition, including ... the provision of nutritious foods...' Article 24(2)(e) requires State Parties to ensure that 'parents and children are informed about child health and nutrition.' In most international documents the right to food is an element of the right to an adequate standard of living. See, eg, ICESCR, Article 11(1).

48 Drèze & Sen (*supra*) at 13.

essential bulwarks for the protection of our right to food.<sup>49</sup> In short, the conditions necessary for the vindication of the right to food are often embedded in the conditions necessary for the vindication of other rights. As a result, the violation of the right to food is often inseparable from the violation of a range of other rights.

### **(i) The duty to respect the right to food**

The duty to respect the right to food requires the State to refrain from impairing people's existing access to adequate food. When such impairment is unavoidable, the State must take steps to mitigate its impact. In addition, it must not place obstacles in the way of people newly gaining access or enhancing existing access to food.

#### **(aa) Refraining from impairing existing access to food**

In *SERAC*, Nigerian military forces attempting to quell community opposition to uncontrolled development of oil fields intentionally destroyed crops and killed animals in attacks on Ogoni villages.<sup>50</sup> This wanton destruction led to malnutrition and starvation. Having found that the right to food can be read into the right to life in the African Charter on Human and Peoples' Rights (ACHPR) the African Commission found that these actions violated the duty to respect the right to food of the Ogoni people.<sup>51</sup> The intentional destruction of food as a weapon of war to effect starvation is an unjustifiable infringement of the right to food that is not likely to occur often in South Africa.<sup>52</sup>

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The duty to respect the right to food is more often violated indirectly. The State interferes with the entitlements that people use to produce food, thus making it impossible, or very difficult, for people to continue producing food. South Africa's apartheid history provides a particularly pointed and pernicious example of such interference. Segregationist 'homeland' policies, dispossession, forced removals from productive agricultural land, and overcrowding in 'native reserves' or 'homelands' unsuited to agricultural use and particularly unsuitable for subsistence farming meant that people who were once food self-sufficient were rendered food insecure.<sup>53</sup> Recurrence of this kind of large-scale interference by the State in people's access to the resources with which to produce food is unlikely. Indeed, the statutory measures

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49 See *Khosa* (supra) at para 42 (On the intersection between equality and socio-economic rights.)

50 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* African Commission, Communication 155/96 (1996) ('*SERAC*'). See C Mbazira 'Reading The Right to Food into the African Charter on Human and People's Rights' (2004) 5(1) *ESR Review* 5.

51 *SERAC* (supra) at paras 64–66. Intentional use of starvation as a weapon of war is a crime in international law. See, eg, Article 8(2)(b)(xxv) of the Rome Statute of the International Criminal Court (1998). *SERAC* also stands for the proposition that a violation of the duty to respect the right to food can occur as a result of the destruction of the means for and environment conducive to the production of food. First, Nigerian forces destroyed farmland and implements. *Ibid* at para 9. Second, the Nigerian government participated in irresponsible development of oil fields, '[poisoning] much of the soil and water upon which ... farming and fishing depended'. *Ibid*. The African Commission found that both the military's destruction of the means for food production and the government's wilful neglect violated the duty to respect the right to food. *Ibid* at para 66.

52 Intentional destruction of food was last used as a weapon of war in South Africa during the Anglo-Boer War. British forces instituted a 'scorched earth' policy, systematically destroying herds, crops, food stores and farmsteads to deprive Boer fighters of food and other resources.

in terms of which these dispossessions occurred have been repealed and new legal measures have been put in place to prevent such a recurrence. (The legacy of such displacement remains.)

Although the best examples of these new legal measures focus explicitly on protecting property rights or housing and security of tenure rights rather than the right to food, they can be, and in some cases have already been, developed by courts to operationalise the duty to respect the right to food. Dispossession of land by the State can now only occur within the limits of FC s 25, through regular expropriation, for a public purpose, following the payment of 'just and equitable' compensation, the amount, and time and manner of payment of which must be determined after all relevant circumstances have been considered.<sup>54</sup> In those cases where a dispossession of land used for subsistence farming is unavoidable, an argument can be made that the fact that the land was used to exercise the constitutional right to food is a circumstance that is eminently relevant to the determination of the amount of 'just and equitable' compensation. This line of argument is illustrated by the interpretation the Land Claims Court has given to elements of the compensatory framework established in the Restitution of Land Rights Act (Restitution Act).<sup>55</sup> Section 2(2) of the Restitution Act states that a claim for the restitution of land rights will only be successful if the claimant can show it did not receive just and equitable compensation at the time of the dispossession. In *In Re Kranspoort Community*, the validity of a restitution claim in terms of the Restitution Act was challenged on the grounds that the claimant community had been adequately compensated for its loss of rights in land at the time of dispossession.<sup>56</sup> The *Kranspoort* Court found that the compensation that was received covered only improvements to the land and not the loss of 'beneficial occupation'. The community's loss of grazing and cultivation rights — their entitlements to food — had not been compensated. As such the compensation was not 'just and equitable'.<sup>57</sup>

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In addition, eviction of people from State land, or by the State from private land, is heavily regulated by a raft of new laws that seek to improve security of tenure for people exercising informal rights to land. These laws are intended to protect both the right to housing and the right to use land as a resource with which to produce food and generate income against State interference. The two most important examples of such legislation in the context of State-owned land and State-sponsored eviction are the Extension of Security of Tenure Act (ESTA)<sup>58</sup> and the Prevention of

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53 On this history's impact on black farmers' capacity to produce food for own use, see, in general, C Van Onselen *The Seed is Mine: The Life of Kas Maine, a South African Sharecropper, 1886-1914* (1996).

54 FC ss 25(2) and (3). The Expropriation Act further regulates expropriation. Act 63 of 1975.

55 Restitution of Land Rights Act 22 of 1994.

56 *In Re Kranspoort Community* 2000 (2) SA 124 (LCC) ('*Kranspoort*').

57 *Ibid* at para 78.

58 Act 62 of 1997. ESTA applies to rural land occupied with the tacit or explicit consent of the owner or person in charge. See ESTA, s 2(1). For the definitions of 'occupier' and 'consent', see ESTA, s 1.

Illegal Eviction from and Unlawful Occupation of Land Act (PIE).<sup>59</sup> These laws protect informal rights of residence and use of land. They do so by making eviction from land in certain instances more difficult than it would ordinarily be. They require, amongst other things, that a court, before granting an eviction order, consider whether an eviction would be just and equitable in light of all relevant circumstances.<sup>60</sup> Although neither ESTA nor PIE state this explicitly, where the land in question is used to produce food, the exercise of this discretion by a court should surely include a consideration of the extent to which the granting of an eviction order would deleteriously affect the exercise by the evictee of the constitutional right to food.<sup>61</sup> Indeed, some of the factors to be taken into account when making an ESTA or PIE assessment engage circumstances in which occupiers use land to produce food. For example, ESTA s 8(1)(c) requires courts to consider the comparative hardship to the owner or person in charge and the occupier before rendering a decision as to whether or not occupation rights were lawfully terminated.<sup>62</sup> If 'hardship' encompasses 'the impairment of access to sufficient food,' then ESTA can be deployed to ensure that the duty to respect any existing exercise of the right to food is discharged.

People's ability to produce food for their own use and for sale was, under Apartheid, diminished in more insidious ways than dispossession and eviction. The statutory prohibition on sharecropping — a practice in terms of which black farmers were allowed by white landowners to cultivate part of their land in return for a share in the resultant crop — denied to black farmers and their families

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access to existing stocks of food and blocked any efforts they might have undertaken to enhance those stocks.<sup>63</sup> Regulation of the South African fishing industry in the apartheid era operated in such a way that subsistence fishing was

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59 Act 19 of 1998. PIE applies to all land, including State-owned land. See PIE, ss 6 and 7. See also the Land Reform (Labour Tenants) Act 3 of 1996 (Labour Tenants Act). The Labour Tenants Act, s 1, applies to rural land occupied and used in terms of a labour tenancy agreement. This Act will, in practice, not apply to State land. Labour tenancy agreements are usually with private landowners. ESTA, PIE and the Labour Tenants Act also regulate private evictions and as such give effect to the duty to protect the right to food. See § 56C.3(b)(ii)(aa) *infra*.

60 See ESTA, ss 8(1) and 11(1), (2) and (3); PIE, ss 4(6) and (7), 5(1)(b) and 6(1) and (3).

61 The relevant factors identified in PIE and ESTA for a decision as to whether the termination of an occupier's residence was lawful or an eviction order should be granted do not constitute a closed list.

62 See also ESTA s 9(3) (Requires a court, under some circumstances, to consider a report of a probation officer that must, amongst other things, indicate how an eviction will affect the constitutional rights (which would presumably include the right to food) of the occupier, before granting an eviction order.) See also *City of Cape Town v Rudolph* 2004 (5) SA 39 (C) at para 48 (Selikowitz J describes the discretion to grant an eviction order that PIE affords a court as 'wide and open' and goes further to say that the 'circumstances to be taken into account by the court ... are also wide-ranging.')

63 See Van Onselen (*supra*) at 167. The prohibition on share-cropping was, at least at first, not very successful. Because share-cropping arrangements worked to the benefit of both black (property-less) and white (propertied) farmers, they remained in wide-spread use. However, the prohibition did have another less obvious, but, in practical terms, very serious effect. It meant that, in cases where white farmers reneged on share-cropping agreements, black farmers could not, as they could have previously, rely on the law to enforce the agreements.

effectively prohibited.<sup>64</sup> This violation of the duty to respect the right to food in apartheid South Africa has seen recent redress. In 1998, the Marine Living Resources Act (MLRA)<sup>65</sup> was adopted. One of the purposes of the MLRA was to regularise the position of subsistence fishers through the so-called Individual Transferable Quotas (ITQ) system. The ITQ system makes provision for licenses for subsistence fishers.<sup>66</sup> However, despite its laudable aims with respect to subsistence fishers, the MLRA's implementation has been beset with problems. First, after an initial allocation of licenses for subsistence fishing, the annual allocation process, due to administrative backlogs, was postponed a number of times. No quotas were allocated for those years.<sup>67</sup> Second, due to a combination of factors, including influence peddling in the award of quotas; the relatively high costs and complex procedures involved in the application process and government's tendency to favour access for larger commercial enterprises, people who have been subsistence fishers all their lives have been unable to obtain quota access.<sup>68</sup> The State's execution of the MLRA and its attendant interference with the right of subsistence fishers to acquire food from the sea can, therefore, be characterised as a *prima facie* violation of the duty to respect the right to food.

### **(bb) Mitigating the impact of interferences in the exercise of the right to food**

The duty to respect the right to food does not constitute an absolute bar on State interference with existing access to food. The State must often interfere in food-rights entitlements in order for it to achieve some other important public purpose.

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In such cases, the duty to respect requires that an effort be made to mitigate the effect of the interference in the exercise of the right to food. The security of tenure laws referred to above provide a good example of how this constitutional duty has been translated into a statutory entitlement. The laws, in some instances, require courts to consider to what extent suitable alternative land is available for evictees before granting an eviction order. An eviction order can be denied if such an

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64 Subsistence fishers operated in a legal vacuum. No quota category existed for subsistence fishing and subsistence fishers had to obtain recreational or commercial licences to operate legally. Both options were out of their reach. See E Witbooi 'Subsistence Fishing in South Africa: Implementation of the Marine Living Resources Act' (2002) 17 *Int J of Marine and Coastal Law* 431, 432. As with the prohibition of share-cropping this meant both that subsistence fishers operated illegally and that they could not rely on the law to protect their fishing against interference. Subsistence fishing is a form of direct food entitlement for a small but significant proportion of South Africa's population: 30 000 fishers depend on subsistence fishing to survive, and at least another 30 000 depend on subsistence fishing in combination with seasonal commercial employment. See J Sunde 'On the Brink' (2003) 12 *SPC Women in Fisheries Information Bulletin* 30, 30.

65 Marine Living Resources Act 18 of 1998.

66 M Isaacs 'Subsistence Fishing in South Africa: Social Policy or Commercial Micro-Enterprise?' (2001) 3(2) *Commons Southern Africa* 20.

67 Although exemptions from the regulatory scheme were awarded for those years, the exemptions were granted only after fishers resorted to civil disobedience. *Ibid* at 21-22. See also Witbooi (*supra*) at 436-437.

68 Sunde (*supra*) at 31.

alternative is absent.<sup>69</sup> Suitable alternative land is, in one instance, defined as land that is suitable with regard to the needs of occupiers for both residential and agricultural use.<sup>70</sup> The laws thereby give expression to the duty of the State to mitigate its interference with existing access by providing alternative modes of access to food.

### **(cc) Removing obstacles in the way of the exercise of the right to food**

The duty to respect the right to food is violated if the State makes it difficult or impossible for people to gain access to food or to enhance their existing access to food. In *Mashavha v The President of the Republic of South Africa*,<sup>71</sup> the Constitutional Court confirmed a High Court order invalidating a presidential proclamation<sup>72</sup> assigning the administration of the Social Assistance Act (SAA)<sup>73</sup> to provincial governments. Mr Mashavha, an indigent, permanently disabled person, had applied for a disability grant to the Limpopo provincial Department of Health and Welfare in October 2000. After approximately four months he was told that he had been awarded the grant and could start collecting it from the Department's payment offices. However, despite his efforts, the grant was never paid. Only after Mr Mashavha initiated legal action against the Department was the grant finally paid out — on 25 January 2002. Even then, the Department refused to pay the amount owed from the date of the award.<sup>74</sup> Mr Mashavha contended that, had it not been for the assignment of the administration of the SAA to the provinces, his grant would have been approved and paid out to him within a reasonable time. The payment of the grant would have been serviced by an efficient, standardised and adequately resourced national administration rather than the inadequate administration of the Limpopo Department of Health and Welfare. Nor would the grant have had to compete with 'potential demands for the reallocation of social assistance monies to other [provincial] purposes.'<sup>75</sup> Although the presidential proclamation was found constitutionally infirm only

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with respect to the competency to make the assignment,<sup>76</sup> the case is very much about Mr Mashavha's constitutional rights to social assistance and to food. Mr Mashavha and his dependents relied on the regular and efficient payment of his

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69 See ESTA, ss 9(3)(a), 10(2) and (3) and 11(3); PIE, s 6(3)(b).

70 See ESTA, s 1 (Definition of 'suitable alternative accommodation'.)

71 *Mashavha v The President of the Republic of South Africa* 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) ('Mashavha').

72 Proclamation R7 of 1996, *Government Gazette* 16992 GN R7, 23 February 1996. The assignment was made in terms of s 235 of the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

73 Social Assistance Act 59 of 1992.

74 See *Mashavha* (supra) at para 9.

75 *Ibid* at para 10.

disability grant for their 'daily sustenance and well-being.'<sup>77</sup> In the absence of employment, the disability grant was their only means to acquire food. The administrative inefficiency that bedevilled its payment constituted an obstacle to the exercise of the right to food.<sup>78</sup> The *Mashavha* Court's ruling supports the proposition that the State must give effect to the duty to respect the right to food by removing an impediment to its effective exercise.

## **(ii) The duty to protect the right to food**

The duty to protect the right to food requires the State to protect the existing enjoyment of this right. The capacity of people to enhance their enjoyment of this right or to gain access to the enjoyment of this right depends on the ability of the State to prevent third party interference.

### **(aa) Legislative and executive measures**

The State can give effect to the duty to protect the right to food by regulating, through legislation or executive/administrative decisions, the manner in which private entities participate in the production, storage and transfer of food. The State must regulate these activities in such a manner, as to enhance everyone's access to food.

One such form of regulation is price regulation. The State either sets a maximum price that may be charged by private producers and retailers for basic foodstuffs to ensure that basic foodstuffs remain reasonably affordable, or introduces other measures to ensure food price stability.<sup>79</sup> The price of a standard loaf of bread used to be regulated in this way in South Africa. However, a general drive towards the deregulation of agricultural markets has seen this protective measure fall away. The result is instructive. In the absence of regulation there

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has been a 'hidden price rise' in bread. Although the price per loaf in rand remained relatively stable in the period 1990 to 2001, both the weight and quality of the standard loaf deteriorated to such an extent that the real price per gram rose 293% in the same period.<sup>80</sup>

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76 *Mashavha* (supra) at para 1.

77 *Ibid* at para 9.

78 The extent to which access to social assistance and access to food are directly linked and the lack of access to a social assistance grant translates into the lack of access to food has been demonstrated by a number of studies. See M Chopra, N Sogaula, D Jackson, D Sanders, N Karaolis, A Ashworth & D McCoy 'Poverty Wipes Out Health Care Gains' (2001/02) 6(4) *ChildrenFirst* 16. It has also been estimated that social assistance grants close the 'poverty gap' (the gap between a grantee's household income and the subsistence income line) by an average of 23%. See Department of Social Development *Transforming the Present — Protecting the Future: Report of the Commission of Enquiry into a Comprehensive System of Social Security for South Africa* ('Taylor Commission') 59.

79 Measures to introduce or maintain stability in food prices (including stock-piling of food reserves), and direct interventions in the food trade sector such as requiring grain traders to report regularly on realised and planned imports) combined with accurate systems of crop estimates could contribute to stabilising food markets.

Another form of regulation that enables the State to protect access to adequate food against the depredations of profit-oriented free-market players is through standard setting in respect of the safety and the nutritional value of food. The Foodstuffs, Cosmetics and Disinfectants Act (FCDA) regulates fungicide and pesticide residue and additive and preservative levels in food by setting minimum and maximum standards and creating mechanisms for the monitoring of these levels in foodstuffs.<sup>81</sup> South Africa has also recently introduced mandatory micronutrient fortification of certain basic foodstuffs.

A final form of food-protection regulation is manifest in statutory safeguards of informal tenure rights. As I noted above, PIE, ESTA and the Labour Tenants Act protect informal rights to land as a resource for food production against private interference in the same way as they protect these rights against the State: by making eviction more difficult than it would otherwise be through imposing additional procedural and substantive safeguards that have to be met before an eviction order can be granted by a court.<sup>82</sup> In this way, a small but significant constituency have their access to food protected.<sup>83</sup>

The duty of the State to protect the right to food through the regulation of private conduct does not only require it to create a regulatory framework. It must also implement and enforce that framework effectively.<sup>84</sup> Concerns have recently been raised about the extent to which the FCDA is effectively enforced. Studies indicate that the required monitoring is not taking place and that the standards created in the Act are not applied.<sup>85</sup> Similar concerns have been articulated with respect to the effectiveness of security of tenure legislation in rural areas. Critics of government efforts with respect to land tenure cite a host of infirmities in South Africa's regulatory scheme: complicity between magistrates, police, and private landowners; disregard for the law by landowners; the absence of legal aid in rural areas; and the absence of alternative accommodation on farms, in

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80 E Watkinson & N Makgetla *South Africa's Food Security Crisis* (2002) 4, 13.

81 Act 54 of 1972.

82 See § 56C.3(b)(i) and (ii) *supra*.

83 600 000 people in South Africa depend on farming as their main source of food. A further 1 million use farming to supplement other means of obtaining food. See Watkinson & Makgetla (*supra*) at 2. See also Magistrates' Courts Act 32 of 1944, s 67(c) (Prohibits the attachment and sale in execution to satisfy a judgment debt of the 'stock, tools and agricultural implements of a farmer' and so protects the capacity of a subsistence farmer to produce food against interference from creditors.)

84 See *Grootboom* (*supra*) at para 42 (Constitutional Court held that '[a]n otherwise reasonable programme [to give effect to a socio-economic right] that is not implemented reasonably will not constitute compliance with the State's obligations.')

85 Watkinson & Makgetla (*supra*) at 5. They attribute the deterioration in the weight and quality of standard bread partly to the lack of effective enforcement of regulations. *Ibid* at 4.

municipal housing projects or other available land distribution programmes.<sup>86</sup> Such systemic failures to implement regulatory measures intended to protect people's right to land tenure security create the conditions for food insecurity and further reflect the State's failure to discharge its duty to protect the right to food.

### **(bb) The judiciary**

The courts can protect the right to food in two ways.

In the first place, the courts can protect the right to food by insulating State measures to give effect to the right to food against legal challenge based on other constitutional or statutory rights. This protective role of the courts is on display with respect to the right to adequate housing in *City of Cape Town v Rudolph*. In this case, the Cape High Court rejected a property-based constitutional challenge to PIE. The *Rudolph* Court held that although the law infringed property rights, the State was justified in enacting the legislation because the Final Constitution required it, or at least authorised it to do so.<sup>87</sup> With respect to the right to food, the German Federal Constitutional Court ('FCC') rejected a challenge to legislation that regulated the price and the sale of drinking milk.<sup>88</sup> This legislation - intended both to keep the price of drinking milk at an affordable level and to ensure that the dairy industry survived over-production - restricted the price of drinking milk and limited the sale of drinking milk to the region in which it was produced.<sup>89</sup> Dairy suppliers and dairies challenged the regulatory scheme on the basis that it infringed their freedom of competition. The German Constitutional Court rejected the challenge on the grounds that milk was a basic foodstuff and that the good of the commonwealth required its price be kept at an affordable level. The FCC identified the dairy sector as a national asset. This finding justified the control of the sale of milk and the imposition of a special tax that invariably

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restricted the freedom of competition. The FCC's ruling can be read as an affirmation of the existence of an implicit right to have access to adequate food on a sustainable basis.<sup>90</sup>

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86 E Lahiff 'Land Reform in South Africa: Is It Meeting the Challenge?' (2001) 1 *PLAAS Policy Brief* 2.

87 See G Budlender 'Justiciability of Socio-Economic Rights: Some South African Experiences' in Y Ghai & G Cottrell (eds) *Economic, Social And Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) 33, 36. See also *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) (State decision, taken in exercise of the constitutional duty to provide access to adequate housing, to house temporarily destitute flood victims on the grounds of a prison outside Johannesburg, was challenged by surrounding property owners as a violation of administrative justice rights. The Court rejected the challenge, albeit without any direct reliance on the State's duty to protect the right to have access to adequate housing.)

88 18 *BverfGE* (supra) at 317.

89 The price of processed dairy products was not similarly restricted and milk intended for processed dairy products could be sold and bought freely across Germany. The effect of increasing surplus production of milk in this unequally regulated industry was that prices for processed dairy products were significantly lower than prices for drinking milk. To offset this disadvantage for suppliers and dairies selling milk for processed dairy products, suppliers and dairies selling drinking-milk were required to pay a special tax.

Courts can protect the right to food in another manner. South African courts are constitutionally obliged to interpret legislation or develop rules of common law so as to promote the 'spirit, purport and objects' of the Bill of Rights.<sup>91</sup> Access to food in a private ownership economy is centrally determined by 'a [statutory and common law] system of legal relations (ownership rights, contractual obligations, legal exchanges, etc).<sup>92</sup> Quite literally, 'the law stands between food availability and food entitlement.'<sup>93</sup> As a result, the constitutionally informed law-making role of courts is potentially an extremely important way in which the protection of the right to food can be advanced.

The interpretation of legislation offers manifold opportunities for such advancement. Courts have, for example, extended the scope of protection afforded by ESTA and the Labour Tenants Act.<sup>94</sup> They have found that various forms of interference with food production activities constitute evictions that have to comply with the stringent procedural and substantive safeguards imposed by these laws. In *Ntshangase v The Trustees of the Terblanché Gesin Familie Trust*, the Land Claims Court held that when a property owner prevents an occupier from accessing grazing lands and a watering hole on his property that the occupier had previously used for her cattle, it constitutes an eviction for purposes of ESTA.<sup>95</sup> In respect of the Labour Tenants Act, the Land Claims Court, in *Van der Walt v Lang*,<sup>96</sup> held that where a property owner had previously allowed an occupier to graze a certain number of cattle on his land, a subsequent restriction of the number of cattle allowed constituted an eviction subject to the Act's safeguards. Similarly, in *Zulu v Van Rensburg*<sup>97</sup> the Land Claims Court held that impounding the cattle of an occupier constituted an eviction that had to comply with the Act's safeguards.<sup>98</sup>

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90 See E de Wet 'Can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?' (1995) 11 *SAJHR* 30, 38.

91 FC s 39(1).

92 Sen (supra) at 166.

93 Ibid.

94 See §§ 56C.3.3(a)(i) and (ii), and (b)(i) supra.

95 *Ntshangase v The Trustees of the Terblanché Gesin Familie Trust* [2003] JOL 10996 (LCC) ('*Ntshangase*') at para 4.

96 *Van der Walt v Lang* 1999 (1) SA 189 (LCC) ('*Van der Walt*') at para 13.

97 *Zulu v Van Rensburg* 1996 (4) SA 1236 (LCC), 1259 ('*Zulu*').

98 The Land Claims Court has interpreted the term 'rights in land' in the Restitution of Land Rights Act to include 'beneficial occupation'. As a result, the long term use of land for grazing and cultivation purposes also constitutes a right in land that can be reclaimed. See, eg, *Kranspoort* (supra) at para 78.

The Constitutional Court in *Jaftha v Schoeman* suggested some new directions for court-sponsored development of statutory law. The *Jaftha* Court was asked to consider the constitutionality of provisions of the Magistrates' Courts Act<sup>99</sup> that

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allowed, where sufficient movables could not be found, the sale in execution of the immovable property, including the home, of a debtor to satisfy a judgment debt. To protect the right of everyone to have access to adequate housing, the Court, through a combination of statutory construction and reading words into the Act, changed the Act in such a way that a judgement debtor's home can now only be sold in execution if a court has ordered it after considering all relevant circumstances.<sup>100</sup> The holding in *Jaftha* is limited to the protection of a judgment debtor's home in the context of the right to have access to adequate housing. However, in future cases, in which a creditor seeks the sale in execution of immovable property that a judgment debtor uses to produce food, the courts can extend the reasoning in *Jaftha* to make any sale of immovable property contingent upon the ability of the debtor to exercise his or her right to food.<sup>101</sup> Such extensions of the holding are grounded in the *Jaftha* Court's emphasis on the severe impact that the execution process could have on the human dignity of a judgment debtor and on a judgement debtor's capacity to have access to the basic necessities of life.<sup>102</sup> Where an indigent person's human dignity and basic survival hang on the attachment and the sale in execution of immovable property used to produce food for personal consumption, any such execution must be understood in the context of the desiderata of the right to food.

Regrettably, the courts have done little to develop socio-economic rights through the development of the common law.<sup>103</sup> In *Afrox v Strydom*, the Supreme Court of Appeal declined the invitation to develop the common law rules of contract so as better to protect the right to have access to health care services.<sup>104</sup> However, the Courts have been fairly active with respect to the development of the common law rules of eviction. Given that access to land often determines access to food, the existing body of common law rules of eviction that hold that a property owner is entitled to an eviction order upon a showing she is indeed owner of the land in question and that the person occupying it is doing so unlawfully has a direct bearing

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99 MCA, s 66(1)(a).

100 *Jaftha* (supra) at paras 61–64 and 67.

101 *Ibid* at para 60 (Court lists factors that should be considered: 'the circumstances in which the debt was incurred; ... attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt *and any other factor relevant to the ... facts of the case ...*' (my emphasis)).

102 *Ibid* at paras 21, 25–30, 39 and 43.

103 I say 'regrettably' because the realization of socio-economic rights is conditional upon the development of common law rules of contract and property that fundamentally determine access to basic resources, and because one would have expected courts to be more comfortable with the use of the common law — which they make — to enforce socio-economic rights than with the creation of constitutional remedies for the same purpose.

104 *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA)(Court rejected argument that common law rules supporting disclaimers in admissions contracts to private hospitals are contrary to the public interest, are unenforceable and should be developed in light of FC s 27(1)(a).)

on the right to food. Where this two-fold showing is made, a court possesses no discretion as to whether or not to award the order.<sup>105</sup> FC s 26(3) of the Constitution could be read so as to alter this rule. FC s 26(3)

states that an eviction from a home may only take place in terms of a court order granted *after all relevant circumstances had been considered*. (Emphasis added). The tenure security laws — which require courts to consider all relevant circumstances before granting an eviction order — give effect to FC s 26(3).<sup>106</sup>

Recent conflicting decisions in the High Courts created some uncertainty over whether the tenure security laws, particularly PIE, applied also to cases of so-called 'holding over' - cases where initially lawful occupation subsequently became unlawful.<sup>107</sup> High Courts were asked to consider whether FC s 26(3) changed the common law rules of eviction in holding-over cases where PIE did not apply and the common law, by default, did. In *Ross v South Peninsula Municipality*,<sup>108</sup> the Cape High Court found that an applicant for an eviction order in holding-over cases governed by common law had to address all the relevant circumstances before the court was entitled to grant the order.<sup>109</sup> However, the Witwatersrand High Court in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* rejected the *Ross* Court's development of the common law.<sup>110</sup> This High Court split reached the Supreme Court of Appeal in *Brisley v Drotsky*.<sup>111</sup> The *Brisley* Court held that FC s 26(3)'s 'relevant circumstances' could only mean *legally* relevant circumstances. The only circumstances legally relevant to the question as to whether an eviction should be allowed were whether the evictor was owner of the land in question and the evictee was occupying it unlawfully. FC s 26(3) did not change the extant rules of common law governing holding-over.<sup>112</sup> As a result all evictions from residential property where the occupant was 'holding over' remained subject to the old common law rule, which afforded a court no discretion in deciding whether to grant an eviction order. This position soon changed again. In *Ndlovu v Ngcobo; Bekker v Jika*, the Supreme Court of Appeal held that PIE applied to evictions in cases of 'holding over'.<sup>113</sup> In short, FC s 26(3) required

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105 *Graham v Ridley* 1931 TPD 476.

106 ESTA, PIE and the Labour Tenants Act. See §§ 56C.3(a)(i) and (ii) and (b)(i) supra for a discussion of these laws.

107 The question raised was whether PIE applied to such evictions. See, eg, *Ellis v Viljoen* 2001 (4) SA 795 (C), 2001 (5) BCLR 487 (C)(PIE does not apply); *Bekker v Jika* [2001] 4 All SA 573 (SE)(PIE does apply.)

108 *Ross v South Peninsula Municipality* 2000 (1) SA 589 (K).

109 *Ibid* at 596.

110 *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W)(FC s 26(3) only applied to evictions by the State and not to evictions by natural or juristic persons.)

111 *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA)('Brisley').

112 *Ibid* at para 42.

the courts to construe PIE in light of constitutional dictates.<sup>114</sup> In cases of 'holding over' a court now possesses, in terms of PIE, the discretion, exercised in light of all relevant circumstances, to grant an eviction order. The holding in *Ndlovu* has important consequences for those South Africans who access food through small-scale agricultural production. The kind of property at issue in cases like *Ndlovu* is used not only for residential purposes but

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also to produce food for personal consumption.<sup>115</sup> Indeed, through various measures the State encourages the cultivation of food gardens on residential plots as a way for people to enhance their access to food.<sup>116</sup> The protection afforded the security of tenure of occupiers of such property after *Ndlovu* protects both the right to have access to adequate housing and their right to have access to adequate food.

The refusal of the Supreme Court of Appeal in *Brisley* to develop the common law of eviction could come back to haunt it. At the end of 2003, prompted by lobbying efforts from banks and large property management concerns, the Department of Housing published for public comment a draft amendment Bill to PIE.<sup>117</sup> It changes the definition of an unlawful occupier so that cases of 'holding over' would once again be excluded from PIE. Should this Bill be adopted, the law would revert back to the *Brisley* Court's characterization. In cases of 'holding over,' a court will no longer be able to take account of the impact the eviction would have on the capacity of the evictee to have access to food.

### **(iii) The duty to promote and fulfil the right to food**

The duty to promote and fulfil<sup>118</sup> the right to food requires the State to 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures'<sup>119</sup> so that those that do not currently enjoy access to food can secure access and so that those who possess access to food may enhance such access.

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113 *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA).

114 *Ibid* at para 23.

115 De Klerk *et al* (supra) at 54-58. The authors note that food gardens in both urban and rural areas make a significant contribution to food security. They contend that the biggest obstacle to the establishment and the maintenance of food gardens is access to land and security of tenure.

116 See, eg, the Department of Social Development's Poverty Relief Programme.

117 The Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Bill, *Government Gazette* 25391, GN 2276 of 2003 (27 August 2003).

118 I discuss the duties to promote and to fulfil here as one. Sandra Liebenberg has suggested that the duty to promote requires the State to undertake educational measures in respect of a right. That is, the State must educate people about the nature and content of a right and the tools and the opportunities with which to secure meaningful access to it. S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson *Constitutional Law of South Africa* (2003) (2nd Edition, OS, December 2003) Chapter 33, 33-6. Geoff Budlender describes it as a duty of executive and administrative agencies 'to have proper regard' to the advancement of socio-economic rights in their decision-making. Both these meanings are included in my discussion of the 'duty to promote and fulfil' the right to food. Budlender (supra) at 37.

The standard of justification articulated by the Constitutional Court in socio-economic rights cases has closely tracked the description of the State's duty to fulfil the right to food in international law.<sup>120</sup> If this 'reasonableness' standard of justification were applied to the right to food, it would generate the following criteria by which to assess the State efforts to promote and fulfil the right to food.

First, the State must devise and implement measures to give effect to the right to food.<sup>121</sup> The speed with which, and extent to which, the State can fulfil the right

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to food are determined by the resources at its disposal. The right also only needs be fulfilled progressively.<sup>122</sup> Still, the State must be able to show that it has measures in place and that it is in the process of implementing them. Any deliberate retrogression would constitute a *prima facie* violation of the right to food and would require a particularly convincing justification.<sup>123</sup>

Second, the state's measures to fulfil the right to food must be reasonable. As a rule, this means that the measures must meet at least the following requirements:

- they must be comprehensive and coordinated and clearly allocate responsibilities to different spheres within government;<sup>124</sup>
- the financial and human resources to implement them must be available;<sup>125</sup>
- they must be both reasonably conceived and reasonably implemented;<sup>126</sup>
- they must be 'balanced and flexible' and capable of responding to intermittent crises and to short-, medium- and long-term food needs;<sup>127</sup>
- they may not exclude 'a significant segment of society';<sup>128</sup>

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119 Committee on ESCR General Comment No 14 'The Right to the Highest Attainable Standard of Health' (Article 12 of the Covenant) (22nd session, 2000) UN Doc. E/C. 12/2000/4 at para 33.

120 GC 12 (supra) at paras 21-28.

121 Ibid at para 21.

122 FC s 27(2) reads, in relevant part: 'The state must take reasonable legislative and other measures, *within available resources*, to achieve the *progressive realisation* of [this] right...' (my emphasis).

123 *Grootboom* (supra) at para 45. See also GC 3 (supra) at para 9 (Deliberate retrogression would require full justification 'by reference to the totality of rights ... in the Covenant and in the context of the full use of the maximum available resources.')

124 *Grootboom* (supra) at para 39. See also GC 12 (supra) at paras 22 and 25.

125 Ibid. See also GC 12 (supra) at para 21.

126 Ibid at para 42.

127 Ibid at para 43.

- they may not 'leave out of account the degree and extent of the denial' of the right to food and must respond to the extreme levels of food insecurity of people in desperate situations; that is, the State's measures must make provision both for access to food being *facilitated* for those who are able to make use of opportunities for themselves and for access to food being *provided* to those who are in desperate conditions and cannot make do for themselves;<sup>129</sup> and
- they must be transparent; they must be made known, both during their conception and once conceived, to all affected.<sup>130</sup>

As yet, the duty to fulfil the right to food has not been the basis of a court decision in South Africa.<sup>131</sup> In the absence of any direct indication of what this duty means, a useful way in which to illustrate the concrete legal entitlements and duties that the duty to fulfil the right to food entails is to consider the extent to which the State's existing measures to realise this right indeed meet the kinds of

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constitutional demands delineated above. Below, I focus on three elements of the duty to fulfil the right: (1) the duty to have in place a national strategy with which to fulfil the right to food; (2) the duty to ensure that such a national strategy be reasonable; and (3) the duty to avoid any deliberate retrogression in the progressive fulfilment of the right to food.

### **(aa) A national strategy**

Until relatively recently, it was difficult to fill out a constitutional scorecard on the South African government's record in discharging its duty to fulfil the right to food. No coherent policy framework was directed specifically at giving effect to the right. In fact, it seemed that government had no 'national strategy' to fulfil the right to food as it is required to have both in terms of international law<sup>132</sup> and in terms of the Constitutional Court's post-*Grootboom* jurisprudence.<sup>133</sup> This in itself constituted at the time a *prima facie* infringement of the right to food.

Prompted in part by the national outcry over the sharp rises in food prices in 2001 and the resultant further erosion of food security amongst the poor, the government

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128 Ibid. See also GC 12 (supra) at para 26.

129 Ibid at para 44. See also GC 12 (supra) at para 28.

130 *TAC* (supra) at para 123. See also GC 12 (supra) at paras 23 and 24.

131 The right to food did make a brief, but unsuccessful, appearance in *TAC*. The Treatment Action Campaign argued that government should be ordered to provide, as part of a comprehensive package to prevent mother-to-child transmission of HIV, breast milk substitutes free of charge and on demand to HIV positive mothers who give birth at public health facilities. The *TAC* Court declined to do so, arguing that the complex nature of the question as to whether or not substitutes are appropriate militated against the Court making a binding order in this respect and that such decisions are best left to health professionals. *TAC* (supra) at para 128.

132 GC 12 (supra) at para 21.

133 *Grootboom* (supra) at para 39.

has introduced a range of new measures to address specific aspects of food insecurity.<sup>134</sup> It has also made a significant effort to develop and publicise a coherent national strategy, focussed on addressing food insecurity in South Africa. Policies related to the fulfilment of the right to food are currently co-ordinated by the Department of Agriculture.<sup>135</sup> The Department's *Integrated Food Security Strategy for South Africa* (IFSS) sets out a broad policy framework for measures aimed at enhancing food security and is intended to 'streamline, harmonise and integrate diverse food security sub-programmes'<sup>136</sup> through a cross-departmental and cross-sectoral management structure.<sup>137</sup> The IFSS also identifies a number of key focus areas for policy development and implementation.<sup>138</sup>

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### **(bb) Ensuring that the national strategy is reasonable**

The policies and programmes the state adopts in order to fulfil the right to food must be reasonable in light of the tests that the Constitutional Court has enunciated in *Grootboom*, *Treatment Action Campaign*, and *Khosa*. As recently as two years ago, government's existing measures to address food insecurity failed this reasonableness test in at least two respects. As I argued at the time, the measures were neither sufficiently focussed nor adequately coordinated to pass a *Grootboom*-inspired test.<sup>139</sup> No specific government department at national, provincial or local level focused on the right to food in a manner comparable to the Department of Health's focus on the right to have access to health care services. As a result, measures intended to foster food security developed in a piece-meal fashion. Different aspects — and sometimes the same aspects — of nutritional policy were addressed by different departments.<sup>140</sup> This higgledy-piggledy approach confounded all attempts to assess the reasonableness of the State's measures to fulfil the right

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134 In the year ending June 2002, the food price index rose 16.7% whilst non-food inflation was only 7.2%. In the same period, the price of a bag of maize meal doubled. Watkinson & Makgetla (supra) at 1. For a full assessment of the extent and nature of the food price volatility in 2001/2002, see Food Pricing Monitoring Committee (supra) at 5-8.

135 Department of Agriculture *Integrated Food Security Strategy for South Africa* (2002) ('IFSS').

136 Ibid at 11.

137 An Inter-Ministerial Committee, chaired by the Minister of Agriculture, heads the IFSS at a political level. It is managed and implemented by a National Co-ordinating Unit. The National Co-ordinating Unit works with Provincial Coordinating Units, which, in turn, oversee both the work of District Food Security Officers and, at the local government level, Food Security Officers. The IFSS envisages the establishment of a National Food Security Forum (NFSF), with membership drawn from the public sector, the private sector and civil society and with corollaries at provincial level (Provincial Food Security Forums), at district level (District Food Security Forums) and local level (Local Food Security Action Groups). The role of the NFSF is to provide 'strategic leadership and advisory services on food security' and to set standards and recommend policy options. Ibid at 34.

138 These key focus areas are: (1) increasing household food production and trading; (2) improving income-generation and job-creation; (3) improving nutrition and food safety; (4) increasing safety nets and food emergency systems; (5) improving analysis and information management systems; (6) Capacity-building; and (7) holding stakeholder dialogues. Ibid at 6.

139 D Brand 'Between Availability and Entitlement: The Constitution, *Grootboom* and the Right to Food' (2003) 7 *Law, Democracy and Development* 1, 22 ('Availability and Entitlement'). See *Grootboom* (supra) at para 39.

to food. In light of the constitutional requirement of transparency in policy formulation and implementation, this lack of transparency in food-related policy was itself constitutionally suspect.<sup>141</sup> Both of these potential violations of the right to food have since been adequately addressed. The IFSS coordinates measures to achieve food security. The Department of Agriculture has line-management authority over efforts to fulfil the right to food. Finally, the government has initiated right to food framework legislation, which, if successful, would further enhance the focus, coordination and transparency of measures to fulfil the right to food.<sup>142</sup>

Despite these important advances, there are two general problems with government's national strategy to fulfil the right to food. The first relates to the comprehensiveness of the strategy; the second to its implementation.

The different measures coordinated within the IFSS come close to constituting the kind of 'comprehensive' programme<sup>143</sup> that addresses 'critical issues and measures in regard to *all* aspects of the food system' required by the FC s 27(2)'s reasonableness test.<sup>144</sup> A number of programmes *facilitate* access to food. Such programmes as the Department of Agriculture's Food Security and Rural

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Development programme,<sup>145</sup> the Departments of Agriculture and Land Affairs' Land Redistribution for Agricultural Development programme,<sup>146</sup> the Department of Public Works' Community Based Public Works (CBPW) programme,<sup>147</sup> and the Department of Social Development's Poverty Relief Programme (PRP)<sup>148</sup> enable more and more South Africans to produce their own food and to generate the income needed to

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140 See Department of Agriculture (2002) (supra) at 11 (Problem acknowledged by government.)

141 TAC (supra) at para 123. See also GC 12 (supra) at paras 23 and 24.

142 See S Khoza 'Protecting the Right to Food in South Africa. The Role of Framework Legislation' (2004) 5(1) *ESR Review* 3.

143 *Grootboom* (supra) at para 39.

144 For a more comprehensive overview of these measures, see D Brand 'Budgeting and Service Delivery in Programmes Targeted at the Child's Right to Basic Nutrition' in E Coetzee & J Streak (eds) *Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges* (2004) 87, 93-101 ('Budgeting'); and E Watkinson 'Overview of the Current Food Security Crisis in South Africa' *SARPN*, available at [www.sarpn.org.za/documents/d0000222/watkinson/Watkinson\\_SA\\_Food\\_crisis.pdf](http://www.sarpn.org.za/documents/d0000222/watkinson/Watkinson_SA_Food_crisis.pdf), (accessed on 14 July 2005).

145 Brand 'Budgeting' (supra) at 95 (Agricultural starter-packs and information packs to enable food production for own consumption is provided to food insecure rural households.)

146 *Ibid* at 96 (Financial support is provided for farmers from previously disadvantaged communities to enable them to buy land and agricultural implements.)

147 *Ibid* (Jobs are created by involving poor rural communities in public works projects.)

148 *Ibid* (The department establishes communal rural food production clusters: food gardens, poultry houses, pig units.)

purchase adequate amounts of food. A variety of measures *provide* access to food to those who cannot make use of existing opportunities to obtain access to food. The bulk of these measures are special needs social assistance cash grants that enable especially vulnerable groups of people to acquire food.<sup>149</sup> Two permanent programmes provide food and nutritional supplementation to children: the Primary School Feeding Scheme (PSFS)<sup>150</sup> and the Protein Energy Malnutrition Programme (PEMP) (the PEMP targets children with acute protein malnutrition).<sup>151</sup> In 2002, government introduced short-term crisis measures in response to rising food prices in the form of a programme to provide food parcels and agricultural starter packs to destitute families.<sup>152</sup>

Government's measures also take account of the need to ensure the availability of food. The Department of Agriculture (through appropriate production policies) and the Department of Trade and Industry (through appropriate food import strategies) have programmes in place to maintain an adequate national food supply and thereby to ensure national food security.<sup>153</sup> Different departments and institutions within government also run programmes to monitor different aspects of national and household food security in South Africa and to enhance

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nutritional status through nutritional education and micronutrient fortification of foodstuffs. An important recent addition to these programmes was the appointment of the Department of Agriculture's National Food Pricing Monitoring Committee — for a period of one year — to investigate and to advise government on food prices in South Africa.<sup>154</sup>

Such measures look, in the aggregate, to be comprehensive. However, government's national strategy fails to fulfil the right to food in one important respect. It does not make any provision for the sustained access to food of a

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149 Ibid at 98 (Special needs grants include the State Old Age Pension; the Child Support Grant; the Foster Care Grant; the Disability Grant; the War Veteran's Grant; the Care Dependency Grant; and Grant in Aid. The Social Relief in Distress Grant, although narrowly tailored, is not a special needs grant.)

150 Ibid at 104-116 (In terms of the PSFS, a nutritious meal is provided once every school day to primary school learners at school.)

151 The PEM programme provides treatment in hospitals and clinics to severely malnourished children and discharges them when they have recovered. For a description and evaluation of PEM, see Chopra *et al* (*supra*) at 16-17.

152 In addition to the provision of food parcels and agricultural starter packs, government announced that it would increase a variety of social assistance grants (ranging from an increase of 2% in the Foster Care Grant to an increase of 8% in the Child Support Grant). See E Watkinson & K Masemola 'The Food Crisis: More Action Needed' (2002) November *NALEDI Policy Bulletin* 4, 4 (Critique of these measures as inadequate to task.)

153 De Klerk *et al* (*supra*) at 3 ('Despite its comparatively unfavourable natural resource base, [South Africa] is a net exporter of agricultural commodities. Its per capita income is high for a developing country. It does not have a tight foreign exchange constraint. It is not landlocked. Its transport infrastructure is generally good.')

154 The Committee was appointed for a period of one year. It has completed its work and has submitted its final report to the Department of Agriculture.

substantial number of people currently in food crisis. The Constitutional Court requires any comprehensive socio-economic rights programme to 'respond to the needs of those most desperate',<sup>155</sup> to take into account the 'amelioration of the circumstances of those in crisis',<sup>156</sup> and not to exclude 'a significant segment of society'.<sup>157</sup> This requirement is closely linked to a requirement of flexibility. Flexibility demands a set of measures that 'make appropriate provision for attention to crises and to short-, medium- and long-term needs'.<sup>158</sup>

These requirements of inclusion and flexibility are echoed in international law. In General Comment No 12, the Committee on ESCR states that a national strategy to fulfil the right to food must include measures of an immediate nature, to address food crises<sup>159</sup> and must include measures to 'ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger'.<sup>160</sup>

Many South Africans do not enjoy *basic essential* levels of food, let alone fully adequate nutrition. Although the desperate nature of this situation is evident from a wide variety of statistics — both food intake data and anthropometric indicators<sup>161</sup> — it is revealed most dramatically in the number of South African households living in food poverty<sup>162</sup> — 43% — and the number of households nationally that experience hunger on a regular basis — 52%.<sup>163</sup> This crisis is not of a passing nature nor can it be attributed to an aberrant event such as a natural disaster or a period of unusual food market volatility. This crisis is a function of deep structural problems in the economy that deny a majority of South Africans access to basic resources. It is an 'endemic crisis'.<sup>164</sup>

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Those South Africans who do not enjoy the most basic essential levels of 'access to' food are, in *Grootboom's* terms, 'desperate', 'in crisis' and 'living in intolerable

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155 *Grootboom* (supra) at para 44.

156 *Ibid* at para 64.

157 *Ibid* at para 43.

158 *Ibid*.

159 GC 12 (supra) at para 16.

160 *Ibid* at para 17.

161 See Watkinson (supra) at 1–6 (For a recent overview of the available food intake data and anthropometric indicators showing this crisis.)

162 De Klerk *et al* (supra) at 25.

163 *Ibid* at 28.

164 See Watkinson (supra) at 5 (In fact, not only are the same people who were in food crisis ten years ago still in food crisis — the situation has worsened.)

conditions'. Children who waste away because of lack of food and do not grow to their full physical and mental potential because of under- and malnourishment, and people who go hungry every day of their lives, exhibit the same urgent, immediate need with regard to the right to food as the community in *Grootboom* exhibited with regard to the right to have access to adequate housing. The case law suggests that government is obliged to take account of the needs of such people. The current national food security strategy does not do so. Against the background of a general focus on longer-term capacity building interventions that focus on facilitating access to food for reasonably self-sufficient people, government's food policy scheme of course makes quite substantial provision for the direct transfer of food or the means with which to acquire food. However, all these initiatives - the Primary School Feeding Scheme, the PEM Programme and the various social assistance grants — target only special needs. The Primary School Feeding Scheme benefits only children at primary school and only when they are at school. The PEM programme benefits severely malnourished children treated at public health facilities. The Child Support Grant, when fully extended, will benefit children under 14; the State Old Age Pension men older than 65 and women older than 60; and the Disability Grant disabled persons. The result is that if one is older than 14 years of age and younger than 60 (for women) or 65 (for men), physically and mentally able, not in foster care and not a war veteran, there is no regular State assistance to meet even the most basic of food needs.<sup>165</sup> The only State assistance that is available for such persons is Social Relief in Distress and the current emergency food parcel programme. Both these programmes provide only temporary relief. Social Relief in Distress is provided monthly for a maximum of 3 months at a time. Food parcels are handed out for 3 months in any given year and the programme is only in place until 2005. As such, neither of these crisis response programmes addresses the endemic nature of South Africa's food security crisis. Moreover, the coverage of both programmes is extremely low.<sup>166</sup> The national strategy fails those in desperate need.

A second limitation in our national strategy concerns implementation. The Constitutional Court has repeatedly emphasised that it is not enough for the State simply to conceive a reasonable national strategy. It must also implement it reasonably.<sup>167</sup> In addition, the Court has said that a programme must be reasonably resourced. Regard must be had to the human, financial and institutional

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resources that a programme requires for its implementation. Once adopted, those resources must be made available for and used for its implementation.<sup>168</sup>

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165 See Taylor Commission (supra) at 59 (More than half of poor South Africans, or 11 840 597 people — the majority of whom are in food crisis — exist in this social assistance vacuum.)

166 The implementation of the Social Relief of Distress grant is notoriously patchy. See, eg, *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province* Case 671/2003 (unreported 23 October 2003)(B)('Kutumela'). Legal action was taken against the North West Provincial Government for its failure to take adequate steps to implement Social Relief of Distress Grant Programme. The case resulted in a wide-ranging order requiring the provincial government to take adequately resourced steps to ensure that those entitled to the grant do in fact get it.

167 *Grootboom* (supra) at para 42.

168 *Grootboom* (supra) at para 39. See also GC 12 (supra) at para 21.

The number of beneficiaries reached through government's various food access facilitation programmes (roughly 120 300 by 2001) constitute only a very small percentage of the nutritionally needy in South Africa.<sup>169</sup> The same can be said of government efforts to provide food or the means through which to acquire food. The uptake rate of the different social assistance grants, despite significant annual gains, remains relatively poor. The Child Support Grant, for instance, currently enjoys an uptake rate of only 2.5 million children. However, an estimated 6.1 million children between the ages of 6 and 15 live below the poverty line and presumably require social assistance.<sup>170</sup>

Two cases illustrate how the 'reasonable implementation' element of the duty to fulfil the right to food can be used to leverage a positive shift in the execution of a comprehensive national food security programme. In *People's Union for Civil Liberties v Union of India*,<sup>171</sup> the Indian Supreme Court was approached with an application that, in part, was directed at obtaining an order that existing national measures to address food insecurity and famine be adequately resourced and implemented at State level so as to reach intended beneficiaries. The complaint noted that both massive food reserves and legal measures exist to address the food insecurity of poor households and, in specific instances, to address famines. The complaint alleged, however, that India's food delivery system failed to reach intended beneficiaries due to: (1) administrative inefficiency or complacency and (2) the routine diversion by state governments of funds from the Federal government, intended to implement these food programmes, to other needs. The Indian Supreme Court has responded with a series of interim orders requiring, amongst other things, that: (1) the identification of beneficiaries qualifying for State assistance be standardised and completed; (2) the effectiveness of the current public distribution system for food be enhanced and that corruption in the process be rooted out; and (3) that funds allocated from national level to state governments for use in public distribution of food and famine measures be used for those purposes.<sup>172</sup>

In *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*, the High Court engaged a similar set of problems.<sup>173</sup> A number of indigent persons from the North-West Province had applied for a

Social Relief of Distress grant. The indigent persons clearly qualified for the grant in terms of the established criteria. They did not receive it. The complaint alleged that although, in terms of the Social Assistance Act and its regulations, provincial

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169 Brand 'Budgeting' (supra) at 102.

170 Ibid.

171 For a discussion of *People's Union*, see KB Mahabal 'Enforcing the Right to Food in India: The Impact of Social Activism' (2004) 5(1) *ESR Review* 7.

172 These orders remain interim orders. The Supreme Court has retained jurisdiction while giving the State the opportunity to discharge this initial set of responsibilities. *People's Union Civil Liberties v Union of India* (Supreme Court of India 2002), available at [http://www.righttofoodindia.org/mdm/mdm\\_scorders.html](http://www.righttofoodindia.org/mdm/mdm_scorders.html), (accessed on 9 March 2005).

173 Case 671/2003 (Unreported 23 October 2003)(B)('Kutumela').

governments were required to provide the grant to eligible individuals upon application, the North-West Province had not dedicated for its implementation the necessary human, institutional and financial resources. As a result, the grant was available on paper but not in practice. The case was settled between the parties. The settlement agreement was made an order of court. The order is particularly wide-ranging. Apart from granting specific relief to the applicants, it provides for various forms of general relief. It requires the North-West provincial government to acknowledge its legal responsibility to provide Social Relief of Distress grants effectively to those eligible for it. It must devise a programme to ensure the effective implementation of the Social Relief of Distress Grant Programme. This programme must enable the province to process applications for Social Relief of Distress grants on the same day that they are received. The programme must allow officials to assess and to evaluate applications and to ensure the eventual payment of the grant. It must put in place the necessary infrastructure for the administration and payment of the grant. In addition, the National Department of Social Development was ordered to develop uniform standards and procedures across the Republic with regard to the Social Relief of Distress Grant Programme. Finally, the provincial government was ordered to make the availability of Social Relief of Distress grants known to the public.

### **(cc) Avoiding retrogression**

The duty to fulfil the right to food requires the State to 'avoid retrogressive measures'.<sup>174</sup> Any deliberate retrogression in the fulfilment of the right to food will constitute a *prima facie* infringement of the right to food and will require a compelling justification. This element of the duty to fulfil socio-economic rights has been emphasised by the Constitutional Court<sup>175</sup> and is recognised at international law.<sup>176</sup>

Recent efforts by the National Department of Agriculture (NDA) and the National Department of Land Affairs (DLA) to effect redistribution of agricultural land are good examples of such retrogressive measures. Before 2001, the NDA redistributed agricultural land to farm workers and emerging farmers from previously disadvantaged groups with the explicit purpose of 'improv[ing] their livelihoods and quality of life'.<sup>177</sup> Land was redistributed through a system of State subsidy. Qualifying households would receive a Settlement/Land Acquisition Grant (SLAG) of R16 000 with which to buy land. The Grant for the Acquisition

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of Municipal Commonage enabled municipalities to make communal land available to the urban and rural poor for grazing and cultivation. These land redistribution efforts enabled people to produce food for their own food needs and to create the additional income needed to purchase extra food and other basic commodities. Problems in the redistribution process and an emphasis on promoting equitable

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174 Liebenberg (supra) at 33-34.

175 *Grootboom* (supra) at para 45.

176 GC 3 (supra) at para 9.

177 Department of Land Affairs *White Paper on Land Policy* (1997) 56.

access for emergent black farmers in commercial agriculture<sup>178</sup> led to a reconsideration of the programme in 2000. A new programme — Land Redistribution for Agricultural Development (LRAD) — was launched in 2001. In LRAD, the focus has expressly shifted from improving livelihoods and quality of life to enabling access to the commercial agriculture sector for 'those aspiring to become full-time, medium to large-scale commercial farmers'.<sup>179</sup> This change in focus is reflected in LRAD's structure. To qualify for a SLAG subsidy, a recipient household had to fall under a maximum monthly income of R1 500. To qualify for a grant under LRAD, a recipient has to make a minimum own contribution to the acquisition of land of R5 000. As Edward Lahiff has pointed out, this requirement clearly excludes the poorest of the poor from the benefit of the programme and dramatically reduces the extent to which LRAD can make a contribution to the fulfilment of the right to food.<sup>180</sup> A change in redistribution policy that withdraws its benefits from such a large cohort of individuals is a *prima facie* infringement of the right to food.

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178 Lahiff (supra) at 4.

179 Ibid.

180 The shift in strategy had another much more direct retrogressive effect. See Lahiff (supra) at 4. Lahiff points out that when the Department of Land Affairs was reconsidering its land redistribution measures during 2000, a moratorium on new projects was introduced. The result was that capital expenditure for land redistribution dropped by R358 million in 1998/99, to R173 million in 1999/2000 and to R154 million in 2000/01. As a consequence, the Medium Term Expenditure Framework allocations for land redistribution dropped by 23% in the period 1999/2001.