

Some thoughts on litigating the right to food in South Africa

Possibilities and challenges

Timothy Serie and Lilian Chenwi

Today, over one billion people do not have access to sufficient food. This worldwide hunger crisis has led to food riots in over 30 countries. Food emergencies in the world stem from a multitude of problems, ranging from drought and adverse weather conditions to civil strife and political crises (Clover, 2003: 8).

The G8 summit held in July 2009 allowed the international community to express its concern over access to food and food security. The G8 nations plan to provide about \$20 billion over the next three years to assist developing countries in dealing with food shortages and developing agriculture. This commitment demonstrates a renewed focus on access to food and food security.

The right to food and food security are major issues in South Africa. Currently, the World Bank estimates that millions of people still do not have access to adequate food and nutrition (World Bank, 2005). Although hunger and starvation are less pronounced in South Africa than in other sub-Saharan African countries, access to adequate food is still a huge challenge (World Bank, 2005).

The South African Constitution guarantees the right to food. However, the Constitutional Court has not yet decided a case directly addressing and defining this right. It is only recently that the Court handed down a judgment that touched on this right in the context of access to (agricultural) land.

This article examines the right to food in the South African context and the possibility of enforcing it through the courts. It draws on the Indian experience in litigating the right to food and the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission).

The right to food: Meaning and legal framework

The right to food is a fundamental right for all human beings. It is realised if food security exists. What, then, is food security? The World Food Summit Plan of Action, issued with the 1996 Rome Declaration

on World Food Security, states: 'Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life'. The United Nations (UN) Committee on Economic, Social and Cultural Rights has also stated that 'the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement' (General Comment 12 on the right to adequate food, UN doc. E/C.12/1999/5, para 6).

The right to food is enshrined in several international instruments. For instance, article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, states: 'The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food ...'. The African Commission on Human and Peoples' Rights has implied the right to food in the African Charter on Human and Peoples' Rights (African Charter), particularly in the right to life (article 4), the right to the best attainable state of physical and mental health (article 16) and the right to economic, social and cultural development (article 22) (see *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication 155/96, (2001) *African Human Rights Law Reports* 60 (ACHPR 2001), paras 64-67 [SERAC case]).

Further, section 27(1)(b) of the South African Constitution provides: 'Everyone has the right to have access to sufficient food and water.' This right, like other socio-economic rights, is subject to the qualifications of progressive realisation and

availability of resources. In addition, South Africa has a national food policy framework, the 2002 Integrated Food Security Strategy for South Africa, which aims to ensure that food is accessible to and sufficient for all South Africans.

Enforcing the right to food

As shown above, the right to food requires that people must have access to sufficient quantities of good-quality food to satisfy their dietary needs. 'Accessibility' means that food should be both economically and physically accessible to all persons.

However, enforcing the right to food is challenging. As Dreze notes, the right to food may be universally accepted, but determining the rights and obligations associated with this right is challenging (Dreze, 2003: 10). Though South Africa has the Integrated Food Security Strategy and programmes aimed at implementing the right to food, such efforts remain ineffective due to lack of implementation (Love, 2003: 19).

These programmes have limited scope and are therefore not sufficient to deal with the problem of food insecurity.

They have also been poorly implemented, resulting in many South Africans lacking food security (Brand, 2007: 333). Moreover, they fail to make provision for the basic food needs of many who are in food crisis (Brand, 2007: 334).

In addition to enforcing the constitutional right to food through legislation or policies, this right can also be enforced through national human rights institutions or the courts. For example, the South African Human Rights Commission (SAHRC) has the responsibility to monitor the realisation of socio-economic rights including the right to food (section 184(3) of the Constitution).

As the SAHRC has a broad and large focus, there is need for a state organ or institution specifically to oversee and enforce the necessary government interventions and the implementation of its food security measures.

Civil society has on more than one occasion contemplated bringing a test case on the right to

food (Kallmann and Yakpo, 2003: 9). As noted earlier, a case concerning the right to food has not yet come before the Constitutional Court.

However, in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2008 (11) BCLR 1123 (CC), the Constitutional Court considered this right in the context of agricultural land.

The case was an appeal against a Supreme Court of Appeal (SCA) judgment interpreting a proviso to the definition of 'agricultural land' as contained in the Subdivision of Agricultural Land Act 70 of 1970.

The proviso provided that 'land situated in the area of jurisdiction of a transitional council ... which immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such'.

Section 1 of the Subdivision of Agricultural Land Act defines 'agricultural land' as any land. This excludes 'land situated in the area of jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee . . . but excluding any such land declared by the Minister after consultation with

the executive committee concerned and by notice in the *Gazette* to be agricultural land for the purposes of this Act' and 'land which the Minister after consultation with the executive committee concerned and by notice in the *Gazette* excludes from the provisions of this Act'.

Section 3 of the Act requires that for the sale or subdivision of agricultural land to be valid, the Minister must give written consent.

The trustees of the Hoogekraal Highlands Trust and Safamco Enterprises (Pty) Ltd were admitted as *amici curiae* and the Minister of Agriculture and Land Affairs (as the portfolio was called then) as an intervening party. The contentions of the *amici* and the Minister invoked, among other rights, the right to sufficient food and water (para 50).

The relevant question was whether the definition could be interpreted in a manner that preserved the role of the national government in the administration of agricultural land (para 84). In this regard, the Minister contended that

The right to food may be universally accepted, but determining the rights and obligations associated with it is challenging

an interpretation that preserves national ministerial power over municipal agricultural land would certainly improve the capacity of the State to fulfil two obligations imposed on it by our Constitution. The one is the duty to ensure the progressive realization of the right of access to food; the other is the task to ensure access to land (para 105).

This contention was supported by the *amici*. The Constitutional Court stated that 'land, agriculture, food production and environmental considerations are obviously important policy issues at national level' (paras 53 and 80). It added that 'excessive fragmentation of "agricultural land", be it arable land or grazing land, may result in an inadequate availability of food' (para 85).

Furthermore, it adopted the notions of availability and accessibility in defining the right to food. It stated that availability 'refers to a sufficient supply of food and requires the existence of a national supply of food to meet the nutritional needs of the population generally' and 'requires the existence of opportunities for individuals to produce food for their own use'.

Accessibility, the Court continued, 'requires that people be able to acquire the food that is available or to make use of opportunities to produce food for their own use' (para 85). The Court also stated that there was an overlap between the state's obligation to facilitate access to land on an equitable basis in section 25(5) of the Constitution and its obligation to protect the environment in section 24 (para 85).

Nevertheless, the Court held that to preserve the power of the Minister to approve each and every sale or subdivision of agricultural land was not the only way in which agriculture was to be developed and food made more readily available (para 139).

Although this case makes some important statements on the right to food, its content and its relationship with other rights such as access to land, it does not define in detail the content of this right and the obligations of the state, mainly because it does not focus on the right to food *per se*.

However, this case highlights the important point that the state would be in breach of the right to food if it failed to facilitate access to agricultural land.

State parties to the African Charter are obliged to protect and improve existing food sources and to ensure access to adequate food for all citizens

Experience from elsewhere: Any lessons for South Africa?

The African Commission

In the *SERAC* case, which raised several issues concerning human and peoples' rights under the African Charter, the African Commission made a number of important pronouncements on the right to food. It was alleged in this case that the Nigerian government had violated the right to food of the Ogoni people (the applicants) by destroying and threatening their food sources through a variety of means, such as engaging in oil development that resulted in contamination of the soil and water upon which Ogoni farming and fishing depended (para 9).

The African Commission noted that the obligation to fulfil the right to food required the provision of 'basic needs such as food or resources that can be used for food (direct food aid or social security)' (para 47). It also referred to the state's duties to respect and protect rights (paras 45 and 46) and reaffirmed the interrelatedness and interdependence between the right to food and other rights, particularly the rights to life, health and economic, social and cultural development (paras 64-67). In addition, the Commission stated that the right to food was inseparably linked to the dignity of human beings and therefore essential for the enjoyment and fulfilment of the rights to health, education, work and political participation (para 65).

As observed by the African Commission, state parties to the African Charter are obliged to protect and improve existing food sources and to ensure access to adequate food for all citizens. The Commission held that the minimum duties implicit in the right to food included the state's duty not to destroy or contaminate food sources, the duty not to allow private parties to destroy or contaminate food sources, and the duty not to prevent peoples' efforts to feed themselves (para 65). Nigeria thus was found to be in violation of these duties and the right to food (para 66).

The *SERAC* case is relevant as it spells out the state's duties in relation to the right to food and its obligation to provide food aid. South Africa is a party to the African

Charter and has therefore undertaken to fulfil these duties. A violation of these duties would be a valid ground for bringing a case against the government.

The Supreme Court of India

The Supreme Court of India considered the right to food in the landmark case of *People's Union for Civil Liberties v Union of India and Others* (1997) 1 SCC 301 [PUCL case]. In this case, the Court ordered the government to identify poor persons in need of food aid and implement various national food distribution schemes to address hunger among the most vulnerable groups in society, including children, mothers and the elderly. This case demonstrates that some aspects of the right to food may be enforced against the state (Dreze, 2003: 12).

In 2001, drought conditions led to widespread famine in some parts of India. A public interest organisation, the People's Union for Civil Liberties, brought a petition before the Supreme Court of India to address the growing problem of hunger and the right to food in those dry parts. It argued that federal institutions and state government were responsible for the widespread malnutrition and starvation occurring in India. As socio-economic rights are not guaranteed in the Indian Constitution, the petitioners relied on the right to life.

The petition focused on two separate aspects of the state's failure to respect the right to life. Firstly, it pointed out the failure of the public distribution system to identify the poor and provide them with adequate food supplies. The government used a system to identify poverty-stricken families that fell below a certain income level. However, this system kept a large number of people in need from receiving benefits. Secondly, the petition asserted that the government's relief works failed to adequately address the crisis situation when drought was declared and provide employment when the famine began. The government, it was argued, had a duty to provide economic opportunities for those struggling to afford food.

The petition also cited a number of studies, with data and statistics, in support of its conclusion that a hunger crisis existed in India and that the Indian government had the resources to address it but was

failing to distribute any part of the large stocks of grain which it had. The petition identified one area in particular, Maharashtra, where millions of people were affected by the drought. The evidence about the existence of surplus grain effectively destroyed the government's main defence, that it lacked the resources to realise the right to food. Thus the petitioners sought an order that the government be compelled to provide employment in the drought-affected villages, provide relief to persons who were unable to work, raise the public distribution system

entitlements available to each family, and provide subsidised grain to all families.

The Supreme Court of India handed down a momentous interim order, which had the effect of extending the application of some nutritional benefit programmes (see also Gaiha, 2003). Furthermore, it compelled the government to introduce a cooked midday meal scheme for all primary schools. Importantly, the Court established a system

to monitor and evaluate the implementation of the order.

The Indian experience could be seen as not very helpful in the South African context, as the circumstances that raised this case in India do not obtain in South Africa. As has been noted above, the main concern of the Indian case was that the government was sitting on huge grain reserves while ordinary Indians were starving. However, this case shows that it is possible to litigate the right to food where the state does not have appropriate measures to ensure access to food and/or fails to implement those measures. As noted above, the implementation of food security measures is a problem in South Africa. Litigation would therefore be useful in making the South African government take the right to food seriously.

Litigating the right to food in South Africa

With the current food insecurity in the country and the poor implementation of food security measures, bringing a test case on the right to food would be important in defining the government's role in ensuring food security under the Constitution. Socio-

The Indian case shows that it is possible to litigate the right to food where the state does not have appropriate measures to ensure access to food and/or fails to implement those measures

economic rights are fully justiciable in South Africa. The Constitutional Court has made dramatic progress in advancing these rights in the past decade.

A lesson to be learned from the Indian case is that to bring a case on the right to food, a litigant needs to support his or her conclusions and arguments with strong factual evidence. This evidence must demonstrate that the government, through its actions or omissions, deprived a segment of the population of access to food. In the Indian case, the petitioners argued their point forcefully using studies, statistics and other information obtained from the government itself.

In South Africa, mounting a case of violation of the right to food simply on the basis of widespread starvation might be challenging. It is possible, however, to bring a case challenging the reasonableness of programmes on the right to food as well as their implementation. It is also possible to commence a case where there is evidence that the government is preventing people from producing their own food through its failure to facilitate their access to agricultural land. The right of access to food encompasses the right to produce one's own food for subsistence. In the past, the South African government expropriated farm land and licensed it for mining operations, creating bitter land disputes. Such conduct may constitute a violation of the right to food if the former owners are subsistence farmers who depended on the land to produce their own food.

Conclusion

Food insecurity still exists in South Africa, and is compounded by poverty and income inequalities. The country has been adversely affected by the recent food price hikes and the global economic crisis. This article has demonstrated that it is possible to enforce food rights through the courts, drawing from the experiences of the African Commission and the Supreme Court of India. The paper has also shown the willingness of the Constitutional Court to pronounce on the right to food. In addressing the challenges relating to the right to food in South Africa, there is a need to define the government's role, at all levels, in providing access to food for the people of South Africa, as well as in providing food aid.

Timothy Serie is a student at American University's Washington College of Law and the School of International Service, USA. **Lilian Chenwi** is a senior researcher in, and coordinator of, the Socio-Economic Rights Project.

The Rome Declaration on World Food Security and the World Food Summit Plan of Action, 1996, are available at www.fao.org/docrep/003/w3613e/w3613e00.htm.

References

- Brand, D 2007. Food rights. In S Khoza (ed) *Socio-economic rights in South Africa*. Community Law Centre, University of the Western Cape.
- Clover, J 2003. Food security in sub-Saharan Africa. 12(1) *African Security Review*.
- Dreze, J 2003. *Democracy and the right to food*. Adapted from a lecture delivered at the International Institute for Population Sciences, Mumbai, 7 November.
- Ga ha, R 2003. Does the right to food matter? 38(40) *Economic and Political Weekly*: 4269. Available at www.jstor.org/stable/4414110 [accessed: 28 June 2009].
- Kallmann, K and Yakpo, K 2003. *Towards a framework law on the right to adequate food in South Africa*. Seminar report, Fian International. Available at www.fian.org/resources/documents/others/towards-a-framework-law-on-the-right-to-adequate-food-in-south-africa/pdf [accessed: 14 August 2009].
- Love, K 2003. *The constitutional right to food in the Republic of South Africa: A critical examination of the history of section 27 and an evaluation of its enforcement*. Available at <http://humanrights.uchicago.edu/Baro/hressay.pdf> [accessed: 14 August 2009].
- World Bank, 2005. World Bank development indicators 2005. Available at <http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,menuPK:232599~pagePK:64133170~piPK:64133498~theSitePK:239419,00.html> [accessed: 24 July 2009].