

5 | *Food (In)Security and Legal Implications in South Africa*

Introduction

A considerable number of post-twentieth-century constitutions and international instruments have witnessed a surge in the codification of socioeconomic needs and demands. On that account, one of the main distinctions between contemporary and medieval constitutions is that while the former is pro-poor, the latter largely overlooks group/individual subsistence. That is to say, while a number of twentieth- and twenty-first-century constitutions explicitly safeguards key socioeconomic needs, their eighteenth- and nineteenth-century counterparts omit these entitlements.¹ As demonstrated by the Constitutions of the USA, Norway, Belgium, Denmark, Argentina, Luxembourg and Tonga, the prevailing opinion at the time was that poor relief did not merit legal guarantees.²

Invariably, the inclusion of the right to food (RTF) in post-twentieth-century instruments, like the 1996 South African Constitution, sprang from periods of struggle, and symbolise unified commitment to ensure that steps are adopted to forestall the repetition of past abuses (Sarkin, 1999). Section 27 of the Constitution is instructive in this regard.³ The

¹ See article 8 of the 2001 Constitution of Senegal; articles 40 & 41 of 2010 Constitution of Rwanda; article 12 of the 2010 Constitution of Niger; articles 19 & 35 of the 2010 Constitution of Madagascar; article 43 of the Constitution of Kenya; articles 10 & 38 of the 2016 Constitution of Côte d'Ivoire; articles 59 to 63 of the 2015 Constitution of Dominican Republic; articles 47 to 48 of the 2005 Constitution of the Democratic Republic of the Congo; article 81 of the Constitution of Angola; article 19 of the Interim Constitution of Sudan; articles 22 and 25 of the 2012 Constitution of Syria ; article 38 and 39 of the 2014 Constitution of Tunisia; article 38 of the 2013 Constitution of Vietnam.

² These include the 1788 United States Constitution, 1814 Norway Constitution, 1831 Belgium Constitution, 1849 Denmark Constitution, 1853 Argentina Constitution, 1868 Luxembourg Constitution and 1875 Constitution of Tonga.

³ Section 27 of the Constitution states that (1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

lingering legacy of the past is reflective in the unrivalled position which the RTF enjoys in the instrument, which invariably could be linked to the mass starvation which millions of Africans were subjected to as a result of the apartheid's oppressive socioeconomic legislations.

Verily, when compared to its contemporaries, the 1996 Constitution arguably provides one of the most overarching guarantees for food security. But the question is: does the RTF belong in a legal instrument? Put in another way, should food security be entrenched in a democratic constitution? Does this right hinder or consolidate democracy, and if accepted and guaranteed, what role does the judiciary have in ensuring its compliance? The objective of this chapter is to demonstrate that the inclusion of this right in a legal instrument holds the prospect of ensuring that key government structures do not sidestep this important entitlement in their daily deliberations.

Why the Right to Food?

The debate as to whether food security belongs in a legal document has been raging for decades in both the Global North and South (Joy, 1973; Marks, 1981; Tomasevski, 1984; Eide and Oshaug, 1991). Admittedly, eighteenth- and nineteenth-century constitutions bypassed social rights, and rather focused on civil rights such as the sanctity of home, right to property, religious liberty and freedom, while neglecting rights linked to access to adequate food (Van Leeuwen, 1994). Defenders of this approach argue that a constitution is, if broadly construed, a tower of liberty or a wall which protects people from state intrusion (Marks 1981; Wellman 2000). In this sense, since the RTF is a positive right and all socioeconomic rights call for state intervention, its inclusion in the constitution will defeat that cardinal protective role of the instrument.⁴ To this camp, the exclusion is justifiable as the role of a constitution is not to promote a positive

- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

- 2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- 3) No one may be refused emergency medical treatment.

⁴ Positive rights include rights which oblige the state to provide some benefit to the rights holder. They are mainly social and economic rights such as access to

right, but rather to safeguard negative rights.⁵ They add that legal guarantees should not be perceived as individual entitlements to be fulfilled by the government, but as group or individual safeguards against hostile state agencies.

These assertions may, however, attract counterarguments, two of which are worth highlighting. The first objection is that, akin to positive rights, negative rights, including property rights, press freedom and a fair trial equally require state intervention. Like the RTF, all negative rights are accompanied by budgets and/or a yearly allocation of funds drawn from taxes to ensure the realisation of most, if not all. For instance, to forestall threat to the life and security of persons, there is the need to establish an efficient and well-armed security agency; or, in the case of election, a comprehensive budgetary allocation for polling stations, ballot papers and remuneration of voting officers. It was in this context that the Constitutional Court in handing down its decision in 1996, mooted that several rights, like the often-termed negative rights equally impose financial burden on tax payers without jeopardising the legitimacy of the Constitution (Certification of the Constitution, 1996). Hence, negative rights in all shapes and forms are indeed positive rights as they call for state action or intrusion into the spheres of individual private life. In any case, the oppressive nature of state power is not limited to the wrongful detention and execution of innocent civilians, but extends to creating harsh socioeconomic conditions which negatively impact on their livelihood, mainly through (hyper)inflation, abuse of state resources and high food prices. Safeguarding a country's economy against these ills might be considered as the key factors needed to fortify the foundation for citizens' self-sufficiency and autonomy as opposed to over reliance on state welfare systems for sustenance. The second relates to an argument often advanced against first generation rights. It flows from a legal argument that if the cardinal focus of the constitution is to consolidate democracy and foster rights of citizens, then it might be difficult to

adequate water, housing, employment, fair wages, sanitation, education, health care, social security, food and electricity.

⁵ Negative rights imposes an obligation on the state or third parties to refrain from actions which might interfere with the enjoyment of one's basic rights. Rights within this category consist of civil and political rights such as freedom from slavery, a fair trial, right to vote, habeas corpus, freedom from torture, freedom of religion, freedom from violent crime, private property, life and freedom of speech.

isolate positive from negative rights. Indeed, one's right to private property is closely tied to democracy. Individuals cannot have the autonomy or security which comes with the status of citizenship if their assets are constantly prone to, or subjected to, unlawful expropriation by the state. Rather than being perceived as safeguarding the interest of the affluent, property rights should be seen in light of consolidating democracy itself. This principle could equally be applied in the case of minimal safeguards against extreme deprivations such as food insecurity. For instance, in order for individuals to be able to consider themselves, or act as, citizens, they must have the kind of independence which this minimal safeguard provides.

However, as a constitution does not always safeguard every interest or right in a just or democratic society, perhaps one ought to place one's trust in ordinary politics as the means of obtaining access to food.⁶ If we have to take this position, then it follows that constitutional guarantees might not be needed after all, as politics can guarantee one's food security. But this triggers a hard question: Why then do some democratic and progressive regimes entrench the RTF in their constitutions? The simple response is that most of these provisions are used as smokescreens to appeal to the poor. With this section of the population lacking political power, there is likelihood that the RTF may run a risk of being sidelined in a democratic regime, especially in sub-Saharan Africa where the right to sustenance is not jealously guarded but downgraded.

Worth noting that proponents of negative rights further affirm that the RTF is beyond the capacities of democratic institutions such as courts to enforce them. To these observers, (quasi)judicial bodies, in most cases, lack the technical skills to oversee budget-setting priorities, as judges do not possess the managerial requirements to adjudicate on issues relating to food security, and any attempt to enforce this guarantee might bring the entire constitutional enterprise into disrepute (Christiansen, 2007; Govindjee, 2013).⁷ One prevailing argument of

⁶ Key examples of rights rarely protected by constitutions are freedom from poverty, access to adequate food and employment.

⁷ The connotation (quasi)judicial bodies implies state agencies with the full and/or partial judicial adjudicative features by possession of the right to conduct investigations into and hold hearings on disputed claims. In the context of South Africa, these include courts and Chapter 9 institutions such as the South African Human Rights Commission and Commission on Gender Equality.

policymakers is that when a government is unable to provide social grants or food parcels for every hungry citizen, perhaps it is because it is constructing a bridge, or subsidising tertiary education or supplying textbooks to high school students (Howard, 1983). With that in mind, a striking inquiry which arises is, can judges make value judgements on a state's (non)compliance with its food security obligation?

The role of judges in ensuring government accountability on socio-economic rights, including the RTF, has occupied centre stage in many academic discourses (Dixon, 2007; Pieterse, 2007). Unlike other arms of government which are directly accountable to their electorates, members of the judiciary are seen as lacking (political) legitimacy to be directly involved in decision-making and resource allocation. Accordingly, undue involvement of courts in public administration, sometimes classified as rule by judges or 'dikastocracy', is perceived as a threat to democracy, as they are neither subject to scrutiny nor answerable to anyone (Heyns, 1999).

One need to hardly point out that a judge's attempt to enforce the RTF may appear to forestall or prevent citizen participation in essential democratic matters, as it might undermine the reasoning or capacity of ordinary people to decide on their preferred cause of action or type of social policy to pursue. Admittedly, even though aspects of this argument can be linked to positive rights, the RTF seems contentious as it places judges in the somewhat awkward position of overseeing complex and far-reaching bureaucratic institutions. To some, there are two angles to overcoming RTF versus institutional challenges: (i) states could guarantee RTF but it could be strictly enforced by parliamentarians and not judges; or (ii) RTF should be completely eliminated from legal documents (Davis, 2008; Michelman, 2008). Like several other African constitutions, the 1995 Constitution of Uganda, 1996 Constitution of Ghana and 1999 Constitution of Nigeria adopt the latter approach. By excluding judicial involvement in socioeconomic affairs, these documents contain legally non-justiciable or non-enforceable directive principles of state policy (DPSP) which entreat parliament to monitor the steps adopted by the state to ensure the realisation of the right to education, food, good health care, work and healthy economy. Clearly, this classification has the merit of sparing judges from being saddled with the herculean task of monitoring complex bureaucratic operations or social interventions. However, there are three striking disadvantages worth mentioning. First, the non-justiciability of the

RTF in the instruments threatens the livelihood of millions as there is no form of social welfare or security in these countries which could cushion vulnerable groups, mainly the disabled, women, children and the aged. Second, its exclusion eliminates the judiciary from the process of providing an oversight role to ensure the state complies with its legal obligation of promoting the wellbeing of its citizens. Third, the relegation of judges in this context implies that the state will be complacent in fulfilling its obligation to the deprived, specifically as members of the executive in most cases double as members of parliament. In light of these constraints, the next section turns to assess how the RTF is being enforced in a regime which has entrenched it in the constitution, and by extension made it justiciable. But before that, an assessment of international and regional human rights instruments which guarantee citizens' RTF suffices.

Food Security Instruments: From Global to Local

Although the promotion of the RTF as a justiciable right in international and regional document dates back to the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR), its protection at the national level is contemporary. Indeed, the ICESCR, a groundbreaking socioeconomic instrument, recognises in section 11(1) the continuous improvement of living conditions of everyone, especially their food security.⁸ In light of this, while its inclusion in the 1996 Constitution was shaped by the jurisprudence of other countries, the legal safeguards of the RTF could be largely traced to international instruments (Nkrumah, 2019). Besides the ICESCR, other relevant documents with strong emphasis on food security are the 1948 *Universal Declaration on Human Rights* (art 25(1)), 1979 *Convention on the Elimination of All Forms of Discrimination Against Women* (art 12(2)), 1981 *African Charter on Human and Peoples' Rights* (*SERAC v Nigeria*, para 47); 1989 *Convention on the Rights of the Child* (art 24(2)(c)), 2003 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (art 15), and 1990 *African Charter on the Rights and Welfare of*

⁸ The exact wording of this provision is that the ICESCR 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

the Child (art 14 (2)(c). With South Africa being a party to all these instruments, they do not only seek to give teeth to the RTF and other socioeconomic rights, but rally the support of the international community for acknowledgement of these rights at the domestic level.

The treaty body responsible for ensuring compliance with food security provision in the ICESCR is the Committee on Economic, Social and Cultural Rights (CESCR). To monitor state compliance, it receives regular reports or submissions from member states on the steps taken or not taken to alleviate hunger. The Committee further receives shadow or alternative reports from civil society organisations (CSOs) which are then used for the overall assessment of states' performance in this domain. In doing this, it has issued a plethora of General Comments which are exceedingly influential in the interpretation and operationalisation of food security. On a more practical level, the Committee observed in its *General Comment No. 12* that although the RTF is enshrined in several international instruments, there is a widening gap between its legal protection (in the constitution) and actual implementation, especially in light of large-scale hunger (CESCR, 1999). It, therefore, concluded that besides good governance, the construction and operationalisation of national food security strategies are essential in eliminating hunger and ensuring adequate living standards for every citizen. The chapter now takes a look at how this right is being safeguarded at the national level, with specific emphasis on South Africa as the country's constitution has been recognised as one of the most progressive globally (Nkrumah, 2018).

The Pacesetter: South Africa and RTF

Before its subsequent codification in the 1996 Constitution, the notion of access to food as a human right was intensely debated during the drafting stage of this document. Akin to other socioeconomic rights, whereas conservatives campaigned against its guarantee, liberals advocated for its inclusion, with neutral advocates in between (Sarkin, 1998a). The striking aspect of the arguments from the two opposing camps centred on whether the legitimacy of the constitution might be compromised by the inclusion of the RTF. The conservatives argued that if the state, saddled by inadequate resources, is unable to meet its obligation of providing adequate food for its citizens, the entire Bill of Rights might be questioned since it failed to fulfil one right within its

bracket (Sachs, 1996). The reasoning is that if the state is capable of violating one right, it may do the same to others. In other words, a violation of the RTF may be followed by subsequent non-compliance of economic/social and civil/political rights. This group of negotiators could be classified as *traditionalist* as they seek to maintain the status quo or ensure that things do not deteriorate. Drawing inspiration from the English Constitution, Armitage (2000) notes that the primary objective of this camp is to preserve the legal order by maintaining existing norms or practices. In sum, the central argument of the conservatives was that rights impose corresponding obligations, hence the legitimacy of the Constitution will be compromised if not eroded when it makes too many promises and yet it is incapable of fulfilling them.

The thoughts of the liberals, on the contrary, were greatly shaped by the provisions of the ICESCR and other international instruments which advocate for equal recognition of civil/political (first generation) rights and social/economic (second generation) rights.⁹ They argued that it is meaningless to inform citizens that they have first generation rights if their RTF cannot be guaranteed. The legitimacy of the Constitution was seen as being run to the ground since the majority of citizens may perceive it as a superficial document which fails to capture their basic needs, especially in light of widespread poverty and starvation. They averred that an exclusion of a basic need such as food runs the risk of triggering discontent in poor black communities whose pressing needs have been ignored by the elite lawmakers whom they galvanise for their liberation and release from prison. Thus, the prospects of *ikasi* (township) residents' rebelling against their struggle stalwarts was instructive. Negotiators in this camp can be seen as *progressives*, as they aim at revolutionising conventional norms and practices. They also seek to transform the constitution by setting new standards which are clearly seen as challenging deep-rooted norms or practices.

A disproportionate aspect of the debate centred around the role of the courts, particularly on the question of judges' (in)capacities to adjudicate on key socioeconomic rights, including food security issues. To some cynics, rather than meddling in bureaucratic quandaries and issues of economic and social (in)justices, judges should (like their

⁹ South Africa recently ratified the ICESCR on 12 January 2015.

African contemporaries) be mandated to focus only on adjudicating civil and political niceties, while the National Assembly (elected by and directly answerable to the people) exercise complete control over budgetary issues. Given that the sovereignty of the people has not been vested in judges (through elections), the primary question was what amount of power courts should exercise in the allocation of state resources, including towards food security?

Going forward, negotiators were presented with four possible options on the question of food security: (i) following the precedence of the American Constitution and completely excluding RTF from the final document; (ii) drawing inspiration from the region and framing it as DPSP; (iii) codifying it but with clawback or conditional clauses; and finally (iv) entirely recognising it as a justiciable right under the Bill of Rights. Since the mandate of the negotiators was simply to ensure smooth transition from apartheid to democracy, the country's 1993 Interim Constitution adopted a minimalist approach.¹⁰ The framers of the instrument only codified conventional (first generation) rights in the Bill of Rights while leaving out contentious issues like the RTF to be debated by the forthcoming fully constituted democratic National Assembly. To be exact, besides the overarching civil/political rights, the few food-security-related rights in the Interim Constitution were the (i) right of detained persons to food (section 25(1)(b)); (ii) rights of workers to fair labour practices (section 27); and (iii) right of children to basic nutrition (section 30(1)(c)). Invariably, the urgency for food security was indisputable as it was perceived as an embodiment of the overall aspiration of the new Constitution. In other words, it was the blueprint for overcoming the legacy of apartheid or poor living conditions of blacks (Sachs, 1997).

A great deal of the final 1996 Constitution was spent uprooting the root and branches of apartheid (Klug, 1996). It begins with a Preamble which reflects on the historic human rights violations and proceeds to elaborate on the state's aspiration of ensuring basic livelihood, social justice and democratic values. This is followed by the Bill of Rights which encompasses an overarching civil/political right, RTF alongside other economic/social rights. The very inclusion of the RTF in the Bill of Rights provides a clear indication that food security is an essential component of the notion of fundamental rights. In underscoring the

¹⁰ Adopted on 27 April 1994 and repealed on 4 April 1997.

indivisibility and interdependence of the different categories of first/second generation rights, the RTF was interspersed between other civil/political rights and not set out under a separate heading such as social/economic rights. In so doing, the protection of the RTF and others, including water, health care, education, electricity and housing, was to forestall regimes from repeating mistakes made in the past, especially where black communities were plunged into starvation due to mistaken and myopic decisions in the past. In echoing this concern, Mandela (1991; own emphasis) bemoaned that

[a] simple vote, *without food*, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanize people. It is to create an appearance of equality and justice, which by implication socioeconomic inequality is entrenched. We do not want freedom *without bread*, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.

To the Nobel laureate, the right to political participation or free speech makes little sense to a woman who can afford neither grain nor bread for her family. The dilemma regarding the codification of food security was finally addressed by parliament when it concurred that akin to other civil/political rights, food security deserves to be codified as a full-fledged right in the Bill of Rights (Brand, 2002).

The process of codifying the RTF could be classified as *norm setting*. Nonetheless, in order to pacify the conservatives, the framers of the Constitution limited the duty imposed on the state in this regard by qualifying or subjecting the enjoyment of this right to a clawback clause. In a specific recognition of limited resources, section 27(1)(b) proceeds to indicate that ‘everyone has the right to sufficient food’. In acknowledgement of the state’s ‘available resources’, the RTF as listed is, therefore, justiciable and subject to judicial protection in light of the binding nature of the Bill of Rights.

Admittedly, the explicit inclusion of the RTF, along with a plethora of other transformative socioeconomic rights, makes this Constitution one of the most robust and forward-looking constitutions in contemporary times.¹¹ Needless to say, a constitutional guarantee in the form of section 27 clearly creates judicial enforcement, as it mandates judges

¹¹ Other rights within this section include access to health-care services, housing, water and social security.

to monitor the compliance of the executive to achieve the progressive realisation of RTF for everyone. The government could then be held accountable for breaching the Bill of Rights if it has the funds to ensure food security yet fails to provide intervention for this purpose.

The ultimate inclusion of RTF carries with it both general/group interests, for the protection of community or household food needs and private/individual interests. In this vein, there are a plethora of provisions within the Constitution relevant for the interpretation and enforcement of the RTF in the Bill of Rights. One striking provision worth citing is section 7(2) which places an obligation on the state to '*fulfil, promote, protect and respect*' people's access to food (own emphasis). The phrase, however, introduces considerable ambiguity as the document does not make entirely clear what these terms mean.

As discussed elsewhere, although section 27(2) of the Constitution may seem like a barrier towards the judicial interpretation of the RTF, recent developments in (inter)national jurisprudence may provide some leverage (*Grootboom*; *SERAC v Nigeria*; *Soobramoney*; *TAC*). In layman's terms, the first three responsibilities in section 7(2) oblige the state to ensure that its citizens are adequately fed by providing the means for them to obtain food. This could be done by either creating jobs, providing skills and training as a means of being self-employed or providing direct welfare in the form of food parcels or cash grants or land for people to farm.

Drawing from the *Maastricht Guidelines* (UoM, 1997), the duty to *fulfil* implies the positive duty of the government to ensure everyone has access to sufficient food. In this instance, it has an obligation to ensure that the bearers of this right afford basic foodstuffs in the market through price regulation, subsidising the price of basic agricultural produce or removing taxes on such products. The duty to *promote* also imposes a positive duty on the government to disseminate information in order to ensure that citizens are well informed of their RTF. The obligation to *protect* imposes a positive obligation on the state to safeguard citizens from undue interference by (non)state actors or third parties, or provide effective reparation when this occurs. The duty to *respect* implies a negative duty on the government to refrain from any act which might hinder people's existing enjoyment of their food security. A classic instance is where the state denies farmers' access to food by destroying their crops or evicting them from their farmland for infrastructural development. Take as an example, whereas the RTF is

not guaranteed in Nigeria's Constitution, the African Commission on Human and People's Rights found Nigerian in violation of this right after its security forces killed farm animals, destroyed crops and created a state of terror which made it impossible for local villagers to return to their farms and livestock (*Serac v Nigeria*).

Another important provision worth citing is section 8(2) of the Constitution which stipulates that the RTF places an obligation not only on the state, but also on private entities. This may be seen as having both horizontal (in terms of the interrelationship between non-state actors) and vertical (interrelation between the state and private actors) applications. Ironically, in the several instances of socio-economic jurisprudence handed down by the Constitutional Court, the exact inference of this contentious provision has not been clearly articulated (see the *TAC*, *Grootboom* and *Soobramoney* cases).

As discussed, section 27(1)(b) proscribes food price rigging, cartels or unreasonable increase in food products. It is worth noting that besides the limitation clause in section 27(2) which states that government must take steps 'within its available resources' to combat hunger, the fulfilment of food security is further subjected to a clawback clause in section 36 which avers that the RTF could be limited if such a limitation is justifiable and reasonable. In this context, an argument advanced for channelling state resources for countering terrorism or upgrading infrastructure rather than food security may be construed as unreasonable. Naturally, these standard qualifications in sections 27 and 36 imply that the state is obliged to simply ensure *access* (instead of direct right) to food, by (i) *taking legislative and other steps*; (ii) *based on available resources*; (iii) towards the *progressive realisation* of food security. Taking into account the fact that the ICESCR greatly influenced the wording of section 27(1)(b), international jurisprudence could provide some useful insight into the exact meaning of the three phrases.

It is important to underscore that framing food security as an *access* right does not guarantee free food on demand or warrant absolute entitlement to food. Simply put, *access* could be perceived as placing emphasis on providing sustainable environment for food production or acquisition instead of direct supply. Yet, the internal qualification of RTF or *access* as a *means* to an end in the Constitution clearly deviates from the food security provisions in international instruments such as the ICESCR where the right is listed in a direct form. Accordingly, the

clear distinction between the ICESCR and the Constitution in this area is whether a person can thrive and have adequate food (either through production or acquisition) when provided with the needed or enabling environment.

With the exception of extreme circumstances, the primary obligation of states is to promote self-sufficiency by creating the kind of environment essential for individuals to acquire their own food without unduly depending on the government. In this context, the state's primary duty is to ensure that (i) farmers have access to lands and farming equipment; (ii) there is adequate and reasonably priced food at the market; and (iii) people have a source of income or gainful employment. The state's failure to provide these interventions in a timely manner may trigger 'extreme circumstances': destitution, malnutrition or famishment.

It suffices to indicate that article 2(1) of the ICESCR, which adds a caveat to the state's RTF obligation, is reflective of section 27(2) of the Constitution. While the former calls on states to adopt 'legislative and other appropriate means' towards the attainment of food security, the latter echoes a similar sentiment by calling on the government to adopt 'reasonable legislative and other measures' to ensure that citizens have access to sufficient food. The CESCR, however, cautions that the construction of such legislative framework alone is not sufficient grounds for fulfilling this obligation, even though they are usually necessary and highly preferable. To this end, the emphasis on the adoption of *other appropriate means* under the ICESCR and *other measures* under the Constitution may be seen as encompassing a plethora of interventions which may include social security programs, free tertiary education, provision of land and financial assistance for small-scale farmers, good roads for transportation of farm produce, job creation and judicial remedies for hunger victims.

Moreover, the qualification clause under article 2(1) of the ICESCR which subjects the enjoyment of food security to a state party's *available resources* is replicated in section 27(2) of the Constitution. In shedding light on the importance of this qualification, the CESCR (1990) argues that its purpose is to safeguard the state from assuming responsibilities beyond its capacity. It, however, warns that states should not hide behind this curtain and overlook the deprivation of its citizens, but rather adopt all required steps since food insecurity is a matter of urgency (CESCR, 1990).

The final caveat of the ICESCR calling for the ‘progressive realisation’ of food security under article 2 is duplicated in section 27(2) of the Constitution. According to the CESCR (1999), this provision is entrenched to indicate that food security as a concept could only be attained over time, given that feeding is a continuous process and not something to be accomplished momentarily. Yet, the state must not use this as a veil to postpone the fulfilment of its obligation. To the Committee, states need to adopt practical measures to meet the dietary needs of people, while framing interventions to address future needs. For that reason, a state would need to provide substantive justification for its failure to adopt adequate measures to enhance household/individual access to food, or any attempt aimed at removing or limiting people’s access to food. It added that even if food security is a continuous process, the state must at least fulfil the urgent need of the most desperate citizens, which could be perceived as the minimum core obligation of the RTF.

On that account, whereas food security is seen as progressive, any failure to provide for a desperate group may constitute a clear violation of section 27(1)(b). This, according to the Constitutional Court, is termed the *minimum core obligations* (*Grootboom*, para 29). Yet, in the *Grootboom* case, the Constitutional Court mooted that one of its challenges in determining a violation of the minimum core obligation is that a great deal of information would have to be submitted to it before a decision could be reached on the right in question. In sum, the CESCR (1990) concluded that even though the ICESCR provides leeway for states to cite insufficient resources as the reason for non-fulfilment of a particular right, they must, at the very least, satisfy the minimum basic levels of all rights.

For purposes of convenience, the state’s duties can be classified under two broad headings: (i) internally qualified rights or application of clawback clause; and (ii) priority obligations or non-application of clawback clauses. It could be said that food security falls under the first bracket and be likened to the right to health care, which also falls within the bracket of section 27. In interpreting this particular provision, the Constitutional Court reiterated that claims for positive rights ought to be considered in light of the general needs of the society as these rights often relate to fair distribution of limited resources (Soobramoney). The Court further observed that decisions relating to the operationalisation of section 27 do not lie with courts, but with

service providers and political organs (*Soobramoney*). That being the case, it added that its main duty was to assess the policies and decisions adopted by these bodies to operationalise the Bill of Rights, and it would, to this end, give special consideration to their (non)compliance. It concluded by asserting that the state had adequately demonstrated its lacks of resources to provide such assistance to the applicant and all patients in similar condition. It concurred with the state that the few interventions provided to a select number of patients had been operationalised in good faith, and that the patient's application had no merit. Suffice to say that food security and related positive rights under the Bill of Rights could have imposed direct obligation on the state to provide immediate intervention had the framers of the Constitution excluded the limitation clause.

Yet, the RTF attains the status of priority obligation in two sections of the Constitution. The first is section 28(1)(c) which enshrines the right of children to basic nutrition without attaching any limitation clause. In this context, children's RTF is not subjected to the usual clause of 'available resources' or 'progressive realisation', but rather imposes immediate and direct responsibility on the state to provide children with food. The second is section 35(2), which guarantees that every sentenced prisoner and detainee has the right to 'adequate accommodation, *nutrition*' and other necessities that are consistent with human dignity. It emphasises that the provision of food to prisoners must be at the expense of the state. Food security in this context does not simply impose a negative duty allowing a detainee to seek for her/his own food, but rather a positive duty on the state to provide food of a certain quality to every detainee. In expatiating on section 35, the Western Cape High Court mooted that detainees are actually entitled to higher thresholds of needs, and thus, the question of 'adequacy' should not be measured in terms of existing practices outside the prison walls (see *Van Biljon v MCS*). Other rights which are relevant for the realisation of food security, especially in terms of having the entitlement or means to access food in the market, relates to labour relations rights under section 23. These include (i) the right of employees to participate in collective bargaining; (ii) right of employees to form and join trade unions; (iii) the right of workers to strike and engage in collective activities; and (iv) fair labour practices.

Two important types of mechanisms – the *soft* monitoring mandate of the South African Human Rights Commission (SAHRC) and the

hard enforcement mandate of courts – were mandated to monitor the state's compliance with its obligation. The role of the (quasi)judicial bodies can be termed as *norm enforcement*. Judicial mandate over food access is relevant in a country like South Africa which is riddled with large-scale poverty and inequality. Drawing from the text of the Bill of Rights, one could discern that the obligation for the promotion of food security lies with the two elected arms of government, the executive and legislative, with the judiciary playing a monitoring role in this arena. The Constitutional Court has, through the several socioeconomic cases, reasserted its mandate to monitor the operations of the other branches of government to ensure that they comply with their obligations (Certification of the Constitution, 1996: para 78). As a result, it could be said that the Court seems to play an activist role, like the Indian Supreme Court towards the judicial enforcement of socioeconomic rights. By way of illustration, the Constitutional Court was emphatic when it added a caveat that second generation rights must be safeguarded from unwarranted invasion (*Soobramoney*). It appears that the import of this ruling is the implication that judicial enforcement would apply only in cases where food security is threatened by the state or a third party through illegal eviction from farmland or restrictions of a water source for animals or irrigation purposes. Yet, if this is the actual reading of the ruling, then this could be seen as very narrow interpretation of the mandate of judges in promoting food security. But even if one could not precisely measure the powers of the judiciary in this domain, drawing from existing socioeconomic case law, one could argue that judges have the mandate to adjudicate on cases relating to excessive food prices, discrimination in the allocation of lands for farming or poor wages. To this end, the hungry or third parties acting in the interest of the poor can (in)directly invoke section 27 and ask for remedies for violation of their basic right.

There are two channels through which (quasi)judicial mechanisms could advance food security. The first is through a direct application to the courts that a violation of citizens' RTF is imminent or occurring or has occurred. An illustration of this breach may be seen to occur where food prices are unchecked and/or price spike prevents ordinary citizens from accessing staple food such as bread and milk for sustenance. Drawing from a series of socioeconomic rights adjudicated, it is evident that the Constitutional Court and its subsidiaries will be inclined to entertain cases which broach positive duties such as food security, with

possible financial compensation against the government (Nkrumah, 2019).¹² Even though in *Soobramoney*, the Court declined the request of the applicant, it added a caveat that the application had a prospect of being awarded remedies had it being filed on the basis of right to health under section 27(1)(a) as opposed to emergency care under section 27(3).¹³ This provides an indication that the RTF (also a qualified right under this same provision) might be successful if filed on grounds of non-compliance on the basis of prevalent hunger. The second falls within the arena of institutions mandated to support constitutional democracy. The relevant institution within this sphere is the SAHRC which is obliged by section 184 of the Constitution to enhance the realisation of food security and other interrelated rights. Section 184(1)(c) specifically mandates the Commission to police the implementation of measures for the realisation of food security, and it may pursue this end through monitoring, assessing and reporting on the observance of human rights in the state.

While the courts' enforcement role in this domain could be seen as a *hard* safeguard, particularly as its decisions are binding, the SAHRC's role could be seen as a *soft* safeguard as it merely makes non-binding recommendations (Nkrumah, 2016). The latter, however, has an important role to play in promoting food security, especially through section 184(3) of the Constitution which establishes that relevant government departments are obliged to furnish the SAHRC with yearly information regarding the measures taken to enhance food security. A classic illustration of this monitoring role of the SAHRC is akin to that of treaty monitoring bodies such as the (i) African Commission on Human and People's Rights under article 62 African Charter on Human and People's Rights; (ii) African Committee on the Rights and Welfare of the Child under article 43 of the African Charter on the Rights and Welfare of the Child; and (iii) CESCR under article 16 of

¹² As discussed elsewhere, the Treatment Action Campaign provides a blueprint on the arguments and strategies to be used in the drafting and filling of application for food security.

¹³ The case was filed by a 41-year-old diabetic man in need of renal dialysis. The court turned down the application on grounds that available resources need to be allocated in a rational manner as the state lacks sufficient economic resources to provide sophisticated healthcare to all those in need of such services. Section 27(3) of the Constitution guarantees that '[n]o one may be refused emergency medical treatment' while the applicant's condition was not emergent but chronic.

the ICESCR to receive and consider measures taken by state parties to realise the RTF and other socioeconomic rights. The core objective of these reporting mechanisms is to reaffirm and remind state parties of their obligations in terms of (among others) the RTF. In the process of assessing reports of state parties, the concerned state is entreated to introspect on how it has performed towards improving the living standards of its people.

Yet, the domestic reporting mechanism of the SAHRC, while distinctive as it operates at the national level, performs a similar role as its construction was modelled on the framework of regional and international institutions. It, therefore, reminds the state of its commitment to enhance food security by assessing relevant state agencies' reports on measures adopted to promote food security. If the SAHRC eventually decides to closely follow the norms and practices of its international predecessors, then CSOs will be allowed to submit independent reports on the RTF which will then be considered concurrently with those once presented by government departments. The SAHRC will then be able to carefully consider, prepare and submit an impartial report to parliament (for further checks on the executive) or as a basis for filing public interest litigation (PIL) against the state.

Ultimately, an objective assessment by the Commission will trigger productive engagement on the way forward between the SAHRC, courts, the public and their representatives (Ntlama, 2004). However, since the courts have not had an opportunity to consider a food security case, one can draw from a housing-related case in order to measure the success or otherwise of a potential RTF application. The closest example in this domain is the celebrated Constitutional Court case *Grootboom*. Four golden threads run through South Africa's food insecurity and housing shortage. First, they have their roots in backward apartheid policies, which relegated natives from productive lands to infertile settlements in the 'Bantustan' or former homeland (Ntlama 2004). Second, the two needs are recognised as human rights in the 1996 constitution. Third, both rights are subject to the same limitation clause of 'progressive realisation' and 'availability of state resources'. Finally, they share similar (quasi)judicial or monitoring institutions, namely the SAHRC and the courts. Akin to the RTF under section 27(1)(b), the text of section 26(1)(2) provides that the state must adopt reasonable legislative and other measures to achieve the progressive realisation of the right to adequate housing for everyone, but *subject to*

available resources.¹⁴ The next section, therefore, takes a look at this case in order to measure the prospect of food security PIL in light of the widespread hunger in contemporary South Africa.

Grootboom and Housing Adjudication

In order to appreciate the extent of food insecurity, homelessness and related social injustices, one must first appreciate the legacies of apartheid in contemporary South Africa. To many observers, the apartheid system is directly responsible for the current state of hunger, especially as it deprived millions access to farming, education and jobs as a means of accessing commercial food in the market (Baldwin-Ragaven et al., 2000). A key weapon used by this regime was that of influx control machinery which curbed the occupation of urban lands by blacks (Sarkin, 1998b). Subsequently, a disproportionate percentage of blacks resettled in informal settlements composed of shanties, shacks or emigrated to the fringes of urban centres in order to search for menial jobs in city centres.

Accordingly, by the mid-1990s, the failure of the post-apartheid regime to provide housing to cater for the rising number of black Africans coupled with the mass influx of natives into urban centres created an acute housing shortage (Hunter and Posel, 2012). As a response to this crisis, (sub)national governments adopted a plethora of legislations following the country's negotiated transition into democracy.¹⁵ Despite the noble ambitions of these policies, several households still do not have access to decent housing in contemporary South Africa. To some observers, the ineffective operationalisation of these policies has exacerbated structural violence, heightened the risk of female sexual abuse and the HIV/AIDS pandemic which consumes a greater percentage of the state's limited resources (Surender *et al.*,

¹⁴ Section 26 (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

¹⁵ The instruments include, among others, the Provision of Land and Assistance Act (Act 126 of 1993), Restitution of Land Rights Act (Act 22 of 1994), Land Reform (Labour Tenants) Act (Act 3 of 1996), Extension of Security of Tenure Act (Act 62 of 1997).

2010). It was in this context that a number of households from informal housing settlement in Wallacedene put in a number of applications to the state's housing programme, officially termed as Reconstruction and Development Programme (RDP) and Cape Town's municipal subsidised housing (Wesson, 2004). Suffice to say these applicants remained on the waiting list for several years. Frustrated by the poor service delivery in this location, such as lack of access to electricity, water and sanitation, residents resettled on land demarcated for private accommodation construction. Having obtained an eviction order, the landowner demolished and, in some cases, burnt down the homes and properties of many. They subsequently relocated, (re)constructed and resided in a plastic structure on a sports field in Wallacedene. Dissatisfied by their inhumane condition, 900 of these residents, including 510 children, from Wallacedene filed an application with the Cape of Good Hope High Court alleging a violation of their right to housing and lack of access to service delivery (*Grootboom*, fn 2). One of the residents and main applicant, Irene Grootboom, resided with her family in a shack of approximately twenty square metres, which to a greater extent questions whether politicians have been able to deliver the fruits of democracy promised during the liberation struggle (*Grootboom*, para 7).

The application was filed on two grounds. First, on section 26, which avows citizens' right to adequate housing (based on the availability of state resources) and from arbitrary eviction. Second, section 28 which guarantees the right of children to family care, basic nutrition and shelter. It is important to underscore some issues.¹⁶ First, the right of citizens against arbitrary eviction under section 26(3) imposes a negative duty not only on the state, but on non-state actors as well. It implies that without the requisite court order, it will be a *prima facie*

¹⁶ 28. (1) (a) to a name and a nationality from birth;
 (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 (c) to basic nutrition, shelter, basic health care services and social services;
 (d) to be protected from maltreatment, neglect, abuse or degradation;
 (e) to be protected from exploitative labour practices;
 (f) not to be required or permitted to perform work or provide services that –
 (i) are inappropriate for a person of that child's age; or
 (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

violation of citizens' right if a private landlord forcibly evicts or demolishes the property of another. This is a landmark provision especially from a constitutional standpoint, given that constitutions rarely place negative obligations on third parties. Again, the provision triggers other striking features, especially from a socioeconomic perspective. While it seeks to help people live in decent apartments, the guaranteeing of right to property based on one's continued occupancy might stimulate some negative or unintended ramifications. For illustrative purposes, knowing that it will be cumbersome to terminate a tenancy or evict an unruly tenant, there might be diminished stock of private residential housing as private actors might, in the first instance, be disinterested in the provision of housing. Also, as has become the norm in contemporary South Africa, one could argue that this provision has somewhat contributed to the rigorous screening processes which potential tenants are subjected to before being granted accommodation by their landlords (Marais and Wessels, 2005). As a consequence, one could safely argue that besides hunger, one major social injustice currently confronting millions is insufficient access to affordable housing (Del Mistro and Hensher, 2009).

Reverting to the case, the second arm of the application, which draws on the overlap between children's rights and housing is equally noteworthy. For whereas the latter in section 26 is qualified or subjected to available resources and progressive realisation, children's rights under section 28 are unqualified or not subject to the discretion of the state. Without any limitation clause in section 28, it is obvious that children are guaranteed access to relevant social goods or largesse irrespective of the financial position of the state. On the basis of constitutional interpretation, this implies that the state is absolutely obliged to provide social services, health care, housing and food/nutrition to children even if the state is facing economic crisis. As to whether this constitutional interpretation is correct remains the task of the next paragraph.

In stark contrast to the previous textual reading, the Constitutional Court held that children's rights to basic necessities are neither absolute nor occupy any special place as compared to other socioeconomic rights (Schneider, 2004). It, however, backtracked when it noted that the government has a responsibility to adopt interventions to safeguard children from degradation, neglect and abuse even though they might be under the roof of their parents. In treading cautiously on subjects relating to priority-setting at the domestic level, it observed that the

duty to provide children with basic amenities such as food and shelter rest with or begins with parents, then to the broader family before the state (Williams, 2014). The obligation of the state is triggered when children are removed from the care of their parents or (extended) family, especially as section 28 does not oblige the government to provide houses on demand to parents for the benefits of their children. For this reason, the constitutional provision does not oblige the government to provide housing for the children in *Grootboom* as they were under the care of their parents. This contentious interpretation of the Constitution may be linked to what is termed as the ‘incoherent consequence’ of denying access to housing to those without (or with older) children to the benefit of those with minor children. Such a ruling stands the risk of rebranding youngsters as yardsticks for accessing state shelters. But a reader could argue that in light of the special needs of minors, it would not be farfetched to use children as benchmarks for allocating shelters. The Court, however, rejected this view arguing that if such an argument is upheld, the rights of children would be invoked in every socioeconomic rights litigation which would eventually water down the clawback clauses provided for all positive rights (Sloth-Nielsen, 2001).

Going back to housing and the first arm of the application, the Court held that section 26 obliges the state to provide temporary shelters to address the immediate needs of people in desperate conditions while seeking for measures to provide long-term solutions to their challenges (De Visser, 2003). It further averred that even though the applicants have failed to provide sufficient information in order to define the minimum core, it held that such detailed information was not necessary as it was obvious that the applicants were residing in structures consisting of plastic sheets. It recalled that in order to fulfil citizens’ right to housing, the government must discharge two obligations to two different sets of people: the poor and the affluent. For the first group, the state’s obligation is to forge interventions to provide decent housing for those incapable of erecting their own structures or renting from third parties. This begs the question, whether the state has ensured the progressive realisation of the right in question by taking reasonable steps? In responding to this, the Court observed that the government has failed in this respect despite the enormous resources at its disposal. It added that the Constitution imposes a duty on the state to construct a coordinated and coherent intervention to address the urgent needs of

people even though it does not automatically guarantee (upon demand) a right to shelter or any of the socioeconomic needs (Sachs, 2003). The onus is, thus, on the government to frame such interventions to respond to the needs of people in intolerable conditions or without roofs over their heads and no access to land. On the question of the second group – the affluent or those capable of paying for or building their own houses – the obligation of the state borders on creating an enabling environment for self-built houses through housing stock and access to loans. In this context, the government has a duty to create competitive markets which are adequately flexible to provide needed flexible loan terms or affordable accommodation for purchase to those who can afford it. Put differently, eliminating monopoly, unreasonable rent hikes or racketeering enables the middle class to participate in the housing market.

On the question of policy, it held that the state's 1997 Housing Act 107 could be considered as constitutional if it is effectively operationalised to ensure that a disproportionate percentage of the poor have access to housing (*Grootboom* case). Although it recognised that some individuals' deprivation of housing may be permissible, especially if they have the means, the government's RDP programme was seen as unreasonable and inconsistent with the constitutional plan for three reasons. Specifically, the programme was seen as failing to manage the crises, not affording relief to desperate people and failing to budget, plan and monitor the operationalisation of housing allocation. The Court reiterated that in recognition of this constitutional duty, the local government of Cape Metro equally adopted a housing policy to respond to the needs of individuals in desperate circumstances. Yet, despite the noble aspiration of the municipal policy, insufficient financial support from the state equally hindered operationalisation of this policy. It ultimately concluded that section 26 had been breached. This decision has, over the last decade, been widely acclaimed as groundbreaking as it underscores priority-setting and the obligation of state to respond timeously to those in desperate need (Chenwi, 2008).

In sum, a historical judgement which allows one to understand and forecast the possible interpretation of a food security application is compelling, as it could be a useful weapon to draw inspiration from and advocate for people's RTF. Such a historical reflection is important since a considerable number of literatures have not paid attention to some of the legal contours or challenges which food security litigants

might encounter in courtrooms. The lesson from this section is grounded on the notion that by drawing from legal precedence, one could frame and file an innovative RTF application with the court for possible (successful) remedies. Three lessons can be drawn from the *Grootboom* case. First, it reminds us that individuals who live in desperate conditions are deprived of their entitlements as citizens and cannot enjoy a decent standard of living. Second, the case underscores the intricate interdependence between democratic deliberation, constitutional law and/or subsistence rights. Third, it demonstrates that an application on the violation of the RTF could be filed if applicants could demonstrate that a section of the population is in desperate need of food and the state has failed to meet its minimum core obligation.

Conclusion

This chapter has demonstrated that the RTF is rarely recognised as a justiciable right in many countries, especially those in sub-Saharan African as well as those in the Global North. In most jurisdictions, the RTF or food security is either relegated to the bracket of DPSP or not recognised at all, as demonstrated in the American Constitution. This lack of recognition impacts on the ability of (quasi)judicial bodies to enforce citizens' right to adequate food. However, the transition of South Africa from apartheid to a democratic regime in 1994 witnessed the birth of its 1996 Constitution which contains provisions unparalleled in contemporary times. The key feature of this instrument worth celebrating is the expansive socioeconomic provisions in the Bill of Rights seeking to enhance the living conditions of the poor. The recognition and justiciability of the RTF in the Constitution is distinctive, especially as very few national constitutions recognise access to adequate food as a human right. Also, to ensure enforcement of this right, the Constitution has mandated the courts and the SAHRC to perform monitoring roles (adjudicating and state reporting) to evaluate the compliance and performance of the state in this domain.

Despite these constitutional guarantees, the RTF is one of the rights frequently abused as millions of South Africans go to bed hungry. One challenge limiting the enjoyment of the right is section 27(2) which subjects it to the availability of state resources. Indeed, the clawback clause has served as a blanket excuse for the state to exclude millions from social assistance programmes since positive rights are about

equitable distribution and individual needs have to be balanced against the broader needs of the community. It is important to note that the promotion of food security cannot be attained through quasi(judicial) institutions alone, but rather in collaboration with the institutions which perform the actual operationalisation of food security interventions: the legislature and executive.