

Mobilising for the realisation of the right to food in South Africa

By

Bright Nkrumah

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Supervisor: Prof. Magnus Killander

University of Pretoria

Declaration of Originality

I, Bright Nkrumah (Student Number: 11326868), hereby declare that this dissertation is the product of my own research activity. I further declare that this dissertation has not previously been submitted for any degree or examination at the University of Pretoria or any other institution.



Signature

1 November 2017

Date

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Dedication

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Abstract

The realisation of the right to food in South Africa is characterised by some stark realities. While there is social security structure and large productive agriculture sector ensuring national food security, more than 14 million South Africans are chronically hungry. Given that access to food is an important legal and political issue in South Africa, it is important to understand the various factors, which enable or hinder the state's effort to eradicate chronic hunger.

A major problem identified is the incoherence in government's policies, which on the one hand, supports the promotion of the right to food, yet, act to undermine it at the same time. This problem can be grouped under two headings. First, inadequate and fragmented food security policies, and poor implementation of these policies. Second, the exclusion of large sections of low-income groups from government's social protection programmes, which has negative implications for many women, men, and children who have an insufficient supply of calories. The impact of chronic hunger and malnutrition on these individuals include heightened vulnerability to illness, stunted growth among children, serious mental and physical effects among children, and in some cases death.

This thesis explores the factors that explain the limited mobilisation around the realisation of the right to food in South Africa despite widespread chronic hunger. It considered various strategies to achieve a change in policy and legislation including lobbying and litigation. The thesis further explored why South Africa, which is riddled with numerous social protests rarely experiences food protests. Social protest, as used here, consists of struggles or resistance against government actions or inactions. The thesis identified various factors that have contributed to and acted as a hindrance against food protest in various jurisdictions and examined how these factors have prevented widespread food protest in South Africa.

Keywords: chronic hunger, food poor, human rights, malnutrition, poverty, food protest, right to food

Abbreviations and acronyms

AIDS	Acquired Immune Deficiency Syndrome
ANC	African National Congress
CASP	Comprehensive Agricultural Support Programme
CBOs	Community-Based Organisations
CC	Constitutional Court
CCF	Concerned Citizens Forum
CCT	Conditional cash transfer
CESCR	Committee Economic Social and Cultural Rights
COSATU	Congress of South African Trade Unions'
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CPI(M)	Communist Party of India (Marxist)
CRC	Convention on the Rights of the Child
CSG	Child Support Grant
CSOs	Civil Society Organisations
DAFF	Department of Agriculture, Forestry and Fisheries
DBE	Department of Basic Education
DDF	District Development Fund
DED	Department of Economic Development
DLA	Departments of Land Affairs
DNA	Department of Native Affairs
DoH	Department of Health

DoL	Department of Labour
DSD	Department of Social Development
ESTA	Extension of Security of Tenure Act 62 (1997)
FAO	Food and Agriculture Organisation
FAP	Food Assistance Programme
FBSAN	Brazilian Food and Nutrition Security Forum
FCDA	Foodstuffs, Cosmetics and Disinfectants Act
FIAN	First Information and Action Network
FNSP	Food and Nutrition Security Policy
FSNWG	Food and Nutrition Security Working Group
FSWG	Food Security Working Group
GA	General Assembly
GDP	Gross Domestic Product
HRC	Human Rights Committee
HSRC	Human Sciences Research Council
ICCPR	International Covenant on Civil and Political Rights
ICDSS	Integrated Child Development Services Scheme
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFIs	International Financial Institutions
IFSNP	Integrated Food Security and Nutrition Programme
IFSS	Integrated Food Security Strategy
IGWG	Inter-Governmental Working Group
INP	Integrated Nutrition Policy

ISS	Institute for Security Studies
ITQ	Individual Transferable Quotas
LCC	Land Claims Court
LGB	Local Government Bulletin
LRAD	Land Redistribution for Agricultural Development
LTA	Labour Tenants Act 3(1996)
MDGs	Millennium Development Goals
MDM	Mass Democratic Movement's
MDS	Ministry of Social Development
MLRA	Marine Living Resources Act 18(1998)
MMS	Midday Meal Scheme
NDP	National Development Plan
NFCS	National Food Consumption Survey
NFNSC	National Food and Nutritional Security Council
NFSA	National Food Security Act
NGOs	Non-Governmental Organisations
NGP	New Growth Path
NHRIs	National Human Rights Institutions
NP	National Party
NPC	National Planning Commission
NSNP	National School Nutrition Programme
PDS	Public Distribution System
PNAE	National School Meal Program

PSNP	Primary School Nutrition Programme
REGA	Regulation of Gatherings Act
SA	South Africa
SAA	Social Assistance Act
SAHRC	South African Human Rights Commission
SANCO	South African National Civic Organisation
SANHANES	South African National Health and Nutrition Examination Survey
SAPS	South African Police Service
SAVACG	South African Vitamin A Consultative Group
SECC	Soweto Electricity Crisis Committee
SERAC	Social and Economic Rights Action Centre
SLAG	Settlement/Land Acquisition Grant (SLAG)
TAC	Treatment Action Campaign
UDHR	Universal Declaration of Human Rights
UIF	Unemployment Insurance Fund
UN	United Nations
US	United States
ZACC	Constitutional Court of South Africa

CHAPTER ONE

INTRODUCTION

1. Research problem

Despite its constitutional protection,¹ high per capita income,² and position as a net exporter of agricultural products,³ the enjoyment of the right to food remains unacceptably illusive for millions of South Africans.⁴ Besides being recognised in the 1996 Constitution, the South African government has over the years ratified numerous (regional and international) treaties which recognise the right to food;⁵ and has adopted several policies (and strategic measures) with the goal of eradicating hunger and malnutrition.⁶ Yet, more than 14 million South Africans are chronically hungry.⁷ This situation suggests one of two things; either the

¹ See art 27 (1)(b); art 28(1)(c); and art 35(2)(e) of the Constitution of the Republic of South Africa, Act 108 of 1996 ('Constitution').

² TradingEconomics 'South Africa GDP per capita 1960-2017' <http://www.tradingeconomics.com/south-africa/gdp-per-capita> (accessed 4 April 2017). According to Jackie Dugard, South Africa is ranked as '+/-29th richest according to size of economy'. The country is therefore, an upper middle income country and not poor. J Dugard 'Transition from apartheid – legal frameworks and judicial structure' *SER litigation strategies and impact Global School on SERs*, University of Pretoria (16 May 2017) 1.

³ Oxfam International 'Hidden Hunger in South Africa: The Faces of Hunger and Malnutrition in a Food-Secure Nation' (2015) available at <https://www.oxfam.org/en/research/hidden-hunger-south-africa> (accessed 8 March 2017); SouthAfrica.info 'South African agriculture' <http://www.southafrica.info/business/economy/sectors/agricultural-sector.htm#.VUCFsPCpVXs> (accessed 7 May 2015); BusinessDayLive 'SA is still a net exporter of food, but how long will that last?' (15 October 2015) available at <http://www.bdlive.co.za/opinion/2012/10/15/sa-is-still-a-net-exporter-of-food-but-how-long-will-that-last> (accessed 7 May 2015). It is important to indicate that the El Niño-induced drought which hit the entire Southern Africa was projected to have an impact on South Africa's food security situation. For more discussions on the drought and South Africa's potential to import more food, see L Steyn 'Drought's devastating ripple effect' (15 January 2016) Mail&Guardian, available at <http://mg.co.za/article/2016-01-14-droughts-devastating-ripple-effect> (accessed 4 August 2016); L Donnelly 'Drought stalks SA crops and economy' (4 September 2015) Mail&Guardian, available at <http://mg.co.za/article/2015-09-03-drought-stalks-sa-crops-and-economy> (4 September 2015).

⁴ NM Dodd 'Household hunger, standard of living and satisfaction with life in Alice, South Africa' (2016) 26(3) *Journal of Psychology in Africa* 284; CM Walsh & FC Van Rooyen 'Household Food Security and Hunger in Rural and Urban Communities in the Free State Province, South Africa' (2015) 54(2) *Ecology of food and nutrition* 118.

⁵ South Africa is a party to the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and African Charter on the Rights and Welfare of the Child (African Children's Charter). On 12 January 2015, South Africa became a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), see ESCR-Net (20 January 2015) 'The Government of South Africa ratifies the ICESCR' <https://www.escr-net.org/node/365752> (accessed 28 July 2015).

⁶ See S Khoza 'The role of framework legislation in realising the right to food: Using South Africa as a case study of this new breed of law' in WB Eide & U Kracht (eds) *Food and Human Rights in Development* (2005) 197.

⁷ Statistics South Africa 2016 (Stats SA 2016) noted in 2016 that 24.9 percent of South Africans were chronically hungry. Therefore, the conclusion that 14.7 million people are hungry was reached by multiplying the 24.9 percent with the country's population of 55.9 million in 2016. See Stats SA 2016a 'Statistical Release

steps (policies) taken by the state are woefully inadequate, or are poorly implemented. In light of this shortfall, it is important to determine which policy actor is best suited to bring about policy change to address the issue of chronic hunger. One of such actors in South Africa is social protest, which has been identified as an effective weapon for policy change.⁸ The poor have used protests to improve their access to quality service delivery in South Africa.⁹ However, chronic hunger has rarely been a pivot around which protesters seek to pursue reforms in South Africa. For this reason, the study sought to examine why there has been little use of protest as a tool to promote the right to food in South Africa as compared to other parts of the world.¹⁰

2. Background

In his 1981 landmark essay titled *Poverty and Famine*, Amartya Sen intimated that chronic hunger and malnutrition are not in essence related to low production of food.¹¹ He asserts that people are chronically hungry because they cannot afford the available food on the markets or they lack the required resources to cultivate their own food.¹² Sen, therefore, concluded that

P0318: General Household survey 2015' (2016) *Statistics South Africa* available at <<https://www.statssa.gov.za/publications/P0318/P03182015.pdf>> (accessed 30 March 2017) 65; Stats SA 2016b 'Mid-year estimates 2016: 55.9 million people in South Africa: planning for a better tomorrow' available at <www.statssa.gov.za> (accessed 31 March 2017) 1.

⁸ W Assies 'David versus Goliath in Cochabamba: water rights, neoliberalism, and the revival of social protest in Bolivia' (2003) *Latin American Perspectives* 14; W Rudig 'Social Protest and Policy Change: Ecology, Antinuclear, and Peace Movements in Comparative Perspective' (2011) 35 *International Journal of Urban and Regional Research* 473; L Walker & L Mann 'Unemployment, relative deprivation, and social protest' (1987)13(2) *Personality and Social Psychology Bulletin* 275. Social protest could simply be defined as a form of unrest, which is driven by social conditions.

⁹ D McLaren, B Moyo & J Jeffery 'The Right to Food in South Africa: Executive Summary An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food' (2015) available at <<http://www.spii.org.za/wp-content/uploads/2015/07/SPII-The-Right-to-Food-in-South-Africa-2015-Executive-Summary.pdf>> (accessed 30 May 2017) 8; Community Law Centre 'MLGI: Service delivery protest barometer' (2012) 14 (3) *Local Government Bulletin (LGB)* 4. According to the LGB, in the first eight months of 2012 alone, the state recorded a total of 226 protests, which eventually spiked to 470 by the end of the year. See Mail&Guardian 'Research shows sharp increase in service delivery protests' available at <http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests> (accessed 6 May 2015). The Community Law Centre recorded 218 protests in 2014 alone. See Community Law Centre 'South Africa's violent protests reach the all-time high – MLGI report' available at <http://communitylawcentre.org.za/news/south-africa2019s-violent-protests-reach-the-all-time-high-2013-mlgi-report> (accessed 13 April 2015).

¹⁰ See Local Government Action 'Social protests and water service delivery in South Africa' <http://www.localgovernmentaction.org/blog/social-protests-and-water-service-delivery-south-africa> (accessed 22 June 2015); eNCA 'Protesters demand improved water services' <http://www.enca.com/south-africa/protesters-demand-improved-water-services> (accessed 22 June 2015).

¹¹ A Sen *Poverty and famines: an essay on entitlement and deprivation* (1981) 154-5.

¹² Sen (n 11 above) 45.

hunger cannot be alleviated simply by increasing yield, but rather, by addressing the poverty situation of the marginalised and most vulnerable groups in the society.¹³

The right to food is a right for all and serves as a ‘compass’ to ensure that legal frameworks and strategies are adopted, and implemented towards the alleviation of hunger and malnutrition.¹⁴ As noted in its General Comment No. 12, the Committee on Economic Social and Cultural Rights states that the human right to food is imperative for the realization of all other rights and applies to ‘everyone’.¹⁵ According to the Committee, the right to food is fulfilled:

when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense, which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, *states have a core obligation to take the necessary action to mitigate and alleviate hunger [...] even in times of natural or other disasters.*¹⁶

The right imposes (both positive and negative) obligations on states to take action to ensure that all individuals within their borders have enough to eat in both peacetime and wartime.¹⁷ It was against this backdrop that the United Nations Special Rapporteur on the right to food, Olivier de Schutter intimated that the right to food under the International Covenant on Economic, Social and Cultural Rights (ICESCR) is a binding obligation and ‘not primarily the right to be fed after an emergency’.¹⁸ The Food and Agriculture Organisation (FAO) equally asserts that this right obliges all states to make certain that ‘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’.¹⁹

¹³ Sen (n 11 above) 39.

¹⁴ O de Schutter ‘Countries tackling hunger with a right to food approach’ (2010) United Nations Briefing Note 1.

¹⁵ CESCR, General Comment No. 12, E/C.12/1999/5, para. 1.

¹⁶ CESCR (n 15 above) para 6. Own emphasis.

¹⁷ K Mechlem ‘Food Security and the Right to Food in the Discourse of the United Nations’ (2004) 10(5) *European Law Journal* 631; WC Edmundson & PV Sukhatme ‘Food and work: poverty and hunger?’ (1990) *Economic Development and Cultural Change* 263.

¹⁸ De Schutter (n 14 above); For a general discussion on the right to food, see J Ziegler, C Golay, C Mahon & SA Way (2011) *The fight for the right to food: lessons learned* 13.

¹⁹ FAO ‘Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security’ Adopted by the 127th Session of the FAO Council November (2004) 5.

At the domestic level, the South African Constitution represents an overarching commitment by the state to advance the right to food for every individual.²⁰ Alongside a catalogue of fundamental socio-economic rights, the Constitution expressly provides for the right to food.²¹ Specifically, while section 27(1)(b) guarantees the rights of everyone to ‘sufficient food’, section 28(1)(c) provides for the rights of every child to basic nutrition, and section 35(2)(e) further sets out the rights of every detained person and prisoner to sufficient nutrition. Other essential rights in the Constitution linked to freedom from hunger are the rights to life, human dignity, equality, work and social security.²² These far-reaching safeguards, in and of themselves, should trigger the fundamental drive towards the effective operationalisation and attainment of national food security.

According to the FAO, a nation is food secured 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’.²³ It was against this backdrop that a former judge in the Constitutional Court, Judge Albie Sachs advocated that the lower class in the society have substantive rights to the minimum level of decent existence, including quality food, which a nation’s resources will permit.²⁴ Sheryl Hendriks affirms that South Africa could be said to be food secured when there is absence of hunger or where there is availability of ‘food supply, access, adequacy, utilisation, safety and, in some cases, cultural acceptability of food for all people at all times.’²⁵

The South African government has over the years, adopted several policies and strategic measures to boost people’s access to food. These initiatives range from the 2002 Household Food and Nutrition Security Strategy,²⁶ 2012 Integrated Food Security Strategy,²⁷ 2013

²⁰ S Khoza ‘Realising the Right to Food in South Africa: Not by Policy Alone-A Need for Framework Legislation’ (2004) 20 *South African Journal on Human Rights* 664.

²¹ See sec 27(1)(b).

²² Secs 10, 11, 23(2), 27(1)(c) & 36.

²³ FAO (n 19 above) 5.

²⁴ A Sachs ‘The judicial enforcement of socio-economic rights: the *Grootboom* case’ (2003) 56 *Current Legal Problems* 579.

²⁵ SL Hendriks ‘The challenges facing empirical estimation of household food (in) security in South Africa’ (2005) 22(1) *Development Southern Africa* 103.

²⁶ For a detailed discussion of the 2002 Household Food and Nutrition Security Strategy, see Department of Social Development and Department of Agriculture, Forestry and Fisheries ‘A national policy on food and nutrition security for the republic of South Africa’ (August 2013) available at <<http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutrition%20security.pdf>> (accessed 24 July 2017).

²⁷ Department of Agriculture, Forestry & Fisheries ‘Integrated Food Security and Nutrition Programme (IFSNP)’ <http://www.daff.gov.za/daffweb3/Programme/Integrated-food-Security-and-Nutrition-Programme> (accessed 2 August 2016).

National Policy on Food and Nutrition Security,²⁸ to social assistance.²⁹ Yet, beyond the curtain of these legislative pledges lurks the naked reality that a vast number of the population are deprived this right.³⁰

Many South Africans, often persons with disabilities, persons living with HIV, children in child-headed households, the infirm and unemployed, live in abject poverty, and are victims of chronic hunger.³¹ Chronic hunger - or undernourishment - is a matter of life or death.³² It can more subtly impair the exercise of a normal life, trigger hunger-related diseases or strike as starvation.³³ Poverty and chronic hunger reinforce each other in a dreadful cycle, since poverty largely hinders access to food, and chronic hunger, on the other hand, impedes labour productivity.³⁴ In children, chronic hunger does not only impair physical and mental development, but also cripples the ability to learn.³⁵ Irrespective of the constitutional guarantee of the right to food, and the chronic hunger situation faced by millions of South Africans, the government has not adopted adequate steps to improve people's access to food. It was, therefore, important to assess which actors could pressure the government to take immediate steps to address the issue of chronic hunger in South Africa. One group of relevant actors are those engaged in, or who may choose to become involved in, social protest.

Social protest to some extent has played a fundamental role locally and in other countries in achieving political and socioeconomic transformation.³⁶ In Bolivia, through the activities of

²⁸ Department of Social Development & Department of Agriculture, Forestry and Fisheries 'National Policy on Food and Nutrition Security' available at <<http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutrition%20security.pdf>> (accessed 2 August 2016).

²⁹ See GroundUp 'Everything you need to know about social grants' available at http://groundup.org.za/article/everything-you-need-know-about-social-grants_820> (accessed 2 August 2016).

³⁰ For a detailed analysis of the nexus between food prices and hunger, see S Hendriks & A McIntyre 'Between Markets and Masses: Food assistance and food banks in South Africa' in R Graham & T Silvasti (eds) *First World Hunger Revisited: Food charity or the right to food? 2nd Edition* (2014) 119.

³¹ See B Nkrumah 'The Potential of the African Human Rights System in Addressing Poverty' Paper presented at the Colloquium on Poverty and Human Rights in Africa, Cape Town, South Africa, 27-28 November 2014 (on file with author) 7.

³² J Ziegler, C Golay, C Mahon & SA Way *The Fight for the Right to Food: Lessons Learned* (2011) 1.

³³ B Nkrumah 'G77 and economic diplomacy: challenges and prospects for Africa's food security' (2016) 31(1) *Latin American Studies Report* 30; L Niada 'Hunger and International Law: The Far-Reaching Scope of the Human Right to Food' (2006) 22 *Connecticut Journal of International Law* 131.

³⁴ N Ramanujam, N Caivano & S Abebe 'From Justiciability to Justice: Realizing the Human Right to Food' (2015) 11 *McGill International Journal of Sustainable Development Law and Policy* 1.

³⁵ P Van Esterik 'Right to food; right to feed; right to be fed. The intersection of women's rights and the right to food' (1999) 16(2) *Agriculture and Human Values* 225; S Damman, WE Eide & HV Kuhnlein 'Indigenous peoples' nutrition transition in a right to food perspective' (2008) 33(2) *Food Policy* 155.

³⁶ Regarding the impact of protest on policy and social change, see CA Nathanson 'Social movements as catalysts for policy change: the case of smoking and guns' (1999) 24(3) *Journal of Health Politics, Policy and Law* 428; TR Rochon & DA Mazmanian 'Social movements and the policy process' (1993) *The Annals of the American Academy of Political and Social Science* 75.

social protest, the government was pressured into amending a legislation leading to free access to water.³⁷ In India, following massive protest against high food prices in 2011,³⁸ the government in 2013 adopted the National Food Security Act,³⁹ and subsequently implemented some measures to address hunger, especially by distributing subsidized food to millions of poor while making vulnerable groups eligible for daily free meals.⁴⁰ The success of the development and implementation of the food security programme in Brazil has been attributed to '[d]emonstrations and other actions at the grassroots' which triggered the adoption and effective operationalization of food security measures.⁴¹

In the case of South Africa (unlike India and Brazil), there has not been any large scale foot riot or protest mainly staged for the purposes of demanding for food or reduction of food prices. It was in this light that McLaren, Moyo and Jeffery in 2015 observed that:

South Africa has not yet seen the food riots that sparked the 'Arab Spring' revolts in many parts of North Africa in recent years, although service delivery protests of various kinds have been on the rise and are a sign of burgeoning discontent in the poorest areas of the country.⁴²

Nonetheless, there have been minor instances of protest worth citing. First, in June 2015, a homeless woman staged a one-woman protest outside parliament and called on the National Assembly to assist her with accommodation and money for basic necessities, such as food. Members of parliament offered to assist the victim with accommodation and directed the Department of Social Development to provide further assistance to alleviate her plight.⁴³ Second, in May 2016, a social movement termed South African Food Sovereignty Campaign threatened to embark on 'sporadic, disruptive' protests against high food prices, which have

³⁷ T Perreault 'From the Guerra Del Agua to the Guerra Del Gas: resource governance, neoliberalism and popular protest in Bolivia' (2006) 38(1) *Antipode* 152.

³⁸ British Broadcasting Corporation 'Thousands protest against high food prices in Delhi' <http://www.bbc.com/news/world-south-asia-12549050> (accessed 7 May 2015).

³⁹ National Food Security Act <http://indiacode.nic.in/acts-in-pdf/202013.pdf> (accessed 15 June 2016).

⁴⁰ De Schutter (n 14 above); Los Angeles Times 'India passes massive program to feed 800 million in poverty' available at <<http://articles.latimes.com/2013/sep/02/world/la-fg-wn-india-food-program-20130902>> (accessed 15 June 2015); Also, see 2013 National Food Security Act, available at <http://dfpd.nic.in/?q=node/955> (accessed 7 May 2015).

⁴¹ FAO 'Right to food: lessons learned in Brazil' available at <<ftp://ftp.fao.org/docrep/fao/010/a1331e/a1331e.pdf>> (accessed 7 May 2015).

⁴² D McLaren, B Moyo & J Jeffery 'The Right to Food in South Africa: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food' *Studies in poverty and inequality institute* (2015) 8.

⁴³ South African Government 'Parliament offers assistance to Limpopo woman protester outside Precinct' available at <<http://www.gov.za/speeches/parliament-offers-assistance-limpopo-woman-protester-outside-precinct-22-jun-2015-0000>> (accessed 29 July 2015). Also see Wisner 'Public Positions: The crisis of democratic representation in local government' available at <<http://wiser.wits.ac.za/event/public-positions-crisis-democratic-representation-local-government>> (accessed 27 July 2015).

pushed many South Africans into debt.⁴⁴ This much anticipated protest, if successfully staged could provide the necessary impetus for the government to reassess its food-related policies in order to provide a sustainable solution to the present chronic hunger in the country. Third, a few students from Tshwane University of Technology protested against unhealthy food at the cafeteria. The students alleged that their 'plate of food is not healthy at all, and it doesn't even look appetising.'⁴⁵ Fourth, staff of three civil society groups composed of Oxfam, Studies in Poverty and Inequality Institute and Ekurhuleni Environmental Organisation picketed outside the DAFF headquarters on 17 March 2015 and presented a memorandum to the department urging the state to open up the proposed food security plan for public consultation.⁴⁶ Finally, poultry workers belonging to the Food and Allied Workers Union staged a demonstration in front of the official residence of the European Union (EU) Delegation to South Africa in November 2016 demanding the EU cease exporting chicken to South Africa.⁴⁷

Evidently, none of these protests could match the large-scale or national food protests discussed by McLaren *et al* above. A large-scale food protest refers to a massive national uprising where citizens from across the country take to the streets in demand for lower prices of food or state's provision of food. It is against this backdrop that this thesis seeks to examine the reason why food protest is rare in South Africa.

The thesis will also seek to identify the factors, which have hindered access to sufficient food in South Africa and examine under what conditions social protest could be used in realising the right to food. In addition, the thesis will examine the content of the right to food within the South African legal system and further investigate the extent to which the state's food initiatives ensure access to adequate food. To this end, international instruments and declarations, the 1996 Constitution and the various food security interventions in South Africa will be primarily considered.

⁴⁴ Sunday Times 'Spiralling food prices driving South Africans into debt' (1 January 2016) available at < <http://www.timeslive.co.za/sundaytimes/stnews/article1405712.ece>> (accessed 18 January 2017).

⁴⁵ African News Agency 'TUT students protest against 'unhealthy' campus food' The Citizen, 15 February 2017, available at < <http://citizen.co.za/news/news-national/1428743/tut-students-protest-against-unhealthy-campus-food/>> (accessed 19 July 2017).

⁴⁶ Health-E News 'Hundred protest for food consultations' (20 April 2017).

⁴⁷ M Allix 'Fawu workers protest against chicken dumping' (25 November 2016) BusinessDay.

3. Research question

The overarching research question is: what factors explain the limited mobilisation around the realisation of the right to food in South Africa despite widespread chronic hunger? In responding to this large but crude question, the study considered the following ancillary questions:

- i. What does the right to food mean in South Africa?
- ii. What has hindered the realisation of this right?
- iii. What is the role of various policy actors in bringing about policy change to address chronic hunger?
- iv. What is social protest?
- v. Why has there been very limited use of food protest in South Africa as compared to other countries despite widespread protest in relation to other areas?

4. Methodology

In seeking to answer the aforementioned questions, the dissertation employed desktop method by relying on available literature in order to assess the major factors militating against the actualization of the right to food in South Africa. To gather information, the study examined existing data or reports from government departments and non-governmental organisations (NGOs). Apart from examining the institutional actions, the dissertation assessed the strategies and implementation mechanisms (e.g. social assistance) on the right to food in the country in order to recommend appropriate long-term solution. Inevitably, this approach unpacked the various (political and socio-economic) constraints, which exacerbate hunger. By conducting this case study, the dissertation is able to map out the elements, circumstance or the distinguishing features affecting the realisation of food security.

Four reasons account for the selection of South Africa as focus: (i) the right to food is expressly enshrined in its Bill of Rights;⁴⁸ (ii) the Constitutional Court has adjudicated on a number of justiciable socio-economic claims relevant to the right to food;⁴⁹ (iii) it has been

⁴⁸ See art 27(1)(b) of the Constitution.

⁴⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002); and *AbahlaliBasemjondolo Movement SA v*

noted to possess adequate resource and food to feed its residents;⁵⁰ and (iv) it is the ‘protest capital’ of the world.⁵¹

4.1. Desktop research

This approach was used to situate the legal and philosophical justification of the right to food. Besides assessing laws and policies on the right to food, a small number of principal theories in this area was considered and consequently traced their effects for legal doctrine and policy. The rights based approach was used to unpack the content of this right and clarify what it encompasses in terms of addressing chronic hunger and malnutrition in South Africa.⁵² The reasoning that is provided sets out the context for exploring the meaning and practical ramifications for the right to food whilst providing motivation that could be assented to by a diverse range of groups and individuals. The rights based approach was further used to establish a comprehensive factual as well as normative truth about the right to food that can appeal to human rights scholars and the general-public.

and Another v Premier of Kwazulu-Natal and Others (1874/08) [2009] ZAKZHC 1; 2009 (3) SA 245 (D); 2009 (4) BCLR 422 (D&CLD); [2009] 2 All SA 293 (D) (27 January 2009).

⁵⁰ BusinessReport ‘Nigeria as Africa’s largest economy is good news for SA’ available at <<http://www.iol.co.za/business/opinion/columnists/nigeria-as-africa-s-largest-economy-is-good-news-for-sa-1.1675311#.VLYvb8IHOE8>> (accessed 14 January 2014).

⁵¹ It is estimated that in 2014 alone, South Africa experienced 218 protests. See DM Powell, M O’Donovan & J De Visser ‘Civic protests barometer 2007-2014’ Multilevel Government Initiative Report’ (2014) *Community Law Centre* 3. Although the Global Database for Events, Language and Tone (GDELT) has documented that Brazil, Russia and India have higher amounts of protests per year than South Africa, these countries have higher population. Thus, the countries with more population largely experience more unrest. In order to reach the conclusion that South Africa has a higher number of protests, the GDELT divided the sum of protests in each country by the size of the country’s population thereby attaining the number of protests per capita. See the GDELT Project ‘Analysis Service’ (2016) available at <<http://www.gdeltproject.org/data.html#gdeltdanalysiservice>> (assessed 23 January 2017). Also see N Wilcox ‘South Africa the “Protest Capital of the World: Inadequate Online Media Coverage of Protestors” Perspectives’ available at <http://nicolewilcox.co.za/Creative_Production_Rationale_Nicole_Wilcox.pdf> (accessed 26 May 2015); Mail&Guardian ‘A massive rebellion of the poor’ available at <https://www.google.co.za/?gfe_rd=cr&ei=xJRkVcLGO-Oo8we5noCQCA&gws_rd=ssl#q=South+Africa+the+%E2%80%98Protest+Capital+of+the++World%2C+Nicole> (accessed 26 May 2016); Spotlight Newspaper ‘S.A, protest capital of the world’ available at <<http://www.spotnews.co.za/index.php/news/153-s-a-protest-capital-of-the-world>> (accessed 26 May 2015); South African History Online ‘Popular resistance and police brutality in democratic South Africa’ available at <<http://www.sahistory.org.za/article/popular-resistance-and-police-brutality-democratic-south-africa>> (accessed 26 May 2015).

⁵² M Chilton & D Rose ‘A rights-based approach to food insecurity in the United States’ (2009) 99(7) *American Journal of Public Health* 1203; RC Offenheiser & SH Holcombe ‘Challenges and opportunities in implementing a rights-based approach to development: an Oxfam America perspective’ (2003) 32(2) *Nonprofit and Voluntary Sector Quarterly* 268.

4.2. Case study

South Africa is party to many international and (sub)regional human rights instruments that recognise the right to food. In addition, section 27(1)(b) of the Constitution explicitly guarantees the right to have access to ‘sufficient food’. In practice, OXFAM has observed that the country produces enough calories to feed all of its population.⁵³ Yet, a significant number of its inhabitants, both in rural and metropolitan areas remain food insecure, experiencing chronic hunger and malnutrition.⁵⁴ This lacuna raises several questions worth considering. First, what primary factors have contributed to the widening gap between policy and practice in the realization of the right to food?⁵⁵ Are there local institutions that work towards the actualisation of this right? If so, are their approaches consistent with international standards, and how practical are they? What has been the government’s response to the hunger situation over the last decade? Why have the food-poor not used protest to press home their demand for adequate access to food in South Africa?

5. Conceptual clarification

The thesis relied primarily on two concepts: hunger and social protest. It was the objective of this dissertation to understand the causes and trend of the former; and the relationship, if any, between the two concepts. Since, these two concepts are the most important notions in the research, a word on both of them are in order. The first part of this section is dedicating to briefly explaining the meaning of chronic hunger, while the second part relates to theory in relation to what sparks protest and its role in enhancing transformation.

5.1. Definition of chronic hunger

In South Africa, the spate of chronic hunger and malnutrition is evident. One does not require probing scrutiny, a complex criteria or convoluted yardstick to identify raw hunger and appreciate its antecedents. Chronic hunger is a recurring seasonal undernourishment or a

⁵³ Oxfam (n 3 above) 2.

⁵⁴ Oxfam (n 3 above).

⁵⁵ Reliefweb ‘Hidden Hunger in South Africa’ (13 October 2014) available at <<http://reliefweb.int/report/south-africa/hidden-hunger-south-africa>> (accessed 29 July 2014); Department of Social Development & Department of Agriculture, Forestry and Fisheries ‘National Policy on Food and Nutrition Security’ (August 2013) available at <<http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutrition%20security.pdf>> (accessed 29 July 2014) 3-4.

condition of constant undernourishment.⁵⁶ Besides contributing to high mortality rates (because of hunger related diseases), chronic hunger may cause stunted growth in children. It is caused by both insufficient access to quality and quantity of food.⁵⁷

In fact, there is indeed a lot that is obvious about hunger and hardship. Hunger can, simply be defined as a lack of food to meet essential nutritional needs.⁵⁸ Hunger is an exhausted condition or a painful sensation that one feels from want of food. It implies the lack of, or scarcity of food (either for a short or long period) due to factors such as climatic or economic adversities or political crisis. Hunger thus, revolves around food insecurity or lack of availability of food. The emphasis on food security is key since the lack of food makes individuals consume anything to fill their stomachs regardless of its nutritional content. This suggests the food-poor can be deprived of important nutrients the human body requires to function well. Yet, by adopting a behavioural, pragmatic and broadly inclusive definition, hunger can be considered as the continued lack of adequate food for human development.⁵⁹ Andersson thus, summarises ‘hunger as the uneasy and painful personal sensation caused by a lack of food’.⁶⁰ This definition does not only reveal the human sensations associated with food deprivation, but also the human action, moral sentiments and political motive associated with it. The next section turns to provide a brief definition of three terms, which will be used throughout in the thesis, namely, nutrition, malnutrition and household.

Malnutrition is an umbrella term for poor nutrition, whether inadequate intake or consumption of one or more nutrients (undernutrition) or excess consumption of nutrients (over nutrition).⁶¹ The study adopts the term malnutrition to mean inadequate consumption of nutrients since the individuals under assessment lack the means to afford meals with nutritional values.

According to the FAO, nutrition is the intake of food, considered in relation to the body’s dietary needs.⁶² Nutrition improvements requires diversified, healthy and balanced diets, and

⁵⁶ JP McWhirter & CR Pennington ‘Incidence and recognition of malnutrition in hospital’ (1994) 308(6934) *British Medical Journal* 945.

⁵⁷ McWhirter & Pennington (n 56 above).

⁵⁸ McWhirter & Pennington (n 56 above).

⁵⁹ J Dreze ‘Democracy and right to food’ (2004) *Economic and Political Weekly* 1727.

⁶⁰ SA Anderson ‘Core indicators of nutritional state for difficult-to-sample populations’ (1990) *The Journal of nutrition (USA)* 1560.

⁶¹ FAO & World Health Organisation (WHO) ‘Conference Outcome Document: Rome Declaration on Nutrition’ Second International Conference on Nutrition para, Rome, 19-21 November 2014, ICN2 2014/2 para

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⁶² FAO & WHO (n 61 above).

where appropriate traditional diets, meeting nutrient requirements of all groups with special nutrition needs and age groups, while virtually eliminating trans-fat and avoiding the excessive intake of saturated fat.⁶³ Poor nutrition can reduce productivity, impair mental and physical development, and increase susceptibility to diseases and lead to reduced immunity.⁶⁴ Good nutrition (well-balanced and adequate diet) is essential for preventing stunting among children.⁶⁵

A household implies a single person who lives alone or a group of persons living together and ‘cook and eat together’.⁶⁶ Members of a household may occupy one or more structures. If a group of persons on a yard, stand or plot sleep in separate structures (e.g. single young male members of the family occupy a room at the back of the house) but ‘eat from the same pot’, all these individuals are considered as a single household. However, when two or more households occupy the same dwelling unit and do not share resources, that is regarded as multiple households.⁶⁷

In their 2015 household survey, Statistics South Africa (Stats SA) adopted two general terms in the assessment of how often children and adults went hungry because there was not enough food in the household.⁶⁸ These were access to food and limited access to food. On the one hand, access to food is where people have the physical and economic means to nutritious, safe and sufficient food to meet their dietary needs for active and healthy life.⁶⁹ Limited access to food, on the other hand, is where individuals or households have uncertain or limited ability to acquire food in socially acceptable ways and/or have limited or uncertain availability of nutritionally adequate and safe foods.⁷⁰

5.1.1. Trends in chronic hunger: 2010 to 2015

Given that the democratically elected government of South African is committed to improving the quality of life for all, Statistics South Africa (previously called Central

⁶³ FAO & WHO (n 62 above).

⁶⁴ JL Brown & E Pollitt ‘Malnutrition, poverty and intellectual development’ (1996) 274(2) *Scientific American* 39.

⁶⁵ HP Martin ‘Nutrition: Its relationship to children’s physical, mental, and emotional development’ (1973) 26(7) *The American journal of clinical nutrition* 767.

⁶⁶ A Kroska ‘Investigating gender differences in the meaning of household chores and child care’ (2003) *Journal of marriage and family* 456.

⁶⁷ Kroska (n 66 above).

⁶⁸ Stats SA 2015 ‘Statistical Release P0318: General Household survey 2015’ (2016) *Statistics South Africa* available at <<https://www.statssa.gov.za/publications/P0318/P03182015.pdf>> (accessed 30 March 2017) 6.

⁶⁹ P Pinstrup-Anderson ‘Food security: definition and measurement’ (2009) 1(1) *Food security* 6.

⁷⁰ P Pinstrup-Anderson & A Herforth ‘Food security: achieving the potential’ (2008) 50(5) *Environment: Science and policy for sustainable development* 52.

Statistical Service) has from 1994 to 2016 conducted 22 household surveys to determine the living conditions and life circumstances of South Africans. This section determines the annual trends in chronic hunger, spanning from 2009 (the first time Stats SA included available data).⁷¹ Also, the first time the statistics agency introduced a section in its report on households and individuals living with hunger was in 2011. In 2009, an estimated 20 percent of South African households had limited access.⁷² By 2010, the number of households, which experienced limited access to food was 23.9 percent,⁷³ while individuals confronted with limited access to food stood at 28.6 percent.⁷⁴

The percentage of households with limited access to food slightly declined to 19.4 percent (a drop of 4.5 percent) in 2011, with the number of individuals confronted with limited access to food also declining to 23.3 percent (a drop of 5.3 percent).⁷⁵ The 2011 Stats SA household report started assessing households and individuals who actually experience chronic hunger. The report, therefore, found that 11.5 percent of households were victims of hunger in 2011, while 13 percent of individuals were hungry.⁷⁶

In 2012, the percentage of households with limited access to food peaked at 21.5 percent, whereas 26.1 percentage individuals experienced similar challenge.⁷⁷ In terms of hunger, 12.6 percent of households faced hunger, while 10.8 percent of individuals also experienced hunger.⁷⁸

As shown in table 1, 2013 recorded an increase to 23.1 percent of households with limited access to food, with 26 percent of individuals experiencing similar problems. Similarly, the percentage of households confronted with hunger also increased to 13.4 percent, while individuals living with hunger also escalated to 11.4 percent.⁷⁹

⁷¹ Stats SA 2009 'General household survey 2009 (Revised version)' Statistical release P0318, available at <<http://www.statssa.gov.za/publications/P0318/P03182009.pdf>> (accessed 31 March 2017) 6.

⁷² Stats SA 2009 (n 71 above).

⁷³ Stats SA 2010 'General Household Survey 2010' available at <<http://www.statssa.gov.za/publications/P0318/P03182010.pdf>> (accessed 31 March 2017) 6.

⁷⁴ Stats SA 2013 'General Household Survey 2013' available at <<https://www.statssa.gov.za/publications/P0318/P03182013.pdf>> (accessed 31 March 2017) 14.

⁷⁵ Stats SA 2011 'General Household Survey 2011' available at <<http://www.washingtongroup-disability.com/wp-content/uploads/2016/03/GHS-2011-Release.pdf>> (accessed 31 March 2017) 4.

⁷⁶ Stats SA 2011 (n 75 above).

⁷⁷ Stats SA 2012 'General Household Survey 2012' available at <http://www.washingtongroup-disability.com/wp-content/uploads/2016/03/2012_GHS_SA_report.pdf> (accessed 31 March 2017) 4.

⁷⁸ Stats SA 2012 (n 71 above).

⁷⁹ Stats SA 2013 'General Household Survey 2013' available at <<https://www.statssa.gov.za/publications/P0318/P03182013.pdf>> (accessed 31 March 2017) 14.

In 2014, 22.5 percent of South Africa’s households were faced with limited access to food, while 26 percentage of individuals experienced limited access to food. The percentage of households that experienced hunger was recorded at 13.1 percent, with the percentage of individuals living with hunger stabilizing at 11.4 percent.⁸⁰

In 2015, the percent of households with limited access to food increased to 22.6 percent, with individuals confronted with limited access also increasing to 26.4 percent.⁸¹ Nonetheless, the percentage of households, which experienced hunger slightly, decreased to 11.3 percent, although the percentage of individuals living with hunger peaked to 13.1 percent.⁸²

Stats SA’s Household Food Insecurity Access Scale in 2016 showed that while households with inadequate or severely inadequate access to food were 22.3 percent, the percentage of individuals experiencing chronic hunger was 24.9 percent in 2016.⁸³ Although the percentage of households and individuals with limited access to food slightly declined in 2016, it is still relevant that an assessment of the conditions, which has hindered the state from completely addressing food insecurity and malnutrition in South Africa, is conducted.

Irrespective of this increasing number of people’s limited access to food or exposure to chronic hunger, protesters rarely take to the streets demanding for food or reduction of food prices. Also, since limited access to food does not automatically mean hunger, and section 27(1)(b) adopts an individual rather than a group approach to the right to food. The thesis’ reference to chronic hunger, therefore, implies the 24.9 percent or the 14.7 million South Africans who are confronted with hunger.⁸⁴

Table 1: Percentage of households and individuals with limited access to food.

Percentage	2009	2010	2011	2012	2013	2014	2015	2016
Household	20	23.9	19.4	21.5	23.1	22.5	22.6	22.3
Individuals	N/A	28.6	23.3	26.1	26	26	26.4	24.9

⁸⁰ Stats SA 2014 ‘General Household Survey 2014’ available at <<http://www.statssa.gov.za/publications/P0318/P03182014.pdf>> (accessed 31 March 2017) 14-15.

⁸¹ Stats SA 2015 (n 66 above).

⁸² See Stats SA 2015 (n 66 above).

⁸³ Stats SA 2016a (n 7 above) 5-6.

⁸⁴ Stats SA 2015 ‘Statistical Release P0318: General Household survey 2015’ (2016) *Statistics South Africa* available at <<https://www.statssa.gov.za/publications/P0318/P03182015.pdf>> (accessed 30 March 2017) 65.

5.2. Social protest

By social protest, the study implies an open and direct expression of dissent or defiance of existing norms and practices. It thus, seeks to introduce political and socioeconomic reforms by influencing the attitudes, behaviour and knowledge of government policies and programmes.⁸⁵ According to Dubé and Guimond, the concept of relative deprivation over the years has been constantly cited as the cause of social protest.⁸⁶ RP in broad terms simply implies feelings of discontent due to socioeconomic deprivation.⁸⁷ Dubé and Guimond affirm that at the root cause of any social protest is the underlining factors of ‘dissatisfaction, some kind of frustration, or feelings of injustice’.⁸⁸ It is, therefore, obvious that hunger, which emanates from the deprivation of food, indeed merits a credible ground for protest as a means of realizing the right to food.

Mamdani and Wamba-dia-Wamba equally saw protest as comprising initiatives that are ‘anti-governmental and overtly political.’⁸⁹ Popular demands according to the scholars in their 1988 celebrated work *Social Movements, Social Transformation and Struggle for Democracy in Africa*, is a ‘revolution of rising expectations’ or demands.⁹⁰ Popular demands were thus, traced to people taking to the streets and agitating for social and economic transformation.⁹¹ Thus, Mamdani and Wamba-dia-Wamba argue that inequality is increased through economic growth but decreased through social protest.⁹² From a Marxist perspective, on the other hand, protests are seen as a result of the failure of the state to create the requisite economic conditions in order to bring the proletariat to the level of the modern bourgeoisie.⁹³ The aforementioned theories will be expanded in chapter two and then tested in relation to food protest in South Africa in chapter six.

⁸⁵ Oxford Bibliographies ‘Social protest’ <http://www.oxfordbibliographies.com/view/document/obo-9780199756841/obo-9780199756841-0005.vxml> (accessed 26 May 2016).

⁸⁶ L Dubé & S Guimond ‘Relative deprivation and social protest: The personal-group issue’ in JMO Herman *et al Relative deprivation and social comparison: The Ontario symposium* (1986) 201.

⁸⁷ Dubé & Guimond (n 86 above).

⁸⁸ Dubé & Guimond (n 86 above) 202.

⁸⁹ M Mamdani & E Wamba-dia-Wamba *African studies in social movements and democracy* (1995)7.

⁹⁰ M Mamdani, T Mkandawire & Wamba dia-Wamba ‘Social movements, social transformation and struggle for democracy in Africa’ (1988) *Economic and Political Weekly* 974.

⁹¹ Mamdani *et al* (n 90 above) 973.

⁹² Mamdani & Wamba-dia-Wamba (n 89 above) 7.

⁹³ M Bratton & N Van de Walle ‘Popular protest and political reform in Africa’ *Comparative politics* 419.

6. Literature review

Scholarship on how social protest can be used in the realization of the right to food is still in its infancy, as indeed is the realization of the freedom from chronic hunger.⁹⁴ Whether starvation is predominant among the most vulnerable even in affluent societies has been the subject matter of a good deal of debating over decades.⁹⁵ As hunger broke out in India in 1918,⁹⁶ northern France in 1940,⁹⁷ Germany between 1941 to 42,⁹⁸ Egypt in 2008,⁹⁹ and Brazil (1970s),¹⁰⁰ various schools of thoughts mushroomed,¹⁰¹ each with its own approach to the subject matter of the day: what is the nature and trend of hunger and how can this be addressed?¹⁰² A starting point for any attempt to understand and seek to resolve this national and indeed global crisis must first reflect on these contending theories, which have initially endeavoured to conceptualize experience, and continue to influence practice. Of these, some merit specific attention.

6.1. Philosophical underpinnings of the right to food

Scholars have provided several theories as being the causes of hunger.¹⁰³ In his 1789 *Essay on the principle of population*, English pastor and economist Thomas Malthus asserted that the primary cause of hunger is overpopulation.¹⁰⁴ He projected that in order to avert and (if possible) combat hunger, there is the need for a strong and sustained control on population.¹⁰⁵ The term ‘population’ in his essay refers to the lower classes in the society.¹⁰⁶ Malthus avows that their unrestrained procreation can exacerbate hunger.¹⁰⁷ He avers that, if food is

⁹⁴ D Brand ‘The minimum core content of the right to food in context: A response to Rolf Künemann’ in D Brand & S Russel *Exploring the minimum core content of socio-economic rights: South African perspectives* (2000) 99.

⁹⁵ See T Pogge *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (2007) 3; P Singer ‘Famine, affluence, and morality’ (1972) *Philosophy & Public Affairs* 229.

⁹⁶ David Arnold ‘Looting, grain riots and government policy in South India 1918’ *Past & Present* 84 (1979) 111.

⁹⁷ L Taylor *Between resistance and collaboration: popular protest in Northern France, 1940-45* (2000) 73.

⁹⁸ Taylor (n 97 above).

⁹⁹ T Sternberg ‘Chinese drought, bread and the Arab Spring’ *Applied Geography* 34 (2012) 520.

¹⁰⁰ F Menezes ‘Social participation in the zero hunger program: The experience of Consea’ in *The Fome Zero (zero hunger) program the Brazilian experience* 249.

¹⁰¹ A Sen ‘Starvation and exchange entitlements: a general approach and its application to the Great Bengal Famine’ (1977) *Cambridge Journal of Economics* 33; P Bowbrick ‘The causes of famine: a refutation of Professor Sen’s theory’ (1986) 11(2) *Food Policy* 105; A Kidane ‘Demographic consequences of the 1984–1985 Ethiopian famine’ (1989) 26(3) *Demography* 515.

¹⁰² For a discussion of these hunger situations, see chap 6 of this thesis.

¹⁰³ C Woodham-Smith *The great hunger: Ireland 1845-1849* (1991) 54.

¹⁰⁴ TR Malthus *An essay on the principle of population* (1798) 6-7.

¹⁰⁵ Malthus (n 104 above) 36.

¹⁰⁶ Malthus (n 104 above) 23.

¹⁰⁷ Malthus (n 104 above) 25.

distributed unequally, and the rich have enough, the poor will be doomed to perish,¹⁰⁸ and the world will reach a stable state with the available food supply being enough to meet the needs of the affluent.¹⁰⁹ While Malthus's assertion may be applicable in some countries (such as China which is confronted with overpopulation) South Africa is not overpopulated and there is adequate food to feed all the population. It is in light of this fact that the thesis seeks to examine the factors that have contributed to chronic hunger although there is enough food. Thus, in disputing the claims of Malthus, Sen emphasised that it is not overpopulation or lack of adequate food, which is the primary cause of hunger, rather it is poverty or lack of access by the poor to the available food in the market.¹¹⁰ In the case of South Africa, Sen's assertion may be applicable given that unemployment has triggered poverty that has denied millions access to adequate food. What Sen does not investigate and this thesis seeks to examine is how can the chronically hungry be fed by the state, in other words, how can the poor influence the state to provide food for them and their dependents, especially as they have the right to adequate food in South Africa's Constitution.

Yet, as a student of Malthus, Fletcher raises a controversial approach to combating chronic hunger.¹¹¹ He argues that states may try to solve their food insecurity problem by humanely reducing the country's population to a size at which equal distribution of food would be enough to feed everyone.¹¹² It is interesting to note that two years after Fletcher's publication, China started implementing its one-child family planning policy in all urban cities in 1979.¹¹³ Although according to Barrows the policy has led to 'the reduction of the total fertility rate [and] its resulting prevention of 400 million births, and corresponding short-run demographic dividend',¹¹⁴ Fletcher's argument is hardly applicable in the case of South Africa, especially in light of its small population as compared to China.¹¹⁵ Besides, South Africa produces enough staple food, and if need be has the capacity to import food to feed its

¹⁰⁸ Malthus (n 104 above) 89.

¹⁰⁹ Malthus (n 104 above) 36.

¹¹⁰ Sen (n 11 above) 45.

¹¹¹ J Fletcher 'Give If It Helps But Not If It Hurts' in W Alken & H LaFollete (eds) *World hunger and moral obligation* (1977) 103.

¹¹² Fletcher (n 111 above) 106-7.

¹¹³ The policy entreats couples not to bear more than one child. See P Kane & CY Choi 'China's one child family policy' (1999) 319(7215) *British Medical Journal* 992.

¹¹⁴ SP Barrows 'China's one-child policy' (2016) 315(12) *Jama* 2349.

¹¹⁵ South Africa's population is estimated at 55 million while China has a demography of more than 1.3 billion. See Worldmeters 'South Africa population (2017)' available at <<http://www.worldometers.info/world-population/south-africa-population/>> (accessed 22 June 2017); Worldmeters 'China population (1950-2017)' available at <<http://www.worldometers.info/world-population/china-population/>> (accessed 22 June 2017).

population.¹¹⁶ In terms of South Africa's potential to address hunger, Dugard avows that the country is upper middle income, and not a poor country since it is ranked as 29th richest globally in terms of the size of its economy.¹¹⁷ Akin to Malthus, Fletcher's fails to set out which actor is best placed to influence the state to distribute available food to its citizens. The thesis will, therefore, discuss the various actors that can influence the state to fulfil its constitutional obligation of providing food to its population.

In his 'least-cost' principle, Wenar argues that the duty to prevent basic threat to the wellbeing of the individual should be located in the agent with the capability to prevent that threat.¹¹⁸ In seeking to analyse who is morally responsible for alleviating starvation and undernourishment, he proposes a guiding principle in which those who can most easily avert deprivation and prevent starvation should have the primary obligation to do so.¹¹⁹ Each individual has the primary responsibility of taking care of her/his basic needs.¹²⁰ Yet, Wenar asserts that naturally, the state has the obligation of ensuring that every resident in its territory gets sufficient food, especially in cases where they face great difficulties and cannot secure for themselves adequate food for their survival.¹²¹ What he fails to set out, however, and this thesis seeks to investigate, is, what strategy can citizens adopt to force an unwilling regime to comply with this obligation.

Zghal argues that it is the state, which has the power for the management of the economic life of its residents.¹²² It is, therefore, in charge, and has an obligation to create jobs and ensure that citizens have a means of income to improve their living conditions.¹²³ The state has the obligation to keep the prices of (some) food products affordable in order to meet the needs of the poor in both rural and urban areas.¹²⁴ The government of sovereign states, therefore, have the obligation of creating an enabling environment in order to ensure that adequate food is made available to every inhabitant within its jurisdiction.¹²⁵ Zghal's theory however does not touch on the moral obligations of the state to provide (sufficient) food to marginalised

¹¹⁶ See fn 5 above.

¹¹⁷ J Dugard 'Transition from apartheid – legal frameworks and judicial structure' *SER litigation strategies and impact Global School on SERs*, University of Pretoria (16 May 2017) 1.

¹¹⁸ L Wenar 'Responsibility and severe poverty' in T Pogge (ed) *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (2007) 261.

¹¹⁹ Wenar (n 118 above) 270.

¹²⁰ Wenar (n 118 above) 270.

¹²¹ Wenar (n 118 above) 271.

¹²² A Zghal 'The "Bread Riot" and the crisis of the one-party system in Tunisia' in M Mamdani & E Wamba-dia-Wamba *African Studies in Social Movements and Democracy* (1995) 99.

¹²³ Zghal (n 122 above) 99-100.

¹²⁴ Zghal (n 122 above) 106.

¹²⁵ Zghal (n 122 above) 126.

individuals within their jurisdictions. It is imperative for states to concede that they are not only legally obliged to ensure the survival of their citizens, but also, have a moral obligation to make certain that their citizens have access to adequate and nutritious food. The thesis will, therefore, seek to investigate what social tactic citizens can use to realise their right to food, mainly through policy change.

In seeking to map out the causation of chronic hunger, Kreide maintains that the basic factor hindering the realisation of the right to food can be linked to the still unresolved theoretical question regarding what encompasses the right to food.¹²⁶ She argues, for instance, that socioeconomic rights are still contested primarily due to the confusion regarding whom the rights address.¹²⁷ She, however, observed that chronic hunger due to poverty is a violation of social autonomy.¹²⁸ Kreide asserts that human beings have a basic right to social autonomy, which entails adequate level of subsistence and economic security.¹²⁹ If the concrete content of these claims fall below the minimum standard, then one or more of the state agents have neglected their duties.¹³⁰ She concludes that states should respect, protect and fulfil their human rights obligation, especially by adopting initiatives, which enhances individual's access to adequate food.¹³¹ Kreide's thesis argues for a path between individual and institutional obligation, as well as combined effort to address chronic hunger. She however, does not address the specific issue of citizens' rights to use conventional or unconventional strategies to influence their leaders to act. This is a question that the thesis will interrogate to determine the appropriate approach to be used by South Africans to force the state to provide a means of securing food for citizens who are chronically hungry.

In his 'Poverty as a form of oppression', Fleurbaey formulates an argument that characterises chronic hunger as a violation forcefully inflicted by the state on the poor.¹³² He emphasises that the oppressive nature of poverty, which encompasses hunger, compels individuals to act against their will, which is most often contrary to their personal integrity.¹³³ This violation, according to him is naturally exacerbated by the operations of the national (and global)

¹²⁶ R Kreide 'Neglected injustice: Poverty as a violation of social autonomy' in T Pogge (ed) *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (2007) 155.

¹²⁷ Kreide (n 126 above) 165.

¹²⁸ Kreide (n 126 above) 165-6.

¹²⁹ Kreide (n 126 above) 168.

¹³⁰ Kreide (n 126 above) 176.

¹³¹ Kreide (n 126 above) 180-1.

¹³² M Fleurbaey 'Poverty as a form of oppression' in T Pogge (ed) *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (2007) 133.

¹³³ Sen (n 11 above) 143.

market economy, which repeatedly undermines the integrity of the hungry masses.¹³⁴ Fleurbaey declares that in light of the fact that deprivation is a violation of the integrity of the person, this breach can be remedied by initiating ‘a right to escape poverty’.¹³⁵ It is thus, by discovering the direct (negative) impact of state’s actions on poverty situation that chronic hunger can adequately be addressed. While his assertion call for an end to poverty, Fleurbaey does not clearly elaborate on the means of addressing poverty or chronic hunger by the state. He places the obligation of addressing food insecurity on the state, but does not provide details on how a state can be influenced to achieve this end. It is against this backdrop that the thesis will seek to analyse why South Africa has failed to realise the obligation of article 27 of the Constitution since its democratic dispensation.

From an entitlement perspective, Sen observes that to properly understand and eliminate starvation, one need to trace the relationship between individuals and their commodities.¹³⁶ He contends that a widespread scarcity in food supply may indeed cause an individual to be exposed to hunger through an increase in food prices, which will have a hostile impact on his exchange entitlement.¹³⁷ Sen affirms that chronic hunger should not be perceived solely from monetary handouts, but rather other relevant factors such as the law. The legal system to him often stands between food availability and food entitlement.¹³⁸ Market forces operating through a system of legal relations such as contractual obligations, and ownership rights can result in chronic hunger.¹³⁹ Sen displayed some inclination towards the theory that the poor should be insulated against price rises by making wages paid to the poor proportional to food prices. While his thesis touches on essential issues such as wages in order to access food, he does not address the question of how citizens can mobilise to influence the state to provide them with employment, social security or food when the state has access to sufficient resources to provide these necessities. It is in light of this shortfall that this thesis seeks to examine why the state has fail to provide citizens with adequate food although the 1996 Constitution places this obligation on the state and what mechanisms can be used by the people in order to enjoy their right to adequate food as set out in section 27 of the Constitution.

¹³⁴ Sen (n 11 above) 142-3.

¹³⁵ Fleurbaey (n 132 above) 154.

¹³⁶ Sen (n 11 above) 1.

¹³⁷ Sen (n 11 above) 1.

¹³⁸ Sen (n 11 above) 45-6.

¹³⁹ Sen (n 11 above) 166.

Viewed from a rights based approach, Pogge in seeking to define chronic hunger classifies it as a human rights violation in light of the fact that chronic hunger is a foreseeable and avoidable effect of how the world economy is presently organised.¹⁴⁰ He affirms that most affluent people hold the view that they are not violators of international human rights standards if they fail to provide for the hungry while they have the ability to do so. Pogge condemns such view as profoundly wrong and morally unacceptable.¹⁴¹ Whereas he places the plight of the food on the affluent, Pogge does not underscore the obligation of the state to provide for those who lack access to food. The thesis, therefore, seeks to examine the obligation of the state in addressing food insecurity and what strategies the food poor (who have the right to hold their leaders accountable) can use to ensure that the South African government provide them with a means of accessing food.

Ashford asserts that the human right to basic-necessities has received global acknowledgement over the years.¹⁴² Considering the devastating impact food deprivation has had, and continues to have on the lives of people, the state has an obligation to enforce this right.¹⁴³ Based on utilitarian school of thought, she advances an argument for a state's positive obligation towards the eradication of hunger, which is implicit in poverty.¹⁴⁴ Ashford asserts that malnutrition can deprive people of their lives or 'preclude a minimally decent and autonomous life' since it cause chronic lethargy, brain damage and other permanent disabilities, which can impair permanently a person's rational autonomous faculties.¹⁴⁵ Against the backdrop of the notion that starvation breaches basic human interests, she recommends that states should primarily fulfil their positive and negative socio-economic obligations.¹⁴⁶ Ashford's proposition introduces an interesting angle into the discourse of the right to food as she delineates a more lucid human rights obligation of the state in this context. She however does not adequately address the issue of the means to pressure a state to fulfil its obligation in terms of the right to food, especially in cases where it is evident that the state has the resources to fulfil such obligation. It is in light of this shortcoming that this thesis seeks to examine the avenues available to the chronically to compel their leaders (in

¹⁴⁰ Pogge (n 95 above) 6.

¹⁴¹ Pogge (n 95 above) 19.

¹⁴² E Ashford 'The duties imposed by the human right to basic necessities' T Pogge (ed) *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (2007) 183.

¹⁴³ Ashford (n 142 above) 191.

¹⁴⁴ Ashford (n 142 above) 186.

¹⁴⁵ Ashford (n 142 above) 189.

¹⁴⁶ Ashford (n 142 above) 190.

this the South African government) to adopt adequate measures (such as inclusion of the unemployment into existing social security programme).

Chauvier adduced that the unfed have a political claim upon their government.¹⁴⁷ According to him, the existing social contract between the citizenry and their governments imposes a positive obligation on the state to fulfill the need of the chronically hungry.¹⁴⁸ Chauvier formulates a case that aside the political right to be free from starvation, there is a natural right to the same, and starvation represents a gross indication of unsatisfied human rights. Chauvier observes that starvation may arise as a result of several considerations. First, a corrupt government that is indifferent to the plight of the citizenry; second, incompetent government; and third, the imposition of unfair economic conditions by global institutions on states. Chauvier finally advocated for a theory of distributive justice or just allocation of social goods. While his thesis clearly sets out the remote and immediate factors of chronic hunger, Chauvier does not set out the strategy to be used by the food-poor to compel a government to mitigate their plight, which this thesis seeks to address.

Chauvier's position was firmly avowed by Gargarella who recognizes that the state is the overriding duty-bearer for ensuring adequate supply of food and basic necessities to its citizens.¹⁴⁹ He affirms that when millions die from hunger, it is inevitable to avoid the assumption that something criminal is occurring. He proposes firmly that citizens have the right to disobey the state or the laws that are systematically disadvantaging them, mainly through confrontation (active resistance) or non-confrontation (passive resistance) approach. He posits that serious social difficulties, which are particularly exacerbated by pervasive legal alienations, are best addressed by civil disobedience. Yet, political and social thinkers including the radical ones, over the years have been unsuccessful in articulating the food demands of the ruled classes.¹⁵⁰ The thesis will seek to consider a few of the leading conceptions on the right to food in chapter three in order to provide sufficient theoretical foundations for the right to food in South Africa.

¹⁴⁷ S Chauvier 'The Right to Basic Resources' in T Pogge (ed) *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (2007) 307-8.

¹⁴⁸ Chauvier (n 147 above) 303.

¹⁴⁹ R Gargarella 'The Right of resistance in situations of severe deprivation' in T Pogge (ed) *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (2007) 359.

¹⁵⁰ Gargarella (n 149 above) 351.

6.2. Food (in)security in South Africa

While social grants have to some extent ameliorated the hunger situation of over 17 million South Africans as of 1 March 2017, they are not adequate to guarantee sufficient access to food for grant beneficiaries in light of the constant price hikes in food and service delivery.¹⁵¹ Thus, although South Africa as a nation is food secured a large number of household within the state face food deprivation. Altman *et al* aver that, despite attempts made by the state to launch advance social grants to some families, household incomes have not been sufficient to address poverty and food insecurity.¹⁵² Apart from identifying the problems associated with social grants, the scholars do not address the question of citizen's response to the failure of the state to provide food for them (or the means of accessing) for them as guaranteed in the 1996 Constitution. The thesis will, therefore, assess the various social grants, and why they are failing to address the chronic hunger situation of recipients and their dependants. The thesis will, therefore, seek to provide recommendation, as to whether the state must create jobs and/or increase the amount of grant money given to recipients or both.

Baiphethi and Jacobs writing on South Africa's hunger situation intimate that although households were previously food secured because they produced most of their own food, both rural and urban households have over the years shifted towards an increase on reliance on food from the market, in certain instances reaching more than 90 percent of their food supplies.¹⁵³ They argued that food expenditure for low-income households often account for as much as 60-80 percent of total household income, which can be reduced by smallholder or subsistence agriculture. They strongly affirm that long-term food security can be achieved in South Africa by encouraging farmers to embark on sustainable intensification of food production through a dramatic use of organic inputs, fertilizer, conservation investments and well-operational markets to enable farmers market their produce. Baiphethi and Jacobs make a strong case for farmers to engage in productive agriculture, but leaves out the unemployed and unskilled who lack access to land to farm. In such cases, it is the obligation of the state to provide for such people as entrenched in section 27 of the Constitution. It is against this

¹⁵¹ The Huffington Post 'Dlamini Will Pay Those Social Grants But She's Not Telling Us How' available at <<http://www.huffingtonpost.co.za/2017/03/05/well-pay-those-social-grants-but-were-not-telling-you-how/>> (accessed 13 March 2017).

¹⁵² M Altman, TG Hart & PT Jacobs 'Household food security status in South Africa' (2009) 48(4) *Agrekon* 347.

¹⁵³ MN Baiphethi & PT Jacobs 'The contribution of subsistence farming to food security in South Africa' (2009) 48(4) *Agrekon* 459.

backdrop that the thesis will examine the interventions provided for the chronically or the food poor, and why they have been unable to address their situation.

In 2005, Hendriks projected that the hunger situation in South Africa will probably worsen in light of the overreliance on cash food purchases, the price surge in food commodities and ‘spiraling vulnerability as a result of HIV/AIDS morbidity and mortality’.¹⁵⁴ Indeed, almost ten years down the line, her prophecy has come to pass: millions currently suffers from chronic hunger.¹⁵⁵ Hendriks advocates for the need to conduct large-scale empirical research to detect rural household’s vulnerability to food security, observe changes and recommend ‘appropriate interventions’.¹⁵⁶ In her paper, Hendriks set out several valid benchmarks for this qualitative assessment, which holds the potential of arriving at a feasible solution for the country’s food insecurity situation. The gap she fails to fill and this thesis seek to address is the practical approach the chronically hungry can use to influence the government to provide them with timely access to adequate food.

Further, in her assessment of the proposals tabled during the National Development Plan (NDP) and New Growth Path (NGP) Framework, Hendriks avows that approximately twenty years after the country’s transition into democracy, food insecurity at both household and individual levels is excessively high.¹⁵⁷ She affirms that although the country repeatedly proclaims its aggregate national position as food secure and produces ‘more maize than is consumed in the country’, there are massive inequalities in the country’s production and consumption statistics.¹⁵⁸ According to Hendriks, although the government has adopted two overarching policies -NDP and NGP- to alleviate poverty, drive economic growth and enhance a decent standard of living for South Africans, these ambitious objectives cannot be realised unless there is a comprehensive food policy and ‘robust market system that drives job creation’.¹⁵⁹ Hendriks’ estimation is correct, yet, these policies have not generated sufficient employment opportunities for millions of South Africans who are still confronted with poverty. The thesis will thus, seek to examine why these policies have not achieved their objectives after five years since their adoption.

¹⁵⁴ Hendriks (n 25 above).

¹⁵⁵ See Oxfam (n 3 above).

¹⁵⁶ Hendriks (n 25 above) 118.

¹⁵⁷ S Hendriks ‘South Africa’s National Development Plan and New Growth Path: reflections on policy contradictions and implications for food security’ (2013) 52 (3) *Agrekon* 1.

¹⁵⁸ Hendriks (n 157 above) 3.

¹⁵⁹ Hendriks (n 157 above) 14

Langford observes that in the international community, South Africa is considered as the ‘poster child of socio-economic rights’, in view of the numerous justiciable socioeconomic rights in the Bill of Rights, coupled with the groundbreaking court judgments, which have offered ‘supporting and intellectually robust interpretations’ to these rights.¹⁶⁰ He further argues that, significant progress has been made on selected socio-economic rights. However, he asserts that despite this progress, it is not rare to hear numerous complaints that there are persistent poverty and inequality in the country, lack of access to housing, basic services and affordable food.¹⁶¹ Langford further stresses in ‘Housing rights litigation: *Grootboom* and beyond’, that housing rights jurisprudence has ‘bequeathed a juridical face to socio-economic rights in South Africa’.¹⁶² Regarding the *Grootboom* case,¹⁶³ he avers that the Constitutional Court for the first time established the ‘general contours of state’s obligations’ and reaffirm that state policies must be reasonably tailored towards promoting socio-economic rights, specifically for the needy and marginalized.¹⁶⁴ He however, condemned the Court for its inability to ‘impose immediate obligations to ensure a minimum level of socio-economic or institute a more robust form of review’.¹⁶⁵ This deficiency inevitably resulted in the apparent limited compliance or lack of enforcement with the order.¹⁶⁶ The order, therefore, did not lead to improvement of the housing needs of the litigant and the eventual death of the lead applicant.¹⁶⁷ What Langford fails to discuss, which this thesis seeks to address is the possible avenues available to victims of chronic hunger to use to improve their situation. In order to determine such an avenue, the thesis will first determine why the existing food security interventions have failed to reach and alleviate the chronic hunger situation of millions of South Africans.

In their ‘Constitutional jurisprudence: the first and second waves’, Wilson and Dugard argue that South Africa’s quest for advancing human rights will fail if the government does not address the vast inequality and deep rooted poverty in the state.¹⁶⁸ They argue that since the

¹⁶⁰ M Langford ‘Introduction: civil society and socio-economic rights’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-economic Rights in South Africa: Symbols Or Substance?* (2014) 1.

¹⁶¹ Langford (n 160 above).

¹⁶² Langford (n 160 above) 185.

¹⁶³ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

¹⁶⁴ Langford (n 160 above) 187.

¹⁶⁵ Langford (n 160 above) 187.

¹⁶⁶ Langford (n 160 above) 187-8.

¹⁶⁷ Langford (n 160 above) 188.

¹⁶⁸ S Wilson & J Dugard ‘Constitutional jurisprudence: the first and second waves’ in Langford *et al* (n 160 above) 35.

country's transition into democratic regime, little progress has been made in social and economic transformation.¹⁶⁹ According to Wilson and Dugard, the country has two economic classes- multiracial elite class prospering while the country's largely black 'poor remain unemployed, and without access to adequate healthcare, education, housing, and basic municipal services'.¹⁷⁰ Although their observations on the great disparities of wealth, which existed even before 1994, are correct, it is unfortunate that the theme of hunger was left out in their analysis of the new constitutional order. The thesis will, therefore, bridge this gap by assessing the various government funded food security programmes and how they seek to improve or deny millions access to adequate food.

In their commentary on poverty and food insecurity in South Africa, Hendriks and McIntyre stress that irrespective of the constitutional guarantee of the right to food, the paths to claiming this right 'are made hazardous by poor coordination between policies'.¹⁷¹ Further, even with the government rolling out food 'safety nets' such as social grants and feeding schemes, these and other similar palliatives have failed and even exacerbated the existing hunger situation.¹⁷² They eventually intimate that following the collapse of apartheid, the country is witnessing 'articulate or effective, waves of protest grounded in the material hardships of poor communities'.¹⁷³ Hendriks and McIntyre admit that, these protests have only been directed towards demands for service delivery such as 'access to housing, sanitation and education'.¹⁷⁴ They also emphasised the possibilities for human rights litigation to redress the country's inequality. Whereas Hendriks and McIntyre's observation of the proliferation of service delivery protest is correct, they do not extend their analysis to issues of food protest and why they have been rare (in comparison to service delivery protests). The thesis will, therefore, determine why the chronically hungry have not often taken to the streets in demand of food as guaranteed in the 1996 Constitution.

¹⁶⁹ Wilson & Dugard (n 168 above).

¹⁷⁰ Wilson & Dugard (n 168 above) 36.

¹⁷¹ Hendriks & McIntyre (n 30 above) 117.

¹⁷² According to Hendriks & McIntyre (n 30 above) 118, the food assistance programme (FAP) which is one of the five ambits of the National Food and Nutrition Security Policy holds the potential of addressing the food insecurity situation in the country. The aims of the FAP include (i) corporate donations of food to charity; (ii) citizen charity programmes (like Rotary); and (iii) redistribution of 'rescued' food. Yet, the programme's poor implementation has rendered it ineffective.

¹⁷³ Hendriks & McIntyre (n 30 above) 126.

¹⁷⁴ Hendriks & McIntyre (n 30 above) 127.

In his article ‘Political power: social pacts, human rights, and the development agenda’, Habib explains that social activists have increasingly resorted to rights-based approaches for promoting socioeconomic rights aspirations of the poor and marginalized communities. Although these approaches to some extent can be considered as progressive, he argues that activists implicitly assume that these rights are being violated due to the failure of individual leaders’.¹⁷⁵ Government officials and political leaders are, therefore, envisaged as reneging on their political promises as a result of being ‘enticed by the trappings of power and the material benefits that it endows’.¹⁷⁶ He further avers that, within the academia, scholars only focus on policies and how these can lead to the realization of socioeconomic rights. Thus, whereas scholars blame poorly crafted policy as the cause of non-attainment of socioeconomic rights, activists perceive leaders as the primary cause.¹⁷⁷ Nonetheless, a critical appraisal of the causes of hunger in South Africa can be traced to a combination of both (policies and leadership), that is, inadequate policies and poor implementation.¹⁷⁸ In the food insecurity realm, the Habib’s assertion of fragmented policies may be correct, but what he fails to do, which this thesis will address is how the food poor can influence policy reform to improve their access to food.

Drimie and Ziervogel also affirm that despite a firm commitment by the South African government to improve development issues, there is a great social and economic disparity between households and communities particularly concerning access to food security.¹⁷⁹ Against this backdrop, the FAO affirms that the best remedy to address chronic hunger is if actors and stakeholders understand the reason why people are food insecure. Such an understanding, according to the organisation requires the establishment of an information system, which ensures that information and statistics, high quality data are easily accessible and available across sectors for monitoring and analysis of chronic hunger situations.¹⁸⁰ It is important to indicate that although the FAO’s recommendation is laudable, the thesis will assess existing policies and determine whether there is the need for South Africa to establish

¹⁷⁵ A Habib ‘Political power: social pacts, human rights, and the development agenda’ in Langford *et al* (n 160 above) 131.

¹⁷⁶ Habib (n 175 above) 131.

¹⁷⁷ Habib (n 175 above) 132.

¹⁷⁸ Habib (n 175 above) 132.

¹⁷⁹ S Drimie & G Ziervogel ‘Food Insecurity in South Africa’ in RE Kasperson & M Berberian (eds) *Integrating science and policy: Vulnerability and resilience in global environmental change* (2011) 215.

¹⁸⁰ FAO ‘Information systems for food security and nutrition’ Delivers on FAO’s strategic objective 1: Help eliminate hunger, food insecurity and malnutrition

a common framework to ensure coherence of policy and policy implementation since many actors hold information and implement programmes about food security in the country.

Drimie and Ziervogel also affirm that despite a firm commitment by the South African government to improve development issues, there is a great social and economic disparity between households and communities particularly concerning access to food security.¹⁸¹ They argue that the state should create a conducive environment for information sharing and enhance improved anti-hunger programming among various government departments. Although three government departments (the Department of Agriculture, Forestry and Fisheries (DAFF), the Department of Planning, Monitoring and Evaluation (DPME), and the Department of Social Development (DSD)) have launched a similar initiative termed Operation Phakisa, it has not completely addressed chronic hunger and malnutrition.¹⁸² The launch of Phakisa (which means ‘hurry up’ in Sesotho) indicated the states urgency to realise the issues highlighted in the National Development Plan 2030 (which seeks to address unemployment, poverty and inequality).¹⁸³ As discussed in chapter four, five years since the launch of the NDP, the rate of unemployment stands at 27.7 per cent in 2017.¹⁸⁴ Thus, access to food of these individuals will inevitably be affected by their lack of income to support themselves (as well as their dependants).¹⁸⁵

In terms of best practice, Rocha posits that ‘Brazil presents a fascinating case for studying [...] food and nutrition security.’¹⁸⁶ According to her, between 2003 and 2009, the country had reduced by half extreme poverty and malnutrition, and approximately 14 million citizens have moved out of poverty.¹⁸⁷ She observes that integrated policy to address hunger and malnutrition, under the aegis of the Fome Zero (Zero Hunger) strategy has contributed to

¹⁸¹ S Drimie & G Ziervogel ‘Food Insecurity in South Africa’ in RE Kasperson & M Berberian (eds) *Integrating science and policy: Vulnerability and resilience in global environmental change* (2011) 215.

¹⁸² Parliamentary Monitoring Group ‘Operation Phakisa: DPME and DAFF; National Food & Nutrition Security Implementation plan: progress report by DPME; Poultry industry: response from DAFF’ (22 March 2017) available at < <https://pmg.org.za/committee-meeting/24202/?via=cte-menu> > (accessed 4 April 2017).

¹⁸³ Department of Planning, Monitoring & Evaluation ‘Operation Phakisa’

¹⁸⁴ Trading Economics ‘South Africa unemployment rate: 2017’

¹⁸⁵ Parliamentary Monitoring Group ‘Operation Phakisa: DPME and DAFF; National Food & Nutrition Security Implementation plan: progress report by DPME; Poultry industry: response from DAFF’ (22 March 2017) available at < <https://pmg.org.za/committee-meeting/24202/?via=cte-menu> > (accessed 4 April 2017).

¹⁸⁶ C Rocha ‘A right to food approach: public food banks in Brazil’ R Graham & T Silvasti (eds) *First World Hunger Revisited: Food charity or the right to food? 2nd Edition* (2014) 41.

¹⁸⁷ Rocha (n 186 above) 29. For developments related to food security in South Africa, see sec 5.1 of this chapter.

combating food and nutrition insecurity in the country.¹⁸⁸ Although it has its own challenges (as discussed in section 3.2.4 of chapter six) the strategy according to Rocha increases income-generating opportunities for low-income groups.¹⁸⁹ The thesis will, therefore, explore in chapter four whether South Africa has adopted similar policies and if so, assess to what extent these initiatives have been implemented to address chronic hunger.

The aforementioned scholars' analysis elaborately discussed the various norms, safety nets and (in)adequate interventions adopted by the state to advance the right to food. Three important questions, which the various authors under this heading fail to address, are: (i) why is there chronic hunger in South Africa despite adequate production of food? (ii) which policy actor is best suited to bring about policy change to address chronic hunger? (iii) why has there been limited use of social protest to advocate for the right to food in South Africa?

6.3. How to achieve policy change

If a state reneges on its obligation to provide adequate and nutritious food to its residents, can court rooms or litigation bring food to the chronically hungry? Legal system according to Handler can hardly be used to transform a society or radically improve economic well-being.¹⁹⁰ He emphasises that litigation is conducive for secondary objectives, such as raising awareness and heightening the publicity of issues. Law, according to Handler, can be seen as simply 'a codification of societal practices.'¹⁹¹ His point is that the existing economic and political frameworks operating outside the courtroom defeats the effectiveness of legal systems to 'change society and specific aspects of it'.¹⁹² For instance, he cited bureaucratic hostility as a major barrier to implementation of socio-economic legal remedies. Rather than stimulating reform, the legal system 'increases benefits and advantages for elites and perpetuates the *status quo*.'¹⁹³ Courts he asserts cannot really accomplish much. By reviewing the course of thirty-five cases drawn from four significant fields –including social welfare- Handler concludes that there are 'favourable and unfavourable conditions for the use of the courts' to achieve concrete changes.¹⁹⁴ From his theoretical presentation and comparative approach, it is apparent that the right to food is not one of the favourable conditions. Social

¹⁸⁸ Rocha (n 186 above) 29.

¹⁸⁹ Rocha (n 186 above) 30.

¹⁹⁰ JF Handler *Social movements and the legal system: A theory of law reform and social change* (1978) ix.

¹⁹¹ Handler (n 190 above) ix.

¹⁹² Handler (n 190 above) xi.

¹⁹³ Handler (n 190 above) 4.

¹⁹⁴ Handler (n 190 above) ix-x.

change he concludes can emanate through a revitalised pluralist framework, with active social protest. Thus, governments and policy makers, he overtly asserts are more responsive to demands emanating from social forces.¹⁹⁵ In this sense, Langford is correct to argue that socioeconomic rights litigation in South Africa lack the capacity to improve the plight of the poor.¹⁹⁶ Although Handler and Langford doubt the potential of courts to address food insecurity, both do not provide a (a cheap and effective) alternative. It is against this backdrop that the thesis will assess selected actors and factors and determine which strategy is best suited to bring about policy reform to improve the food insecurity situation of millions of South Africans.

At the domestic level, Madlingozi avers that the country has several social movements, which often adopt protest as a means to advocate for many progressive causes.¹⁹⁷ The lower socio-economic classes are usually the subjects of patronage and suppression. Wage earners and the unemployed in townships live in a political arena where their basic socioeconomic rights are perpetually violated.¹⁹⁸ The coexistence of oppression of the lower class by the middle class and the entrenched poverty caused by the severe macro-economic policies has heightened the activism of post-apartheid social protests.¹⁹⁹ Akin to Habib (discussed above), while Madlingozi recognises the upsurge of social protest in post-apartheid South Africa, he does not zero in on the issue of chronic hunger and why it has not trigger frequent and large-scale protest as the service delivery protests. The thesis will, therefore, assess the scale of food insecurity and why the millions affected by this condition have not taken to the streets to demand for food or reduction of food prices, as demonstrated in service delivery protests.

Alexander asserts that South Africa has experienced a progressive movement of local and grass-roots protests after 1994.²⁰⁰ According to him '[t]his has been widespread and intense, reaching insurrectionary proportions in some cases.'²⁰¹ These locally-organised protests which usually spring from poorer neighbourhoods (black and coloured townships) attract massive participation by a new regime of fighters, particularly the unemployed youth and

¹⁹⁵ Handler (n 190 above) x.

¹⁹⁶ M Langford 'Housing rights litigation: *Grootboom* and beyond' in Langford *et al* (n 160 above) 188.

¹⁹⁷ T Madlingozi 'Social movements and the Constitutional Court of South Africa' in O Vilhena & U Baxi *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 534.

¹⁹⁸ The objectives of the movements often comprise improvement in the social services sector.

¹⁹⁹ The existing neoliberal macro-economic policy has exacerbated the economic plight of the poor, leading to millions of households faced with job loss and evictions. See Madlingozi (n 197 above) 534-5.

²⁰⁰ P Alexander 'Rebellion of the poor: South Africa's service delivery protests—a preliminary analysis' (2010) 37 (123) *Review of African Political Economy* 32.

²⁰¹ Alexander (n 184 above) 23-34.

school students. The form of their activities include mass meetings, confrontations with the police, petitions, drafting of memoranda, toyi-toying, stay-aways, chasing unpopular individuals out of townships, processions, construction of barricades, burning of tyres, blockading of roads, forced resignations of elected officials, destruction of buildings, looting, and election boycotting.²⁰² Most of these ‘rebellion of the poor’²⁰³ have been triggered by poor service delivery and against self-serving, corrupt and uncaring leaders of municipalities.²⁰⁴ Alexander’s categorisation of protest is very, but what he fails to discuss, which this thesis will investigate is why the food poor have not often adopted some of these tactics to press their demands for adequate food.

In terms of protest, in their 1999 ground-breaking article ‘Popular protest and political reform in Africa’, Bratton and Van de Walle stress that policy or constitutional reforms in any authoritarian or democratic regime depend on the strength of social movements to press for collective demands.²⁰⁵ They argue in essence, that the immediate and often preferred modality for improving material conditions in urban economy is through popular protest conducted by social groups.²⁰⁶ They aver that the lower social class have customarily expressed their contention in boycotts, demonstrations, marches and strikes.²⁰⁷ To influence reform outcomes, social forces have to meet certain basic requirements, namely there must be norms, organisations, and leaders who inspire a deprived and leaderless social group into collective action.²⁰⁸ Bratton and Van de Walle recognise the power of protesters to bring about (policy) reform. They, however, do not address the issue of the conditions why could trigger citizens to take to the streets in demand for food or reduction of food prices, which this thesis will attempt to analyse.

For Atkinson, since 1994 the de-radicalisation and transformation of the system of local governments in South Africa has failed to ensure development and deal with unemployment, urbanisation, poverty, HIV/AIDS and marginalised communities.²⁰⁹ Consequently, many shack settlements and townships have witnessed demonstrations, marches, mass protest,

²⁰² J Beall, S Gelb & S Hassim ‘Fragile stability: State and society in democratic South Africa’ (2005) 31(4) *Journal of Southern African Studies* 682.

²⁰³ Alexander (n 184 above).

²⁰⁴ Alexander (n 184 above).

²⁰⁵ Bratton & Van de Walle (n 85 above) 420.

²⁰⁶ Bratton & Van de Walle (n 85 above) 421.

²⁰⁷ Bratton & Van de Walle (n 85 above) 426.

²⁰⁸ Bratton & Van de Walle (n 85 above) 427.

²⁰⁹ D Atkinson ‘Taking to the streets: has developmental local government failed in South Africa?’ in S Buhlungu et al (eds) *State of the nation: South Africa* (2007) 53.

petitions and violent confrontations over the last two decades.²¹⁰ The response of the African National Congress (ANC) government to local (political) protests, according to Atkinson has ranged from a repressive obstinacy, at the one extreme, to an open recognition of guilt, at the other. Therefore, in light of the latter, the state is complying with the demands of protesters by seeking to facilitate improvement in municipal technical skills and infrastructure delivery. According to Atkinson, the three main grounds for the mass action were poor service delivery, the crude reaction of municipalities to inhabitants' concerns, plus the obvious misuse of public funds by municipal staff and councillors.²¹¹ The gap Atkinson fails to provide, and this thesis seeks to bridge is why millions of people confronted with chronic hunger have not often protested for food from the local to the national level.

Booyesen further affirms Atkinson's assertion that both the quality of service delivery and public representation of the grass-root service delivery have been the two prime bases of grass-roots protests in South Africa.²¹² For instance, in the two years prior to the March 2006 elections, roughly 900 service delivery protests were recorded between February 2004 to February 2006.²¹³ The protests which were concentrated in the urban and metropolitan centres of all the nine provinces was a clear indication that the 'politics of getting service delivery was changing gears'.²¹⁴ In an attempt to prevent future protest, the ANC government in 2006 started issuing renewed and detailed deadlines for conclusive plans for access to electricity for all houses, clean water and elimination of the bucket system. Despite the fact the analysis of Booyesen is insightful, she does not link protest to food security or investigate what conditions trigger social protest in general or food protest in particular. The thesis will, therefore, bridge this gap by assessing the substantive and procedural factors that trigger or prevent the upsurge of food protest in selected regimes, with focus on South Africa.

In his 'Post-apartheid social movements and legal mobilisation', Madlingozi observes that the entry into force of the Constitution has been accompanied with an increase in the activities of social movements to advance socioeconomic rights. He argues that the socioeconomic rights strategies of social movements are often centred on legal mobilisation, where these movements explicitly employ rights strategies and tactics in their engagement with the state

²¹⁰ S Mottiar & P Bond 'Social protest in South Africa' Centre for Civil Society, University of KwaZulu-Natal 1.

²¹¹ Powell *et al* (n 50 above).

²¹² S Booyesen 'With the ballot and the brick: The politics of attaining service delivery' (2007) 7(1) *Progress in Development Studies* 21.

²¹³ Booyesen (n 196 above) 22.

²¹⁴ Booyesen (n 196 above) 22.

and other actors.²¹⁵ Madlingozi further affirms that, established social movements are composed of collectives of marginalised actors, with level of organisation and advance change-oriented goals. They are, therefore, distinguishable from spontaneous community protests, modern trade unions, non-governmental organisations (NGOs) and interest groups.²¹⁶ Nonetheless, they sometimes rely on dramatic, unconventional and sometimes disruptive forms of political expressions.²¹⁷ Indeed, all these forms of expressions have the potential of yielding positive response in term of advancing the right to food. Akin to Booysen, the gap Madlingozi fails to cover, which this thesis seeks to bridge is linking social protest to the right to food, as well as determining the conditions that need to be present before a food protest could be triggered.

Dugard equally observes that despite the Constitution, which entrenches the rights for basic services such as free basic water, electricity and sanitation, the reality on the ground is different.²¹⁸ She affirms that at the ground level where service delivery takes place, there are prevalent failures culminating in heightening resentment in several poor rural and urban areas. According to Dugard, the broader neo-liberal economic policies pursued by the government after the democratic transition have failed to promote ‘inclusive economic and human development’.²¹⁹ Central government has, therefore, relinquished the obligation for basic services to the local government domain and has underscored a cost recovery driven strategy to basic services. Municipalities are therefor under pressure to provide services to only households that can pay to the detriment of those that cannot pay. Although Dugard’s argument is valid, she does not consider what impact the activities of local administration have on people’s access to food, and the hunger situation in South Africa. Arguably, a reason for the lower involvement of local authorities in addressing food insecurity at the municipal and provincial levels may be due to the fact that these officials have less say on the prices of food since South Africa liberalised markets in post-1994 and the government is not involved in price setting, except in special conditions such as with the export prices of wheat. In her assessment, Dugard fails to link social protest to chronic hunger and why there has been limited use of protest to address this crisis. The thesis, thus, addresses this question by

²¹⁵ T Madlingozi ‘Post-apartheid social movements and legal mobilization’ in Langford *et al* (n 160 above) 92.

²¹⁶ Madlingozi (n 215 above) 535.

²¹⁷ Madlingozi (n 215 above) 538.

²¹⁸ J Dugard ‘Urban basic services: rights, reality, and resistance’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-economic Rights in South Africa: Symbols Or Substance?* (2014) 275.

²¹⁹ Dugard (n 218 above) 276.

analysing why food protests rarely occurs in South Africa, and what actors are necessary to be mobilised to address food insecurity through protest.

Allan and Heese have observed that protest in urban centres such as Johannesburg, Ekurhuleni and Cape Town is often sparked partially by relative deprivation and inequality; and mostly by poor communication between municipal representatives and communities.²²⁰ This lack of, or poor communication may be traced to the fact that informal settlements are usually marginalised and are in essence denied access to fundamental necessities, which includes accessing housing and economic opportunities. Indeed, Allan and Heese conclude that unemployment and poverty are core factors in triggering service delivery protest since residents in poorer areas while enduring hardship and poor service delivery, observe communities in more formalised municipalities benefiting from upgraded services and living luxurious life. While the assertions of Allan and Heese could be seen as correct in terms of poverty and chronic hunger, the scholars do not extend their analysis to investigate whether the food-poor have the right to influence their leaders to provide them with food and what strategy is best suited for this purpose. The thesis will, therefore, address this issue by assessing citizen's right to protest and whether this strategy is the best approach to influence the South African government to revise its existing food security or social security programme to provide for the unemployed and chronically hungry.

The various scholars provide useful insight into the link between social protest and policy change, specifically on service delivery. However, none of them attempted to examine why South Africans rarely take to the streets in demand for food or reduction of food prices.

In summary, whether economist or political scientist, sociologist or philosophers, working historically or in contemporary periods, these theorists and others have made great efforts in conceptualizing the global and South African hunger situation –the trend, causes, and duties of state and moral obligations. They all strived to address the problem of the day -hunger. Yet, the -historical and recent- authors did not address the broader structural link among hunger, state obligation and social protest.

²²⁰ K Allan & K Heese 'Understanding why service delivery protests take place and who is to blame' (2011) *Municipal IQ* 21.

8. Outline of chapters

The thesis is structured in seven chapters. The first chapter sets out the framework of the thesis, as well the method to be used in gathering the relevant information. Chapter two sets the scene for assessing the theoretical as well as legal basis for the use of protest. The thesis then proceeds to assess more broadly the effectiveness of protest movements in achieving change, specifically in the area of social and economic development. In particular, a detailed analysis was conducted on the approach that has been used by the masses during protest in South Africa. The thesis also demonstrates here, how the poor to ensure government accountability and thereby ensure a considerable access to social services have used protest.

Chapter three is concerned with an enquiry into the theoretical and legal justification for the right to food in South Africa. Here, the study examines the principal normative basis for the right to food with the aim of demonstrating its significance to eradicating chronic hunger.

In chapter four, the thesis focuses on the factors which particularly hinder the alleviation of chronic hunger and malnutrition in South Africa. The dissertation first considers the existing initiatives tailored to address food insecurity in order to determine their effectiveness.

Chapter five examines the various actors which could bring about significant policy reform to address chronic hunger. The structures and functions of the executive, legislative and the judiciary were assessed to determine their strengths and weaknesses in bringing about policy reforms. Non-state actors, such as human rights institutions, the media, public opinion, and non-governmental organisations are also examined to determine their capability in terms of influencing policymakers to amend existing policy to provide for the food poor.

In chapter six, the dissertation interrogates why there has been limited use of food protest in South Africa as compared to other selected countries. A case study of states, which have used protest to access adequate food, is provided, with specific reference to countries such as Brazil, India, Mozambique and Kenya. The objective of these case studies is to explain why there has been limited application of such similar protest in South Africa. Against this backdrop, the chapter sets out the circumstances under which the food-poor have resorted to food protest to ensure their access to adequate food and nutrition.

In the seventh and concluding chapter, the thesis summarizes its key findings, draws conclusions, provides recommendations for the effective realisation of the right to food in South Africa and sets out areas for further research.

CHAPTER TWO

THEORY AND PRACTICE OF SOCIAL PROTEST

1. Introduction

The period after World War II witnessed deep, dramatic changes.¹ Pro-democracy mobilisations in places as diverse as colonial Gold Coast and Nigeria, Mau Mau uprising in British Kenya (women's and students') social movements that would contribute to South Africa's transition into democracy: all these developments –as well as many others – indicated that dramatic political transformations were in the making.² Most of these collective actions had been mobilised against unjust political regimes, or the decisions of government and sought to hinder them.³

However, social protest did not only begin in post-1945. In fact, it could be traced back to 66 BC when a mob protested for lack of food and attacked the house of Marcus Cicero, then a Roman consul.⁴ Protest or discontent was also the trigger of the the 1917 Russian Revolution,⁵ 1989 French Revolution,⁶ the fall of the Confederate States of America 1860-61,⁷ as well as the fall of the British Raj in India in 1947.⁸ All these protest actions serve as instruments of contestation in which discourses, identities, symbols, practices, and bodies are used to prevent or pursue changes in institutionalised power relations.⁹ A fundamental feature of social protest, as discussed in section 2, is its capacity to put pressure on decision-makers by mobilising public opinion through non-routinized forms of action.¹⁰ Section 3, examines the causes, strategies, escalation, justifications as well as the numbers and profile of protesters within the context of post-apartheid South African. An important aspect of this section is sub-section 6, which details the various methods of coercion and persuasion or repertoire of collective action often used by protesters in South Africa.

¹ J Auyero 'Global Riots' (2001) 16 *International Sociology* 35.

² PS Bearman & KD Everett 'The Structure of Social Protest, 1961–1983' (1993) 15 *Social Networks* 172.

³ J Auyero 'When Everyday Life, Routine Politics, and Protest Meet' (2004) 33 *Theory and Society* 417.

⁴ Auyero (n 3 above).

⁵ R Wade *The Russian Revolution, 1917* (2005) 62.

⁶ G Rudé *The Crowd in History* (1964) 7.

⁷ AF Smith *Starving the South: How the North Won the Civil War* (2011) 3.

⁸ D Arnold 'Dacoity and rural crime in Madras, 1860–1940' *The Journal of Peasant Studies* 6.2 (1979) 147.

⁹ G Arrighi & B Silver *Chaos and Governance in the Modern World System* (1999) 19.

¹⁰ Arrighi & Silver (n 9 above).

In this section, poor service delivery, lack of political accountability, high university fees, lack of access to land and xenophobic attacks will be referred in order to illustrate that strategies vary differently in terms of their action and radicalism. The section concludes by summarising the different tactics commonly used by protesters to pressure the state, which includes, but not limited to looting, construction of barricades, mass meetings, and confrontations with police.

2. Conceptual underpinning of social protest

In accordance with the concept of representative democracy, the policies of the state can immediately be challenged by the opposition in parliament, or citizens could subsequently punish the decision-makers in elections by the voting choices.¹¹ Besides coup d'état or military intervention, citizens could resort to negotiations or lobbying with the help of civil society organisations (CSOs).¹²

Yet, over the years, an increasing number of citizens have come to affirm the legitimacy of other tactics of pressure on the state.¹³ These citizens, when confronted with unjust decisions or laws, or seek to improve their condition, adopt a more traditional form of political participation – including attending political meetings, persuading friends, discussion politics with others, acquaintances to vote in particular ways, contacting public officials, following politics in the newspapers, and working for political parties and their candidates – to the unconventional and new forms, such as blocking traffic, withholding of tax or rent, wildcat strikes, sit-ins, occupations, boycotts, demonstrations and signing petitions.¹⁴

Tilly further adds that strategies and tactics are key in achieving success in protest actions.¹⁵ Tilly stated that during protest, participants are presented with a wide variety of tactical choices otherwise known as 'repertoire of contention'.¹⁶ Tactical choice, according to Tilly,

¹¹ PR Donati 'Building a Unified Movement: Resource Mobilization, Media Work, and Organizational Transformation in the Italian Environmentalist Movement' in L Kriesberg (ed) *Research in Social Movements, Conflict and Change: vol. 19* 127.

¹² SH Barnes, M Kaase, K Allerbeck, B Farah, F Heunks, R Inglehart, M Jennings, K Kent, D Hans, A Marsh, & L Rosenmayr *Political Action* (1979) 157.

¹³ DD Porta & M Diani 'Action forms, repertoires, and cycles of protest' in D Della Porta & M Diani *Social movements: An introduction* (2nd ed) (2009) 166.

¹⁴ P Bagguley 'Middle Class Radicalism Revisited' in T Butler & M Savage (eds) *Social Change and the Middle Classes* (1995) 13.

¹⁵ C Tilly 'Contentious repertoires in Great Britain, 1758–1834' (1993) 17(02) *Social Science History* 258.

implies protesters using the most strategic tool (for example picketing, procession, petition) to press for a specific grievance within a specific period.¹⁷ According to Barnes *et al*, these new forms of citizens' political repertoire have increasingly become legitimised.¹⁸ It was against this backdrop that Norris mentioned that protest politics have not only become increasingly popular and pervasive in recent decades, but are on the rise as a medium of political mobilisation and expression.¹⁹ It is, therefore, the objective of this section to provide an explanation for the term protest, and specifically social protest. Such an explanation will assist in distinguishing this form of collective action from other violent or non-violent actions such as rebellion, revolution, deviance and crime. The section will finally address the question of the elements, which trigger social protest.

2.1. What is social protest

The term protest is often used to refer to an indirect channel of influencing decision-makers. Protest can simply be defined as a declaration or expression of dissent, disapproval or objection, usually in opposition to something one is powerless to avoid or prevent.²⁰ Michael Lipsky defines it as a political resource of the powerless.²¹ While protest actions are generally peaceful or violent, there are instances where some individuals or groups in society just simply protest everything.²² An example of such protest involves a child who protests every command from a teacher or parent in the hope of gaining certain favours.²³ The chapter will not concern itself further with these cases. The subject of interest to this chapter is social protest, which implies a serious expression of grievance or dissent with the intent to trigger ameliorative action.

In terms of protest definition, the most accurate way of classifying a disturbance as an act of social protest, is by first, identifying the grievance in question and, second, ascertaining

¹⁶ Repertoire of contention is a set of protest-related tools and actions. For a detailed discussion of this approach, see CD Brockett 'A Protest-Cycle Resolution of the Repression/Popular-Protest Paradox' in M Traugott (ed) *Repertoires and Cycles of Collective Action* (1995) 119.

¹⁷ Tilly (n 15 above).

¹⁸ SH Barnes, M Kaase, K Allerbeck, B Farah, F Heunks, R Inglehart, M Jennings, K Kent, D Hans, A Marsh, & L Rosenmayr *Political Action* (1979) 157.

¹⁹ P Norris *Democratic Phoenix: Reinventing Political Activism* (2002) 221.

²⁰ Random House *Random House Dictionary of the English Language* (1967).

²¹ M Lipsky *Protest and City Politics* (1965) 67.

²² P Bagguley 'Protest, Poverty and Power: A Case Study of the Anti-Poll Tax Movement' (1995) 43 *Sociological Review* 699.

²³ RH Turner 'The Public Perception of Protest' (1969) 34(6) *American Sociological Review* 816.

whether the main objective is to improve the unjust (economic/social) conditions.²⁴ In addition, it would be useful (but not decisive) to determine if the participants invoke the expression of social protest. Grimshaw observed that disturbance or riot could be labelled as social protest in light of the objectives pursued and emphasised by the participants, whether they are seeking for improvement in economic condition, political emancipation or social conditions.²⁵ Lang and Lang, also intimated that a disturbance can be labelled as social protest based on the kind of official response the participants expect from the target group or state officials.²⁶

Virtually all protests hinge on five key principles: (i) the organisers of the protest depend upon some combination of fear and sympathy to pressure the government; (ii) the aim of the action is to attract public attention to the grievance(s); (iii) the protesters are not able to directly use their own efforts to correct the situation; (iv) the action demonstrates a grievance of injustice or conviction of wrong; and (v) the action is meant to provoke ameliorative steps by the state or a target group.²⁷ Protesters often adopt different approaches as a means of expressing their dissent against injustice, and, to make bystanders understand the need for such an exceptional means of communication. As is often perceived in situations of disaster, threats of injury and violence to persons are not merely criminal actions; burning buildings and breaking store windows is not primarily an immoral vengeance or perverted form of amusement like arson or the usual vandalism; looting is not simply a means of acquiring property.²⁸

Describing an act of disturbance as social protest does not preclude one from advocating immediate steps to suppress and control the disturbance, nor does it preclude one from disapproving the disorder or violence by which the protest is expressed. Fogelson asserted that a riot could be termed as a social protest when it calls the attention of the society to the widespread dissatisfaction with the social/economic injustice confronting specific individuals or group. Such riots are, considered as legitimate, mainly because they are selective,

²⁴ J Ayres 'Framing Collective Action Against Neoliberalism: The Case of the Anti-Globalization Movement' (2004) 10 *Journal of World Systems Research* 13.

²⁵ AD Grimshaw 'Three views of urban violence: civil disturbance, racial revolt, class assault' in LH Masotti & DR Bowen (eds) *Riots and Rebellion* (1968) 109.

²⁶ K Lang & G Lang 'Racial disturbances as collective protest' in LH Masotti & DR Bowen (eds) *Riots and Rebellion* (1968) 7.

²⁷ RD Benford & D Snow 'Framing Processes and Social Movements' (2000) 26 *Annual Review of Sociology* 613.

²⁸ R Dynes & EL Quarantelli 'What looting in civil disturbances really means' (1968) 5 *Transaction* 12.

restrained, and even more essentially, targeted at the source of the protesters' most profound and immediate grievances.²⁹

The manner in which society perceives a disturbance, either as a social protest or rebellion, has implications for short- and long-term facilitation or suppression of reform, and for the course and recurrence of the act of disturbance. Arguably, one of the main consequences or importance of labelling a disturbance as a social protest is that, whereas other labels or definitions (such as rebellion, crime or revolution) often attract more restricted access to legitimate means for promoting reform, social protest spurs efforts to make nonviolent and legitimate methods for promoting change more available than they had previously been.³⁰ For instance, individuals or groups to whom president Jacob Zuma's administration is a massive threat to the country's economy are unwilling to invoke revolutionary terms such as coup d'état or seizure of power since they acknowledge that this method is improper and illegitimate.

There are five key features of social protest worth citing. These features are however, merely theoretical and not tested findings. First, social protest is the outcome of an invitation extended by government officials through their unjust behaviours.³¹ Second, social protest instigates conflict against the state, which may attempt to avoid further confrontation through conciliation.³² Third, bystanders or the public test protest actions for credibility in terms of society's understanding of justice and collective action. Fourth, social protest establishes some form of bargaining relationship between the protesters and the state.³³ Fifth, social protest communicates some combination of *threat* and *appeal*. It must be noted that between these two combinations, the threat component is less significant to bystanders (or observers) than the appeal component.

The element of appeal in a grievance is usually useful in attracting attention from groups or individuals who have no stake in the grievance of the protesters and far removed from the venue of the protest.³⁴ For instance, the affluent in the society are unlikely to protest against inadequate government grant and perhaps rising food prices. To these people, the imminent hunger, which would confront the poor in the face of such price hikes, is unlikely to affect

²⁹ RM Fogelson 'Violence as protest' in Robert H. Connery (ed) *Urban Riots: Violence and Social Change* (1968) 37-38

³⁰ RH Turner & LM Killian 1957 *Collective Behavior* 327.

³¹ P Bagguley *From Protest to Acquiescence: Political Movements of the Unemployed* (1991) 11.

³² M Diani & R Eyerman *Studying Collective Action* (1992) 5.

³³ J Breuilly *Nationalism and the State* (1993) 13.

³⁴ P Bachrach & MS Baratz *Power and Poverty: Theory and Action* (1970) 48.

them. Given that personal threat to hunger is minimized, the best approach of gaining the support of this group is by appealing to their conscience. Unlike appeal, the element of threat is used to target a group rather than individuals.³⁵

Generally, individuals see themselves as members of a group, and when that group is threatened, the individual becomes threatened.³⁶ For example, in times of protest around water service delivery issues, there is an expectation that members of the African National Congress (ANC) led government (such as ward councillors, members of the regional executive committee, and provincial executive committee), who may not be working at the department of water and sanitation, often experience similar threat as result of their identification with the ruling party. Under the heat of the protest, such members of the ANC equally mount pressure on their party executives to take immediate action towards addressing the grievance of the protesters.

Threat by itself attracts much attention, while appeal is often weak in this regard). It is however, important for protesters to refrain from the excessive use of threat, since escalation of threats into violence during protest reduces its legitimacy.³⁷ When the threat component rises above the optimal range, a supposed-to-be protest action will be seen as a rebellion; below the optimal range, the possible perception is deviance or unruly behaviour. An optimal mixture of appeal and threat is important for the probability of attracting participants and perceiving the act as a legitimate action.³⁸ The combination of appeal and threat however has its negative side, and that is, it may prove difficult to keep the awareness of the protest dominant for a long period.

2.2. What can be considered as social protest?

It is important to indicate that before any collective action could be recognised as social protest, it must somehow sound and look like social protest to the people in the society. Irrespective of the background of the protesters, anytime the public witnessing such an action

³⁵ RL Breiger (1988) 'The Duality of Persons and Groups' in B Wellman & SD Berkowitz (eds) *Social Structures: A Network Approach* 89.

³⁶ M Berezin 'Emotions and Political Identity' in J Goodwin, JM Jasper & F Polletta (eds) *Passionate Politics* (2001) 87.

³⁷ DB Balsemer 'The Impact of Environmental Factors on Factionalism and Schism in Social Movement Organizations (1997) 76 *Social Forces* 202.

³⁸ WL Bennett 'Social Movements beyond Borders: Understanding Two Eras of Transnational Activism' in D della Porta & S Tarrow (eds) *Transnational Protest and Global Activism* (2004) 206.

see that its organisation is widely contrary to their understanding of social protest, it is most likely that they would not consider such an act as social protest.³⁹

In order for any disturbance to earn the reputation as a social protest, it must abide by these four golden rules: First, in order for society to see a disturbance as social protest, protesters (or challengers) must be seen to show signs of: (i) a moral virtue that renders them 'deserving' of an improvement of a particular condition; (ii) are believed to be collectively or individually powerless to correct their grievances; and (iii) they constitute a major part of a group whose grievances are already well documented.⁴⁰

Non-protesters are predisposed to perceive a collective action as a revolutionary act or deviance by a small cadre of agitators, especially when there is any indication that only few sympathised with or participated in the disturbance.⁴¹ Protesters' claim that their use of unconventional approach was triggered by poor condition is undermined, when it appears that other people in similar circumstance did not join the protest.⁴² In such cases, bystanders consider the protest as a minor annoyance and advance claims such as 'What are they asking for this time?' or 'Unemployed? Let them go out, walk the streets, and find a job the way I did!'⁴³

Second, for an action to be a credible act of social protest, signs of enjoyment of destruction of property, violence, the settlement of private feuds, and/or the use of the disturbance for self-aggrandisement must be subordinated to desperation and naïve anger.⁴⁴ Although social protest could turn disruptive and violent, participants must acknowledge that the intent to do (personal and property) injury is secondary in importance to the attempt to secure a remedy to their grievance.⁴⁵

³⁹ R Dalton 'Strategies of Partisan Influence: West European Environmental Movements' in JC Jenkins & B Klandermans (eds) *The Politics of Social Protest: Comparative Perspectives on States and Social Movements* (1995) 297.

⁴⁰ LA Banaszak, K Beckwith & D Rucht 'When Power Relocates: Interactive Changes in Women's Movements and the State' in LA Banaszak, K Beckwith & D Rucht (eds) (2003) *Women's Movements Facing the Reconfigured State 2*.

⁴¹ M Diani & I Bison 'Organization, Coalitions, and Movements' (2004) 33 *Theory and Society* 281-2.

⁴² RJ Dalton & M Kuechler *Challenging the Political Order: New Social and Political Movements in Western Democracies* (1990) 19.

⁴³ RH Turner 'The Public Perception of Protest' (1969) 34(6) *American Sociological Review* 819.

⁴⁴ SM Buechler 'The Strange Career of Strain and Breakdown Theories of Collective Action' in DA Snow, SH Soule & H Kriesi (eds) *The Blackwell Companion to Social Movements* (2004) 47.

⁴⁵ L D'Anjou & J van Male 'Between Old and New: Social Movement and Cultural Change' (1998) 3 *Mobilization* 297.

Third, a disturbance can be classified as social protest when there is an indication that what triggered the action was an act or incident of government injustice, and that a series of similar injustices had laid the foundation for this unusual method.⁴⁶ Social protest credibility is however, weakened when there is any evidence of seriously intended threats of violence, conspiracy or covert planning.⁴⁷

Fourth, any group of protesters, which confronts a more powerful institution (such as a state) with a grievance, is usually obliged to be more virtuous and circumspect in their approach.⁴⁸ Considering that disruption and violence undoubtedly raises the issue of virtue, the current and past behaviour of the group in question must have some indications of goodness.⁴⁹ To be credible as protest, the group must have exercised restraint on other occasions, must have used acceptable means and must be customarily law-abiding. For instance, two features of South Africa's 2015 and 2017 xenophobic rioting, which have detracted repeatedly from the image of social protest, are the physical injury to victims and looting for personal gain.

Another feature, which distinguishes riots like xenophobic attacks from social protest, is the unrestrained nature of their actions. According to Turner, an important feature of social protest is that protesters would go exceptional lengths (during dramatic instances) to guarantee non-protesters safe passing, and not cause bodily harm to state security apparatus.⁵⁰ A belief that severe injuries to persons or deaths resulted only under special conditions of provocation and confusion, and that only property and not personal injury was the object of attack is often a salient factor in determining whether a dissent is a social protest. The legitimacy of a social protest is guaranteed when organisers essentially condemn the violent approach of a few of its members, and, when the action attracts widespread sympathy and/or support for its grievances.

2.3. Reaction of state to protest action

It is now imperative to assess the reaction of the state in situations of protest action. During a protest action, participants often use insulting messages and portraits as a means of coercing

⁴⁶ N Crossley *Making Sense of Social Movements* (2002) 91.

⁴⁷ J Bandy & J Bickham-Mendez 'A Place of Their Own? Women Organizers in the Maquilas of Nicaragua and Mexico' (2003) 8 *Mobilization* 173.

⁴⁸ RL Curtis & LA Zurcher 'Social Movements: An Analytical Exploration of Organizational Forms' (1974) 11 *Social Problems* 370.

⁴⁹ M Diani 'Social Movements and Social Capital: A Network Perspective on Movement Outcomes' (1997) 2 *Mobilization* 137.

⁵⁰ RH Turner 'The Public Perception of Protest' (1969) 34(6) *American Sociological Review* 819.

public officials to meet their demands. In addition, social protest involves threats of damage or further damage to persons or property of the state, physical injury to security apparatus or municipal officials. Faced with such confrontation, the executive is presented with three key options (within which to choose from), even though some are not suitable in specific cases.

First, it is not unusual for a member of the ruling party or staff of a government department to react to protest action by joining hands with the protesters (as a sign of solidarity). Although from the opposite side of the social protest, such individuals are equally classified as dissidents. A classic example of this response is lecturers joining forces with students to protest high fees (when seen from the perspective that necessary action must be taken by someone else, particularly university administration or the government) or some members of the ruling African National Congress (ANC) acting in solidarity with students for government to reduce high cost of university education. The second approach can be linked to an attempt to depreciate the significance of the action as deviance or rebellion, or completely ignore the protest.⁵¹ Where the state classifies such an act as rebellion, the appropriate response it triggers is retaliatory suppression.⁵² This approach was demonstrated in the Sharpeville massacre where the apartheid regime killed 69 and wounded 180 black South Africans for protesting the pass laws in 1960.⁵³ A recent example of the state's suppressive response of protest occurred on 16 August 2012 where members of the police service opened fire on a crowd of striking mineworkers at Marikana, which left 78 wounded and 34 dead.⁵⁴ The final alternative (if the possibility of surrender is omitted), is to extend a bargain or proposal of conciliation.⁵⁵

The purpose of conciliation is for the state to avert further confrontation by assuring protesters of nullifying a policy or adopting immediate steps to improve their condition.⁵⁶ Here the state (otherwise referred to as the conciliator) promises repentance and corrective actions, by offering public acknowledgment that it has failed to provide essential services to

⁵¹ D della Porta 'Social Movements and the State: Thoughts on the Policing of Protest' in D McAdam, J McCarthy & MN Zald (eds) *Comparative Perspectives on Social Movements. Political Opportunities, Mobilizing Structures, and Cultural Framing* (1996) 69.

⁵² D Cress & DA Snow 'The Outcomes of Homeless Mobilization: The Influence of Organization, Disruption, Political Mediation, and Framing' (2000) 105 *American Journal of Sociology* 1065.

⁵³ R Austin *Racism and apartheid in southern Africa: Rhodesia: a book of data* (1974) 93.

⁵⁴ South African History Online 'Marikana massacre 16 August 2012' (16 August 2012) available at < <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012> > (accessed 20 July 2017).

⁵⁵ G Davis, D McAdam, R Scott & MN Zald *Social Movements and Organization Theory* (2005) 12.

⁵⁶ P Bagguley 'Social Change, the Middle Class and the Emergence of "New Social Movements": A Critical Analysis' (1992) 40 *Sociological Review* 26.

the protestors.⁵⁷ By making this acknowledgement, the conciliator supplies the basis for believing that the protestors' resentment is alterable and is not personal to his government or department.⁵⁸ For instance, a clerk from the Department of Social Development (DSD) can say that the resentment of those excluded from grant and/or grant beneficiaries (due to the small amount of grant) is not really, directed at staff of DSD, but merely against the minister and the president who is insensitive to the plight of the poor. It is also important to indicate that conciliation also grants that there is some justification for the protestors hostility toward the state.

Given that protestors sometimes appeals to the conscience and support of bystanders, the conciliator typically considers an offer of conciliation as an act of generosity, exceeding what could be required or expected.⁵⁹ Resorting to conciliation clearly implies the government's admission of fault or guilt, which places it in a precarious condition later if the situation of the protestors does not improve.⁶⁰ There is, therefore, a strong tendency for protestors to ignore the promises of the state, and to return to the streets when their grievance is not addressed within a specific period.⁶¹ Since conciliation is often the desired response any protestor hopes to attain, it is important to assess the conditions, which trigger acts of conciliation.⁶² Four factors underpin the reason why a state resort to conciliation: first, to prevent the diversion of state's resources into containing the spread of the protest; second, to safeguard the image of the ruling party, especially towards election time; third, to prevent the risk of injury or further injury to government employees; and fourth, to prevent injury or further injury to the protestors.⁶³

The above four conciliatory benchmarks bring to bear three important conditions, which are necessary to attract people to participate in social protest. First, the greater the level of accountability on the state towards its citizens, the more likely protest action is to occur.⁶⁴

⁵⁷ M Diani 'Analysing Social Movement Networks' in M Diani & R Eyerman (eds) *Studying Collective Action* (1992) 125.

⁵⁸ D della Porta *Social Movements, Political Violence and the State* (1995) 14.

⁵⁹ D Cress & D Snow 'Mobilization at the Margins: Resources, Benefactors, and the Viability of Homeless Social Movement Organizations' (1996) 61 *American Sociological Review* 1089.

⁶⁰ M Diani 'The Concept of Social Movement' (1992) 40 *Sociological Review* 7

⁶¹ P Burstein 'Social Movements and Public Policy' in M Giugni, D McAdam & C Tilly (eds) *How Social Movements Matter* (1999) 38.

⁶² ES Clemens 'Organizational Form as Frame: Collective Identity and Political Strategy in the American Labor Movement' in D McAdam, J McCarthy & MN Zald (eds) *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framing* (1996) 215.

⁶³ P Burstein & A Linton 'The Impact of Political parties, Interest Groups, and Social Movement Organizations on Public Policy' (2002) 75 *Social Forces* 138.

⁶⁴ D Chong (1991) *Collective Action and the Civil Rights Movement* 78.

The accountability may be legal, electoral or moral. If the state fails to live up to its electoral pledges, moral or constitutional obligations, and its support base is threatened through protest, the likelihood of offering conciliation protest increases.⁶⁵ Second, the stronger the sentiments of poor socioeconomic condition among the people, the greater the likelihood of social protest exploding.⁶⁶ Third, it is more likely for people to support a protest when they are confronted with an imminent danger (of lack of water or electricity) rather than when there is none.⁶⁷

It is important to indicate that a strong government with staunch support among the voting population is not likely to tolerate violent protest action.⁶⁸ However, in instances when it lacks local support or the resource to contain the protesters or lacks the resource to quickly meet the demand, the standard official approach is to resort to bargaining.⁶⁹ The offering of bargaining serves as some form of amelioration in place of guarantees against further disorder and violence.⁷⁰

2.4. Role of bystanders

In order to understand the importance of third parties in social protest, one must first seek to understand why third parties who are merely bystanders (to take a sympathetic stand and acknowledge grievances) concern themselves with protest action. The appropriate response for this question is that: third parties often take keen interest in the protest when there is some basis for identification with one of the two parties, or there is some potential threat to them in the course of the protest. South Africans seldom concern themselves sufficiently with poor service delivery affecting a particular group of residents, until the action of the protesters becomes an immediate concern in their own locality. For instance, recent Coal Transportation Forum protest in Gauteng attracted sufficient attention only when disgruntled truck drivers blocked highways leading into Pretoria, causing chaos for morning commuters.⁷¹ In such moments where third parties are affected by the tactics of the protestors, they are inclined

⁶⁵ CJL Collins, Z Gariyo & T Burdon 'Jubilee 2000: Citizen Action Across the North-South Divide' in M Edards & John Gaventa (eds) *Global Citizen Action* (2001) 138.

⁶⁶ M Chesler 'Mobilizing Consumer Activism in Health Care: The Role of Self-help Groups' (1991) 13 *Research in Social Movements, Conflicts and Change* 279.

⁶⁷ H Blumer 'Social Movements' in A McClung Lee (ed) *Principles of Sociology* (1951) 199.

⁶⁸ JW Button *Black Violence: Political Impacts of the 1960s Riots* (1978) 26.

⁶⁹ C Calhoun 'Nationalism and Civil Society: Democracy, Diversity, and Self-Determination' in C Calhoun (ed) *Social Theory and the Politics of Identity* (1994) 304-5.

⁷⁰ P Burstein, RL Einwohner & JA Hollander 'The Success of Political Movements: A Bargaining Perspective' in JC Jenkins & B Klandermans *The Politics of Social Protest* (1995) 275.

⁷¹ The protest was in relation to Eskom's imminent contracting of independent power producers, which would lead to job losses.

toward wishing ‘a plague on both your houses’, rather than toward a sympathetic affiliation to either side. Alternatively, they can adopt a defense of neutrality (means of giving something to each other) by condemning the tactic or strategy of the protesters while acknowledging their grievances as valid.

Third parties are sometimes inclined to sympathize with protestors when the grievance (directly or indirectly) affects them.⁷² On this basis, other disadvantaged townships might support the efforts of militant Mamelodi residents protesting against high electricity tariffs, if they could be reasonably convinced that whatever concessions are won from the government would also benefit them. It was against this backdrop that Lipsky affirms that the most effective way through which collective action by weak individuals or groups can achieve some success is by activating and winning the sympathy of bystanders.⁷³

The tendency of third parties supporting protesters brings to bear several theories worth citing. First, in light of the existing antagonism towards the state because of some unfulfilled electoral promises, some bystanders are inclined to proffer support to the protesters. This partnership could be an effective weapon of enhancing the third party’s position *vis-a-vis* the state on the basis that the strong partnership will ultimately trigger an overarching reform, which will naturally benefit the entire society. Second, when the protest is directed wholly against the state, the private sector and non-government officials become third parties. For instance, the #FeesMustFall movement was directed against the government, thus, making university lecturers and administrators third parties. As bystanders, these actors arguably provide sympathy or support to the students, though mainly behind the scenes. Third, through the lens of social injustice, bystanders who through intimate familiarity and constant contact with the conditions of the protesters, acknowledge and support their grievance by comparison with their own more favorable circumstance.⁷⁴ All these principles, however, operate differently when protesters launch an attack against non-state actors (such as private businesses and organisations). In such cases, the only available support for these bodies is the support the state provides (in the form of security agencies) to control the situation. In sum, social protest, which is an indirect expression of dissent or disapproval has increasingly come to be acknowledged by sociologists and political scientists as a legitimate strategy of political

⁷² H Blumer ‘Social Problems as Collective Behavior’ (1971) 18 *Social Problems* 299.

⁷³ M Lipsky ‘Protest as a political resource’ (1968) 62 *American Political Science Review* 1145.

⁷⁴ KW Brand ‘Cyclical Aspects of New Social Movements: Waves of Cultural Criticism and Mobilization Cycles of New Middle-class Radicalism’ in R Dalton & M Kuechler (eds) *Challenging the Political Order* Cambridge (1990) 23-4.

persuasion.⁷⁵ The chapter now turns to assess some of the factors, which trigger social protest. The list presented here are not a complete catalogue of the features of protest, notably omitted are such variables as empathy, kindness and understanding.

3. Why do people protest?

In his 1973 article, Peter Eisinger found that states, which allowed citizens to freely participate in public decision making often, do not protest, while those with limited access for citizens' participation recorded higher rate of protest.⁷⁶ Eisinger's observation evidently demonstrates that where there are effective platforms for addressing citizen's grievances, they are less likely to resort to unrest.⁷⁷ Building on Eisinger's work, Charles Tilly argues that when a government presents its citizens with meaningful and routine platforms for addressing complaints, few of its citizens take to the streets, especially as they have more direct (and inexpensive) access to influence issues which concern them.⁷⁸ Taken together, Eisinger and Tilly provide a general overview of the reason for social protest and the need for citizen's participation in decision-making. The next section now turns towards an in-depth analysis of the factors, which trigger social protest.

3.1. Means of improving (socioeconomic) conditions

In his 1947 essay, Max Weber observes that social protest is a strong social reform agent.⁷⁹ He argues that in any sovereign regime (be it autocratic or democratic) protest action can be utilized as the mechanism to break all conventional norms and transform all values.⁸⁰ The struggle for social change and welfare of the poor, according to him, are the primary aims of protest action. According to Weber, any social system that is unable to meet the needs of the majority of its citizens is a hotbed for protest action.⁸¹ He further argued that before the outbreak of social protest, some people assume leadership positions and convince individuals confronted with socioeconomic hardships that as a group, they could confront their political

⁷⁵ C Tilly 'Social Movements, Old and New' in L Kriesberg (ed) *Research in Social Movements, Conflict and Change*, vol. 10 (1988) 18; D Tindall 'Social Movement Participation Over Time: An Ego-Network Approach to Micro-Mobilization' (2004) 37 *Sociological Focus* 168; B Useem 'Solidarity Model, Breakdown Model and the Boston Anti-busing Movement' (1980) 45 *American Sociological Review* 359; V Taylor 'Social Movement Continuity: The Women's Movement in Abeyance' (1989) 54 *American Sociological Review* 765.

⁷⁶ PK Eisinger 'The conditions of protest behavior in American cities' (1973) 67(01) *American political science review* 18.

⁷⁷ Eisinger (n 76 above) 25.

⁷⁸ C Tilly *From Mobilization to Revolution* (1978) 7.

⁷⁹ M Weber *Theory of social and Economic Organizations* (1947) 362.

⁸⁰ M Weber *Economy and Society* (1922) 1115.

⁸¹ Weber (n 80 above) 1121.

rulers to improve their current social/economic situation. People are, therefore, attracted to participate in social protest for two reasons: (i) they identify with the theme of the protest and (ii) they believe the protest action has the potential to improve their lot.⁸² The existing poor economic/social condition and the prospect of the protest action, therefore, act as the recruiting force that attracts individuals to participate in social protest.⁸³

Further, groups of scholars who belong to the collective behavior school of thought agree to the notion that social protest is a key social reform agent.⁸⁴ One of such scholars is Herbert Blumer, who perceived social protests as ‘collective enterprises to establish a new order of life’.⁸⁵ Building on Blumer, Turner and Killian defined social protest as a collective action ‘with some continuity to promote or resist a change in the society’.⁸⁶ Lang and Lang equally classified social protest as a small or ‘large-scale, widespread, and continuing, elementary action in pursuit of an objective that effects and shapes the social order in some fundamental aspect’.⁸⁷ Collective behaviorists like Blumer, Lang and Lang, Killian, and Turner in short, perceive social protest as irregular forms of collective action directed toward social reform. Also, it is important to indicate that social protest, according to the collective behaviorists, cannot be defined by culture, pre-existing social norms and organisation since most protest actions often evolve and dissipate within a short span of time.⁸⁸

3.2. Personal interests of protesters

In 1789, Bentham staunchly argued that the underlying motive of any social protest is the benefit which people stand to gain when they riot.⁸⁹ According to him, people are attracted to participate in protest mainly because of the utilitarian cost-benefit calculations.⁹⁰ Bentham (a key proponent of rational action school of thought) asserted that people make rational *choices* in the course of pursuing some objectives, which they share with other individuals.⁹¹ He explicitly explained social protest as an outcome of rational choices made by citizens as a

⁸² Weber (n 80 above) 1117

⁸³ Weber (n 80 above) 1118.

⁸⁴ CJ Jenkins ‘Resource mobilization theory and the study of social movements’ (1983) 9*Annual Review of Sociology* 529; R Turner & L Killian *Collective Behavior* (1972) 247.

⁸⁵ H Blumer ‘Collective behavior’ in AM Lee (ed) *New Outline of the Principles of Sociology* (1951) 166.

⁸⁶ Turner & Killian (n 84 above) 246.

⁸⁷ K Lang & G Lang *Collective Dynamics* (1961) 490.

⁸⁸ Lang & Lang (n 87 above) 491; Turner & Killian (n 84 above) 249.

⁸⁹ Jeremy Bentham *Principles of Morals and Legislation* (1789) 4.

⁹⁰ Bentham (n 89 above).

⁹¹ Bentham (n 89 above) 5.

means of realising personal objectives, which could not be realised as effectively through other methods.⁹²

Oberschall, agreeing with Bentham asserts that protest occur because groups and individuals seek to achieve their personal interests.⁹³ He disagrees with the idea that social protests spring from irrational impulses or system breakdowns. Oberschall specifically summarizes the position of protesters by stating ‘that the lower the risks and the higher the rewards for an individual and members of a group or social stratum’ the more likely they are going to be members of protest activities.⁹⁴ John McCarthy and Mayer Zald, therefore, summarised the theory of Oberschall and Bentham by avowing that protest action is created and spread by those with selfish interests.⁹⁵

Granovetter, in assessing collective behavior argues that participation in social protest is based on a cost-benefit calculation.⁹⁶ According to him, an individual is more likely to engage in protest when the expected gain of participating is more than the expected risk. It was against this backdrop that he declares that most participants before joining a protest action would first want to see a large crowd before they would jump on the street.⁹⁷ He, therefore, argues that since each individual would participate on condition that their net gain of participating exceeds net cost, the basics to explaining the origin and spread of social protest is through the frequency *distribution* of thresholds. Social protest, therefore, springs up when thresholds (or propaganda) are distributed (spread) in a way, which ensures that ‘contagion’ can take place.⁹⁸ The spread of social protest may be rendered impossible when higher-level threshold/propaganda is not created to attract vast range of participants at the initial stages.⁹⁹ Nonetheless, the approach of Granovetter has certain shortcomings. The first limitation is the lack of explanation on *why* and *how* participants come to be in the same place simultaneously. Second, Granovetter fails to explain why social protest ceases even

⁹² Bentham (n 89 above) 5-6.

⁹³ A Oberschall ‘Theories of social conflict’ (1978) 4 *Annual Review of Sociology* 293.

⁹⁴ Oberschall (n 93 above) 162.

⁹⁵ JD McCarthy & MN Zald ‘Resource mobilization and social movements: a partial theory’ (1977) 82 *American Journal of Sociology* 1219.

⁹⁶ M Granovetter ‘Threshold models of collective behavior’ (1978) 83 *American Journal of sociology* 1420

⁹⁷ Granovetter (n 96 above) 1433; Own emphasis.

⁹⁸ Contagion implies the approach which is used to spread the message or grievance from one person to another.

⁹⁹ JLCohen ‘Strategy and Identity: New Theoretical Paradigms and Contemporary Social Movements’ (1985) 52 *Social Research* 665.

though some participants' basic needs are not met. Third, is it always the case that protesters are 'rational actors with *complete* information who always act to maximize their utility'?¹⁰⁰

Bentham, Oberschall and Granovetter, therefore, agree greatly in terms of the argument that utilitarian belief motivates people to protest.¹⁰¹ In contrast, Mancur Olson has advanced an argument challenging the trio by arguing that it is not reasonable for an individual to participate in or contribute to protest if (i) all participants will receive similar collective goods irrespective of their level of participation, or (ii) the contribution of no one person will make a significant contribution to any of its participants or the group.¹⁰² In so doing, Olson argues that the 'free-rider' problem, which confronts protest action, can be addressed by dividing the benefits or costs of the protest based on the level of participation, otherwise known as 'selective incentives'.¹⁰³ Thus, Olson and Granovetter seem to agree that without benefits or *selective incentives* it would be difficult for individuals to engage in social protest.

3.3. Poor socioeconomic condition

William Gamson in analysing the strategy of social protest establishes that what triggers 'unruly' behavior in collective behavior is the poor socioeconomic condition of the protesters.¹⁰⁴ He avers that protest groups often become disruptive and violent because of the frustration, which they experience in the society.¹⁰⁵ Such frustration, according to him, comes from the group's lack of access to basic economic/social means, which is controlled, by the state.¹⁰⁶

Ted Gurr, equally places emphasis on the engagement between social conditions, public opinion regarding those conditions, and actions emanating from those opinions as the major triggers of social protest.¹⁰⁷ He argues that where individuals are denied and deprived basic necessities, there is usually a trend of frustration-anger-aggression.¹⁰⁸ According to him, when citizens observed huge differences in their social conditions compared to their legal

¹⁰⁰ Granovetter (n 96 above) 1425.

¹⁰¹ Eg Granovetter (n 96 above); also see M Olson *The Logic of Collective Action* (1965) 87.

¹⁰² Olson (n 98 above) 85.

¹⁰³ Free rider problem implies that both passive and active participants tend to get the same share of the benefits of protest action.

¹⁰⁴ WA Gamson *Strategy of Protest* (1975) 8.

¹⁰⁵ Gamson (n 104 above) 72.

¹⁰⁶ Gamson (n 104 above) 73.

¹⁰⁷ TR Gurr *Why Men Rebel* (1970) 9. Also see JW Cleveland 'Does the New Middle Class Lead Today's Social Movements?' (2003) 29 *Critical Sociology* 169.

¹⁰⁸ T Gurr 'A causal model of civil strife: A comparative analysis using new indices' (1968) 62 *American Political Science Review* 1124.

entitlement, they become frustrated, angry, and gradually mobilise themselves and demonstrate to offset feelings of deprivations.¹⁰⁹ Gurr, in his thesis *Why men rebel*, asserts that social protest is one of four different types of uprisings against the state. The other three according to him are turmoil, conspiracy and internal war. He, therefore, defines protest as comprising ‘all collective attacks within a political community against the political regime, its actors [...] or its policies’.¹¹⁰ He further provides a clear explanation of the other three forms of uprisings as:

Turmoil: Relatively spontaneous, unorganized political violence with substantial popular participation, including violent political strikes, riots, political clashes, and localized rebellions.

Conspiracy: Highly organized political violence with limited participation, including organized political assassinations, small-scale terrorism, small-scale guerrilla wars, coups d’état, and mutinies.

Internal war: Highly organized political violence with widespread popular participation, designed to overthrow the regime or dissolve the state and accompanied by extensive violence, including large-scale terrorism and guerrilla wars, civil wars, and revolutions.¹¹¹

Charles Tilly however argues that it is important to separate the various forms of social protest (such as sit-ins, strikes, riots, violence, boycotts and demonstrations) from political action (including revolution, political movements and wars).¹¹² He argues that although the two sets of actions (social and political actions) are distinct, several proponents (including Michael Lipsky, Craig Jenkins and Charles Perrow) often commit the mistake of putting them into the same box.¹¹³

Like Gurr, other theorists such as James Davies and George Holmes are divided in terms of the various forms of deprivations, and the sources of those deprivations, which generate protest.¹¹⁴ Irrespective of their differences, they agree that changes in *felt deprivation* (such as lack of food, water, and housing) spring from rapid social changes in the society which cause the gap between what the society delivers and what people expect. Some of these rapid

¹⁰⁹ S Huntington *Political Order in Changing Societies* (1968) 38.

¹¹⁰ Gurr (n 107 above) 3.

¹¹¹ Gurr (n 107 above) 11.

¹¹² Tilly (n 78 above) 53.

¹¹³ Tilly (n 78 above) 54.

¹¹⁴ JC Davies ‘Toward a theory of revolution’ (1962) 27 *American Sociological Review* 19; G Holmes ‘Protection, politics and protest: understanding resistance to conservation’ (2007) 5(2) *Conservation and Society* 184.

changes, which trigger relative deprivation, comprise urbanization,¹¹⁵ job losses,¹¹⁶ increase in prices of basic commodities,¹¹⁷ increased exposure to education and mass media.¹¹⁸ Unfavorable social changes according to Gurr, trigger political anger as result of discrepancies between expectations and outcomes.¹¹⁹

3.4. Lack of formal representation

In the words of Charles Tilly, social protest is:

A sustained series of interactions between national powerholders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly-visible demands for changes in the distribution or exercise of power.¹²⁰

Tilly's explanation defines an important element of social protest, namely, the composition and strategies of protesters. He specifically perceives social protests as 'usually much more fragmented and heterogeneous: shifting factions, temporary alliances, diverse interests, a continuous flux of members and hangers on.'¹²¹ He further avows that the (i) outcomes of protests are products of strategic choices made by protesters; and (ii) unruly behavior of protesters are rational and justifiable.¹²² Equally, in their 1973 article, McCarthy and Zald view protest as a 'set of opinions and beliefs in a population which represents preferences for changing some elements of the social structure.'¹²³ Undoubtedly, their definition denotes that since no society lacks individuals who have desires for reform, latent social protest will forever persist in societies. Thus, social protest, from McCarthy and Zald's position are simply effective tools to bring about social reform.¹²⁴ Tilly's exposition here brings to bear three tasks for researchers: (i) assess the tactics used to mobilizing large numbers of

¹¹⁵ D Hibbs *Mass Political Violence: A Cross-National Causal Analysis* (1973) 12.

¹¹⁶ IK Feierabend, BA Nesvold & RL Feierabend 'Social change and political violence: Cross-national patterns' in HD Graham & TR Gurr (eds) *Violence in America: Historical and Comparative Perspectives* (1969) 79.

¹¹⁷ M Olson 'Rapid Growth as a Destabilizing Force' (1963) 23 *Journal of Economic History* 532.

¹¹⁸ M Parvin 'Economic determinants of political unrest: An economic approach' (1973) 17 *Journal of Conflict Resolution* 279.

¹¹⁹ Huntington (n 109 above) 82-3; Olson (n 117 above) 89.

¹²⁰ C Tilly 'Social movements and national politics' (1979) 8197 *Ann Arbor Michigan* 12.

¹²¹ Tilly (n 120 above) 19.

¹²² JD McCarthy & MN Zald *The Trends of Social Movements in America: Professionalization and Resource Mobilization* (1973) 27-28; Tilly (n 117 above) 31.

¹²³ McCarthy & Zald (n 122 above) 1214.

¹²⁴ McCarthy & Zald (n 122 above) 1218.

supporters; (ii) assess the response of government to protest actions; and (iii) combine these two to determine the outcome of unrest in societies.¹²⁵

3.5. The presence of a charismatic leader

In his assessment of the origin and motive for collective action, Neil Smelser asserts that one of the main factors, which triggers and attracts large participants for a protest action, is the involvement or presence of a charismatic leader. In *Theory of Collective Behavior*, he avows that the main forces, which generate protest action, can be grouped into two: (i) structural conduciveness and (ii) generalized beliefs.¹²⁶ He devoted some paragraphs to explain their meaning and role in protest action. *Structural conduciveness* signifies the extent to which structural condition can attract protesters. Such conditions may include the existence of *charismatic leader* who is readily available to mobilise the masses to confront the state. Thus, to Smelser an influential leader serves as magnet, which brings the people together to challenge the state to improve their poor living conditions. In the case of South Africa, leaders like #FeesMustFall leader Mcebo Dlamini, Treatment Action Campaign's Zackie Achmat and ANC's Nelson Mandela are a few of individuals who possessed the ability to inspire and motivate followers to bring about reforms in the society.

Smelser further asserts that every leader acts on the basis of a belief which redefines social action.¹²⁷ Considering that people are often drawn to the personality or aspiration or beliefs of the leader, Smelser places emphasis on 'generalised beliefs' as the basis which underpin any collective action. Generalised beliefs according to him comprise a 'belief in the existence of extraordinary forces [... and] are thus, akin to magical beliefs' which a charismatic leader may possess.¹²⁸ The concept of generalized beliefs thus, seeks to explain the factors, which allow individuals to follow the vision of one particular leader in an attempt of improving the living standard.¹²⁹

This section has shown that personal interests, poor socioeconomic conditions, social reform and lack of formal representation as some of the key factors, which contribute to social protest. The chapter now moves to assess the application of these theories within the lens of South Africa.

¹²⁵ C Tilly 'Does modernization breed revolution?' (1973) 5 *Comparative Politics* 427.

¹²⁶ N Smelser *Theory of Collective Behavior* (1962) 278.

¹²⁷ Smelser (n 126 above).

¹²⁸ Smelser (n 126 above) 279.

¹²⁹ Smelser (n 126 above) 282.

1. South Africa

South Africa's social protest can be examined within three different lenses, namely (i) political opportunities, (ii) mobilizing structures, (iii) framing processes.¹³⁰ These terms will be discussed extensively in the section below, so their meanings will be summarised here. Political opportunities imply analysing protest within the broader context of the political constraints and opportunities within which protest participants function.¹³¹ Mobilizing structures comprises both the formal and informal tools, which are used to mobilise protesters and engage in protest.¹³² Lastly, framing processes simply refers to the grievances, which are used to draw the attention of the protesters that with collective action, their problems will be redressed by the state.¹³³

The next section examines the extent to which social protest has been used in both historical and contemporary times to protest and promote various forms of rights. The first section assesses social protest in the pre-democratic era (with focus on political freedoms) while the second arm is dedicated to socioeconomic protest in post-democratic era in South Africa.

4.1. History of protest in South Africa

Africans protesting injustices in South Africa dates back to the early 19th century.¹³⁴ It was mainly concentrated in Cape Colony, where John Jabavu, in 1887 launched a protest against the Parliamentary Voters Registration Bill, which by its definition of franchise denied tribal Africans the right to vote.¹³⁵ Two years later, (aided by his comrades) Jabavu organised another protest against the proposals to extend pass laws.¹³⁶

Largely, black movements in other countries impacted heavily on South African blacks.¹³⁷ At the continental level, liberation struggles in the rest of African countries also heavily

¹³⁰ PG Klandermans 'Identity politics and politicized identities: Identity processes and the dynamics of protest' (2014) 35(1) *Political Psychology* 3.

¹³¹ E Webster 'The shifting boundaries of industrial relations: Insights from South Africa' (2015) 154(1) *International Labour Review* 27.

¹³² AM Honwana 'Youth, Waithood and Protest Movements in Africa' (2013) *International African Institute* 9.

¹³³ Honwana (n 129 above).

¹³⁴ A social protest in this era was directed at the proposed Vagrancy Law in 1840 which, according to Walker, required all black Africans to 'carry passes and to contract for service within two weeks of leaving their last place'. See E Walker *History of South Africa* (1928) 28.

¹³⁵ D O'meara *Forty lost years: The apartheid state and the politics of the National Party, 1948-1994* (1996) 1-2.

¹³⁶ T Kuperus *State, civil society and apartheid in South Africa: An examination of Dutch Reformed Church-state relations* (1999) 19.

¹³⁷ H Giliomee & L Schlemmer *From apartheid to nation building* (1993) 7.

influenced protest in South Africa.¹³⁸ Nonetheless, throughout the late 19th century to the early 20th century, African protest achieved little in South Africa.¹³⁹ A key reason for this failure was the moderate stance often adopted by the leaders.¹⁴⁰ It was in this light that Solomon Plaatje in his 1916 *Native Life in South Africa*, touted that ‘[i]n every crisis of the past four years [...] the native leaders have taken upon themselves the thankless and expensive task of restraining the natives from resorting to violence.’¹⁴¹

Yet, the election of the Nationalist Party (NP) in 1948, spurred black Africans to strengthen their demand for full participation in the political process.¹⁴² Following its election, the NP used parliament as a platform to adopt new discriminatory laws (coded as apartheid laws).¹⁴³ This development triggered more protest from the black community.¹⁴⁴

By 1949, the predominantly black African National Congress’ (ANC) Youth League felt that the time for the party’s negotiations and resolutions was over, and there was a need for more radical action.¹⁴⁵ The party then adopted a vigorous programme of action, involving non-cooperation, strikes and election boycotts.¹⁴⁶

By the 1980s, both the government and some leaders within the ANC had come to acknowledge that neither side could win (considering that a deadlock has been reached).¹⁴⁷ Both sides were plagued with sharp internal factions.¹⁴⁸ The moderate members in the government’s NP wished simply to negotiate with the ANC, while the hardliners talked of fighting to the death.¹⁴⁹ Some in the ANC also wished to come to the table at once, while others were in favor of intensifying the armed struggle.¹⁵⁰ In 1985, the Minister of Justice visited Mandela (who had been moved from Robben Island to the mainland in 1982) with

¹³⁸ A Sachs *Protecting human rights in a new South Africa* (1990) 12.

¹³⁹ H Wolpe ‘Capitalism and cheap labour-power in South Africa: from segregation to apartheid’ (1972) 1(4) *Economy and society* 425.

¹⁴⁰ D Downing *Apartheid in South Africa* (2004) 3.

¹⁴¹ Austin (n 53 above) 86.

¹⁴² N Alexander *An ordinary country: Issues in the transition from apartheid to democracy in South Africa* 7.

¹⁴³ JL Gibson & A Gouws ‘Truth and reconciliation in South Africa: Attributions of blame and the struggle over apartheid’ (1999) 93(03) *American Political Science Review* 501.

¹⁴⁴ RM Price *The apartheid state in crisis: Political transformation in South Africa, 1975-1990* (1991) 9; See S Dubow *Racial segregation and the origins of Apartheid in South Africa, 1919–36* (1989) 21.

¹⁴⁵ H Bernstein ‘For their triumphs & for their tears: women in apartheid South Africa’ (1985) *Africa Fund* 1.

¹⁴⁶ P Maylam ‘The rise and decline of urban apartheid in South Africa’ (1990) 89(354) *African Affairs* 57.

¹⁴⁷ P Waldmeir *Anatomy of a miracle: The end of apartheid and the birth of the new South Africa* (1997) 12.

¹⁴⁸ N Pons-Vignon & W Anseeuw ‘Great Expectations: Working Conditions in South Africa since the End of apartheid’ (2009) 35(4) *Journal of southern african studies* 883.

¹⁴⁹ H Adam & K Moodley *The negotiated revolution: Society and politics in post-apartheid South Africa* (1993) 32.

¹⁵⁰ T Lodge ‘The African National Congress in the 1990s’ (1992) 6 *South African Review-SARS* 44.

proposal from PW Botha (president from 1978 to 1989) promising abolition of segregation of beaches and shops.¹⁵¹ Since these were no significant political transformation, the ANC turned down his proposal.¹⁵² The concessions came at a time when the ANC had more leverage, with an increasing number of Africans now based in the urban centers, and the international community condemning the government's atrocities.¹⁵³

Upon his election into office in 1989, President F.W. de Klerk, recognising that it was imperative to commence negotiations soon, made a dramatic speech in 1990 which led to the release of Nelson Mandela and his comrades from prison as well as removing the ban on the ANC.¹⁵⁴ While 1990 witnessed a string of massive protest for freedom, a protracted four-year negotiation finally resulted in a settlement in 1994.¹⁵⁵ Subsequently, De Klerk's government repealed most of the legislations that underpinned apartheid, including the Population Registration Act.¹⁵⁶ A new Constitution, which enfranchised all racial groups, took effect in 1994.¹⁵⁷ Thus, the continuous protest by Africans for freedom finally yielded results in 1994 when elections that year led to a coalition government with a non-white majority, indicating the official collapse of the apartheid system.¹⁵⁸

4.2. Social protest in post-apartheid South Africa

At the international level, the South African Constitution has been recognised as one of the most progressive in the world. Of particular relevance to social protest is individual's rights to demonstrate, picket and present petitions which is grounded in section 17 of the 1996 Constitution and international human rights instruments and further regulated in the Regulation of Gatherings Act (RGA).¹⁵⁹

¹⁵¹ T Simpson "'Umkhonto we Sizwe, We are Waiting for You': The ANC and the Township Uprising, September 1984–September 1985' (2009) 61(1) *South African Historical Journal* 158; S Ellis 'The ANC in exile' (1991)90(360) *African Affairs* 439.

¹⁵² RW Johnson *South Africa's brave new world: The beloved country since the end of apartheid* (2009) 17.

¹⁵³ LM Eades *The end of apartheid in South Africa* (1999) 49; B Freund 'South Africa: The end of apartheid & the emergence of the "BEE Elite"' (2007) 34(114) *Review of African Political Economy* 661.

¹⁵⁴ H Adam & K Moodley *The opening of the Apartheid mind: options for the new South Africa* (1993) 1.

¹⁵⁵ J Rantete *The African National Congress and the Negotiated Settlement in South Africa* (1998) 6.

¹⁵⁶ R Fine & D Davis *Beyond apartheid: Labour and liberation in South Africa* (1991) 2-3.

¹⁵⁷ MBG Motlhabi *The theory and practice of Black resistance to apartheid: A social-ethical analysis* (1984) 2.

¹⁵⁸ A Krog *Country of my skull: Guilt, sorrow, and the limits of forgiveness in the new South Africa* (2007) 45-46.

¹⁵⁹ Arts 19 & 21 of the International Covenant on Civil and Political Rights; UN Human Rights Council 'The promotion and protection of human rights in the context of peaceful protests' 11 April 2014, UN Doc A/HRC/RES/25/38; Art 20(2) of the African Charter on Human and People's Rights. As suggested by the date of adoption, the Regulation of Gatherings Act 205 of 1993 was adopted in the pre-democratic era.

The inclusion of the right to protest in the RGA can be traced back to the recommendations of the Goldstone Commission of Inquiry, which was charged to assess the causes of the massive political violence in 1991 in South Africa.¹⁶⁰ In submitting its findings in May 1993, the Commission averred that in order to ‘reduce considerably the phenomenon of public violence in South Africa’ the state must codify the right to protest and established guidelines to regulate protest actions.¹⁶¹ Consequently, the RGA was adopted in 1994 and became operational in 1996, which coincided with the entry into force of the Constitution, which also guaranteed the right to protest.¹⁶² It is important to indicate that the date of the adoption of the RGA equally coincided with the entry into force of the Interim Constitution of South Africa (1993), 27 April 1994 which explicitly guaranteed that ‘[e]very person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions’.¹⁶³

The enactment of the RGA and the Constitution witnessed the immediate scrapping of several repressive legislations, including those, which targeted protest, namely: (i) 1992 Gatherings and Demonstrations at or near Union Buildings Act 103; (ii) the 1982 Demonstrations in or near Court Building Prohibition Act 71;¹⁶⁴ (iii) the 1973 Gatherings and Demonstrations in the Vicinity of Parliament Act 52.¹⁶⁵ The repeal of this legislation was in line with the new democratic regime’s agenda to remove all laws, which hindered the enjoyment of fundamental rights and liberties. The codification of the right to protest in South Africa indeed flowed from the basic concept that the right to assemble, protest, picket, petition and demonstrate is an important element for enhancing people’s right to political participation.¹⁶⁶

However, as its name suggests, the RGA was not enacted to promote citizens’ rights to protest, but rather to control or regulate their rights to demonstrate, which to some extent infringes on section 17 of the 1996 Constitution.¹⁶⁷ Whereas the Constitution guarantees citizens’ rights to demonstrate, section 12(1)(a) of the RGA imposes criminal sanctions on

¹⁶⁰ HURISA ‘Goldstone Report Booklet - hurisa’ <http://hurisa.org.za/wp-content/uploads/2009/11/Goldstone-Booklet.pdf> (accessed 17 May 2016).

¹⁶¹ HURISA (n 160 above) 92.

¹⁶² P Bond & S Mottiar ‘Movements, protests and a massacre in South Africa’ (2013) 31(2) *Journal of Contemporary African Studies* 283.

¹⁶³ Sec 16 of the Interim Constitution of South Africa (1993), 27 April 1994.

¹⁶⁴ Secs 46(1) & (2), 47, 48, 49, 51, 53, 57 & 62.

¹⁶⁵ As amended in 1992.

¹⁶⁶ C Mbazira ‘Service delivery protests, struggle for rights and the failure of local democracy in South Africa and Uganda: parallels and divergences’ (2013) 29(2) *South African Journal on Human Rights* 262.

¹⁶⁷ Sec 17 guarantees the right to ‘Assembly, demonstration, picket and petition. -Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.’

any individual who convenes demonstrators without having provided a notice or adequate notice to the relevant authority. Given that some protests (including service delivery protest) are usually spontaneous or unplanned, protesters run the risk of being arrested and charged under section 12(1)(a) of the RGA.¹⁶⁸

4.2.1. New wave of protest

While South Africa has had a history of social protest, the ‘protest movement’ in South Africa has undergone three distinct phases in post-apartheid era.¹⁶⁹ The first phase, which was related to discontent over lack of infrastructure, housing and municipal services, occurred in the mid-and late 1990s.¹⁷⁰ Besides the Mass Democratic Movement’s (MDM) popular protest action against the new regime of Nelson Mandela, other notable dissent within this era was the Congress of South African Trade Unions’ (COSATU) one day anti-privatization strike.¹⁷¹

It is important to indicate that Mandela’s government did not wholeheartedly welcome the approach of the protesters and, therefore, decried in his 1995 opening address in Parliament that:

Let it be clear to all that the battle against the forces of anarchy and chaos has been joined [...] Some have misread freedom to mean license, popular participation to mean the ability to impose chaos [...] Let me make abundantly clear that the small minority in our midst which wears the mask of anarchy will meet its match in the government we lead [...] The government literally does not have the money to meet the demands that are being advanced [...] We must rid ourselves of the culture of entitlement which leads to the expectation that the government must promptly deliver whatever it is that we demand.¹⁷²

The early 2000s marked the second phase of protest, which was tied to the rise of a diverse set of new social movements with the aim of mobilizing marginalised communities to confront the state about failed socioeconomic policies and programmes.¹⁷³ Some of these new

¹⁶⁸ For a detail analysis of the criticisms on the RGA, see EELC ‘Right to protest: challenging Regulations of Gathering Act’, available at <<https://eelawcentre.org.za/portfolio-posts/right-protest-challenging-regulations-gatherings-act/>> (accessed 17 July 2017).

¹⁶⁹ MP Sebola ‘The Community Policing philosophy and the right to public protest in South Africa: are there positive developments after two decades of democracy?’ (2014) 49(1) *Journal of Public Administration* 302

¹⁷⁰ K von Holdt ‘South Africa: the transition to violent democracy’ (2013) 40(138) *Review of African Political Economy* 589.

¹⁷¹ P Bond *Elite transition: From apartheid to neoliberalism in South Africa* (2014) 217.

¹⁷² Cited in Bond (n 171 above) 223.

¹⁷³ E Mills ‘You Have to Raise a Fist!’ Seeing and Speaking to the State in South Africa’ (2016) 47(1) *IDS Bulletin* 63.

organisations included the Durban's Concerned Citizens Forum (CCF), the Soweto Electricity Crisis Committee (SECC), the Treatment Action Campaign (TAC), and the Anti-Privatization Forum (APF).¹⁷⁴

From 2004 onwards to the present day protest, otherwise known as 'popcorn protest' marks the third wave. Unlike the 1990s MDM or the early 2000s new social movements, the current wave of (predominantly service delivery) protest does not exhibit specific ideological tendencies, such as opposition to the policies of a particular political party or fighting ethnic/racial/gender inequality.¹⁷⁵ Key examples of this 'rebellion of the poor' since 2004 include militant national strikes and local community protests.¹⁷⁶

The term 'popcorn protest' refers to the nature of these protests, which often 'pop up' and quickly dissipate because of their lack of ideological coherence.¹⁷⁷ In addition, while they are up, they adopt all manner of unpredictable strategies and tactics depending on the wind, quite frequently even blowing in the direction of xenophobia.¹⁷⁸ It was against this backdrop that Christopher Mbazira noted that the 'protests that have rocked the country in recent years are unprecedented'.¹⁷⁹ He illustrates that '[b]y 2007, the protests were averaging 8.7 protests in a given month, moving to 9.8 in 2008, 19.1 in 2009 and had reached 16.33 by 2010'.¹⁸⁰

According to the South African Police Service (SAPS), since 2010, South Africa has been experiencing an increasing number of popular protests each year.¹⁸¹ By the end of 2016, this number has escalated to 14 695 incidents of which 11,151 were peaceful, and 3,542 turned violent.¹⁸² The peaceful protest include meetings, gatherings and assemblies, while the violent related protest included community protests, and labour disputes in the transport, mining and educational sectors.

¹⁷⁴ A Desai *We are the poors: Community struggles in post-apartheid South Africa* (2002) 1.

¹⁷⁵ Desai (n 174 above).

¹⁷⁶ Alexander (n 142 above) 25.

¹⁷⁷ S Mottiar 'From "popcorn" to "occupy": protest in Durban, South Africa' (2013) 44(3) *Development and Change* 603.

¹⁷⁸ H Deegan *Politics South Africa* (2014) 11.

¹⁷⁹ Mbazira (n 166 above) 265.

¹⁸⁰ Mbazira (n 166 above) 266.

¹⁸¹ R Ballard, A Habib & I Valodia *Voices of protest: Social movements in post-apartheid South Africa* (2015) 3.

¹⁸² SAPS 'Annual Report for 2015/16: South African Police Service - Vote 23: Department of Police' available at https://www.saps.gov.za/about/stratframework/annual_report/2015_2016/saps_annual_report_2015_2016.pdf (accessed 01 March 2017) 153.

Table 2 provides an overview of the number of protest in the last six years and reflects an increase of 2,044 protests from 2010 to 2016. As illustrated by the table below, the increase is in relation to violent protest, which could be linked to ‘poor communication and relationships of accountability with communities; weak community participation; and community’.¹⁸³ Mbazira argues that most peaceful marches often turn into violent protests, sometimes after police provocation or their handling of some of the marches in a brutal way.¹⁸⁴

Table 2: Number of social protest

Type of social protest	Number of protest 2010/11	Number of protest 2011/2012	Number of protest 2012/13	Number of protest 2013/14	Number of protest 2014/15	Number of protest 2015/16
Peaceful protest	11, 680	10,744	10,517	11,668	12 451	11, 151
Violent protest	971	1,194	1,882	1,907	2, 019	3, 542
Total	12, 651¹⁸⁵	11,938¹⁸⁶	12,399¹⁸⁷	13,575¹⁸⁸	14 470¹⁸⁹	14 695¹⁹⁰

The table above indicates that there was a notable increase of 225 protests in 2015/16, compared to 2014/15. Reasons for this high level of discontent can be grouped into six categories (i) socioeconomic (grievances concerning broader issues, e.g. land distribution and unemployment); (ii) party-political (discontent between and within political parties, e.g. competition for public office); (iii) municipal governance (issues relating to the political or administrative management of the municipality, such as corruption and financial mismanagement); (iv) municipal services (services in schedules 4b and 5b of the

¹⁸³ Mbazira (n 166 above) 267.

¹⁸⁴ Mbazira (n 166 above) 267.

¹⁸⁵ SAPS ‘Annual Report for 2013/14 Financial Year-Vote 25: Department of Police’ available at <https://www.saps.gov.za/about/stratframework/annual_report/2013_2014/ar2014_02_partb.pdf> (accessed 01 March 2017) 142.

¹⁸⁶ SAPS (n 182 above).

¹⁸⁷ SAPS (n 182 above).

¹⁸⁸ SAPS (n 182 above).

¹⁸⁹ SAPS ‘Annual Report for 2014/15 Financial Year-Vote 25: Department of Police’ available at <http://www.gov.za/sites/www.gov.za/files/SAPS_Annual_Report_2014-15.pdf> (accessed 01 March 2017) 9.

¹⁹⁰ SAPS ‘Annual Report for 2015/16: South African Police Service - Vote 23: Department of Police’ available at <https://www.saps.gov.za/about/stratframework/annual_report/2015_2016/saps_annual_report_2015_2016.pdf> (accessed 01 March 2017) 153.

Constitution, e.g. electricity and water); (v) non-municipal services (services that are to be provided by state-owned entities, provincial or national government, e.g. policing and education);(vi) unspecified services (the grievance was not reflected in records).¹⁹¹ Between 2007 and 2016, the single most prominent category of grievance cited by protesters is directly related to municipal governance or aspects of municipal services at 58 percent of all protests. Party political grievances constituted 15 percent of protest, governance 14 percent, socioeconomic grievances 12 percent and other grievances 1 percent.¹⁹² This data suggests that most of the protests were directed at the local or municipal levels (which is responsible for service delivery) rather than the national government which is responsible for overall food-related issues.

Besides workers and students who often participate in these marches, members of political parties, CSOs, residents of informal shack settlements and townships also engage in protest actions.¹⁹³ Some of the protests have been fanned by factions, dissent forces and politicians within the ANC itself, who are discontent either because they did not make it to the party's list (in order to gain access to political office) or feel marginalised and their contribution to the party ignored.¹⁹⁴

Patrick Bond and others have defined the recent wave of protest in South Africa as 'intensely localized and self-limited in their politics'.¹⁹⁵ Besides lacking ideological orientation, the current protest lack bridging organisational strategies as well as common programmes, and they are politically and geographically isolated from each other.¹⁹⁶ In addition, their lack of effective leadership has played a negative role in dividing rather than unifying various protests groups and their support networks.¹⁹⁷

These and other latent impediments have watered down the potential of dissidents to trigger reforms in several instances. For example, since most protest groups often lack unified force, they limit their demands to the door-step of the local government officials who often fail (or lack the capacity) to transmit the situation on the ground to the central government.¹⁹⁸

¹⁹¹ TC Chigwata, M O'Donovan & DM Powell 'Civic Protests and Local Government in South Africa' Working Paper Series No. 2, *The Civic Protests Barometer 2007 – 2016* 15.

¹⁹² Chigwata *et al* (n 188 above) 16.

¹⁹³ Sebola (n 166 above).

¹⁹⁴ Mbazira (n 166 above) 268.

¹⁹⁵ P Bond, A Desai & T Ngwane 'Popular Protest Still Far from Posing a Genuine Threat' (2012) 6 *Mercury* 1.

¹⁹⁶ Bond *et al* (n 195 above).

¹⁹⁷ Bond *et al* (n 195 above).

¹⁹⁸ P Alexander & P Pfaffe 'Social Relationships to the Means and Ends of Protest in South Africa's Ongoing Rebellion of the Poor: The Balfour Insurrections' (2014) 13(2) *Social Movement Studies* 204.

Moreover, any unrest which does not resonate at the national level (but restricted to the local level loses its reformist influence.¹⁹⁹ In sum, although South Africa has witnessed many social protests in recent years very little success has been recorded in terms of their ability to pressure the state to meet their demands.²⁰⁰ According to Mbazira, the lack of impact of social protest at the national level explains ‘why, although the protests appear to be directed at the ANC, the party has remained strong and continues to win support at elections.’²⁰¹

4.2.2. Causes of protest

The causes of protest in South Africa can be classified into two broad groups: (i) structure and (ii) agency on the part of the local government.²⁰² On the one hand, protesters who mobilise against the agency of the state, and often launch well-recognised complaints of corruption, political party manipulation of voters and lack of capacity.²⁰³ On the other hand, structural factors relate to issues triggered by neoliberal (economic) policies such as cost-recovery, fiscal austerity, deep-rooted systems of exploitation, poverty, inequality and marginalization.²⁰⁴ Neoliberal policy can simply be referred to as a set of programmes that transfers control of economic factors to the private sector.²⁰⁵ Beside seeking to privatize businesses run by the state, to open up markets for trade and suggesting that government must limit subsidies.²⁰⁶

Following its mandate to critically scrutinize the remote and immediate causes of violent service delivery unrest in South Africa, the Parliamentary Ad Hoc Committee on Coordinated Oversight on Service Delivery in September 2010 failed to provide a valid explanation about causes of protests for service.²⁰⁷ It simply stated that:

¹⁹⁹ S Matthews ‘Privilege, solidarity and social justice struggles in South Africa: A view from Grahamstown’ (2015) 88(1) *Transformation: Critical Perspectives on Southern Africa* 12.

²⁰⁰ DE Russell *Rebellion, revolution, and armed force: A comparative study of fifteen countries with special emphasis on Cuba and South Africa* (2013) 32. For discussion relating to the potential of social protest bringing about policy reform, see sec 4.2.6 of this chap.

²⁰¹ Mbazira (n 166 above) 268.

²⁰² T Goodman, R Eyerman & JC Alexander *Staging solidarity: Truth and reconciliation in a new South Africa* (2015) 18.

²⁰³ J Fish *Domestic democracy: at home in South Africa* (2016) 27.

²⁰⁴ JS Saul & P Bond *South Africa-The Present as History: From Mrs Ples to Mandela and Marikana* (2014) 1.

²⁰⁵ F Miraftab ‘Neoliberalism and Casualization of Public Sector Services: The Case of Waste Collection Services in Cape Town, South Africa’ (2004) 28(4) *International Journal of Urban and Regional Research* 875.

²⁰⁶ Miraftab (n 205 above).

²⁰⁷ Report of the Ad Hoc Committee on Coordinated Oversight on Service Delivery, Parliament of the Republic of South Africa, 8 September 2010, available at <pmg-assets.s3-website-eu-west-1.amazonaws.com/.../100908adhocdeliveryreport.doc> (accessed 20 May 2016) 4.

It is the political issues that require urgent attention. The interface of politics and administration, the quality and frequency of public participation, responsiveness to citizens override all other factors we raised in the report as factors that partly explain the protests as well as what we need to urgently attend to going forward.²⁰⁸

By merely citing malgovernance as the major cause of protest, members of parliament who prepared the report were perceived as being partial in providing account concerning the actual causes of protest.²⁰⁹ The Committee ignored two underlying factors of protest, namely, neoliberal public policy and inadequate finance.²¹⁰ In earnest, dating to the second phase of social protest (Mbeki era) in South Africa, government authorities have refrained from admitting that (i) existing economic policies are harmful, (ii) the executive is not properly implementing progressive policies, and (iii) the legislature has been dormant in its oversight responsibility over the executive.²¹¹

The common political argument often advanced for poor service delivery is that municipal and provincial government officials fail to effectively operationalise the national governments otherwise 'best' policies and programmes at the local levels.²¹² Ironically, according to Mbazira, the Khutsong protests and subsequent countrywide protest, which bust out like popcorn occurred at a period where most municipalities had begun operationalizing policies that assured free basic services such as electricity and water to the poor.²¹³ These free services were however, withdrawn over time when the poor were unable to pay the balance after exceeding the free monthly allowance provided by the state.²¹⁴ Thus, residents whose access to these services was disconnected because of non-payment became aggrieved and resorted to protest as a means of registering their discontent to the state.

In line with the structuralist explanation above, the Parliamentary Committee also explained that the country's high frequency in protest could be linked to lack of citizen's participation

²⁰⁸ Report of the Ad Hoc Committee (n 207 above) 4.

²⁰⁹ S Mottiar & P Bond 'The politics of discontent and social protest in Durban' (2012) 39(3) *Politikon* 309.

²¹⁰ B Matlala "'We want the bread, not the crumbs': Challenging traditional authority in the platinum belt' (2014) 49 *SA Crime Quarterly* 31.

²¹¹ PJ Spiro 'Better Now Than Never: Economic and Social Reforms in South Africa' (2016) *Cato Institute Policy Analysis* 1.

²¹² HJ Dawson 'Patronage from below: political unrest in an informal settlement in South Africa' 113(453) *African Affairs* 518.

²¹³ Mbazira (n 166 above) 265. Residents of Khutsong Township in the Free State protested in August 2005 over municipal demarcations and service delivery. Mail & Guardian 'Service-delivery Protesters Run Riot in Free State' (23 August 2005), available at <<http://mg.co.za/article/2005-08-23-servicedelivery-protesters-run-riot-in-free-state>> (accessed 11 May 2017).

²¹⁴ S Booysen 'With the Ballot and the Brick: The Politics of Attaining Service Delivery' (2007) 7 *Progress in Development Studies* 24.

in decision-making.²¹⁵ Indeed, this explanation swept several contentious issues under the carpet, especially as it overlooks key neoliberal issues such as decentralized ‘unfunded mandates’ to provinces, coupled with funding cuts to municipalities.²¹⁶ In addition, by failing to question the country’s restrictive fiscal policy,²¹⁷ the Committee could not see the barriers erected by such neoliberal policies, especially in the areas of ‘cost recovery’.²¹⁸ Consequently, it could not provide any substantive recommendation for the transfer of adequate funds (and effective monitoring mechanism) to the municipalities in order to improve the basic services and poor infrastructures needed by the poor.²¹⁹

A substantive recommendation of the Committee, however, was that the ‘tender system in municipalities needs to be tightened to close gaps that allow corruption to flourish.’²²⁰ It is imperative to say that this recommendation did little to curb corruption in the area of service delivery, especially as it was not generally acted upon.²²¹ For instance, Corruption Watch indicated that between January 2012 and December 2013 alone, it received 62 reports of corruption related to water alone, with most reports originating from the Gauteng province.²²²

4.2.3. Rise of social protest

Some argue that the increase in frequency of social protest in recent years is due to the distorted nature of economic ‘growth’ that the country experienced following its adoption of neoliberal micro-and-macroeconomic development policies after the country’s transition to democratic era.²²³ It is important to indicate that these economic policies were introduced before the democratic transition in 1994, but were being implemented even in the late 1980s, which triggered a number of the early 1990s community discontent including the demonstration, by the South African National Civic Organisation (SANCO).²²⁴ These widespread urban protests triggered several other protest against the rising poverty and inequality, as well as the commodification of life – which includes the commercialization of

²¹⁵ Report of the Ad Hoc Committee (n 207 above).

²¹⁶ Mottiar & Bond (n 209 above) 284.

²¹⁷ Introduced by Finance Minister (Trevor Manuel 1996-2009) and retained by Pravin Gordham, his successor.

²¹⁸ L Wild, V Chambers & D Harris ‘Common constraints and incentive problems in service delivery’ (2012) *Research Paper. London: ODI* 13.

²¹⁹ C Tapscott & L Thompson ‘Between supply and demand: The limits to participatory development in South Africa’ (2013) 79(2) *International Review of Administrative Sciences* 368.

²²⁰ Report of the Ad Hoc Committee (n 207 above) 51.

²²¹ Mottiar & Bond (n 209 above) 285.

²²² Corruption Watch ‘Corruption fuels poor service delivery’ available at <<http://www.corruptionwatch.org.za/corruption-fuels-poor-service-delivery/>> (accessed 20 May 2016).

²²³ L Piper & C Bénit-Gbaffou ‘Mediation and the contradictions of representing the urban poor in South Africa: the case of SANCO leaders in ImizamoYethu in Cape Town, South Africa’ in *Mediated citizenship* (2014) 25.

²²⁴ Bond (n 171 above) 223.

municipal services.²²⁵ Undeniably, the majority of resistances in most provinces were related to lack of access to, and rising costs of basic services such as electricity, sanitation and water.²²⁶

The ANC government in 2001 introduced ‘Free Basic Services’ where municipalities provide free 50 kWh of electricity and 6 kl (6000 liters) of water per household per month for the basic needs of poor households. Yet, the sharp increase in monthly electricity and water consumptions implied that ‘the poor were plunged into debt traps when their consumption exceeded the free allowances’. The implementation of cut-offs for non-payment by municipalities triggered higher discontent leading to higher rates of protest in poor neighbourhoods.²²⁷

Also, the increase of electricity and water prices from 1998 has forced poor people to consume lower levels of these commodities.²²⁸ According to Bond, between 1998 to 2004, fully one million of Eskom’s four million customers registered zero consumption, signifying their disconnection from the national grid (even though some if not all would have reconnected illegally).²²⁹ It is estimated that electricity prices have increased by over 300 percent from 2004 to 2017, which partially explains the rising discontent over service delivery.²³⁰ Also, between 1998-2004, the consumption levels of water by the poorest third of residents in Durban dropped from 22,000 to 15,000 liters per month.²³¹ The situation of citizens’ discontent over water has not improved since 2004. Whereas residents of Majakaneng (Madibeng municipality, Pretoria) in 2015 launched a violent water protest due

²²⁵ P Bond ‘South Africa’s financial bubble and boiling social protest’ (2010) *Monthly Review* 28.

²²⁶ R Pithouse ‘An Urban common? Notes from South Africa’ (2014) 49(suppl 1) *Community Development Journal* 135.

²²⁷ For water, approximately 1.5 million people are affected yearly. See M Muller ‘Free basic water—a sustainable instrument for a sustainable future in South Africa’ (2008) 20(1) *Environment and Urbanization* 67; R Inglesi ‘Aggregate electricity demand in South Africa: Conditional forecasts to 2030’ (2010) 87(1) *Applied Energy* 197; M Madubansi & CM Shackleton ‘Changing energy profiles and consumption patterns following electrification in five rural villages, South Africa’ (2006) 34(18) *Energy Policy* 4081; CT Gaunt ‘Meeting electrification’s social objectives in South Africa, and implications for developing countries’ (2005) 33(10) *Energy Policy* 1309.

²²⁸ H Giliomee & L Schlemmer (eds) *Negotiating South Africa’s Future* (2016) 3.

²²⁹ Bond (n 171 above) 4.

²³⁰ Payasyougosolar ‘Electricity prices in South Africa “Historical and projected”’ available at <<http://www.payasyougosolar.co.za/electricity-prices-in-south-africa-historical-projected/>> (accessed 17 July 2017).

²³¹ P Bond & J Dugard ‘The case of Johannesburg water: What really happened at the pre-paid “Parish pump” Law’ (2008) 12(1) *Democracy & Development* 1.

to disconnection for non-payment of tariffs, residents of Tugela Ferry in May 2017 also embarked on a violent demonstration for the same reason.²³²

Although there is a great similarity between the nature of protests under the Thabo Mbeki and Jacob Zuma eras, Alexander argues that protesters in the Zuma administration firmly believe that it is only through demonstration that the ANC regime would heed to their demands.²³³ This belief, thus, implies that protest action may be envisaged as a new form of political participation in contemporary South Africa. This assumption is reflected in the #FeesMustFall student protest, which attained a partial success when the government rescinded its decision to increase tuition fees, by 8 percent. It was in this light that an observer intimated that the nature of post-apartheid South Africa's public participation involves assembled layers of participatory activities with 'protest participation' as one of its layers.²³⁴ Booysen, therefore, maintains that demonstration, as a form of direct participation in decision-making has become one of the cardinal objectives of post-Mbeki era protesters.²³⁵

It is in this light that Luke Sinwell draws the line between 'invented' and 'invited' spaces of public participation.²³⁶ An *invited* space implies formal avenues for citizens' participation in deliberation and decision-making in a democratic regime. An example is the National Assembly, Ward Committee and Ward Councilors system at the local levels.

An *invented* space on the other hand, represents those strategies individuals devise to draw attention to a specific issue, with protest being a prime example. Within the invented space, social movements and NGOs usually support grassroots mobilizations.²³⁷ Grassroots actions are tailored to provide the deprived with coping and survival mechanisms by advocating for social reform, resisting dominant power relations and challenging the status quo. More often than not, these actions are condemned as illegal by the state as well as mainstream media.²³⁸

²³² K Mudzuli 'Water protest chaos in Majakaneng-Pics' (5 February 2015) *IOL*; The Witness 'Protest over water at Tugela Ferry turns ugly' (17 May 2017) *News24*.

²³³ P Alexander 'Rebellion of the poor: South Africa's service delivery protests—a preliminary analysis' (2010) 37 (123) *Review of African Political Economy* 40.

²³⁴ S Booysen 'Public participation in democratic South Africa: from popular mobilisation to structured co-optation and protest' (2009) 28(1) *Politeia* 6.

²³⁵ Booysen (n 234 above) 8.

²³⁶ L Sinwell 'Conceptualizing direct action as a form of participation in development: a South African case' (2010) 37(1) *Politikon* 68.

²³⁷ R Mattes 'The "Born Frees": The prospects for generational change in post-apartheid South Africa' (2012) 47(1) *Australian Journal of Political Science* 133.

²³⁸ F Miraftab 'Invited and invented spaces of participation: Neoliberal citizenship and feminists' expanded notion of politics' (2004) 1 *Wagadu* 7.

Nonetheless, invented spaces have been hailed as the most effective weapon for the poor especially in view of the many challenges confronting formal channels of participation at the local levels.²³⁹ Regarding the poor functioning of ward councilor and ward committee systems, while Pithouse observes that ward councilors have often been sacked for financial misappropriation, Oldfield maintains that ward committees have come under constant attacks for failing to remain independent and non-partisan.²⁴⁰

4.2.4. Justifications of protest

Although South Africa's transition into democracy came with hopes of improved standard of living for many South Africans, millions still experience widespread poverty and inequality. Widespread poverty and inequality still looms large on the country.²⁴¹ One is not surprised to see that shack dwellers and residents in townships often take to the streets, while those in better resourced suburbs rarely protest.²⁴² Reasons for protest include lack of accountability by local councilors and inadequate service delivery.²⁴³ Even if a deeper (agency) problem of state-citizen engagement is the dominant reason or whether it is (structural) crisis including finance and housing/electricity/water is mainly responsible, it is obvious that most of the protest actions are related to both political non-accountability and service delivery.²⁴⁴ Besides these dominant themes, other causes of protest can be termed 'xenophobic' since they attack immigrants seen as exacerbating their socioeconomic crisis (by overtrading in township retail market, causing unaffordable scarce housing and accepting low wages).²⁴⁵

Service delivery frustration often concerns lack of access to housing, sanitation, water, electricity and general infrastructural problems.²⁴⁶ Protesters in this regard also complain about lack of employment, high crime rates, billing issues, lack of response from local authorities, as well as lack of business opportunities.²⁴⁷

²³⁹ Alexander (n 233 above).

²⁴⁰ Mirafitab (n 238 above) 8.

²⁴¹ S Mottiar & P Bond 'The politics of discontent and social protest in Durban' (2012)39(3) *Politikon* 309.

²⁴² Alexander (n 233 above) 27.

²⁴³ Alexander (n 233 above) 31-32; Bond *et al* (n 195 above); Booysen (n 234 above).

²⁴⁴ M Langa & P Kiguwa 'Violent masculinities and service delivery protests in post-apartheid South Africa: a case study of two communities in Mpumalanga' (2013) 27(1) *Agenda* 20.

²⁴⁵ C Adjai & G Lazaridis 'Migration, xenophobia and new racism in post-apartheid South Africa' (2013) 1(1) *International Journal of Social Science Studies* 192.

²⁴⁶ MC Dawson 'Protest, performance and politics: the use of "nano-media" in social movement activism in South Africa' (2012) 17(3) *Research in Drama Education: The Journal of Applied Theatre and Performance* 321.

²⁴⁷ J Cilliers & C Aucoin 'Economics, governance and instability in South Africa' (2016) 293 *Institute for Security Studies Paper* 5.

Social protest concerned with service delivery often place emphasis on the indignity suffered by residents in townships and shack dwellers. *'It's our water: we want it'* was the inscription on a bucket displayed by a protester when residents from Thembelihle informal settlement marched to the Johannesburg Urban Management offices in Lenasia in February 2014 demanding immediate attention to their water and electricity problems.²⁴⁸ During the 'FeesMustFall' protest movement which began in mid-October 2015 in Johannesburg against university fee hikes, one student asked *'Do only the rich deserve education?'*²⁴⁹

Similarly, in April 2011, during a protest march in Cape Town (from Gugulethu to Khayelitsha Site B) discontent of urban township residents was captured in a protest placard, which read *'Welcome to hell: SA townships'*.²⁵⁰ In the same month, a protester in Khayelitsha E Section asked a practical question after a relative was evicted from his home for non-payment of rent, *'Where must Nomachin's family sleep tonight?'*²⁵¹ In a reference to a lack of access to sanitation, the Social Justice Coalition organised a protest in April 2011, which attracted nearly 2000 residents of Khayelitsha with a placard advocating for *'Dignity in our lifetime'*.²⁵² Lastly, *'They don't do anything for us but they want our vote'* was the statement by Mitchells Plain backyarders occupying land in Tafelsig, Cape Town, in May 2011.²⁵³

Local discontent and frustration is also demonstrated towards lack of political accountability.²⁵⁴ In March 2015, thousands of protesters participated in a corruption march in Cape Town with a banner reading *'Corruption threatens democracy, we demand accountability'*.²⁵⁵ Another banner during the protest also decried *'Our parents fought apartheid, now we fight corruption'*.²⁵⁶ In addition, as thousands of South Africans marched

²⁴⁸ Council on Foreign relations 'South Africa: What Does "Service Delivery" Really Mean?' available at <<http://blogs.cfr.org/campbell/2014/05/page/2/>> (accessed 17 May 2016).

²⁴⁹ News24 '#FeesMustFall campaign back' available at <<http://www.news24.com/SouthAfrica/News/feesmustfall-campaign-back-20160110>> (accessed 17 May 2016).

²⁵⁰ W Meyer 'ANC DA clash at Easter march' (April 24, 2011) *Weekend Argus* available at <<http://www.iol.co.za/news/south-africa/western-cape/anc-da-clash-at-easter-march-1060815>> (accessed 17 May 2016).

²⁵¹ A Hartley 'Evictions spark violence' (14 April 2011) *Cape Times* <http://www.iol.co.za/news/south-africa/western-cape/eviction-sparks-violence-1056550> (accessed 17 May 2016).

²⁵² Z Nicholson 'Residents march to demand toilets' (28 April 2011) *IOL* available at <<http://www.iol.co.za/news/south-africa/western-cape/residents-march-to-demand-toilets-1061821>> (accessed 17 May 2016).

²⁵³ R Wagiet 'More press reports on the Mitchell's Plain land occupation' (18 May 2017) *Abahlali baseMjondolo* available at <<http://abahlali.org/node/8057/>> (accessed 27 July 2017).

²⁵⁴ For a detailed discussion of the different classifications of social protest, refer to sec 2 of this chapter.

²⁵⁵ GettyImages 'South Africans march against corruption' available at <<http://www.gettyimages.com/detail/news-photo/protestors-wave-placards-during-a-nationwide-march-against-news-photo/490651402>> (accessed 17 May 2015).

²⁵⁶ GettyImages (n 255 above).

in December 2015 in protest of the Zuma administration, their banners were directed at a single grievance ‘*We need leaders, not looters*’.²⁵⁷ Other discontent unleashed by the demonstrators related to mismanagement, corruption in appointment processes and tender processes.

In a related protest march against neoliberalism as worsening the unemployment and poverty situation of shack dwellers, in July 2015, one dominant banner read ‘*No land, no house, no vote!*’²⁵⁸ The demand for threat to boycott elections dates back to the 1980s in the height of the apartheid era when the Black Local Authorities (BLAs) system experienced massive resistance from black residents in urban townships.²⁵⁹ This resistance led to boycotting of BLAs elections with physical assault on candidates who visited the election venue since they were considered illegitimate representatives of blacks.²⁶⁰

Apart from the political accountability and service delivery types of protest, other types of protest relate to student and worker protest, which involves pressing for better learning/working conditions.²⁶¹ Resistance related to community justice typically comprises residents seeking out alleged perpetrators of crimes (such as serial killers, rapists and thieves) and arbitrary punishing such an individual.²⁶² It is important to indicate that some of these mob justices (which are unjustifiable, irrespective of the perpetrator’s crime) reflect South Africa’s legacy of ‘a culture tolerant of citizens taking the law into their own hands’.²⁶³

Civil society organisations (CSOs) in South Africa equally rely on protests as a medium of drawing attention to some critical issues confronting various communities.²⁶⁴ Such issues

²⁵⁷ The Christian Science Monitor ‘Leaders not looters’: South Africans march in anger over corruption’ available at <<http://www.csmonitor.com/World/Africa/2015/1216/Leaders-not-looters-South-Africans-march-in-anger-over-corruption>> (accessed 17 May 2015).

²⁵⁸ War on Want ‘London and south african activists to talk about violence of neoliberalism’ <http://www.waronwant.org/media/london-and-south-african-activists-talk-about-violence-neoliberalism> (accessed 17 May 2016).

²⁵⁹ RB Beck *The history of South Africa* (2013) 67.

²⁶⁰ K Shubane ‘Black local authorities: a contraption of control’ in M Swilling *Apartheid City in Transition* (1991) 64.

²⁶¹ F Nash ‘Participation and passive revolution: the reproduction of neoliberal water governance mechanisms in Durban, South Africa’ (2013)45(1) *Antipode* 101.

²⁶² LM Weiss ‘Informal settlements and urban heritage landscapes in South Africa’ (2014)14(1) *Journal of Social Archaeology* 3.

²⁶³ R Monaghan ‘Community-based justice in Northern Ireland and South Africa’ (2008)18(1) *International Criminal Justice Review* 83.

²⁶⁴ PH Frankel *Between the rainbows and the rain: Marikana, migration, mining and the crisis of modern South Africa* 42.

comprise campaigns against drug dealing rape, discrimination against sex work, mining contracts, environmental concerns and homophobia.²⁶⁵

Xenophobia protest often relates to the manner in which South Africans were blaming and maltreating the 'other' for their material problems.²⁶⁶ It was in this regard that around 200 anti-xenophobia protesters marching in Johannesburg displayed placards with slogans '*The Africa we want has no place 4 xenophobia*' and another question was '*Is this what we struggled for? Down with xenophobia*'.²⁶⁷

4.2.5. Strategies of social protest

South African protesters adopt a number of strategies in order to draw attention to their grievances. Protesters see these varieties of strategies as complementary forms of activity to normal channels of political participation.²⁶⁸ Common strategies range from processions, election boycotts, looting, construction of barricades, blockading of roads, forced resignation of elected officials, chasing unpopular individuals out of townships, mass meetings, confrontations with police, drafting of memoranda, destruction of buildings, burning of tyres, stay-aways, toyi-toying, to petitions.²⁶⁹

It is important to note that each strategy has its unique effect. Protesters, therefore, sometimes combine two or more strategies in order to draw attention to their specific concern.²⁷⁰ Besides these 'formal' types of protest, there are daily forms of 'protest', which are often ignored by social protest analysts.²⁷¹ Such protest action includes informal sabotage of state systems comprising illegal reconnections of electricity and water, which are pervasive in many informal settlements and townships.²⁷²

²⁶⁵ L Pereira & S Drimie 'Governance Arrangements for the Future Food System: Addressing Complexity in South Africa' (2016) 58(4) *Environment: Science and Policy for Sustainable Development* 13.

²⁶⁶ B Amisi, P Bond, N Cele & T Ngwane 'Xenophobia and civil society: Durban's structured social divisions' (2011) 38(1) *Politikon* 59.

²⁶⁷ France24 'South African police fired rubber bullets and tear gas on anti-immigration protesters in a Johannesburg suburb Thursday hours after thousands rallied against xenophobia in the port city of Durban' available at <<http://www.france24.com/en/20150416-south-africa-thousands-protest-against-wave-xenophobic-attacks>> (accessed 17 May 2016); CrowdNews 'Unite Against XeNOphobia' available at <<http://www.crowdnews.co.za/unite-against-xenophobia/>> (accessed 17 May 2016).

²⁶⁸ M Williams *The roots of participatory democracy: democratic communists in South Africa and Kerala, India* (2016) 8.

²⁶⁹ Alexander (n 233 above) 26.

²⁷⁰ J Hayem 'From May 2008 to 2011: xenophobic violence and national subjectivity in South Africa' (2013) 39(1) *Journal of Southern African Studies* 77.

²⁷¹ SK Mitra *Power, protest and participation: local elites and development in India* (2002) 10.

²⁷² M Mamdani 'Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa' (2015) 43(1) *Politics & Society* 61.

Within the third phase of social protest (post-2005), demonstrators have limited themselves to certain strategies considered as more effective by Bond and Mottiar.²⁷³ The strategies, which feature prominently, are picketing, marching, demonstration and vandalizing of (public and private) properties.²⁷⁴ Burning tyres and barricading roads are also frequently used.²⁷⁵ The impact of burning tyres is very significant since it is practically convenient and draws the necessary attention, given that they readily combust and emit smoke.²⁷⁶ The culture of burning tyre in South Africa dates back to the apartheid era where corrupt officials or black informants (betrayers or traitors) of the apartheid regime were usually subjected to ‘necklace’ burning.²⁷⁷ According to Ball, in a matter of just five years (1985-1990) an approximately 428 necklacings occurred in South African townships and urban centres.²⁷⁸

It is equally important to highlight that specific strategies are most preferred for certain grievances. The most common strategy utilized for highlighting a cause in protest includes the use of petitions, marching, picketing and demonstration.²⁷⁹ Students engaging in protest prefer strategies of picketing, demonstrating and marching with intermittent disruptions, intimidation, vandalizing of (public and private) properties.²⁸⁰ Worker protest favour strategies of picketing, marching, strike action and demonstration.²⁸¹ Barricading roads and burning tyres seem to be the most common strategy for political accountability and service delivery.²⁸² This repertoire of social protest is often used in South Africa as part of normal routine for demanding public accountability from bureaucrats and politicians.²⁸³

As discussed in section 3.3, while some of these strategies are peaceful, others are violent. Violence against persons or property has both instrumental and symbolic aims. Besides serving as an effective weapon to gain media attention, violence is often justified as a symbolic resistant of an unjust government policy. The use of violence is very significant, especially as it enhances the visibility of the grievance since it ‘gets newspaper reporters

²⁷³ RP Inman & DL Rubinfeld ‘Understanding the democratic transition in South Africa’ (2013) *American law and economics review* 8.

²⁷⁴ Weiss (n 262 above) 11.

²⁷⁵ Dawson (n 246 above) 323.

²⁷⁶ Mottiar & Bond (n 209 above) 284; J Joffe *The State Vs Nelson Mandela: The Trial that Changed South Africa* (2014) 86.

²⁷⁷ Necklace burning implies a tyre set alight around the neck of a victim.

²⁷⁸ J Ball ‘The ritual of the necklace’ (1994) *Centre for the Study of Violence and Reconciliation* 3.

²⁷⁹ J Hayem ‘From May 2008 to 2011: xenophobic violence and national subjectivity in South Africa’ (2013) 39(1) *Journal of Southern African Studies* 77.

²⁸⁰ Nash (n 261 above) 102.

²⁸¹ Frankel (n 264 above) 43.

²⁸² Williams (n 268 above) 28.

²⁸³ G Cundill, G Thondhlana, L Sisitka, S Shckleton & M Blore ‘Land claims and the pursuit of co-management on four protected areas in South Africa’ (2013) 35 *Land use policy* 171.

running to where it's taking place and sends out the message [...] to others sitting at home in front of the TV.²⁸⁴

Although there are some merits in the use of violence, the use of this approach also has many constraints and limitations. First, violence against property or persons during protest action may trigger an increase in government suppression and may lead to alienation of sympathizers. Violence according to Tarrow, turns relations between the protesters and the state into a 'bipolar one' where the state's repressive agencies swings into action, bystanders retreat, allies defect, and people are compelled to choose sides.²⁸⁵ Thus, even though violence in some instances may be useful in mobilisation, it is important to note that such direct actions usually trigger brutal response from the state. The state exercises a monopoly on the legitimate use of force in a democratic dispensation, and a group, which opposes that monopoly, are bound to be suppressed, transforming social discontent into military conflict in which the government ultimately possesses the greater firepower.²⁸⁶ It is thus, advisable for protest movements to adopt the approach of Gandhi and Martin Luther King and develop nonviolent techniques as an option of value and a strategic choice.

4.2.6. The notion of numbers and profile of protesters

Popularly referred to as *Power in Numbers* by Denardo, the impact of a social protest largely depends on the number of its supporters.²⁸⁷ Considering that 'there always seems to be power in numbers', the 'size of the dissidents' demonstrations directly or indirectly affects the government.²⁸⁸ Ultimately, ability of the government to control crowds inevitably suffers as they number grows larger. In addition, the increases with numbers also naturally lead to disruption of daily routines and provide an indication to both the government and bystanders of how much support the grievance enjoys.²⁸⁹ It is, therefore, important for organisers of social protest to mobilise the greatest number of demonstrators possible. As discussed above, some of the main strategies designed to demonstrate the numerical strength behind protests are marches, petitions and demands for referendums.

²⁸⁴ Cundill *et al* (n 283 above).

²⁸⁵ S Tarrow *Power in Movement: Social Movements, Collective Action and Politics* (1994) 104.

²⁸⁶ D della Porta *Social Movements, Political Violence and the State* (1995) 92.

²⁸⁷ J DeNardo *Power in Numbers: The Political Strategy of Protest and Rebellion* (1985) 3.

²⁸⁸ DeNardo (n 287 above) 35.

²⁸⁹ DeNardo (n 287 above) 36.

Participants in each protest action have been noted to range between one hundred to one thousand protesters depending on the particular grievance at hand.²⁹⁰ In terms of frequency, shack dwellers or township residents are the most likely to demonstrate, followed by CSOs, trade unions, private and public sector organisations.²⁹¹ Workers, students as well as members of political parties' protest also feature prominently.²⁹² It is important to indicate that the number and composition of protesters is often based on factors such as the location of the protest, the nature of grievance, the type of leader or organizer of the protest and the reaction of the police towards the protesters.

As noted in the beginning of section 3.3, the post-2004 or 'popcorn' protests (which often 'pop up' and quickly dissipate) are 'spontaneous' since they are not well coordinated and lack a well formulated grievance.²⁹³ Yet, some of these protests (including student, worker and community protest) have been identified as possessing an element of leadership or organisation.²⁹⁴ For instance, individuals otherwise known as 'community leaders' have been identified as responsible for the mapping and operationisation of the strategies of the uprising.²⁹⁵

Overall, social protest has played an enormous role in enhancing the participation of poor people in decision-making. Although some of the numerous service delivery protests have not been very successful in compelling the government to change policy, it somewhat made an impact in the #FeesMustFall protest as discussed in section 3.4 of this chapter.²⁹⁶ Besides the success of the student protest leading to policy change, the thesis will highlight three cases where social protest has been instrumental in bringing about policy change. First, following a wave of strikes by farmworkers in the Western Cape from August 2012 to January 2013, due to low worker pay of R69, the official minimum wage was increased by 52 percent in order to end the protest.²⁹⁷ Second, in 2007, the squatters' movement Abahlali baseMjondolo took to the streets in protest against the Slums Act, which sought to eliminate

²⁹⁰ KS Newman & A De Lannoy *After freedom: The rise of the post-apartheid generation in democratic South Africa* (2014) 28.

²⁹¹ Tapscott & Thompson (n 219 above) 369.

²⁹² LA Stachel & D Hammett "For the future of the nation": Citizenship, nation, and education in South Africa' (2013)32 *Political Geography* 38.

²⁹³ Bond *et al* (n 192 above) 5.

²⁹⁴ Alexander (n 233 above) 31.

²⁹⁵ Alexander (n 233 above) 33.

²⁹⁶ L Laccino 'South Africa: Jacob Zuma announces 0% university fee increase following Fees Must Fall protest' (23 October 2015) available at <<http://www.ibtimes.co.uk/south-africa-jacob-zuma-announces-0-university-fee-increase-following-fees-must-fall-protest-1525398>> (accessed 17 May 2017).

²⁹⁷ SA History 'Western Cape 2012 Farm workers' Strike' available at <<http://www.sahistory.org.za/article/western-cape-farm-workers-strike-2012-2013>> (accessed 17 May 2017).

and prevent re-emergence of slums in the KwaZulu-Natal province.²⁹⁸ After the Constitutional Court declared the Act unconstitutional in 2009, members of the movement continued with their occasional protest until the state abandoned its plans to evict shack dwellers in the province by 2014.²⁹⁹ Third, while facing a continuing refusal by the state to implement a Constitutional Court order to make antiretrovirals available, the Treatment Action Campaign (TAC) in 2002 began a series of marches and civil disobedience campaigns against the state.³⁰⁰ The movement only suspended its protest action in 2003 when the state initiate steps to operationalise a nationwide treatment plan, which until today it is still in operation. These cases indicate that social protests have implication in terms of bringing about policy change.

5. Conclusion

In the course of the last five decades, there has been a considerable expansion on scholarly work that place emphasis on the effect of protest in transforming social structures and improving the socioeconomic needs of the poor. By re-examining a list of literature, the chapter traced the origin, conceptualization, development and prospect of social protest. In the course of responding to critical theoretical questions, the chapter discussed the influence of social protest in addressing economic and social challenges.

The basic concept in social protest theory is that, the potential of community leaders to mobilize protesters, and promote a specific interest are often based on the environment within which they find themselves. Political sociologists for that reason have tailored much of their work to the world outside of a mass protest, on the basis that external factors promote or impede a mass protest's potential for (i) influencing mainstream institutional policy and politics (ii) advancing specific grievances instead of others (iii) mobilizing (iv) cultivating alliances (v) adopting specific political tactics and strategies.

Protest ordinarily has some common features worth noting. First, social protests are classically broader in scope (than other collective actions such as deviance), comprising one or more groups of laid-off workers, students, shack dwellers or civil society organisations (CSOs). Instead of avoiding mass recruitment, social protesters often look for larger crowd.

²⁹⁸ Provincial Act No. 6 of 2007.

²⁹⁹ *Abahlali Basemjondolo Movement SA v and Another v Premier of Kwazulu-Nataland Others* (1874/08) [2009] ZAKZHC 1; 2009 (3) SA 245 (D).

³⁰⁰ S Friedman & S Mottiar 'A rewarding engagement? The treatment action campaign and the politics of HIV/AIDS' (2005) 33(4) *Politics & Society* 533.

Second, the grievances of protesters are mostly linked to basic economic/social concern or material needs. Third, they do not generally seek to remove the government from power, but usually press for demands relating to individual's standard of living.

The present chapter has been dedicated to assessing the theories underlying social protest and the strategies adopted by participants to press home their demands. Social protest has been defined as unorthodox action in which people express their discontent or dissatisfaction of government action or inaction. Although social protest goes beyond the conventional forms of participation in representative democracy, it has over the years evolved to be recognised in South Africa as a legitimate act of political persuasion. As discussed in the chapter, people participate in protest for several reasons. In particular, a grievance or the personality of the person leading the protest could serve as a rallying point for people to join the march. The contribution of this chapter to research is its ability to demonstrate the essence of numbers, which seeks to demonstrate the power or strength of support for a grievance; the different types of strategies used; the motive behind the use of violence or direct action during protest; the motive of disrupting everyday routine, which enhances the visibility of the protest; and the need to use violence (if need be) to attract media attention.

In sum, social protest has been acknowledged as complementary to formal channels of participation in local communities (particularly to ward committees and ward councilors). Four cases highlighted above indicated that social protest can be considered as an effective form of bringing about policy change. An uprising in South Africa (or anywhere for that matter) may qualify as 'social' protest to the extent that local organisations or citizens are responsible for encouraging discontent and resistance. In some instances, the reason for the protest action reflects the inadequate access to water/housing/electricity/political participation but rarely for food security. Since the thesis seeks to examine the role of protest in enforcing the right to food, the next chapter turns to examine the content and jurisprudence of the right to food, with chapter 4 examining why this right has been breached irrespective of the fact that the states has adequate food and resources to ensure adequate food for everyone.

CHAPTER THREE

THE RIGHT TO HAVE ACCESS TO ADEQUATE FOOD

1. Introduction

Section 27(1)(b) of the 1996 Constitution of South Africa affirms the right of everyone to have access to adequate food.¹ The right of children to basic nutrition is also entrenched under section 28(1)(c) while the right of detainees to sufficient nutrition at the expense of the state is guaranteed under section 35(2)(e). Jointly, these provisions affirm for each person (with different levels of intensity) a justiciable right to food and nutrition.²

In terms of food sovereignty, it is highly unlikely that South Africa will feature at the top of the agenda at any global discourse on famine. Even for an emerging economy, the country has a high per capita income, and is a net exporter of agrarian commodities. According to Oxfam, 'South Africa is considered a 'food-secure' nation, producing enough calories to adequately feed every one of its 53 million people'.³ It is important to note that, although South Africa (akin to other Southern African countries) has been hit by the El Niño-induced drought which might result in low yield of crops and animal production) the country still has the capacity to import surplus food to feed its population.⁴

¹ The terms 'right to food' and 'freedom from hunger' may be used interchangeably considering that both seek to address a common problem, hunger and malnutrition.

² D Holness & A Govindjee 'The Realisation of the Constitutional Right to Food in South Africa' (2008) 41 *De Jure* 524.

³ Oxfam 'Hidden hunger in South Africa: The faces of hunger and malnutrition in a food-secure nation' (2014) available at https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/hidden_hunger_in_south_africa_0.pdf (accessed 17 July 2016) 2. Also see K Wilkinson 'Are there 13, 14 or 15 million hungry people in South Africa?' (10 May 2016) available at <<https://africacheck.org/reports/are-there-13-14-or-15-million-hungry-people-in-south-africa/>> (accessed 18 July 2016).

⁴ M Piesse 'South Africa: Drought Threatens Food, Energy and Water Security' (March 31, 2016) <http://www.futuredirections.org.au/publication/south-africa-drought-threatens-food-energy-water-security/> (February 23, 2016); H Krog 'South Africa to ease some GM crop rules to avert food crisis' (February 23, 2016) *The Guardian*, available at <<https://www.theguardian.com/environment/2016/feb/23/south-africa-to-ease-some-gm-crop-rules-to-avert-food-crisis>> (accessed 5 August 2016); K Ngoepe 'At least R20bn will be needed to import maize - Grain SA' (15 January 2016) *News24*, available at <<http://www.news24.com/SouthAfrica/News/at-least-r20bn-will-be-needed-to-import-maize-grain-sa-20160115>> (accessed 5 August 2016); J Maromo 'Drought could force SA to import food' (November 13, 2015) *IOL*, available at <<http://www.iol.co.za/business/news/drought-could-force-sa-to-import-food-1945072>> (accessed 5 August 2016); *AfricaNews* 'Severe drought threatens food security in South Africa' (14 January 2016) available at <http://www.africanews.com/2016/01/14/severe-drought-threatens-food-security-in-south-africa/> (accessed 5 August 2016).

Besides the Constitution, which entrenched the right to food and nutrition under sections 27 and 28, the state has adopted several policies, which seek to advance this right.⁵ One could easily conclude that adequate calories ought to be available and accessible at all times to everyone. The painful truth is that in reality, irrespective of these favorable indicators, it is estimated that millions of South Africa's population face chronic hunger and malnutrition.⁶ This figure is alarming, especially considering that these individuals face undernourishment in 'the midst of plenty'.⁷

Chronic hunger and malnutrition may emanate from both inadequate consumption of calories and from insufficient micronutrients.⁸ Vitamins and micronutrients such as iodine,⁹ iron¹⁰, folic acid,¹¹ and vitamin A¹² are specifically essential for breastfeeding women, infant children, teenagers and pregnant women.¹³ Lack of fundamental nutrients and vitamins can have life-long dire consequences on the hungry.¹⁴

Understanding the legal obligation of the state to provide food for the chronically hungry is the basis of this chapter. The chapter seeks to explore the various steps adopted by the state to prevent hunger, and, why these steps seem to have failed. This would be done by assessing the various food related programmes and their potential of addressing hunger.

Consequently, the chapter seeks to examine whether the constitutional right to be free from hunger could potentially serve as a basis by which indigents could invoke to obtain continuous and sustainable access to food. The reading and interpretation of the right to food in the Constitution call for a creative and progressive thinking. The core issue, nonetheless,

⁵ One of such policies is the National Integrated Food Security Strategy (IFSS).

⁶ See Stats SA 2016a 'General Household Survey' 2016 Statistical Release P0318 5-6.

⁷ Oxfam (n 3 above) 2.

⁸ P Sharma, S Dwivedi & D Singh 'Global poverty, hunger, and malnutrition: a situational analysis' (2016) *Biofortification of Food Crops Springer India* 19.

⁹ Iodine deficiency most commonly impedes fetal brain development. During pregnancy, even a mild deficiency of iodine can reduce brain development of the foetus and cripple the intellectual ability of an individual for life. Inadequate iodine can also cause severe physical and mental retardation, termed as cretinism.

¹⁰ Iron deficiency is associated with increased morbidity rates, damages immune mechanisms, and impairs the cognitive and physical development of the individual. If occurring in times of pregnancy, it is associated with numerous adverse outcomes for both mother and infant, including increased risk of sepsis, low birth weight, perinatal mortality, and maternal mortality.

¹¹ The intake of folic acid before and during pregnancy prevents infant malformations such as anencephaly and spina bifida.

¹² Vitamin A deficiency increases the risk of severe illness, and even death, from common childhood infections such as measles and diarrhoeal diseases. In the case of child-bearing mothers, it enhances maternal mortality. It is a major cause of childhood blindness and further causes night blindness.

¹³ JR Miner *et al* 'Hunger and food insecurity among patients in an urban emergency department' (2013) 14(3) *Western Journal of Emergency Medicine* 253.

¹⁴ TG Spies, JJ Morgan & M Matsuura 'The Faces of Hunger: The Educational Impact of Hunger on Students With Disabilities' (2014) 50(1) *Intervention in School and Clinic* 5.

is, can this right be met at the national and municipal levels in light of the government's obligation to guarantee people's freedom from hunger? The chapter will seek to justify that the right to food is a defined right which is entitled to enforcement and protection, and not merely an ambiguous and abstract theory.

The approach and structure of this chapter is first to outline the context and policies that underpin the right to food in South Africa. In part two, the chapter provides a theoretical overview of the concept of right to food. Then in part three, the chapter considers the extent to which international legal frameworks guarantees this right at the global and regional levels. In part four, the chapter turns to assess the extent to which the South African Constitution guarantees the right to food, including the various ways in which this right has been guaranteed. Under this section, the chapter will also examine whether in future, freedom from hunger can be given actual expression in South African legislation, through judicial decisions and policy enactment. Against the backdrop of the current food and nutritional needs in South Africa, the section moreover considers whether present government response meets the threshold of its constitutional obligation under sections 21(1)(b), 28(1)(c), and 35(2)(e).

The next section focuses on the conceptual issues surrounding human rights approach to food. The aim of this chapter is to attract the attention of scholars to the basic problems surrounding the right to food and how to overcome them. It purports to do so by tentatively setting out some of the issues at play in combating hunger and malnutrition. It is imperative to admit that the right to food is a multi-faceted and complex issue, and that this chapter alone cannot address all the issues involved.

2. A conceptual approach to the right to food

In recent times, the concept of right to food has featured in legal and political discourse, especially in view of the poverty and food insecurity, which confronts millions of people around the world.¹⁵ There is something enormously striking in the notion that every individual, regardless of his or her national legislation, religion or culture, has an inherent right to have adequate access to food.¹⁶ Several scholars and human rights activists calling for an end to poverty and inequality have used the concept of the human right to food.¹⁷ Yet, the

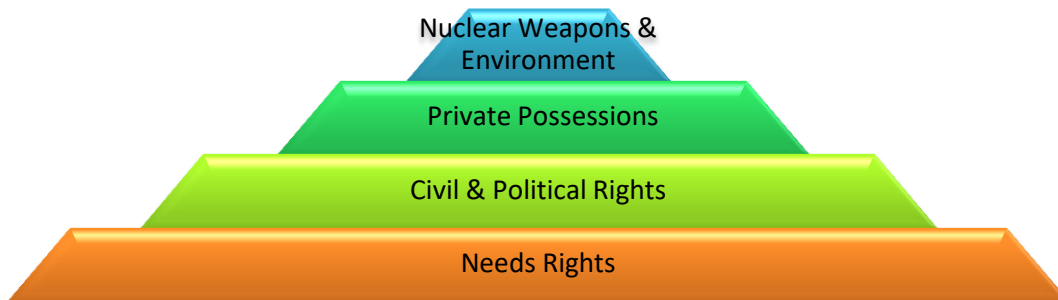
¹⁵ A Sen 'Elements of a theory of human rights' (2004) 32(4) *Philosophy & Public Affairs* 325.

¹⁶ W Brown 'The most we can hope for ...: Human rights and the politics of fatalism' in AS Rathore & A Cistelean (eds) *Wronging Rights? Philosophical Challenges for Human Rights (Vol. 1)* (2012) 132.

¹⁷ Sen (n 15 above) 315.

overarching concept of right to food as something that individuals possess, and have even without any particular law, is seen by some commentators as principally uncertain and lacking clarity.¹⁸ A recurring question is, what is the conceptual basis of right to food? Is this right universal?

In an attempt to address these questions, Christian Bay in his 1980 work noted that the right to food (like civil/political or economic/social rights) is universal and only by grouping the various rights, in the form of a pyramid can one really understand its importance.¹⁹ He argues that it is only by establishing a ‘rationally defensible priorities among human rights’ or human needs could one appreciate the essence of the right to food.²⁰ As demonstrated in the pyramid below, Bay’s preferred pyramid of human rights or fundamental needs is, therefore, structured as follows: the first level of the pyramid consists of the ‘needs’ rights or access to the means of existence and survival such as air, food, medicines, shelter and water.²¹ The second level is composed of civil and political rights to citizenship, vote, and, protection from exploitation and justice, which are restricted solely by a duty to respect the fundamental rights of others.²² The third level of the pyramid of rights entails desires and rights to some private possessions, restricted in order to guarantee equitable and fair shares for all potential rights-bearers.²³ The last priority would be a concern for matters surrounding nuclear weapons and the environment.²⁴



Pyramid 1: Bay’s concept of human rights

¹⁸ R Rorty ‘Human rights, rationality, and sentimentality’ in AS Rathore & A Cistelean (eds) *Wronging Rights? Philosophical Challenges for Human Rights (Vol. 1)* (2012) 108; GC Spivak ‘Righting wrongs’ in AS Rathore & A Cistelean (eds) *Wronging Rights? Philosophical Challenges for Human Rights (Vol. 1)* (2012) 79.

¹⁹ C Bay ‘Universal Human Rights Priorities: Toward a Rational Order’ in J Nelson & V Green (eds) *International Human Rights: Contemporary Issues* (1980) 5.

²⁰ Bay (n 19 above) 8.

²¹ Bay (n 19 above) 13.

²² Bay (n 19 above) 19.

²³ Bay (n 19 above) 19.

²⁴ Bay (n 19 above) 20.

To Bay, since food constitutes an essential element for the survival of human species, any legitimate government or political institution must provide, for each human being (in this case, for those who lack the means to fend for themselves), as much food needed for their existence.²⁵ Like other first and second-generation rights, he presents the right to food as an inherent right that needs no further justification.²⁶

Bay's pyramid of rights provokes the question as to whether one could make the case for these layers of human needs. Absolutely, the layers appear valid and justifiable. Nonetheless, one is left with the sense that the structure is unfinished. Something must exist beyond the fulfilment of the needs of survival. Maurice Cranston avers that the placement of the right to food within the economic/social rights category by Bay, might generate disappointing outcomes for the enforcement of this right.²⁷ He asserts that it would be nearly impossible to enforce a socioeconomic right to food.²⁸ Cranston explains his pessimistic approach to the right to food by going back to the negative versus positive rights analysis. According to Cranston, basic rights (like the right to food) can only be classified as 'positive' if they are attainable.²⁹ He affirms that when it is impossible for a thing to be done, it is absurd to claim it as a right.³⁰ Cranston avers that in view of the fact that some states currently cannot provide adequate standard of living (including adequate access to food) for everyone, such a right should not be recognised and guaranteed.³¹

In affirming the position of Cranston, Dorothy Lee asserts that basic needs themselves are not the foundation for all human actions, and that any list or hierarchy that comprised entirely of human needs would generate an incomplete pyramid.³² Lee further highlights instances where

²⁵ Bay (n 19 above) 6.

²⁶ Bay (n 19 above) 8.

²⁷ M Cranston *What are human rights?* (1976) 75.

²⁸ Actually, Cranston rejects the universality of economic/social rights. His radical position was most evident during his interpretation of François-Noël Babeuf in the conspiracy of the equals by affirming that 'When at the time of the French Revolution Babeuf claimed the right of the people to education, he was about the rights of Frenchmen, and not of man'. See Cranston (n 27 above) 69.

²⁹ Cranston (n 27 above) 69.

³⁰ Cranston (n 27 above) 66.

³¹ Cranston (n 27 above) 69.

³² D Lee 'Are basic needs ultimate?' (1948) 43(3) *The Journal of Abnormal and Social Psychology* 391.

individuals elected to give up the security of shelter and food to pursue a political cause.³³ Lee further argues that individuals act to fulfil specific *needs*, such as liberty.³⁴

Nonetheless, Rhoda Howard advances an argument for the realisation of economic/social rights, such as the right to food, in order for one to enjoy other essential rights such as the right to vote.³⁵ In her *full belly theory*, she espouses that civil/political rights could only be realised after physical needs, including provision of adequate food, have been fulfilled.³⁶ The notion of physical needs or basic rights, according to her, are the rights held by every individual on the basis of being a human being. The recognition of essential civil/political rights such as freedom and justice without adequate access to food, according to Howard, is an empty entitlement to the hungry.³⁷ She, therefore, called for an end to classification of human needs into civil/political and economic/social rights, and the importance of one set of rights over another. According to her, the rights to food and freedom from execution are both essential to human survival, and the state should endeavour to guarantee both without discrimination. Howard, therefore, concludes:

[T]here is a basic right to personal or physical integrity; in Shue's term, to security and subsistence. This right is both political and economic in nature. In political terms it means the right to freedom from execution and torture.... In economic and social terms it means the right to adequate nutrition and a minimal standard of health care [...] The economic right of adequate nutrition has [...] its own political dimension. Nutritional standards are a result as much of the distribution as of the ultimate supply of food.³⁸

In cases where one set of rights is imposed over another, the tension that arises is often linked to the fact that the pyramid or hierarchies of rights themselves are artificial.³⁹ A reasonable concept of basic rights would recognise, and accommodate all forms of rights (including the right to food) in order to realise particular basic rights.⁴⁰

³³ Lee (n 32 above).

³⁴ Lee (n 32 above) 393.

³⁵ R Howard 'The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa' (1983) 5 (467) *Human Rights Quarterly* 488.

³⁶ Howard (n 35 above) 485.

³⁷ Howard (n 35 above) 488.

³⁸ Howard (n 35 above) 488.

³⁹ P Overby 'The Right to Food' (1990) 54 *Saskatchewan Law Review* 26-27.

⁴⁰ Overby (n 39 above) 27.

In summary, the realisation of civil/political rights such as political participation or access to justice is very much dependent on one's access to adequate food. It was against this backdrop that Sen intimated that 'democratic rulers often possess the social and economic incentives to take timely measures to avert any threat of hunger and undernourishment.'⁴¹ Unlike authoritarian regimes, democratic governments risk impeachment or face public criticism in the event that they fail to adopt adequate measures to forestall chronic hunger and such other catastrophes.⁴² It is against this backdrop that Sen concludes that no starvation 'has ever taken place in the history of the world in a functioning democracy -be it economically rich [...] or relatively poor'.⁴³

It is not the objective of this thesis to put an end to the ancient debate of the importance of one right over the other. It is, however, important to indicate that irrespective of its position on any pyramid of rights, the right to food or nutrition is vital for the survival of humans in order to exercise or enjoy any other essential (civil/political and/or social/economic rights). Besides providing people with the energy and nutrients they need to accomplish various bodily tasks, food is essential for building and maintaining organs and healthy cells necessary for one's development and proper growth.

The fulfillment of the right to food (like other basic rights) is often tied to, and only possible through the transformation of the social order by the realisation of political freedoms and civil liberties. Human beings are exposed to chronic hunger in South Africa not only because there is no food, but because the government has failed to adopt adequate measures to address the needs of the food poor.⁴⁴ The state's inaction has, therefore, hindered economic development of the food poor, especially as these individuals cannot effectively participate in economic activities (due to hunger) in order to acquire adequate food for themselves.

3. The right to food in international law

Generally, the right to adequate food involves the practical notion that all human beings should have an adequate standard of living, particularly sufficient food to consume in both peacetime and hostilities.⁴⁵ Akin to other socioeconomic rights, the right to adequate food

⁴¹ A Sen *Development as freedom* (1999) 1516.

⁴² Sen (n 41 above).

⁴³ Sen (n 41 above).

⁴⁴ For a detailed discussion of this setback, see sec 1 of chapter 1 of this thesis.

⁴⁵ Mechlem (n 17 above) 633.

entails respect for human dignity, which is underscored in the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights.⁴⁶ It is also about freedom from want and hunger, originally termed the 'Third Freedom' by president Roosevelt.⁴⁷

3.1. The right to food in the UDHR and ICESCR

The right of individuals to have access to adequate food and nutrition has been recognised in several international human rights instruments, with the 1948 Universal Declaration of Human Rights (UDHR) being the first.⁴⁸ Article 25(1) of the UDHR avers that '[e]veryone has the right to a standard of living adequate for the health care [...] and well-being of himself and of his family, including *food*, clothing, housing and medical care [...]'⁴⁹

As a binding obligation, the human right to food and the actions to be adopted are set out in article 11 of the ICESCR, which calls on state parties to:

1. [...] 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 States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take individually and through international co-operation, the measures, including specific programmes, which are needed:
 - a. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
 - b. Taking into account the problem of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

⁴⁶ J Ziegler, C Golay, C Mahon & SA Way *The Fight for the Right to Food: Lessons Learned* (2011) 10; UN General Assembly *International Covenant on Economic, Social and Cultural Rights* 16 December 1966, United Nations, Treaty Series, vol. 993.

⁴⁷ See generally 'The Four Freedoms' speech by Franklin Delano Roosevelt, made on 6 January 1941 to the United States Congress.

⁴⁸ International Bill of Human Rights: A Universal Declaration of Human Rights, G.A. Res. 217 (111), UN GAOR, 3rd Sess., Supp. No. 13, 71 at 76. U.N. Doc. A/810 (1948).

⁴⁹ Own emphasis.

In its General Comment No. 12, the CESCR intimates that the right to adequate food is of primary importance for the realisation of other rights.⁵⁰ For this reason, the phrase ‘for himself and his family’ in the first paragraph under article 11, does not imply any restrictions on the applicability of the rights in the case of child headed households, or households headed by women or men.⁵¹

The notion of right to food embraces various elements. The first arm, as set out in article 11, paragraphs 1 and 2, is the concept of adequate food. This notion of right to adequate food, as enumerated by the CESCR in its General Comment No. 12 is realised 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 [...] States have a core obligation to take the necessary action to mitigate and alleviate hunger [...]⁵²

The other two elements of the notion of right to adequate food are the concepts of sustainability and adequacy.⁵³ According to the CESCR, ‘the notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations’.⁵⁴ In other words, sustainability indicates the notion of long-term availability and accessibility of food.⁵⁵

The notion of adequacy is, largely determined by existing climatic, ecological, economic, social, cultural and other related prevailing factors.⁵⁶ This concept serves to underscore numerous conditions which must be considered in determining whether specific diet or food that are easily accessible could be regarded as the most appropriate under an existing situation.⁵⁷ According to the Committee, the core content of the right to food implies:

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;

⁵⁰ CESCR ‘General Comment No. 12: The Right to Adequate Food (Art. 11)’ Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999 (Contained in Document E/C.12/1999/5) para 25.

⁵¹ Para 1.

⁵² CESCR (n 50 above) para 6.

⁵³ Paras 7 & 8.

⁵⁴ CESCR (n 50 above) para 7.

⁵⁵ CESCR (n 50 above) para 7.

⁵⁶ CESCR (n 50 above) para 7.

⁵⁷ Ziegler *et al* (n 46 above) 17.

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.⁵⁸

The element of accessibility applies to any entitlement or acquisition structure through which a person or household procure their food.⁵⁹ It specifically indicates that people's financial costs related to the acquisition of food for a sufficient nutrient should be at a rate capable of enhancing the fulfillment and realisation of other basic rights.⁶⁰

The notion of food and nutrient *availability* requires the existence of a national food supply adequate to meet the dietary needs of all the individuals (national food security).⁶¹ By extension, availability signifies that there is the existence of opportunities for the production of personal or household food for own consumption.⁶² Adequate food further specifies that food must be safe, especially by properly preserving, storing and handled in a manner that is not spoiled or contaminated.⁶³ Yet, the state of food safety, cultural adequacy and nutritional adequacy are determined by a chain of factors, and the circumstances in a specific country such as traditional dietary patterns, prevalent body type of population and climate.⁶⁴

In contrast, *accessibility* of food requires that individuals utilise the available opportunities to produce food for own consumption or have the capacity to obtain the available food and nutrients (household food security).⁶⁵ Such capacities exist when individuals exercise some degree of entitlement over food or its means of production. Accessibility is realised when:

- (i) people exercise some form of legal control over means of production so that they can produce food for own use;⁶⁶
- (ii) people have an entitlement to in-kind or monetary social assistance from the government with which they acquire food;
- (iii) people earn wages or income by selling labour or other commodities, which they use to access food.

⁵⁸ CESCR (n 50 above) para 8.

⁵⁹ Ziegler *et al* (n 46 above) 18.

⁶⁰ CESCR (n 50 above) para 5.

⁶¹ Ziegler *et al* (n 46 above) 17.

⁶² CESCR (n 50 above) para 12.

⁶³ CESCR (n 50 above) para 10.

⁶⁴ A Eide *The right to adequate food and to be free from hunger* (1999) E/CN 4/Sub 2/1999/12, para 49.

⁶⁵ CESCR (n 50 above) para 9.

⁶⁶ Such means of production require access to land, seeds, water, implements, pesticides and other essentials.

From the illustration above, accessibility may be categorised into *economic* and *physical* accessibility. Physical accessibility refers to those individuals who lack entitlement (or are not self-sufficient) and for that reason, have to receive government intervention in order to access food and nutrition.⁶⁷ Economic accessibility, in contrast, refers to entitlements or self-sufficient individuals.⁶⁸ They, therefore, possess the means (income or control the means of food production) to access individual or household food. This distinction seeks to underpin the triple obligations of states to:

- (i) provide food;
- (ii) provide the means to acquire it directly to those who are not self-sufficient; or
- (iii) enhance access to food for those people who are reasonable self-sufficient.⁶⁹

Accessibility according to the CDESCR refers 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’.⁷⁰ It further avers that individuals must have access to adequate food, which encompasses enough food for physical activity, development and maintenance, and for physical and mental growth. Everyone should have access to sufficient food in quality, nature and quantity, and must be accessible and available.⁷¹ Accessibility further connotes that food must be culturally adequate and fulfil the cultural practices and preferences of people.

The ICESCR equally recognises the obligation of state parties to ‘take *appropriate steps* to ensure the realization of the right to food.’⁷² Article 11 of the ICESCR, akin to other texts in this instrument, attempts to grant rights to individuals, yet, the measures for its operationalisation is left to the discretion of states.⁷³

The meaning of ‘appropriate steps’ in legal terms seems cumbersome to interpret, considering that it entails several technical considerations.⁷⁴ To some extent, the content of ‘appropriate steps’ in this context stretches from the enhancement of the means of production,

⁶⁷ Ziegler *et al* (n 46 above) 17.

⁶⁸ As above.

⁶⁹ CDESCR (n 50 above) para 13.

⁷⁰ CDESCR (n 50 above) para 13.

⁷¹ CDESCR (n 50 above) para 9.

⁷² Article 11 (2). Own emphasis.

⁷³ DP Forsythe ‘Socioeconomic Human Rights: The United Nations, The United States, and Beyond’ (1982)4 *Human Rights Quarterly* 433.

⁷⁴ M Langford ‘Housing rights litigation: *Grootboom* and beyond’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-economic Rights in South Africa: Symbols Or Substance?* (2014) 188.

conservation and distribution.⁷⁵ Nonetheless, it should be acknowledged that increased production alone would not readily translate into a hunger and malnutrition free state.⁷⁶

3.2. Other right to food related human rights instruments

While the UDHR and the ICESCR serve as the direct guiding principles for the realisation of the right to food, other global documents have evolved to complement their provisions. One of such document is the Universal Declaration on the Eradication of Hunger and Malnutrition. This declaration was borne out of the 1974 World Food Conference and endorsed by the United Nations General Assembly resolution 3348.⁷⁷ The declaration was adopted to address the global food crisis, and was a plan for the collective determination of states to combat the issue of chronic hunger. Yet, this declaration has failed to guarantee food security either at the national or household levels.⁷⁸ One factor for this failure might be traced to the fact that the UN has no power to enforce such declarations.⁷⁹

Similarly, the human right to food has been read into international treaties of general scope, which does not explicitly guarantee this right. For instance, in its General Comment No 6, the Human Rights Committee (HRC) creatively interpreted article 6 (the right to life) of the ICCPR as encompassing the right to food.⁸⁰ The Committee specifically averred that the provision obliges state parties to ‘reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition’.⁸¹ This reading of the HRC clearly demonstrates how the right to food has evolved in international law and human rights discourse.⁸²

⁷⁵ S Leckie ‘Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights’ (1998) 20(1) *Human Rights Quarterly* 95.

⁷⁶ What is needed is the question of accessibility, people having the means to secure the needed food for their physical and mental development. For further reading on this issue, see M Gomez ‘Social economic rights and human rights commissions’ (1995) 17(1) *Human Rights Quarterly* 155.

⁷⁷ Report of the World Food Conference: Rome, 5-16 November 1974, Universal Declaration on the Eradication of Hunger and Malnutrition (New York: UN Publications, 1975) at 1, UN Doc. E/Conf. 65/20 endorsed in GA Res. 3348 (XXIX). The declaration was endorsed by UN General Assembly Resolution 3348 (XXIX), of 17 December 1974.

⁷⁸ Food security implies the availability and adequate access to food.

⁷⁹ M Ayalew ‘What is food security and famine and hunger’ (2012) Using Science Against Famine: Food Security, Famine Early Warning <<http://www.ilankelman.org/glanz/Glantz1997ScienceFamine.pdf#page=4>> (accessed 7 March 2016) 2

⁸⁰ HRC ‘General Comment 6’ para 5.

⁸¹ HRC (n 80 above).

⁸² G Kent *Freedom from want: the human rights to adequate food* (2005) 74.

Besides these texts, the right to food can be found in human rights instruments, which address specific needs of a group of vulnerable individuals. In the case of armed conflicts, the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War avers that the ‘basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies.’⁸³ Article 51 of the same document obliges state parties to ensure that prisoners are ‘granted suitable working conditions, especially as regards to food.’⁸⁴ Consequently, using hunger as a weapon of war is a crime under international humanitarian law.⁸⁵

The 1951 Convention Relating to the Status of Refugees equally affirms that ‘[w]here a rationing system exists [...] refugees shall be accorded the same treatment as nationals’ which includes access to food and nutrition.⁸⁶ In terms of prisoners, the 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served’.⁸⁷ In the case of women, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also affirms that ‘[...] State Parties shall ensure to women [...] adequate nutrition during pregnancy and lactation.’⁸⁸

Regarding children, the 1989 Convention on the Rights of the Child (CRC) obliges state parties to ‘combat disease and malnutrition [...] through, *inter alia* [...] the provision of adequate nutritious foods [...]’⁸⁹ Article 24(2)(e) of the CRC further obliges state parties to ensure that children and their parents are well informed about child nutrition.⁹⁰

Further, several other documents have been adopted at the UN level with the clear objective of setting out thresholds against which a breach or realisation of the socioeconomic right to food can be measured. For instance, the Rome Declaration on Food Security (Rome Declaration) and the World Food Summit Plan of Action (Plan of Action), both adopted at the 1996 World Food Summit in Rome, describe best policies and practices in respect of the

⁸³ Art 26.

⁸⁴ Own emphasis.

⁸⁵ L Collingham *Taste of War: World War II and the Battle for Food* (2012) 91.

⁸⁶ Art 20. South Africa became a party in 1996. See <http://www.unhcr.org/3b73b0d63.pdf> (accessed 10 August 2016).

⁸⁷ Rule 22(1).

⁸⁸ South Africa became a party in 1979.

⁸⁹ Art 27(3).

⁹⁰ Ratified by South Africa in 1995.

right to food.⁹¹ The Declaration specifically sets out the commitments of states to eradicate chronic hunger and malnutrition, while the Plan of Action underscores follow-up actions for individuals' states, international NGOs and the international community.⁹² Among the numerous texts of the Plan of Action is the need for the relevant actors at the UN level to take measures to interpret the meaning and content of the right to food.⁹³

It is important to highlight that the Rome Declaration and Plan of Action have triggered no less than two major initiatives that provide a clear understanding of this right.⁹⁴ First, following a 1997 expert consultation on food security, it was suggested that there is the need for the drafting of a General Comment on the right to food by the CESCR.⁹⁵ In 1999, the Committee fulfilled this obligation with the adoption of General Comment No 12.⁹⁶ Second, it has generated a coalition of international NGOs developing voluntary guidelines on the right to food.⁹⁷ Consequently, through its Inter-Governmental Working Group on the Right to Food (IGWG), the Food and Agriculture Organisation (FAO) in 2004 drafted Voluntary Guidelines on the Progressive Realisation of the Right to Food.⁹⁸ The Guidelines, which aim to combat undernourishment at the national level, was finally adopted by the 127th Session of the FAO Council in November 2004.⁹⁹ The Voluntary Guidelines recommend that:

States should consider adopting a holistic and comprehensive approach to hunger and poverty reduction. Such an approach entails, inter alia, direct and immediate measures to ensure access to adequate food as part of a social safety net; investment in productive activities and projects to improve the livelihoods of the poor and hungry in a sustainable manner.¹⁰⁰

⁹¹ See FAO 'World Food Summit: Rome Declaration on World Food Security' (1996) <http://www.fao.org/docrep/003/w3613e/w3613e00.htm> (accessed 06 March 2016).

⁹² On detailed discussion of these documents, see Eide (n 64 above) paras 31-43.

⁹³ Eide (n 64 above) para 33.

⁹⁴ PJ Ericksen, JS Ingram & DM Liverman 'Food security and global environmental change: emerging challenges' (2009) 12(4) *Environmental Science & Policy* 373.

⁹⁵ Ziegler *et al* (n 46 above) xviii.

⁹⁶ CESCR (n 50 above).

⁹⁷ This coalition includes the World Alliance on Nutrition and Human Rights <http://acronyms.thefreedictionary.com/World+Alliance+for+Nutrition+and+Human+Rights> (accessed 05 March 2016); and Food First Information and Action Network (FIAN) <http://www.fian.org/> (accessed 05 March 2016).

⁹⁸ FAO 'Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security' (2005) <http://www.fao.org/docrep/009/y7937e/y7937e00.htm> (accessed 06 March 2017).

⁹⁹ FAO (n 98 above).

¹⁰⁰ FAO (n 98 above) Guideline 2.4.

The provisions of the Guidelines largely can be interpreted as not only extending, but also deepening the understanding and actions needed to operationalise policies at the national level in order to realise the right to adequate food.¹⁰¹ According to Olivier De Schutter, these Guidelines have contributed to an increased integration of the right to adequate food in national constitutions.¹⁰²

Beyond the international arena, there are very few regional instruments, which explicitly provides for the right to food. The 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) under article 12(1) guarantees that ‘everyone has the right to *adequate nutrition* which guarantees the possibility of enjoying the highest level of physical, intellectual and emotional development’.¹⁰³ Also, the entire article 15 of the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) entrenches the right of African women to have adequate and nutritious food.¹⁰⁴ The Protocol specifically obliges state parties to take all necessary measures to ensure that they

- a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;
- b) establish adequate systems of supply and storage to ensure food security.¹⁰⁵

The 1990 African Charter on the Rights and Welfare of the Child (African Children’s Charter) on the other hand oblige state parties to provide adequate nutrition for children.¹⁰⁶ Other regional instrument, which guarantees the right of everyone to adequate standard of living including adequate food, is the 2004 Arab Charter of Human Rights under article 38.¹⁰⁷

The 1981 African Charter on Human and Peoples’ Rights (African Charter) does not explicitly provide for this right. Nonetheless, the African Commission on Human and

¹⁰¹ MD Anderson ‘Rights-based food systems and the goals of food systems reform’ (2008)25(4) *Agriculture and human values* 593.

¹⁰² O de Schutter ‘The right to adequate nutrition’ (2014) 57(2) *Development* 154.

¹⁰³ Own emphasis.

¹⁰⁴ www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (accessed 10 August 2016).

¹⁰⁵ Art 15.

¹⁰⁶ Art 14(2)(c). South Africa became a party in 2000.

¹⁰⁷ Arab Charter on Human Rights, available at <http://www.humanrights.ch/upload/pdf/091029_Arab_Charter_on_Human_Rights_2004.pdf> (accessed 2 August 2016).

Peoples' Rights (which is the monitoring body of the African Charter) in the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, interpreted the African Charter to integrate the right to food.¹⁰⁸ In this case, the government of Nigeria was directly involved in the production of oil through the Nigerian National Petroleum Company (NNPC) with majority shares in a company with Shell Development Corporation (SPDC).¹⁰⁹ With no regard for environment or health of local communities, the company exploited oil resulting in serious short- and long term health impacts (such as respiratory and gastrointestinal ailments, reproductive and neurological problems, an increased risk of cancers as well as skin infections) since air, soil and water became contaminated by avoidable spills.¹¹⁰ The Nigerian government facilitated and condoned these violations by placing the military and legal powers of the state at the disposal of the company.¹¹¹ The plight of the Ogoni people was further worsened when the state's security apparatus destroyed and burned livestock, food and villages in an attempt to quell violent protests by the Ogoni people.¹¹² The communication which alleged the death of many residents, also alleged violations of right to food and housing.¹¹³

The Commission intimated that the right to food is implicitly located within the rights to life,¹¹⁴ health¹¹⁵ and development.¹¹⁶ The African Commission held that the government had breached the right to food which is implicitly recognised in the African Charter.¹¹⁷ The Commission indicated that the right to food is inseparably tied to the rights to life and dignity of every human being, and is thus crucial for the fulfilment and enjoyment of other essential rights including the political participation, work, education and health.¹¹⁸

The right to food, according to the Commission obliges the government of Nigeria to safeguard and ensure citizens have adequate access to food by improving their existing food sources.¹¹⁹ Its minimum core bound the state to refrain from preventing people's efforts to

¹⁰⁸ (2001) AHRLR 60 (ACHPR 2001).

¹⁰⁹ *SERAC* (n 108 above) para 2.

¹¹⁰ *SERAC* (n 108 above) para 51.

¹¹¹ *SERAC* (n 108 above) para 7.

¹¹² *SERAC* (n 108 above) para 9.

¹¹³ *SERAC* (n 108 above) para 67.

¹¹⁴ Art 4 African Charter.

¹¹⁵ Art 16 African Charter.

¹¹⁶ Art 22 African Charter.

¹¹⁷ *SERAC* (n 108 above) para 57.

¹¹⁸ *SERAC* (n 108 above) para 65.

¹¹⁹ *SERAC* (n 108 above) para 65.

feed themselves, or allow (condone with) private parties to destroy or contaminate food sources.¹²⁰ The Commission, as a result, held that the government of Nigeria was laible for creating significant obstacles to efforts by the Ogoni people to feed themselves, allowing private oil companies to destroy food sources and for destroying food sources through its security apparatus. The Commission affirmed that state parties should, therefore, refrain from actions, which hinder peoples' access to food.¹²¹ In addition, states must safeguard individuals' access to food and nutrition from arbitrary interference by other actors, such as corporations.¹²²

Subsequently, the African Commission in 2010 adopted Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Guidelines) to provide practical recommendations to states for the protection and realisation of socioeconomic rights.¹²³ The Commission in the Guidelines averred that although the right to food is not expressly entrenched in the African Charter, it is an:

individual right that is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights that are also enshrined in the African Charter.¹²⁴

The Guidelines, thus, confirm that African states are obliged to develop national polices and action to ensure the availability, accessibility and adequacy, which includes '[a]ssist[ing] individuals to meet their duty to feed their dependent family members'.¹²⁵ The thesis now turns its attention to understand the meaning and legal application of the right to food.

¹²⁰ SERAC (n 108 above) para 57.

¹²¹ Paras 64-66.

¹²² SERAC paras 64-66.

¹²³ African Commission 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2010) <http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf> (accessed 10 August 2016).

¹²⁴ African Commission (n 115 above) 84.

¹²⁵ African Commission (n 115 above) 86(r).

4. Obligations of states in relation to right to food

Once serious chronic hunger exists, or a group of people become undernourished, one could easily conclude that the right to food has been breached because there is shortage of food.¹²⁶ The remedy would then be simply to produce or acquire more food from other countries.¹²⁷ Yet, one would also agree with Amartya Sen that people are not chronically hungry and malnourished simply because there is no food in their community, but instead hunger could easily take place in the land of plenty.¹²⁸ For this reason, realising the right to food is contingent on the existence of adequate supply of food and nutrition (availability and adequacy), as well as the ability of individuals to acquire that food (accessibility). These three elements of food security as discussed above impose an obligation on the state to take measures to ensure that people enjoy their freedom from hunger.

One must, therefore, ask to what extent does international human rights law oblige state parties to operationalise the right to food? The response to this overarching question was provided by the CESCR in its 1990 General Comment 3, *The nature of States parties' obligations*.¹²⁹ According to the Committee, states have the obligation to use 'all appropriate means, including particularly the adoption of legislative measures' and to the maximum of its available resources to progressively realise the rights.¹³⁰ For purposes of this chapter, the obligation of the state signifies that state must take all relevant measures to ensure that individuals have access to adequate food, which is culturally acceptable, safe and nutritious on a sustainable manner.

The General Comment No. 12 affirms that the right to food must be respected, protected and fulfilled.¹³¹ These three tenets have been cited in several international documents and, are by now familiar to most human rights scholars and activists. First, to *respect* the right to food, the state must refrain from actions, which may hinder people's access to sufficient food.¹³² The state must also refrain from placing undue burdens in the way individuals gain access to

¹²⁶ S Narula 'The Right to Food: Holding Global Actors Accountable under International Law' (2005) 44 *Columbia Journal of Transnational Law* 691.

¹²⁷ J Dreze & AK Sen *Hunger and public action* (1991) 20.

¹²⁸ A Sen *Poverty and famines: an essay on entitlement and deprivation* (1981) 1.

¹²⁹ CESCR 'General Comment 3' The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 (2003) para 14.

¹³⁰ CESCR (n 121 above) para 3.

¹³¹ CESCR (n 121 above) para 15.

¹³² Ziegler *et al* (n 46 above) 19.

food, and where such impediments are inevitable, the state should adopt adequate steps to forestall its impact. Second, to *protect* the right to food, the state must take the necessary measures to safeguard individuals existing access to food and nutrition.¹³³ The state also needs to safeguard the right of individual's access to food against the interference of third parties.¹³⁴ Third, to *fulfil* the right to food, the state must adopt steps to ensure that people whose access to food is inadequate, it enhances their access to adequate food.¹³⁵ Further, the state must ensure that those who presently lack access to adequate food can gain adequate access. The obligation to fulfil can further be dissected into two obligations. According to the CESCR the obligation to fulfil (provide), on the one hand encompasses the obligation of states to provide directly food or the means of acquiring to individuals who are unable to utilise existing opportunities to gain access to food.¹³⁶ On the other hand, the obligation to fulfil (facilitate), obliges the state to take steps to increase opportunities for self-sufficient individuals and households to gain access to sufficient food and nutrition, or to boost their current access.¹³⁷

Importantly, the human right to food does not oblige states to act in a uniform manner, especially in terms of adopting particular policies and programmes in attaining its realisation.¹³⁸ Thus, in view of the fact that the right to food will inevitably differ significantly from state to state, each state must simply adopt programmes it deems appropriate and will eventually lead to realising food security under circumstances prevalent in their respective countries.¹³⁹ Yet, such programmes should encompass all facets of the right to food as set out in the General Comment No. 12. Such measures should seek to:

- (i) provide food directly or the means to access food to those who are deprived;
- (ii) fulfil the right to food for vulnerable individuals even in cases where the state is confronted with severe economic set back;¹⁴⁰
- (iii) enhance social assistance programmes, or specifically food stamp to assist the poor gain access to food;

¹³³ Ziegler *et al* (n 46 above) 19.

¹³⁴ Eide (n 65 above) paras 52; sec 7(2) of 1996 Constitution of South Africa.

¹³⁵ Ziegler *et al* (n 46 above) 19.

¹³⁶ Ziegler *et al* (n 46 above) 20.

¹³⁷ Ziegler *et al* (n 46 above) 20.

¹³⁸ CESCR (n 50 above) para 21.

¹³⁹ Ziegler *et al* (n 46 above) 27.

¹⁴⁰ CESCR (n 50 above) para 28.

- (iv) prevent discrimination in accessing food;¹⁴¹
- (v) facilitate measures which enhance access to food, specifically through actual price control or subsidisation, market regulation, tax zero-rating of basic foodstuffs, and food price monitoring;
- (vi) monitor the food and nutritional condition in the state in order to influence policy development and operationlisation;
- (vii) enhance measures which ensure that food and nutritional standards are culturally acceptable, safe and adequate, especially through adequate regulation regarding the handling, toxicity and storage of foodstuffs;
- (viii) enhance the creation and maintenance of adequate supply of food, superficially through sustainable use and management of natural and other related resources for food production, food import and export planning, agricultural production, planning and subsidization.¹⁴²

Thus, for the human rights to food and nutrition to be achieved, food must be available and accessible for every individual, including future generations. Further, for states to achieve a realisation of the right to food, the CESCR recommends that there is the need for the adoption of a ‘national strategy’¹⁴³ entrenched preferably in a ‘framework law’.¹⁴⁴ Such a national strategy should be developed in a systematic manner and encompass steps addressing all the aforementioned right to food issues. The development of the national strategy should ensure accountability, participatory process, and transparency in its operationlisation.¹⁴⁵ The strategy should also ensure proper coordination of mandates and roles between all levels and sectors of government in the operationlisation of the right to food.¹⁴⁶

Akin to several other socioeconomic rights guaranteed under the ICESCR, the obligation of the state to realise the right to adequate food is contingent on the provision of ‘progressive realisation’ and subject to the ‘maximum of available resources’.¹⁴⁷ Undoubtedly, these two

¹⁴¹ CESCR (n 50 above) para 26.

¹⁴² See CESCR (n 50 above) paras 28-35.

¹⁴³ CESCR (n 50 above) para 21.

¹⁴⁴ CESCR (n 50 above) para 29.

¹⁴⁵ CESCR (n 50 above) para 23-4.

¹⁴⁶ CESCR (n 50 above) para 22.

¹⁴⁷ K Roth ‘Defending economic, social and cultural rights: Practical issues faced by an international human rights organization’ (2004) 26(1) *Human Rights Quarterly* 68.

conditional clauses on the obligation imposed by the right are designed to circumvent the absurdity of affirming a legal right, which could not be realised overnight.¹⁴⁸ In other words, the two conditions avoid the assertion that the right to food and nutrition imposes an obligation on the state to provide food to everyone even when it is manifestly not able to comply.¹⁴⁹

Yet, in providing a broad interpretation to article 11 of the ICESCR, the Committee distinguishes two types of rights to food: (i) inadequate access to food; and (ii) full-blown hunger.¹⁵⁰ In terms of the latter, the Committee asserts that:

‘[v]iolations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food [...] the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.’¹⁵¹

This assertion undeniably denotes that the obligation to mitigate chronic hunger and malnutrition is a topmost priority, and failure to comply with article 11 of the ICESCR will attract heightened scrutiny from the Committee.¹⁵² Thus, the vast number of South Africans currently living with chronic hunger is in gross violation of the provisions of the Covenant (which has recently been ratified by South Africa in January 2015) and the African Commission’s Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights.¹⁵³ As asserted by the African Commission, a violation of the right to food is, by extension, a violation of other socioeconomic rights such as health and life, since the right to food is inextricably linked to other rights.

¹⁴⁸ Mechlem (n 17 above) 634.

¹⁴⁹ Mechlem (n 17 above) 641.

¹⁵⁰ Dreze & Sen (n 119 above) 35.

¹⁵¹ CESCR (n 53 above) para 17.

¹⁵² AR Chapman ‘A violations approach for monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996)18(1) *Human Rights Quarterly* 34.

¹⁵³ ESCR-Net ‘The government of South Africa ratifies the ICESCR’ 20 January 2015, available at <<https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>> (accessed 22 June 2017).

5. The right to food in South Africa

In respect of the inclusion of socioeconomic rights in the 1996 South African Constitution, while there was a considerable measurement of agreement on how to deal with this issue along the way, there was much disagreement along the way. While one side campaigned against and other side argued for setting out provisions granting economic and social rights in the instrument, with a series of options in between.¹⁵⁴

At both extremes, the most persuasive parts of the debate concerned the impact which the granting of economic and social rights could have on the Constitution's legitimacy.¹⁵⁵ Those who campaigned for the inclusion of significant provisions granting economic and social rights was that it will make little sense for citizens to be informed that their civil and political rights will be safeguarded, if they continue to experience social exploitation and economic deprivation.¹⁵⁶ To someone who is dying of hunger, freedom of expression means little. It was said, the legitimacy of the Constitution would suffer if socioeconomic rights were not given meaningful guarantees by the Constitution since citizens would be bound to say it does not address their most basic needs.¹⁵⁷ According to Heyns and Brand, this 'raised the spectre of angry and disillusioned people holding up the Constitution and asking whether this is what the struggle was all about.'¹⁵⁸

The credibility of the Constitution, to those who campaigned against a significant role for these rights, would be equally erosive if it guarantees too much promises.¹⁵⁹ The credibility of the Constitution would be lost if it tells citizens they are entitled to some basic (economic and social rights), and due to lack of resources, the state cannot deliver these rights. Thus, if economic and social rights are grouped under the Bill of Rights (together with civil and political rights), the entire Bill of Rights would be discredited if it becomes obvious that the state is unable to meet its obligations created by the Constitution due to lack of resources. The hunting picture of people saying the struggle has been betrayed would appear, if civil and

¹⁵⁴ S Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359

¹⁵⁵ P De Vos 'Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67.

¹⁵⁶ De Vos (n 155 above).

¹⁵⁷ De Vos (n 155 above) 68.

¹⁵⁸ C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) *Law, Democracy and Development* 154.

¹⁵⁹ Heyns & Brand (n 158 above).

political rights go down with economic and social rights due to state's inability to fulfill these rights.¹⁶⁰

The various alternatives available to address this disagreement were: (i) not making any reference to socioeconomic rights at all; (ii) merely setting them out as non-justiciable principles of state policy; (iii) including economic and social rights in the Bill of Rights as justiciable rights, but subjecting them to special qualifications (many alternatives were asserted); or (iv) the full recognition of economic and social rights as justiciable rights without any special qualifications. The issue of possible inclusion of economic and social rights in the 1996 Constitution was left for the fully representative Constitutional Assembly (responsible for drafting the 'final' Constitution) to decide.¹⁶¹

The Constitutional Assembly, against this background struck the following balance in terms of economic and social rights.¹⁶² It was agreed that economic and social rights would be recognised at the same level as civil and political rights, and provided for in the Bill of Rights.¹⁶³ Nonetheless, in terms of obligations placed on the state, most aspects of these rights would be subject to extensive internal limitations, while some would not be subjected to special qualifications.¹⁶⁴

By recognizing a broad spectrum of economic/social rights along civil/political rights, the Constitution marks a bold commitment to making this aspiration achievable.¹⁶⁵ As former president, Nelson Mandela mooted in explaining the inclusion of freedom from hunger in the Constitution:

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 dehumanise 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.

¹⁶⁰ Heyns & Brand (n 158 above).

¹⁶¹ De Vos (n 155 above).

¹⁶² Heyns & Brand (n 158 above) 155.

¹⁶³ Heyns & Brand (n 158 above) 155.

¹⁶⁴ Heyns & Brand (n 158 above) 155.

¹⁶⁵ M Pieterse 'Eating socioeconomic rights: the usefulness of rights talk in alleviating social hardship revisited' (2007) 29(3) *Human Rights Quarterly* 798.

We must provide for all the fundamental rights and freedoms associated with a democratic society.¹⁶⁶

Nonetheless, this aspiration has remained a pipedream to those who continue to be confronted with prevalent food insecurity, as well as poverty.¹⁶⁷ The state's efforts to combat the endemic chronic hunger and malnutrition have been mainly through policy actions. Several laws have also been enacted to advance the right to food from different government departments.¹⁶⁸ Even though some of these policies and measures seem promising, they have woefully failed to address the issue at hand effectively.¹⁶⁹ One reason for this failure is that these policies have not only been properly enforced, but are also fragmented and poorly coordinated. This 'schizophrenia' is exacerbated by the lack of (or poor) communication between relevant governments agencies mandated to advance this right.¹⁷⁰ The next section will highlight this constraint.

5.1. Constitutional obligations

The notion of right to food as elaborated in this chapter is guaranteed in three distinct provisions with three distinct constructions in the 1996 Constitution of South Africa. The overarching provision is section 27(1)(b) which guarantees that every individual has the right to have access to adequate food. Section 28(1)(c) equally entrenches the right to sufficient food by affirming that children have the right to basic nutrition. Finally, the right of detained persons to nutrition is further affirmed in section 35(2)(e), where detained persons are entitled to, amongst others to provision of adequate nutrition at the expense of the state.

In the Constitution, these three food and nutrition-related provisions are guaranteed along the same lines as all other economic and social rights. In terms of section 7(2) of the Constitution, all the three provisions require that the state 'respect, protect, promote and

¹⁶⁶ NR Mandela 'Address: On the occasion of the ANC's Bill of Rights conference' in A Bill of Rights for a Democratic South Africa: Papers and Report of a Conference Convened by the ANC Constitutional Committee (May 1991) 12.

¹⁶⁷ JC Mubangizi & BC Mubangizi 'Poverty, human rights law and socio-economic realities in South Africa' (2005) 22(2) *Development Southern Africa* 279.

¹⁶⁸ Some of these laws include: Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972; Health Act 63 of 1977; Agricultural Products Standards Act 119 of 1990; Meat Safety Act 40 of 2000; The International Health Regulations Act 28 of 1974; Trade Metrology Act 77 of 1973; Liquor Products Act, 60 of 1989; and Genetically Modified Organisms Act 25 of 1997.

¹⁶⁹ NM Dodd 'Household hunger, standard of living and satisfaction with life in Alice, South Africa' (2016) 26(3) *Journal of Psychology in Africa* 287; CM Walsh & FC Van Rooyen 'Household Food Security and Hunger in Rural and Urban Communities in the Free State Province, South Africa' (2015) 54(2) *Ecology of food and nutrition* 119.

¹⁷⁰ G Davie *Poverty Knowledge in South Africa* (2015) 19; J Seekings & N Nattrass *Policy, Politics and Poverty in South Africa* (2015) 52.

fulfill' the rights to food.¹⁷¹ Akin to the interpretation and application of international human rights law, this symbolises that the state must:

- (i) refrain from actions which arbitrary interferes with the enjoyment of these rights;
- (ii) take steps which safeguards the enjoyment of this right from third parties (corporate bodies); and
- (iii) adopt measures to extend the availability and access of food to every person.¹⁷²

Yet, in terms of these three related food and nutrition provisions, some of these obligations vary. In terms of the obligations to protect, to promote and to fulfill under section 7(2) of the Constitution, section 27(1)(b) professes the *conditional* right to adequate food for every individual. The obligation of the state to adopt measures to comply with section 27(1)(b) in terms of protecting, promoting and fulfilling the right to food is clearly defined in a subsequent provision of the Constitution which qualifies the obligation of the state in this regard. Importantly, section 27(2) of the Constitution merely obliges the state to take reasonable measures, within available resources, to achieve the progressive realisation of the right to adequate food and nutrition of everyone.¹⁷³

According to the Constitutional Court, this qualification as demonstrated in several socioeconomic rights cases means that the state's steps to realise economic and social rights can be subjected to a test of reasonableness.¹⁷⁴ Even though as a rule certain steps cannot be suggested to the state, it must undoubtedly adopt measures to realise this right.¹⁷⁵ Such measures should nonetheless be reasonable and capable of giving effect to the realisation of the particular socioeconomic right in question in due course, and, certainly, dependent on the availability of resources at its end.¹⁷⁶ Depending on the conditions of each case, the Court applied this test with different degrees of scrutiny by testing the conduct of the state against

¹⁷¹ Ziegler *et al* (n 46 above) 19.

¹⁷² For an in-depth discussion of these benchmarks, see Ziegler *et al* (n 46 above) 21.

¹⁷³ Ziegler *et al* (n 46 above) 21.

¹⁷⁴ *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169.(CC), para 77; *Minister of Health and Others v Treatment Action Campaign and Others* (2002) AHRLR 189 (SACC 2002); *Khosa & Others v Minister of Social Development & Others* 2004(6) BCLR 569 (CC). For a detailed discussion on reasonableness, see D Bilchitz 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) *South African Journal on Human Rights* 19.

¹⁷⁵ L Chenwi & R Hardowar 'Promoting Socio-economic Rights in South Africa through the Ratification and Implementation of the ICESCR and its Optional Protocol (2010) 11(1) *ESR Review* 7.

¹⁷⁶ *Grootboom* (n 174 above) para 41; *TAC* (n 174 above) para 38; *Khosa* (n 174 above) para 43.

benchmarks stretching from full-blown proportionality¹⁷⁷ to basic rationality and good faith.¹⁷⁸

The notion of proportionality means that the public interest violated by the state is weighed up against the detrimental effect the denial has had on the enjoyment of that right and the litigants in question. For instance, the Constitutional Court assessed in *Khosa & Others v Minister of Social Development & Others (Khosa)*¹⁷⁹ whether the available resources are able to accomplish the objectives of the basic right and interests of the litigants. By reading section 27(1)(c) of the Constitution, the Court affirmed that the reason for the exclusion of permanent residents from the benefits of social assistance were unreasonable because the reason for the exclusion,¹⁸⁰ could be attained through less restrictive measures. It concluded that the harmful impact upon the life and dignity (that a limitation of access to social assistance to) of all permanent residents is far greater than the immigration and financial considerations of the state.¹⁸¹ The Court on the other hand applied the rule of rationality and good faith in the *Soobramoney v Minister of Health, KwaZulu-Natal (Soobramoney)* case.¹⁸² Here, it held that in terms of a reasonable policy, the refusal of life-prolonging renal dialysis treatment to a patient by a state hospital was made rationally and in good faith.¹⁸³

By contrast, the triple obligations to protect, promote and fulfill the rights to food and nutrition of children and detainees should not be limited on grounds of inadequate resources. This creates the impression that, unlike the right of everyone to food under section 27(1)(b),¹⁸⁴ the wording of sections 28(1)(c) and 35(2)(e) imposes a more direct obligation on the state to ensure that children and detainees have adequate access to food and nutrition. Even though it has not as yet clarified what the practical implications are, the Constitutional Court in the *Government of the Republic of South Africa & Others v Grootboom & Others (Grootboom)*¹⁸⁵ and *Minister of Health and Others v Treatment Action Campaign and Others*

¹⁷⁷ *Khosa* (n 174 above) para 65.

¹⁷⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) paras 27 & 29.

¹⁷⁹ 2004(6) BCLR 569 (CC).

¹⁸⁰ To forestall immigrants from becoming a burden on the state; see *Khosa* (n 174 above) para 65.

¹⁸¹ Para 82.

¹⁸² *Soobramoney* (n 178 above).

¹⁸³ *Soobramoney* (n 178 above) paras 27 & 29.

¹⁸⁴ Sec 27(2) qualifies the right to adequate food by avowing that '[h]e state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.' Own emphasis.

¹⁸⁵ *Grootboom* (n 174 above) para 77.

(TAC)¹⁸⁶ cases have explained the theoretical meaning of the nutritional rights in the case of children. These cases demonstrate that the state's obligation to provide (food and) nutritional requirements of children and detainees would be subjected to a higher threshold of scrutiny than its measures to do same in terms of section 27(1)(c) – the right of everyone. As specifically set out by the overarching claw-back clause under section 36(1), the proportionality test will apply in circumstances where it is found that the fulfillment of these basic rights has failed. It is imperative to state that, in situations of endemic chronic hunger, it will be more cumbersome for the state to justify its reason for failing to take adequate measures to promote the rights to food and nutrition of children and prisoners, than a failure in terms of section 27(1)(c).

5.2. Defining the content of the right to food in South Africa

It is imperative to put into perspective that the legal right to food and nutrition is interdependent on, or inextricably linked to, other basic rights.¹⁸⁷ Realizing the right to food and nutrition is dependent on, and enhances the realisation of other core rights. In contrast, other socioeconomic rights can be used as a tool for the realisation of the constitutional right to food and nutrition. In this respect the right to have access to water under section 27(1)(b) proves to be the most obvious. Access to water is not only relevant for household cultivating crops for own use, but water is also essential for survival.

Other socioeconomic rights are essential in the sense that they create a conducive environment for the cultivation of crops for own use. The most recognizable rights, which come to mind, are the environmental rights in section 24, access to land and tenure security in section 25,¹⁸⁸ and the prohibition on arbitrary eviction under section 26. Besides these, other rights are equally significant to the enjoyment of the rights to food and nutrition. These rights do not simply create entitlements to an income with which to acquire food, but they also enhance the freedom to earn an income to obtain sufficient food or nutrients.¹⁸⁹ Such provisions stretch from freedom of choice of trade, occupation and profession in section 22,

¹⁸⁶ TAC (n 174 above) para 79.

¹⁸⁷ S Leckie 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights (1998) 20(1) *Human Rights Quarterly* 84.

¹⁸⁸ According to sec 25(5) the state is obliged to take steps to enhance conditions which will enable people to access land on an equitable basis. Sec 25(6) also avers that an individual who as a result of past racially discriminatory practices their tenure of land is legally insecure, are entitled to tenure which is legally secure or to comparable redress.

¹⁸⁹ MD Anderson 'Rights-based food systems and the goals of food systems reform' (2008) 25(4) *Agriculture and Human Values* 593.

the right to fair labour practices in section 23, as well as the right of everyone to have access to social security in section 27(1)(c).¹⁹⁰

Still, section 27(1)(a) which deals with the rights to health and section 29 which guarantees the right to education are specifically relevant to the realisation of the right to food and nutrition. The interconnection between the right to food and health care is fundamental. One's nutritional status is a core determinant of one's health, and health condition determines nutritional requirements. Also, the right to equality in section 9, right to human dignity in section 10, right to life in section 11, and section 33 which provides for administrative justice rights are all fundamental instruments through which the right to food and nutrition can be guaranteed.

Additionally, the importance of education to the fulfillment of the right to food is significant for boosting the capacity of individuals to acquire the means of accessing food and nutrition. The constitutional right to food is also a prerequisite for the effective realisation of the right to education. For instance, one's capacity to participate effectively in education is dependent on the person's nutritional standard.¹⁹¹

In summary, the constitutional right to food and nutrition are inherent in other rights.¹⁹² The actions adopted to realise this right are intrinsically linked with the actions to fulfill other rights, and as its infringement is frequently tied to breaching a broad spectrum of rights.

5.3. Obligations of the South African government

Section 7(2) of the 1996 Constitution provides a valuable guide in which to describe the substantive legal obligations that the rights to food and nutrition place on the state and its apparatus. This provision superficially entrenches the three cardinal obligations of the state *to respect, to protect and to fulfill* the constitutional guarantees.

¹⁹⁰ According to Hendriks, most people in South Africa unlike other African countries acquire food through exchange instead of production. See S Hendriks 'South Africa's National Development Plan and New Growth Path: reflections on policy contradictions and implications for food security' (2013) 52 (3) *Agrekon* 8.

¹⁹¹ K Rendall-Mkosi, F Wenhold & NB Sibanda 'Case study of the national school nutrition programme in South Africa' (2013) Pretoria: PCD, NEPAD & DOBE iv; D Labadarios, ZJR Mchiza, NP Steyn, G Gericke, EMW Maunder, YD Davids & WA Parker 'Food security in South Africa: a review of national surveys' (2011) 89(12) *Bulletin of the World Health Organization* 898.

¹⁹² MD Anderson 'Rights-based food systems and the goals of food systems reform' (2008) 25(4) *Agriculture and Human Values* 594.

5.3.1. The obligation to respect

The obligation of the state to respect the right to food obliges the state to:

- (i) desist from hindering individuals existing access to sufficient food;
- (ii) desist from creating impediments in the way of individuals newly acquiring access to food or improve their existing access to food;
- (iii) where such impediments are inevitable, adopt measures to avert its impact.

The next section provides an in-depth analysis of these state obligations.

5.3.1.1. To desist from hindering individuals existing access to sufficient food

This first part of the obligation to respect the constitutional right to food is more commonly, breached indirectly. For example, the state often interferes with the means or entitlement that individuals use to produce or acquire food, and thereby making it difficult or practically impossible for individuals to continue producing food. In this respect, the segregationist ‘homeland’ policies of apartheid South Africa where large numbers of blacks were forcibly removed from and dispossessed of their productive agricultural land provides a particularly good example.¹⁹³ In this light, people who used to be food sufficient were dumped in overcrowded ‘native reserves’ which were often unsuitable for subsistence farming and general agricultural purposes.¹⁹⁴ Black Africans were, thus, subjected to undernourishment.¹⁹⁵

Repetition of this sort of extensive interference by the state in people’s access to land and other agricultural resources with which to cultivate crops is unlikely. This conclusion is, reached on the basis that the legislation, which triggered these dispossessions, has been nullified and new legislation and mechanisms have been established to forestall such undesirable repetition.¹⁹⁶ Even though most of these instruments and institutions are not directly directed at the right to food (but rather on safeguarding people’s rights to security of

¹⁹³ L Ntsebeza & R Hall *The land question in South Africa: The challenge of transformation and redistribution* (2007) 6.

¹⁹⁴ Ntsebeza & Hall (n 193 above).

¹⁹⁵ For a thorough discussion of this historic case study of ‘food war’ see C van Onselen *The seed is mine: The life of Kas Maine, a South African sharecropper, 1894-1985* (1996) 17.

¹⁹⁶ L Royston ‘Security of urban tenure in South Africa: Overview of policy and practice’ in *Holding their Ground. Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165.

tenure, housing or property rights) they can be (and in some instances have already been) interpreted to encompass the protection of the right to food and nutrition.¹⁹⁷

More importantly, under South Africa's new constitutional dispensation, dispossession of land by the state can simply arise through regular expropriation for public use, and after the payment of 'just and equitable compensation' as set out under section 25 of the Constitution.¹⁹⁸ Prior to such initiative, all relevant circumstances such as the amount, manner of payment and time have to be agreed upon by the landowner and the state.¹⁹⁹ However, an argument can be advanced against such dispossession (in instances where a dispossession of fertile agricultural land is looming) that the land is being used to realise the legal right to food and nutrition. Arguments of this nature could be exceptionally significant in determining the amount of adequate compensation.

In terms of forced eviction of informal settlers on state land, there has been a raft of new legislation, which seeks to regulate and enhance security of tenure of persons who enjoy informal land rights. Three such fundamental legal instruments in this context are the 1996 Labour Tenants Act 3 (LTA),²⁰⁰ the 1998 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 (PIE)²⁰¹ and the 1997 Extension of Security of Tenure Act 62 (ESTA).²⁰²

Besides seeking to safeguard individuals' rights of access to housing, this legislation also aim at enhancing individuals' right to utilize land to generate income through the production of

¹⁹⁷ TA Benjaminsen, S Holden, C Lund & E Sjaastad 'Formalisation of land rights: Some empirical evidence from Mali, Niger and South Africa' (2009) 26(1) *Land use policy* 28.

¹⁹⁸ The Expropriation Act 63 of 1975 equally controls expropriation. For a detailed discussion of 'just and equitable compensation', see in *reKranspoort Community* 2000 2 SA 124 (LCC). In this case, following the dispossession of the land belonging to the Kranspoort residents, the state paid them only compensation for its loss of land rights at the time of dispossession. The Court held that the claimant community was arbitrarily disposed of their land without just and equitable compensation. Specifically, the community's loss of 'beneficial occupation' which encompasses their entitlements to food (such as cultivation and grazing rights), were not adequately compensated by the state.

¹⁹⁹ Royston (n 196 above) 167.

²⁰⁰ <http://www.justice.gov.za/lcc/docs/1996-003.pdf> (accessed 06 March 2016).

²⁰¹ https://www.google.com.gh/search?q=1998+Prevention+of+Illegal+Eviction+from+and+Unlawful+Occupation+of+Land+Act+19&aqs=chrome..69i57.62006j0j1&sourceid=chrome&es_sm=93&ie=UTF-8 (accessed 06 March 2016).

²⁰² <http://www.justice.gov.za/lcc/docs/1997-062.pdf> (accessed 06 March 2016). LTA applies to rural land used and inhabited in accordance with labour tenancy agreement with private landowners. PIE is applicable to all land, which encompasses state-owned land. ESTA on the other hand generally is applicable only to rural land inhabited by individuals with the explicit or tacit consent of the person in charge or the owner. All these laws are fundamental in giving effect to the right to food considering that they play an instrumental role in regulating private evictions.

food.²⁰³ These statutes have, therefore, instituted stringent measures, which seek to safeguard the informal rights of occupants by making eviction from land in some cases more cumbersome than it would usually be.²⁰⁴ For instance, both the PIE and ESTA require that before granting an eviction order, the Court should consider all the fundamental circumstances including whether an eviction would be just and equitable.²⁰⁵ More importantly, while these Acts do not explicitly provide for this, in cases where the land in question is used for agricultural purposes, the court when exercising its discretionary powers is obliged by the Acts to take into consideration the degree to which giving an order for eviction would impact on the legal right to food of the evictee.²⁰⁶ In this manner, the obligation of the state to respect existing exercise of the constitutional right to food and nutrition is operationalised.

The rights to food and nutrition of individuals were further, curtailed in means that are more devious during apartheid South Africa than merely through eviction from or dispossession of land. A typical case in point was the introduction of the regulation on the fishing industry, which prohibited the operation of previously large-scale subsistence fishing.²⁰⁷ For black subsistence fishers to operate legally, they had to apply and secure commercial or recreational permits, of which both options were out of their reach.²⁰⁸ Black fishers had to conduct their operations illicitly and for that reason, they could not depend on the law to safeguard their fishing occupation against arbitrary interference.²⁰⁹

Also, the statutory prohibition imposed on the practice of share-cropping compromised black farmer's access to food.²¹⁰ This was a system where white landowners permitted black African farmers to farm on a portion of their land, and in return, split the resultant yields.²¹¹ The prohibition had a very serious impact on the black (property-less) farmers, especially in

²⁰³ Royston (n 196 above) 170.

²⁰⁴ B Cousins, T Cousins, D Hornby, R Kingwill, L Royston & W Smit 'Will formalising property rights reduce poverty in South Africa's second economy: Questioning the mythologies of Hernando de Soto' (2005) *Plaas Policy Brief* 18.

²⁰⁵ PIE Secs 4(6) & (7), 5(1)(b) and 6(1) & (3); ESTA secs 8(1) & 11(1).

²⁰⁶ Cousins *et al* (n 204 above) 20-21.

²⁰⁷ E Witbool 'Subsistence fishing in South Africa: implementation of the Marine Living Resources Act' (2002) 17 *International Journal of Marine and Coastal Law* 431.

²⁰⁸ See J Sunde 'On the brink' (2003) 12 *SPC Women in fisheries Information Bulletin* 30.

²⁰⁹ Witbool (n 207 above) 432.

²¹⁰ B Worsfold "'Eurocentrism in hybridity: a critique of Charles van Onselen's' The Seed is Mine: the life of Kas Maine, a South African Sharecropper 1894-1985' (2000)(2) *Journal of English Studies* 172.

²¹¹ CJ Lee & C Van Onselen *The Seed Is Mine: The Life of Kas Maine, A South African Sharecropper, 1894-1985* (1999) 132.

cases where white (propertied) farmers reneged on sharecropping contracts.²¹² In this case, the former could not (as they could previously have) invoke the law to enforce the terms of the contract.²¹³

This continuous breach of the right to food and nutrition during the apartheid regime has triggered adequate safeguards for this right in democratic South Africa. For example, through the Individual Transferable Quotas (ITQ) system entrenched in the 1998 Marine Living Resources Act 18 (MLRA), the state seeks to regularize the position of subsistence fishers by creating a system of licensing that involves a classification for subsistence fishers.²¹⁴ Yet, irrespective of its instructive objectives, the operationalisation of the ITQ has been saddled with several impediments. These constraints have further militated against the efforts by some subsistence fishers to access food from the sea. Two of such limitations are worth citing: First, due to administrative backlogs, after the initial provision of permits for subsistence fishers, the yearly allocation of permits or quotas to these fishers has been postponed several times which has negatively impacted on fishers access to food.²¹⁵ Second, individuals who have been subsistence fishers for decades have been incapable to acquire quota access. Reasons for this set back may be tied to several factors including:

- (i) the complex procedure and the relatively high costs involved in the application process;
- (ii) government's tendency to favor access for larger commercial enterprises;
- (iii) influence peddling in the award of quotas.²¹⁶

Arguably, this situation can likewise, be asserted as a *prima facie* contravention of the obligation to respect the constitutional right to food and nutrition, which the state would have to prove otherwise.

²¹² Ntsebeza & Hall (n 193 above) 6.

²¹³ For a thorough description of sharecropping practice in the apartheid era, see van Onselen (n 197 above).

²¹⁴ A Sundström 'Corruption and regulatory compliance: Experimental findings from South African small-scale fisheries' (2012) 36(6) *Marine Policy* 1256.

²¹⁵ TJ Stewart, A Joubert & R Janssen 'MCDA framework for fishing rights allocation in South Africa' (2010) 19(3) *Group Decision and Negotiation* 248.

²¹⁶ JR McCafferty, ER Ellender, OLF Weyl & PJ Britz 'The use of water resources for inland fisheries in South Africa' (2012) 38(2) *Water SA* 327.

5.3.1.2. Forestalling the effect of interferences

Very often, it seems idealistic to assert that the obligation of the state to respect the right to food proscribes it from interfering in existing access to food. In contrast, it is relevant for the state to interfere in the means or entitlements that individuals possess towards their right to food. Such interference often assists the state in fulfilling other constitutional obligations. The obligation to respect in such instances obliges the state to take measures to avert the impact of the interference in the exercise of the legal right to food and nutrition.

The aforementioned security of tenure statutes (LTA, PIE and ESTA) provide a clear indication of how this legal obligation of the state has been transformed into a sort of legal entitlement for land occupiers. In some cases, the statutes oblige the courts to take into consideration the extent to which evictees can have access to suitable alternative land prior to granting an eviction order.²¹⁷ Then again, where such an alternative land is lacking, an eviction order can be declined.²¹⁸ A suitable alternative land may, be defined as a piece of land that is appropriate and fulfills the residential and agricultural needs of the inhabitants.²¹⁹ Against this backdrop, the statutes impose an obligation on the state (particularly where it is inevitable to interfering with individual's basic access to food and nutrition) to reduce the rate of interference by ensuring other approaches to access food.

5.3.1.3. Eliminating barriers in the path of accessing food

A contravention of the obligation to respect the constitutional right to food is similarly triggered when the state adopts measures, which fails to enhance people's existing access to food, or makes it impossible or cumbersome for individuals to acquire sufficient food. Similar to the constraints subsistence fishers are facing in section 5.3.1.1 above, this obligation is demonstrated in the case of *Mashava v The President of the Republic of South Africa*,²²⁰ where the Constitutional Court nullified a presidential proclamation. This proclamation (1996 Proclamation R7),²²¹ specifically allocated the operationalisation of the 1992 Social Assistance Act 59 (SAA) to provincial governments.²²² In this case, a permanently disabled indigent, had submitted an application in October 2000 to the Limpopo provincial Department of Health and Welfare for a disability grant. He was informed, after

²¹⁷ ESTA secs 8(1) & 11(1); PIE secs 5(1)(b).

²¹⁸ See PIE sec 6(3)(b); ESTA secs 9(3)(a), 10(2) & (3) & 11(3).

²¹⁹ Suitable alternative accommodation is further explained in sec 1 of ESTA.

²²⁰ [2004] 12 BCLR 1243 (CC).

²²¹ For a detail outline of the statute, see www.saflii.org/za/cases/ZACC/2004/6.rtf (accessed 06 March 2016).

²²² http://www.gov.za/sites/www.gov.za/files/a59_1992.pdf (accessed 06 March 2016).

approximately four months that his application had been successful and he could start accessing the grant from the Department's finance office. Yet, he was subsequently, denied this grant for several months until he instituted a legal action against the Department. He later received his first grant on 25 January 2002 without the full amount of outstanding back pay.²²³ The claimant averred that if the SAA was being operationalised from the national level, he would have received his grant within a reasonable time. He further avowed that unlike the national level, the administration of the grant at the provincial level is saddled with incapacity, inadequate resources as well as inefficiency.²²⁴

Considering that the administrative incapability hindered the payment of Mr Mashava's disability grant and thereby depriving him and his dependents their sole entitlement to access food, the Court affirmed that the state must remove all forms of impediments while fulfilling its obligation to respect the right to social security. Undoubtedly, there is a direct link between social assistance grants and access to food, especially for the rural poor. Therefore, a delay or denial of one's access to social assistance directly affects one's 'daily sustenance and well-being', particularly her right to food.²²⁵

5.3.2. The obligation to protect the right to food

The obligation to protect the right to food as set out under section 7(2) of the 1996 Constitution obliges the state to safeguard individuals right of access to food against third parties.²²⁶ Consequently, the state has to adopt policies, which regulates the activities of private actors to ensure that food prices are reasonable to meet the needs of the poor.²²⁷ The next two sections unpacks the measures to be adopted by the state to protect individual's right to food.

5.3.2.1. Executive and legislative measures

The simple approach through which the state can fulfill its obligation to safeguard the right to food and nutrition is for the various spheres of government to adopt administrative/executive decisions and other related legislation, which regulates the ways in which third parties engage

²²³ *Mashava v The President of the Republic of South Africa* 2004 12 BCLR 1243 (CC) para 9.

²²⁴ Para 10.

²²⁵ Para 9.

²²⁶ S Liebenberg 'The right to social assistance: the implications of *Grootboom* for policy reform in South Africa' (2001) 17(2) *South African Journal on Human Rights* 233-4.

²²⁷ Liebenberg (n 226 above).

in food production, preservation, storage and transfer.²²⁸ The primary objective should be for the state to standardize these undertakings in such a manner that, in balance with other essential legal rights including equality and freedom, the right of individuals to food and nutrition is enhanced.²²⁹ Price regulation and the establishment of the Food Pricing Monitoring Committee in 2003 serves as the classic example of such measures, which often comes to mind.²³⁰ In this circumstance, the state ensures that the price of basic food stuffs remain reasonably affordable by either introducing mechanisms to ensure price stability or setting a threshold that may be charged by both private producers and retailers.²³¹ Other mechanisms to introduce or maintain prices of foodstuffs include:

- (i) the establishment of accurate systems of crop estimate;
- (ii) direct interventions in the food trade sector, which includes obliging grain traders to report regularly on realised and planned imports;
- (iii) Stock-piling of food reserves.²³²

In the South African context, the state used to control and regulate agriculture and food markets for about six decades before the country's transition into democracy.²³³ On behalf of the state, several parastatals performed a number of functions including issuing of licenses, permits, price control and import control.²³⁴ The state's food price regulation or price setting process for food products (from the farm gate to the retailer) played a key role in reducing corruption in the price setting process and even the possibility of market manipulation by retailers.²³⁵ Yet, in the mid-1990s, South Africa liberalized its agricultural and food market, with limited regulation over the behavior of retailers, farmers, food companies and traders in the food value chain.²³⁶ With the era of controlled food marketing coming to an end and the spirit of liberal capitalism in full operation, the poor have been at the receiving end of high

²²⁸ Third parties here refers to private entities.

²²⁹ Hendriks (n 190 above).

²³⁰ National Agricultural Marketing Council & DAFF 'The South African food cost review: 2007' (2007) i.

²³¹ Hendriks (n 190 above) 5.

²³² Food Pricing Monitoring Committee Final Report (2003) 31.

²³³ J Kirsten 'The political economy of food price policy in South Africa' (2012) <<http://www.trademarksa.org/news/kirsten-political-economy-food-price-policy-south-africa>> (accessed 12 April 2014).

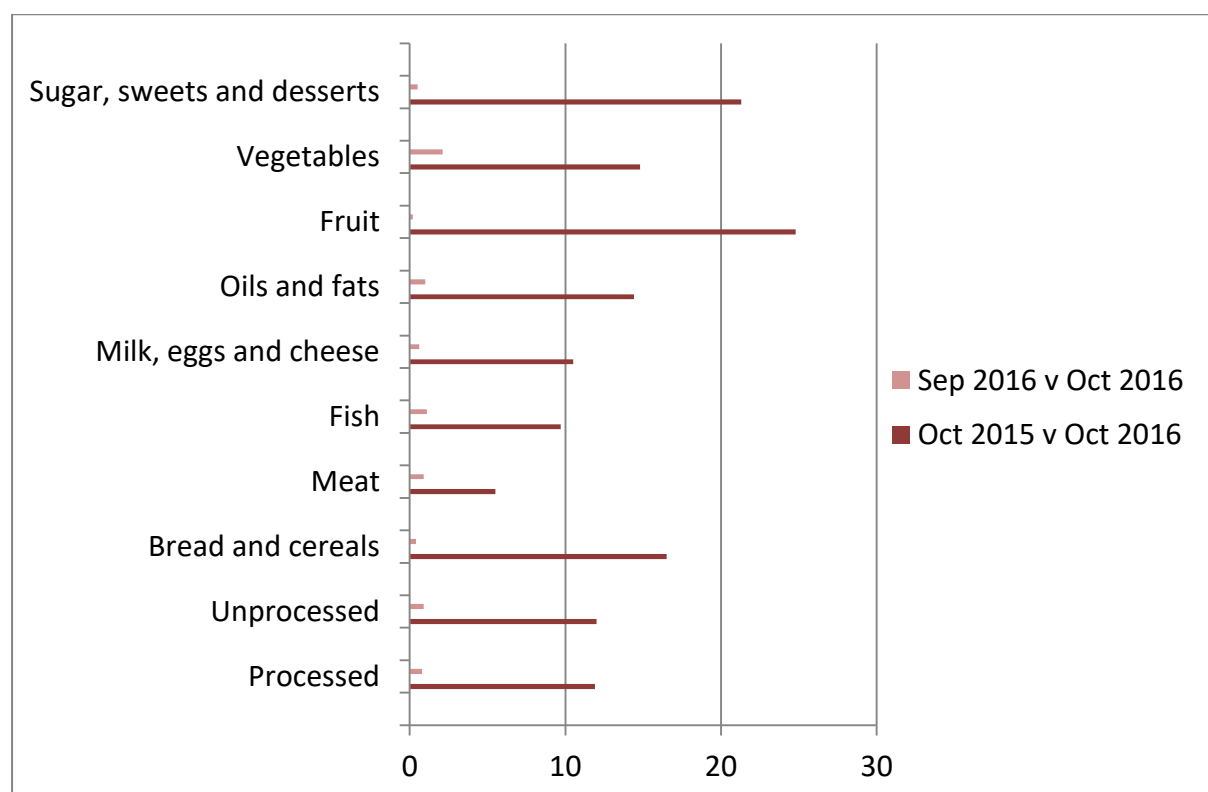
²³⁴

²³⁵ N Vink & J Kirsten 'Pricing behavior in the South African food and agricultural sector' Final Report: Strictly Confidential (2002) A report to the National Treasury, available at <sarpn.octopus.co.za> (accessed 23 June 2017) vi.

²³⁶ MN Baiphethi & PT Jacobs 'The contribution of subsistence farming to food security in South Africa' (2009) 48(4) *Agrekon* 464.

food prices.²³⁷ Even though the Competition Commission has attempted to address the adverse impact of unregulated agricultural and food markets by conducting a number of investigations and imposing heavy fines on several food companies for uncompetitive behavior in food supply chains, retail prices of staple foods have increased rapidly.²³⁸ These increases have become a source of concern for the plight of the poor in rural and urban communities, to the extent that they have adversely affected the state's ability to reach its inflation targets.²³⁹ In its October 2016 Consumer Price Index (CPI), Statistics South Africa (Stats SA) presented a graph which shows the trend of food and non-alcoholic beverage inflation rates which changed year-on-year. The graph below summarizes the percentage of price hikes of different food categories between 2015 and 2016.

Figure 1: Percentage change for different food categories on month-on-month (September 2016 v October 2016) and year-on-year (October 2015 v October 2016) basis



Source: Stats SA 2016d

²³⁷ Vink & Kirsten (n 218 above).

²³⁸ M D'Haese & G Van Huylenbroeck 'The rise of supermarkets and changing expenditure patterns of poor rural households case study in the Transkei area, South Africa' (2005)30(1) *Food Policy* 98.

²³⁹ Stats SA 2016c 'Taking stock of food prices' 20 April 2016, available at <<http://www.statssa.gov.za/?p=6421>> (accessed 20 July 2017).

Figure 1 demonstrates that between October 2015 and October 2016, the following percentage increase were recorded: bread and cereals increased by 16.5 percent, processed foods by 11.9 percent, unprocessed foods by 12.0 percent, fish experienced 9.7 percent, oils and fats by 14.4 percent, vegetables 14.8 with percent, fruit went up by 24.8 percent, meat 5.5 percent, milk, eggs and cheese escalated by 10.5 percent, sugar, sweets and desserts by 21.3 percent, and other food increased by 13 percent.²⁴⁰ As discussed in detail in section 4.3 of chapter four, the rise in inflation has not kept up with increase in social grants. For instance, while bread and cereals increased by 16.5 percent, from October 2016 to April 2017, old age (under 75 years) grant, increased by only 6 percent, old age (over 75 years) grant increased by 5.8 percent, child support grant increasing by 5.6 percent, with no increase in war veterans grant or grant in aid.²⁴¹ Given that the major expenditure of poor families is food, the high inflation in food prices without accompanying increase in grant will impact negatively on the access to food needed by the food-poor to survive.

Another major avenue which the state could use to safeguard individual's access to sufficient food is through standard setting *vis-à-vis* the nutritional value and safety of food. The 1972 Foodstuffs, Cosmetics and Disinfectants Act 54 (FCDA)²⁴² is a classic example of state's intervention which was designed to regulate the additive and preservative levels in food. The Act sets out the quality standards that must be complied with by manufacturers and importers of food items. Section 2(2) of the Act specifically states that '[a]ny person who manufactures, imports or sells maize meal or maize flour, may manufacture, import or sell highly fortified maize meal or maize flour.' Akin to the FCDA is the Consumer Protection Act (Act 68 of 2008) which seeks to 'protect consumers from hazards to their well-being and... and establish national norms and standards.'²⁴³ A consumer refers to 'a person to whom those particular goods [...] are marketed.'²⁴⁴ Clearly, both laws provide strong protection for citizens in terms of healthy eating, but, fail to address the question of improving accessing to these food items.

²⁴⁰ Stats SA 2016d 'Consumer price index' Statistical Release P0141 (2016) 7. Also see National Agricultural Marketing Council 'Markets and Economic Research Centre' Food Price Monitor (November Issue/2016) 1.

²⁴¹ See section 4.3 of the next chapter for a detailed analysis of the interface between rising food prices and low levels of social grants.

²⁴² Foodstuffs, Cosmetics and Disinfectants Act 54 OF 1972 AVAILABLE AT <<http://www.nda.agric.za/vetweb/Legislation/Other%20acts/Act%20-%20Foodstuffs,%20Cosmetics%20and%20Disinfectants%20Act-54%20of%201972.pdf>> (accessed 06 March 2016).

²⁴³ Republic of South Africa. Consumer Protection Act (Act 68 of 2008) Preamble.

²⁴⁴ Sec 1(a) of Consumer Protection Act (Act 68 of 2008).

At the judicial level, the Magistrates' Courts Act 32 of 1944,²⁴⁵ also safeguards the capacity of a subsistence farmer to produce food against the arbitrary interference from creditors. The Act specifically affirms that in the execution to satisfy a judgment debt, creditors should refrain from the attachment and sale of the 'stock, tools and agricultural implements of a farmer.'²⁴⁶ This provision safeguards individual rights to land (as a means for producing food from the interference of both private entities and the state itself). The Act has imposed stringent procedural requirements and substantive safeguards, which have to be met by the state or any third party before a court can grant an order for the sale of a person's land or farm implements. For this reason, the state has made dispossession of a person's means of production (of crops and animals) more cumbersome than it would otherwise have been. In this light, the right of individual to access land is guaranteed, which for a relatively small, but substantial group of individuals in the country serves as their only source of accessing food.²⁴⁷

It is imperative to state that the obligation of the state to safeguard the constitutional right to food does not only require enacting policy framework to regulate private conducts, but also to effectively operationalise them. It was against his backdrop that the Constitutional Court in *Grootboom* averred that an 'otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations'.²⁴⁸

This assertion is true for any scheme or intervention devised to realise a specific socioeconomic rights. For instance, commentators have professed that the evictions of farm workers or labour tenants in South Africa are still possible and happen often although evictees rarely find alternative accommodation on farms, municipal housing projects or other available land distribution programmes.²⁴⁹ Reasons for this set back may be attributed to among others:

²⁴⁵ Magistrates' Courts Act 32 of 1944, available at <<http://www.justice.gov.za/legislation/acts/1944-032.pdf>> (accessed 06 March 2016).

²⁴⁶ Magistrates' Courts Act 32 of 1944 sec 67(c) <http://www.justice.gov.za/legislation/acts/1944-032.pdf> (accessed 06 March 2016).

²⁴⁷ B Tibesigwa, M Visser & J Turpie 'The impact of climate change on net revenue and food adequacy of subsistence farming households in South Africa' (2015) 20(03) *Environment and Development Economics* 327. For instance, as of the end of 2015, Tibesigwa and others mooted that approximately 1100 households in South Africa relied on small-scale subsistence farming as their major source of food.

²⁴⁸ Para 42.

²⁴⁹ F Miraftab & S Wills 'Insurgency and spaces of active citizenship the Story of western cape anti-eviction campaign in South Africa' (2005) 25(2) *Journal of planning education and research* 200; B Cousins 'More than socially embedded: The distinctive character of 'communal tenure' regimes in South Africa and its implications for land policy' (2007) 7(3) *Journal of Agrarian Change* 281.

- (i) utter disregard of the statutes by landowners;
- (ii) complicity between private landowners, police and magistrates;
- (iii) the absence of legal aid in rural areas.

Also, concerns have been raised recently *vis-à-vis* the ineffective implementation of security of tenure legislation in rural areas, where the relationship between access to food and tenure security is most apparent. Equally, issues regarding the poor operationalisation of the 1972 Foodstuffs, Cosmetics and Disinfectants Act 54 have been raised, especially, in terms of lack of effective enforcement of the regulations.²⁵⁰ Khumalo *et al* have declared that not only are the standards set out in the Act not applied, but also the required monitoring is not taking place.²⁵¹ The failure of the state to operationalise regulatory policies designed to safeguard individual's rights to food can be interpreted as constituting a *prima facie* non-compliance of the obligation to protect the right to food.²⁵²

In summary, the primary role, which the state can play in complying with its obligation to safeguard the right to food, is through safeguarding informal tenure rights. Both rights (the rights to food and informal tenure rights) are entrenched in the LTA, ESTA and PIE, they just need effective and efficient operationalisation at the national, provincial and local levels.

5.3.3. The obligation to promote and fulfill

The obligation to promote and fulfill the right to food oblige the state to ensure that people who lack access to adequate food gain access, through the adoption of interventions stretching from administrative, budgetary, legislative to judicial measures. Specifically,

(1) the state must develop and operationalise steps to achieve the constitutional right to food and nutrition.²⁵³ In fulfilling this obligation, while the realisation of the right to food is progressive and is dependent on available resources, the state must be able to demonstrate that it has adopted the relevant measures and that it is in the process of operationalizing these measures.

²⁵⁰ RR Chanda, RJ Fincham & P Venter 'A review of the South African food control system: challenges of fragmentation' (2010) 21(6) *Food Control* 817.

²⁵¹ TP Khumalo, HC Schonfeldt & H Vermeulen 'Consumer acceptability and perceptions of maize meal in Giyani, South Africa' (2011) 28(2) *Development Southern Africa* 278.

²⁵² E Lahiff 'Land reform in South Africa: Is it meeting the challenge?' (2001) I *PLAAS Policy Brief* 2.

²⁵³ CESCR (n 53 above) para 21.

(2) any step (legislative and other programmes) adopted by the state must be feasible and practicably able of enhancing individuals' access to adequate food. Besides refraining from actions which will interfere with the enjoyment of the right to food by individuals, any steps, which the state adopts to promote and fulfill its obligation in this light, must:

- (i) Respond to the degree and extent of undernourishment. The state should enhance access to food for those who already have access while providing direct food or money for acquiring food to those in desperate need;²⁵⁴
- (ii) Not exclude a broad section of the society;²⁵⁵
- (iii) Be well-coordinated by allocating different responsibilities to different government departments;²⁵⁶
- (iv) Be properly operationalised;²⁵⁷
- (v) Make available financial and human resources for its operationlisation;²⁵⁸
- (vi) Be transparent (to all stakeholders) during conception and operationlisation;²⁵⁹
- (vii) Be capable of containing immediate and long term food crisis.²⁶⁰

Regrettably, unlike other socioeconomic rights in South Africa, this obligation of the state has not been the basis of a court judgment. However, it is important to indicate that for the first time the courts attempted to safeguard citizens right to food in two cases, namely *Mukudamm v Pioneer Foods Ltd & Others*;²⁶¹ and *Kenneth George & Others v the Minister of Environmental Affairs and Tourism*.²⁶² The petition in the *Kenneth George* case was aimed at safeguarding the rights of access of traditional fishing communities. In 1998, the state introduced in the Cape of Good Hope Province the Marine Living Resources Act, which establishes a system of quotas whereby the totality of fishable resources in a particular year was divided into commercial licenses. The law failed to take into account the particular needs

²⁵⁴ CESCR (n 53 above) 28; *Grootboom* (n 174 above) para 44.

²⁵⁵ CESCR (n 53 above) para 26.

²⁵⁶ CESCR (n 53 above) para 22 & 25; *Grootboom* (n 174 above) para 39.

²⁵⁷ *Grootboom* (n 174 above) para 42.

²⁵⁸ CESCR (n 53 above) para 21; *Grootboom* (n 174 above) para 39.

²⁵⁹ CESCR (n 53 above) para 23 & 24; *TAC* para (n 174 above) 123.

²⁶⁰ *Grootboom* (n 174 above) para 43.

²⁶¹ Case CCT 131/12 [2013] ZACC 23.

²⁶² Case No. EC 1/2005, Judgment of 2 May 2007.

of fishing communities, thereby excluding, de facto, traditional fishermen since the quota licensing procedures were burdensome and complex. The nutritional status of the entire fishing communities significantly deteriorated with the implementation of the law since they lost their access to the sea. A number of traditional fishermen (with an *affidavit* submitted by the Special Rapporteur of the United Nations on the right to food, Jean Ziegler and development organisations) invoked their right to food in a case submitted to the High Court of Cape of Good Hope Province. The court nullified the legislation and ordered the state to draft a new policy framework and law, with the participation of the fishing communities.²⁶³ The parties also reached an agreement that approximately 1000 traditional fisherman who have shown that their primary means of survival is dependence on fishing, should be granted the right to fish and sell their products by granting them fishing authorization.²⁶⁴

In the *Mukudamm* case, the applicant Mr Imraahn Ismail sourced bread from the respondents, which are distributed in the Western Cape Province. Following complaints filed by the applicant and others, the Competition Commission in 2006 initiated a probe against the respondents (Premier Foods the maker of Blue Ribbon, Pioneer Foods and Tiger Brands, the maker Albany bread) that the bakeries had raised prices of by between 30c and 35c of a loaf a week before Christmas in 2006. The Commission observed that the respondents have breached the Competition ACT by colluding to raise prices. One of the respondents (Premier Foods) negotiated and concluded a settlement agreement with a penalty of approximately R99 million imposed for unlawful conduct.²⁶⁵ Pioneer Foods suffered a more penalty of R196 million in breach of the Competition Act. Tiger Brands was fined R98.8 amounting to 5.7 percent of its national turnover for bread operations for 2006 financial year.²⁶⁶ In light of the decision by the Competition Commission, some small scale bread producers sought leave of the Court to file for losses they have incurred due to the uncompetitive conduct of the indicted companies. The class action claim against the companies was rejected by the Western Cape High Court and the Supreme Court of Appeal. However, the Constitutional Court overturned this decision on the basis of allowing business damages to be claimed by those affected, but not on the basis of right to food.²⁶⁷ It is important to indicate that while these two cases

²⁶³ Paras 1-7.

²⁶⁴ Para 12.

²⁶⁵ Para 7.

²⁶⁶ N Seria 'Tiger Brands admits to price-fixing, pays fine' (13 November 2007) *Moneyweb*; 'Tiger Brands slapped with R98m cartel fine' (12 November 2007) *Mail&Guardian*.

²⁶⁷ Para 77.

attempts to ensure people's right to food, they guarantee the right of a select few rather than casting a wider net for citizens' right to food.

The right to food, however, made a passing, but futile appearance in the *TAC* case.²⁶⁸ As an element of the overarching measures to forestall mother-to-child transmission of HIV, the *TAC* argued that the state should provide free breast milk substitutes (on demand) for HIV positive mothers who give birth at public health facilities. In refuting this argument, the Court declared that such decisions should be left to the discretion of professionals in the health sector, considering that the complex nature of the issue was a challenge for the Court to make a binding order in this respect.²⁶⁹

It is, however, important to indicate that based on the World Health Organization's (WHO) revised principles and recommendations for HIV and infant feeding released in November 2009, South Africa Department of Health (DoH) revised its clinical guidelines for prevention of mother to child transmission of HIV.²⁷⁰ One aspect of the new DoH guidelines relevant in this section is the provision of free commercial infant formula to HIV-infected women through public health system.²⁷¹ Although the programme could be seen as a form of cash transfer to poor household, a survey conducted in the predominantly rural Hlabisa district, Kwa-Zulu Natal show that some HIV-positive mothers lacked access to the formula, especially as they do not have the financial means to travel to the health facilities for the milk.²⁷²

In view of the fact there is no legal precedent to shed light on the meaning and content of state's obligation to promote and fulfill the right to food, it is imperative to examine the extent to which the state's current food and nutrition measures meets its constitutional duties while mapping out setbacks in this regard. The threshold for measuring the state's constitutional compliance will be hinged on three elements:

- (i) the state's obligation to create a national food security framework;
- (ii) the obligation to adopt a reasonable policy framework;

²⁶⁸ *TAC* (n 174 above).

²⁶⁹ *TAC* (n 174 above) para 21.

²⁷⁰ WHO 'HIV and infant feeding' (2010) <whqlibdoc.who.int.9789241599532_eng> (accessed 15 April 2017).

²⁷¹ T Doherty, D Sanders, A Goga & D Jackson 'Implications of the new WHO guidelines on HIV and infant feeding for child survival in South Africa' (2011) 89(1) *Bull World Health Organ* 62

²⁷² Doherty *et al* (n 271 above) 65.

- (iii) the obligation to avoid purposeful retrogression in the operationalisation of the right to food measures.

5.3.3.1. Creating national food security framework

Although the South African Constitution entrenched the right to food in 1996, the country (for more than half a decade) never adopted an explicit national strategy to enhance the realisation of the right to food²⁷³ At the time, this inaction constituted a *prima facie* contravention of the state's obligation to promote and fulfill, among others, the right to food. Subsequently, as a result of the 2001 national outcry over the sharp rises in food prices, the state launched a series of national food security measures (including the Integrated Food Security Strategy for South Africa (IFSS)), specifically tailored to address undernourishment in the country.²⁷⁴

The 2002 IFSS -a cross-departmental policy framework- has been introduced by the state to address specific aspects of chronic hunger and malnutrition in South Africa.²⁷⁵ As its name suggests, the IFSS is intended to harmonize, streamline, and integrate different food and nutrition sub-programmes. Operationalised by the Department of Agriculture Forestry and Fisheries (DAFF), the strategy provides a comprehensive action plan designed to ensure that individuals have adequate access to food.²⁷⁶ To this end, the strategy underscores the need for the adoption and operationalisation of specific focus areas such as:²⁷⁷

- (i) Improving nutrition and food safety;
- (ii) Holding stakeholder dialogue and providing capacity-building;
- (iii) Improving analysis and information management systems;

²⁷³ DAFF 'Integrated Food Security and Nutrition Programme (IFSNP)' (2015) <http://www.daff.gov.za/daffweb3/Programme/Integrated-food-Security-and-Nutrition-Programme> (accessed 06 March 2016)1.

²⁷⁴ According to E Watkinson & N Makgetla 'South Africa's food security crisis' (2002) *National Labour & Economic Development Institute* 41, the 'price of maize meal doubled in the year [2001] to June 2002'. Ellis and Maughan also argued that South Africans were paying 44 times more for basic groceries than they did in 1970. See E Ellis & K Maughan 'It was cheaper to eat in the good old days' (2 July 2001) IOL, available at < <http://www.iol.co.za/news/south-africa/it-was-cheaper-to-eat-in-the-good-old-days-68928>> (accessed 25 July 2017).

²⁷⁵ S Drimie & S Ruysenaar 'The integrated food security strategy of South Africa: an institutional analysis' (2010) 49(3) *Agrekon* 316.

²⁷⁶ MN Baiphethi & PT Jacobs 'The contribution of subsistence farming to food security in South Africa' (2009) 48(4) *Agrekon* 459.

²⁷⁷ DAFF 'Integrated Food Security and Nutrition Programme (IFSNP)' (2015) <http://www.daff.gov.za/daffweb3/Programme/Integrated-food-Security-and-Nutrition-Programme> (accessed 06 March 2016).

- (iv) Increasing safety nets and food emergency systems;
- (v) Improving income generation and job creation;
- (vi) Increasing household food production and trading.

The IFSS further calls for 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 local level (Local Food Security Action Groups), at district level (District Food Security Forums) and at provincial level (Provincial Food Security Forums) with the mandate to provide advisory services and strategic leadership on food security.²⁷⁸ The role of the NFSF is to set standards and recommend policy options while providing ‘strategic leadership and advisory services.’²⁷⁹ The strategy further underscores the need for a cross-sectoral and cross-departmental management structure.²⁸⁰

The operationalization of the IFSS has not been without a flaw. One of such challenge is the fragmentation of activities of relevant government departments. The provisions of the strategy are not sufficiently focused and coordinated given that the state failed to establish the NFSF to streamline food security interventions. At present, there is no particular government department at the local, provincial or national level focused in the first instance on realising the right to food in the way that, for example, the Department of Health is dedicated to principally ensuring the realisation of the right to access health care services. The Department of Agriculture, Forestry and Fisheries (DAFF), which is mandated with the obligation to ensure multisectoral coordination of food security programmes arguably lacks the administrative and financial capacity to operationalise their own activities and perform the task of coordinating and streamlining different departments and programmes aimed at addressing food insecurity in South Africa.²⁸¹ The lack of coordination between the various institutions at the national and local levels, where the span of departments involved –Water and Sanitation, Health, DAFF, Environment and Tourism, provincial and local government to name only the most obvious ones- has made coordination of food policy at the national level a substantial challenge.

²⁷⁸ DAFF ‘Integrated Food Security and Nutrition Programme’ (2002) < <http://www.nda.agric.za/daoDev/sideMenu/foodSecurity/policies.pdf> > 19-20 (accessed 1 March 2016) 34.

²⁷⁹ DAFF (n 578 above) 34.

²⁸⁰ FT Jacobs ‘The status of household food security targets in South Africa’ (2009) 48(4) *Agrekon* 433. The challenges confronting the implementation of the IFSS is discussed in the next section.

²⁸¹ HM Nkwana ‘The Implementation of the National Food and Nutrition Security Policy in South Africa Strategies for Multisectoral Coordination’ (2015) 23(4) *Administratio Publica* 282.

Beyond institutional constraints are resource and social constraints, which plague the effective operationalization of the IFSS. The first example of resource constraint is insufficient access to water, and the second, has already, been referred to in section 5.3.2.2, namely lack of sufficient access to land with secure tenure. Among the list of social constraints are (i) skill deficiencies of project coordinators or farmers, (ii) infighting between competing groups for control of resources (iii) a culture of dependency that often leads to collapse of urban agriculture when public sector support is withdrawn or scaled down, specifically when initiatives have been top-down driven rather than bottom-up; (iv) lack of commitment of participants once land has been secured, in the face of competition from other income-earning option and (v) theft which both rural and urban farmers consider as a major disincentive to domestic cultivation.²⁸²

5.3.3.2. Adopting a reasonable framework

The extent of the obligation of the state to provide sufficient food to the chronically hungry is demonstrated in the benchmark that the Constitutional Court developed in the *Grootboom*, *TAC* and *Khosa* cases. As asserted by the Court in these cases, whatever steps the state adopts in order to fulfill its socioeconomic obligation (including the right to food) must be reasonable. Thus, although the state attempted to adopt the IFSS to enhance coordination of food security interventions, this strategy failed to meet the threshold of reasonableness as espoused by the court in the aforementioned cases. While the IFSS appeared good on paper, it failed in establishing institutional framework such as the National Food Security Forum for addressing the complex dimensions of chronic hunger. Equally, the National Food and Nutrition Security Policy and Food endorsed by cabinet in 2013 and the 2015 Food and Nutrition Security Plan (discussed in detail in the next chapter) failed to meet the reasonable test. Besides experiencing serious institutional challenges, the main features of these two policy development processes were a lack of genuine co-development and consultation with stakeholders from across the food system, especially the food poor.²⁸³ Consequently, the ‘policy and plan were limited in identification of problems with the food system and necessary responses.’²⁸⁴ Giving that the IFSS, National Policy and Plan have failed to effectively tackle systematic inadequacies and respond to the needs of affected

²⁸² T Kepe & D Tessaro ‘Trading-off: Rural food security and land rights in South Africa’ (2014) 36 *Land Use Policy* 269.

²⁸³ L Pereira & S Drimie Governance Arrangements for the Future Food System: Addressing Complexity in South Africa’ (2016) 58(4) *Environment: Science and Policy for Sustainable Development* 24.

²⁸⁴ Pereira & Drimie (n 583 above) 24.

people (by establishing an effective coordinating body), that has contributed to widespread hunger, it is evident that all these three interventions constitute a *prima facie* violation of this reasonableness test.²⁸⁵

To better enhance people's access to food, the state has adopted several other steps to provide access to food for those who lack the opportunities or entitlement to access the available food.²⁸⁶ Most of these measures are designed to provide social support in the form of cash grants and other social arrangements that ensure that a specific group of people (usually the vulnerable and marginalised individuals) is able to access food.²⁸⁷ There are 12 interrelated food and nutrition programmes targeting specific groups worth citing. These are:

- (i) Protein Energy Malnutrition Control (PEM);
- (ii) National School Nutrition Program (NSNP);
- (iii) Child Support Grant (CSG);
- (iv) Disability Grant for disabled persons;
- (v) Care Dependency Grant
- (vi) Old Age (under 75 years) Grant
- (vii) Old Age (over 75 years) Grant
- (viii) War Veterans grant
- (ix) Grant in Aid
- (x) Child Support Grant
- (xi) Foster Care Grant
- (xii) Social Relief of Distress Grant (SRDG).²⁸⁸

²⁸⁵ CESCR (n 53 above) paras 23 &24; TAC (n 174 above) para 123.

²⁸⁶ D Labadarios, ZJR Mchiza, NP Steyn, G Gericke, EMW Maunder, YD Davids & WA Parker 'Food security in South Africa: a review of national surveys' (2011) 89(12) *Bulletin of the World Health Organization* 891.

²⁸⁷ J Ferguson 'Formalities of poverty: Thinking about social assistance in neoliberal South Africa' (2007) 50(02) *African Studies Review* 73.

²⁸⁸ M Bac 'Protein-Energy Malnutrition Intervention Strategies' (2012) available at < <https://www.safpj.co.za/index.php/safpj/article/view/2842/3431>> (accessed 20 July 2017); DBE 'National

While these government interventions make a substantial contribution to the fight against chronic hunger (by providing cash or direct provision of food) all these efforts are only, designed to address the needs of a specific group.²⁸⁹ The PEM provides treatment in clinics and hospitals to children with acute protein energy malnutrition.²⁹⁰ Nutritious meal is, provided through the PSFS once every school day to primary school learners at school.²⁹¹ The CSG is financial assistance given to primary care givers (e.g. parent, grandparent or a child over 16 heading a family) to provide for the basic needs of children who must not be older than 18 years. The SRDG only provides a short term (between three to six months) assistance to persons who meet one of eight conditions.²⁹² For this reason, persons who are physically and mentally able, neither war veterans nor in foster care, between the ages of 18 and 59, and do not meet the criteria of the SRDG, are not eligible for regular state assistance (no matter how bad their nutritional circumstances are). Given that there is no obvious and single solution to address these constraints, the state has adopted a couple of institutional (food related) measures, which the thesis now turns to.

5.3.3.3. Other food security programmes

Besides the IFSS, a variety of other state interventions also seeks to enhance access to food and nutrition for self-sufficient people through food production for own use or income generation with which to acquire food. Some of these measures include the:

- (i) Department of Social Development's (DSD's) National Poverty Reduction and Eradication Programmes which provides communal rural food production clusters including pig units, poultry houses and food gardens;
- (ii) Department of Public Work's (DPW's) Community-Based Public Works creates jobs by involving poor rural communities in public works projects;

School Nutrition Program' available at <
<http://www.education.gov.za/TheDBE/DBEStructure/SocialandSchoolEnrichment/NationalSchoolNutritionProgramme/tabid/131/Default.aspx> > (accessed 20 July 2017); SASSA 'Social grants' available at <
<http://www.sassa.gov.za/index.php/social-grants>> (accessed 20 July 2017).

²⁸⁹ A detailed discussion of the aforementioned social grants, their prospects and practical challenges is discussed in the next chapter, under sec 4.3.

²⁹⁰ D McCoy, R Saitowitz, M Saasa, D Sanders, A Wigton, M MacLachlan & M Hendricks 'An evaluation of South Africa's primary school nutrition programme' (1997) *Health Systems Trust* 8.

²⁹¹ McCoy *et al* (n 290 above).

²⁹² The conditions for the SRDG are: no maintenance is received from parents; refusal of the SRDG application will cause undue hardship; the applicant is not receiving assistance from other organisations; the person has been affected by a disaster; the applicant's bread winner has been admitted to state funded institution; the applicant's bread winner is deceased; the applicant does not receive maintenance from parent or spouse; the applicant is not medically fit to work; or the person is awaiting payment for an approved social grant.

- (iii) DAFF Land Redistribution for Agricultural Programme provides financial support for purchase of land and farm implements to previously disadvantaged communities;
- (iv) DAFF Food Security and Rural Development Programme provides information and agricultural starter-packs to food insecure rural households for food production and own consumption.

Further, through appropriate production policies and food import strategies, the DAFF and Department of Trade and Industry (DTI) respectively have collaborated to enhance national food supply. In addition, various institution and government departments on the one hand, enhance enhance people's access to food through collection and redistribution of edible surplus from manufacturers and wholesalers (e.g. Foodbank SA and FoodForward SA), and on the other, implement different programmes to monitor individual, household and national food security.²⁹³

Nonetheless, the state's attempt through the IFSS to ensure the realisation of access to adequate food and nutrition has been confronted with one major 'schizophrenia': the strategy excludes a substantial number of indigents. As part of its *reasonable* test, the Constitutional Court, has (for instance, in *Grootboom*)²⁹⁴ framed a threshold of reasonable inclusion. A policy, therefore, meets the benchmark of reasonableness if it:

- (i) does not exclude a significant segment of the population;²⁹⁵
- (ii) takes into account the enhancement of the conditions of those in crisis;²⁹⁶
- (iii) responds to the needs of the most desperate.²⁹⁷

The threshold of *reasonableness* is closely, tied to another constitutional benchmark, *flexibility*, which affirms that a policy must be able to address problems and provide short-, medium and long-term remedies. At the international level, the CESCR has given an expansive definition to these two concepts (reasonableness and flexibility) by affirming that

²⁹³ A key development in this regard was the appointment of the DAFF National Food Pricing Monitoring Committee in 2003 to assess and recommend to government on prices of food. Supplementary initiatives like FoodBank SA and FoodForward SA are discussed in sec 4.3 of chap 4.

²⁹⁴ Para 44.

²⁹⁵ *Grootboom* (n 174 above) para 43.

²⁹⁶ *Grootboom* (n 174 above) para 64.

²⁹⁷ *Grootboom* (n 174 above) para 44.

any government programme, which seeks to address the right to food, must contain measures to ensure the minimum essential level of food and nutrition. In addition, the policy should provide short-, medium and long-term remedies (flexibility).²⁹⁸

These two benchmarks (reasonableness and flexibility) will be thoroughly examined in the next chapter, which looks at the reasons why there is chronic hunger in a food secure country with a strong agricultural sector.²⁹⁹ Many people are confronted with ‘daily terrorism of hunger’ and are unable to meet their basic levels of nutrition.³⁰⁰ These individuals face serious and permanent health risks considering that they are unable to fully enjoy adequate nutritional status. While this fact has been demonstrated through empirical survey and articles,³⁰¹ it is commonly known that millions face chronic hunger,³⁰² and over 30 million South Africans were living in poverty in 2015.³⁰³

People who are chronically hungry each day of their life (or children who do not grow to their full physical and mental potential or waste away as a result of lack of mal- or undernourishment) may be classified (in *Grootboom*’s term) as ‘living in intolerable’,³⁰⁴ condition, ‘in crisis’,³⁰⁵ and in ‘desperate’ situation.³⁰⁶ As demonstrated in the *Grootboom* judgment, while the state is obliged to adopt measures, which are inclusive, coherent and well-coordinated, existing national food, and nutrition measures do not address these requirements.³⁰⁷ This endemic national crisis is not caused by unusual food market volatility or famine, but by deep structural economic factors which has resulted in large scale unemployment and grinding poverty.³⁰⁸

²⁹⁸ CESCR (n 53 above) paras 16 & 17.

²⁹⁹ Wilkinson (n 4 above); P Conceição, S Levine, M Lipton & A Warren-Rodríguez ‘Toward a food secure future: Ensuring food security for sustainable human development in Sub-Saharan Africa’ (2016) 60 *Food Policy* 9.

³⁰⁰ WB Eide & U Kracht (eds) *Food and human rights in development: legal and institutional dimensions and selected topics (Vol. 1)* (2005) 197.

³⁰¹ M Aliber ‘Chronic poverty in South Africa: Incidence, causes and policies’ (2003) 31(3) *World Development* 473; C Meth & R Dias ‘Increases in poverty in South Africa 1999–2002’ (2004) 21(1) *Development Southern Africa* 62; D Labadarios, NP Steyn, E Maunder, U MacIntyre, G Gericke, R Swart & J Nel ‘The national food consumption survey (NFCS): South Africa, 1999’ (2005) 8(05) *Public health nutrition* 535.

³⁰² Oxfam (n 3 above) 2.

³⁰³ Stats SA 2017 ‘Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015’ *Report No. 03-10-06* 14.

³⁰⁴ Para 59.

³⁰⁵ Paras 60-61.

³⁰⁶ Para 63.

³⁰⁷ A Sachs ‘The Judicial Enforcement of Socio-Economic Rights: The *Grootboom* Case’ (2003) 56 *Current Legal Problems* 579.

³⁰⁸ Oxfam (n 3 above) 2.

5.3.3.4. Prevent intentional retrogression

The state is obliged to forestall retrogressive measures in the government's progressive realisation of food security. In the realisation of the right to food, any intentional retrogression will constitute a *prima facie* contravention of the state's socioeconomic rights obligation. The Constitutional Court and international law, has recognised the state's duty to prevent retrogressive measures, which militate against its obligation to enhance economic and social rights obligations.³⁰⁹

While the state has progressively adopted some measures to enhance the right to food, some retrogressive measures persist.³¹⁰ Many examples can be given to illustrate this assertion, but the most common is located in the 2001 amendment to the Social Assistance Act which stipulates that in order to be eligible for child grants, caregivers must be in possession of the birth certificate and a thirteen-digit identity document of the child(ren).³¹¹ Instead of enhancing the 'progressive realisation' of individual's access to social protection in line with section 27 of the Constitution, the amended legislation was unreasonably retrogressive. Also, the state's efforts to redistribute agricultural land to emerging farmers and farm workers from formerly disadvantaged groups could also be considered as retrogressive. Through a system of state funding called Settlement/Land Acquisition Grant (SLAG), the Department of Land Affairs' (DLA) and DAFF redistributed agricultural land with the aim of enhancing the quality of life and livelihoods of black farmers.³¹² Irrespective of its noble ambition, the structure of the state's Land Redistribution for Agricultural Development (LRAD) has one major setback, which limits its potential to address the food insecurity situation of several poorest of the poor. This impediment is in relation to a minimum contribution or payment, which a potential beneficiary has to make in order to access this programme.³¹³ The programme is retrogressive in light of the fact that while the programmes allege to improve the living conditions of the food-poor by providing them with land for agricultural purposes, the compulsory minimum payment bars them from accessing them. For instance, according to Ntsebeza and Hall, to be eligible for a LRAD subsidy, a recipient household had to make a

³⁰⁹ *Grootboom* (n 174 above) para 45; CESCR (n 53 above) para 9.

³¹⁰ Ntsebeza & Hall (n 193 above) 10-11. For a detail analysis of programmes seeking to enhance the right to food, turn to the next chapter.

³¹¹ See *Alliance for Children's Entitlement to Social Security v Minister of Social Development* No: 5251/2005 discussed in chap 4.

³¹² Department of Land Affairs 'White paper on South African land policy' (1997) <http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf> (accessed 6 March 2016) 56.

³¹³ Ntsebeza & Hall (n 193 above) 12.

minimum contribution of 5 000 Rand to the acquisition of land, while SLAG beneficiaries have to earn an income above 1 500 Rand.³¹⁴ This threshold explicitly reduces the potential of the programme to enhance the right of access to food of the impoverished. To this end, the state's LRAD and SLAG constitute a *prima facie* infringement of the state's obligation to promote and fulfill the right to adequate food and nutrition.

7. Conclusion

All people have the right to be free from hunger and live in dignity. Akin to the right to life, the right to food is a human right. The human right to food indicates that the state must safeguard individuals from the actions of others that might hinder their access to adequate food. It also specifies that the state must not take steps that would lead to increasing levels of malnutrition, food insecurity and chronic hunger. This right should be envisaged as an obligation on the state to ensure that all individuals (citizens and migrants) have the capability to feed themselves in dignity. This right should not be regarded as a charity.

Certainly, one might describe the right to food in South Africa as paradox. While the country is 'food-secured', producing enough calories to adequately feed every one of its population, millions are still faced with 'daily terrorism of hunger'.³¹⁵ This simple, nonetheless, painful fact demonstrates that we are confronted with what one could term as Mzansi's ('South Africa' in township slang) utmost humiliation.³¹⁶ Without adequate food and nutrition, the human body would perish, and any conversation of human rights would be purely rhetorical. Although the right to food has, been recognised in the 1996 Constitution and several international instruments of which South Africa is a party, it is a source of constant theoretical debate in the country and beyond.³¹⁷

In terms of application of the concept of right to food, the thesis found that, South Africa has already enacted legislation, which seeks to recognise, safeguard and enforce this right. It is, hoped that South African lawyers, the courts and human rights activist would rely on the aforementioned legal frameworks to advance the rights of the food poor.

³¹⁴ Ntsebeza & Hall (n 193 above) 12.

³¹⁵ Eide & Kracht (n 300 above) 197. Also see Oxfam International (n 4 above) 2.

³¹⁶ C Du Plessis 'Chaos and Resilience' in E Charlesworth & R Adams *The EcoEdge: urgent design challenges in building sustainable cities* (2013) 51.

³¹⁷ D Rose & KE Charlton 'Prevalence of household food poverty in South Africa: results from a large, nationally representative survey' (2002) 5(03) *Public health nutrition* 385; Labadarios *et al* (n 261 above) 899; M D'Haese & G V Huylensbroeck 'The rise of supermarkets and changing expenditure patterns of poor rural households case study in the Transkei area, South Africa' (2005) 30(1) *Food Policy* 97.

In South Africa, there is a general agreement that the primary cause of chronic hunger and malnutrition is because people lack access or the capital to obtain food as a result of poverty.³¹⁸ What then is the significance of legislation in this regard? In terms of enhancing production, legislation cannot alter natural factors such as the total unavailability of fertile land, inadequate rainfall, and sunshine.³¹⁹ Legislation, nonetheless, may have an enormous influence on key decisions such as when and how much logistics are needed to optimize the method of manufacture, preservation and supply of food to the chronically hungry.³²⁰ Legislation could also contribute to improving the capability of individuals to obtain food, for instance, through the operationalisation of social security schemes, labour registration and land reforms.³²¹ Nonetheless, whether national law will be used for such objectives is heavily determined by political leaders, who determine which resource should be used and for what purpose.³²²

Yet, economic and social structures, usually legitimized through legal mechanisms, hinder the realisation of individual's rights to food.³²³ It was in this light that the chapter turned its attention to the legal constraints facing the right to food against the backdrop of the *Grootboom* and the *TAC* cases. The chapter argued that in the *Grootboom* case, the cardinal principle that the state is legally obliged to take adequate steps to ameliorate the living conditions of those in desperate need, by extension, provides indication that the state is constitutionally obliged to provide sufficient food and nutrients through direct intervention in the form of food transfers.

In view of the fact that the state has failed to adopt a comprehensive policy framework to enhance a minimum food transfer to address the needs of the hungry and the nutritionally deprived (in particular those not covered at all by the presently insufficient programmes of direct transfer in the respective food policy framework), appears to signify a lacuna in the policy that falls foul of *Grootboom*.

³¹⁸ Oxfam (n 3 above).

³¹⁹ D Nally "'That Coming Storm': The Irish Poor Law, Colonial Biopolitics, and the Great Famine' (2008) 98(3) *Annals of the Association of American Geographers* 721.

³²⁰ S Skogly 'Right to Food: National Implementation and Extraterritorial Obligations' (2007) 11 *Max Planck Yearbook of United Nations Law* 339; Art 2 of the ICESCR obliges States to use the 'maximum of their available resources' to ensure the realisation of basic rights, including the right to food.

³²¹ WB Eide *Food and human rights in development: legal and institutional dimensions and selected topics (Vol. 1)* (2005) 415.

³²² A Sen *Development as freedom* (1999) 1.

³²³ Sen (n 322 above) 166.

Further, the Court having found in *Grootboom*, that the government failed to provide for those in desperate need, and, thus, held that the Housing Act (failed to provide for those with no roof over their heads), undeniably refused to declare to the government how accurately it should rectify the shortfall in this legislation. Specifically, the Court averred that there would be a broad spectrum of possible policy choices through which this order could be complied, and it was not going to propose which option was desirable, so long as the remedy was provided.³²⁴ In the context of the right to food, and as envisaged in *Grootboom*, direct intervention can equally be realised through several channels such as:

- (i) Through direct provision of food to desperate people;
- (ii) Through social assistance grants including cash grants, vouchers and food stamps which enhance direct access to food through exchange;

In departing from the Court's stance in the *Grootboom* case, it is important to determine which of these two options may be considered most preferable. In the case of South Africa, a range of dynamics demonstrates that cash grants (in the form of social security) under the present circumstance may seem most suitable. Reasons for preference of cash transfer are discussed in detail in the next chapter, under section 4.3.

The Chapter has demonstrated that the widespread problem of chronic hunger and malnutrition in South Africa can be challenged, and the outcome of this challenge greatly depends on the domestic policies and international instruments designed towards the realisation of the right to food. The study was limited by its focus on (i) relevant international instruments such as the ICESCR and the African Charter on Human and Peoples' Rights; (ii) the 1996 South African Constitution and the jurisprudence of the Constitutional Court; (iii) statutes relating to right to food and (iv) relevant policies. The Constitution recognises a justiciable right to food for everyone. Nonetheless, translating this legal entitlement into concrete legal terms has been problematic. This lacuna may be linked to, among others, inadequate right to food programmes and poor operationalization of existing food security related policies.

The chapter provided an overview of the constitutional entitlements and legal obligations of the state in respect of the right to food. The chapter looked at how the right to food in the Constitution has triggered legal reforms in the context of instruments regulating security of

³²⁴ *Grootboom* (n 174 above) para 41.

tenure and access to land, as well as jurisprudence regulating access to land reforms and social assistance. The chapter further provided some guidance on how to improve state measures towards enhancing the realisation of the right to food. Indeed, the above discussion has demonstrated that the state has initiated some policies, but in light of the ongoing hunger situation, there is the need for further development of these policies. It is against this backdrop that the next section seeks to understand, to what extent do the existing policies guarantee the right to food, and/or how effective are these food security related policies operationalised.

CHAPTER FOUR

THE CHALLENGE OF REALISING THE RIGHT TO FOOD

1. Introduction

This chapter sets out to uncover the factors, which hinder individuals' access to adequate food and nutrition in South Africa. In examining the factors that militate against the realisation of the right to food in South Africa, the chapter examines those factors, which cut across the catalogue of the rights to food and nutrition. The chapter aims to set out current right to food impediments by examining factors such as historical, administrative and legal impediments in the operationalisation of some food security programmes by key government departments mandated to address chronic hunger and malnutrition. An essential element of this chapter will be the discussion on the interventions designed to enhance the right to food developed in piece-meal fashion, with diverse components - and occasionally similar components- of nutritional programme operationalised by different departments. The chapter will, thus, select few departments to highlight the patchwork of programmes and interventions all seeking to address chronic hunger and malnutrition in a fragmented manner. Taking into account the aforementioned factors, this chapter maps out the crosscutting issues that may inform the country's future direction on food security.

2. Tracing the root causes of chronic hunger in South Africa

It is impossible to understand chronic hunger in contemporary South Africa without reference to the effects of apartheid land policies and practices. The central point is that in the view of some observers, the apartheid system is directly responsible for the present food insecurity confronting millions.¹

¹ D Posel 'What's in a name? Racial categorisations under apartheid and their afterlife' in *Transformation-Durban* (2001) 57; JS Crush *Power of development* (1995) xi.

The Dutch and British colonial land robbery and dispossession of the native African population had devastating impact on the food security situation of black Africans.² Followed by the adoption of a series of discriminatory laws, these events culminated in the imposition of the Black Land Act 27 of 1913 and Development Trust and Land Act 18 of 1936, which according to Ackermann led to the allocation of 87 percent of the best land in the country to the whites who constituted about 18 percent of the country's demography.³ Despite the fact that Africans had always comprised more than 75 percent of the country's population, only 13 percent of the land was reserved for them.⁴

The land legislations of the various racist regimes before, during and after the formation of the Union of South Africa should be viewed in light of then labour policies. The operationalisation of grand apartheid, which created the bantustan system and changed the status of many Africans from landowners to labourers had its most overt manifestation in the 1913 Land Act, and the Native Trust and Land Act 18 of 1936.⁵ These legislations resulted in the development of the white agricultural sector at the expense of the rural black population in South Africa.⁶

Administrative and legal controls introduced by various racist regimes had the cumulative impact of forcing hundreds of rural blacks to leave vast areas of their land to the ownership and control of white settlers and foreign firms while selling their labour to white farmers.⁷ The policy of pushing hundreds of rural Africans from their homelands can be considered as a death penalty for Africans, for the 'land dispossession of the African people ensures that hunger compels [blacks] to bring [their] hides to the market'.⁸

A number of other statutes regulating land settlement (apart from the the 1913 and 1939 Land Acts) were passed by the apartheid government. Most significant of these legislations were the Prevention of Illegal Squatting Act 52 of 1951, Trespass Act 6 of 1959, Blacks (Prohibition of Interdicts) Act 64 of 1956, Slums Act 76 of 1979, the Proscription of Labour Tenancies Act of 1973. These legislations were reinforced with the adoption of the South

² A Werner 'Native Affairs in South Africa' (1909) 9(33) *Journal of the Royal African Society* 75.

³ Werner (n 2 above).

⁴ Z Skweyiya 'Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models' (1990) 6 *South African Journal on Human Rights* 214 197.

⁵ Werner (n 2 above).

⁶ M Cobbett 'The Land Question in South Africa: A Preliminary Assessment,' in *The South African Economy after Apartheid* (1986).

⁷ A Dubb 'The Rise and Decline of Small-Scale Sugarcane Production in South Africa: A Historical Perspective' (2015) *Journal of Agrarian Change* 3.

⁸ T Mbeki 'Domestic and Foreign Policies of a New South Africa' in *Review of African Political Economy*

Africa Constitution Act 110 of 1983 which made the land issue an integral component of its provisions. In order to successfully implement the constitution, the apartheid regime adopted complementary laws, such as Group Areas Act 36 of 1966 (amending the Group Areas Act of 1950) which fragment the land areas of South Africa into racially determined residential areas; and the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952, which define the black majority as non-citizens of the country; Urban Consolidation Act of 1945; Black Labour Act 67 of 1964. Except by joining the vast migrant labour force, blacks were given little opportunity to earn money because of these systematic coercive measures.⁹ Dugard succinctly captured the plight of Africans when he avowed that:

A vast web of statutes and subordinate legislation confine the African to his tribal homeland and release him only in the interest of the agricultural and industrial advancement of the white community. When he visits a "white area" as a migrant labourer he does so on sufferance, shackled by the chains of legislation and administrative decision.¹⁰

With hundreds of young men coerced to search for wage employment in industrial areas, the elderly, children and women who stayed behind in their traditional villages had difficulty in maintaining the levels of food production attained previously.¹¹ This resulted in the worsening of their standards of living as the soil became increasingly eroded and their cultivation practices and traditional irrigation falling into disuse.¹²

As the rural areas became entwined with the monetary sector through the purchase of trade goods and sale of labour, the class relations in the bantustans gradually became reliant on the dominant structures of the white economy.¹³ White farmers settled Areas from which Africans were removed were distributed to white farmers.¹⁴ Government agencies provided massive technical and financial assistance to these white farmers to expand their agricultural output.¹⁵ Africans were prevented from competing with white farmers by complex quota and marketing arrangements.¹⁶ Whenever blacks managed to grow cash crops, the violent impact

⁹ J Dugard *Human rights and the South African legal order* (1978) 71.

¹⁰ Dugard (n 9 above) 73.

¹¹ D Posel 'Race as common sense: Racial classification in twentieth-century South Africa' (2001) 44(02) *African Studies Review* 89.

¹² D Wylie *Starving on a Full Stomach: Hunger and Triumph of Cultural Racism in Modern South Africa* Charlottesville (2001) 21.

¹³ RA Wilson 'The Sizwe will not go away: The truth and reconciliation commission, human rights and nation-building in South Africa' (1996) 55 (2) *African Studies* 4.

¹⁴ TD Moodie *The rise of Afrikanerdom: Power, apartheid, and the Afrikaner civil religion* (1975) 17.

¹⁵ G Shimoni *Jews and Zionism: The South African Experience (1910-1967)* (1980) 112.

¹⁶ LS Hinds 'The Gross Violations of Human Rights of the Apartheid Regime under International Law (1998) 1 *Rutgers Race & the Law Review* 231.

of economic fluctuations in the world market, reinforced by administrative coercion, posed a barrier to the efforts of these surviving peasants.¹⁷

The institutionalization of the aforementioned numerous apartheid policy, resulted in the emergence of two types of agriculture in South Africa, namely Bantustan subsistence agriculture and white commercial agriculture.¹⁸ As such, the underdevelopment and overpopulation of the bantustans led to their stronger gravitation towards labour than agricultural production.¹⁹

This section sets the scene for the chapter by elucidating the historical factors, which have had an impact on South Africa's food insecurity situation. Arguably, the country presents an interesting and unique case study in understanding how historical events or circumstances can have a long-term impact on the standard of living of people. The section encompasses landmarks from the colonial era, policies adopted and the institutions established to entrench discriminatory practices against black Africans.

While being a major supplier of labour, African subsistence agriculture in contemporary South Africa makes limited contribution to the export economy of South Africa, mainly due to the poor infrastructure, poor marketing and lack of access to adequate land for black people. Unless there is improvement in production, the potential of many African subsistence farmers to support themselves with their product is rather bleak under post-apartheid South African regime and its agriculture strategies.²⁰

Against this backdrop, one might be correct to aver that the apartheid system has arguably had a far-reaching impact on the current chronic hunger situation, especially in terms of lack of land and skills (for black Africans) for food production and securing jobs respectively.²¹ In summary, the contemporary setbacks of hunger and malnutrition are linked to the operationalisation of apartheid policies and legislation.²² Amongst others, the lack of access to

¹⁷ The previous regime was a coalition government composed of the National Party and Labour Party. See D Gaitskell & E Unterhalter 'Mothers of the nation: A comparative analysis of nation, race and motherhood in Afrikaner nationalism and the African National Congress' in *Woman-Nation-State* (1989) 35; S Dubow *Racial segregation and the origins of apartheid in twentieth century South Africa, 1919-36* (1989) 43.

¹⁸ JF Herbst 'The Administration of Native Affairs in South Africa' (1930) XXIX *Oxford Journals* 487.

¹⁹ P Daphne 'Agrarian Reform in Post Apartheid South Africa,' in *Beyond Apartheid*, SAERT Working Papers

²⁰ See sec 4 of this chapter.

²¹ H Marais 'South Africa pushed to the limit' (2011) *The Political Economy of Change* 63; M Leibbrandt, A Finn & I Woolard 'Describing and decomposing post-apartheid income inequality in South Africa' (2012) 29(1) *Development Southern Africa* 19-20.

²² M Aliber 'Chronic poverty in South Africa: Incidence, causes and policies' (2003) 31(3) *World Development* 474.

food could be tied to the (i) exclusion of black people from economically active areas; (ii) unequal structure of the social welfare system along racial lines, and the (iii) forceful dispossession of African groups of their productive land.²³ Thus, one is tempted to affirm that the aforementioned historical factors are the remote causes of hunger and undernourishment in South Africa.²⁴ The next section examines the content of the various food security initiatives and why they have failed to adequately address chronic hunger in South Africa.

3. Existing grounds for food interventions

To critically analyse recent policies relating to the right to food, this section is divided into two parts. Part one, takes stock of government's overall policy framework, which has been adopted over the years to address food insecurity. Part two provides an overview of the emergency policy adopted in recent times to address chronic hunger and malnourishment. This section adopts two themes throughout:

- (i) the degree to which policies on food security and nutrition are coherent and coordinated; and;
- (ii) the manner in which (as well as the degree to which) they address the needs of the desperate.

It must be indicated from the onset that presently, neither the Constitutional Court nor other lower courts (including Magistrates' Courts, High Courts and the Supreme Court of Appeal) have provided a clear interpretation on the content and nature of the right to food.²⁵ Assessing the meaning of the right to food in South African context is relevant for two fundamental reasons. *First*, the internationally recognised principle that all human rights are indivisible, interdependent and interrelated is highlighted in the South African Constitution.²⁶

As discussed in chapter three, section 2(2) of the Constitution imposes a generic obligation on the state to ensure the full realisation of the rights in the Bill of Rights.²⁷ This constitutional obligation can be fulfilled through the implementation of several rights

²³ MR Carter & J May 'One kind of freedom: Poverty dynamics in post-apartheid South Africa' (2001) 29(12) *World development* 1989.

²⁴ Dugard (n 9 above) 74.

²⁵ S Liebenberg 'Human development and human rights, South African Country Study' (2000) *Human Development Report* 25.

²⁶ D Brand & CH Heyns '(eds) 'Introduction' in *Socio-economic rights in South Africa* (2005) 1.

²⁷ D McLaren, B Moyo & J Jeffrey 'The Right to Food in South Africa: An Analysis of the Content, Policy Effort, Resource Allocation and Enjoyment of the Constitutional Right to Food' *Studies in Poverty and Inequality Institute Working Paper* <http://www.spii.org.za/wp-content/uploads/2015/07/SPII-Working-Paper-11-The-Right-to-Food-in-South-Africa-2015.pdf> (accessed 13 August 2016) 33.

including the right to work, access to social security and land.²⁸ An all-inclusive enjoyment and protection of these rights provide the relevant stimulus for the realisation of the right to food.²⁹ It is in this light, that the Constitutional Court has systematically and constantly underscored the relationship between economic/social rights and other constitutional safeguards.³⁰

Second, there are textual similarities between the duties imposed on the state by the Constitution regarding the right to food, as well as those rights the Constitutional Court has had the occasion to elucidate including the right to social security (*Khosa and Others v Minister of Social Development and Others (Khosa)*),³¹ access to health care (*Minister of Health v Treatment Action Campaign (TAC)*),³² and adequate housing (*Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom case)*).³³ This constitutional provision (section 27 of the Constitution) specifically obliges the state to take reasonable legislative and other measures to achieve progressive realisation of the right to food conditional on available resources.³⁴ Against this backdrop, the Constitutional Court, when confronted with a claim relating to the right to food, is expected to refer to the existing case law on economic/social rights obligations.³⁵

Nonetheless, when invoking a constitutional guarantee as overarching as the right of access to adequate food, in its textual context, one should not merely underscore its interrelations with other basic rights, rather its relevance in enhancing the constitutional objectives of equality, the rights to life, human dignity and social justice.³⁶ The Constitution is grounded upon these core tenets. It is in this regard, that Yacoob J, in *Government of the Republic of South Africa and Others v Grootboom and Others* intimated that:

Our Constitution entrenches both civil and political rights, and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no

²⁸ F Coomans 'The Ogoni Case Before the African Commission on Human and Peoples' Rights' (2003) 52(03) *International and Comparative Law Quarterly* 749.

²⁹ Coomans (n 28 above).

³⁰ See the judgements of *Government of the Republic of South Africa & Others v Grootboom & Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

³¹ *Khosa & Others v Minister of Social Development & Others* 2004(6) BCLR 569 (CC).

³² *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).

³³ *Grootboom* (n 30 above) para 13.

³⁴ S Bonti-Ankomah 'Addressing food insecurity in South Africa' (2001) SARP *conference on land reform and poverty alleviation in Southern Africa* Pretoria 5.

³⁵ *Khosa* (n 31 above).

³⁶ MB Struble & LL Aomari 'Position of the World Dietetic Association: Addressing world hunger, malnutrition, and food insecurity' (2003) 103(8) *Journal of the Academy of Nutrition and Dietetics* 1046.

doubt that human dignity, freedom and equality, the foundational values of our society are denied those who have no food, clothing and shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2³⁷

The right to sufficient food does not only serve as a precondition for the enjoyment of all rights and freedoms, but it is fundamental for human survival.³⁸ Its infringement amounts to violation of several strings of rights.³⁹ Therefore, besides being deprived of access to other basic rights, the chronically hungry and malnourished are equally leading a life devoid of human dignity.⁴⁰ Yet, the vital nature of this right does not translate into the fact that all aspects of the content of the right must be enforced instantly.⁴¹

Even though the courts have not had the opportunity to determine the legal contours of the right to food, the Constitutional Court, in the *Grootboom* case provided a useful guiding principle for the interpretation and application of these obligations.⁴² In this case, the Court intimated that first, the constitutional provisions in question must be thoroughly assessed, and economic and social rights must be interpreted in their historical, social and textual context.⁴³ Second, such an interpretation must encompass the application of relevant foreign and international legislation.⁴⁴

The next section assesses the possible interpretation of the right to food within the context of the applicability of economic and social rights, and within the lens of two Constitutional Court cases, the *Grootboom* and *TAC* cases. Even though the two decisions are prone to wide-ranging interpretations, symbolizing for some a robust interpretation (and application of basic rights issues) and for others, a narrow approach to the judgment of economic and social rights challenge,⁴⁵ the chapter will limit its assessment to the application of the right to food

³⁷ [2000] ZACC 19, 2001 (1) SA 46 (CC) para 23.

³⁸ MJ Dennis & DP Stewart 'Justiciability of economic, social, and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing, and health?' (2004) *American Journal of International Law* 462.

³⁹ TD Beuchelt & D Virchow 'Food sovereignty or the human right to adequate food: which concept serves better as international development policy for global hunger and poverty reduction?' (2012) 29(2) *Agriculture and Human Values* 259; M Armar-Klemesu 'Urban agriculture and food security, nutrition and health' *Growing cities, growing food* (2000) *Urban agriculture on the policy agenda* 99.

⁴⁰ S Skogly 'Right to Food: National Implementation and Extraterritorial Obligations' (2007) 11 *Max Planck Yearbook of United Nations Law* 339.

⁴¹ J Clover 'Food security in sub-Saharan Africa' (2003) 12(1) *African Security Studies* 5.

⁴² The *Grootboom* case concerned access to housing.

⁴³ *Grootboom* (n 30 above) para 22.

⁴⁴ *Grootboom* (n 30 above) para 26.

⁴⁵ D Bilchitz 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' (2003) *South African Journal on Human Rights* 19, condemned the Court for its general failure to attribute any direct positive obligations to the state, as well as its failure to adopt (in any

based on what *Grootboom* and *TAC* have expressly demonstrated. I follow a critical and skeptical reading of the judgments to better understand the conceptual and practical implications of existing government food programmes (which will be discussed later on in the chapter).

When the Court handed down the two judgments, it intimated that the positive obligations of the state as set out under sections 26(1) and 27(1) are jointly defined both in sections 26(2) and 27(2) of the Constitution.⁴⁶ This implies that the only positive obligation imposed by sections 26(1) and 27(1) on the government is an obligation to frame and enforce policies to attain economic and social rights that are reasonable in terms of the available resources, while being cognizant of the fact that economic and social rights have to be progressively realised.⁴⁷ In setting out the meaning of *reasonableness*, the Court affirmed that for a policy to be reasonable, it must be coherent, adequately flexible (to respond to short, medium- and long-term needs), rational, well-coordinated, inclusive of all relevant actors in the society and effectively operationalised.⁴⁸ The next sections take a critical look at these principles and how they apply to the right to food programmes.

3.1. The principle of inclusivity and flexibility

The concepts of inclusivity and flexibility identified above espouse that individuals are confronted with different levels of deprivations, and for that reason, demonstrate different levels of basic needs.⁴⁹ Hence, government is obliged to adopt policies, which take into consideration all the various levels of needs and deprivations.⁵⁰ While containing current emergency circumstances, a policy must provide for more permanent, long-term remedies.⁵¹

In *Grootboom*, the element of reasonableness, in practical terms obliges government's housing policy to take into consideration the needs of those individuals who were *desperate* and lived in a condition of housing *crisis*. On the one hand, the Court was concise about who

manner) the minimum core principle in both *Grootboom* and the *TAC* cases. T Roux 'Understanding Grootboom-A response to Cass R. Sunstein' (2001) 12 *Constitutional Forum* 41, also notes that the Court has created nothing more than a duty of 'reasonable inclusion' in the *Grootboom* case, considering that it woefully failed to engage in substantive priority-setting in the adjudication.

⁴⁶ See *Grootboom* (n 30 above) paras 34 & 38; *TAC* (n 32 above) paras 29 & 30.

⁴⁷ *Grootboom* (n 30 above) para 38.

⁴⁸ *Grootboom* (n 30 above) para 39-44.

⁴⁹ S Foale, D Adhuri, P Aliño, EH Allison, N Andrew, P Cohen & N Stacey 'Food security and the Coral Triangle initiative' (2013)38 *Marine Policy* 174.

⁵⁰ Foale *et al* (n 50 above).

⁵¹ *Grootboom* (n 30 above) para 89; *TAC* (n 32 above) para 20.

the ones in crisis are and who were the most desperate.⁵² One possible option could have been to select only a few individuals, a vulnerable group, who due to some kind of prevailing crisis, have for the time being sunk beneath a certain level of the enjoyment of basic rights.

Consequently, the Court in *Grootboom* rejected the narrow definition of ‘those in crisis’ and ‘most desperate’ groups as merely ‘people who are living in intolerable conditions and [...] people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition.’⁵³ Arguably, the Court sought to affirm that for whatever reason, any individual who has sunk below a specific level of enjoyment of a fundamental right, is considered as (i) living in intolerable situation, (ii) in crisis, and (iii) most desperate.⁵⁴ The reason for the disaster may stretch from natural disaster to socioeconomic deprivation. A desperate persons’ circumstance may be temporary or more permanent in nature.⁵⁵

The inclusivity and flexibility element was further invoked by the Constitutional Court to nullify government’s policy position in the *TAC* case.⁵⁶ The government’s health initiative in this light exempted impoverished HIV positive mothers and their babies from its health care benefits on the grounds that they lacked access to one of the pilot sites where Nevirapine (HIV/AIDS drug) was being distributed.⁵⁷ The Court, therefore, framed its ruling of unreasonableness on the grounds of the policies inflexibility to adjust to the needs of the indigent. The Court, however, was less clear on the meaning and content of what it entails in ‘making provision for’ individuals. A less skeptical interpretation, on the one front, would hold that such people in desperate need are legally entitled to direct and immediate state assistance, even if only basic intervention.⁵⁸ As a matter of urgency, the government has to practically provide for their most fundamental needs. A skeptical reading on the other, would assert that the Court stopped far short in the *Grootboom* (unlike the *TAC*) case, to set out an obligation for the government on immediate and direct provision of basic resources.⁵⁹

⁵² *Minister of Public Works v Kayalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC) para 38.

⁵³ *Grootboom* (n 30 above) para 52. Own emphasis.

⁵⁴ *Grootboom* (n 30 above) para 99(2).

⁵⁵ *Grootboom* (n 30 above) para 52.

⁵⁶ *Grootboom* (n 30 above) para 45; *TAC* (n 32 above) para 19.

⁵⁷ *TAC* (n 32 above) para 6.

⁵⁸ *Grootboom* (n 30 above) para 36.

⁵⁹ M Pieterse ‘Eating socioeconomic rights: the usefulness of rights talk in alleviating social hardship revisited’ (2007) *Human Rights Quarterly* 798.

Three things underpin this limited reading of the *Grootboom* and *TAC* cases. First, and more theoretically, the Court in demonstrating its dislike to the notion of the minimum core content has in the two decisions rejected the concept that an obligation of immediate and direct provision applies to conditions of very dire deprivation.⁶⁰ Second, and on a practical level, in the *Grootboom* decision, the Court order does not oblige the state to take any definite step in respect of allocation of resources.⁶¹ Third, a narrow reading of the two decisions would rule that the dual obligations of inclusivity and flexibility (set out in the *Grootboom* and *TAC* cases) in actual fact simply demands that, a policy must make at least some partial provision of resources to those individuals (who, regardless of the reason, be it permanently or temporarily), find themselves in desperate situation (of lack of health care services, access to food, water or housing).⁶² The thesis will adopt this reading in assessing the right to food in South Africa.

Irrespective of their narrow scope, the obligations of inclusivity and flexibility still bear great prospects for constraints facing contemporary government's food and nutritional policies. Against the backdrop of the right to have access to housing (the Court in the *Grootboom* case), held that those who are 'desperate' (in other words, those who have no durable shelter or are truly homeless) should be catered for.⁶³ This triggered the order instructing the state to revise local, provincial and national housing policy, and incorporate steps for the direct provision of provisional shelters to those in desperate housing needs.⁶⁴

One may assert that the millions of South Africans currently facing chronic hunger and malnutrition would meet the threshold (for purposes of the holding in the *Grootboom* case) of 'living in intolerable conditions', 'in crises' and 'most desperate'.⁶⁵ Individuals who have little or no food to consume every day of their life (or children who do not grow to their full mental and physical potential or waste away as a result of mal-and-undernourishment) demonstrate the same immediate and urgent need regarding the right to food akin to the right

⁶⁰ JC Mubangizi & BC Mubangizi 'Poverty, human rights law and socio-economic realities in South Africa' (2005) 22(2) *Development Southern Africa* 279.

⁶¹ M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26(4) *Human Rights Quarterly* 889.

⁶² *Grootboom* (n 30 above) para 49; *TAC* (n 32 above) para 19.

⁶³ *Grootboom* (n 30 above) para 79.

⁶⁴ *Grootboom* (n 30 above) para 51.

⁶⁵ S Liebenberg 'Right to Social Assistance: The Implications of *Grootboom* for Policy Reform in South Africa' (2001) 17 *South African Journal on Human Rights* 232.

to have access to housing in the Grootboom community.⁶⁶ This is not only logical, but it is true, even if the most basic baseline or measurement is used.⁶⁷

The Court has further demonstrated in the *Grootboom* and *TAC* cases that the state has an obligation to address the food and nutritional needs of the chronically hungry.⁶⁸ The basic policy framework for the immediate and direct supply of food to those in ‘disaster’ can now be considered in legal terms.⁶⁹ As demonstrated by *Grootboom*, the government needs to adopt far-reaching measures to provide for the immediate and direct supply of food, be it through food stamps, the actual provision of food, food price controls, or extended monetary social assistance.⁷⁰

3.2. The principle of coherence and coordination

The second criterion, which determines whether a policy is reasonable, is coherence and coordination.⁷¹ The reasonableness of a policy is measured by the threshold that such a policy (for instance, regarding the right to have access to health care and the right to food), must be well coordinated and coherent.⁷²

The implication seems to indicate that in the first place, each of the rights must have a single policy framework tailored to, and operational for every specific right.⁷³ Thus, depending on the situation, the Court affirmed that this might need a policy framework at national level and effectively operational at the local level.⁷⁴ Any such (coherent) framework legislation must clearly coordinate the realisation of diverse tasks, stating which section of government

⁶⁶ J Sloth-Nielsen ‘The Child’s Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of Grootboom’ (2001) 17 *South African Journal on Human Rights* 210.

⁶⁷ O Hospes ‘Overcoming barriers to the implementation of the right to food’ (2008) *European Food and Feed Law Review* 246.

⁶⁸ J Fitzpatrick & RC Slye ‘*Republic of South Africa v Grootboom*. Case No. CCT 11/00.2000 (11) BCLR 1169 and *Minister of Health v. Treatment Action Campaign*. Case No. CCT 8/02’ (2003) *American Journal of International Law* 669; *Grootboom* (n 30 above) para 45; *TAC* (n 32 above) para 20.

⁶⁹ DM Chirwa *Child poverty and children’s rights of access to food and basic nutrition in South Africa: A contextual, jurisprudential and policy analysis* (2009) 1.

⁷⁰ *Grootboom* (n 30 above) para 52.

⁷¹ *Grootboom* (n 30 above) para 41.

⁷² J Ruggie ‘Protect, respect and remedy: A framework for business and human rights’ (2008) 3(2) *Innovations* 192.

⁷³ Pieterse (n 59 above) 796.

⁷⁴ *Grootboom* (n 30 above) para 40.

department is in charge for the operationalisation of a specific segment of the policy framework.⁷⁵

Whereas in *Grootboom*, the Court's judgment merely addressed the issue of coordination between various spheres of government (local, provincial and national) the concept can certainly be extended to coordination between different departments and agencies within one arm of government. The concept of coherence and coordination, in this extended sense, is specifically essential to policy frameworks designed to fulfill the right of access to adequate food.

The right to food is dependent on fulfilling a range of other rights.⁷⁶ In a definite sense, food is not just plucked from trees. To access it, it has to be acquired through exchange or own production.⁷⁷ This ability to acquire food through exchange or production hinges on attaining interrelated socioeconomic rights.⁷⁸ Thus, simply to acquire food, one needs education, resultant employment and income generation, or access to land to produce or social assistance.⁷⁹

Jean Drèze and Amartya Sen in their survey have demonstrated that an individual's ability to acquire food greatly depends on the '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 land and eradication of infectious epidemics'.⁸⁰ Their theory suggests, for instance, that an individual after drinking contaminated water is unwell from a simple illness like diarrhoea is incapable to ingest the required amount of calories and nutrients.⁸¹ The right to food, in this circumstance, is violated by the non-realisation of the right to water.⁸² In addition, failures in health as a result of disease, trigger additional requirement for realising the right to food.⁸³ For instance, an individual who is unwell due to

⁷⁵ Pieterse (n 59 above) 822.

⁷⁶ M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26(4) *Human Rights Quarterly* 889.

⁷⁷ M Altman, T Hart & P Jacobs 'Household food security status in South Africa' (2009) 48(4) *Agrekon* 346.

⁷⁸ R Dixon 'Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited' (2007) 5(3) *International Journal of Constitutional Law* 391.

⁷⁹ K Fiscella, P Franks, MR Gold & CM Clancy 'Inequality in quality: addressing socioeconomic, racial, and ethnic disparities in health care' (2000) 283(19) *Jama* 2579.

⁸⁰ J Drèze & A Sen *Hunger and public action* (1991) 77.

⁸¹ N Silanikove 'Interrelationships between water, food and digestible energy intake in desert and temperate goats' (1989) 12(3) *Appetite* 167.

⁸² SC McCaffrey 'A Human right to water: Domestic and international implications' (1992) 5 *Georgetown Environmental Law Review* 1.

⁸³ M Armar-Klimesu 'Urban agriculture and food security, nutrition and health' (2000) *Growing cities, growing food. Urban agriculture on the policy agenda* 98.

malaria needs (besides other prescriptions) extra quantities of iron. Moreover, an individual who is not adequately educated is not able to produce/acquire and preserve adequate food as a result of lack of knowledge about food production and preservation.⁸⁴

Since the right to food is in this distinctive sense intrinsically linked to the realisation of other rights, policy framework(s) adopted to ensure its fulfillment requires a careful attention to coherence, and specifically a thorough (and extensive inter-sectoral and) interdepartmental coordination.⁸⁵ The next section, which focuses on the policy review for the realisation of the right to food will be underpinned by these two constitutionally indicated thresholds: (i) focus on coherence and coordination, (ii) direct transfer of food (to generate food entitlement for those in desperate needs).

But before proceeding to access the content and policy implications of the respective government departments, the chapter will briefly set out some of the general hindrances confronting people's access to food in South Africa.

4. The right to food and the problem of implementation

An effective operationalization of food and nutrition security policies hinges on appropriate governance and management systems to implement such policies through established mechanisms and programmes.⁸⁶ Ideally, specific state institution or relevant government department will, therefore, have a significant role to play in the implementation and improving food and nutrition security interventions.⁸⁷

Yet, there is no single government department or agency (for example, a department of food security) in South Africa with the overarching mandate to address chronic hunger and malnutrition.⁸⁸ In fact, considering that the realisation of the right to food is so particularly dependent on fulfilling other basic rights, it perhaps makes good sense that various institutions and departments are mandated for implementing various aspects of food-related

⁸⁴ JC Mubangizi 'The Constitutional Protection of Socio-Economic Rights in selected African countries: a comparative evaluation' (2006) 2(1) *African Journal of Legal Studies* 12.

⁸⁵ P Gilibert 'The feasibility of basic socioeconomic human rights: a conceptual exploration' (2009) 59(237) *The Philosophical Quarterly* 659.

⁸⁶ P de Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258.

⁸⁷ MJ Cohen & MA Brown 'Access to justice and the right to adequate food: implementing Millennium Development Goal One' (2005) 6 *Sustainable Development Law & Policy* 54.

⁸⁸ S Hendriks 'Drivers of change policy review' Presentation at a conference held on 21 September 2016 at Brooklyn, Pretoria (on file with author).

programmes. The actual challenge nonetheless is the poor coordination between the different departments involved.⁸⁹ This setback is apparent both at the level of policy development as well as at the level of operationalization.

On a policy level, instead of an overarching policy, food-related policies have rather been developed in piecemeal fashion, with diverse components implemented by several departments.⁹⁰ Whereas the 2002 Integrated Food Security Strategy was designed to address this constraint, its implementation has been riddled with several institutional, resource and social constraints as discussed in section 5.3.3.1 of chapter three. As its name suggests, although the Department of Agriculture, Food and Fisheries (DAFF) should have been the sole body responsible for the operationalisation of food security initiatives, each of the numerous departments (Departments of Health (DoH); Department of Labour (DoL), Department of Social Development (DSD), Department of Basic Education (DBE), and Department of Economic Development (DED)) have framed their own individual programmes to address food/nutrition related issues (which they perceive as their mandate) without there being any common policy framework setting out priorities. In DAFF, there is the 2010 food security programme,⁹¹ in the DoH, it is the 1995 integrated nutrition programme,⁹² and in the DSD, parts of the poverty relief programme.⁹³

On an institutional level, there is no overarching and primary structure established to coordinate the activities of the various departments in this regard.⁹⁴ As mentioned above, at least six different government departments have averred that at the national level their mandates have direct bearing on the realisation of the right to food.⁹⁵ Further, the role of three other departments such as the Department of Finance; the Department of Trade and Industry;

⁸⁹ MS Kende 'The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics' (2003) 19 *Connecticut Journal of International Law* 617.

⁹⁰ SL Hendriks & NJ Olivier 'Review of the South African agricultural legislative framework: food security implications' (2015) 32(5) *Development Southern Africa* 557; K Fischer & F Hajdu 'Does raising maize yields lead to poverty reduction? A case study of the Massive Food Production Programme in South Africa' (2015) 46 *Land Use Policy* 304; CM Walsh & FC van Rooyen 'Household Food Security and Hunger in Rural and Urban Communities in the Free State Province, South Africa' (2015) 54(2) *Ecology of food and nutrition* 118.

⁹¹ EC Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African constitutional court' (2006) 38 *Columbia Human Rights Law Review* 321.

⁹² Department of Health 'The Integrated Nutrition Programme' (2003) https://www.westerncape.gov.za/text/2003/inp_foundation_for_life_1to12.pdf (accessed 1 April 2016) 1.

⁹³ BN Mbuli *Poverty reduction strategies in South Africa* (2009) 136.

⁹⁴ Holness & Govindjee (n 2 above) 525; Brand & Heyns (n 26 above) 153.

⁹⁵ SB Gutto 'Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79. The departments are DBE, DAFF, DoH, DoL, DSD and DED.

and the Department of Water and Sanitation, can be seen as having a direct bearing on the realisation of food security in South Africa.⁹⁶

The food security operations of these relevant government departments are coordinated through an interdepartmental committee convened by the DAFF.⁹⁷ Arguably, this joint Committee has been generally malfunctioned especially in terms of synchronizing the various programmes of the respective government department.⁹⁸

The next section pays specific attention to the respective food programmes operationalised by various government departments, while paying attention to the various impediments confronting their various interventions. In order to identify the prevailing constraints confronting the current food and nutrition insecurity in South Africa, it is imperative to assess some of the strengths, opportunities, constraints and weaknesses in food security programmes and interventions. It must be noted that while there is a vast array of government-funded programmes in food security and nutrition in South Africa, this analysis will only be limited to selected programmes with the aim of showing the fragmentation or lack of coordination among these interventions. Incoherence or lack of coordination will not only result in duplication of government efforts, but waste of resources, which could otherwise be transferred to the food-poor not covered in any of the manifold programmes. The limitation to government-sponsored interventions will assist in determining whether the state is actually complying with its obligation under section 27 of the Constitution. Again, the limitation will also provide a platform for the thesis to provide adequate recommendations, which will effectively respond to any impediments within the existing system.

4.1. Nutrition programmes

4.1.1. Integrated Nutrition Policy

Nutrition initiatives implemented by the Department of Health are set out in its 1995 Integrated Nutrition Policy (INP).⁹⁹ This initiative is aimed at providing various interventions as a means of optimizing the food and nutrition requirements of South Africans. These interventions include:

⁹⁶ Holness & Govindjee (n 2 above) 528.

⁹⁷ Food and Agriculture Organization 'Regional Overview of Food Insecurity Africa' (2015) <http://www.fao.org/3/a-i4635e.pdf> (accessed 1 April 2016) 11.

⁹⁸ JJ Candel 'Food security governance: a systematic literature review' (2014) 6(4) *Food Security* 585; S Drimie & S Ruysenaar 'The integrated food security strategy of South Africa: an institutional analysis' (2010) 49(3) *Agrekon* 316.

⁹⁹ Department of Health (n 92 above) 5.

- (i) Nutritional education projects;
- (ii) Interventions intended for limited food transfer, nutritional supplementation, and support for capacity building; and
- (iii) A range of information gathering and monitoring projects.¹⁰⁰

The INP specifically focuses on what the Department of Health refers to as the group at-risk, which encompasses women and children.¹⁰¹ As the basis for the INP, the department, in order to appropriately inform its current policy development, has committed itself to establishing a nutrition information system.¹⁰²

It was in this light that the department in 2012 launched the South African National Health and Nutrition Examination Survey (SANHANES).¹⁰³ The initiative was instituted to provide a more comprehensive and broader platform to examine the health status of people on a regular basis.¹⁰⁴ Thus, through a continuous population health survey, the survey seeks to address the food and nutritional status of South Africans as it relates to dietary intake and food security.¹⁰⁵ The SANHANES study also found that in South Africa an average diet ‘is energy dense but micronutrient poor’.¹⁰⁶ In light of the findings that the state undoubtedly has a huge burden of (household and individual) food insecurity fueled by multiplicity of risk factors, the report recommended that there is an urgent need for healthy public policies and multi-sectoral action.¹⁰⁷ The survey specifically recommended that the state provide several interventions including:

- i. Folic acid and iron supplementation for pregnant women;
- ii. Vitamin A supplementation for children;
- iii. Provision of adequate finance for the Integrated School Health Programme to ensure the provision of micronutrient rich meals at schools;
- iv. Public awareness of dietary diversity, micronutrients and practices.¹⁰⁸

¹⁰⁰ Department of Health (n 92 above) 2.

¹⁰¹ Department of Health (n 92 above) 2.

¹⁰² Department of Health (n 92 above) 5.

¹⁰³ Human Sciences Research Council (HSRC) ‘The South African National Health and Nutrition Examination Survey’ (2014) 3.

¹⁰⁴ HSRC (n 103 above) 1.

¹⁰⁵ HSRC (n 103 above) 1.

¹⁰⁶ HSRC (n 103 above) 35.

¹⁰⁷ HSRC (n 103 above) 33.

¹⁰⁸ HSRC (n 103 above) 35.

It is important to indicate that, the Department, as a response to some studies conducted in the past has instituted measures to address specific malnutrition problems. Some of these surveys were the:

- (i) 1995 South African Vitamin A Consultative Groups Survey (SAVACG);¹⁰⁹
- (iv) 1999 South African National Food Consumption Survey (NFCS);¹¹⁰
- (ii) Road to Health Card (RTHC) to monitor a child's health in the first 5 years of life.¹¹¹

In light of the findings of the two aforementioned surveys and the RTHC, the Department of Health adopted a string of responsive interventions. For instance, in 1995, the department (as a result of the SAVACG report) instituted the mandatory iodization of all table salt to address the high prevalence of iodine deficiency among babies and primary school children.¹¹² Consequently, an iodine deficiency survey (1998 Iodine Deficiency Disorder Survey) indicated that iodine deficiency among children has been cut down to 10 percent prevalence.¹¹³

More so, a vitamin A supplementation project was initiated in April 2000 by the Department of Health.¹¹⁴ The objective of the project was to combat the high prevalence of vitamin A deficiency in children, which, besides a general link to morbidity, has been specifically

¹⁰⁹ South African Vitamin A Consultative Group (SAVACG) <http://ghdx.healthdata.org/organizations/south-african-vitamin-consultative-group-savacg> (accessed 28 March 2016).

¹¹⁰ The objective of the NFCS was to determine factors that influence the dietary intake of children (1-9 years), their anthropometric status as well as their nutrient intake. The survey found that the most common nutritional disorder affecting nearly one in five children was stunting due to the intakes of folic acid, vitamin B6, niacin, riboflavin, vitamins A, D, C and E, selenium, zinc, iron, calcium, and energy which were less than two-thirds of the Recommended Dietary Allowances (or daily energy needs). The conclusion was that many households were experiencing micronutrient deficiencies and energy deficit due to chronic hunger, leading to high levels of stunting. This result, along with the SAVACG report and the Health Systems Trust study were used as motivated the introduction of mandatory fortification in South Africa. See D Labadarios, NP Steyn, E Maunder, U MacIntyre, G Gericke, R Swart, R & JH Nel 'The national food consumption survey (NFCS): South Africa, 1999' (2005) 8(05) *Public health nutrition* 534.

¹¹¹ Department of Health 'Road to health' available at < http://roadtohealth.co.za/wp-content/uploads/2016/08/road_to_health_booklet_girls.pdf (accessed 28 March 2016).

¹¹² PL Jooste, MJ Weight & CJ Lombard 'Short-term effectiveness of mandatory iodization of table salt, at an elevated iodine concentration, on the iodine and goiter status of schoolchildren with endemic goiter' (2000) 71(1) *The American journal of clinical nutrition* 75; MLD Sebotsa *et al* 'Iodine status as determined by urinary iodine excretion in Lesotho two years after introducing legislation on universal salt iodization' (2005) 21(1) *Nutrition* 23-24.

¹¹³ PL Jooste, MJ Weight & CJ Lombard 'Iodine concentration in household salt in South Africa' (2001) 79(6) *Bulletin of the World Health Organization* 534.

¹¹⁴ A Coutsooudis, K Pillay, E Spooner & L Kuhn 'Randomized trial testing the effect of vitamin A supplementation on pregnancy outcomes and early mother-to-child HIV-1 transmission in Durban, South Africa' (1999) 13(12) *Aids* 1517.

associated with a heightened risk of mother-to-child HIV transmission.¹¹⁵ The project is operationalised through direct dietary supplementation and food fortification through primary health care services.¹¹⁶ In light of its logistical constraints, the full operationalisation of the project only kicked off in 2008.¹¹⁷ As a response to the severe malnutrition among children, the department pilots this project through primary health facilities.¹¹⁸ This project succeeded in its pilot phase in reducing the infant mortality rate as a result of severe malnutrition to 14 percent from its initial 28 percent.¹¹⁹

On chronic hunger, the department, has adopted some measures (which includes nutritional supplementation initiatives, financial assistance for capacity building programmes, information gathering and education programmes) as a means of addressing people's access to food.¹²⁰ For this reason, the policy response of the department arguably seems to be a balanced initiative from the direct initiatives to longer-term capacity building. Yet, the interventions which encompass the direct supply of nutrition (including the different nutritional supplementation projects) are somewhat tailored towards addressing the micronutrient needs of a specific group of individuals (specifically women and children). Therefore, the Department of Health interventions do not adequately address the food and nutritional needs of people as set out under section 27 of the Constitution.

4.1.2. Food fortification

A comprehensive national survey on the nutritional status of South African (pre-school) children aged 6 to 71 months was conducted in 1994 and published by the South African Vitamin A Consultative Group (SAVACG) in 1995 with the support of the DoH. The SAVACG survey indicated 33.3 per cent of children are vitamin A deficient, a prevalence which showed that one of the major health issues in the country was vitamin A deficiency. It the survey further found a 5 per cent prevalence of iron deficiency, 10 per cent prevalence of

¹¹⁵ ML Newell, H Coovadia, M Cortina-Borja, N Rollins, P Gaillard & F Dabis 'Mortality of infected and uninfected infants born to HIV-infected mothers in Africa: a pooled analysis' (2004) 364(9441) *The Lancet* 1236.

¹¹⁶ A Oelofse, M Faber, JG Benadé, AJS Benadé & DG Kenoyer 'The nutritional status of a rural community in KwaZulu-Natal, South Africa: the Ndunakazi project' (1999) 45 *Central african journal of medicine* 14.

¹¹⁷ United Nations Children's Emergency Fund 'News note: South Africa launches its first ever Vitamin "A" supplementation campaign' (2015) http://www.unicef.org/media/media_45583.html (accessed 5 August 2016).

¹¹⁸ JB Ubbink, A Van der Merwe, WJH Vermaak & R Delport 'Hyperhomocysteinemia and the response to vitamin supplementation' (1993) 71(12) *The clinical investigator* 993.

¹¹⁹ United Nations Children's Emergency Fund (n 117 above).

¹²⁰ J Doherty, M Chopra, L Nkonki, D Jackson & T Greiner 'Effect of the HIV epidemic on infant feeding in South Africa:" When they see me coming with the tins they laugh at me' (2006) 84(2) *Bulletin of the World Health Organization* 95.

iron deficiency and 21.4 percent prevalence of anaemia.¹²¹ The survey concluded with recommendations to the DoH to improve the vitamin A status of children by investigating the feasibility of food fortification. Further, a non-governmental organisation, Health Systems Trust in 1997 conducted a research titled *The Nutritional Status of South Africans: A Review of the Literature from 1975-1996*, affirmed the findings of the SAVACG survey by concluding that at least 20 per cent of primary school and 25 per cent of pre-school children were stunted from malnutrition.¹²² Akin to the SAVACG report, the study called for fortification as an important element for enhancing the nutritional status of children. Against this backdrop, the state on 7 April 2003, adopted the R504 Regulation which oblige all manufacturers, importers, wholesalers and retailers of maize, wheat flour, bread and foodstuffs which contain 90 percent of either maize or wheat flour (including bread) to fortify them or be guilty of an offence punishable by a fine.¹²³ The fortification regulation, published under the 1972 Foodstuffs, Cosmetics and Disinfectants Act No. 54 is applicable to small and large millers in rural, peri-urban and urban centres. It designates the addition of minerals (zinc and iron) and vitamins (Pyridoxine (Vitamin B6), Folic Acid, Niacin, Riboflavin (Vitamin B2), Thiamin (Vitamin B1) and Vitamin A) to be added to wheat flour and maize meal.¹²⁴ Under its quality control principles, the regulation states that millers must (i) maintain strict stock rotation to avert the packaged products from losing potency by sitting on store shelves beyond expiry dates, (ii) store the fortification mix under proper conditions (defined by the manufacturer) and keep monthly records.¹²⁵

Besides the substantive the aspect of mineral and vitamins fortification, the regulation covers proper labelling of packages with a fortification logo along with a nutrition declaration table displayed. The objective of the logo is to inform the consumer that the product is fortified and meets the recommended dietary allowance. The promulgation of the regulation triggered concerns of cost. Consumers were concerned that the extra cost of fortification was going to jeopardise the profits of the milling industry while making staple foods unaffordable to the target market due to increase in prices. It was discovered that the amount passed onto the consumer after the fortification mix will be nominal (two cents increase per kilogram of

¹²¹ Cited in DoH 'Integrated nutrition Programme: Strategic plan 2002/03 to 2006/07' (November 2001) 3.

¹²² DoH 'A Reflection of the South African Maize Meal and Wheat Flour Fortification Programme (2004 to 2007)' 2.

¹²³ Regulation Gazette No. 7634

¹²⁴ Annexure V.

¹²⁵ Annexure I.

maize and once cent per loaf of bread).¹²⁶ While the programme ensured that millers fortified their products (which played a key role in reducing the risk of diseases and helping the organs to function properly), small millers seeking for cost advantage failed to comply. The Department of Health's reliance upon and close association with the South African Chamber of Baking and the National Chamber of Milling from the drafting to operationalisation of the legislation increased a pervasive sentiment that amongst small millers that the legislation was created to force them out of the market.¹²⁷ According to a survey conducted by the DoH, although the regulation enhanced the health needs of citizens, the requirements of the regulations did not only cause some employees in the seasonal and micro millers to lose their jobs, but led to the closure of many small millers. The new regulation, along with potential fines of R 125,000 for non-compliance, monitoring requirements, purchase of new equipment, and training of staff in addition to lack of funds for fortification mix forced many farmers and millers out of business.¹²⁸ Thus, while the regulation has the noble intent of boosting the nutritional needs of consumers, it forced some small millers out of business, thereby cutting their source of income and access to food. In summary, the Department of Health has been involved in several food and nutrition security advocacy, and promotional projects. These activities encompass the operationalisation of breastfeeding guidelines for health workers, the development of nutritional guidelines for persons living with HIV/AIDS, development and operationalisation of primary school nutritional education package, and the development and distribution of a vitamin A brochure in eight of the official languages.¹²⁹ It is important to indicate however that most of these interventions breaches the principle of inclusivity as discussed in section 3.1 of this chapter, especially as they exclude men and/or boys over 16 years who still need adequate nutrition to function well.

4.2. School feeding programmes

Following South Africa's first democratic election in 1994, the state has been providing pupils in schools in impoverished areas with meals.¹³⁰ Commonly termed as the National

¹²⁶ DoH 'A Reflection of the South African Maize Meal and Wheat Flour Fortification Programme (2004 to 2007)' 7.

¹²⁷ Department of Health (n 111 above) 14.

¹²⁸ Department of Health (n 111 above) 4

¹²⁹ HM Coovadia, NC Rollins, RM Bland, K Little, A Coutsoodis, ML Bennish & ML Newell 'Mother-to-child transmission of HIV-1 infection during exclusive breastfeeding in the first 6 months of life: an intervention cohort study' (2007) 369(9567) *The Lancet* 1107.

¹³⁰ ME van Stuijvenberg 'Using the school feeding system as a vehicle for micronutrient fortification: experience from South Africa' (2005) 26(2suppl) *Food and nutrition bulletin* S215.

School Nutrition Programme (NSNP), the initiative is operationalised as an education intervention as well as a poverty alleviation programme.¹³¹ For nearly a decade after its launch (1994-2003), the programme was first run by the Department of Health with the prime objective of enhancing ‘the health and nutritional status of South African primary school children, to improve levels of school attendance and to improve the learning capacity of children.’¹³² Moreover, in April 2004, the mandate was shifted to the Department of Basic Education (DBE).¹³³ The transfer of mandate between departments also witnessed the modification of programme name from its previously Primary School Nutrition Programme (PSNP) to its current NSNP.¹³⁴ Its aims were also broadened, and now are:

- i. To strengthen sustainable food production initiatives in schools and communities;
- ii. To stimulate nutrition education in schools and communities;
- iii. Developing partnership to enhance the programme;
- iv. To enhance learning capacity through school feeding.¹³⁵

The coverage of the NSNP encompasses selected schools for learners with disabilities, poorly resourced schools in poor communities and non-fee paying schools.¹³⁶ By 2013, the meal component provided for primary school pupils in a limited number of identified schools has progressed from being a peanut butter sandwich or a fortified biscuit (prior to 2004) to a daily cooked meal. The NSNP currently provide food to more than 8 million learners in over 20 thousand primary and high schools.¹³⁷ It is operationalised through a conditional cash transfer to the provincial level, which has the mandate for providing primary and secondary education in the country.¹³⁸ From 1994, the programme provided for only learners in primary schools

¹³¹ LT Bourne, EV Lambert & K Steyn ‘Where does the black population of South Africa stand on the nutrition transition?’ (2002) 5(1a) *Public health nutrition* 157.

¹³² Bourne *et al* (n 131 above).

¹³³ CC Jinabhai, M Taylor and KR Sullivan ‘Implications of the prevalence of stunting, overweight and obesity amongst South African primary school children: a possible nutritional transition?’ (2003) 57(2) *European Journal of Clinical Nutrition* 358.

¹³⁴ M Faber ‘Dietary intake of primary school children in relation to food production in a rural area in KwaZulu-Natal, South Africa’ (1999) 50(1) *International journal of food sciences and nutrition* 59.

¹³⁵ Department of Education ‘National School Nutrition Programme a Guide for Secondary Schools’ (2009) <http://www.education.gov.za/LinkClick.aspx?fileticket=AzMOJpmC/dE%3D> (accessed 2 April 2016) 2.

¹³⁶ D Labadarios, NP Steyn, C Mgiijima & N Daldla ‘Review of the South African nutrition policy 1994–2002 and targets for 2007: achievements and challenges’ (2005) 21(1) *Nutrition* 108.

¹³⁷ K Rendall-Mkosi, F Wenhold and NB Sibanda ‘Case Study of the National School Nutrition Programme in South Africa’ (2013) *Pretoria: PCD, NEPAD and DOBE v.*

¹³⁸ Department of Basic Education ‘National School Nutrition Programme (NSNP) Annual report 2011/2012 www.education.gov.za/LinkClick.aspx?fileticket=WEuFok4zUSM%3D&tabid=440&mid=1911 (accessed 7 July 2016).

until October 2008 when the government extended it to cover students in secondary schools.¹³⁹

Following its inception, there have been several audits of the programme, which provides useful information regarding its achievements, constraints and impacts. This includes regular briefings in parliament, and several external audits between 1996 and 2012.¹⁴⁰ Even though this programme provides nutrition to nearly 95 percent of children enrolled in primary school, auditors of the NSNP generally agree that there are significant operational impediments to the programme making the necessary impact. For instance, an external survey conducted revealed that, school age children demonstrated signs of nutritional problems in the form of overweight (6 percent), wasting (4 percent) and stunting (18 percent), and approximately 20 percent of households experiencing undernourishment.¹⁴¹ An independent survey conducted revealed that the failure of the NSNP to adequately address the nutritional needs of learners could be linked to food delivery problems because of ‘fraud taking place within the centralized procurement system’.¹⁴² Other impediments, which have militated against the programme, are government’s late payment to suppliers and food handlers, which often leads to distribution of poor quality food (or in some cases non-delivery of food on some days).¹⁴³

In addition, the programme which provides food to learners in targeted schools seems to exclude some learners. The focus of the criteria for selection is based on the history and location of the school, rather than targeting the social needs or circumstances of poor children. To be a beneficiary of the programme, a school must be situated in a poverty-stricken area and previously disadvantaged (yet, not all schools in such locations will eventually benefit). Consequently, this criterion leads to the exclusion of several underprivileged learners attending schools that are not targeted either because they are not historically disadvantaged or located in poor neighborhoods, or even in cases where they are situated in such areas, are not considered disadvantaged or are not yet targeted.

¹³⁹ S Myataza ‘School nutrition programme deserves praise’ Mail&Guardian (17 March 2017) available at www.mg.co.za (accessed 14 July 2017).

¹⁴⁰ Studies in Poverty and Inequality Institute ‘The Right to Food in South Africa An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food’ available at <http://www.spii.org.za/wp-content/uploads/2015/07/SPII-Working-Paper-11-The-Right-to-Food-in-South-Africa-2015.pdf> (accessed 20 August 2016) 45.

¹⁴¹ Rendall-Mkosi (n 137 above) iv.

¹⁴² Rendall-Mkosi (n 137 above) 39.

¹⁴³ Rendall-Mkosi (n 137 above) 39.

Further, despite the expansion of the objectives of the programme, it primarily still remains a school feeding initiative with the other objectives mainly relegated to the background. In their review, Wildeman and Mbebetho perceive it as ‘an exclusively feeding programme with insufficient fiscal space for other vital aspects of an integrated nutrition strategy.’¹⁴⁴ Still, in its 2013/2014 Annual Performance Plan, the only purpose of the programme listed by the Department of Basic Education was ‘to provide nutritious meals to targeted learners.’¹⁴⁵ This is in keeping with the criticism of the initiative that it ignores key necessity of children such as nutritional supplement and deworming which are considered as logistically easier to obtain and less expensive.¹⁴⁶

In addition, to ensure effective operationlisation of the programme, the NSNP is monitored by national, provincial and district DBE-NSNP staff who are tasked with doing monitoring visits to schools.¹⁴⁷ Yet, besides the lack of transport for monitors to visit the schools, the high number of schools in each district often makes such monitoring infrequent as once per year per school.¹⁴⁸ Provincial officials are, therefore, not able to visit schools frequently to monitor whether the food prepared and served is of sufficient quantity and quality.¹⁴⁹ Simply, many impediments have arguably militated against the overarching objective of the NSNP to adequately address the hunger and nutritional needs of people in impoverished communities.¹⁵⁰

4.3. Social assistance programmes

Food subsidies as implemented in several countries such as Mozambique, are very commonly used for the explicit purpose of controlling the rate of inflation of food prices, and often control the prices that poor people pay for specific food items.¹⁵¹ Unlike its Southern African Development Country counterpart, post-apartheid South Africa has not instituted food or

¹⁴⁴ R Wildeman & N Mbebetho ‘Reviewing Ten Years of the School Nutrition Programme, Budget Information Service’ (2005) www.eldis.org/vfile/upload/1/document/0708/DOC20662.pdf (accessed 20 August 2016).

¹⁴⁵ Department of Basic Education ‘Annual Performance Plan 2013/2014’ <www.education.gov.za/LinkClick.aspx?fileticket=CQ9wvkQ9GUk> (accessed 20 August 2016).

¹⁴⁶ DoH ‘National vitamin a supplementation policy guidelines for South Africa’ 2.

¹⁴⁷ CC Jinabhai, M Taylor, A Coutsoodis, HM Coovadia, AM Tomkins & KR Sullivan ‘A health and nutritional profile of rural school children in KwaZulu-Natal, South Africa’ (2001) 21(1) *Annals of Tropical Paediatrics: International Child Health* 58.

¹⁴⁸ Rendall-Mkosi (n 137 above) 25.

¹⁴⁹ Rendall-Mkosi (n 137 above) 25

¹⁵⁰ M Chopra ‘Risk factors for undernutrition of young children in a rural area of South Africa’ (2003) 6(7) *Public health nutrition* 646.

¹⁵¹ MR Carter, R Laajaj & D Yang ‘Policy Brief: Savings, Subsidies, and Sustainable Food Security in Mozambique’ (May 2010) available at <<https://basis.ucdavis.edu/sites/g/files/dgvnsk466/files/2017-01/amabrief10-02.pdf>> (accessed 28 July 2017).

agricultural subsidies, except zero-taxation on some selected food items.¹⁵² Although targeted food subsidy programmes can play a key role in addressing the needs of the poorest, Vink and Kirsten argued that South Africa does not need specific food subsidies since they ‘have unintended consequences and, like all subsidy programmes, are difficult to terminate once initiated.’¹⁵³ They, therefore, argue that the state already has institutionalised mechanisms to address poverty, such as social security system, which is adequate to combat poverty. The next section assesses whether Vink and Kirsten’s assertion, made about a decade and half ago, is still valid today.

The state’s social assistance initiative is implemented by the Department of Social Development (DSD). The department demonstrated its commitment to address the triple challenge of poverty, hunger and malnutrition in the White Paper for Social Welfare adopted in 1997.¹⁵⁴ The paper sets out key objectives, which includes designing a suitable food and nutritional interventions tailored to address the needs of those in distress.¹⁵⁵

In their analysis of the food (in)security situation in South Africa, Goldblatt and Rosa indicate that as at 30 September 2012, about one third (16 million people) out of a total population of 50 million South Africans benefit from social assistance grants.¹⁵⁶ Over the past decade and half, the social security system, according to them has grown dramatically and it is hailed as having a wide ‘developmental impact on the high levels of poverty and unemployment.’¹⁵⁷ Within the Department of Social Development (DSD), issues relating to hunger and malnutrition are generally considered under its poverty relief intervention.¹⁵⁸ The

¹⁵² South Africa has zero-taxation on some foodstuffs, namely, lentils, frozen or fresh vegetables and fruits, eggs (from hens), edible legumes and pulses, dried mealies, dried beans, cooking oil (excluding olive oil), canned or tinned pilchards, samp, rice, milk, maize meal, brown bread, and brown bread flour. Yet, these foodstuffs lose their zero-taxation status once they are sold as part of meal, refreshment or prepared further for sale. Therefore, processed fruit or vegetables attract the standard Vat rate of 14%. S Mzizi ‘Did you know: only these 14 foodstuffs are zero-rated’ *accountingandtaxclub* (16 May 2014) available at <accountingandtaxclub> (accessed 14 July 2017).

¹⁵³ N Vink & J Kirsten ‘Pricing behaviour in the South African food and agricultural sector’ Final Report: Strictly Confidential (2002) A report to the National Treasury, available at <sarpn.octoplus.co.za> (accessed 23 June 2017) x.

¹⁵⁴ Department of Welfare ‘White Paper For Social Welfare’ (1997) www.gov.za/whilepaper1997/soswe197.htm (accessed 1 April 2016).

¹⁵⁵ A Lombard ‘The implementation of the white paper for social welfare: a ten-year review’ [http://repository.up.ac.za/bitstream/handle/2263/9739/Lombard_Implementation\(2008\).pdf?sequence=1](http://repository.up.ac.za/bitstream/handle/2263/9739/Lombard_Implementation(2008).pdf?sequence=1) (accessed 1 April 2016) 155.

¹⁵⁶ B Goldblatt & S Rosa ‘Social security rights: campaigns and courts’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-economic Rights in South Africa: Symbols or Substance?* (2014) 253.

¹⁵⁷ Goldblatt & Rosa (n 156 above).

¹⁵⁸ DSD ‘Social development’ <http://www.gov.za/about-sa/social-development> (accessed 1 April 2016).

DSD clearly recognises that hunger and malnutrition form a major indicator of deep-seated unemployment, poverty and inequality in which the country's social crisis are entrenched.¹⁵⁹

Within the relief programme, the DSD also identifies the link between inability to generate an income (or low levels of income) and undernourishment.¹⁶⁰ Against this backdrop, the DSD recognises as one of the overarching targets of the poverty relief programme to formulate and operationalise a household food security through its Food for All Programme (FAP).¹⁶¹ Thus, the DSD has been tasked with the main obligation of 'facilitating and monitoring' the operationalisation of the FAP.¹⁶² Through this initiative, the DSD aims to provide food for distressed households through what the department classifies as direct and indirect efforts.

Within the lens of the DSD, a direct intervention encompasses creating and operating a household (and rural) food production clusters to optimize the production of staple foods for personal consumption.¹⁶³ The department, therefore, collaborates with FoodBank South Africa (a non-profit organisation) with the aim of strengthening its FAP programme.¹⁶⁴ It, therefore, aims to feed three million individuals by 2015/2016.¹⁶⁵ Indirectly, the FAP addresses chronic hunger and malnutrition by promoting income generating activities (thereby enhancing food entitlement through exchange).¹⁶⁶

While the conventional cash payments of the DSD contribute in the fight against hunger, it acknowledges the need to shift to a more self-sufficient approach, such as job creation.¹⁶⁷ It is against this backdrop that Antoinette Lombard affirms that the department's

developmental approach to social welfare embraces socio-economic rights, including the right to cash transfers and anti-poverty strategies. Progress in this respect during the next decade of the implementation of the White Paper for Social Welfare is promising, given government's acknowledgement of the neglect of social services and the lack of planning for exit levels in social security [...] An exit strategy is a proactive and a deliberate strategy to link social grant

¹⁵⁹ H Schneider, H Hlophe & D van Rensburg 'Community health workers and the response to HIV/AIDS in South Africa: tensions and prospects' (2008) 23(3) *Health policy and Planning* 183.

¹⁶⁰ J Ferguson 'Formalities of poverty: Thinking about social assistance in neoliberal South Africa' (2007) 50(02) *African Studies Review* 86.

¹⁶¹ DSD (n 158 above).

¹⁶² DSD (n 158 above).

¹⁶³ DSD (n 158 above).

¹⁶⁴ FoodBank South Africa 'What we do' <http://www.foodbanksa.org/> (accessed 1 April 2016).

¹⁶⁵ DSD (n 158 above).

¹⁶⁶ DSD (n 158 above).

¹⁶⁷ DSD 'Linking social grants beneficiaries to poverty alleviation and economic activity' *Discussion document* (2006) 2-3.

beneficiaries to opportunities for economic activities [...] and to improve their capabilities which reduce their sole reliance on income support and to facilitate the reduction of high levels of poverty.¹⁶⁸

Although this approach is commendable, almost a decade down the line, such an exit strategy has still not been realised.¹⁶⁹ Although it might be argued that exit strategies have been built into the programme, with pensioners exiting death, child grant recipients at 18, the question that arises is what special programme is available to cushion the unemployed 18 year-old who just exited the child support or care dependency grants? Thus, while the existing system has arguably made significant contribution in terms of poverty reduction, the amounts of the respective cash grants are woefully inadequate and hardly meet the nutritional needs of the target groups (as well as their dependents).¹⁷⁰

More importantly, the existing framework of social assistance demonstrates a conceptual demonization towards the idea of dependence on the government. The overarching objective of all the main South African social assistance grants is to address the needs of a particular group of individuals, often considered as vulnerable groups.¹⁷¹ These people often have specific needs besides being simply poor.¹⁷² For instance, at the risk of stating the obvious, only parents of disabled children are entitled to the care dependency grant; the child support grant applies only to children under the age of 18 years; the disability grant falls only to a very limited category of disabled people; the foster care grant applies only to families caring for foster children; the old age pension applies only to the aged; and the Grant-in-Aid applies only to older persons, disability grant for persons who are disabled, and the war veterans grant (as its name implies) provides for former soldiers. This (special needs-based system of) social assistance proclaims a socioeconomic theory, by averring that (even though dependence on the state is not desirable) the beneficiaries have justifiable reasons (which include old age, orphans and the disabled). The picture is, therefore, painted that the chronically hungry who cannot attribute their plight to natural causes (such as disability or

¹⁶⁸ A Lombard 'The implementation of the White Paper for Social Welfare: A ten-year review' (2008) 20 (2) *The Social Work Practitioner-Researcher* 161.

¹⁶⁹ L Idahosa and J Van Dijk 'South Africa: Freedom for whom & quest; Inequality, unemployment and the elderly' (2016) 58(1) *Development* 96.

¹⁷⁰ W Zembe-Mkabile, V Ramokolo, D Sanders, D Jackson & T Doherty 'The dynamic relationship between cash transfers and child health: can the child support grant in South Africa make a difference to child nutrition?' (2016)19(02) *Public health nutrition* 356; AH Wiltshire 'The meanings of work in a public work scheme in South Africa' (2016) 36(1/2) *International Journal of Sociology and Social Policy* 11.

¹⁷¹ AY Amoateng & BMP Setlalentoa 'Family structure, race, gender and poverty: The case of food deprivation in South Africa' (2016) 19(1) *African Sociological Review/Revue Africaine de Sociologie* 43.

¹⁷² Amoateng & Setlalentoa (n 171 above).

age), are to some extent to be blamed for their situation (and thus, unworthy of government intervention).¹⁷³

More specifically, the current (special needs-based system of) social assistance cuts off several able bodied and unemployed youths who will have no long-term access to state intervention irrespective of how desperate their situation might be.¹⁷⁴ The only remedy is a temporary grant, termed Social Relief of Distress Grant, accessible only for a period of three months for individuals who are confronted with exceptional distress because of some sudden crisis.¹⁷⁵ The Social Relief of Distress Grant provides a certain quantity of food provision (in the form of food stamps) to victims in distress for a limited period.¹⁷⁶ Besides providing this limited support in the form of food or food vouchers, the complex requirement that one has to fulfill prior to accessing the grant is not only burdensome, but time consuming and expensive.

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Finally, the DSD acknowledges that cash transfers are fundamental device to increase food entitlement.¹⁷⁸ Yet, as discussed above, most of the Department's interventions are special needs based and, therefore, seek to address the food insecurity situation of a seemingly selected section of the country's population.

Besides having a narrow scope, the social assistance scheme of the DSD is woefully inadequate in terms of their low uptake rates and low levels of grants. It was in this light that a section of the public condemned the minister for Social Development, Bathabile Dlamini in June 2016 when she said that a social grant of R753 is adequate to cover beneficiaries for the whole month.¹⁷⁹ Thus, in his February 2017 budget, the then finance minister, Pravin

¹⁷³ LA Williams 'Welfare and legal entitlements: The social roots of poverty' in Kairys D (ed) *The politics of law: A progressive critique* (1998) 569.

¹⁷⁴ MR Carter & J May 'One kind of freedom: Poverty dynamics in post-apartheid South Africa' (2001) 29(12) *World development* 1988.

¹⁷⁵ DSD 'Social Relief of Distress' <<http://www.sassa.gov.za/index.php/social-grants/social-relief-of-distress>> (accessed 2 April 2016).

¹⁷⁶ The grant provides intervention for a maximum of three months only. It could however be extended for additional three months under special circumstances.

¹⁷⁷ The practical application and limitation of the grants is discussed in *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*, Case 671/2003 (23 October 2003) (B).

¹⁷⁸ DSD (n 171 above).

¹⁷⁹ J Etheridge 'DA invites social development minister on shopping trip to see what R753 can buy' (19 June 2016) *News24* available at <<http://www.news24.com/SouthAfrica/News/da-invites-social-development-minister-on-shopping-trip-to-see-what-r753-can-buy-20160619>> (accessed 19 July 2016); Tmg Digital 'The Democratic Alliance has thrown down the gauntlet to Minister of Social Development Bathabile Dlamini, challenging her to join the party on a shopping trip to test her assertion that R753 in social grants is enough to sustain an entire family for an entire month' (19 June 2016) *Sowetan* available at <<http://www.sowetanlive.co.za/news/2016/06/19/da-challenges-bathabile-r753-is-enough-dlamini-to-accept>>

Gordhan announced small increases in the social grants.¹⁸⁰ The table below sets out the respective amount, which was received by beneficiaries, the increment and the new amount which commenced from 1 April 2017.

Table 3: Social grants

Type of grant	Amount from October 2016	Increase from 1 April 2017	Current amount
Old Age (under 75 years)	R1 510	R90	R1 600
Old Age (over 75 years)	R1 530	R90	R1 620
War Veterans	R1 530	-	R1 530
Grant in Aid	R360	-	R360
Child Support	R360	R20	R380
Care Dependency	R1 510	R90	R1 600
Foster Care	R890	R30	R920
Disability Grant	R1 510	R90	R1 600

Table 3 indicates that the affected social grants are Old Age (under 75 years) grant who now receive R1,600, Old age (over 75 years) grant receive R1,620, Child Support Grant

invitation-to-go-shopping-for-basics> (accessed 19 July 2016); N Mbatha ‘ANC minister says South Africans can survive on R753 a month’ (9 June 2016) *The South African* available at <<http://www.thesouthafrican.com/anc-minister-says-south-africans-can-survive-on-r753-a-month/>> (accessed 19 July 2016); City Press ‘Can R753 support a family of 5? Bathabile Dlamini thinks so’ (21 June 2016) *City Press* available at <<http://city-press.news24.com/News/can-r753-support-a-family-of-5-bathabile-dlamini-thinks-so-20160621>> (accessed 19 July 2016).

¹⁸⁰ L Dentlinger ‘#Budget2017: social grants to be increased: Pensioners and others reliant on social grants can expect an increase in their grants on 1 April’ (22 February 2017) *Eyewitness News* available at <<http://ewn.co.za/2017/02/22/budget2017-social-grants-to-be-increased>> (accessed 5 April 2017); B Capazorio ‘Budget 2017: R90 a month increase in old age, disability grants’ (22 February 2017) *Sunday Times Business* available at <<http://www.timeslive.co.za/sundaytimes/businesstimes/2017/02/22/Budget-2017-R90-a-month-increase-in-old-age%E2%80%9A-disability-grants>> (accessed 5 April 2017); S Devereux ‘Why South Africa’s social grants aren’t eradicating malnutrition’ *The Conversation* <<https://theconversation.com/why-south-africas-social-grants-arent-eradicating-malnutrition-72020>> (accessed 5 April 2017).

beneficiaries now receive R380, Care Dependency Grant is R1,600, Foster Care Grant is R920 and Disability Grant is now R 1,600.¹⁸¹

Any expansion of social grants theoretically, should contribute to reducing chronic hunger and malnutrition. More money seems to mean beneficiaries (or poor people) will eat more diversified diets, spend more on meals per day and on nutritious food. Ironically, the minor increases in payments will not necessarily change the status quo and will not ‘necessarily feed through into the battle to reduce child malnutrition’.¹⁸² Two reasons account for this. First, since the causes of malnutrition are complex, it requires not only increase in social grants to reduce it, but rather a comprehensive package of interventions. Second, the amounts are too small and are usually distributed among many individuals besides the intended beneficiary. Thus, although the number of persons receiving social grants has gone up from June 2016 to June 2017, the rates of chronic hunger and malnutrition among, for instance, children ‘have remained stubbornly high.’¹⁸³ According to the 2016 Global Nutrition Report (GRN), South Africa has 23.9 percent stunting prevalence and 27.6 percent anaemia prevalence.¹⁸⁴ For instance, whereas South Africa’s child stunting rate is slightly better than many African countries such as Somalia, Swaziland and Congo, its rate of malnutrition is worse than several poorer African countries including Senegal, Libya, Ghana and Gabon.¹⁸⁵

The failure of South Africa’s extensive social grants to eradicate chronic hunger and malnutrition underscore two key factors affecting food security in this light. First, social grants (in practice) make up part of the income of the household and are spent on non-food requirements of the entire household. The grant payments (specifically Foster Care and Child Support Grants) are not solely spent on food for the child, and even if they were, the grants do not cater for the nutritional requirement of the child. The grants, for that reason, have multiple ‘users’ and many ‘uses’. It is ‘diluted’ among many people and for many needs. Even if all the grant of R360 as Child Support Grant was not shared with other members of the household and was solely spent on food for the child, it would cover less than two-thirds of the cost of a nutritionally adequate diet for a child.¹⁸⁶ Second, the increases in grant payments have not kept up with inflation. While social grants have been increasing slowly, prices of food in recent years have been rising by as much as 10 percent or more in

¹⁸¹ Dentlinger (n 180 above); Devereux (n 180 above).

¹⁸² Devereux (n 180 above).

¹⁸³ Devereux (n 180 above).

¹⁸⁴ GRN 2016 ‘From promise to impact: ending malnutrition by 2030’ 123.

¹⁸⁵ GRN (n 184 above) 120.

¹⁸⁶ Devereux (n 180 above).

South Africa.¹⁸⁷ For instance, while the Child Support Grant increased by only 9 percent, the cost of adequate nutritional diet between 2016 to early part of 2017 increased by an estimated 16 percent.¹⁸⁸

Moreover, the DSD was saddled with a debacle when it released a statement on 1 March 2017 that it will be unable to continue payment of social grants to about 17 million beneficiaries from 1 April 2017, given that the department and SASSA have not entered into an agreement with any service provider to ensure the disbursement of the funds.¹⁸⁹ This crisis could be traced back to 2014 when the Constitutional Court ruled that the appointment of Cash Paymaster Services (CPS) was unlawful.¹⁹⁰ In response to public condemnation of the department's inaction to timeously appoint a new service provider, the Social Development Minister Bathabile Dlamini assured Parliament's Standing Committee on Public Accounts on 8 March 2017 that there will be no disruptions in the payment of their grants from 1 April 2017.¹⁹¹ It was a great relief for the public, and the grant recipients in particular, when the Constitutional Court ruled on 17 March 2017 that CPS and SASSA are constitutionally obliged to continue with the payment of the grants on 1 April until another entity assumes that responsibility.¹⁹² After criticizing SASSA and Minister Bathabile Dlamini's poor handling of the situation, the court extended CPS's contract for the next 12 months.¹⁹³

Although the aforementioned criticisms of South Africa's social grants are evident, it would be unfair to argue that the grants are failing to positively impact on the welfare of millions of South Africans. The grants are crucial component of the country's fight against hunger and poverty. Without the grants, the well-being of more than 17 million people living in poverty would be worsened.¹⁹⁴ The grants have over the past 23 years played a key role in the

¹⁸⁷ Devereux (n 139 above).

¹⁸⁸ Devereux (n 139 above).

¹⁸⁹ The Huffington Post 'Dlamini Will Pay Those Social Grants But She's Not Telling Us How' available at <<http://www.huffingtonpost.co.za/2017/03/05/well-pay-those-social-grants-but-were-not-telling-you-how/>> (accessed 13 March 2017).

¹⁹⁰ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC), para 1.

¹⁹¹ Eyewitness News 'Dlamini: no national crisis over social grants' available at <<http://ewn.co.za/2017/03/08/dlamini-no-national-crisis-regarding-payment-of-social-grants>> (accessed 13 March 2017).

¹⁹² G Nicolaidis 'Concourt instructs Sassa, CPS to continue paying social grants' Eyewitness News (17 March 2017) available at <<http://ewn.co.za/2017/03/17/concourt-instructs-sassa-cps-to-continue-paying-social-grants>> (accessed 10 April 2017).

¹⁹³ K Cowan 'Social grants crisis – Constitutional Court's Catch 22' Times Live (17 March 2017) available at <<http://www.timeslive.co.za/politics/2017/03/17/ANALYSIS-Social-grants-crisis-%E2%80%93-Constitutional-Court%E2%80%99s-Catch-22>> (accessed 10 April 2017).

¹⁹⁴ Devereux (n 139 above).

reduction of hunger and food insecurity. However, in light of the great number of South Africans still confronted with chronic hunger, it is imperative that the state adopts a more comprehensive approach to tackle this problem.

In short, the DSD operates a social security system which targets those who are willing but are unable to work due to ill health, disability or age (children and the aged). Even though benefits in this regard are accessible as long as the beneficiary, subject to a means test, meets the requirement of ill health, disability or age, the amount is meager. The DSD's efforts, as a result, do not adequately respond to the chronic hunger situation of its target group.

Besides the DSD's intervention, some non-governmental organisations (NGOs) have been instrumental in the fight against chronic hunger. Three of such interventions are FoodForwardSA, FoodBank South Africa and Global Alliance for Improved Nutrition (Gain) in South Africa. The website of FoodForwardSA indicates that it collects edible surplus food from retailers, wholesalers and manufacturers, and reallocates this food to hundreds of non-profit organisations that jointly feed daily hundreds of chronically hungry individuals.¹⁹⁵ In addition, as its name sounds, FoodBank South Africa is national foodbanking network which source for donated food and then issue it to over 203 000 children and adults through local food aid agencies such as HIV/AIDS clinics, soup kitchens, shelters, old age homes, crèches and orphanages.¹⁹⁶ Moreover, in October 2013, GAIN launched an initiative termed StartSmart to support national efforts to promote malnutrition awareness creation and help mothers feed their babies correctly from the start.¹⁹⁷ As a key component of a wider programme run by the Ministry of Health (called NutriMark), StartSmart focuses on the 1, 000-day window of opportunity for infant and child malnutrition. The initiative uses a digital campaign active across three main platforms: an interactive Unstructured Supplementary Service Data (USSD)-based platform; the popular South African messaging platform Mxit; and a mobile, or 'mobi,' website. The USSD, accessible from all Global System for Mobile (GSM) phones is a text-based, interactive service that enables access to information and quizzes on nutrition to enhance mothers' understanding about healthy diets.¹⁹⁸ While all these

¹⁹⁵ FoodForward SA 'Home' <<https://foodforwardsa.org/>> (accessed 10 April 2017).

¹⁹⁶ FoodBank South Africa 'About Us' available at <<http://www.wecanchange.co.za/Profiles/FoodbankSA/tabid/224/Default.aspx>> (accessed 10 April 2017).

¹⁹⁷ Malabo Montpellier Panel 'Nourished: How Africa can build a future free from hunger and malnutrition' (2017) *A Malabo Montpellier Panel Report 13*.

¹⁹⁸ GAIN 'How Cellphones Are Improving Nutrition in South Africa and Asia' available at <http://www.gainhealth.org/knowledge-centre/mobile-technology-improving-nutrition> (accessed 14 October 2017).

external interventions (not state funded) are essential and play a key role in promoting people's access to food, they have not being able to completely address chronic hunger and malnutrition confronting millions in South Africa.¹⁹⁹

4.4. Unemployment insurance programmes

Akin to the aforementioned departments, the Department of Labour (DoL) plays a far-reaching role in addressing chronic hunger and malnutrition. The department manages the Unemployment Insurance Fund (UIF), which has approximately 7.5 million workers who provide different levels of contributions.²⁰⁰ The fund was established by the Unemployment Insurance Act No. 63 of 2001, which seeks to provide safety net for the unemployed.²⁰¹

The unemployment insurance scheme provides income support to workers who are either:

- (i) Retrenched;
- (ii) Require maternity leave;
- (iii) Experience a long-term illness;
- (iv) Experience other life events that prevent them from earning an income.²⁰²

This scheme is mandatory contributory scheme applicable to all employees in the formal sector.²⁰³ The benefits, which accrue from the fund, are:

- (i) Funded largely from mandatory employer and employee contributions for a specific group of employees;
- (ii) Restricted to a certain percentage (often between 40 percent to 75 percent) of the employee's income at the time of official retrenchment;
- (iii) Limited in duration between 3 to 6 months (and depending on special circumstances, 1 year).²⁰⁴

¹⁹⁹ S Devereux 'Why South Africa's social grants aren't eradicating malnutrition' The Conversation <<https://theconversation.com/why-south-africas-social-grants-arent-eradicating-malnutrition-72020>> (accessed 5 April 2017).

²⁰⁰ DoL 'Unemployment Insurance Fund' (2015) <https://www.adobe.com/showcase/casestudies/uif/casestudy.pdf> (accessed 29 March 2016) para 2.

²⁰¹ DoL 'Unemployment Insurance Act No. 63 of 2001' <http://www.ukzn.ac.za/dhr/hr-%20labour%20relations/Acts/Amended%20Act%20-%20Unemployment%20Insurance.pdf>> (accessed 29 March 2016).

²⁰² N Molefe 'The Status of Unemployment Insurance Policies in Africa' Africa Institute of South Africa (2011) 35 *Briefing Policy 2*.

²⁰³ Molefe (n 202 above) 3.

²⁰⁴ DoL (n 200 above).

Although providing a temporary cushion following unemployment, the scheme benefits are meager and limited to approximately between 40 to 75 percent of the beneficiary's monthly earnings received for a maximum of up to 238 days while the beneficiary remains unemployed.²⁰⁵ Unfortunately, the UIF is accessible only to small fraction of South Africa's population in formal employment.²⁰⁶ Although this fund might play a role in the procurement of food, there is also a problem with access for those covered. The lack of coordination within the various structures and levels (from national, provincial to the district) of the Department of Labour delays the processing of applications, as well as the disbursement of payment, which tend to cause undue hardships on potential recipients.²⁰⁷

The unemployment insurance scheme, therefore, paints a bleak picture of the government's interventions to date to alleviate grinding poverty and chronic hunger of:

- (i) Persons who are underemployed;
- (ii) Persons in the informal sector;
- (iii) Persons who have never been employed;
- (iv) Persons who remain unemployed for extended duration of time.

It must be noted that the Department of Labour's launch and operationisation of the unemployment insurance scheme is laudable considering that it provides a short-term intervention to alleviate poverty and chronic hunger. Yet, in light of the lack of (appropriate) skills, many are unable to find jobs and, thus unable to benefit from the scheme.²⁰⁸ It was against this backdrop that Molefe touted that many of the current unemployed are individuals who migrated to urban areas with the hope of escaping the lack of income-generating opportunities in rural areas.²⁰⁹ These individuals who are unable to find employment, unfortunately, are usually in the classification not basically catered for either by the social security benefits or unemployment insurance benefits.²¹⁰

4.5. Poverty Eradication Programmes

In light of the failures of the respective department's effort to alleviate hunger, Cabinet in 2010 recognised that South Africa cannot attain sustained economic development and social

²⁰⁵ Republic of South Africa, Unemployment Insurance Act, 2001; Molefe (n 202 above) 4.

²⁰⁶ Molefe (n 202 above) 5.

²⁰⁷ Molefe (n 202 above) 5.

²⁰⁸ Molefe (n 202 above).

²⁰⁹ Molefe (n 202 above) 5.

²¹⁰ Molefe (n 202 above) 5.

cohesion unless all actors cooperate to combat chronic hunger and malnutrition.²¹¹ It was against this backdrop that the government in 2010 and 2012 adopted two strategic policies, namely the New Growth Path (NGP),²¹² and the National Development Plan (NDP) respectively.²¹³ The NGP was developed by the Economic Cluster under the leadership of Minister for Economic Development Ebrahim Patel while the NDP was developed by the National Planning Commission (NPC).²¹⁴

The two policy frameworks are grounded on the notion that households (and individuals) self-sufficiency should be enhanced while reducing over-dependency on the government.²¹⁵ These policies are for that reason strategically designed to promote national food security with emphasis on food availability, accessibility and utilization.²¹⁶ Both target several interventions, which aim at maintaining income generation and stimulating food production through small-scale commercial agriculture as a means of promoting food accessibility.²¹⁷

The two frameworks adequately provide a platform for various approaches and strategies, which encompass:

- i. Efforts to increase food production and distribution through increased access to production inputs;
- ii. The strategic use of trade measures and market interventions which will enhance food security;
- iii. Increased and better targeted public spending in social activities which impact on access to food;

²¹¹ S Hendriks 'South Africa's National Development Plan and New Growth Path: reflections on policy contradictions and implications for food security' (2013) 52(3) *Agrekon* 1.

²¹² DED 'New Growth Path' file:///C:/Users/bershtonto/Downloads/NGP_fina%20(1).pdf (accessed 1 April 2016).

²¹³ NPC 'National Development Plan' <http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> (accessed 1 April 2016).

²¹⁴ JM Borel-Saladin & IN Turok 'The impact of the green economy on jobs in South Africa' (2013) 109(9-10) *South African Journal of Science* 4.

²¹⁵ M Aliber & R Hall 'Support for smallholder farmers in South Africa: Challenges of scale and strategy' (2012) 29(4) *Development Southern Africa* 548.

²¹⁶ A Todes 'Urban growth and strategic spatial planning in Johannesburg, South Africa' (2012) 29(3) *Cities* 158.

²¹⁷ J Seekings & N Nattrass *Policy, Politics and Poverty in South Africa* (2015) 80.

- iv. Leveraging state food procurement to support smallholders and community-based food production programmes.²¹⁸

As a framework of the Department of Economic Development (DED), the NGP adequately reflects the government's socioeconomic plan of action.²¹⁹ The overarching objective of the strategy paper is to operationalise a range of microeconomic and macroeconomic interventions with explicit and concrete stakeholder commitments to realise sustainable economic growth.²²⁰

The NGP provides a short-term vision for the country and aims to reduce unemployment by approximately 10 percentage points by 2020.²²¹ It goes on to list eleven 'essential elements' for the operationalisation of the plan.²²² These include efficiency and strategic partnerships, capacity development, and supportive/enabling policy frameworks.²²³ On the one hand, the NGP's macroeconomic approach encompasses monetary policy interventions to attain 'growth and jobs targets'.²²⁴ On the other hand, the Plan's microeconomic approach targets actions, which will enhance job creation and competitiveness. This approach will further ensure that the macroeconomic strategy is viable and sustainable.²²⁵

Further, some key interventions are listed in the microeconomic section of the NGP as a means of regulating the inefficiency and strategies to support social equity.²²⁶ Among these are:

- (i) Youth employment through agriculture;
- (ii) Enhancing tourism;
- (iii) Strategy for the green economy;
- (iv) Support farmworkers organisations;

²¹⁸ R Kanbur 'Structural Inequalities and the New Growth Path: A Response to Jeremy Cronin, Deputy Minister of Transport, Republic of South Africa' (2011) *Cornell University* 24.

²¹⁹ NPC (n 213 above).

²²⁰ N Natrass 'The new growth path: Game changing vision or cop-out?' (2011) 107(3-4) *South African Journal of Science* 8.

²²¹ H Zarenda 'South Africa's National Development Plan and its implications for regional development' (2013) D13WP01 *tralac Working Paper* 3.

²²² F Tregenna 'A new growth path for South Africa?' (2011) 38(130) *Review of African Political Economy* 627.

²²³ C Musvoto, K Nortje, B De Wet, BK Mahumani & A Nahman 'Imperatives for an agricultural green economy in South Africa' (2015) 111(1-2) *South African Journal of Science* 07.

²²⁴ These targets stretch from a re-prioritisation of public spending to ensure sustainability over time, a lower cost of capital and a more competitive exchange rate.

²²⁵ These measures include a broad of actions such as rural development, small business development and skills development.

²²⁶ Natrass (n 202 above) 9.

- (v) Reform of the Broad-Based Black Economic Empowerment to support job creation.²²⁷

The NGP further recognises that a government-led approach has to align market outcomes with developmental needs.²²⁸ Hence, the NGP recommends that the state should support transformation towards a ‘more equitable, decent work-generating and green economy’ while minimizing costs for business.²²⁹ The NGP adopts job creation as the topmost priority and sets out concrete measures to enhance a more labour-absorbing growth pattern in targeted sectors (such as manufacturing sectors included in the Industrial Policy Action Plan (IPAP), green economy, high-level services, infrastructure, the mining value chain, and the agricultural value chain).²³⁰ The following measurable benchmarks or evaluating successes are provided:

- (i) Equity (poverty, inequality and lower wage)
- (ii) Environmental outcomes
- (iii) Growth (composition of economic growth, rate and labour intensity)
- (iv) Jobs (number and quality of jobs created)

Unlike the NGP, the strategic perspective of the NDP provides a long-term vision of eliminating poverty and reduces inequality, while ensuring that all individuals achieve a decent standard of living by 2030.²³¹ Besides this overarching objective, the plan lists many other aims including:

- (i) Improve social security system for the poor and needy;
- (ii) Promoting household food and nutrition security;
- (iii) Realising a food surplus with one-third being produced by subsistence farmers;
- (iv) Ensuring access to clean running water for all;

²²⁷S Ashman, B Fine and S Newman ‘Amnesty international? The nature, scale and impact of capital flight from South Africa’ (2011) 37(01) *Journal of Southern African Studies* 7.

²²⁸J Dubihlela & C Park ‘Transactional Costs Inhibiting Sustainable Entrepreneurial Agrarian Growth: Reflective Evidence from Small-scale Farmers (SSFs) in South Africa’ (2016) 54(2) *Journal of Human Ecology* 87.

²²⁹NPC (n 213 above); Hendriks (n 211 above) 7.

²³⁰SA Government ‘The New Growth Path: The New Growth Path framework’ 92017) available at <<http://www.gov.za/about-government/government-programmes/new-growth-path>> (accessed 20 July 2017).

²³¹J Dubihlela & C Park ‘Transactional Costs Inhibiting Sustainable Entrepreneurial Agrarian Growth: Reflective Evidence from Small-scale Farmers (SSFs) in South Africa’ (2016) 54(2) *Journal of Human Ecology* 87.

- (v) Redressing inequities of the past and broadening social cohesion;
- (vi) Ensuring access to sufficient energy for poor households;
- (vii) Increasing the quality of primary education.

In terms of poverty reduction, the plan is very specific and explicit in setting out its objectives by 2030:

- (i) Increasing per capita incomes from R50, 000 in 2010 to R120,000 by 2030;
- (ii) Raising employment from 13 million to 24 million over this time period;
- (iii) Reducing income inequality by 2030 from 0.69 to 0.6 (using the Gini Coefficient measure).²³²

The core content of a ‘decent standard of living’ as set out in the plan are:

- (i) Adequate nutrition;
- (ii) Clean environment;
- (iii) Employment;
- (iv) Social protection;
- (v) Quality education and skills development;
- (vi) Safety and security;
- (vii) Housing, water, electricity and sanitation;
- (viii) Housing, water, electricity and sanitation;
- (ix) Quality health care;
- (x) Safe and reliable public transport;
- (xi) Recreation and leisure.²³³

In a 2013 Post-State of the Nation Address (SONA) press briefing, Ministers Trevor Manuel and Collins Chabane intimated that there are four overriding operational objectives of the NDP, namely:²³⁴

²³² The Gini coefficient is used to measure income or wealth inequality.

²³³ NPC (n 213 above).

- (i) Providing a basis for making choices about how well to utilize limited resources;
- (ii) Creating a long-term strategic framework which enhances the successful realisation of the objectives of the NDP;
- (iii) Develop primary objectives to be achieved in 2030;
- (iv) Build consensus on some of the potential barriers which might hinder these objectives and how to address them

In its ambitious objective for 2030, the NDP avers that the country has the capacity and potential to ‘eliminate poverty and reduce inequality’ over the next twenty years.²³⁵ Although this aim is part of the Sustainable Development Goals, in reality, no country (in history or contemporary times) has in fact eliminated poverty irrespective of the size of its population. The meaning of poverty in itself is relative, and its benchmark can be tailored to provide statistics that are more suitable. However, in South Africa (where approximately one-fifth of all citizens are supported by state grants, growth is stagnant, and more than half the working age population is unemployed), achieving this target will be akin to moving a mountain.²³⁶ It was against this backdrop that the NDC in their critical assessment intimated that if South Africa at its current growth rate wants to achieve a level of per capita equivalent to developed and high income countries (like Portugal and Poland), it would take thirty-five years (and not twenty-years as its goal seems to purport).²³⁷

In 2011, when the NPC carried out its *Diagnostic Overview*, the rate of employment and personal income were dropping at 4 percent per year.²³⁸ The country’s economic growth or Gross Domestic Product (GDP) has slowed even more after the 2009 recession, with gloomy projections for 2016-2017.²³⁹ Statistics South Africa (Stats SA) has indicated that the

²³⁴SA Government Information *Implementation of the National Development Plan-Post-SONA media briefing* By Ministers Trevor Manuel and Collins Chabane, 19 February 2013, available at <<http://info.gov.za/speech>> (accessed 22 April 2017) 1.

²³⁵ Starting from the year of its adoption in 2010. See E Nel & CM Rogerson ‘The contested trajectory of applied local economic development in South Africa’ (2016) 31(1-2) *Local Economy* 109.

²³⁶ A Maredza & S Ikhide ‘Dealing with the challenge of generating employment in South Africa: Does banking sector efficiency matter?’ (2013) 12(11) *The International Business & Economics Research Journal (Online)* 1361.

²³⁷ NPC (n 213 above) 8.

²³⁸ CAI ‘Can South Africa be considered a developmental state? The New Growth Path and National Development Plan in perspective’ available at <www.consultancyafrica.com/index.php?option=com_content&view=article&id=967:cansouth-africa-be-considered-a-developmental-state-the-new-growth-path-and-nationaldevelopmental-plan-in-perspective&catid=87:african-finance-a-economy&Itemid=294> (accessed 15 February 2016).

²³⁹ Trading Economics (2016) ‘South Africa GDP Growth Rate 1993-2016’ available at <<http://www.tradingeconomics.com/south-africa/gdp-growth>> (accessed 1 April 2016). GDP is the monetary value of all the goods and services produced over a specific period.

country's economy has not yielded effective results in decreasing household poverty and inequality.²⁴⁰

It must be noted that the NDP largely ignores agriculture and it is silent on chronic hunger.²⁴¹ The NDP for instance, fails to set out the potentials agriculture presents, as well as the constraints confronting producers.²⁴² The only direct reference to chronic hunger and malnutrition in the NDP is when it calls for an increased in irrigated agriculture to boost the productivity of land, in addition to growth in agricultural development based on effective land reform (as means for the creation of million jobs in South Africa).²⁴³

Nonetheless, ongoing job-shedding trends in the agricultural sector seek to derail efforts towards job creation.²⁴⁴ An additional (and more implicit) reference to undernourishment in the NDP is the inclusion of infant and maternal health care in the list of interventions.²⁴⁵ Based on the service delivery and appropriate programme, this could have an impact on the right to food.²⁴⁶

The NGP on the other hand, also recognises agriculture as an important sector for local food security and export economic growth.²⁴⁷ The Plan makes occasional references to agricultural and land policies, highlights the need for trade policies, and advocates for the integration and harmonization of development policies.²⁴⁸ The NGP most importantly, takes into consideration the high and volatile inflation impacting on farm inputs and food staples.²⁴⁹ The NGP also mentions the production and consumption elements of the food system as key component of economic growth.²⁵⁰ Nonetheless, NGP conspicuously fails to recognise the

²⁴⁰ Statistics South Africa (2015) 'Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011' <<http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf>> (accessed 1 April 2016) 39.

²⁴¹ G Ziervogel, M New, E Archer van Garderen, G Midgley, A Taylor, R Hamann & M Warburton 'Climate change impacts and adaptation in South Africa' (2014)5(5) *Wiley Interdisciplinary Reviews: Climate Change* 605.

²⁴² Hendriks (n 211 above) 6.

²⁴³ KE Altieri, H Trollip, T Caetano, A Hughes, B Merven & H Winkler 'Achieving development and mitigation objectives through a decarbonization development pathway in South Africa' (2016) *Climate Policy* 11.

²⁴⁴ M Masutha & CM Rogerson 'Small enterprise development in South Africa: The role of business incubators' (2014) 26(26) *Bulletin of Geography. Socio-economic Series* 141.

²⁴⁵ NPC (n 213 above) 8-9.

²⁴⁶ B Cousins 'Smallholder irrigation schemes, agrarian reform and 'accumulation from above and from below 'in South Africa' (2013) 13(1) *Journal of Agrarian Change* 116.

²⁴⁷ JK Musango, AC Brent & AM Bassi 'Modelling the transition towards a green economy in South Africa' (2014) 87 *Technological Forecasting and Social Change* 257.

²⁴⁸ Musango *et al* (n 261 above) 259.

²⁴⁹ G Nhamo 'Green economy readiness in South Africa: A focus on the national sphere of government' (2013) 8(1) *International Journal of African Renaissance Studies-Multi-, Inter-and Transdisciplinarity* 115.

²⁵⁰ Hendriks (n 211 above) 9.

urgency for a policy regarding direct or indirect food transfer as a means of addressing undernourishment.²⁵¹

Within the South African context, chronic hunger and malnutrition are caused by structural poverty.²⁵² Poverty and undernourishment are intrinsically linked.²⁵³ Together, they create an inescapable trap. The famished compared to the well-fed, are less productive.²⁵⁴ The poor also lack the necessary capital and resources to seek work in order to obtain adequate food and nutrients.²⁵⁵

Ultimately, in order to realise the right to food, there is the need for a concept, which envisions alleviating poverty as the primary role of the economy.²⁵⁶ Such an approach needs a vibrant economy which provides economic security and access to opportunities (in the form income generating activities) to support purchasing power of the chronically hungry. Addressing chronic hunger and malnutrition also needs an overarching national strategy, complemented by progressive policies (as well as efficient regulatory system) which will transform the food economy into a promoter of sustainable employment and vehicle of rapid economic growth.²⁵⁷ Further, to effectively realise the right to food, all actors (both government departments and the private sector) need to collaborate in order to find pro-poor opportunities for creating a robust food system to enhance economic transformation.²⁵⁸

Therefore, irrespective of the numerous objectives of the NGP and NDP policy frameworks, South Africa has largely been unable to create adequate income generating opportunities for many (as a form of boosting their access to food).²⁵⁹ The country's present food security challenges can, therefore, be summarized as follows:

- i. Individuals have insufficient access to information and resources to make optimal choices for safe and nutritious diets;

²⁵¹ Hendriks (n 211 above) 6.

²⁵² Amoateng & Setlalentoa (n 171 above) 46.

²⁵³ Amoateng & Setlalentoa (n 171 above) 48.

²⁵⁴ Amoateng & Setlalentoa (n 171 above) 48.

²⁵⁵ JE Drewes & M van Aswegen 'National planning in South Africa: a critical review' (2013)173 *WIT Transactions on Ecology and the Environment* 193.

²⁵⁶ A du Toit 'Poverty measurement blues: some reflections on the space for understanding chronic and structural poverty in South Africa (2005) 55 *Chronic Poverty Research Centre Working Paper* 8.

²⁵⁷ I Woolard & S Klasen 'Determinants of income mobility and household poverty dynamics in South Africa' (2005) 41(5) *Journal of Development Studies* 865.

²⁵⁸ DA Greenberg & JM Rogerson 'The greening of industrial property developments in South Africa' (2014) 25 *Urbani izziv* S122.

²⁵⁹ CM Rogerson 'Improving market access opportunities for urban small, medium and micro-enterprises in South Africa' (2013) 24(2) *Urbani izziv* 133.

- ii. There is lack of adequate, relevant and timely information on food security;
- iii. There are insufficient food emergencies and safety nets management systems to provide for those who are unable to meet their immediate food needs.

The different policy frameworks of the different government departments, read together, demonstrate conflicting approaches on how to address the chronic hunger situation. The appraisal of these food security and nutrition policy initiatives demonstrates that the general focus of these government departments is undoubtedly on the operationalisation of capacity building, instead of direct or indirect food transfers. A critical analysis of the policy frameworks of the department's indicates that, two types of interventions prevail: First, different capacity building initiatives aimed at enhancing individual's potentials to produce food for themselves; second, limited cases of direct transfer of food and nutrition.²⁶⁰ While the former seems to be the norm, the latter is the limited exception.

The various government departmental policy initiatives, if taken together, seem to be grounded on a preference for longer-term programmes in food and nutrition accessibility through income generation and capacity building, as opposed to direct transfers (except for in relation to particular groups). This is a conscious policy inclination of the Department of Labour, DSD and DAFF and appears to be a dormant subject matter in the policy framework of the DoH. The DBE provides somewhat direct food transfers most notably in the form of primary school feeding scheme, while the DoH provides the nutritional supplementation programmes; these policy frameworks are limited in their scope. While these interventions are directed only towards specific group (categorized as vulnerable group), they are also targeted at addressing only certain micronutrient deficiencies instead of food security in general.

The same can be said about the direct access to food created by social security cash grants. While the approach implemented by the DSD largely excludes able-bodied unemployed youths, it is also inadequate in terms of the level of grants and uptake of grants. The same can be stated in terms of the unemployment insurance scheme of the Department of Labour. The DSD and Department of Labour's approaches are by their very design do not take cognizance of the need for a sustained approach to the lingering food crisis, but rather their responses are basically special needs-based as discussed in section 4.3 of this chapter.

²⁶⁰ Rogerson (n 259 above).

Finally, although the Department of Economic Development's has adopted two overarching policies (New Growth Path and National Development Plan) to boost employment and the social security system, the latter is silent on the issue of chronic hunger and ignores the challenges confronting local farmers. The New Growth Path equally fails to set out how to absorb unskilled workers into mainstream labour market and/or how to integrate (previously excluded) unemployed youths into the existing social security structure.

Given that the existing state programmes are fragmented and lack coherence (as discussed in the next chapter), it is important to examine what sort of legislation could harmonize and ensure the effective implementation of all the food related policies. The next section turns to assess framework law, which seems to hold some potential in addressing some of the institutional challenges in addressing chronic hunger. It is in this light that the chapter now turns its attention to consider the features and merits of such a framework law.

4.6. Income generating programmes

One of the core mandates of the Department of Agriculture, Forestry and Fisheries (DAFF) is to develop agricultural policies and support projects designed to enhance household food production and food insecurity.²⁶¹ In October 1994, the department launched the Food Security Working Group (FSWG).²⁶² Three years after its establishment in 1997, the working group drafted an important policy discussion paper (titled *Food security policy for South Africa*) which made several recommendations on how to improve the country's chronic hunger situation.²⁶³ In light of these submissions, the DAFF in May 1998 adopted its food security policy.²⁶⁴

The policy has three overarching objectives. First, the policy seeks to stimulate and maintain national food supply through food production for own use. Second, it seeks to enhance the development of small-scale commercial agriculture to boost access to food and nutrition. Third, the policy aims at boosting food security by enhancing food availability, accessibility and utilization through income generation activities. For purposes of this chapter, the latter approach is specifically important.

²⁶¹ DAFF was previously called Department of Agriculture and Land Affairs (DLA).

²⁶² Reliefweb 'Southern African Food and Nutrition Security Working Group (FSNWG): Issue 2, June 2015'(2015) available at <<http://reliefweb.int/report/zimbabwe/southern-african-food-and-nutrition-security-working-group-fsnwg-issue-2-june-2015>> (accessed 1 April 2016).

²⁶³ DAFF 'Integrated Food Security Strategy' available at <<http://faolex.fao.org/docs/pdf/saf149624.pdf>> (accessed 2 April 2016) 9.

²⁶⁴ DAFF (n 263above).

The approach of the DAFF to boost food and nutritional accessibility is grounded on the notion that individual and household self-sufficiency should be encouraged while cutting down on over-dependence on the state.²⁶⁵ This approach, for that matter, focuses specifically on reducing poverty (and if possible eliminate it) through a series of capacity building strategies including agriculture.

The food security efforts of the DAFF have two major thrusts: First, the department takes cognizance of the fact chronic hunger and malnutrition can be addressed by increasing food production. Enhancing production has direct and indirect impacts at the individual and household levels. On the one hand, general increase in food production indirectly enables easier access to food through exchange by (potentially) driving down prices of food on the market. On the other hand, an increase in production for own consumption directly enhances household access to food.²⁶⁶ Consequently, the food security policy of the DAFF places emphasis on diversifying and improving food production through a range of programmes that seek to enhance small-scale farmers' accessibility to productive resources (in areas of capital, land, education, implements and agricultural extension programmes) which holds the potential for stimulating existing initiatives on subsistence food production.²⁶⁷

Second, in recognising that household food production alone will not adequately address the chronic hunger and malnutrition, the DAFF envisages that it is also imperative to improve household access to food through exchange.²⁶⁸ For this reason, the department has made some effort towards enhancing income from agriculture. This approach is operationalised through several channels. On the micro level, the DAFF provides education projects and extension services as a means of improving small-scale household production of cash-crops.²⁶⁹ On the macro level, the DAFF seeks to enhance job creation through the stimulation of production, not only in food related areas, but also in the production of cash crops for the global market.²⁷⁰

While the DAFF supports self-sufficiency (in so doing discouraging dependency), it recognises that certain undernourishment situations can only be remedied through (direct or

²⁶⁵ Rogerson (n 259 above).

²⁶⁶ A du Toit 'Poverty measurement blues: some reflections on the space for understanding chronic and structural poverty in South Africa (2005) 55 *Chronic Poverty Research Centre Working Paper* 3.

²⁶⁷ Rogerson (n 259 above).

²⁶⁸ Rogerson (n 259 above).

²⁶⁹ Du Toit (n 266 above) 5.

²⁷⁰ DAFF '2015/16 to 2019/20: Strategic Plan' <http://www.daff.gov.za/daaDev/topMenu/DAFF_SP_%20complete.pdf> (accessed 1 April 2016) vii.

indirect) food transfers.²⁷¹ Nonetheless, the department envisages a limited role for itself in this light and thereby restricts itself to enhancing self-reliance projects (mainly) through provision of grants to vulnerable groups (especially women and marginalised rural communities) as a means of promoting production.²⁷²

Since most of the department's interventions have failed to address the hunger situation within the target group, it has, since the year 2000, launched several projects designed to respond to the failures of the previous programmes.²⁷³ It was against this backdrop that the department adopted the 2002 Integrated Food Security Strategy (IFSS).²⁷⁴ The IFSS sets out specific objectives and priority areas for food security. The prime objective of this strategic document is to harmonize, streamline and integrate the various food security programmes.²⁷⁵ Particular barriers earmarked in the documents are the:

- (i) Poor nutritional status
- (ii) Inadequate safety nets
- (iii) Lack of purchasing power
- (iv) Weak disaster management systems and institutional support networks
- (v) Insufficient household food production.

The IFSS further sets out five key priority areas for the country's food security, which encompasses:

- (i) Improved nutritional status;
- (ii) Increased income opportunities;
- (iii) Increased household food production;
- (iv) Enhanced institutional support networks;
- (v) Improved nutritional status.

²⁷¹ Du Toit (n 266 above) 7.

²⁷² Du Toit (n 266 above) 8.

²⁷³ DAFF (270 above) 4.

²⁷⁴ See DAFF (n 270 above).

²⁷⁵ Drimie & Ruysenaar (n 99 above) 317.

The basic structure of the IFSS is to bring together various programmes of different government departments, and thus, does not have its own dedicated programme with actions in place. While the IFSS was seen by Pereira and Drimie as ‘good on paper’, it has over the last decade been unable to achieve many of its goals (including increased income opportunities and household food production).²⁷⁶ The failure of the IFSS to achieve its objectives could be tied to two main setbacks, namely, measurement and legislative constraints. The absence of a legislation, which could clearly set out the working procedures, organizational structure, responsibility and authority of the proposed inter-ministerial committee responsible for the operationalization of the IFSS programme, is what is classified as legislative constraint. This challenge is exacerbated by the lack of food security act which could enhance an effective operationalization of the IFSS.²⁷⁷ In terms of measurement challenges, the IFSS, though calling for continued evaluation of the policy through monitoring, makes limited references to specific parameters or measurements for food security within the framework. Thus, there is no standardized or specific yardstick of measuring food (in)security or the successes or challenges of the framework, and how it can be improved.

As of 2011, the DAFF chronic hunger and malnutrition related issues have been made the primary mandate of the Chief Directorate of Food Security.²⁷⁸ The Chief Directorate is charged with an overall mandate of:

- (i) Establishing opportunities for diversification and increasing wages through the small stock, vegetables and small-scale aquaculture;
- (ii) Enhancing capacity building and institutional establishing efficient support systems for farmers;
- (iii) Develop an effective capacity at the local level through access to information and intensive training for farmers;
- (iv) Providing an efficient mechanism for increasing rural development and household food security (through effective coordination between government departments at

²⁷⁶ L Pereira & S Drimie ‘Governance Arrangements for the Future Food System: Addressing Complexity in South Africa’ (2016) 58(4) *Environment: Science and Policy for Sustainable Development* 24.

²⁷⁷ Pereira & S Drimie (n 276 above).

²⁷⁸ DAFF ‘2015/16 to 2019/20: Strategic Plan’ (2015) available at <http://www.daff.gov.za/daaDev/topMenu/DAFF_SP_%20complete.pdf> (accessed 1 April 2016) vii.

the national level and non-governmental organisations (NGOs) at the local level).²⁷⁹

The chief Directorate is sub-divided into three directorates, namely:

- (i) Infrastructure Support;
- (ii) Small-Holder Development; and
- (iii) Subsistence Farming.²⁸⁰

The focus of the latter unit is amongst others, to design and operationalise a national policy and benchmark for household food security.²⁸¹

The IFSS arguably did record some successes in terms of decreasing the incidence of hunger and improving food access.²⁸² Yet, since many persons still experience inadequate access to nutrition and many others fail to benefit from adequate calories, it became imperative for the department to adopt a comprehensive policy to ensure the full realisation of the right to food. It was against this backdrop that the department in 2005 adopted the Comprehensive Agricultural Support Programme (CASP). The objective of this programme is to promote and facilitate agricultural development by enhancing the provision of support services to the beneficiaries of land reform and other producers who have acquired land through private means. The CASP is limited to four categories of beneficiaries: (i) subsistence farmers, (ii) household food producers, (iii) hungry and vulnerable persons and (iv) commercial farmers).²⁸³ The interventions provided to the beneficiaries include:

- (i) Financial support;
- (ii) Training and capacity building;
- (iii) Advisory and regulatory services;
- (iv) Information and technology management;

²⁷⁹ DAFF 'Organisational Structure' available at <<http://www.daff.gov.za/daffweb3/About-Us/Structure-and-Functions>> (accessed 2 April 2016).

²⁸⁰ DAFF (n 216 above).

²⁸¹ DAFF 'National policy on food and nutrition security' <<http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutrition%20security.pdf>> (accessed 2 April 2016) 3.

²⁸² Drimie & Ruysenaar (n 98 above) 317.

²⁸³ DAFF 'Comprehensive Agricultural Support Programme' <<http://www.nda.agric.za/docs/CASP/casp.htm>> (accessed 2 April 2016).

- (v) On/off farm infrastructure and product inputs.²⁸⁴

Since its inception in 2004/05, the Micro-Agricultural Financial Institution of South Africa (MAFISA) has been providing financial assistance in the form of loans to farmers to assist them in production.

In an effort to determine whether the programme is achieving its policy objectives, DAFF and the Department of Performance Monitoring and Evaluation (DPME) commissioned an impact evaluation of the CASP. The evaluation found that although the programme has made some progress towards increasing agricultural production of some beneficiaries, it has some major setbacks.²⁸⁵ Two key findings of the evaluations were: (i) while the programme has been beneficial to most of the target groups, it excludes a great number of youth and persons living with disability. At the time of the evaluation, the programme's participants had only 3 percent of disabled persons and 14 percent of youths; (ii) there has been insufficient progress in promoting commercialization and improving market access for the products of CASP farmers. The food security situation of the farmers and their household in almost all the provinces had not improved since their participation in the programme. While some farmers believe that their formal market access has actually declined since participating in CASP, majority complained that they still found it difficult to access formal markets for their products. This problem is partially linked to the failure of CASP to contribute to capacity building through skills transfer, which could enhance the knowledge and marketing skills of the farmers. It is, therefore, imperative that DAFF improves the involvement of persons with disability, women and youth in the programme. Moreover, CASP within DAFF should collaborate with the Department of Trade and Industry in order to boost the commercialisation and market access of these beneficiaries.

4.7. Multifaceted programmes

In 2013, cabinet approved three important guiding strategies, the National Policy on Food and Nutrition Security Policy (NPFS), the Household Food and Nutrition Security Strategy (HFSS) and the Fetsa Tlala Production Plan (Fetsa Tlala) and in 2015 the National Food and

²⁸⁴ E Idsardi, H Jordaan & HD van Schalkwyk 'A Characterisation of Success Factors of Projects Funded by the Comprehensive Agricultural Support Programme in the Free State Province' available at <http://www.karoofoundation.co.za/images/GRT%20conference/Ernst_Idsardi_paper_agricultural_training_for_small_holder_a.pdf> (accessed 29 March 2016) 2.

²⁸⁵ BEUP 'Impact Evaluation of the Comprehensive Agricultural Support Programme (From its inception in 2004 to February 2013)' (29 June 2015) available at <[file:///C:/Users/user/Downloads/CASP.Long%20report.Final.19May2015%20\(3\).pdf](file:///C:/Users/user/Downloads/CASP.Long%20report.Final.19May2015%20(3).pdf)> (accessed 18 April 2017) vii.

Nutrition Security Implementation Plan (NFSP). The provisions of these strategies call for multisectoral platforms or institutionised bodies or processes which draw together stakeholders from different departments in order to formulate and operationalise them.²⁸⁶ The uniqueness of multisectoral dialogues and platforms is that stakeholders make commitments (and go beyond networking) to provide resources for those commitments while holding each member accountable to coordinated responses. The challenge remains that currently there are myriad of food security task teams in the country, and thus, the right to food cannot be addressed comprehensively. The next section assesses the provisions of these food security policy and strategies to determine their possibility of addressing chronic hunger.

4.7.1. National Policy on Food and Nutrition Security

Akin to the IFSS, the NPFS seeks to intergrate, harmonise and streamline the different food related programmes, while serving as a guide in pursuing food security at the local, provincial and national levels.²⁸⁷ It, thus, provides an overarching framework, which seeks to improve availability and accessibility of food by strategic use of trade measures, and market interventions, which will promote food security;

- i. Leveraging state food procurement to support community-based food production initiatives and smallholders;
- ii. Efforts to enhance food production and distribution, which includes increased access to inputs for food production
- iii. Better targeted and increased spending on social programmes, which might influence food availability and accessibility.²⁸⁸

The policy affirms that in order to attain food security, the state must operationalise five multi-sectoral programmes and initiatives stretching from:

- (i) food and nutrition security risk management, among others, increasing investment in technology and research to boost production;

²⁸⁶ D Macqueen, Zapata, J., Campbell, J., Baral, S., Camara, K., Chavez, L., Grouwels, S., Kafeero, F., Kamara, E., Rametsteiner, E., and Rodas, O. (2014) 'Multi-sectoral platforms for planning and implementation- How they might better serve forest and farm producers' FFF Working paper 2 Rome, Italy: FAO. Available at: <http://www.fao.org/3/a-i4168e.pdf> ix.

²⁸⁷ Macqueen *et al* (n 286 above) 5.

²⁸⁸ Macqueen *et al* (n 286 above) 6.

- (ii) enhance market participation of the emerging agricultural sector through government food purchase initiatives and public-private partnerships that supports smallholder farmers;
- (iii) the alignment of investments in agriculture towards local economic development (support services and subsidization of inputs), especially in rural areas;
- (iv) (iv) improved nutrition education, including improved meal planning and consumer literacy; and
- (v) the availability of improved nutritional safety nets, such as government, non-government organisation and community based organisation feeding programmes/emergency food relief.

The NPFS proposes the establishment of National Food and Nutrition Security Advisory Committee chaired by the Deputy President and composed of representatives of organised committees, organised agriculture, food security and consumer bodies. The two institutions responsible for the operationalisation of the National Food and Nutrition Security Policy are the DAFF and DSD. The policy calls for the establishment of parallel structures at the local and provincial spheres of government. In light of the multisectoral and multidimensional nature of chronic hunger, it is imperative that the policy be operationalised with clear-cut and explicit work-based operational plans that clearly spell out the responsibility of the different provincial and national departments involved as well as their responsibility in policymaking, analysis, operationalisation, monitoring and evaluation. Given that section 152 of the 1996 Constitution makes the promotion of economic and social development (which encompasses food security) the prime obligation of local government (as well as national government) it is important that the state does not sideline municipalities in the operationalisation of the National Policy. The participation of municipalities in the process of policy operationalisation is key in light of the fact that local sphere of government are responsible service delivery, which have an impact on stability of food supply, food production, food use and food access which are important pillars of food security. Being responsible for the provision of basic services (such as electricity or water used by households to cook and prepare certain kinds of food), the municipalities are the closest to the people.

However, the operationalisation of the policy is confronted by five major problems. First, the NPFS does not contain any clear guidelines on how the participation of the private sector and civil society organisations will be fostered in the operationalisation of its provisions. It, further, underscores the need to establish similar body at the municipal and provincial levels.

The policy however, fails to set out how these structures could be established. Second, the 1996 Constitution sets out agriculture as a function of provincial and national departments which have to consider (although not mandatory) directives as guiding principles.²⁸⁹ The department of agriculture at the provincial level, therefore, does not need to be accountable to the national. Thus, in order to form food security advisory committees, it is imperative that the National Policy sets out a mechanism to ensure synergy between all the three spheres of government (national, provincial to local) towards the formation of local, provincial and national committees. The policy further does not set out the way in which the three-tier committees would operate particularly in terms of the proposed institutional arrangements set out in the established Fetsa Tlala and the HFSS. Third, given that the policy will not be operationalised in isolation from existing policies, it is imperative that such a national policies sets out how the advisory committee will be aligned with current institutional arrangements. Fourth, institutions such as DAFF with the mandate of ensuring food security seem to be confronted with two key challenges, namely lack of funding for programmes and human capital management capacity. Beside capacity shortages, departments responsible for food security such as DAFF are faced with weak and limited funds, as well as lack of coordination and integration of systems. Thus, the National Development Plan was correct when it observes that the social sector is faced with constraints and challenges from the apartheid era, and is currently fragmented and under-resourced envisioned this challenge. The lack of capacity for operationalisation, monitoring and evaluation serves as a major challenge for the effective implementation of the policy, and thus, eradication of chronic hunger. Fifth, the fragmentation of food security programmes might pose a serious challenge to the realisation of the objectives of the NPFS. For instance, under the IFSS where some learners are confronted with chronic hunger and malnutrition due to fragmentation and poor coordination of food security programmes (the DBE responsible for school feeding programme while provision of supplements and deworming are the responsibility of the DoH), the NPFS does not contain a provision which seeks to establish an overarching body or a coordinating structure to streamline the food security activities of the various departments involved in this regard.

In order to successfully realise the objectives of the NPFS, it is crucial that a coordinating institution like DAFF is able to work with, and around structures, rules, other organisations and partners in bureaucracies. In addition, there is the need for adequate capacity to ensure

²⁸⁹ Schedule 4, Part A.

effective carry out the task of decision-making, evaluation and feedback review, organisation of work, policy analysis, policy planning, and accountability.²⁹⁰ Given that there are no funds that are specifically dedicated to chronic hunger in all levels of government, the operationalisation of food security programmes (such as the the Fetsa Tlala and HFSS) must take into consideration the allocation of budget items by the National Treasury.²⁹¹ Further, it is imperative that role-players and stakeholders engage with all municipalities in the development of guidelines for an advisory committee responsible for the operationalisation of the National Policy. This call is important especially as a one-size-fit all approach will not adequately address the food insecurity of the present 278 municipalities with unique characteristics.

The role of civil society organisations (CSOs) in the operationalisation of the NPFS cannot be ignored. In order to determine the contribution of CSOs in public policy operationalisation (such as the NPFS), it is important to distinguish between policy stakeholders and policy role-players. Policy role player are actual participants in the policy process, and they are directly involved in the process of policy-making, operationalisation, monitoring and evaluation. Policy stakeholders are those actors who have either direct or indirect influence on policy formulation. While indirect policy stakeholders comprise academic institutions, non-governmental organisations, and interest groups; direct policy stakeholders comprise political actors and institutions such as public institutions and government researchers. The participation of stakeholders in the policy process do not only democratise institutions of decision-making bodies, but strengthen institutions of representative democracy. The NPFS sets out the involvement of the private sector and CSOs in the advisory committee, although the Policy fails to state the the exact role of these stakeholders. Given that CSOs (which comprise a wide array of non-profit organisations and NGOs, professional associations and foundations, faith based organisations, indigenous groups, labour unions, charitable organisations, community groups, and community groups), play a key role in shaping food security policies and strategies, it is important that the Policy is revised to clearly set out how these bodies will be absorbed into the institutional arrangements and included in the development of policy implementation plans at the local, provincial and national levels.

²⁹⁰ J Garret & M Natalicchio (2011) 'Working multisectorally in nutrition: principles, practices and case studies' Washington DC: International Food Policy Research Institute 33

²⁹¹ HM Nkwana 'The Implementation of the National Food and Nutrition Security Policy in South Africa Strategies for Multisectoral Coordination' (2015) 23(4) *Administratio Publica* 283.

4.7.2. The Household Food and Nutrition Security Strategy

The Household Food and Nutrition Security Strategy indicates a multisectoral approach towards food security by bringing representatives from the Department of Science and Technology, Department of Water Affairs as well as the Department of Rural Development and Land Reform to form a Ministerial Household Food Security Advisory Committee. The strategy envisages a centralised food control system, which must be the responsibility of multiple government departments. While the strategy tasks the Department of Trade and Industries (DTI) for ensuring sustainable and accessible meat placement for consumer products, the DoH is made responsible for foodstuffs, with DAFF envisage as the lead regulatory authority for ensuring food security.²⁹²

In their proposed ‘Model for the implementation of household food and nutrition security programme’ the Department of Social Development’s (DSD) affirms that the prime objective of the programme is to improve nutrition security of people, support households attain self-reliance and self-sustenance, procurement of food from local food producers and increase food distribution to poor and vulnerable households.²⁹³ Consequently, the department is expected to set up a network of food distribution centres, among others establishing community nutrition development centres, community food depots and provincial food distribution centres in collaboration with NGOs operating in the targeted communities. The Department projected that at the end of the first year (2013/14) there must be a total of 24 community nutrition and development centres, 15 community food depots in three targeted provinces, three provincial distribution centres (Northern Cape, Mpumalanga and Free State). Further, by the end of year three, there must be 91 community nutrition and development centres as well as nine provincial food distribution centres servicing 45 community food depots. According to the DSD’s proposed operational plan, in order for an applicant to qualify for the household food and nutrition programme, (i) s/he must act as a place of safety for children in need, (ii) the breadwinner is deceased and the applicant lacks adequate means for food provisions, (iii) the applicants is not receiving assistance from any other organisation, (iv) the combined monthly income of the household must be less than R2160, and (v) members of the household must be unemployed.²⁹⁴ Although the programme and its

²⁹² Department of Health, Department of Trade and Industry and DAFF. 2013. Food safety and food control in South Africa: Specific reference to meat labelling. Available at: <http://pmg-assets.s3website-eu-west-1.amazonaws.com/130621food.pdf>.12

²⁹³ DSD ‘Model for the implementation of household food and nutrition security programme’ 2.

²⁹⁴ DSD (n 293 above) 10.

proposed implementation plan provide adequate benchmarks for eradicating chronic hunger, the lofty ambition of the programme has not been successfully operationalised. Therefore, 22.6 percent of households, which is mostly unemployed and poor, still experience chronic hunger and malnutrition.²⁹⁵ To address this shortcoming, a more integrated and comprehensive food programme need to be operationalised to deal with the challenges that majority of individuals and households are experiencing in accessing adequate food.

4.7.3. The Fetsa Tlala Production Plan

As its name sounds, the Fetsa Tlala is an integrated framework which seeks to address structural causes of food insecurity by encouraging food or crop production.²⁹⁶ It places emphasis on coordination among a select group of government departments to address food insecurity. With DAFF as the lead institution, it is expected to form a national task team comprised of composed of the private sector in partnership with government departments to ensure the operationalisation of the provisions of the Fetsa Tlala Production Plan.²⁹⁷ A major barrier which poses hinderance to the successful operationalisation of this plan is the lack of convening power by one ministry over other government departments. Although the plan envisages DAFF as the convenor, the department has no de facto powers over other sector departments and since the plan is not binding nor enforceable, other departments are not oblige to attend meetings to ensure a successful implementation of the plan. The lack of binding instrument resulting in poor coordination of the IFSS continues to militate against this programme. It is, therefore, imperative that an enforceable law is adopted which sets out in clear terms the way in which DAFF can coordinate the operations of food-related government departments.

Giving that there are many food related programmes, it is important that one particular government (perhaps, DAFF) develop a national database of food insecurity information coupled with key programmes, polices and strategies which have been developed since 1994 by assesing their successes and failures, and what can be done to improve their efficiency. For operational purposes, working groups and/or task teams must be established with lead departments (such as DAFF) and supporting departments responsible for a particular arm of food security.

²⁹⁵ See sec 5.1.1 of chap 1.

²⁹⁶ DAFF 'FETSA TLALA: PRODUCTION PLAN 2014/15' 1.

²⁹⁷ Department of Social Development. 2013. Annual report. Available at <http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=424&Itemid=3> 11

4.7.4. National Food and Nutrition Security Implementation Plan

The main objective of the National Food and Nutrition Security Implementation Plan is to address the causal factors (including poverty) for the current food security situation by providing synergy for the operationalisation of food security programmes. According to the state, the implementation plan will prioritise four key areas, which will seek to provide production capital (resources and inputs) to smallholder and subsistence producers to serve as agricultural hubs for the establishment of tertiary, secondary and primary industries.²⁹⁸ The four focus areas of the implementation plan are:

- (i) Ensuring better market access for both small holder and subsistence producers through through processesing and packaging of commodities, establishment of agro-processing and distribution of commodities.
- (ii) Developing an effective food and nutrition security early warning and monitoring and evaluation framework.
- (iii) Improving health, nutrition and hygiene through improved nutrition awareness, promotion of healthy life style, fortification of staples, and improved food utilization.
- (iv) Improving access to food through development programmes and social protection including rural development, diversified food production and self-reliant, institutional and community gardens, smallholder food production support, feeding programmes, irrigation schemes and improving of access to social grants.

Irrespective of their noble ambition, the NPFS and its Implementation Plan have been heavily criticised for concealing the ongoing and generalised ‘crises of industrial capitalist agriculture and its uneven development model.’²⁹⁹ The challenge with how the two documents perceive chronic hunger is their focus on scarcity rather than lack of access (some people not having enough food rather than there not being enough) and thus offer little in the way of alleviating chronic hunger. The documents could, therefore, be summarised as shying away from an important element of food insecurity, and that is, the influence of big businesses in the food system or capital interests within the food value-chain. Given that production of food has undergone considerable codification with the rise of massive food retailers and a shift from subsistence farming to powerful corporations and international conglomerate, documents

²⁹⁸ Government of South Africa ‘Food and nutrition security policy implementation plan’ 5.

²⁹⁹ B Moyo ‘South Africa’s new food and nutrition policy fails to address constitutional right to food’ (27 Febraury 2017) South African Civil Society Information Service.

such as the National Policy and the Implementation Plan must underscore the urgency to broaden social security to provide direct food or cash to the poor (and unemployed) to promote their access to food sold in the market.

To successfully implement the NPFS based on its Implementation Plan, evidenced-based decision-making is an important feature in the enabling environment for addressing chronic hunger. A viable food security decision must be grounded on evidence generated and systems that are functional to map actions, assess impacts in a timely manner, track and monitor trends while enabling lessons learned to inform the policy process.³⁰⁰ The existence of quality data for is key not only for monitoring objectives of policies but also in setting performance targets to evaluate the progress or successes of policy objectives. The essence of policy evaluation is to inform decision-making through the generation of information on a specific policy. Evaluation could, thus, be summarised as an assessment activity and can be conducted before, during or after operationalisation of a policy. In order to avoid administrative inefficiencies, a department may conduct a feasibility study as a form of pre-implementation evaluation.³⁰¹ Beside the Labour Force Survey, the General Household Survey and the Information Management Unit, Subsistence Farming Directorate of DAFF, other departments with food security mandates have their internal reporting systems, monitoring, evaluation and indicators. It is important that uniformity is used for monitoring and evaluation of food security in order to have a clear picture of the successes or challenges the various government programmes aimed at addressing chronic hunger are facing.

In concluding this section, while it is important to acknowledge that the existing interventions seek to alleviate chronic hunger and malnutrition, they have to address food insecurity in a comprehensive way. More so, unlike the Social Security Act, none of the food security related documents (including the NFSP, HFSS, Fetsa Tlala and NFSP) converts into legal entitlements and reinforces the right to food. Beside the non-binding nature of these documents, failure by the respective departments to accomplish the objectives or provisions of these documents will hardly attract sanctions or condemnations from the courts for failing to fulfil their own policy. In order to successfully realise the right to food, it is important that the lofty ideas of these programmes are consolidated into a single binding instrument (akin to

³⁰⁰ The United Nations Food and Agriculture Organisation. 2009. Declaration of the World Summit on Food Security, Rome, available at <<ftp://ftp.fao.org/docrep/fao/Meeting/018/k6050e.pdf>> (accessed 6 October 2017)
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³⁰¹ I Ile 'Monitoring and evaluating the quality of policy implementation' in C Thornhill, G Van Dijk & I Ile (eds) *Public Administration and Management in South Africa: A developmental perspective* (2014) 193.

the Social Security Act) which will provide citizens avenues to litigate when the provisions of such a legal instrument is not operationalised. It is against this backdrop that the thesis recommends that it would be imperative that the state adopts a framework law in order to adequately fulfill section 27(1)(b)³⁰² and 28(1)(c)³⁰³ of the Constitution (as well as article 11 of the ICESCR). It is in this light that the chapter now turns its attention to consider the features and merits of such a framework law.

5. Framework law

The lack of coordination between government departments responsible for the right to food makes a framework law, specifically a Food Act necessary.³⁰⁴ The right to food remains the only constitutional right not legislated for in the country.³⁰⁵ Consequently, government food security policies have not only been fragmented, but also poorly coordinated and operationalised.³⁰⁶ As discussed above, due to the lack of framework legislation, there are no effective remedies for rights-holders who would wish to claim an infringement of their rights.³⁰⁷ As its name sounds, the existing National Policy on Food and Nutrition Security is merely a *policy* or objectives/goals set by the state to achieve. Thus, unlike a Food Act, such a policy is not binding on the government to achieve the stated objectives. In view of these shortcomings, the state needs to begin a participative process of drafting a Food Act for the realisation of the right to food. The legislation should among others set out the key guiding principles governing food security. This legislation will not only reinforce the obligation of the government to eradicate chronic hunger (in a more coherent manner), but also ensure effective delivery and implementation of food security programmes.³⁰⁸

6.1. Key features of framework law

A framework law, unlike constitutional provisions, is more specific in terms of setting out the specific measures or steps to be taken by the state. A framework law is necessary in

³⁰² Groups and particular person's right to adequate food.

³⁰³ Rights of children to basic nutrition.

³⁰⁴ S Narula 'The Right to Food: Holding Global Actors Accountable under International Law' (2005) 44 *Columbia Journal of Transnational Law* 691.

³⁰⁵ *Khosa* (n 174 above) 668.

³⁰⁶ S Robins & B von Lieres 'Remaking citizenship, unmaking marginalization: the treatment action campaign in post-apartheid South Africa' (2004) 38(3) *Canadian Journal of African Studies/La Revue canadienne des études africaines* 575.

³⁰⁷ F Coomans & K Yakpo 'Framework Law on the Right to Food-An International and South African Perspective' (2004) 4 *African Human Rights Law Journal* 17.

³⁰⁸ S Maxwell 'Food security: a post-modern perspective' (1996) 21(2) *Food policy* 157.

safeguarding and promoting (in a comprehensive manner), the key content of the right to food as spelt out in both the CESCR General Comments 3 and 12, where the state is obliged:

- (a) To alleviate hunger by providing basic foodstuffs to the population;
- (b) To satisfy the dietary needs of individuals by making food available in terms of quantity and quality;
- (c) To refrain from interfering with the enjoyment of individual's access to food.³⁰⁹

It is important that a framework law sets out key provisions, which does not only seek to provide sufficient food, but also takes into consideration the timely delivery of such commodities.³¹⁰ The following three key features are worth considering when drafting a framework law.

First, the law will need to underscore the level of urgency in providing food intervention to those affected by or threatened with hunger and malnutrition.³¹¹ It will also be necessary to emphasize the importance of ensuring that steps are adopted immediately and efficiently to enhance sustainable access to food for the food poor.³¹² For instance, this means that the provisioning of free basic food initiatives (including food parcels) should be made more sustainable.³¹³ Presently, one of the laws, which to some extent addresses this question is the 2004 Social Assistance Act,³¹⁴ which provides for the 'establishment of an inspectorate',³¹⁵ for purposes of payment of social grants to improve the living conditions of beneficiaries and their dependents. Yet, since the Act does not adequately address the question of chronic hunger, especially as it excludes millions of food poor, it is important that a specific legislation is adopted to ensure the full realization of the right to food.

³⁰⁹ CESCR (n 3 above) para 8 (availability and accessibility of sufficient food); UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art 2, para 1, of the Covenant), 14 December 1990, E/1991/23, available at: <http://www.refworld.org/docid/4538838e10.html> (accessed 13 August 2016) para 10 (provisioning of general foodstuffs).

³¹⁰ JE Hobbs & LM Young 'Closer vertical co-ordination in agrifood supply chains: a conceptual framework and some preliminary evidence' (2000) 5(3) *Supply Chain Management: An International Journal* 131.

³¹¹ LE White 'African Lawyers Harness Human Rights to Face Down Global Poverty' (2008) 60 *Maine Law Review* 165.

³¹² B van der Meulen 'The Global Arena of Food Law: Emerging Contours of a Meta-Framework' (2010) 3 *Erasmus Law Review* 217.

³¹³ H Wittman 'Food sovereignty: a new rights framework for food and nature?' (2011) 2(1) *Environment and Society: Advances in Research* 87.

³¹⁴ Social Assistance Act [No. 13 of 2004].

³¹⁵ Sec 3(d).

Second, framework legislation would have to ensure that at a minimum, the urgent food needs of the malnourished and hungry or those threatened is thereby addressed.³¹⁶ For instance, it is a common knowledge that undernourishment or lack of nutrition in early childhood can seriously affect the mental development, life, and health of children, while severely jeopardizing their potential in future careers.³¹⁷

Third, framework legislation, at the same time, needs to underscore the urgency to move speedily in realising the maximum content of the right to food, by taking into consideration the availability of food.³¹⁸ This objective can be achieved through a series of measures, which includes regulation of the price of basic foodstuffs to make it more affordable.³¹⁹ In essence, a framework law needs to entail clear objectives as well as the means for eradicating hunger. It does need to:

- (a) set goals, targets, and benchmarks for monitoring,
- (b) set priorities for the provision of food for those in desperate need, including food aid schemes and the integration of national poverty strategies,
- (c) ensure the participation of relevant stakeholders, CSOs as well as the international community,
- (d) establish institutional monitoring mechanisms and accountability, in addition to providing for resource procedures. This should include food price monitoring, food production, conservation and distribution.³²⁰

Even though the state has established most of these measures through various food security legislative frameworks and structures, it is imperative that these actions are brought under one overarching framework, particularly dealing with the right to food.³²¹ Such legislation

³¹⁶ AL Sarelin 'Human rights-based approaches to development cooperation, HIV/AIDS, and food security' (2007)29(2) *Human Rights Quarterly* 460.

³¹⁷ S Narula 'Reclaiming the right to food as a normative response to the global food crisis' (2010) 13 *Yale Human Rights and Development Law Journal* 403.

³¹⁸ CG Gonzalez 'Global Food Crisis: Law, Policy, and the Elusive Quest for Justice' (2010) 13 *Yale Human Rights and Development Journal* 462.

³¹⁹ Gonzalez (n 318 above) 466.

³²⁰ SA Schneider 'Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability' (2009) 34 *William & Mary Environmental Law and Policy Review* 935.

³²¹ Khosa (n 174 above).

should also address the concerns of lack of benchmarks and indicators for monitoring existing policies.³²²

Benchmarks can be defined as targets set by the government in consultation with relevant stakeholders to achieve specific human rights objectives.³²³ By recognising that the wider community could be reached overtime, benchmarks specifically focus on the improvement of the conditions of the worst-off groups by setting particular timeframes within which to achieve that objective.³²⁴

It must be noted that the inclusion of these essential features (benchmarks, targets, timeframes and goals) in the frameworks has a fundamental role to play in the eradication of food poverty.³²⁵ A classic example of such benchmarks and timeframes is set out in the 2013 India National Food Security Act, which stipulates that the state government shall ‘within such period not exceeding three hundred and sixty-five days, after the commencement of the Act, identify the eligible households’ to enhance ‘doorstep delivery of foodgrains’.³²⁶ Besides helping to address government’s inaction in the fulfillment of the right to food, these features are also crucial in monitoring as well as measuring the progress made in addressing chronic hunger.³²⁷

Moreover, the inclusion of goals in the framework is relevant to establish a sense of projection regarding where the state’s food security scheme is heading.³²⁸ In setting out such goals, there must be a balance between short, medium and long-term goals.³²⁹ Yet, the government must pay immediate attention to the needs of the most vulnerable and desperate group, as set out in the *Grootboom* standards.³³⁰

³²² L Weingärtner ‘The concept of food and nutrition security’ (2005) 3 *Achieving Food and Nutrition Security* 21.

³²³ L Birchfield & J Corsi ‘Between starvation and globalization: realizing the right to food in India’ (2009) 31 *Michigan Journal of International Law* 691.

³²⁴ Eide & Kracht (n 315 above) 415-6.

³²⁵ KG Stamoulis & A Zezza ‘A conceptual framework for national agricultural, rural development, and food security strategies and policies’ (2003) FAO Agricultural and Development Economics Division 7.

³²⁶ National Food Security Act [No. 20 of 2013]; Sec 10(1)(b); sec 12(2)(a).

³²⁷ G Riches ‘Hunger, food security and welfare policies: issues and debates in First World societies’ (1997) 56(1A) *Proceedings of the Nutrition Society* 63.

³²⁸ Weingärtner (n 322 above) 27.

³²⁹ K Pillay ‘Implementing *Grootboom*: supervision needed’ (2002) 3(1) *ESR Review: Economic and Social Rights in South Africa* 13.

³³⁰ J Fitzpatrick & RC Slye ‘*Republic of South Africa v Grootboom*. Case No. CCT 11/00.2000 (11) BCLR 1169 and *Minister of Health v Treatment Action Campaign*. Case No. CCT 8/02’ (2003) *American Journal of International Law* 671.

Moreover, benchmarks and targets force the drafters of the legislation to set out the content and scope the right to food in order to enhance its operationalisation and monitoring, and afterwards, such definition will be helpful in the enforcement of this right.³³¹ Thus, without benchmarks it is difficult for CSOs, monitoring institutions and the state to monitor and measure the progress made in the eradication of chronic hunger and malnutrition.³³²

Further, another key reason for the inclusion of benchmarks in the framework is to provide for effective enforcement and monitoring of the right to food.³³³ In the first place, non-attainment of benchmarks would suggest, that there is a violation of a constitutional obligation, in which case the onus is placed on the state to prove that it is taking reasonable steps, within its available resources, to fulfill the right.³³⁴ Moreover, where there are still a large number of food poor, it would have to provide detailed explanations to justify this failure.³³⁵ One would consider this a better remedy in tackling the difficulties established by the standard of reasonableness where plaintiff bears the onus of showing that government's policy or programme is unreasonable.³³⁶ With the provision or inclusion of these features in the legislation, the burden of proof shifts to the government.³³⁷

Therefore, the legislation must place a responsibility on the relevant government institution, department or minister to adopt strategies, policies and regulations that encompass these features for the eradication of food poverty.³³⁸ The difference or significance of the framework law is that it provides for the establishment of benchmarks in the law.³³⁹ The potential impact of this is that it ensures that legal certainty is not, threatened by the need to

³³¹ Schneider (n 320 above) 938.

³³² Of particular concern has also been the lack of participation in the drafting process of existing food security policies which has led to low level of awareness among the implementers of the legislation and the potential beneficiaries.

³³³ T Lang & D Barling 'Food security and food sustainability: reformulating the debate' (2012) 178(4) *The Geographical Journal* 326.

³³⁴ C Mbazira 'Non-implementation of court orders in socio-economic rights litigation in South Africa: is the cancer here to stay?' (2008) 9(4) *ESR Review: Economic and Social Rights in South Africa* 4; CP Timmer 'Food security and economic growth: an Asian perspective' (2005) 19(1) *Asian-Pacific Economic Literature* 17.

³³⁵ J Sloth-Nielsen 'Too little? Too late? The implication of the Grootboom case for state responses to child-headed households' (2003) 1 *Law, Democracy and Development* 118.

³³⁶ D Maxwell & K Wiebe 'Land tenure and food security: Exploring dynamic linkages' (1999)30(4) *Development and Change* 825.

³³⁷ A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' (2003) 56(1) *Current Legal Problems* 579.

³³⁸ M Redwood *Agriculture in urban planning: generating livelihoods and food security* (2012) 34.

³³⁹ Sachs (n 337 above) 579.

frequently review or repeal relevant laws.³⁴⁰ Moreover, it will compel the state to fulfill its responsibility, not through policies, but rather the law.³⁴¹

The South African Constitution serves as a useful instrument for the introduction of framework law. It provides the right to food as a justiciable human right, and not merely as an aspirational or directive principle for state policy actions. Moreover, it obliges the government to ensure access to adequate food through reasonable legislative measures.³⁴² To be reasonable, such measures must attend to the needs of most desperate people, be balanced and flexible, coherent and comprehensive, well-coordinated, and must be reasonably formulated and operationalised.³⁴³ Framework legislation, as discussed above, encompasses all these constitutional requirements.

Against the backdrop of the several existing piecemeal right to food programmes, it is possible that there are duplications, alongside obstacles and gaps in the implementation of their operationalisation. What is needed at this point is a review of all these laws -an essential component of a framework legislation approach.³⁴⁴ This review will assist in identifying existing gaps, obstacles and duplications, while providing direction for the integration or strengthening of specific policies in order to boost their impact.³⁴⁵ The findings of the review would be useful in the course of the drafting process of the framework law.

6.2. Merits of framework law

There are many benefits associated with the adoption of a framework law, such as Food Security Act for South Africa. First, it will provide a comprehensive and coordinated tool for the operationalisation of national policies and strategies.³⁴⁶ Against this backdrop, a Food Security Act will first and foremost seek to get an analytically defined and complex process of eradicating chronic hunger, by identifying the obstacles, gaps and duplications experienced in the course of operationalizing current government food related policies and

³⁴⁰ K Pillay, R Manjou & E Paulus *Rights, Roles and Resources: An Analysis of Women's Housing Rights: Implications of the Grootboom Case* (2002) 22.

³⁴¹ D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484.

³⁴² Sec 27(1) of 1996 South African Constitution.

³⁴³ *Grootboom* (note 157 above) paras 39-44.

³⁴⁴ D Maxwell & KD Wiebe *Land tenure and food security: A review of concepts, evidence, and methods* (1998) 61.

³⁴⁵ P Jones & K Stokke *Democratising Development: The Politics of Socio-economic Rights in South Africa* (2005) 52.

³⁴⁶ F Burchi & P De Muro *A human development and capability approach to food security: conceptual framework and informational basis* (2012) 15.

programmes.³⁴⁷ It would not only integrate and harmonize government initiatives, but also establish a set of guiding principles to which law reforms and policy development must conform.³⁴⁸

Second, it holds the potential of creating the structures needed for ensuring accountability of, and improved coordination amongst relevant departments and organs of state, along with CSOs involved in the operationlisation of food security policies and programmes.³⁴⁹ For instance, the framework legislation would trigger the establishment of different interlinked committees at various levels of government, from local, provincial to national government.³⁵⁰ It is important that these various committees are composed of various representatives, specifically, the affected communities.³⁵¹ The formulation, operationlisation and monitoring process of the framework law must be transparent.³⁵²

Third, its adoption symbolises the reaffirmation of state's commitment to fulfill its overarching legal obligation to this right.³⁵³ The Constitution obliges the government to adopt reasonable legislative measures to enhance people's right to adequate food.³⁵⁴ This legal obligation and/or commitment cannot be left to the discretion of the executive alone.³⁵⁵ The right to food encompasses a legal obligation that every relevant state and non-state actor should be involved in the formulation and operationlisation of food security policies.³⁵⁶

Fourth, framework legislation will in addition help with the definition of the scope and nature of the right to food, and in setting out the principles to be followed in the eradication of chronic hunger.³⁵⁷ In doing so, the drafters of the law have to draw inspiration from regional and international human rights jurisprudence on the right to food, in particular, the FAOs

³⁴⁷ D Davis 'Socio-economic rights in South Africa. The record of the Constitutional Court after ten years: feature' (2004) 5(5) *ESR Review: Economic and Social Rights in South Africa* 3.

³⁴⁸ Davis (n 347 above).

³⁴⁹ A Oshaug, WB Eide & A Eide 'Human rights: a normative basis for food and nutrition-relevant policies' (1994) 19(6) *Food Policy* 491.

³⁵⁰ JJ Williams *The Grootboom case and the constitutional right to housing: the politics of planning in post-apartheid South Africa* (2005) 51.

³⁵¹ B Hepple 'Equality and empowerment for decent work' (2001)140(1) *International Labour Review* 14.

³⁵² L Marais & J Wessels 'Housing standards and housing rights: the case of Welkom in the Free State Province' (2005)16 (1) *Urban Forum* 17.

³⁵³ R Gottlieb & A Fisher 'Community food security and environmental justice: Searching for a common discourse' (1996)13(3) *Agriculture and Human Values* 23.

³⁵⁴ H Jinrong 'The Role of Court in Protecting Economic and Social Rights: A Commentary on *Grootboom* Case in South Africa' (2006) 1 *Global Law Review* 011.

³⁵⁵ T Roux 'Legitimizing transformation: Political resource allocation in the South African constitutional court' (2003)10(4) *Democratization* 93.

³⁵⁶ Roux (n 355 above) 97.

³⁵⁷ K Rideout, G Riches, A Ostry, D Buckingham & R MacRae 'Bringing home the right to food in Canada: challenges and possibilities for achieving food security' (2007) 10(6) *Public Health Nutrition* 566.

Voluntary Guidelines on the Right to Adequate Food in the Context of National Food Security and the relevant general comments of the CESCR.³⁵⁸ Of specific significance in this regard is the emphasis on priority setting for providing basic dietary subsistence to households and individuals who cannot access adequate food on a daily basis.

Fifth, the justiciability of the right to food is re-enforced by a framework law, especially through the provision of some concrete redress or remedies for violations in this regard.³⁵⁹ In sharp contrast to the Constitution which, bestows extensive mandate to the judicial bodies to determine the appropriate and effective remedy on a giving finding (of a breach of the right), (framework) law often sets out some specific redress mechanism (such as the establishment of quasi-judicial bodies (including Commissions of Inquiry), for seeking remedies in the event of a violation of the right.³⁶⁰ For instance, section 27(1)(d) of the 2004 Social Security Act mandates the Inspectorate for Social Assistance to establish complaints mechanism receive and decide on cases relating to social assistance. Unlike the normal route of enforcing the right to food, these avenues are often more effective and less expensive.³⁶¹ In addition, they seek to prevent and prohibit future infringement of the right by both private entities and the state.³⁶²

Sixth, a framework law re-enforces the observance of human rights norms and democratic principles such as empowerment, participation and transparency.³⁶³ The process, which precedes the adoption of the law, involves an all-inclusive participation of various actors in the identification of the needs, duplications, gaps and constraints in the realisation of the right.³⁶⁴ For example, this could be done by allowing debates, submissions on the draft law, holding hearings and public meetings.³⁶⁵

³⁵⁸ LJ Van Rensburg & W Naudé 'Human rights and development: The case of local government transformation in South Africa' (2007)27(5) *Public Administration and Development* 393.

³⁵⁹ M Huchzermeyer 'Housing rights in South Africa: invasions, evictions, the media, and the courts in the cases of *Grootboom, Alexandra and Bredell*' (2003) 14 (1) *Urban Forum* 87.

³⁶⁰ Liebenberg (n 65 above) 233.

³⁶¹ M Tushnet 'The issue of state action/horizontal effect in comparative constitutional law' (2003) 1(1) *International journal of constitutional law* 79.

³⁶² K Klug 'Five Years On: How Relevant is the Constitution to the New South Africa' (2001) 26 *Vermont Law Review* 803.

³⁶³ C Rodríguez-Garavito 'Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America' (2010)89 *Texas Law Review* 1669.

³⁶⁴ A Skuse & T Cousins 'Spaces of resistance: informal settlement, communication and community organisation in a Cape Town township' (2007) 44(5-6) *Urban Studies* 979.

³⁶⁵ C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African constitution' (1992)141(1) *University of Pennsylvania Law Review* 48.

Seventh, framework legislation, as demonstrated above does not only enhance accountability, but ensures better coordination by assigning particular obligations to different government institutions and organs of state.³⁶⁶ In addition, it serves as a yardstick for monitoring and measuring progress made in the realisation of the right to food, especially by outlining timeframes, goals, targets and benchmarks.³⁶⁷

While the National Policy on Food and Nutrition Security adopted in 2014 meets some of the aforementioned thresholds (such as the inclusion of goals and benchmarks it is provision); it is still a soft law and not a binding instrument to enforce the rights of citizen to food. The thesis argues that the National Policy (like other food programmes) must be replaced with a substantive Food Act, especially as government's commitment to policies and programmes is often compromised since it is aware the citizens cannot hold it accountable (mainly through courts) for non-fulfilment of its obligation. Policy unlike an Act is neither enforceable nor legally binding. To ensure the operationalisation of any policy, such document must be followed by legislation. Then, the concerned line functionary department must submit their annual performance plans (APPs) to the legislature concerned (provincial legislature or national parliament, as the case may be) setting out their requests for funding for stated detailed projects or programmes.³⁶⁸ The legislature may then approve the expenditure after careful consideration of the APP.³⁶⁹

As argued in chapter three, the state is obliged to adopt legislative measures to ensure the realisation of citizen's right to food. It is important to indicate that such legislation provides a mechanism for ensuring alignment and compliance with this human right as well as the overall government commitment, while setting out a sound framework for the evaluation of existing programmes, strategies and policies. This is even more crucial in a regime that has inherited most of legislations from the previous apartheid system (the remote cause of South Africa's poverty and dramatic inequality).³⁷⁰ According to Hendriks and Olivier, post-apartheid South African government has carried out only limited law reform to realign

³⁶⁶ Roux (n 341 above) 43.

³⁶⁷ P De Vos 'Grootboom, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 259.

³⁶⁸ SL Hendriks & NJ Olivier 'Review of the South African Agricultural Legislative Framework: Food Security Implications' (2015) *Development Southern Africa* 11.

³⁶⁹ Hendriks & Olivier (n 368 above).

³⁷⁰ Hendriks & Olivier (n 368 above) 12.

previous legislations in a manner which can reverse entrenched poverty and structural inequalities.³⁷¹

It is important to indicate that adjustments or revisions in individual food policies or programmes alone cannot bring about the consolidation or coherence in the manifold food security interventions, which will address chronic hunger.³⁷² Whereas the National Policy on Food and Nutrition Security must be hailed for setting out strategies and programmes to promote, protect and facilitate the right to food, there is the need for a concomitant legislation in the form of a food security Act. Such a law will provide for enforcement mechanisms to ensure that relevant provisions are adhered to, as well as providing the basis for cooperation between government departments and the private sector. Also, the Act will not only form the framework to obtain funding for dedicated food security projects and programmes stated in a department's APPs, but will also entrench the right to access food.³⁷³ Consequently, the Act must include appeals mechanism. Moreover, it should provide for mandatory early warning systems and contingency plans (including compensation schemes for government negligence, and emergency response systems) a sound monitoring and evaluations system that includes continuous surveillance of poverty and hunger levels, accountability systems, delivery mechanisms, institutional arrangements, targeting and registration methodologies, identification of beneficiaries and a mix of instruments to fulfill citizens right to food. The Food Act may be accompanied with an operational strategy, which will provide the framework indicating detailed expected outputs, deliverables, timeframes, an appropriate monitoring and evaluation system, outcomes, institutional responsibilities and specific deadlines binding on all actors.

It is important to indicate at this point that the adoption of a Food Act must be accompanied with the establishment of government department wholly responsible for operationalising the Act. The setting up of a single department for food security will act as a single unit, thereby eliminating waste due to overlapping of efforts among government departments responsible for food security. The primary objective of the Department of Food Security will be to consolidate all the existing fragmented food security interventions and ensure timely and efficient distribution of food to the food poor. The department will be responsible for monitoring of production, stock and price levels of food stocks, procurement of various food

³⁷¹ Hendriks & Olivier (n 368 above).

³⁷² Hendriks & Olivier (n 368 above).

³⁷³ Hendriks & Olivier (n 368 above) 12.

stocks, building up and maintenance of food and delivery to the distributing agencies. The establishment of such a department will enhance the integration of cross-sectoral responsibilities into the performance appraisal of the various departments involved in food security programmes.

Further, given that the neoliberal market policy implemented in South Africa has benefitted the large corporations to the detriment of farmers and peasants, it is important that the proposed Department of Food Security also act as a regulatory body that would control prices and exports of food as well as farm produce.³⁷⁴ This role will be important in shifting control of the food system back from agribusiness (corporates and elites which have been implicated in, for instance, price fixing as evidenced in the *Mukudamm v Pioneer Foods Ltd & Others* discussed in chapter three above) back to smaller enterprises, farmers and peasants.³⁷⁵ The establishment of a single food security department (akin to India's Department of Food and Public Distribution) will be classified as one of the most important novelties in post-apartheid South Africa to address the needs of the food poor. The first achievement, in this regard, will be when the state provides free grains and cash allowance to enhance the food and nutritional requirement of the chronically hungry. This commitment may seem modest, but its ramifications may be remarkable in that the hunger needs of millions will be reduced.³⁷⁶

The absence of a Food Act means that the right to food does not have enforceable legal framework, with no mechanism for guaranteeing household and individual access to food. While the National Policy, and other food security programmes offer some relief to the chronically hungry or those susceptible to food insecurity, these policies and programmes are by no means legally enforceable. The plight of the chronically hungry can best be addressed if there if legislations are enforced with fair appeal processes accessible to all citizens. The adoption of a food act will play a key role in reviewing existing policies and ensuring legal remedies for the food poor.

5. Conclusion

This chapter clearly indicates that there is fragmentation in policy formulation as well as continuing lack of coherence between the respective departments responsible for addressing

³⁷⁴ L Pereira & S Drimie 'Governance Arrangements for the Future Food System: Addressing Complexity in South Africa' (2016) 58(4) *Environment: Science and Policy for Sustainable Development* 27.

³⁷⁵ See *Mukudamm v Pioneer Foods Ltd & Others* CCT 131/12 [2013] ZACC 23.

³⁷⁶ Malabo Montpellier Panel 'Nourished: How Africa can build a future free from hunger and malnutrition' (2017) *A Malabo Montpellier Panel Report* 5.

South Africa's chronic hunger situation. It is against this backdrop that Holness and Govindjee stated that since there is no holistic government ministry, which deals with food security, the different approaches adopted by the different ministries have militated against the state's drive for food security.³⁷⁷ This situation has not improved at the time of writing. While each department acknowledges that they have a legal obligation to address chronic hunger and malnutrition, they have not been able to forge a better cooperation between their roles.

The seeming lack of harmonization between the different departments involved in the development and operationalisation of policies regarding food security is reflected in two ways: First, the (food security) programmes overlap between the different departments is a clear manifestation of the lack of coordination. For instance, all the aforementioned institutional players recognise (if not their most fundamental policy focus) the improvement of capacity to generate food for own use as one of their obligations. For this reason, all the government departments (although with different levels of drive) finance or run projects of this kind.

Second, the lack of harmonization has not merely result in wasted logistics, but has also exacerbated the present policy overlap. Besides primary and high school pupils, none of the aforementioned principal institutions has any focus on the provision of direct food (vouchers) to the hungry. This constraint in the policy generates a seemingly *prima facie* legal lacuna in the various frameworks.

The attempts by the DAFF to adopt and operationalise the IFSS have failed to adequately address this fragmentation. Though the strategy seems to provide room for effective coordination between the institutions and structures at the local and national levels, its operationalisation has been flawed. For instance, while the IFSS seeks to create national standards and targets as benchmarks for addressing the current chronic hunger and malnutrition situation, the other government departments have not followed its operationalisation with interests.

It is, therefore, recommended that the state in pursuing its quest to address the chronic hunger situation adopt a 'reasonable' policy option towards any possible expansion of existing social security grants, be it child support grant or old age pensions). Yet, it is imperative to point out

³⁷⁷ Holness & Govindjee (n 2 above) 527.

that, to adequately address the current food insecurity situation in the country, the state needs to adopt a specific right to food policy, or broaden the scope of the Social Relief of Distress grant into a large scale grant to provide for the needs of the unemployed until such a time when they begin to earn an income. This form of social assistance will, therefore, provide assistance to a broad spectrum of indigents who are currently denied state assistance.

Thus, considering that the state has failed to harmonize its policies and thereby is unable to fulfill its obligation under section 27(1), it is important to examine the agents or institutions, which can bring about policy reform to address the needs of the food poor. The next chapter will examine the role of parliament, pressure groups and the courts in producing major social policy reform. Among other issues assessed, the chapter will pay particular attention to determine whether it would be legally justifiable to institute a direct court challenge against the state for violating the right to food.

CHAPTER FIVE

POLICY ACTORS AND SOCIAL POLICY CHANGE

1. Introduction

The previous chapters assessed one important social problem -chronic hunger- and the social policies formulated by the South African government to address it. Chapter four in particular, focused on the failures of existing policies to address the food and nutritional needs of millions who have been excluded from government's food programmes. Like chronic hunger, many injustices, oppression and inequality deserve to be named social problems.¹ Yet, the state only selects a few of these human sufferings from the society and gives them primary importance as social problems.² Ultimately, private issues become social problems and good candidates for social policies when they draw the attention of policy actors and other opinion makers, as well as the media. Two factors determine whether a private issue becomes a social problem, namely, how intense is the problem perceived to be and how many people are (or might be) affected by it.³ An obvious example of private issue, which made headlines and became a major social problem demanding a solution, is HIV/AIDS in 2007 when it was estimated that millions of South Africans had been infected.⁴ The search for treatment summoned national interests as the activities of an activist group led to the launch of a large-scale free treatment of HIV/AIDS patients.⁵ Interest in prevention has also been heightened as the state encourages male circumcision and condom usage even at junior high school levels.⁶

The objective of this chapter is to explore the function and influence that policy actors could exert in the formulation of an overarching food security policy. The term policy actor(s) refers to both (formal and informal) groups and individuals which seek to influence social

¹ T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011)11(2) *African Human Rights Law Journal* 542.

² H Blumer 'Social problems as collective behaviour' (1971) 18(3) *Social problems* 298.

³ L Gerston *Public policy making: process and principles* (1997) 49.

⁴ SSA Karim, GJ Churchyard, QA Karim, & SD Lawn 'HIV infection and tuberculosis in South Africa: an urgent need to escalate the public health response' (2009) 374(9693) *the Lancet* 923.

⁵ S Rosen, M Ketlhapile, I Sanne & MB DeSilva 'Cost to patients of obtaining treatment for HIV/AIDS in South Africa' (2007) 97(7) *South African Medical Journal* 525.

⁶ L Long, M Fox, I Sanne & S Rosen 'The high cost of second-line antiretroviral therapy for HIV/AIDS in South Africa' (2010) 24(6) *Aids* 915; F Tanser, T Barnighausen, E Grapsa, J Zaidi & ML Newell 'High coverage of ART associated with decline in risk of HIV acquisition in rural KwaZulu-Natal, South Africa' (2013) 339(6122) *Science* 966.

policy creation and operationalization in South Africa.⁷ In this chapter, policy actors include the three arms of government (the executive, legislature and judiciary), human rights institutions, public opinion, the media and social protesters.⁸ The chapter will thus, discuss the major features of government system and the implications for social policy change. Social policy refers to an important component of public policy, which addresses social issues.⁹ It implies the interventions and guidelines for the creation, maintenance and changing of living conditions which are conducive to human welfare.¹⁰ As an element of public policy and practice, social policy seeks to address social needs in the areas of education, labour, inequality, criminal justice, human services and food.¹¹ It thus, bridges the gap between the welfare of the individual and society.¹² In seeking to address specific social issues, officials within government institutions develop social policies through existing political processes.¹³ The next section begins with an assessment of the challenges faced by government institutions and non-state policy actors (those who influence social policy from outside government,) in changing or improving social policy. The objective of this assessment is to determine the role of these actors in bringing about social policy change.

2. Social policy actors

To ensure that government do not tyrannize the people, the 1996 Constitution established a system of checks and balances among the institutions of government.¹⁴ That is to say, no government institution would wield absolute power to pose such threats.¹⁵ The Constitution also made provision for the creation of other major policy actors to shape the formulation and adoption of policies, which would not hinder, but rather promote the rights of citizens, including the right to food.¹⁶ The South African system is grounded on a tripartite division of authority among the judiciary, executive, and legislative institutions, with each branch having

⁷ W Carlsnaes 'Actors, structures, and foreign policy analysis' in S Smith, A Hadfield & T Dunne (eds) *Foreign policy: theories, actors, cases* 113.

⁸ SJ Ball, M Maguire, A Braun & K Hoskins 'Policy actors: Doing policy work in schools' (2011) 32(4) *Discourse: Studies in the cultural politics of education* 625.

⁹ RM Titmuss *Social policy* (1974) 138-9.

¹⁰ H Rittel & M Webber 'Dilemmas in a General Theory of Planning' (1973) 4(2) *Policy sciences* 159.

¹¹ TH Marshall *Social policy in the twentieth century* (1975) 11.

¹² M Hill & ZM Irving 'Understanding social policy' (2009) 2.

¹³ Marshall (n 12 above).

¹⁴ E Cameron 'Judicial Accountability in South Africa' (1990) 6(2) *South African Journal on Human Rights* 251-2; from secs (42) - (180).

¹⁵ S Seedat 'The South African parliament in 2015' A paper commissioned by the Council for the Advancement of the South African Constitution, available at <<http://www.casac.org.za/wp-content/uploads/2015/02/The-South-African-Parliament-in-2015.pdf>> (accessed 20 July 2017) 2.

May 2015

¹⁶ Secs (181) - (194).

a distinct responsibility to protect the fundamental rights of citizens.¹⁷ Although the fragmentation of government power had the noble intention of safeguarding the liberty of citizens from government, this system of separated institutions also has implications for policy processes as well as the social policy they produce.¹⁸ As demonstrated by the enactment of current national policies and new programmes, the system of separated institutions does not prevent the state from adopting a food policy or amend the Social Security Act to provide for the food poor.¹⁹ Also, policymaking institutions in South African can sometimes act quickly, to formulate and approve a food policy.²⁰ Examples include the enactment of legislations (such as the Unemployment Insurance Amendment Act of 2016, Children's Amendment Act of 2016, and Children's Second Amendment Act of 2016) which were tabled in parliament in 2016.²¹ Given that these three legislations were passed within a year, and they may contribute to enhancing people's access to food (in terms of access to money through unemployment fund or child grant), similar urgency can be attached to amending the Social Security Act to provide for the food poor.²²

Notwithstanding the above successes in policy change, generally government's fragmented political institutions might not make it easy for decision makers to timely respond to chronic hunger.²³ The number of policy actors within the South African government and their overlapping functions, may add to the difficulty and complexity of policymaking, and to policy gridlock.²⁴ This complexity might, therefore, make it difficult for one to understand which actor is responsible for the formulation and adoption of a social policy, such as food

¹⁷ RB Mattes 'South Africa: democracy without the people?' (2002) 13(1) *Journal of Democracy* 26.

¹⁸ B Dixon 'Development, crime prevention and social policy in post-apartheid South Africa' (2006) 26(1) *Critical Social Policy* 169.

¹⁹ Seedat (n 15 above) 3.

²⁰ A Wood 'The politics of policy circulation: Unpacking the relationship between South African and South American cities in the adoption of bus rapid transit' (2015) 47(4) *Antipode* 1067.

²¹ Unemployment Insurance Amendment Act, Government Gazette, 19 January 2017. Act No. 10 of 2016; Children's Amendment Act, Government Gazette, 19 January 2017. Act No. 17 of 2016; Children's Second Amendment, Government Gazette, 19 January 2017. Act No. 18 of 2016.

²² The Unemployment Insurance Amendment Act was tabled at the National Assembly and passed on 19 May 2016, while the Children's Amendment & Second Amendment Bill were tabled before parliament on 2 September 2015. PMG 'Children's Amendment & Second Amendment Bill [B13-2015] & [B14-2015]: public hearings Day 1' (02 September 2015) available at <<https://pmg.org.za/committee-meeting/21447/>> (accessed 26 July 2017); PMG 'Unemployment Insurance Amendment Bill [B25D-2015]: Department of Labour briefing, with Minister in attendance' (06 September 2016) available at <<https://pmg.org.za/committee-meeting/23197/>> (accessed 26 July 2017).

²³ PR Verkuil 'Separation of Powers, the Rule of Law and the Idea of Independence' (1988) 30 *William & Mary Law Review* 301.

²⁴ TO Sargentich 'Contemporary Debate About Legislative-Executive Separation of Powers' (1986) 72 *Cornell Law Review* 430.

policy.²⁵ Complexity in social policy formulation and approval is an indication of the government's inability to address social problems due to the political conflicts that inevitably arise over how best to address those issues.²⁶ Put differently, in such a fragmented governing system, it is difficult to discover and define for instance, chronic hunger, formulates appropriate plans, and approves such plans.²⁷

²⁵ J Stewart 'A dogma of our times—the separation of policy-making and implementation' (1996) 16(3) *Public Money & Management* 34.

²⁶ DP Dolowitz & D Marsh 'Learning from abroad: The role of policy transfer in contemporary policy-making' (2000) 13(1) *Governance* 5.

²⁷ P Gewirtz 'Realism in Separation of Powers Thinking' (1988) 30 *William & Mary Law Review* 343.

Like several other social problems (such as HIV/AIDS and child abuse), chronic hunger is recognised (by several scholars) as a major social problem and a candidate for social policy solutions by decision makers and political actors. Although a social policy is commonly thought of as a formalized, institutionalised response to a perceived social problem, it does not have to be institutionalised formally.²⁸ Given that a social policy directs our responses to a specific social problem, the *lack of* a government strategy to improve a social problem (such as the absence of national right to food act) can itself be thought of as a social policy. In this regard, a collective response to a perceived social problem is classified as a social policy. At times, it entails efforts to ameliorate the problem without solving it (as in Unemployment Insurance Fund), at times it comprises efforts to solve the problem (such as Social Security), and at times it entails efforts to avoid the problem (such as in the absence of national right to food policy).²⁹ Within this definition, the lack of right to food policy can be considered social policy since it meets the perceived threshold to protect the food-poor from chronic hunger. It is, therefore, imperative that policy makers and political actors formulate a policy solution, given that the issue of chronic hunger has consistently been brought to the attention of the public. It may as a result, be useful to provide a brief assessment of the most notable features of key policymakers in South Africa, and their role towards the adoption of a food policy or amendment of the Social Security Act. The reason for this assessment is that the rules these institutions adopt for decision-making, and the way they are (designed and) structured, have an impact on how they operate and the social policy, which results. The next section assesses each of the arms of government, and their potential for policy change. Generally, all branches of government share similar systems and must address the comparable difficulty and complexity within their respective structures.³⁰

2.1. Legislative branch

The legislative branch of South Africa is a bicameral (two-house) parliament, composing of the National Council of Provinces (NCOP) and the National Assembly. The two houses differ from each other in terms of operational style and composition. The NCOP, constitutionally mandated to protect the welfare of the provinces, consists of 10 delegates from each of the nine provinces. The National Assembly is composed of 400 members

²⁸ Titmuss (n 10 above) 1-2.

²⁹ J Jimenez *Social policy and social change: Toward the creation of social and economic justice* (2010) SAGE: Los Angeles 16.

³⁰ P Davies & J Hughes 'The fractured arms of government and the premature end of lifelong learning' (2009) 24(5) *Journal of Education Policy* 610.

elected every five years (based on a party-list proportional representation system), responsible for passing legislation and scrutinising executive actions.

Section 55 of the Constitution sets out the functions of the National Assembly, but the most important in this context is its power to make or ‘amend’ any legislation.³¹ To achieve this responsibility, the National Assembly operates under a structure that provides for policy specialisation or division of labour.³² Social policy development is concentrated within an elaborate structure of (portfolio and joint standing) committees, each of which is chaired by a member of the party with majority seats in the National Assembly.³³ The committees of the National Assembly have particular influence over specific social policies and the government departments that implement them.³⁴

Bills introduced into the National Assembly are referred to a committee for consideration.³⁵ Each committee has sizable staffs that examine such policy, by acquiring information on the merits and demerits of the proposed law through public hearing.³⁶ At this stage, non-governmental organisations (NGOs), think tanks, experts from academia and officials from the executive branch may be invited for their opinions.³⁷ Based on the committee’s experience and expertise (and the outcome of the public hearing), it either rejects, modify or accept the bill.³⁸ For a bill to become law, the committee reports to the National Assembly on their findings and recommendations.³⁹ The National Assembly may pass a law or amend existing law through a two-thirds vote of the members of parliament (MPs) and be signed by the president.⁴⁰ The president may reject or veto a bill approved by the National Assembly, and with two-thirds vote, the National Assembly may in turn overrule the president’s veto.⁴¹

Although there are some disadvantages to the division of labour among the committees in the National Assembly, there are some advantages as well. The multiple (portfolio and joint-

³¹ Sec 55(a).

³² L Bank & R Southall ‘Traditional leaders in South Africa’s new democracy’ (1996) 28(37-38) *The Journal of Legal Pluralism and Unofficial Law* 409-10.

³³ The ANC is the party in the National Assembly with 249 members.

³⁴ Parliament of South Africa ‘Business of parliament: Committees’ (04 July 2017) available at <www.Parliament.gov.za> (accessed 04 July 2017)

³⁵ PMG ‘Role of parliamentary portfolio committees and members of parliament on oversight: workshop’ <<https://pmg.org.za/committee-meeting/11720/>> (accessed 20 July 2017).

³⁶ Seedat (n 15 above) 3.

³⁷ Seedat (n 15 above) 3.

³⁸ DP Baron & D Diermeier ‘Elections, governments, and parliaments in proportional representation systems’ (2001) 116(3) *The Quarterly Journal of Economics* 938.

³⁹ Baron & Diermeier (n 38 above) 939.

⁴⁰ Seedat (n 15 above) 3.

⁴¹ Seedat (n 15 above) 6.

standing) committees create many platforms, which might be useful when considering social problems as well as social policy bills.⁴² Against this backdrop, virtually any social issue - from social security to chronic hunger- can gain considerable attention in parliament. On the downside, social policy gridlock may result when members of a committee fail to agree due to lack of expertise (or for other reasons) on the gravity and complex nature of chronic hunger and proposed solution.⁴³

Besides the setback at the committee level, parliament has in recent times (as well as in the past) come under continuous attack for adopting laws, which are unable to solve social problems, due to their poor contents.⁴⁴ In May 2012, Max Sisulu, then Speaker of Parliament, in his budget statement, questioned MP's professionalism and the poor standard of law making that results.⁴⁵ He pointed out that more and more laws are being returned to the National Assembly by the courts after being found unconstitutional.⁴⁶ All Sisulu's criticisms are valid and persist today. On 29 June 2017, the Constitutional Court upheld a high court ruling that sections 34(1)(b) and (d) of the Immigration Act (dealing with the detention of suspected or alleged illegal foreigners without prompt judicial intervention) is unconstitutional.⁴⁷ The court entreated parliament to revise this provision in accordance with the ruling.⁴⁸ It is, therefore, of major concern whether parliament would be willing to set out all the relevant provisions in a legislation (if it decides to do so) which seeks to address chronic hunger.

What is noteworthy is not that these constraints persist, but that many members who double as cabinet ministers frequently absent themselves and may not be readily available to respond to questions (on chronic hunger) on time (especially at the committee level).⁴⁹ This setback,

⁴² S Haggard & MD Cubbins *Presidents, parliaments, and policy* (2001) 1.

⁴³ K Strøm 'Delegation and accountability in parliamentary democracies' (2000) 37(3) *European journal of political research* 273.

⁴⁴ A van Zyl 'Court declares sections of firearm act unconstitutional' <<https://www.zoutnet.co.za/articles/newsflash/42848/2017-07-04/court-declares-sections-of-firearm-act-unconstitutional>> (accessed 20 July 2017).

⁴⁵ C Dodds 'MPS failed to keep eyes on the ball: parliament's 2012 has been a year of fierce debate, with signs of a gathering democratic resolve' *Weekend Argus (Saturday Edition)* Press Reader (8 December 2012) available at www.pressreader.com (accessed 04 July 2017).

⁴⁶ S Friedman 'Fiercely (in-)dependent: South Africa's Parliament' in K Ben-Zeev & J Luckscheiter *Do parliaments matter: African legislatures and the advance of democracy* Heinrich Böll Stiftung 13.

⁴⁷ TimesLive 'Government gets rules for treatment of suspected illegal foreigner' (29 June 2017) available at www.timeslive.co.za (accessed 04 July 2017); also see Lawyers for Human Rights 'High Court declares parts of the new Immigration Act unconstitutional' available at <<http://www.lhr.org.za/news/2003/high-court-declares-parts-new-immigration-act-unconstitutional>> (accessed 04 July 2017).

⁴⁸ Lawyers for Human Rights (n 47 above).

⁴⁹ T Gqirana 'Absence of ministers – and Zuma's number difficulties – evoked by parliament' (8 December 2016) BizNews, available at <<http://www.biznews.com/leadership/2016/12/08/absence-ministers-zuma>>

in theory, should not happen. Although MPs are meant to unselfishly (re)present the interest of their voters, they are subject to the same frailties like any other human being.

Besides, the pressures for members of the National Assembly to behave as effective lawmakers and representatives are very weak, given that electorates do not have much of say in who is elected to parliament.⁵⁰ As stated at the beginning of this section, South Africa uses the closed list proportional representation system at the provincial and national levels. MPs are elected by the order they appear on the party list with voters voting for the party (and not an individual).⁵¹ MPs could lose their seat even though they perform devotedly throughout their terms because the party structures do not want them there. It is, therefore, far more important for an MP to be submissive to the leaders of the party who (who draw up the party list) than any electorates (who have no idea who is on the list).⁵² Consequently, elections can hardly be used as a tool to influence the adoption of a policy to eradicate chronic hunger unless a party has taken up the issue in its manifesto or there is sufficient external pressure to address a situation. Another reason why elections (of MPs) cannot be a guarantee of policy reform is that South Africans (like many parts of Africa) vote based on their identities (some people support and vote for parties closest to them, in particular based on race, culture or even popularity in a province).⁵³ MPs in the larger parties do not have to work hard to win votes since their parties often have guaranteed vote banks to support them (irrespective of their performance in parliament).⁵⁴

With almost a two-thirds majority, the African National Congress (ANC) hardly needs the support of any opposition party to oppose the enactment of a food legislation or amendment of any existing legislation (such as the Social Security Act) to provide for the food poor.⁵⁵ In

parliament/ > (accessed 21 July 2017); PoliticsWeb ‘Ministers absent from Parliament committee meeting on ICC withdrawal’ (08 March 2017) available at <http://www.politicsweb.co.za/politics/ministers-absent-from-parliament-committee-meeting> (accessed 21 July 2017); A Makinana ‘Gordhan, Motsoaledi, Motshekga among 32 ANC MPs who did not vote’ (11 November 2016) *City Press* available at <http://citypress.news24.com/News/no-confidence-motion-gordhan-motsoaledi-motshekga-among-32-anc-mps-who-did-not-vote-20161111> (accessed 21 July 2017).

⁵⁰ Friedman (n 46 above) 13.

⁵¹ Friedman (n 46 above) 14.

⁵² Friedman (n 46 above) 15.

⁵³ It is however important to indicate that the 2016 local government elections portrayed that there is a shift in this trend, especially with black people now voting on issues and not on race. See British Broadcasting Corporation News ‘South Africa local elections: ANC loses in capital Pretoria’ (06 August 2016) available at <http://www.bbc.com/news/world-africa-36997461> (accessed 04 July 2017).

⁵⁴ M Hunter & N Cedile ‘Bridging the gap: R2K’s Campaign in the South African Parliament’ in K Ben-Zeev & J Lukscheiter *Do parliaments matter: African legislatures and the advance of democracy* (2012) 16.

⁵⁵ ANC has 249 out of 400 MPs (62 percent). See M Merten ‘No confidence vote’ the politics & numbers at parliament’ (04 April 2017) *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2017-04-04-no-confidence-vote-are-those-calling-for-it-confident-the-numbers-will-add-up/#.WXtyDYh96M8> (accessed

this regard, the opposition could be reduced to ineffective protest and parliament turned into a rubber-stamp for the legislation of the party leadership.⁵⁶ A parliament can avoid this setback when MPs of the majority ANC party show more independence, and this they have done.

Arguably, the leadership of the ANC, until the 2016 municipal elections, kept a tight control on its MPs.⁵⁷ Since the elections, and president Jacob Zuma's recent cabinet reshuffle, which saw the removal of 'much respected finance minister' Pravin Gordhan, there has been increasing changes in the conduct of ANC MPs.⁵⁸ Although majority MPs tend to display allegiance to parties in the National Assembly, there have been demonstrations of independence and cooperation with the opposition in the portfolio and joint-standing committees where they could hold ministers accountable, and discuss bills before they reach the floor of the house. In April 2017, ANC MP Pravin Gordhan, who is a member of the portfolio committee on public enterprises, grilled and launched a scathing attack on the Eskom board and public enterprises minister Lynne Brown for the reappointment of Brian Molefe as chief executive officer (CEO) of the power utility company.⁵⁹ Perhaps, there is no better demonstration to the independence of some ANC MPs than the fact that the leadership of the ANC, in April 2017, removed Makhosi Khosa from the finance committee after being extremely critical of former communications Minister Faith Muthambi regarding the fitness of the South African Broadcasting Cooperation (SABC) board.⁶⁰ The effort by the party leadership to control independence has led to the containment of the zeal of some of the portfolio committees, but not necessary all of them.⁶¹

04 July 2017). The only way to prevent the party from passing any law is if all opposition parties in parliament unanimously vote against a legislation.

⁵⁶ Friedman (n 46 above).

⁵⁷ According to British Broadcasting Corporation (BBC), the 2016 elections was the 'ANC's worst electoral performance since it was elected to power at the end of apartheid'. See BBC 'South Africa local elections: ANC loses in capital Pretoria' (6 August 2016) available at <<http://www.bbc.com/news/world-africa-36997461>> (accessed 04 July 2017).

⁵⁸ L Chutel 'South Africa is on edge after the president fired his finance minister and uprooted 19 others' QuartzAfrica (30 March 2017).

⁵⁹ Brian Molefe is a former chief executive officer of the power utility. See E Mabuza 'Pravin Gorghhan, MP, grills Eskom bosses in parliament' BusinessLive (23 May 2017) available at <https://www.businesslive.co.za/rdm/politics/2017-05-23-pravin-gordhan-mp-grills-eskom-bosses-in-parliament/> (accessed 04 July 2017).

⁶⁰ 'Makhosi Khosa has been moved from parliament's finance committee as Molefe heads to parly' (21 February 2017) Huffpost, available at <. http://www.huffingtonpost.co.za/2017/02/21/makhozi-khoza-has-been-moved-from-parliaments-finance-committee_a_21718220/> (accessed 04 July 2017).

⁶¹ See B Capazorio 'https://www.businesslive.co.za/bd/national/2017-07-10-makhosi-khoza-hits-back-at-mthembus-ill-discipline-accusations/' BusinessDay 910 July 2017) available at www.businessday.co.za (accessed 11 July 2017).

Nonetheless, while some ANC MPs see the need to be critical of the executive action, it does not mean that they will ‘selflessly serve those who voted for them by finding out what most of their voters want and battling fearlessly for it’.⁶² It was against this backdrop that Friedman noted that ‘unless there are strong pressures which prompt members to behave as they should, the chances are that they’ will continue to serve the interests of their parties and not the food poor.⁶³

2.2. Executive branch

The executive branch is composed of the president, the vice-president and cabinet members. It is responsible for administering the legislation enacted by parliament. Unlike many other countries, the president and his vice-president are not elected nationally, but by the National Assembly. In effect, the president represents the interests of parliamentarians and their voters, and symbolises South African culture and values. While the president and his cabinet do not make laws, they introduce bills in parliament and are actively involved in policy formulation and adoption, agenda setting, as well as policy operationalization. For instance, presidents Nelson Mandela in 1994 and Thabo Mbeki in 1999 were somewhat successful in focusing national attention on the need to address massive shortfalls in social services and poverty alleviation through the Reconstruction and Development Programme. From 2009, president Jacob Zuma has overseen a life-saving extension of HIV/AIDS medication and treatment.⁶⁴

Besides the president, the entire presidency is closely involved in social policy development.⁶⁵ The presidency consists of the deputy president; the minister of women; the minister of performance, monitoring and administration as well as administration; the deputy minister for planning, performance, monitoring and evaluation.⁶⁶ Jointly, these individuals constitute a ‘mini-bureaucracy’, which is supposed to provide the president with important information on chronic hunger and policy ideas towards the development and operationalization of a right to food policy or strategy.⁶⁷ The deputy president, who is in charge of government business in parliament keeps the president updated about the numerous

⁶² Friedman (n 46 above) 13.

⁶³ Friedman (n 46 above) 13.

⁶⁴ S Leclerc-Madlala ‘Popular responses to HIV/AIDS and policy’ (2005) 31(4) *Journal of Southern African Studies* 853.

⁶⁵ A Butler ‘The State of the South African Presidency’ (2013) 71 *The Journal of the Helen Suzman Foundation* 4

⁶⁶ Butler (n 65 above) 5.

⁶⁷ Butler (n 65 above).

social policies being considered in parliament, giving him opportunity to influence policy direction at the National Assembly, where his party commands majority.⁶⁸

The president's agenda and position on certain social problems, in most policy areas, reflects his social and political ideology, party affiliation and the number of affected persons in provinces most loyal to his party (and - maybe to his successor's election. Although the ultimate responsibility for the adoption of a food policy rests with the president's appointees at the top of each relevant department, public servants (such as chief directors and directors) in the departments have considerable authority to shape such policy.⁶⁹ Because their interpretation of social problems can push policy decisions one way or another, the president and his cabinet members take a keen interest in who is appointed to serve as head of department directorates.⁷⁰ Further, to ensure that departments' policy decisions are in line with the president's priorities and programmes, senior public servants work closely with the president's staff, especially in cases where a specific social policy is not restricted by constitutional requirements.⁷¹ Thus, South Africa's bureaucracy is highly politicised and any social policy change is subject to the prior approval of the president.⁷² That the president and his cabinet have the power to adopt and implement a comprehensive food policy, and yet has failed to do so is a clear demonstration of the executives' unwillingness to address chronic hunger holistically. In light of this, it is likely that any attempt made by public servants to reform the Social Security Act or adopt a new food policy at the department level might not be approved immediately by the presidency. It is, therefore, important to turn our attention to the last, but not the least arm of government, the judiciary, and assess whether citizen's can pressure the executive through litigation in bringing about social policy reform to address chronic hunger.

2.3. Judicial branch

The judicial arm of government is composed of district and regional magistrates 'courts, the provincial divisions of the High Court, the Supreme Court of Appeal and the eleven-member

⁶⁸ Butler (n 65 above) 8.

⁶⁹ NL Roux 'Public policy-making and policy analysis in South Africa amidst transformation, change and globalisation: Views on participants and role players in the policy analytic procedure' (2002) 37(4) *Journal of Public Administration* 424.

⁷⁰ Roux (n 69 above) 426.

⁷¹ Roux (n 69 above) 426.

⁷² Roux (n 69 above) 419.

Constitutional court.⁷³ Undoubtedly, the courts have the last word on how the right to food in the Constitution should be interpreted.⁷⁴ While many would hardly perceive them as policymakers or reformers, they play an important role in the area of interpreting social policies formulated by parliament and the executive.⁷⁵

Besides the executive and legislative arms of government, the judiciary has a significant role in fulfilling the state's obligation to safeguard the right to food, in two ways. First, courts can safeguard the rights to food and nutrition by deciding on legal and other constitutional challenges to state programmes that are tailored to enhance the right to food.⁷⁶ This adjudicative and protective role of the courts has been exemplified in the Cape High Court case of *City of Cape Town v Rudolph*,⁷⁷ where the Court rejected a constitutional challenge to the state's security of tenure. It held that, while the PIE Act might infringe on the right to property, this is permissible since the the Constitution safeguard the rights of occupiers from arbitrary eviction.

A second illustration relates to the Constitutional Court case of *Minister of Public Works v Kyalami Ridge Environmental Association*, which concerns the right to have access to adequate housing.⁷⁸ In this case, the Court rejected the claim of property owners who claimed that the state has housed destitute flood victims on the grounds of a prison outside Johannesburg, which was adjacent to their properties. Although the Court, in taking its decision did not refer to the state's constitutional obligation to provide access to adequate housing, it averred that the state was exercising its administrative rights in order to protect its citizen's rights to life and dignity.

A second way in which courts can fulfill their obligation to safeguard the right to food is through developing the rules of common law and exercising their law-making activity in interpreting legislation. The judiciary (otherwise known as the third arm of government) is legally required to ensure that the 'spirit, purport and objects' of the Bill of Rights are promoted, especially when developing rules of common law or interpreting legislation.⁷⁹

⁷³ S Liebenberg 'Human development and human rights: South African country study' (2000) *Human Development Report* 25-26.

⁷⁴ MM Taylor *Judging policy: courts and policy reform in democratic Brazil* (2008) 1.

⁷⁵ Taylor (n 74 above).

⁷⁶ YP Ghai & J Cottrell *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) 36.

⁷⁷ 2004 5 SA 39 (C).

⁷⁸ 2001 3 SA 1151 (CC).

⁷⁹ Sec 39(1) of the 1996 Constitution.

Courts are, for that reason, constitutionally obliged to take into cognizance the values underpinning the Constitution and infuse them into the existing law. As stated by Sen, in a private ownership economy, ‘the law stands between food availability and food entitlement.’⁸⁰ For this reason, access to food is primarily, determined by a ‘system of legal relations’ including legal exchanges, contractual obligations and ownership rights.⁸¹ Against this backdrop, the constitutionally informed adjudicating mandate of the courts is significant in the interpretation of the Constitution through which the right to food of citizens can be safeguarded.⁸²

This protective role of the courts can also be stretched to encompass interpreting statutes, which seek to regulate the means for acquiring food or access to resources for the production of food. Already, there have been numerous instances in terms of the tenure security laws where courts have played this role. For instance, courts at different levels have interpreted and applied the LTA and ESTA to safeguard individual’s right to food. It has often held that, different types of third party interference in peoples’ occupation of land also threaten food production activities (such as cattle rearing and crop cultivation).⁸³ Consequently, all evictions should comply with the substantive safeguards and stringent procedures set out in these legal statutes.

Akin to the *Mukudamm v Pioneer Foods Ltd & Others*;⁸⁴ and *Kenneth George & Others v the Minister of Environmental Affairs and Tourism*⁸⁵ cases discussed in section 5.3.3 of chapter 3, the Constitutional Court case of *Jaftha v Schoeman*⁸⁶ provides an interesting possibility for a court driven development of the legislation to safeguard the constitutional right to food. Through a combination of interpretation and reading words into the 1944 Magistrates’ Courts Act 32,⁸⁷ the Court amended the Act to provide additional protection to indigents. Due to this amendment, a judgment debtor’s home can only be auctioned or sold in execution if a court has ordered it, but only after a thorough assessment of all fundamental considerations.⁸⁸ In

⁸⁰ A Sen Poverty and famines: an essay on entitlement and deprivation (1981) 166.

⁸¹ Sen (n 80 above) 166.

⁸² Nonetheless, the court’s role in this regard may be limited largely by the cost of litigation. Besides placing enormous financial burden on the food poor, litigation on right to food may also deplete provincial budgets, which could have been used to address chronic hunger situation.

⁸³ R Hall ‘Transforming rural South Africa? Taking stock of land reform’ (2007) *The land question in South Africa: the challenge of transformation and redistribution*88.

⁸⁴ Case CCT 131/12 [2013] ZACC 23.

⁸⁵ Case No. EC 1/2005, Judgment of 2 May 2007.

⁸⁶ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 1 BCLR 78 (CC).

⁸⁷ See sec 66(1)(a).

⁸⁸ *Jaftha* (n 86 above) paras 61-64 & 67.

the absence of any other basic source of access to food, any attachment or sale of poor person's immovable asset, which he uses to produce food for, own use is tantamount to breaching the individual's right to food.

Also, in *Zulu v Van Rensburg*,⁸⁹ the Land Claims Court held that confiscating the cattle of an occupant meets the threshold of an eviction which had to comply with the LTA provision and safeguards. Similarly, in the case of *Van der Walt v Lang*,⁹⁰ the same court found that in situation where a landowner had previously permitted an occupant to graze a certain number of cattle on his property, any later limitation on the number of cattle permitted on his property qualifies as eviction subject to the LTA's statutory safeguards. Later the Court, in the case of *In re Kranspoort Community*,⁹¹ gave an expansive definition to the 'rights in land' by including 'beneficial occupation' to the provisions set out in the 1994 Restitution of Land Rights Act 22. According to the Court, a protracted use of land - for purposes such as cultivation or grazing - correspondingly constitutes 'beneficial occupation', which can be reclaimed. The Land Claims Court further held in *Ntshangase v The Trustees of the Terblanche Gesin Familie Trust*,⁹² that when a land owner hinders an occupant from accessing watering hole and grazing lands that the occupier had previously used for her cattle - in terms of the ESTA- that constitutes an eviction.⁹³

Through the exercise of their mandate to develop the common law, courts can further contribute to the protection of the constitutional right to food. Unfortunately, there has been little progress on this front in the South African jurisprudence. The Supreme Court of Appeal, once presented with the invitation to develop common rules of contract *vis-à-vis* access to health care services in the case of *Afrox Health Care (Pty) Ltd v Strydom*⁹⁴ declined the opportunity to exercise its power in this light.

Yet, in terms of access to land, the court has been instrumental in developing the common law rules of eviction, which directly has an impact on the right to access to adequate food. In *Graham v Ridley*,⁹⁵ the court held that before an order for eviction could be granted to a

⁸⁹ 1996 4 SA 1236 (LCC) 1259.

⁹⁰ 1999 1 SA 189 (LCC) para 13.

⁹¹ 2000 2 SA 124 (LCC).

⁹² [2003] JOL 10996 (LCC) para 4.

⁹³ See secs 1 & 2(1) 123. For other similar judgements, see *Philips v Minister of Rural Development and Land Reform and Another* (LCC76/2010) [2013] ZALCC 13 (30 July 2013); *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016).

⁹⁴ 2002 6 SA 21 (SCA).

⁹⁵ *Graham v Ridley* (1931) TPD 476.

property owner, she must demonstrate that the land is rightfully hers and the occupier is illegitimately occupying the land. Nonetheless, considering that access to land significantly determines access to food, the 1996 Constitution provides a unique safeguard for individuals facing possible eviction. Section 26(3) of the Constitution specifically guarantees that only ‘after considering all the relevant circumstances’ may a court grant an order for eviction. This constitutional safeguard is not limited only to house evictions, but to all the three tenure security laws discussed above.

Contradictory judgments emanating from the High Court, have nonetheless, raised doubt as to whether the PIE and the other tenure security laws are applicable to the alleged (lease) *holding over* cases.⁹⁶ For instance, on the question of whether PIE is applicable to evictions, while in *Bekker v Jika*,⁹⁷ the court held that it does apply, the court in *Ellis v Viljoen*,⁹⁸ held that the PIE does not apply. For this reason, in those cases where the PIE is not applicable and common law does by default, courts had to decide whether section 26(3) changed the common law rules of eviction.⁹⁹

In addition, in *Ross v South Peninsula Municipality (Ross)*,¹⁰⁰ the Cape High Court held that an application seeking for an eviction order has to set out substantial arguments why such an eviction should occur, before it would be convinced to grant such an order. Nonetheless, the Witwatersrand High Court later contradicted the Cape High Court on this same issue by averring that section 26(3) is applicable only in evictions by the state and not evictions triggered by natural or juristic persons.¹⁰¹

In addressing this contradiction, the Supreme Court of Appeal concurred with the outcome of *Ross* and affirmed that section 26(3) of the Constitution did not alter the common law rules (in effect section 26(3) does not extend to residential evictions through PIE). Thus, all evictions from properties where the occupier was holding over are subject to the old rules of common law, which extended no discretion to a court in deciding whether to grant an order

⁹⁶ Lease holdover occurs when a tenant continues to remain in possession of the leased property after the lease expires or terminates.

⁹⁷ (2001) 4 B ALL SA 573 (SE).

⁹⁸ (2001) 4 SA 795 (C).

⁹⁹ B Cousins ‘More than socially embedded: The distinctive character of ‘communal tenure’ regimes in South Africa and its implications for land policy’ (2007) 7(3) *Journal of Agrarian Change* 282.

¹⁰⁰ *Ross v South Peninsula Municipality* 2000 1 SA 589 (K), 596H.

¹⁰¹ See *BettaEiendomme (Pty) Ltd v Ekple-Epoh* 2000 4 SA 486 (W), 473A-B.

for eviction. Conversely, the same court later held that in cases of holding over, both PIE and section 26(3) are applicable.¹⁰²

The Supreme Court of Appeal's decision in *Ndlovu v Ngcobo; Bekker v Jika (Ndlovu)* is far reaching in many respects, specifically in term of an individual's right to food *vis-à-vis* subsistence farming. Small-scale food production on residential plots, as was the case in *Ndlovu* is key in generating food for own use. The Court's decision that the PIE and section 26(3) are applicable in determining the tenure of occupants provides overarching safety nets for occupiers in terms of their access to housing, and by extension, their right to adequate food.

The first step toward the judicial process producing important social policy change (in the form of adopting a food policy or amending the Social Security Act) is through winning a court case. In order for the food-poor or an NGO to successfully, launch a claim in court, it is imperative that they substantiate the denial of the right. Any attempt to challenge the constitutionality of government's policies and actions regarding the right to food in court demands a careful consideration of the arguments for and against such a claim. It is against this backdrop that the next section deals with possible arguments, which can be used by litigators when requesting a court to make a ruling in favour of significant social reform in the area of right to food.

2.3.1. Arguments for right to food claim

The most apparent tool against which to test the prospect of any court action regarding the constitutionality of government's food interventions are the groundbreaking Constitutional Court judgments, which have expanded the scope of key economic and social rights enforcement.¹⁰³ It can be affirmed that these judgments, in short, demonstrate that existing policies or programmes, which unlawfully violates people's right to food, will not pass constitutional muster. Against this backdrop, the lack of current across-the-board cash food

¹⁰² See *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) para 23.

¹⁰³ *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002); *Khosa* (n 78 above); *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

interventions to address the chronic hunger situation of, to use *Grootboom*'s terms, desperate group of individuals is most likely susceptible to legal scrutiny.¹⁰⁴

In assessing government's food policy programmes, Holness and Govindjee equally argue that such policies fail to adequately address chronic hunger and malnutrition, especially as they are tailored to address the special needs of a specific category of people.¹⁰⁵ Also, Bilchitz, in examining the state's policies regarding economic and social rights, affirms that it is imperative that such policies places emphasis on the urgent need of those in desperate circumstances, whose very survival is threatened by such policies.¹⁰⁶ Against this backdrop, it is imperative to re-examine cases of people who are in 'desperate need' where legal action on the denial of the right to food might be able to be initiated.

In light of the alleged unconstitutionality of existing state legislation or government policy, three scenarios could demonstrate the argument in favour of a court challenge: first, chronically hungry adults could institute a legal action claiming that their food rights under section 27 are breached since they have been denied access to all forms of social assistance grant, they could not sufficiently feed themselves. It was against this backdrop that the plaintiffs in *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province* filed an urgent application claiming a violation of their right.¹⁰⁷ In this case, the plaintiffs who had applied for the Social Relief of Distress Grant did not receive it, even though they clearly qualified.¹⁰⁸

Their challenge in this light was submitted (not as a separate individual application but rather) as joint application which advocated for each one to receive the social assistance grant to which each individual had a subjective statutory right. The urgent requirement for calories of the first plaintiff was summarised in his founding affidavit, which argued that we are 'in

¹⁰⁴ S Liebenberg 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' 2001 *South African Journal on Human Rights* 246.

¹⁰⁵ D Holness & A Govindjee 'The Realisation of the Constitutional Right to Food in South Africa' (2008) 41 *De Jure* 525.

¹⁰⁶ D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484.

¹⁰⁷ *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*, Case 671/2003 (23 October 2003) (B).

¹⁰⁸ Established by the Fund Raising Act 107 of 1978, the Social Relief of Distress Grant was established to relieve distress by providing for temporary and immediate material assistance to individuals in desperate circumstances.

desperate need of social assistance, since presently [...] we are living without food and are hungry.’¹⁰⁹

In the case, the complainants argued that the government has committed itself to provide to eligible individuals (under the Social Assistance Act and its regulations) a Social Relief of Distress Grant.¹¹⁰ The plaintiffs further argued that while adequate funds have been allocated to the North West province from the national government for this purpose; the province had not allocated the relevant logistics (human, financial and institutional) for the distribution of the funds. Consequently, on paper, the grant was available but not in practice.

The case resulted in settlement order, which required various forms of general as well specific reliefs to the parties. The province was required to recognise its constitutional obligation to, effectively disburse the Social Relief of Distress Grant to individuals who qualify for it. On specific reliefs, the province was in essence, ordered to make good on legal obligations to effectively ensure the realisation of the right of individuals to have access to social assistance, with the result that cash grant would be available in future to every qualified individual, as well as it being paid out to the individual complainants.

On general reliefs, the order required the province in question to:

- (i) Put in place the relevant infrastructure for the operationlisation and disbursement of the grants;
- (ii) Plan a programme to enhance the effective operationlisation of the social relief of distress grants (SRDG); and
- (iii) Establish a mechanism to monitor the implementation of the grant.

It is obvious that individuals whose current food insecurity is akin to the needs of the plaintiffs qualify for urgent food assistance. Such interventions will not only enhance the realisation of the right to food and nutrition, but also other fundamental civil/political and socioeconomic rights such as the rights to life, equality, dignity, health and education.

The chronic hunger situation of the plaintiffs in the *Kutumela* case could be remedied by way of ordering the provincial government in question to roll out the SRDG. Yet, considering that the grant is limited in terms of its duration and application, indigents facing chronic hunger

¹⁰⁹ *Kutumela* (n 106 above) paras 9.1 & 9.2 of founding affidavit; D Brand & CH Heyns (eds) *Socio-economic rights in South Africa* (2005) 14.

¹¹⁰ Social Assistance Act 59 of 1992.

and malnutrition (akin to the victims in the *Kutumela* case) and are not in the brackets of those who are eligible for the grant, or are chronically hungry even after receiving a grant, could justifiably assert that the state's response in failing to address their basic food requirement is *prima facie* infringement of sections 27 and 28 of the Constitution.

In order to significantly increase the prospect of food security related claims, it is imperative that those who are food insecure are given education on the right to food and its content. Such knowledge on the right will increase the prospect of the group of plaintiffs or a suitable plaintiff to properly, exercise such right. Moreover, it is important to indicate that before any successful legal action in this light could be launched, it would warrant a far-reaching on-site examination to determine whether programmes created by the government are being poorly/properly operationalised. Such research and litmus test would require effective collaboration between research organisations, social movements, non-governmental organisations and government departments before a judgment could be reached by the court.

As demonstrated in the plethora of case authority relating to the non-payment of old age pensions in the Eastern Cape, there may be a valuable role for legal action whenever the government unduly delays (or fails to provide cash transfers or food stamps in the form of) social assistance.¹¹¹ The multiple numbers of cases especially in the Eastern Cape Province relating to dysfunctional operation of social grants led Froneman to make this observation:

The failure in proper administration has led to the situation where the courts have become the primary mechanisms for ensuring accountability in the public administration of social grants.¹¹²

Given that Members of the Executive Committee of the province failed to comply with similar judgments, Plasket in *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* observed:

[...]the time for talk and no action has long passed. Something drastic and concrete must be done to remedy a serious and systemic infringement of the Constitution and the law -and the principles of good administration- by the respondent's department.¹¹³

¹¹¹ *Bushula v Permanent Secretary, Department of Welfare*, Eastern Cape 2000 2 SA 849 (E); *Kotze v Minister of Health* 1996 3 BCLR 417 (T); *Mbanaga v MEC for Welfare*, Eastern Cape 2002 1 SA 359 (SE); *Kate v MEC for Department of Welfare*, Eastern Cape, 2006 4 SA 478 (SCA).

¹¹² *Kate* (n 111 above) para 5.

¹¹³ *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229, para 22.

In a renewed effort to redress some of the unjust administration social grants payments, Froneman in *Kate v MEC for Department of Welfare* ordered that the ruling be served on the chairperson of the South African Human Rights Commission:

so that he can consider whether to institute an investigation into the conduct of the respondent's department with a view to proposing concrete steps to ensure that it begins to comply with its constitutional and legal obligations and ceases to infringe constitutional rights on the present grant scale.¹¹⁴

Based on this case law, it is apparent that direct court challenge (though costly) could stimulate the effective rolling out of government's policies and programmes, (including the Social Relief of Distress Grant) which have direct impact on the right to food. In this context, applicants in dire poverty, unemployed or impoverished can make a claim for the extension of a Social Relief of Distress Grant for a second three-month period. Consequently, applicants could file a complaint before a court for the unreasonableness of any denial by the state to extend a grant for a second period. This litigation relating to the insufficient application of the grant may be extended to any claim concerning the arbitrary implementation of other government policies relating to the right to food.

Second, tertiary students who are under-or-malnourished and yet do not qualify or are excluded from tertiary funded (such as the National Student Financial Aid Scheme (NSFAS)) could file a claim in court that their exclusion constitutes a violation of their right to food- that the NSFAS does not meet the reasonableness test set by the Constitutional Court in the *Government of the Republic of South Africa & Others v Grootboom & Others*.¹¹⁵ The students could argue that they also deserve similar food programmes as their basic school counterparts especially as they cannot focus and concentrate in school because of chronic hunger and malnutrition. Against this backdrop, it could be argued that sections 27 (and in some cases section 28) food rights of the Constitution are perhaps, unreasonably infringed upon, since they have been excluded from benefiting from state resources. Hence, the fact that some tertiary students who do not have the financial means to access adequate food are denied access to study loans and bursaries appears unconstitutional and a reasonable basis for a court action.

¹¹⁴ *Kate* (n 111 above) para 25.

¹¹⁵ (2000) ZACC 19, 2001 (1) SA 46 (CC). See sec 5.3.3.3 of chap 4 for a discussion of the reasonable test.

Third, in the *Alliance for Children's Entitlement to Social Security v Minister of Social Development* case, the issue of the unconstitutionality of state food intervention once again came to the fore.¹¹⁶ The case was filed against the Social Development Minister (Dr Zola Skweyiya) by the Alliance for Children's Entitlement to Social Security (Access). The case was triggered by the dreadful reports of children dying of undernourishment over the last few years in the desperately impoverished Mount Frere District.¹¹⁷ As a coalition of approximately 1000 children's sector organisations, Access prayed that the Provincial Division should nullify the 2001 amendment to the Social Assistance Act which denied many impoverished South African children access to social security grants since their guardians could not access government grants.¹¹⁸ The amendment stipulates that in order to be eligible for child grants, the caregivers must be in possession of the birth certificate and a thirteen-digit identity document of the child(ren).¹¹⁹ As hinted by the Director of Access, nearly 35 percent of children in poor areas who are eligible for the child support grant were unable to access it.¹²⁰ The plaintiffs justifiably perceived that instead of enhancing the 'progressive realisation' of individual's access to social security rights in line with section 27 of the Constitution, the amended legislation was unreasonably retrogressive. At the great expense to the taxpayer, the state defended this statute for three years. The court in 2006 finally set aside the 2001 amended regulation. Yet, the Social Development Minister's legal representatives in a supplementary paper before the court argued that 'no-one' was aware if the regulations were being operationalised or in force.¹²¹ The High Court (Transvaal Provincial Division), for this reason, ordered the Minister to adopt measures to implement its ruling and communicate any steps adopted to its own officials as well as the general public. This order demonstrates that a direct court challenge may ensure administrative justice in the effective operationalisation of food programmes.¹²² In summary, there is sufficient precedent or case law, which litigators could invoke to substantiate their claims for a breach of right to food as guaranteed by the Constitution.

¹¹⁶ Case No: 5251/2005.

¹¹⁷ For a detailed discussion of the case, see S Handa, S Devereux & D Webb *Social Protection for Africa's children* (2010) 171.

¹¹⁸ Holness & Govindjee (n 105 above) 535-6.

¹¹⁹ For a thorough discussion of the regulation, see MC Delany *Rights to Reality - The Right to Social Security, with Particular Emphasis on the Legal Resources Centre's Welfare Project in the Eastern Cape* (LLM Dissertation 2003 Rhodes) 1.

¹²⁰ Cited in Holness and Govindjee (n 105 above) 535.

¹²¹ Carlisle 'Mount Frere starvation deaths: Government taken to court' *Daily Dispatch* available at (2008-03-18) <http://www.dispatch.co.za/article.aspx?id=183846> (accessed 25 March 2016).

¹²² See S Handa, S Devereux & D Webb (eds) *Social Protection for Africa's children* (2010) 171.

In a related case, there were news reports circulating on social media pertaining to the introduction of compulsory DNA testing for registration of new births.¹²³ The Department of Home Affairs in condemning these reports as a hoax, however, indicated that such a requirement, as set out in the 2014 Births and Deaths Regulations would apply only in cases where a single South African mother approaches the department and requests that a non-South African man be recorded as her child's biological father.¹²⁴ According to section 14(1) of the regulation, an application for insertion of unmarried father's particulars in births register of child born out of wedlock 'shall be accompanied by original paternity test results [...] confirming that such person is the biological father of the child.' The department indicated that such men use children born out of wedlock to boost their application for permanent residence status in the country on the basis that children have the right to be cared for by their parents often use such request. Akin to the 2001 amendment to the Social Assistance Act, while the residential status of the mother may enhance the child's access to social grants, the 2014 regulation is retrogressive given that children whose (migrant) father cannot afford DNA test are denied the opportunity to take on their father's surnames. An important omission in the regulation which needs to challenge in court, is situation where a child is born out of wedlock and the mother is a non-national while the father is a South African. In this case, the regulation places an undue burden on the mother to prove -through DNA- that the biological father is a citizen and the baby deserves the benefits of social grants. This high cost of DNA coupled with the likely unavailability of the father to undergo such test will have a significant impact on the access to social grants for children.

A final argument in favour of legal action, from a procedural standpoint, is the very broad access to the court. As set out in section 34 on access to courts read with the broad *locus standi* provisions of section 38 of the Constitution, litigants have the constitutional right to seek for legal compensation for alleged violation of their constitutional right, including the right to food.¹²⁵ Specifically, section 34 provides *locus standi* for litigants to approach any competent court for redress, while section 38 of the Constitution provides *locus standi* for a broad spectrum of affected and interested parties to litigate on rights to food claims. It is,

¹²³ R Kgosana 'DNA testing for birth registration is a hoax – home affairs' (14 September 2016) The Citizen;

¹²⁴ Department of Home Affairs 'Media statement regarding hoax online article on DNA requirements for birth registration' (14 September 2016). See Regulations on the Registration of Births and Deaths, 2014, Government Notice R128.

¹²⁵ *Locus standi* implies the right or capacity to appear in court or bring an action or a case.

envisaged that subsections (a) to (e) of section 38 could potentially provide the grounds for litigation on matters relating to food right.¹²⁶

A legal action in this light would seek to ensure future compliance of the right to food, especially by challenging government's inefficiency and inaction, wherever it exists. Consequently, to serve as an incentive to effectively, operationalise the policies thereafter, each application should seek reparation against the state. Any new food relating policy or legislation warrants a dissemination of information on the rights it guarantees as well as the applicable measures for its operationalisation. Civil society organisations (CSOs) could, therefore, educate affected individuals (the poor and impoverished) on their food rights and eligibility as recipients of social assistance such as the Social Relief of Distress Grant (SRDG). Without passing on the relevant information to the affected individual, these individuals may not have the knowledge that they are eligible to receive a government intervention.

Put differently, in cases where their application is improperly dealt with by the state, they may not know how to seek for redress in court. NGOs are well placed to assist worthy applicants in applying for grants and seeking for redress in event of arbitrary denial. Also, it could be argued that improved grassroots education and information dissemination on the SRDG may contribute to enhancing the number of grant holders and applicants. If applicants for a SRDG were to unduly wait for a long period for their grant applications to be processed, then CSOs may assist such applicants to litigate since they could have suffered irreparable damage due to the undue delay. There is, therefore, a clear obligation for courts to ensure administrative justice in terms of the operationalisation of government's food security policies and programmes.¹²⁷

¹²⁶ Section 38 of the Constitution explicitly guarantees that 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —
(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

¹²⁷ This point was succinctly captured by Arthur Chaskalson's when he affirmed that 'courts no longer have to claim space and push boundaries to find means of controlling state power. The control is vested in them under the Constitution [...].' See *Pharmaceutical Manufacturers Association of South Africa; In re: Ex Parte Application of the President of South Africa* 2000 2 SA 674 (CC) para 45.

In view of the aforementioned arguments in favour of right to food litigation, one may conclude that unless considerable progress is, made to enhance the realisation of the right to food, provincial and national departments will be exposed to string of court cases alleging violating section 27 of the Constitution. For a balanced perspective, the chapter now turns to assess arguments against a direct court challenge.

2.3.2. Arguments against direct court litigation

Before assessing the justification of any legal claim against the failure of the government's responses to address chronic hunger, one has to acknowledge that presently, SRDG and the IFSS somewhat address the present food crisis. Consequently, the state may argue that it is not relevant to go to court to seek for an order for the establishment of a feasible approach at this stage, especially as these initial state responses (including IFSS and SRDG) all seem to some degree respond to the undernourishment situation. Put differently, before attacking the merits of the government's responses to the hunger situation, it may be prudent to first measure at greater length the operationalisation of these interventions before testing their constitutionality.

Considering that the government has taken some steps to respond to some of the most glaring needs of the population, one may argue that any litigation relating to chronic hunger and malnutrition would not only be delayed but also would be rendered unsuccessful. This argument of refraining from instituting a legal claim against the government's response to section 27 of the Constitution is, backed by the fact that none of the existing right to food scholars have avowed for a direct court action.¹²⁸ Yet, one may affirm that the mere fact that none of the scholars has written or conceived the thought does not negate the fact that it should and/or could not take place. This position is, supported by a 2005 case where South African men challenged the different age brackets for men and women in terms of the old age grants.¹²⁹ It could have been assumed prior to filling the papers in this case, that the subject matter was a system of fair discrimination, (thereby justified) and not fit for direct court

¹²⁸ None of the extensive academic writing of these scholars on the right to food in South Africa has suggested direct litigation. The list of writers in this regard include S Hendriks 'Food security in South Africa: Status quo and policy imperatives' (2014) 53(2) *Agrekon* 1-24; WH Oldewage-Theron, EG Dicks & CE Napier 'Poverty, household food insecurity and nutrition: coping strategies in an informal settlement in the Vaal Triangle, South Africa' (2006) 120(9) *Public health* 795-804; J Van Zyl & J Kirsten 'Food security in South Africa (1992) 31(4) *Agrekon* 170-184; M Altman, TG Hart & PT Jacobs 'Household food security status in South Africa' (2009) 48(4) *Agrekon* 345-361; D Rose & KE Charlton 'Prevalence of household food poverty in South Africa: results from a large, nationally representative survey' (2002) 5(03) *Public Health Nutrition* 383-389.

¹²⁹ J Matyu 'Men challenge ruling which allows women earlier pension' (11 November 2005) *The Herald* available at http://www.theherald.co.za/herald/2005/09/16/news/n04_16092005.htm (accessed 29 March 2016).

challenge. It was after the case was filed in court, only then did it generate scholarly attention.¹³⁰

The judiciary may produce food policy in five ways. First, they could interpret executive orders, prior court decisions (considered as precedent), treaties, regulations, administrative rules, statutory languages, and above all the Constitution -in order to make a determination on the violation of the right to food and the need for the executive or parliament to enact a policy to address the problem.¹³¹ Such interpretation is necessary given that the architects of the Social Security Act excluded millions of people who are in need of assistance. Second, the courts may set standards for review, such as whether they will review a government department's inaction (to chronic hunger) more critically and provide recommendations.¹³² Third, they may decide whether a right to food litigation is ready or 'ripe' for review, victim's right to appeal a decision and who has the right to bring a case (or standing to sue) for chronic hunger.¹³³ Fourth, courts are mandated to select which judicial remedy is appropriate for violation of the right to food.¹³⁴ Finally, courts have the final say on the interpretation of the Constitution and the Social Security Act (to ensure the executive honours its constitutional obligation of ensuring that citizens' have adequate access to food), unless parliament amends the law to make its purpose clearer.¹³⁵

There are however, certain limitations, which prevents courts from being effective policymakers or reformers. Unlike the two other branches of government, the judiciary's policymaking is not *proactive*, but rather *reactive*.¹³⁶ The Constitutional Court and other subsidiary courts only offer opinions and rulings on cases brought before them, whereas parliament and the executive can initiate social policy, such as food policy.¹³⁷ For this reason, the courts are limited in their roles of producing food policy (or amending existing social policy) than the executive and legislative branches. Besides having to wait for an appropriate case to bring about food policy, the legitimacy of the judiciary is based on the willingness of

¹³⁰ R Kruger 'Come Back When You Are 65, Sir: Discrimination in Respect of Access to Social Assistance for the Elderly' (2006) *Law Democracy & Development* 70.

¹³¹ HJ Friendly 'The Courts and Social Policy: Substance and Procedure' (1978) 33 *University of Miami Law Review* 21.

¹³² B Bugaric 'Courts as policy-makers: Lessons from transition' (2001) 42 *Harvard International Law Journal* 247.

¹³³ Bugaric (n 132 above).

¹³⁴ DL Horowitz *Courts and social policy* (2010) 1.

¹³⁵ Friendly (n 131 above) 22.

¹³⁶ GN Rosenberg *The hollow hope: Can courts bring about social change?* (2008) 1.

¹³⁷ Rosenberg (n 136 above) 8.

the executive to abide by the decisions of the court.¹³⁸ The courts may risk losing the executive and public's confidence if the decisions of judges do not reflect acceptable legal rationales.¹³⁹ Nonetheless, since judges vary in their judicial philosophies (some are more liberal or conservative than others), the bases they use in arriving at judgements differ.¹⁴⁰

The president (in terms of section 174(6) of the Constitution) appoints judges of the Constitutional Court for a non-renewable twelve-year term.¹⁴¹ In light of this, the public, NGOs and some parliamentarians scrutinise the views of some judges on social policy issues to determine their suitability.¹⁴² Arguably, the president appoints the judges he prefers to the Constitutional Court, and parliament (if it finds an appointee unacceptable) does not have the power to block it. In light of the lengthy twelve-year term of Constitutional Court judges (which exceeds that of the two-five year terms of the president), the influence of the president on the issue of right to food can continue even after leaving office.

Access to legal assistance is a key constraint for the food poor, particularly in the rural areas. Besides NGOs, the government-funded legal aid system hardly provide legal assistance to people seeking to affirm their right to socioeconomic rights, such as the right to food.¹⁴³ Equally, apart from being expensive and possibly, transferring significant amount of resources from the poor to lawyers, legal victory merely offers short-term remedies. This is because judges often fail to question the existing political order of the day.¹⁴⁴ The poor are consequently sceptical about the use of the courtroom to achieve social reform.¹⁴⁵ Apart from the aforementioned legal setbacks, there is no constitutionally mandated legal assistance available to poor residents seeking for a progressive cause.¹⁴⁶ Thus, with all these impediments coupled with implementation problems, poor people have no other option than to resort to extra-legal tactics such as not for profit organisations (NPOs) and the media to put

¹³⁸ Rosenberg (n 136 above) 10.

¹³⁹ Rosenberg (n 136 above) 11.

¹⁴⁰ Rosenberg (n 136 above) 11.

¹⁴¹ SA Government 'President Jacob Zuma appoints judges to different courts' available at <<http://www.gov.za/speeches/president-jacob-zuma-appoints-judges-different-courts-26-may-2017-0000>> (accessed 21 July 2017).

¹⁴² F Rabkin 'Julius Malema questions judge about spouse's business interests' available at <<https://www.businesslive.co.za/bd/national/2016-10-06-julius-malema-questions-judge-about-spouses-business-interests/>> (accessed 21 July 2017); Thsepo 'Video : Judge crumbles as Malema grills him' 10 April 2016, available at <<http://imzansi.com/video-judge-crumbles-as-malema-grills-him/>> (accessed 21 July 2017).

¹⁴³ LegalAid 'Get help' available at <<http://www.legal-aid.co.za/>> (accessed 26 July 2017).

¹⁴⁴ For a discussion regarding neoliberal economic system, see sec 5.2.2 of chapter 5.

¹⁴⁵ T Madlingozi 'Social movements and the Constitutional Court of South Africa' in O Vilhena & U Baxi *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (2013) 523.

¹⁴⁶ Only few law-clinics and middle class NGOs often provide their services without cost.

forward their demands.¹⁴⁷ These factors grossly restrict people's ability to use the court to improve their conditions, especially since such attempts will require a legal fee, which they can hardly afford.

Nonetheless, it is important that the three arms of government, under the South African system of separated powers, cooperate to ensure the enactment and effective operationalization of a food policy. A food policy, indeed, will not result from the separate actions of these branches, but rather their continuous interaction. Although parliament is the constitutionally mandated body for constructing this policy, it is essential to involve other branches in this regard. It is evident that the three arms of government have the capability to assess chronic hunger and formulate (action plans in the form of) food policy to address it; yet, it is also evident that consensus building among these different policy actors with diverse constituencies and political incentives, while vital, is difficult.

2.4. Chapter 9 institutions

Chapter 9 of the 1996 Constitution requires the establishment of independent institutions for supporting constitutional democracy and promoting the rights of citizens. Arguably, two of these institutions relevant for promoting the right to food are the Commission for Gender Equality (CGE) and the South African Human Rights Commission (SAHRC). According to Section 187(1) of the Constitution, the CGE is mandated to strengthen the attainment, development and protection of gender equality in the country. This objective, according to section 11 of the 1996 Commission on Gender Equality Act is to be achieved through the monitoring and evaluation of the activities of government agencies (at all levels), including private and public institutions, enterprises and businesses.¹⁴⁸ Given that the CGE has the mandate to make recommendations on social issues, it could recommend to the executive and parliament for the adoption of a food policy or the amendment of the Social Security Act to provide for the women and children suffering from chronic hunger.¹⁴⁹ Further, it could use its power of receiving and resolving complaints to entreat the executive branch to adopt appropriate steps to fulfil its constitutional obligation under section 27(1)(b) of the Constitution.¹⁵⁰ In instances where the executive fails to heed to this recommendation, it could institute legal proceedings against the government in the Equality Court for violation of

¹⁴⁷ Madlingozi (n 145 above) 553.

¹⁴⁸ Commission on Gender Equality Act (No. 39 of 1996).

¹⁴⁹ Sec 11(1)(c) of the Commission on Gender Equality Act of 1996.

¹⁵⁰ Section 11(1)(d) of the Commission on Gender Equality Act of 1996.

its responsibility to adequately provide chronically hungry women and children.¹⁵¹ Yet, while the CGE may be instrumental in the fight against chronic hunger, its effectiveness may be grossly hindered by the inadequate support and cooperation from the presidency, lack of financial resources and incessant challenge of inadequate capacity.¹⁵²

Like the CGE, the SAHRC has the mandate to educate, research, report and make recommendations on human rights issues, as well as monitor, investigate and receive complaints from the public on human rights violations.¹⁵³ Section 181 of the Constitution and the Human Rights Commission Act of 1994 sets out the mode of appointing commissioners, composition, functions and powers of the SAHRC. Section 184(3) of the Constitution further stipulates that

Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

This special mandate of the Commission has been hailed by many commentators as a viable mechanism for the progressive realisation of economic and social rights in the country.¹⁵⁴ According to Heyns, section 184(3) is akin to the domestication of the international reporting procedure established under the International Covenant on Economic, Social and Cultural Rights which basically places a system of monitoring on the SAHRC while imposing an obligation of justification (for non-fulfilment of socioeconomic duties) on the state.¹⁵⁵ As national equivalent to international reporting procedure, he asserts that government departments have a duty to report to the Commission upon requests on the measures they are

¹⁵¹ Sec 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

¹⁵² S Meintjes 'Gender equality by design: The case of South Africa's commission on gender equality (2005) 32(2) *Politikon: South African Journal of Political Studies* 269.

¹⁵³ M Ebadolahi 'Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa' (2008) 83 *New York University Law Review* 1565.

¹⁵⁴ C Heyns 'Taking socio-economic rights seriously: The "reporting procedure" and the role of the South African human Rights commission in terms of the new constitution' (1999) 30 *De Jure* 197; S Libenberg 'The protection of economic and social rights in domestic legal systems' in A Eide (ed) *Economic, social and cultural rights* (2001) 83; D Horsten 'The role played by the SAHRC's economic and social rights reports in good governance in South Africa' (2006) 2 *Potchefstroom Electronic Report* 3; J Klaaren 'A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights' (2005) 27 *Human Rights Quarterly* 543; N Ntlama 'Monitoring the implementation of socio-economic rights in South Africa: some lessons from the international community' (2004) 8 *Law, Democracy and Development* 214; DG Newman 'Institutional monitoring of social and economic rights: A South African case study and a new research agenda' (2003) 19 *South African Journal on Human Rights* 199.

¹⁵⁵ Heyns (n 154 above) 207.

or have adopted to ensure the realisation of economic and social rights.¹⁵⁶ Nonetheless, unlike the CESCR that waits for states to submit their periodic reports, section 183(4) places a demanding task on the Commission, which requires it to commit a significant amount of resources, attention and time in order to comprehensively monitor (at least once every year) the realisation of economic and social rights. In fulfilling this mandate, the Commission requests and evaluate the relevant information from the relevant department. The evaluation of the information supplied, according to Liebenberg, enhances socioeconomic rights accountability among the responsible government departments since the Commission is able to identify structural patterns of violation of socioeconomic rights, which it submits to parliament in its section 184(3) report.¹⁵⁷

Thus, the role of the Commission under section 184(3) ensures the constitutional obligation of the executive while enhancing the practical operationalization of economic and social rights, by (i) determining the extent to which government departments have operationalised these rights; (ii) determining the reasonability of the steps government has adopted to ensure the realisation of these rights; and (iii) providing important recommendations for the realisation of these rights. It was in light of this mandate, that the Commission, in its *5th Economic and Social Rights Report* affirmed that in order to address chronic hunger affecting millions of South Africans, the state must create employment and adopt a food security act which would assist in addressing the fragmentation in government measures.¹⁵⁸

The Commission could, therefore, play an important role in the promotion and protection of citizen's rights to food through: promoting right to food education and awareness, for instance, through campaigns, workshops and publications; assessing, monitoring and making recommendations to parliament and the executive on the conditions of the food-poor and the need for an immediate policy to address the problem; and finally, assisting disadvantaged complainants to obtain remedies for infringements of their rights to food by initiating investigations, taking cases to court, or using alternative dispute resolution mechanisms such as mediation or negotiation to entreat the executive to produce food policy.

¹⁵⁶ Heyns (n 154 above) 207.

¹⁵⁷ S Liebenberg 'The South African human rights commission releases its fourth annual economic and social rights report' (2003) 4 *ESR Review* 16.

¹⁵⁸ South African Human Rights Commission *The right to food: 5th Economic and Social Rights Report Series 2002/2003 Financial Year (2004)* <https://www.sahrc.org.za/home/21/files/Reports/5th_esr_food.pdf> (accessed 26 July 2017) 65.

Although it could use its special mandate under the Constitution to assist victims of chronic hunger, the SAHRC faces several noticeable constraints, which militates against its ability to effectively press for such social policy. The first constraint is its broad mandate, which encompasses ‘anything and everything that has to do with human rights’, thereby limiting its capacity to effectively engage in a specific human rights issue, like the right to food.¹⁵⁹ The broad mandate compels the Commission to continuously shift its priorities or activities, and consequently limiting its ability to advance the right to food from year to year.¹⁶⁰ Second, the SAHRC’s ability to influence the adoption of social policy is limited by its ineffective powers to make decisions, which are binding and legally enforceable.¹⁶¹ This limitation is worsened by the fact that neither the executive nor parliament is naturally inclined to adopt and implement the Commission’s decisions.¹⁶² Third, structural limitations in the areas of human capacity and financial resources are major factors, which will limit the SAHRC from effectively influencing the adoption of a policy to address chronic hunger.¹⁶³ While Kollapen argues that the limited resources available to the Commission can only result in minimum levels of activities and effectiveness, Cardenas affirms that the Commission’s effectiveness in advancing socioeconomic rights such as the right to food is constrained by inadequate financial and human capacity.¹⁶⁴

2.5. Social policy and non-state policy actors

This chapter has so far analysed the role of the three different formal government bodies in shaping or formulating food policy. It does not seem complex for individuals to understand their respective structures and processes in social policy reform. The next section deals with other important, but informal players in social policy change, such as human rights institutions, NGOs, public opinion and the media. In addition, the section assesses a theory of how the informal and formal policy players can cooperate in bringing about food policy.

¹⁵⁹S Khoza ‘The South African human rights commission and its monitoring of socio-economic rights through compiling periodic reports: a submission on the parliamentary ad hoc committee on review of state institutions supporting constitutional democracy’ (2007) 63.

¹⁶⁰J Klaaren ‘A second look at the South African Human Rights Commission, access to information, and the promotion of socioeconomic rights (2005) 27(2) *Human Rights Quarterly* 552.

¹⁶¹Klaaren (n 160 above) 553.

¹⁶²Liebenberg (n 157 above).

¹⁶³Liebenberg (n 157 above).

¹⁶⁴J Kollapen ‘Not only the business of the state but also a business of all: state reporting in South Africa and popular participation’ (2011) 15 *Law and Development* 414; S Cardenas *Chains of justice: the global rise of state institutions for human rights* (2014) 333.

2.5.1. Non-governmental organisations

In South Africa, the numbers and activities of non-governmental organisations (NGOs) and other civil society organisations (CSOs) have soared since 1994, and are a major influence on social policy reforms or formulation.¹⁶⁵ The objective of such groups indicates that they have direct stake in social policies, such as people's access to healthcare, housing and land. Most of these groups are involved in public education campaigns, grassroots or indirect lobbying aimed at mobilising the group's supporters or the public, or direct lobbying of policymakers. Some also engage in litigation, or challenging government action in courts, or engage in electioneering, by supporting or endorsing a political party.

NGOs are normally organisations that are neither government operated nor private businesses, but provide goods or services.¹⁶⁶ Akin to other CSOs, many NGOs such as Centre of Excellence in Food Security, Studies in Poverty and Inequality Institute, Ekurhuleni Environmental Organisation and Oxfam do or attempt to advocate for, or influence social policy in areas of food security. As discussed in section 2 of chapter 1, these organisations picketed at the Department of Agriculture, Forestry and Fisheries and requested for participation in food security policies. Nonetheless, section 30 of the 1962 Income Tax Act (which sets out the rules governing exemption from tax for NGOs) limits the kinds of activities that these organisations can pursue to influence the adoption of a food policy.¹⁶⁷ For instance, section 30(2)(h) of the Act prohibits any NGO from using 'its resources directly or indirectly to support, advance or oppose any political party.' To maintain their preferential tax treatment, they cannot sponsor or support advocacy advertisements that are intended to affect the opinions of voters (and their votes), or contribute money and other resources to a party, or endorse the candidates for office. These attempts could play a role in defeating parties (or candidates) who oppose the group's position on a particular social policy, and electing or re-electing those who favour its positions. Thus, NGOs need to be cautious of their involvement in the social policy reform, yet, to be clear they are key players in social policy change.

The most visible activity of NGOs is probably lobbying. NGOs lobby policymakers primarily by providing the findings and recommendations of social policy-related studies they or others

¹⁶⁵ SL Robins. *From revolution to rights in South Africa: Social movements, NGOs & popular politics after apartheid* (2010) 1-2; A Habib & R Taylor 'South Africa: anti-apartheid NGOs in transition' (1999) 10(1) *Voluntas: international journal of voluntary and nonprofit organizations* 82.

¹⁶⁶ SK Vaughn & S Arsneaut *Managing non-profit organisations in a policy world* (2013) 4.

¹⁶⁷ Income Tax Act 58 of 1962.

have conducted, or by supplying information to legislatures on their policy views. They may encourage their members to call or write to legislators, meet with individual members of policymakers or their staff, or testify in legislative committee hearings.¹⁶⁸ Generally, all these activities are intended to keep certain policy alternatives or social problems on or off the legislative agenda, oppose social policies the group does not favour, or support those it favours.¹⁶⁹ Besides legislators, NGOs lobby members of the executive through frequent and informal dialogues with officials of government departments, as well as submitting findings of studies and recommendations.

Many organisations issue news releases, reports, and studies. In an attempt to educate the public and mobilise support for their activities, they occasionally appear in news and on webpages, or produce commercials that air on radio and television.¹⁷⁰ Another social policy tool used by NGOs is litigation. They may try to get the courts to change a particular social policy or regulation by filing a suit against a government department, as seen in the *Minister of Health v Treatment Action Campaign* case.¹⁷¹

Before the implementation of any social policy, it is the mandate of government departments to set out the guidelines and procedures, as well as the specific standards that affect ordinary citizens or selected group of people.¹⁷² Given that these guidelines can have major ramifications, organisations' lobbying directed at relevant departments is often intense; after all, they and their members (might) have a great deal at stake.¹⁷³

The role of NGOs in the South African political system is fundamental for understanding how they can influence or fail to influence the adoption of a food policy or reforming the Social Security Act to address chronic hunger. In addition, it brings to bear issues that are important to addressing the country's social problem, specifically chronic hunger. For instance, do segments of the population or certain groups, have privileged access to policymakers than others, or are ordinary citizens well represented in the activities of NGOs?

¹⁶⁸ BJ Levine *The art of lobbying: building trust and selling policy* (2009).

¹⁶⁹ A Ebrahim 'Accountability in practice: Mechanisms for NGOs' (2003) 31(5) *World development* 812.

¹⁷⁰ PJ Nelson & E Dorsey 'At the nexus of human rights and development: new methods and strategies of global NGOs' (2003) 31(12) *World Development* 2016.

¹⁷¹ (2002) 5 SA 721 (CC).

¹⁷² Ebrahim (n 169 above).

¹⁷³ C Mercer 'NGOs, civil society and democratization: a critical review of the literature' (2002) 2(1) *Progress in development studies* 7.

There is little question that (at all levels of government and within all branches) NGOs are highly influential and omnipresent in social policy processes.¹⁷⁴

2.5.2. The public

Even if it constitutes a passive or indirect form of action on the public's part, public opinion (in South Africa) constitutes an essential ingredient for the adoption of food policy.¹⁷⁵ Public opinion influences the agenda of elected officials, particularly on social problems (such as the scale and figure of the food poor) that elicit strong opinions, or of great importance to voters.¹⁷⁶ While it is hardly the decisive factor in social policy change, public opinion sets the boundaries for policy makers in the framing of social policies.¹⁷⁷ To avoid the wrath of the public, some social policies often tend to be sensitive to the broad preferences, fears and concerns of South Africans.¹⁷⁸

Public opinion can simply be defined as the views of the public about a set of issues or a specific social problem at any point in time.¹⁷⁹ The definition of the term 'public' in this context is not always clear. To understand its meaning, it is important to separate the attentive public (those who are apt to take interest in a particular social problem or policy), from the general public. Unlike other members of the population, the attentive public are more likely to be informed about the numbers of the chronically hungry and get involved through some means.¹⁸⁰ Typically attentive public comprises less than 10 percent of the general population.¹⁸¹ Although the communications and actions of both the attentive and general public could play a key role in the adoption of a food policy, the first group has much influence.¹⁸² The opinions of the attentive public tend to have a greater impact on social

¹⁷⁴ AJ Cigler & BA Loomis *Interest group politics* (2011) 13.

¹⁷⁵ L Kenworthy 'The effect of public opinion on social policy generosity' (2009)7(4) *Socio-Economic Review* 727.

¹⁷⁶ P Burstein 'The impact of public opinion on public policy: A review and an agenda' 56(1) (2003) *Political research quarterly* 29.

¹⁷⁷ P Burstein 'Bringing the public back in: Should sociologists consider the impact of public opinion on public policy?' (1998) 77(1) *Social forces* 28.

¹⁷⁸ Burstein (n 177 above).

¹⁷⁹ K O'Connor & LJ Sabato *American government: continuity and change* 4.

¹⁸⁰ NP Lovrich Jr & CH Sheldon 'Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?' (1984) *The Justice System Journal* 29.

¹⁸¹ Lovrich Jr & Sheldon (n 180 above).

¹⁸² KP Adler 'Polling the attentive public' (1984) 472(1) *The ANNALS of the American Academy of Political and Social Science* 143-4.

policy change, while the views of the general public tend to shape only the overall social policy development.¹⁸³

Public opinion is often expressed as the sum or aggregate of the views of the adult population or opinion of individuals on a given social situation, for instance, whether food policy should be adopted.¹⁸⁴ Typically, it is measured by polltakers through a random sample of the adult population through interviews conducted over the telephone.¹⁸⁵ Yet, the social policy student must first ensure that the survey (for instance, if standard opinion research methods are used) followed proper methods, before accepting a poll's results as accurate. For instance, was a random question used, or did the interviewers lead the respondents to a specific position, or were the questions objective?¹⁸⁶ According to Kraft and Furlong, similar to many polls commissioned by interest groups, where the use of leading questions is common, self-selected surveys and internet polls almost always fail to meet these criteria.¹⁸⁷

Policymakers at all levels of government need to be aware of the shifting views of the public, since South Africans have several avenues to express their opinions.¹⁸⁸ Besides responding to surveys and polls, individuals use several platforms to express their grievances such as backing or opposing government initiatives, joining interest groups, speaking or writing to government officials, attending meetings and joining opposition political parties. These can be classified as the direct form of public participation in social policymaking. According to Herman, among the many ideologies, which have attracted a section of the South African population to join, the Economic Freedom Fighter's is their call for land grabs, which the ANC regime opposes.¹⁸⁹

Although public opinion is important for the adoption of food policy in a democratic dispensation, the truth, nonetheless, is that not many people pay particular attention to the problems of the food poor, policy issues, politics and government.¹⁹⁰ Arguably, most individuals are preoccupied with matters of importance to them on a daily basis, such as

¹⁸³ Adler (n 182 above) 144.

¹⁸⁴ DR Kinder & DO Sears 'Public opinion and political action' (1985) 2 *Handbook of social psychology* 662.

¹⁸⁵ Through this approach, each person of the general public has an equal opportunity of being chosen.

¹⁸⁶ H Asher *Polling and the public: what every citizen should know* 2011

¹⁸⁷ Lovrich Jr & Sheldon (n 180 above).

¹⁸⁸ H Thiel & RB Mattes 'Consolidation and public opinion in South Africa' (1998) 9(1) *Journal of Democracy* 98.

¹⁸⁹ See P Herman 'Parliament votes 261 to 33 against expropriation without compensation' (28 February 2017) *Huffingtonpost*.

¹⁹⁰ Herman (n 189 above).

homes, jobs and families.¹⁹¹ Consequently, they may have few strong opinions about the enormity of the chronic hunger crisis since they may not be well informed.¹⁹² Opinions of this nature are usually considered as being low in intensity, saliency and stability.¹⁹³ Intensity is often characterised as the strength of an opinion about a given social problem or how firmly that opinion is held; saliency implies how centrally important a social problem is for an individual.¹⁹⁴ These two qualities are essential for determining how likely and whether citizens will act on their views.

The continuation of the opinions that people hold is referred to as stability.¹⁹⁵ Public opinion is fickle, and it can be influenced by the way chronic hunger is presented by public officials and discussed in the media, as well as by current events.¹⁹⁶ As one could discern from this section, it is usually not easy to understand exactly what social policy proposals citizens might prefer in this circumstance.¹⁹⁷ Nonetheless, policymakers are more likely to consider or pay attention to chronic hunger when there is a more stable public opinion about the issue.¹⁹⁸

Arguably, irrespective of some citizens' lack of interest in chronic hunger and its resultant policy, given the opportunity, they can influence government officials to address this problem, voice their opinions, inform themselves on the possible solutions, and take a keen interest in making inputs towards the adoption of a food policy.¹⁹⁹ The public can get involved, and play an important role, especially at the local level in influencing government officials to enact a new policy to address the needs of the food poor.²⁰⁰

It is important to indicate that since the objective of this section is to introduce or bring about reform to assist the poor, it is important that such reform or measures are taken with the consultation of the people concerned. The participation of the poor in policy reform does not only contribute to designing more effective policies against poverty and chronic hunger, it also implies being capable of contributing to the development as well as their recognition

¹⁹¹ C Harmse 'Public opinion could cause necessary change in SA' (13 April 2016) *Fin24* available at <<http://www.fin24.com/Opinion/public-opinion-could-cause-necessary-change-in-sa-20160411>> (accessed 21 July 2017).

¹⁹² Harmse (n 191 above).

¹⁹³ M Bratton, R Mattes & E Gyimah-Boadi *Public opinion, democracy, and market reform in Africa* (2005) 16.

¹⁹⁴ Bratton *et al* (n 193 above).

¹⁹⁵ JN Druckman, J Fein & TJ Leeper 'A source of bias in public opinion stability' (2012)106(2) *American Political Science Review* 434.

¹⁹⁶ Druckman *et al* (n 195 above).

¹⁹⁷ Druckman *et al* (n 195 above) 435.

¹⁹⁸ Bratton *et al* (n 194 above)

¹⁹⁹ ME Portner *Public policies for environmental protection* (2015) 4; DA Masmanian & ME Kraft *Toward sustainable communities: transition and transformations in environmental policy* (2009) 2.

²⁰⁰ JM Berry, KE Portney & K Thomson *The rebirth of urban democracy* (2002) 7.

as fully-fledged citizens. However, the poor, who are often the victims of chronic hunger are often faced with several challenges which prevents them from accessing public spaces and influencing policies. Besides having access to fewer channels through which to exercise their rights, the poor (unlike other citizens) experience social exclusion more strongly and meet greater barriers to participation. In order to enhance the participation of disadvantaged citizens in policy reforms, the following steps must be adopted: (i) civil societies must reach out to people that live in poverty to encourage them to participate in public dialogues; (ii) NGOs should promote education and dialogue among the poor by organising educational activities to promote dialogue between the poor (especially those who are most isolated) and other citizens to overcome exclusion and misunderstandings of the conditions of the poor. (iii) To stimulate the participation of the poor in policy reform, the poor must be encouraged to participate in the evaluation of existing food security policies; (iv) Finally, the poor must be encouraged to speak in public fora by creating the conducive environment for them to take the floor, and ultimately, to become fully-fledged discussion partners in the policy reform process.

2.5.3. Academics

The concept of academia as objective, benign guardians of knowledge who through revealing the insights from their work can glide into the policy processes and effect change. Academics play a key role in policy formulation especially by embedding academic knowledge into the policy processes, especially at the level of manifestoes. As academics are confronted with growing pressure to link their research to policy development, South African researchers are continuously exploring how they can effectively shape policies with their works. In order to address this challenge, there is the need for better engagement between the two actors with policymakers visiting academic institutions regularly in order to tap directly into scholars latest research while researchers could equally pose questions and gleaned insights into policymaking processes.

Also, the relationship between politicians/decisionmakers and academics is however confronted with fundamental problems, timeframes. Compared to academics, policymakers often have relatively tight timeframes, and thus regularly require clearly written and succinct, synopses of research that simply shed light on their policy problems. Academics, on the other hand, find the more immediate demands of politicians or policymakers a challenge, especially having been trained to think at length and more carefully about their research problems they

confront. Given that academics are driven to get published in high quality journals and secure grants, their research may go beyond five years, akin to the term of the president or parliament. The long period of time required by academics to research in order to make a researchable contribution to policy could be a challenge for policy reform. Moreover, according to Lloyd, much research in social science merely supports the status quo in public policy and, therefore, has limited relevance to contemporary policy debates and agendas.²⁰¹

2.5.4. Media

Section 16(1)(a) of the 1996 Constitution provides for the right of everyone to freedom of expression including 'freedom of the press and other media'. Two things that South Africans value are: the guarantee that freedom of the press is safeguarded and the freedom of speech. Today, the media is an important and evolving player in social policy change or enactment.²⁰² The media, at its most basic level, informs the public about social policies being debated and passed in parliament, as well as the social problems of the day. This information shapes the opinion of the public about the social problems and the policy that result.²⁰³ The media contributes to shaping social policy by picking, and bringing a story to the attention of the public (through their news stories and politics), thereby increasing public awareness of a particular social problem.²⁰⁴ The media could, therefore, contribute to the adoption of a right to food policy or the amendment of the Social Security Act by highlighting the number of individuals who go to sleep hungry, as well as the negative impact of this problem on their physical and mental wellbeing.

Yet, the media, like other factors listed above is also facing major problems, which could constrain its effort in influencing policymakers to adopt or amend existing policies to address chronic hunger.²⁰⁵ The first problem is the high level of inaccuracies. Public confidence in the media, already low continues to drop, due to factual errors (ranging from misinterpretations,

²⁰¹ J Lloyd 'Should academics be expected to change policy? Six reasons why it is unrealistic for research to drive policy change' London School of Economics Blog

²⁰² PJ Fourie 'Rethinking the role of the media in South Africa' (2002) 21(1) *Communicare: Journal for Communication Sciences in Southern Africa* 27

²⁰³ Fourie (n 202 above).

²⁰⁴ AM Kaplan & M Haenlein 'Users of the world, unite! The challenges and opportunities of Social Media' (2010) 53(1) *Business horizons* 59.

²⁰⁵ J McLure 'Turkey and South Africa media face challenges' (23 June 2016) *Global Journalist* available at <<http://globaljournalist.org/2016/06/turkey-and-south-africa-media-face-challenges-program/>> (accessed 21 July 2017).

grammar or spelling mistakes to actual errors) in the news stories.²⁰⁶ This has resulted in some South Africans becoming more sceptical about the accuracy of their news.²⁰⁷ Second, a section of the public sees the media as an agency, which does not only frequently overdramatize some news stories, but also put out misleading headlines just to sell more papers. Third, while the media is busy covering sensationalist stories (sex scandals, kidnappings, car crashes, and murders since they are considered exciting), important issues like chronic hunger which affects the lives of millions receive little attention.²⁰⁸ Arguably, though Statistics South Africa releases a yearly data on the number of the chronically hungry, debate over this topic in the print, or on the air, is not frequent. In summary, although the media is well positioned to contribute to the issue of right to food (as in the case of Kenya, discussed in chapter six of this thesis), some of its operations has contributed to a decline in public trust in the news they read and hear. Citizens as well as government, will, therefore, be sceptical or perhaps, indifferent to a news coverage highlighting the plight of the food poor.

3. Conclusion

This chapter has covered the way policy actors within the formal government structure interact with the informal sector in social policymaking. The chapter has shown that the trend of the country's policy development provides an indication that South Africa has a robust capacity to formulate, adopt and operationalise a right to food legislation. The evidence lies in the volumes of social policies enacted and implemented currently.

Should the state adopt a new right to food policy or reform the Social Security Act to cater for the food poor? Absolutely. Government will have to do a better job of responding to the current chronic hunger issue holistically, and not in piecemeal as evidenced by the numerous and fragmented policies purporting to solve this problem. The state should subsequently assign a government department (be it social development or department of agriculture, forestry or fisheries) to ensure the successful implementation of the resultant policy.

However, as shown from the above discussion, the executive (drawn from members of parliament) lack the political will to bring about such a social reform. Parliament, which is

²⁰⁶ G Berger 'Changes and challenges in media diversity' (06 August 2009) *Mail&Guardian* available at <https://mg.co.za/article/2009-08-06-changes-and-challenges-in-media-diversity> (accessed 21 July 2017)

²⁰⁷ DailySource 'Current problems in the media' (26 June 2017) available at www.dailysource.org (accessed 14 July 2017).

²⁰⁸ ME McCombs & DL Shaw 'The agenda-setting function of mass media' (1972) 36(2) *Public opinion quarterly* 178.

responsible for debating and producing a right to food policy or amending the Social Security Act, has become a rubber stamp for the executive since members of the ruling ANC regime dominate it. By extension, parliament will not take an initiative (outside the strategic priorities of the executive) to adopt a policy which seeks to provide adequate access to food for the poor. The executive, has over the last two decades, still not tabled before the National Assembly a comprehensive food policy to assist the food poor. It is puzzling why such a policy cannot come into existence, given the fact that the state has the capacity to fulfil this obligation.²⁰⁹ In light of the greater policy impacts of court decisions, a legal suit alleging a violation of the right to food was seen as a good avenue to bring about a policy reform. Four key arguments for a right to food claim were advanced, namely, (i) denial of access to social grants to the food, (ii) chronically hungry tertiary students excluded from student financial aid scheme, (iii) children living with undernourishment, and (iv) citizens' broad access to courts. These arguments, could however be countered by the state that some degree of measure (though inadequate) has been adopted to reduce chronic hunger, and, therefore, it is irrelevant to litigate.

Besides the government institutions, the chapter found that a number of actors could play a key role influencing the three arms of government to act in bringing about change in food policy. One of such institutions is the human rights institutions, in particular the CGE and SAHRC. While the CGE could use its powers to entreat to the executive and parliament to adopt a food policy or amend existing instruments to assist the food poor, the chapter found that lack of financial resources and inadequate cooperation and support from the executive will limit its impact in this regard. Also, although the SAHRC could promote right to food education through workshops and campaigns, as well as, assist the chronically hungry to obtain remedies against the government, its broad mandate, lack of human and financial resources are key constraints which might hamper its attempt in this regard.

Moreover, the lack of citizens' interest in the topic of right to food, coupled with many South Africans' preoccupation with daily issues of families, homes and jobs might negatively affect the potential of public opinion in influencing policymakers to bring about policy reform to address chronic hunger. In addition, while the Income Tax Act bars NGOs from supporting political candidates and thereby influencing the adoption of a food policy, the long period of time needed by academics to influence a policy is a key challenge, the waning confidence of

²⁰⁹ See sec 1 of chap 1.

the public in the media also has negative ramifications for its influence in this regard, since South Africans might be sceptical about news relating to chronic hunger.

Given that the above policy actors are not well-positioned to bring about immediate social reform (to address chronic hunger due to their respective limitations), it is important to define which other avenue could be used to assert strong pressure on the state to formulate and implement a comprehensive right to food policy. This leads us to assess whether social protest (which is rampant in South Africa) could be or has been used successfully to bring about social policy reform in addressing chronic hunger. But before delving into this issue, it is important to first understand the meaning of social protest, what triggers it and whether it is an important policy changer. The next chapter turns to examine the conditions under which social actions (as discussed in chapter two) could be used to improve adequate food access in South Africa. In order to determine these conditions, the chapter will draw inspiration from cases where food protest has been used and what conditions triggered such action.

CHAPTER SIX

‘A STARVING MOB HAS NO RESPECT’: FOOD PROTEST IN SOUTH AFRICA

1. Introduction

The preceding chapter demonstrates that South Africa experiences an increasing number of social protests (including service delivery demonstrations, student unrest and worker strikes) yearly. Chapter three, also discussed the high number of people with chronic hunger. As it has been shown, social protest has been used by different groups to achieve social policy reform or improve their social situations (including increasing workers' wages, improving access to healthcare, and prevent eviction). It is against this backdrop, that this chapter seeks to explore the reasons why the chronically hungry hardly use social protest to pressure the state to provide adequate food for them.

As would be shown later in this chapter, food-related protests (otherwise called food protests) have (re)gained momentum in some African and developing countries (such as Kenya, Mozambique, Egypt, Brazil and India), but rarely in South Africa. Therefore, food protest in South Africa has received little attention in the academic literature. Most of these literatures are often in relation to emerging debates on service delivery protests, social movements, food sovereignty/security, land grabbing or repossession. Consequently, there have been few attempts to provide a clear assessment or systematic enquiry of the political, social and economic factors, which have prevented (or could enhance) persistent food protest as a tool for addressing chronic hunger in the country. This chapter attempts to fill this gap by mapping existing literature and reviewing food protest triggered in selected countries to understand the factors, which triggered those protests and whether those factors are present in South Africa.

The chapter includes, but also goes beyond, a critical review of some of the policies adopted in response to food protest in some countries, and whether they could serve as a blueprint for future food policy in South Africa. The chapter now turns to assess the meaning of food protest and what factors have triggered protests of this nature in some selected countries.

2. Food protest: a nuanced understanding of collective action

Food protest is an ‘instinctive response to hunger’.¹ It may also be defined as an event of mob violence or unrest relating to food.² In addition, it implies the contention over food between the masses and their government in relation to food.³ The thesis will thus, define food protest as people taking to the streets to demand for food.

Normally, such protests are defensive acts, through which protesters attempt to assert their previously established rights or claims, which are being violated or challenged by the state. To attract the necessary attention and popular support, protesters often locate their rebellious acts in places of ‘natural assemblage’ or common public gathering places.⁴ These contentions often take the form of petitioning, parading effigies, demonstrating or food looting.⁵

It is important to note that most food protests are underpinned by two major concepts: (i) political economy and (ii) politics of provision. The former implies that citizen’s possess a common knowledge that their government has an ultimate obligation to guarantee their food right. This understanding is not always in the legal sense, but rather in the moral sense that ‘we are all in this together’.⁶ As observed by Thompson in his seminal discussion, the basic right to survive makes food a matter of ‘moral economy’.⁷

Nonetheless, moral economy as recognised by Thompson is definite to each polity, hence it must be redefined for different circumstances and places.⁸ Contemporary moral economy, according to Hossain, encompasses one overarching principle, that is, ‘individuals have the right to eat, and the right lives in the gut, where chronic hunger meets justice.’⁹

The ‘politics of provision’, on the other hand, refers to the struggles (of the common people) with the responsibility of the state to provide basic economic goods, specifically food, and

¹ P Erdkamp “‘A starving mob has no respect’ Urban markets and food riots in the Roman world, 100 BC–400 AD’ (1971) 50 *Past and Present* 77.

² J Bohstedt *Riots and community politics in England and Wales, 1790-1810* (1983) 57.

³ M Schneider *We are Hungry! A summary report of food riots, government responses, and states of democracy in 2008* (2008) 12.

⁴ R Patel ‘Food riots’ in *International Encyclopedea of Revolution & Protest* (2009) 7.

⁵ J Bohstedt ‘Food Riots and the Politics of Provisions in Early-Modern England and France, the Irish Famine and World War I’ in *Crowd Actions in Britain and France from the Middle Ages to the Modern World* (2015) 103.

⁶ JK Walton & D Seddon *Free markets and food riots: The politics of global adjustment* (2008) 3.

⁷ E Thompson ‘The Moral Economy Reviewed’ in *Customs in common, 97-184* (1991) 259.

⁸ J Bohstedt ‘The Moral Economy and the Discipline of Historical Context’ (1992) 26 *Journal of Social History* 268.

⁹ N Hossain ‘Food Riots and Food Prices: A Moral Economy in a Global Era’ (2013) 8(4) *Food Ethics* 2.

ensure stable food prices.¹⁰ The politics of provision might encompass the commonly shared concept of ‘moral economy’ concerning the rights to food within a reasonable price.¹¹ While this interaction between the people and the state are constantly occurring, one only sees them when there are protests, which spring up when there are chronic hunger as a result of price spikes.¹²

During food protests, the relationship between protesters and their government is usually determined by previous political/social interactions and habits.¹³ The politics of provisions in democratic, as well as dictatorial regimes is often grounded on an (explicit or implicit) social contract that the citizens will continue to recognise a regime as long as it continues to guarantee their sufficient access to food.¹⁴ It would then be important to ask, what factors trigger food protest?

3. Mapping key factors which influence food protests

Racial or national differences notwithstanding, a number of factors cut across the catalogue of food protest and significantly influence people’s participation in such acts. Among the most decisive are food shortage, personal interest, food rations, lack of formal representation, social movement, the courts, a charismatic leader, and poor socioeconomic condition factors. This section provides a mapping of how these factors enable or hinder food protest in the context of citizens experiencing chronic hunger, taking into account challenges brought about by high food prices or food shortages. It is important to indicate that the factors can be grouped into two categories, material and procedural.

3.1. Material factors

Material factors (circumstances or events) that have laid the foundation for citizens’ discontent to protest. Such factors include food shortages, lack of access to social security, poor food rations and poor socioeconomic conditions.

¹⁰ J Bohstedt *The politics of provisions: Food riots, moral economy, and market transition in England, c. 1550-1850* (2013) 1.

¹¹ J Bohstedt ‘Food riots and the politics of provisions in world history’ (2014) 444 *IDS Working Papers* 3.

¹² MW Rosegrant *Biofuels and grain prices: impacts and policy responses* (2008) 4.

¹³ J Berazneva & DR Lee ‘Explaining the African food riots of 2007-2008: An empirical analysis’ (2013) 39 *Food Policy* 29.

¹⁴ A Charlesworth *An Atlas of rural protest in Britain 1548-1900* (1983) 54; P McMichael ‘The world food crisis in historical perspective’ (2009)61(3) *Monthly Review* 32.

3.1.1. Food shortages

Food shortages may refer to scarcity or general and persistent lack of food. Thus, a lack of access to food, due to drop in crop yields or inability to meet demands for quantity is a recipe for food protest. This assertion is underpinned by the 1789 French revolution, which was inflamed by a ‘disastrous harvest and famine’.¹⁵ During the course of the protest, the food-poor attacked traders, shopkeepers, and farmers as a means of pressuring them to reduce the prices of their foodstuffs. This approach in the words of Charles Tilly is termed *taxation populaire* i.e. a circumstance where the actors in the food supply chain are forced to pay ‘popular tax’ by incurring a loss or forgoing a profit due to the price ceiling imposed by the protesters.¹⁶

Equally, India experienced a sequence of famines from 1860-1877 which caused a loss of lives.¹⁷ The high mortality rate due to hunger created political discontent which led to full brown food protest in British India in 1880. To end the hunger and thus, restore peace, the British officials in 1880 formed the Indian Famine Commission to find short, medium and long-term relief to the hunger situation in the Raj, which led to the adoption of the 1883 Famine Code.¹⁸ The Indian Famine Code was one of the earliest hunger interventions.¹⁹ The Code identifies three phases of food insecurity: famine, scarcity, and near-scarcity.²⁰ ‘Famine’ was defined as the increase in the prices of food to above 140 percent of ‘normal’, widespread mortality, and the movement of people in search of food.²¹ ‘Scarcity’ was perceived as large populations in distress due to three successive years of crop failure, crop yields of one-third or one-half normal.²² By presenting an early warning system to detect and respond to food shortages, this famine code was one of the first attempts to predict famine.²³ The Famine Commission also set out in the Famine Code that artisans and agricultural labourers’ loss of wages from lack of employment were principal causes of food shortages

¹⁵ G Rudé *The Crowd in History* (1964) 18.

¹⁶ LA Tilly ‘The food riot as a form of political conflict in France’ (1971) 2(1) *The Journal of Interdisciplinary History* 23.

¹⁷ L Brennan ‘The development of the Indian famine codes personalities, politics, and policies’ *Springer* 91.

¹⁸ See P Bowbrick ‘The causes of famine: a refutation of Professor Sen's theory’ (1986) 11(2) *Food Policy* 105; MB McAlpin ‘Dearth, famine, and risk: The changing impact of crop failures in western India, 1870–1920’ (1979)39(01) *The Journal of Economic History* 143.

¹⁹ AD Waal ‘Social contract and deterring famine: first thoughts’ (1996) 20(3) *Disasters* 194.

²⁰ J Mayer ‘Coping with famine’ (1974) 53(1) *Foreign Affairs* 98.

²¹ I Stone *Canal Irrigation in British India: Perspectives on Technological Change in a Peasant Economy* (1984) 217.

²² R Passmore ‘Famine in India an historical survey’ (1951) 258(6677) *The Lancet* 303; E Clay ‘The 1974 and 1984 floods in Bangladesh: From famine to food crisis management’ (1985) 10(3) *Food Policy* 202.

²³ AK Sen ‘Africa and India: what do we have to learn from each other?’ in *The Balance between Industry and Agriculture in Economic Development* (1988) 105.

and price spikes.²⁴ The Famine Code further relied on open-ended public works in order to apply a strategy creating jobs for these sections of the population.²⁵ In independent India, the Famine Code has been updated and renamed as the Bombay Scarcity Manual.²⁶ Famine or shortage of food is, therefore, an important trigger of food protest.

In terms of food sovereignty, it is highly unlikely that South Africa will feature at the top of the agenda at any global discourse on famine.²⁷ Even for an emerging economy, the country has a high per capita income, and is a net exporter of agrarian commodities. According to Oxfam, 'South Africa is a 'food-secure' nation, producing enough calories to adequately feed every one of its 53 million people'.²⁸ It is important to note that although South Africa (akin to other Southern African countries) has been hit by the El Niño-induced drought which resulted in low yield of crops and animal production) the country had the resource to import maize to forestall food shortage in the market.²⁹ It could, therefore, be argued that since food was not completely short or scarce in the market, and retailers did not hoard their stock, citizens were not spurred to trigger food protest in the country.

3.1.2. Social assistance

Even though food protests often differ in form and size, they share some unique characteristics, which may vary from one place and time to another. One such feature is the lack of state intervention in the provision of food to vulnerable members of the society, such as children and the disabled. Before and during early 20th century, while some states (New Zealand, Australia) institutionalised some form of social assistance, which provided financial or direct food supply to children whose parents or caregivers were unemployed, others did not.³⁰ The burden of providing food for children, in some instances, rested squarely on the

²⁴ Sen (n 23 above) 106.

²⁵ U Kalpagam 'Colonial governmentality and the "economy"' (2000)29(3) *Economy and Society* 418; D Hall-Matthews 'The Historical Roots of Famine Relief Paradigms' in *A World without Famine?* (1998) 107.

²⁶ B Currey 'Coping with complexity in food crisis management' in *Famine* (1984) 202.

²⁷ See Oxfam 'Hidden hunger in South Africa: The faces of hunger and malnutrition in a food-secure nation' (2014) available at https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/hidden_hunger_in_south_africa_0.pdf (accessed 17 July 2016) 2. Also see K Wilkinson 'Are there 13, 14 or 15 million hungry people in South Africa?' (10 May 2016) available at <<https://africacheck.org/reports/are-there-13-14-or-15-million-hungry-people-in-south-africa/>> (accessed 18 July 2016).

²⁸ Oxfam (n 27 above).

²⁹ M Piessse 'South Africa: Drought Threatens Food, Energy and Water Security' (31 March 2016) available at <<http://www.futuredirections.org.au/publication/south-africa-drought-threatens-food-energy-water-security/>> (February 23, 2016).

³⁰ New Zealand established social security as early as 1898. See M McClure *A civilised community: a history of social security in New Zealand 1898-1998* (2013) 1; According to Patterns, social security schemes in Africa

aged, disabled and single or widowhood mothers, some of whom found it difficult to provide for their households. A price hike in food, therefore, worsened their already difficult economic condition and spurs discontent among the already cash strapped households. Three of such food protests occurred in 1917 in New York, 1918 in Barcelona and 1924 in Toronto.³¹ In the last century, rising food prices without concomitant social welfare to ameliorate the plight of the food-poor also sparked food protest in several African countries such as Senegal in November 2007, Morocco in September 2007, Mauritania in November 2007, Madagascar in May 2008, Guinea Conakry between January and February 2007, Côte d'Ivoire in March 2008, Cameroon in February 2008, Burkina Faso in February 2008 and Algeria January 2011.³²

In sharp contrast to the norm of the 20th century NYC, Barcelona and Toronto, South Africa has a range of social assistance programmes, which arguably prevents citizens from taking to the streets in food protest. As discussed in Chapter four, the various grants (specifically child support grant, foster child grant, care dependency grant and grant for older people) arguably serve as a means of acquiring some quantity of food and have, therefore, kept the aged, disabled, unemployed single or widowed mothers and caregivers off the streets.

3.1.3. Food rations

In the course of the World War II, there was food protest during the German military occupation of northern France.³³ This particular protest erupted because of the perceived injustices in the allocation of rations, and/or the inadequacy of the allotted food rations.³⁴ These protests occasionally involved large crowds, ranging from dozens to hundreds of women (and often accompanied by their children) from the immediate village, neighborhood, or community, who gathered in front of the mayor's office (who was locally responsible for

only commenced after the Second World War. See CS Patterns 'Social security in Africa: South of the Sahara' (1961) 84 *International Labor Review* 147.

³¹ For a detailed discussion of these protests, see D Frank 'Housewives, socialists, and the politics of food: The 1917 New York cost-of-living protests' (1985) 11(2) *Feminist Studies* 258; M Friedman 'American consumer boycotts in response to rising food prices: Housewives' protests at the grassroots level' (1995) 18(1) *Journal of Consumer Policy* 56; L Golden 'The Women in Command: the Barcelona Women's Consumer War of 1918' (1985) 6 *UCLA Historical Journal* 21; RA Frager 'Politicized Housewives in the Jewish Communist Movement of Toronto, 1923-1933' in *Beyond the Vote: Canadian Women and Politics* (1989) 265.

³² In the case of Morocco, the government was forced to cancel a 30 percent hike in the price of bread due to protest. See LQ Sneyd, A Legwegoh & E Frazer 'Food riots: Media perspectives on the causes of food protest in Africa' (2013) *Food Security* 6.

³³ L Taylor *Between resistance and collaboration: popular protest in Northern France, 1940-45* (2000) 73.

³⁴ A Bentley & C Spackman 'Food Riots, Historical Perspectives' in *Encyclopedia of Food and Agricultural Ethics* (2014) 923.

the distribution and rationing system).³⁵ Generally, the demonstrators were (in a limited way) successful, obtaining redress in the form of a temporary soup kitchen or an extra distribution of food.³⁶ Thus, where a state is responsible for the direct provision of food, and such a provision abruptly stops, the citizens will mobilise themselves into a collective force to demand a continuation of such practice.

Injustice in the allocation of rations was a key trigger of food protest in Germany during the WWII and recently in Venezuela in May 2016.³⁷ In the case of Venezuela, after shortage of chicken, residents of Caracas were informed the state was coming to provide chicken meat and queues were formed. When two trucks finally arrived, national security guardsmen instructed the trucks to drive to another town, which instantly sparked anger and mass protest for food.³⁸ However, in democratic South Africa, the government indirectly provides rations in the form of grants and zero-taxation on some food items (commonly consumed by the poor), which has arguably hindered the protest on grounds of unjust allocation of food.³⁹

3.1.4. Poor socioeconomic condition

It is important to indicate here, that hunger does not always lead to food protest (with South Africa being a case in point).⁴⁰ Many political scientists and journalists new to the field assume that food protests are the product of the hungriest people, the poorest, but that is yet to be proved. Severe deprivation, on the other hand, appears to de-mobilise individuals.⁴¹ The non-involvement of the chronically hungry in the 2008 food protests in Haiti underscores this assertion.⁴² The centre of the protests was in the city of Les Cayes.⁴³ Protesters started by looting food markets as well as trucks of grain.⁴⁴ Ironically, in the course of this protest, one of the capital's largest slums, Cité Soleil, remained uninterested.⁴⁵ One resident when asked about the community's lack of interest explained that 'Many people just don't have the

³⁵ JD Steinert 'Food and the Food Crisis in Post-War Germany, 1945–1948: British Policy and the Role of British NGOs' in *Food and Conflict in Europe in the Age of the Two World Wars* (2006) 268.

³⁶ F Magdoff & B Tokar *Agriculture and food in crisis: Conflict, resistance, and renewal* (2010) 67.

³⁷ S Brodzinsky "'We are like a bomb": food riots show Venezuela crisis has gone beyond politics' (20 May 2016) *The Guardian*; JD Steinert 'Food and the Food Crisis in Post-War Germany, 1945–1948: British Policy and the Role of British NGOs' *Food and Conflict in Europe in the Age of the Two World Wars* (2006) 268.

³⁸ Brodzinsky (n 38 above).

³⁹ For a detailed discussion of zero-rating food items, see sec 4.3 of chap 4.

⁴⁰ J Auyero & TP Moran 'The dynamics of collective violence: Dissecting food riots in contemporary Argentina' (2007) 85(3) *Social Forces* 1346.

⁴¹ E Holt-Gimenez & R Patel *Food rebellions: Crisis and the hunger for justice* (2012) 5.

⁴² P Girard *Haiti: the tumultuous history-from pearl of the Caribbean to broken nation* (2010) 1.

⁴³ P Collier 'The Politics of Hunger-How Illusion and Greed Fan the Food Crisis' (2008) 87 *Foreign Affairs* 67.

⁴⁴ The peacekeepers were despised as foreign invaders.

⁴⁵ Al Jazeera 'Morocco Rolls back Bread Price Hike: Violent Protests Force Government to Withdraw 30 per cent Hike in Bread Prices' (25 September 2007).

energy to take to the streets [...],⁴⁶ Yet, in responding to the pressure from the masses through a televised address to the nation, President Rene Préval announced an emergency plan to reduce the price of food by intimating that the ‘international aid money would be used to subsidise the price of rice and that the private sector had agreed to reduce the cost of each bag by \$3 [15 percent].’⁴⁷ The Haitian example demonstrates that hunger can weaken people’s physical and mental ability to resist unfair treatment and agitate for reform.

The chronically hungry alone, as shown in the case of Haiti, lack the energy to mobilize and embark on food protest. In cases where food protest has been successful like in Egypt, a broad range of actors (students, lecturers, lawyers and NGOs) come together to confront the government on food-related issues. However, since some of the food-poor lack the ability to protest, the chronically hungry are demobilized. This perhaps explains the reason why some of the people confronted with chronic hunger have not embarked on food protest.

3.2. Procedural factors

Procedural factors refer to the actors who galvanize or incite (food) protest, including opposition political parties, the media, civil society organisations, the courts and charismatic leaders.

3.2.1. Civil society advocacy and campaigns

The 2007 Egypt food protest was triggered not by spontaneous urban protesters, but by existing labour movements and social networks including students and organised associations.⁴⁸ These networks collectively acted to counter excessive price hikes in bread.⁴⁹ In this case, when the workers from Mahalla factory complained of inadequate access to bread as a result of its high price, the Cairene opposition movements readily partnered with them to trigger a strike action.⁵⁰ The protest achieved national prominence when dozens of students and faculty members from Cairo and Helwan Universities joined the strike in

⁴⁶ L Brown ‘The great food crisis of 2011’ (2011) 10 *Foreign Policy* 5.

⁴⁷ See Aljazeera ‘Haiti senators vote to remove PM’ (April 13, 2008) available at <<http://www.aljazeera.com/news/americas/2008/04/200852512234460358.html>> (accessed 12 June 2016); British Broadcasting Corporation (12 April 2008) ‘Haitian senators vote to fire PM’ available at <<http://news.bbc.co.uk/2/hi/americas/7344729.stm>> (accessed 12 June 2016).

⁴⁸ HS Bienen & M Gersovitz ‘Consumer subsidy cuts, violence, and political stability’ (1986) 19(1) *Comparative Politics* 25.

⁴⁹ J Beinin ‘The Working Class and the Popular Movement in Egypt’ in *The Journey to Tahrir: Revolution, Protest, and Social Change in Egypt* (2012) 92.

⁵⁰ According to Beinin (n 49 above), they started collaborating with the Mahalla workers as far back as September 2007.

solidarity. Members of the Bar Association who joined the protest chanted ‘The strike is legitimate against poverty and starvation’.⁵¹ Members of the Bar Association then spent several hours providing free legal services to arrested protesters.⁵² In light of the gravity of the situation, Egypt’s neoliberal prime minister, in just two days rushed to Mahalla to cut a deal for wage increases and renewed food subsidies.⁵³ Between 2007 and 2008, the government increased its food and fuel subsidies by more than 20 percent.⁵⁴ This improvement, in many ways could be interpreted as a tactical victory for social protest.

The Indian experience is also uniquely relevant for this section as it represents a typical role of right to food movement in triggering food protest. On the morning of 16 September 2007, while the leaders of the Communist Party of India (Marxist) (CPI(M)) were educating the Radhamohanpur villagers in West Bengal on the negative effects of the Indo-US nuclear agreement, the villagers spontaneously requested the party leaders to provide foodgrains instead.⁵⁵ This incident intensified when a social movement, termed the Right to Food Campaign (RFC) and opposition parties took to the streets to oppose the rising inflation of food.⁵⁶ The RFC was particularly active in this light, especially by given a particular form and visibility to high food prices, which have historically been a political issue in India.⁵⁷ As a short-term responsive measure, the state government suspended the operations of 113 grain dealers who were accused by the demonstrators as inflating grain prices.⁵⁸

Akin to West Bengal, Madhya Pradesh also had its share of social movement activism around the right to food as well as activating accountability for chronic hunger.⁵⁹ Here, right to food movements tied increasing food prices to a range of other issues such as declining access to

⁵¹ H el-Hamalawy ‘Some Notes on the Mahalla Uprising’ (April 27, 2008) *3arabawy blog* available at <www.arabawy.org/2008/04/27/some-notes-on-the-mahalla-uprising/> (accessed 13 February 2017).

⁵² A Mossallam “‘These Are Liberated Territories’ – Everyday Resistance In Egypt: Dismantling State Power, Experimenting With Alternatives And The Growing Movement From 2000 To 2010’ in H Wimmen & L Al-Zubaidi (eds) *Democratic Transition in the Middle East: Unmaking Power* (2013) 124.

⁵³ A Jones ‘Food Riots in Egypt’ (13 March 2008) *Al Jazeera*.

⁵⁴ J Harrigan & H El-Said Economic liberalisation, social capital and Islamic welfare provision (2009) 83.

⁵⁵ L Birchfield & J Corsi ‘Between starvation and globalization: realizing the right to food in India’ (2009) 31 *Michigan Journal of International Law* 691.

⁵⁶ P Niehaus & S Sukhtankar ‘The marginal rate of corruption in public programs: Evidence from India’ (2013) 104 *Journal of public Economics* 54.

⁵⁷ JH Rah, A Gard, BR Naidu, DD Agrawal, RS Pandey & VM Aguayo ‘Reaching the poor with adequately iodized salt through the Supplementary Nutrition Programme and Midday Meal Scheme in Madhya Pradesh, India’ (2013) 91(7) *Bulletin of the World Health Organization* 540.

⁵⁸ A Singh, A Park & S Dercon ‘School meals as a safety net: an evaluation of the Midday Meal scheme in India’ (2014) 62(2) *Economic Development and Cultural Change* 275.

⁵⁹ V Bhagwan, R Rani & P Joshi ‘National food security act, 2013: Retrospect and prospect’ (2014) 4(6) *Academicia: An International Multidisciplinary Research Journal* 171.

local food sources (including forests, farming) and rising cost of living.⁶⁰ With malnutrition being an acute issue, the national media on several occasions was used as a platform to draw public authorities' attention to the prevalent malnourishment.⁶¹ The West Bengal riot was rooted in the price differential between market and subsidised grains. In early 2012, prices of wheat (which previously were lower in the market) increased due to inflation, the villagers turned to the state's subsidised wheat. The people, however, became discontent when owners of ration shops alleged that the wheat were unavailable, because of central government's imposition of quotas. Mobilised and led by RFC activists, the villagers protested by accusing ration shop owners of corruption and demanded that they replenish the supplies they had diverted to the open market. The central government responded in a form of a reduction in the price of rice allocated through public distribution system as well as providing larger allocations of subsidised wheat.

After the protest, the RTC launched a campaign demanding the adoption of a comprehensive food security policy. This campaign did not only gain national prominence, but attracted the attention and support of hundreds of grassroots social movements.⁶² The central government's policy response was significant: it finally adopted the 2013 National Food Security Act (also termed Right to Food Act).⁶³ The major aim of the Act is on the one hand, to convert into legal entitlements the existing food security programmes, and on the other hand, provide subsidised grain to around two-thirds of the country's 1.2 billion population.⁶⁴ The striking feature of the Act are its Midday Meal Scheme (MMS), the Integrated Child Development Services scheme (ICDS) and the Public Distribution System.⁶⁵ The MMS is a state-run school meal programme designed to enhance the nutritional values of children by supplying free lunches on working days for pupils in lower and upper primary classes in

⁶⁰ S Bathla, P Bhattacharya & A D'souza 'India's National Food Security Act 2013: Food Distribution through Revamped Public Distribution System or Food Stamps and Cash Transfers?' (2015) 28(1) *Agricultural Economics Research Review* 39.

⁶¹ S Manhas & A Dogra 'Awareness among Anganwadi workers and the prospect of child health and nutrition: a study in Integrated Child Development Services (ICDS)' (2012) 14(2) *Jammu, Jammu and Kashmir, India Anthropologist* 171.

⁶² N Hossain, L Brito, F Jahan, A Joshi, C Nyamu-Musembi, B Patnaik, M Sambo, A Shankland, P Scott-Villiers, D Sinha, D Kalita & N Benequista (2014) "'Them Belly Full (But We Hungry)': Food rights struggles in Bangladesh, India, Kenya and Mozambique' Synthesis report from DFID-ESRC research project 'Food Riots and Food Rights' Brighton: Institute of Development Studies 21.

⁶³ India Department of Food and Public Distribution 'National Food Security Act (NFSA) 2013' available at <<http://dfpd.nic.in/nfsa-act.htm>> (accessed 3 August 2016).

⁶⁴ K Pradhan 'Fiscal Sustainability of India's National Food Security Act 2013' (2015) 9(2) *Margin: The Journal of Applied Economic Research* 133.

⁶⁵ RK Chudasama, UV Patel, AM Kadri, A Mitra, D Thakkar & J Oza 'Evaluation of integrated Child Development Services program in Gujarat, India for the years 2012 to 2015' (2016) 60(2) *Indian Journal of Public Health* 124.

various schools.⁶⁶ The programme thus, provides ‘adequate nutritious food’ to 120,000,000 children in over 1,265,000 schools.⁶⁷

The ICDS on the other hand is a government welfare scheme, which aims at fighting malnutrition by providing food to children less than 6 years of age and their mothers.⁶⁸ The programme seeks to provide nutritional food to the mothers of young children, reduce instances of mortality, and raise the health and nutritional level of poor Indian children below 6 years of age.⁶⁹ Established by the Ministry of Consumer Affairs, Food, and Public Distribution, the Public distribution system (PDS) distributes subsidised food and non-food items to the impoverished.⁷⁰ The most basic of these commodities are staple food grains which includes rice, sugar, wheat, as well as kerosene (through a network of ration shops or fair price shops established across the country).⁷¹

Whereas the PDS reaches approximately two-thirds of the population (50 percent in urban areas and 75 percent in rural areas), the MMS and ICDS are universal in nature.⁷² The Right to Food Act equally recognises maternity entitlements.⁷³ Consequently, pregnant women, lactating mothers and certain group of children are eligible for free daily meals.⁷⁴ Therefore, 50 percent of the urban population and 75 percent of the rural population are entitled to 5 kilograms for three years at US\$4.5 (R66), US\$ 3.0 (R44), US\$1.5 (R22) per kg of rice, wheat and millet, respectively.⁷⁵ It was in this light that Dreze affirmed that the Act

⁶⁶ These are schools owned by government, assisted by government, National Child Labour Project schools run by the ministry of labour, Education Guarantee Scheme, local body, and alternate innovative education centres. See J Ali & M Akbar ‘Understanding students’ preferences on school mid-day meal menu in India’ (2015) 117(2) *British Food Journal* 805.

⁶⁷ SR Hrivastava, PS Shrivastava & J Ramasamy ‘The Mid-Day Meal scheme: A holistic initiative to augment the nutritional and educational status of the children’ (2014) 28(1) *Journal of Medical Society* 38.

⁶⁸ T Anand, M Rahi, P Sharma & GK Ingle ‘Issues in prevention of iron deficiency anaemia in India’ (2014) 30(7) *Nutrition* 764.

⁶⁹ M Jain ‘India’s Struggle Against Malnutrition—Is the ICDS Program the Answer?’ (2015) 67 *World Development* 72.

⁷⁰ A Kishore & S Chakrabarti ‘Is more inclusive more effective? The ‘New Style’ public distribution system in India’ (2015) 55 *Food Policy* 117.

⁷¹ P Svedberg ‘Reforming or replacing the public distribution system with cash transfers’ (2012) 47(7) *Economic and Political Weekly* 53; HG Jacoby ‘Food prices, wages, and welfare in rural India’ (2016) 54(1) *Economic Inquiry* 159.

⁷² R Khera ‘Mid-Day Meals: Looking Ahead’ (2013) 48(32) *Economic and Political Weekly* 12.

⁷³ M Hossain ‘Building Responsible Social Protection in South Asia India’s Food Security Act as a New Direction’ (2014) 34(2) *South Asia Research* 133.

⁷⁴ S Babu, SN Gajanan & P Sanyal *Food security, poverty and nutrition policy analysis: statistical methods and applications* (2014) 7.

⁷⁵ R Jayaraman & D Simroth ‘The Impact of School Lunches on Primary School Enrolment: Evidence from India’s Midday Meal Scheme’ (2015) 117(4) *The Scandinavian Journal of Economics* 1176; Also see W Yu ‘Food security policies in India and China: implications for national and global food security’ (2015) 7(2) *Food*

‘is a form of investment in human capital. It will bring some security in people’s lives and make it easier for them to meet their basic needs, protect their health, educate their children, and take risks.’⁷⁶

In sharp contrast to South Africa’s current special needs based system of social grants, one distinguishing feature of the 2013 Act worth citing is its universal approach to food distribution. The focus of the Indian Act (unlike the 2004 South African Social Security Agency Act) is to address the hunger needs of the more than 194 million food-poor Indians by providing rice, wheat and coarse grains to each individual at subsidized rates.⁷⁷ The adoption of similar Act in South Africa would undoubtedly go a long way in addressing the food needs of millions in the country.

The success of local leaders in mobilising the food-poor may be linked to their networks with the state and national level actors, which also offered the organisation access to media networks, new repertoires of action (including public hearings), mobilising strategies and new sources of information, which enabled the organisation to punch above its weight. Though lack of nutrition was the main trigger of the protests, political opportunities (rarely predictable) created new spaces for public action.⁷⁸ Hundreds of such grassroots groups at the national level provided support and legitimacy to the RFC thereby enabling it to press for a comprehensive right to food policy, in the form of the National Food Security Act, which guarantees a range of entitlements to food through government led programmes.⁷⁹

It must be noted that whilst the passage of legislation does not guarantee an automatic eradication of chronic hunger, it has at least moved one-step towards the robust food politics.⁸⁰ The achievement of this feat by the campaign was partly made possible in light of its simultaneous and constructive stance.⁸¹ While the NFSA has opened up new possibilities in the fight against the eradication of chronic hunger, the country is still a long way from

Security 405; R Das & P Bhattacharjee ‘A Study on Utilization of ICDS Scheme Among Children Bellow 6 Years Age, in an Urban Area of Agartala, Tripura’ (2016) 5(7) *Indian Journal of Applied Research* 13.

⁷⁶ J Drèze ‘The Food Security Debate in India’ (9 July 2013) *New York Times* available at < <https://india.blogs.nytimes.com/2013/07/09/the-food-security-debate-in-india/> > (accessed 27 July 2017).

⁷⁷ FAO, IFAD & WFP ‘The State of Food Insecurity in the World 2015’ Meeting the 2015 international hunger targets: taking stock of uneven progress (2015) Rome, FAO 46.

⁷⁸ A Kotwal & K Power ‘Eating words: a discourse historical analysis of the public debate over India’s 2013 National Food Security Act’ 23(3) (2015) *On the Horizon* 174.

⁷⁹ T Lang & M Heasman *Food wars: The global battle for mouths, minds and markets* (2015) 61.

⁸⁰ S Islam *et al* ‘Nutritional status of under 5 children belonging to tribal population living in riverine (Char) areas of Dibrugarh district, Assam’ (2014) 39(3) *Indian journal of community medicine: official publication of Indian Association of Preventive & Social Medicine* 169.

⁸¹ P Kaur ‘Food security in India-some issues and challenges’ (2014)4(11) *EXCEL International Journal of Multidisciplinary Management Studies* 14.

addressing structural inequities (including restrictions on access to natural resources, gender relations, land and agrarian crisis, which are mainly responsible for people's impoverishment.⁸² This development creates the impression that the Food Act was merely to contain popular discontent rather than ameliorate universal food distress.⁸³ The Indian experience indicates that to varying degrees, citizens place accountability for hunger squarely at the doorstep of the government; and public authorities, at least rhetorically, acknowledge this obligation.⁸⁴ The institutionalization of such accountability ultimately occurred through the entry into force of the 2013 National Food Security Act.⁸⁵

South Africa, unlike India, lacks effective right to food movements or non-governmental organisation (NGO) which advocates for the right of the food poor. In South Africa, while there are some NGOs such as the Centre of Excellence in Food Security, Studies in Poverty and Inequality Institute, Ekurhuleni Environmental Organisation and Oxfam with food security mandates, these organisations arguably contribute to chronic hunger mainly at the policy level and not in areas of mobilising the food poor or litigating for people's access to food. As discussed in chapter 1, section 2, the first time these organisations mobilised and picketed at a government department was in 2015. While their demand for consultation was laudable, they could have done better by mobilising those who are most affected by food policies (unemployed and chronically hungry) and marched to the seat of government or big retail shops in demand for reduction of food prices. In summary, the lack of activist right to food NGOs to mobilise the community of food-poor has limited the upsurge of food protest in South Africa.

3.2.2. The media

The media in Kenya played a critical role in disseminating information and raising awareness on the impact of rising prices of food on the poor in both rural and urban centres. The country suffered from an annual rate of food price inflation as high as 27 percent in 2008, because of poor harvests nationally and rising food prices globally. This, and perceived lack of government intervention, triggered food riots nationwide, the most memorable and visible being the *Unga Revolution* in 2008.⁸⁶

⁸² Manhas & Dogra (n 61 above) 172.

⁸³ R Khera 'Implications of India's National Food Security Act' in *Global Economic Cooperation* (2016) 73.

⁸⁴ Niehaus & Sukhtankar (n 56 above) 52.

⁸⁵ National Food Security Ordinance, No. 7 of 2013, 5 July 2013.

⁸⁶ Hossain *et al* (n 62 above) 24.

When food prices shot up yet again at the beginning of March 2008, members of the *Bunge la Mwananchi*, (the ordinary people's parliament') used the electronic and print media as a tactic to agitate loudly about the rising cost of living, especially food prices. Among the numerous messages advanced by the agitators was that government policies encouraged larger producers of maize, Kenya's staple food to be exported rather than sold locally for higher profits. It is however not clear whether this argument had merits since Kenya, by 2008 relied heavily on imports from Uganda, Tanzania and beyond for maize in light of its poor local harvest. Nonetheless, the media gave wide coverage to the weekly outdoor debates and campaigns of activist leaders in low-income neighbourhoods. On 31 May 2008, similar campaigns by *Bunge la Mwananchi* in Nairobi and other city centres attracted local residents and sparked protest when television and radio stations (such as the Citizen, NTV, Kiss FM, and Radio Jambo) broadcasted widely their campaign.⁸⁷

Like in Kenya, the media in South Africa operate in an environment where freedom of the press is a constitutional right. The media has, to some extent, attempted to draw the public's attention to the discontent or protest action of a group seeking to oppose certain measures, which might affect their jobs.⁸⁸ An example of such coverage is found in *BusinessDay*, which covered the demonstration of poultry workers belonging to the Food and Allied Workers Union who protested against imports of frozen chicken.⁸⁹ This demonstration does not meet the threshold of food protest for three reasons: First, the demand did not address the question of lack of food or high food prices; second, it was not directed against the government but the European Union to cease dumping chicken in the country; third, it was composed of only members of FAWU and, therefore, lacked popular support. The *Sunday Times* published an article, which details how South Africans are being driven into debt because of spiralling food prices.⁹⁰ Since this article shifted its focus to health issues rather than access to food, by arguing that 'escalating food costs affect[s] diets and the health of consumers', it could not serve as the rallying point around which the food-poor could mobilise.⁹¹ Finally, the *Citizen's* story of Tshwane University of Technology (TUT) students demonstrating against the selling

⁸⁷ DH Downing *Radical Media: Rebellious Communication and Social Movements* (2001) 43.

⁸⁸ Hossain *et al* (n 62 above).

⁸⁹ M Allix 'Fawu workers protest against chicken dumping' (25 November 2016) *BusinessDay*.

⁹⁰ S Govender 'Spiralling food prices driving South Africans into debt' *Sunday Times*, 1 May 2016.

⁹¹ Govender (n 90 above).

of ‘unhealthy’ food in February 2017 was significant.⁹² The memorandum of grievances to campus management alleged that the food is ‘crappy’ and ‘doesn’t even look appetising.’⁹³

3.2.3. The courts

With the entry into force of a new Constitution in 2010, the right to be ‘free from hunger, and to have adequate food of acceptable quality’ was for the first time guaranteed to all Kenyans.⁹⁴ With the failure of the state to fulfill this obligation, the Consumer Federation of Kenya (COFEK) in 2011 filed a legal case against the government for failing to reduce high food prices and looming food shortage.⁹⁵ When the court ruled that the rising cost of food is not the fault of the state and, therefore, dismissed the application,⁹⁶ urban slum dwellers in the capital, Nairobi, felt a mix of outrage and despair, and, therefore, thronged the streets calling for lower food prices.⁹⁷ The state, in an attempt to calm the situation, lifted the 50 per cent import tax on all grain imports, which subsequently reduced the price of food.⁹⁸ In order to avoid a relapse of similar protest, the government instituted (with the assistance of donors) a Hunger Safety Nets Programme (in the form of conditional cash transfers) for those living with HIV/AIDS, orphaned and vulnerable children, and the elderly.⁹⁹ Besides having a limited coverage (as it excludes other groups such as the disabled, refugees and the unemployed), the heavy dependence of the programme on donors raises serious concern over its sustainability.¹⁰⁰

It is important to indicate that the acceptance of the case suit by the court in this case served as an eye-opener for the poor, most of who were not aware of their constitutional right to food. Courts, therefore, have an essential role to play in the interpretation of the right to food to citizens through litigation.

⁹² African News Agency ‘TUT students protest against ‘unhealthy’ campus food’ *The Citizen*, 15 February 2017.

⁹³ As above.

⁹⁴ Art 43 (1)(c) of the Constitution of Kenya.

⁹⁵ *Consumer Federation of Kenya (COFEK) v Attorney General & 4 Others*, Petition No. 88 of 2011 [2012] eKLR.

⁹⁶ Paras 41 & 42.

⁹⁷ M Verpoorten *et al* ‘Self-reported food insecurity in Africa during the food price crisis’ (2013) 39 *Food Policy* 56.

⁹⁸ A De Janvry & E Sadoulet *The global food crisis: Identification of the vulnerable and policy responses* (2008) 13.

⁹⁹ R Schiffman ‘Hunger, food security, and the African land grab’ (2013) 27(03) *Ethics & International Affairs* 239.

¹⁰⁰ M Ivanic, W Martin & H Zaman ‘Estimating the short-run poverty impacts of the 2010–11 surge in food prices’ (2012) 40(11) *World Development* 2-3.

The 2001 *People's Union for Civil Liberties (PULC) v Union of India & Others* is very relevant for this section.¹⁰¹ In 2001, the PULC file a compliant alleging several families eating in rotation or 'rotation hunger' whereas excessive amounts of food grains are rotting in government granaries. By invoking the right to food, the petition highlighted that India's Public Distribution System (PDS) is ineffective and, therefore, distribution of foodstuffs is irregular and often entirely absent. The petition highlighted the state's negligence and poor handling of the food distribution especially in light of the availability of resources. In affirming the right to food as a precondition for the fulfilment of article 21 (life with human dignity) of India's Constitution, the court held that all the PDS shops, if closed were to be re-opened. The decision of the court provides an indication that state's cannot escape their obligation of ensuring that citizen's have adequate access to food. It is important to indicate that the case laid the foundation for strengthening the formulation and operationalisation of the right to food act.

In contrast to Kenya where the right to food was only introduced in the 2010 Constitution, and India's PDS, there has not been a single case brought before the Constitutional Court or other courts seeking for enforcement of the right to food at the national level or for every South African since the entry into force of the 1996 Constitution. As discussed in chapter three, the series of cases which have been brought before the lower courts dealt mainly with right to food of a select few, social grants or land related issues, but not similar to the *COFEK* case which called on the court to intervene in high food prices or India's PDS. The lack of legal case in this regard has limited dissemination of information on this right, and perhaps, prevented the rise of food protest. However, as discussed in chapter two, some successful protest action has been linked to litigation.

3.2.4. The presence of a charismatic leader

The Mozambique food protest suggests that the involvement of charismatic leaders in society in the fight against hunger can equally trigger food protest.¹⁰² In 2010, after the state's announcement of price hikes in state-regulated goods such as bread and rice,¹⁰³ rap musicians openly satirised government officials as out of touch with the hardships of the people, and

¹⁰¹ Writ Petition (Civil) No. 196 of 2001.

¹⁰² R Patel 'Mozambique's food riots—the true face of global warming' (2010) *The Guardian* 5.

¹⁰³ BE Bertelsen 'Effervescence and Ephemerality: Popular Urban Uprisings in Mozambique' (2016) 81(1) *Ethnos* 29.

thus, called for the advent of ‘people power’.¹⁰⁴ Voices of dissent began to flood online social networks and heard across the previously pro-government news media.¹⁰⁵ According to one protester, the collective action ‘was for the government to relax the prices, because it’s the prices that are killing here in Mozambique. It’s the chapa, the rice, the charcoal. Basic things that are very expensive.’¹⁰⁶ Although the government initially tried to suppress them, it eventually made concessions, which ended the protest.¹⁰⁷ The state did not only extend subsidies to bakers, but also reduced customs duties on the import of sugar and third grade rice, expanded the District Development Fund (DDF) to the urban districts, and announced the introduction of a ‘basic basket’ of subsidised goods.¹⁰⁸

The Brazilian experience also provides a useful lesson for understanding the role of revolutionary leaders in triggering food protest. The first actor to consider in this context is the 1940s and 1950s contributions made by the Brazilian geographer, sociologist and physician Josué de Castro.¹⁰⁹ Based on close observation of reality and, his personal experience, de Castro avowed that the phenomenon of chronic hunger is neither a curse imposed on certain people nor a natural phenomenon, but rather, a socioeconomic phenomenon, which can be addressed by human action.¹¹⁰ Besides higher agricultural productivity, Josué de Castro advocated that the fight against hunger also requires better food distribution.¹¹¹ Against this backdrop, he advocated that the state should adopt adequate measures towards soil degradation, land ownership, but most importantly, equitable distribution of wealth.¹¹²

In his book *The Geography of Hunger*, de Castro made an enormous contribution to the theory and practice of hunger and popular uprising.¹¹³ Following his death, the military regime in 1964 adopted a series of repressive measures to silence his adherents and any

¹⁰⁴ J Sumich ‘Politics after the Time of Hunger in Mozambique: A Critique of Neo-Patrimonial Interpretation of African Elites’ (2008) 34(1) *Journal of Southern African Studies* 112.

¹⁰⁵ B Cunguara ‘An exposition of development failures in Mozambique’ (2012) 39(131) *Review of African Political Economy* 167.

¹⁰⁶ Bertelsen (n 103 above) 27.

¹⁰⁷ R Patel ‘Mozambique’s food riots—the true face of global warming’ (2010) 5 *The Guardian* 3.

¹⁰⁸ Walton & Seddon (n 6 above) 24.

¹⁰⁹ PC Kesavan & RD Iyer ‘MS Swaminathan: a journey from the frontiers of life sciences to the state of a “Zero Hunger” world’ (2014) 107(12) *Current Science* 2036.

¹¹⁰ C Rocha ‘A Right to Food Approach: Public Food Banks in Brazil’ in R Graham & T Silvasti (eds) *First World Hunger Revisited* (2014) 29.

¹¹¹ VF Dos Santos, W da Cruz Vieira & B dos Santos Reis ‘Effects of alternative policies on income redistribution: Evidence from Brazil’ (2009) 27(5) *Development Policy Review* 602.

¹¹² H Wittman & J Blesh ‘Food Sovereignty and Fome Zero: Connecting Public Food Procurement Programmes to Sustainable Rural Development in Brazil’ (2015) *Journal of Agrarian Change* 57.

¹¹³ J De Castro ‘The Geography of Hunger’ (1952) 74(5) *Soil Science* 404.

group, which sought to advocate for adequate food for the poor.¹¹⁴ Nonetheless, social protest did emerge. In the late 1970s, in light of the food price hikes which affected millions of Brazilians, his followers mobilised workers and housewives to resist rising prices which deprived the poorest segments of the people from accessing basic goods and services, specifically grain.¹¹⁵ In view of the indifference of the military regime to tackle the price hikes, approximately 1.3 million signatures were collected and a large protest was staged to coerce the government to act.¹¹⁶ While the protesters were not specifically successful in their demand, the collective action laid the foundation for the launch of fundamental food security policies and programs.¹¹⁷ Two of such programs were the *Fome Zero* (Zero Hunger) and the *Bolsa Familia* programmes which many policy makers have hailed as ‘magic bullets’ for rapidly reducing chronic and absolute poverty.¹¹⁸

A wave of food protest 1985 compelled the state to take steps to address the country’s hunger situation. The term ‘food security’ was officially used for the first time in 1985 in Ministry of Agriculture document termed *Food Security – A Proposal for a Policy against Hunger*.¹¹⁹ One year later, the Ministry of Health organised the 1st National Conference on Food and Nutrition, where health and nutrition related professionals were brought together to deliberate on food security issues.¹²⁰ A proposal for a Food Security Policy was later drawn up in 1991 under the so-called ‘parallel government’ (then led by Lula da Silva) as an alternative to the Collor de Melo administration.¹²¹ The proposal was delivered to the new president Itamar Franco two years later following the impeachment of president de Melo.¹²²

Based on the recommendation of the proposal, the National Food Security Council (CONSEA) was established in May 1993 to steer issues related to food and nutrition matters.¹²³ The setting up of the Council was triggered by the intense popular action against

¹¹⁴ A Hall ‘Brazil’s Bolsa Família: A Double-Edged Sword?’ (2008) 39(5) *Development and change* 799.

¹¹⁵ Hall (n 114 above) 801.

¹¹⁶ F Menezes ‘Social participation in the zero hunger program: The experience of Consea’ in *The Fome Zero (zero hunger) program the Brazilian experience* 250.

¹¹⁷ R Paes-Sousa & J Vaitsman ‘The Zero Hunger and Brazil without Extreme Poverty programs: a step forward in Brazilian social protection policy’ (2014) 19(11) *Ciência & Saúde Coletiva* 43.

¹¹⁸ PC Kesavan & RD Iyer ‘MS Swaminathan: a journey from the frontiers of life sciences to the state of a “Zero Hunger” world’ (2014) 107(12) *Current Science* 2036.

¹¹⁹ The document is officially called *Seguran- ça Alimentar – proposta de uma política de combate à fome*.

¹²⁰ MF Dest ‘The Impact of Brazil’s Bolsa Família Program on Food Security in Santo Antônio de Jesus, Bahia’ (2009) *ISP Collection* 756.

¹²¹ C Rocha ‘Work in progress: addressing food insecurity in Brazil’ *Food Poverty and Insecurity: International Food Inequalities* (2016) 105.

¹²² RD Marques, AM Ganem & JC Marques ‘The Brazilian Zero Hunger social program implications in achieving sustainable development’ (2013) 1(2) *Future of Food: Journal on Food, Agriculture and Society* 39.

¹²³ F Eiró & A Ansell ‘Zero Hunger: Political Culture and Antipoverty Policy in Northeast Brazil’ (2014) 171-2.

chronic hunger immediately after the assumption of office of the new president Itamar Franco.¹²⁴ The then society's mobilisation against hunger gave birth to some of the most vibrant social movement such as Campaign against Hunger, which is led by the Citizen's Action against Hunger and Poverty and for Life.¹²⁵

Within this same period, the idea of nutrition was also integrated into the notion of food security and their interdependence was highlighted.¹²⁶ In 1998, the Brazilian Food and Nutrition Security Forum (FBSAN) was launched in the city of São Paulo, comprising around 100 organisations such as children's organisations, social movements, NGOs and academic institutions.¹²⁷

In 2001, the Citizenship Institute launched the Zero Hunger Project with the principal objective of developing a Food and Nutrition Security Policy (FNSP), which would be submitted to the newly elected president (at the end of 2002) for endorsement and operationalisation.¹²⁸ Among the individuals who engaged in the project were researchers and members of the academia, social movements and NGO representatives.¹²⁹ The arguably comprehensive food security policy adopted by the Institute among others underscored the people's rights to adequate food, the spate of chronic hunger and its causes in the country, the effectiveness and/or challenges confronting existing policies, and finally, mechanisms to ensure the effective operationalisation of the FNSP.¹³⁰ The wide array of non-state actors in the drafting process of the FNSP (which contained the proposal for the Zero Hunger Project) arguably led to calls for the recreation of CONSEA (as mentioned in the policy document).¹³¹

After assumption of office as president, Luís Inácio Lula da Silva (the country's first working class president, with an extensive track record of trade union activity) did not only implement all the recommendations of the FNSP, (specifically the Zero Hunger Program), he also

¹²⁴ S Marcello *Development in the mountains of confusion: Guaribas under the Zero-Hunger Programme*. Dissertation submitted to London School of Economics and Political Science (2011) 32.

¹²⁵ C Finger 'Brazil launches initiative to eliminate hunger' (2003) 361(9357) *The Lancet* 586.

¹²⁶ I Maag *Brazil's Foreign Economic Policy: South-South, North-South Or Both?* Friedrich-Ebert-Stiftung, Geneva Office (2005) 72.

¹²⁷ C Rocha, L Burlandy & R Maluf 'Small farms and sustainable rural development for food security: The Brazilian experience' (2012) 29(4) *Development Southern Africa* 519.

¹²⁸ R Young 'Dilemmas and advances in corporate social responsibility in Brazil. The work of the Ethos Institute' in *Natural Resources Forum* (2004) 21.

¹²⁹ JG Da Silva, ME del Grossi & CG de Franca 'The Zero Hunger project: A proposal for a food security policy for Brazil' *The Fome Zero (Zero Hunger Programme): The Brazilian experience* (2011) 40.

¹³⁰ C Milhorange, E Sabourina & M Bursztynb 'Potential and limits to diffusing Brazil's zero hunger strategy in Sub-Saharan Africa: The case of Mozambique' (2015) *International conference of public policy* 24.

¹³¹ P Townsend 'Social Security in developing countries: A brief overview' *Building Decent Societies* UK (2009) 245.

avowed to combat hunger.¹³² To be exact, at his inauguration in January 2003, President Lula touted that: 'If, by the end of my term of office, every Brazilian has food to eat three times a day, I shall have fulfilled my mission in life.'¹³³

In order to translate this pledge into practice, Lula, on 30 January 2003, recreated the National Food and Nutritional Security Council (NFNSC) with 59 members (42 CSOs representatives and 17 ministers).¹³⁴ The composition of the council was in line with the recommendation in the FNSP that at least two-thirds of its members should be drawn from CSOs.¹³⁵ Again, the mere fact that the council was chaired by a CSO representative and that it was convened within the premises of the presidency demonstrated the high priority attached to the role of CSOs in the advancement of food security.¹³⁶

This development also led to the recreation of several national councils for human rights and public policies (including CONSEA), which was in line with the new federal regime's commitment to its 'Democratic-Participatory' project.¹³⁷ It is imperative to assess the paths of CONSEA (as an element of community organisation and) as a nexus between CSOs and the government in advancing food security during the eight year regime of Lula.¹³⁸ In its founding decree, CONSEA was defined as a consultative council mandated to provide guidelines and advise to the president on food security related matters.¹³⁹ At the practical level, community organisations have been active in four major areas; (i) the Family Agriculture Food Acquisition Program (PAA), (ii) National School Meal Program (PNAE), (iii) *Bolsa Família* and (iv) One Million Cisterns Program (P1MC).¹⁴⁰

The *Fome Zero* aims to ensure attendance at schools by fostering joint responsibility between the government and families, thereby specifically placing the onus on parents to educate their

¹³² PHC Rondó 'Brazil's Progress in Achieving the Millennium Development Goals' (2008) 54(4) *Journal of tropical pediatrics* 219.

¹³³ Rondó (n 133 above).

¹³⁴ V Vyasulu "'Brazil's Fome Zero Strategy": Can India Implement Cash Transfers?' (2010) *Economic and Political Weekly* 89.

¹³⁵ F Comim 'Poverty and Inequality Reduction in Brazil throughout the Economic Crisis' (2012) 106 *ISPI Analysis* 52.

¹³⁶ B Meade & S Rosen 'Food Security in Brazil: Can "Lula" Keep his Promise?' (2003) *Annual Meeting of the American Agricultural Economics Association. Montreal, Ca., July 3.*

¹³⁷ BA Schmitz, EA Moreira, MB de Freitas, GM Fiates, CG Gabriel & RL Fagundes 'Public intervention in food and nutrition in Brazil' (2011) 61(4) *Archivos latinoamericanos de nutricion* 361.

¹³⁸ FV Soares, RP Ribas & RG Osório 'Evaluating the impact of Brazil's Bolsa Familia: Cash transfer programs in comparative perspective' (2010) 45(2) *Latin American Research Review* 173.

¹³⁹ B Meade, C Valdes & S Rosen 'Brazil's food security and food assistance programs to reduce poverty' (2004) *Economic Research Service/USDA* 21.

¹⁴⁰ Soares *et al* (n 137 above).

children.¹⁴¹ Besides being regarded as a break away from clientelism, the *Fome Zero* 'has been heralded as an alternative to more traditional, paternalistic approaches to social assistance and has helped counter criticisms of [conditional cash transfer] programmes as handouts'.¹⁴² However, irrespective of its enormous potential for addressing the chronic hunger situation, the *Fome Zero* was riddled with several constraints only a few months into Lula da Silva's administration.¹⁴³ First, there was no overall co-ordination, leading to independent operationlisation of each of the sub-projects (with separate banking arrangements, beneficiary selection methods, administrative structures and reporting procedures).¹⁴⁴ This lack of coherence resulted in duplication and high implementation costs of the project.¹⁴⁵ There were in addition widespread allegations of political manipulation in the selection of recipients, harking back to the 1990s during the *cesta basica* food distribution scheme. In light of the constraints, a group of beneficiaries took to the streets and bemoaned the failure of the project in addressing chronic hunger and poverty.¹⁴⁶ It was against this backdrop that in October 2003, the government consolidated the four separate sub-projects under the new brand *Bolsa Familia* (Family Grant) which arguably remains the largest conditional cash transfer (CCT) globally.¹⁴⁷

In January 2004, Ministry of Social Development and Fight against Hunger (MDS) was formed (by merging the Ministry of Social Welfare with the Ministry of Food Security and Fight against Hunger).¹⁴⁸ This development led to the operationlisation of the Food Card Program as well as the transfer of the management unit of the *Bolsa Familia* from the Office of the President to the MDS to enhance co-ordination and integration.¹⁴⁹ It was in this light

¹⁴¹ M Fraundorfer 'Global Solutions from the Tropics: The Brazilian Vision of How to Fight Hunger and Poverty' (2013) *Society Breeze* 47.

¹⁴² L Rawlings 'A New Approach to Social Assistance: Latin America's Experience with Conditional Cash Transfer Programs' (2004) 6.

¹⁴³ PC Kesavan & MS Swaminathan '2014 International Year of Family Farming: a boost to evergreen revolution' (2014) 107(12) *Current Science* 1970.

¹⁴⁴ A Gas´ (Ministry of Mines and Energy), Cartao Alimentao (Fome Zero), Bolsa Alimentacao (Ministry of Health) and Bolsa Escola (Ministry of Education).

¹⁴⁵ A Ansell & K Mitchell 'Models of clientelism and policy change: The case of conditional cash transfer programmes in Mexico and Brazil' (2011) 30(3) *Bulletin of Latin American Research* 298.

¹⁴⁶ Ansell & Mitchell (n 144 above).

¹⁴⁷ R Young 'Dilemmas and advances in corporate social responsibility in Brazil: The work of the Ethos Institute' (2004) 28(4) *Natural Resources Forum* 23.

¹⁴⁸ C Grisa & CJ Schmitt 'The Food Acquisition Programme in Brazil: contributions to biodiversity, food security and nutrition' (2013) *Diversifying Food and Diets* 355.

¹⁴⁹ Grisa & Schmitt (n 147 above) 359.

that the World Food Programme in 2014 praised the country as ‘[a] champion in the fight against hunger’.¹⁵⁰

Although *Bolsa Familia* has had a noticeable impact of decreasing school dropouts and improved the share of total household budget spent on food, it enforces the stigma that all beneficiaries are poor. Thus, given that the cash assistance does not cater for individuals but only poor families (if they fulfill certain conditions), president Lula da Silva in 2004 signed into law the basic income bill, titled Law of Citizen’s Basic Income (LCB) which ‘guarantees the right of all Brazilians, regardless of their socioeconomic status, to receive an annual cash transfer.’¹⁵¹ Since then the LCB has been implemented through the Bolsa Familia program.¹⁵² In sharp contrast to the LCB, South Africa’s social security system only addresses the special needs of a specific group and, therefore, limited to those who are unable to work due to ill health, disability or age (children and the aged).

3.2.5. Opposition political parties’ participation

Political parties play a key role in the mobilisation and agitation for adequate food for citizens. The food protest in Barcelona, the food market boycott in Toronto and the protests in northern France were led by Radical Republican Party (RRP), the Jewish Communist Movement (JCM) and the French Communist Party (FCP) respectively.¹⁵³ Also in April 2010, the main opposition party in India, Bharatiya Janata Party led a mass protest across New Delhi demanding the Congress-led government reduce (rising prices of) grains, sugar and lentils.¹⁵⁴

In stark contrast to the above protests, opposition parties in South Africa (such as the Democratic Alliance (DA), Economic Freedom Fighters (EFF) and Congress of the People (COPE)) have arguably been immune to the plight of the food poor. The most obvious involvement of these parties in the right to food debate can be linked to three particular incidents. First, is the EFF’s call for wholesale nationalisation and expropriation of land without compensation. This theme has since 2013 gained considerable political attention

¹⁵⁰World Food Programme ‘Brazil - a champion in the fight against hunger’ (June 24, 2014) available at <<http://www.wfp.org/stories/brazil-champions-fight-against-hunger>> (accessed 3 August 2016).

¹⁵¹ EM Suplicy ‘Citizen’s Basic Income’ (March 2007) *Latin American Program Special Report 2*.

¹⁵² 10.835/2004.

¹⁵³ Golden (n 31 above) 21; Frager (n 31 above) 261. For a detailed discussion of the involvement of these political organisations in the mobilisation and staging of food riots, see J Bohstedt ‘Food Riots and the Politics of Provisions in Early-Modern England and France, the Irish Famine and World War I’ in *Crowd Actions in Britain and France from the Middle Ages to the Modern World* (2015) 101-123

¹⁵⁴ B Majumdar ‘India’s opposition leads price hike protest’ (22 April 2010) *China Daily*.

leading to parliament's approval of the land expropriation Bill in May 2016.¹⁵⁵ The Bill, which sets out the requirement for the government to lay claim to land for public interest or purpose, has attracted criticisms from economists that the untimely redistribution of land (especially as the country is emerging from a major drought) could lead to low rate of food production (similar to farm seizures in neighbouring Zimbabwe).¹⁵⁶ Second, is the political parties' condemnation of the minister for social development for asserting that R753 social grant was adequate to sustain a family for a month.¹⁵⁷ The parties failed not only to take this debate further, but by mobilising the affected individuals to demand for more grants. Third, is the DA march to the Department of Social Development in Tshwane in the hopes of ensuring social grants are paid to beneficiaries after 1 April 2017.¹⁵⁸ Although this march, on the one hand, may to some extent be perceived as food protest (given that some beneficiaries rely on it to access food), on the other hand, it could not be clearly classified as food protest as discussed in section 2 of this Chapter. As mentioned in section 4.3 of chapter two, the likelihood of an upsurge of food protest (as response to the state's failure to pay grants) was diminished when the Constitutional Court made a landmark ruling addressing the dispute surrounding the grants. Thus, the lack of interests of existing political associations or parties to trigger large-scale food protest to ensure the poor (and not only beneficiaries of grants) is also a contributory factor why food protest has been rare in democratic South Africa.

4. Conclusion

The aim of this chapter was to answer the question: why is food protest rare in South Africa, especially in the midst of numerous protests directed at other socioeconomic conditions? Food protest, as its name suggests, reflects the struggle of the food-poor against governments to provide more food or reduce the cost of the food basket. In order to respond to the overarching question of food protest in South Africa, selected factors, which enhanced or hindered similar protest in other countries, were examined in order to determine whether such

¹⁵⁵ Minister of Public Works 'Expropriation Bill' available at <http://www.gov.za/sites/www.gov.za/files/b4-2015_150213_edited.pdf> (accessed 27 July 2017).

¹⁵⁶ E Stoddard, J Macharia & A Roche 'Zuma's Radical Transformation: South Africa Will Allow Expropriation Of Land Without Compensation' available at <http://www.huffingtonpost.co.za/2017/02/24/zumas-radical-transformation-south-africa-will-allow-expropria_a_21721009/> (accessed 27 July 2017).

¹⁵⁷ T Digital 'DA challenges Bathabile 'R753 is enough' Dlamini to accept invitation to go shopping for basics' available at <<http://www.sowetanlive.co.za/news/2016/06/19/da-challenges-bathabile-r753-is-enough-dlamini-to-accept-invitation-to-go-shopping-for-basics>> (accessed 27 July 2017).

¹⁵⁸ ENCA 'In Pictures: DA marches for social grants' (10 March 2017) available at <<https://www.enca.com/south-africa/da-marches-for-social-grants>> (accessed 13 March 2017). For a detailed discussion of the SASSA debacle, see chap 3, sec 4.3.

factors were prevalent in democratic South Africa. These factors range from (a) food shortage, (b) social assistance, (c) food rations, (d) opposition political parties, (e) civil society advocacy and campaigns, (f) the media, (g) the courts (h) presence of a charismatic leader and (i) poor socioeconomic condition factors. The chapter found that factors (a) to (h) enhanced the rise of food protest (in most of the countries) assessed while factor (i) hindered the protest in this regard. In the case of South Africa, the relative absence of factors (a) to (h) and the large presence of factor (i) may have hindered the rise of food-related protest. The chapter specifically discovered that the commitment of key actors such as political organisations, charismatic leaders, lawyers and social movements in mobilising and agitating for improved access to food in other places is missing in South Africa. The food-poor, therefore, lack activist or leaders who would mobilise them to confront the government to comply with its constitutional obligation to food. In short, in order to effectively address chronic hunger, all the various actors such as charismatic individuals, members of opposition political organisations, social movements, students, lawyers, lecturers, community leaders and the food-poor must join forces to call for revision of existing legislation and policy to improve the food poor's access to adequate food.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

South Africa is not a poor country. It is a net exporter of agricultural products with a relatively high per capita income. Besides the 1996 Constitution, which entrenches the right to food, international instruments (African Charter on Human and Peoples' Rights and the International Covenant on Economic, Social and Cultural Rights) to which South Africa is a party, also safeguard the right to adequate access to food. Yet, the lack of a comprehensive food policy and the poor implementation of existing (fragmented) food-related policies have led to millions of South Africans being faced with chronic hunger. Generally, the programmes which seek to safeguard people's right to food, include the 1994 National School Nutrition Programme (NSNP), 1995 Integrated Nutrition Policy, 2001 Unemployment Insurance Act (UIA), 2002 Integrated Food Security Strategy, 2004 Social Security Act (SSA), 2005 Comprehensive Agricultural Support Programme (CASP), 2010 New Growth Path, and 2012 National Development Plan (NDP). The thesis found that while many of these programmes excludes millions of people (NSNP, UIA, SSA, CASP), others ignored steps to address chronic hunger (NDP). In investigating how to address chronic hunger in the face of these policy incoherence, the thesis posed two key questions: what policy actor can bring about policy change (to address chronic hunger) and why is social protest rarely used to improve people's access to food? This chapter begins with a general overview of the

research. The conclusions reached as a result of the research are discussed and the contributions made to research are summarised. Finally, the areas, which require further research, are identified and brief comments on the implication of this research to the question of right to food are made.

2. Overview

Chapter 1 motivated the research by focusing on the background to the problem. It underscored South Africa's high agricultural production and upper middle-income rank contra its failure to feed millions of its population. The thesis acknowledged social protest as a tool with the potential to promote the right to food. It was observed, that while South Africa has a lot of social protests yearly and millions of food poor, the people rarely protest for food. The thesis then set out to examine why food protest is rare in South Africa. It further underscored the need for a better understanding of the concept of right to food as well as collective action or social protest. This was the need addressed in this research. The structure and scope of the dissertation was explained, using desk research of literature, policies, official documents, newspaper reports, legal instruments and internet sources. The research begun with a premise that while social protest (such as service delivery protests) are frequent in South Africa, lack of access to food (due to high food prices) rarely attract people to protest against the state.

Chapter 2 presented an overview of the conceptual and legal perspective to the right to food. The chapter found that after the collapse of the apartheid regime (a regime primarily opposed to the concept of universal human rights, including the right to food), the new democratic government established a rights-based approach to food. The content of the right and the responsibilities they impose on the government have been entrenched in several sources, including the 1996 South African Constitution, legislation and policies tailored to promote the right to food, the provisions of international and regional human rights and humanitarian instruments of which South Africa is a party, recognised norms and standards set by, the Food and Agriculture Organisation (FAO); the Committee on Economic, Social and Cultural Rights (CESCR) and the African Commission on Human and Peoples' Rights. The chapter found that these instruments set out the positive and negative rights, as well as the entitlements that rights-holders have. The thesis found that these norms establish the parameters for state action while ensuring that rights-holders have access to justice as well as meaningful reparation for lack of effective action in the realisation of the right to food.

Specifically, Section 27(1)(b) of the South African Constitution recognises the right of *everyone* to adequate food. The ‘everyone’ in the Constitution implies that men, women, children, migrants and prisoners should not be deprived the basic right to food.

As conceived by Christian Bay, the primary obligation of any government is to protect and promote the different aspects of human freedoms, including their freedom to be free from hunger.¹ Howard observed that any government risks losing its legitimacy once it fails to protect, promote and fulfill the natural rights of its citizens. Thus, citizens have the right to (as well as the moral obligation) to confront their rulers once they are unable to fulfill their human rights, including their rights to food.² It is in this light that various international and regional human rights and humanitarian laws have entrenched the right to freedom from hunger as a means of giving further impetus to this right.³

At the domestic level, the South African Constitution obliges the government to *respect* the right to food (by refraining from actions which will hinder individuals’ existing access to adequate food), *protect* people’s freedom from hunger (by adopting executive and legislative measures to safeguard individual’s interest from high food prices often imposed by food entities), and *promote* and *fulfill* (by adopting actions which will ensure affordable prices of food, as well as create avenues where citizens can generate income as a means of accessing food (either through production or purchase)). The study found that, irrespective of this legal protection, the right to food has eluded many South Africans. It is against this backdrop that the thesis turned to chapter three to understand the causes of the chronic hunger and malnutrition in South Africa.

Chapter 3 examined the factors militating against the realisation of the right to food in South Africa. The chapter found that many South Africans are confronted with serious problems of food insecurity, malnutrition and hunger. Many households, including women and children, struggle to meet their daily basic subsistence. Their circumstance is due to, or is worsened by, a plethora of economic and social factors, which includes price increases in basic foodstuffs, unemployment, HIV/AIDS and poverty. Besides constituting a *prima facie* infringement of section 27(1)(b) of the Constitution—right of access to adequate food- this condition also

¹ C Bay ‘Universal Human Rights Priorities: Toward a Rational Order’ in J Nelson & V Green (eds) *International Human Rights: Contemporary Issues* (1980) 5.

² Bay (n 1 above).

³ See generally, chapter three of this thesis.

makes a mockery of the founding values of the Constitution – right to life, freedoms, equality and human dignity.

Presently, there is no comprehensive normative instrument that provides for the right to food for everyone. Moreover, the existing food security policies and legislation do not appear to provide sufficient safeguards to people's access to food. The right to food is currently only implicitly guaranteed in an ad hoc manner through a plethora of legislation in sectors such as health care, public works, water, social welfare, land and agriculture. Measures by the state to give effect to this right have been mostly policy driven, and have been characterised by lack of coordination and poor operationalisation. A major example relates to the state's primary school feeding programme (which serves as the government's child specific nutritional policy). Here, the chapter found that the programme, which provides a daily meal to primary school learners at targeted schools, has a limit in terms of its reach. The criteria for selecting schools (based on location in poor areas and historically deprived school) have been identified as limiting the reach of the programme. Consequently, food-poor children in schools which are neither located in poverty-stricken nor historically deprived are cut off from obtaining food from the programme. Another example is the accessing of social welfare grants where due to several constraints (such as institutional obstacles and administrative reasons) some of the poor who are eligible are unable to access the funds. The amounts provided as social grants are also inadequate.

At present, food security initiatives have also being formulated and operationalised as though chronic hunger was a fleeting social problem. To be exact, presently there is no universal free basic food programme. Moreover, existing programmes are being administered in piece-meal fashion, which only produce temporary, palliative remedies. These programmes, therefore, do not systematically address critical issues regarding food prices, extension services, credit, inputs, land skills and non-agricultural livelihoods. These and other impediments have pushed many individuals to the margins of malnutrition and chronic hunger. The chapter concluded that this situation could be addressed more effectively by government through the introduction of a wider social welfare policy in the form of a universal social grant (for those excluded), or alternatively, the operationalisation of a free basic food programme.

Chapter 4 explored the question of how to address chronic hunger through social policy change. In light of the fragmented or inadequate food-related policy, coupled with their exclusion of millions from benefiting from the state's food programmes, the thesis turned its

attention to assess which (policy actors are well-placed to produce a significant social policy change to address a social problem such as chronic hunger. In this regard, the potential of the three arms of government in terms of policy formulation was first assessed.

The National Assembly (legislative branch) which has the principal function of making and amending laws is dominated by the ruling African National Congress, thereby turning parliament into a rubber-stamp (for the actions of the executive). In practice, the closed list proportional representation system practiced in South Africa denies voters the opportunity to elect their preferred members of parliament (MPs) who could (re)present their interest. Also, this system reduces MPs to the position of ‘servants’ of their party leaders (including the president and his cabinet) who draw up the party list for elections. Therefore, the prospect of MPs, acting independently in order to produce a food act without the authorization of the executive is arguably non-existent. The second arm of government, the executive was seen as possessing the required capability or mini-bureaucracy to bring about a policy change, yet lacks the political will to bring about such a social policy change to address chronic hunger. The judiciary was seen as an important player in policy reform, especially since the decisions of courts can have broader impact for policy reform. Yet, the courts potential to produce a law legislation was seen as limited since it lacks independence (with the appointment of judges), and, it cannot initiate steps towards the adoption of food policy until an appropriate case is brought before it.

The chapter found that human rights institutions such as the Commission for Gender Equality and the South African Human Rights Commission could use their powers to recommend to the National Assembly and the executive to adopt a food policy or amend the Social Security Act to provide for the excluded food poor. The two commissions were found to experience similar constraints, namely, lack of (capital and human) resources and cooperation from the executive. In terms of the influence of non-state actors, public opinion was also seen as setting or defining the boundaries for policymakers when framing social policy. The thesis however found that public opinion can contribute less to addressing chronic hunger (through social policy) since most citizens are uninformed on food security issues. Finally, while the activities of non-governmental organisations to support a food policy could be limited by the Tax Act, the growing negative image of the media could also hinder its effort to bring about policy reform. It was in light of the above limitations facing the various strategies that the thesis explored whether social protest could be useful in social policy change.

Chapter 5 attempted to analyse the meaning of social protest as it appears in the (classical and contemporary) literature. It was noted that there is no commonly agreed upon definition of protest. Nonetheless, in seeking to adopt a unified definition for the purposes of the next chapter, the chapter defined protest as a distinctive collective action pursuing an explicit objective by the use of disruptive, confrontational or in some cases violent means. The ‘violent means’ cited in the definition encompasses a range of acts classified as protest action, which undoubtedly involves abusive language or insults but not necessary violence against other persons, particularly civilians. The omission of violent actions against civilians or other community members is important in order to clearly differentiate protest actions from other political acts such as civil war, domestic insurgency or terrorism, which undoubtedly will have a distinct impact upon a state’s level of democratic performance. The chapter further assessed the strategies, the essence of numbers in mobilisation, reasons for protest as well as the rise of protest in post-apartheid South Africa. It was found that protest was successful in influencing policy shift in four main instances.

Chapter 6 conducted a critical analysis of factors, which contributed or hindered food protest in selected countries. In order to determine what these factors are the thesis assessed the various conditions, which triggered similar protest in some countries. In virtually all the episodes examined, particular actions caused the protest by outraging public opinion, mostly at times when basic food was scarce as a result of sharp increases in food prices or famine. The chapter found that the chronically hungry alone are incapable of triggering food protest, especially as they lack the energy to embark on such action. In most cases, the success of the protest was due to the key role played by political organisations, charismatic leaders, students and social movements who mobilised the masses to demand for food price cuts or adequate distribution of food. Thus, the lack of these key actors in the fight for against hunger has prevented the eruption of similar large-scale food protest in South Africa as witnessed in other countries. Generally, eight factors were found to be strong catalyst of food protest while one, was found to prevent the rise of people taking to the streets in demand for food. These factors were (a) food shortage, (b) social assistance, (c) food rations, (d) opposition political parties, (e) civil society advocacy and campaigns, (f) the media, (g) the courts (h) presence of a charismatic leader (i) poor socioeconomic condition factors are strategically important factors in triggering or preventing food related protest. The chapter concluded that the absence of factors (a) to (h) and the strong presence of factor (i) have arguably contributed to the limited use of food protest in South Africa.

3. Conclusions

The following general conclusions can be drawn, based on this study:

- Irrespective of the widespread food insecurity and hunger plaguing a large section of the South African population, there has been insufficient and poorly coordinated effort by the state to address the crisis.
- The prevalence of chronic hunger in South Africa can be linked to:
 - (i) fragmented food security policies
 - (ii) poor implementation of food-related policies
- The South African government has, nonetheless failed to develop a comprehensive and coordinated approach to this right.
- Social protection programmes for rural and urban low-income poor are inadequate in scope and coverage.

Based on the research, the following conclusions regarding social protest have been reached:

- Protest actions can help in re-establishing the mandate for governments to act in times of (food) crisis, clarifying people's expectation and how their rights can be advanced.
- Various actors, such as charismatic leaders, civil society organizations, political organisations, social movements, the courts and the media have a primary role to play in the successful conduct of food protest.

As a result of the multidisciplinary literature survey adopted in this research, a number of other conclusions regarding the protests-based approach to the right to food emerged as the research progressed:

- Poor people with precarious (or low) income are less likely to protest when they are hungry and lack the energy to confront the state.
- Protest provides a form of enforcement by way of labeling the government as incompetent. When reported globally, food protest serves as a way of shaming the national political leadership. And the sheer shame of being labeled as incapable to feed one's own population, for most governments, is enough sanction. To be

infamous for battling food protests in your regime is a matter of shame, an indication of a ruler's incompetence to feed adequately one's own population – the governance comparison of the breadwinner's emasculating failure to put food on the table. Governments who need and value their popular legitimacy (especially as their everyday success of their regimes depends on this) will perceive and interpret the food protest as an indictment on their regime.

- Participation of CSOs: NGOs and research organisations have not always supported food rights protests in South Africa. Food rights campaigning or subsistence protests are often avoided by CSOs, especially, as they are regarded as contentious themes. Further, both donor and governments are wary of subsistence-related protest in view of their unruliness and historic association with the left. Aid-donors often invest in pro-market reforms, and, therefore, often distance themselves and the CSOs they sponsor from unruly and contentious politics, such as food protests.
- To address chronic hunger in South Africa, there is the need for a sustained national right-to-food movement that cuts across both rural and urban parts of the country to mobilise for a universal food supply or basic income.

The dissertation has made key contributions to the right to food and some ancillary contributions related to right to protest. The contributions to the right to food are the following:

- It exposed the importance of protest as an effective political action for addressing chronic hunger in South Africa, and considered its merits *per se*.
- Through a series of case studies, it considered the impact of food protest in developed and developing countries, whilst considering the applicability of food protest in South Africa.
- It suggested that constraints confronting the poor in accessing adequate food could be addressed by viewing hunger not only as a legal obligation, but as a moral obligation of the state to feed its population. Failure on the part of public authorities in this regard is an indication of a breach of the existing social contract and the people have the political right to protest.

- It identified the key factors, which have hindered the successful conduct of large food protest in South Africa.
- New areas of research are suggested below. They demonstrate the importance of food right and protest action to be approached holistically and in an integrated way.
- The scope of the research underscores the need for a multidisciplinary approach to the right to food, so that the (normative and institutional) problems identified may be approached in a holistic manner or perspective.

Ancillary contributions to other disciplines include:

- It created a greater awareness of an alternative and cheaper means of enforcing the right to food, which may be used by the food-poor to demand accountability from public authorities.
- It provided the necessary conditions, which are relevant to trigger or prevent food protest (in South Africa).
- It focused on the importance of social contract as an avenue which provides legitimacy for the people to protest when their rulers fail to fulfill their obligations.
- It took a concept, politics of provisions, and explicated its relevance to the eradication of chronic hunger and malnutrition, by invoking the social and moral obligation of the state to provide basic economic goods, specifically food to its population.
- It provided an overview of the available literature on, and problems confronting food security in South Africa.

4. Recommendations

By bringing together the major findings of the respective chapters, this section provides some recommendations based on those findings. These recommendations include discussions on how the chronically hungry can use protest as a tool to force the state to forge new paths towards the universal enjoyment and fulfillment of the realisation of the right to food in South Africa.

- **Mobilisation:** Protest leaders need to create political spaces in which food grievances can be made and translated into simple languages that ordinary citizens can understand and support.
- **Expressing discontent:** in order to effectively protest around food, protesters need to have a clear message. One way through which people can register their discontent is by invoking shared sociocultural values around food. In political discourse, food has a distinct status, which transcends nutritional, material value, and the symbols and metaphors of eating gives food a specifically personified influence.
- **Targeting power-holders:** Discontent is often framed in class terms, such as ‘them and us’ element either articulated in rap songs or text messages serve as a great strategy for mobilising.
- **Avenues of protest:** Potential food protesters in South Africa, like their 18th century English counterparts need to protest in actual marketplaces, supermarkets, block the export of grain and influence large scale retailers (such as Shoprite, Woolworths, Spar and PicknPay) to reduce prices of food.
- **Politicization of chronic hunger:** As demonstrated in India, protesters can politicize chronic hunger, so that negotiations and contestations continue towards the adoption of framework law.
- **Exploiting current struggles:** as demonstrated in the thesis, some protests were generally linked to wider protest actions and not specifically triggered by lack of food *per se*. For instance, the food protests in Mozambique and Egypt were triggered by protest against increases in urban transport and corruption concurrently. The food-poor in South Africa should, therefore, participate in, and take advantage of ongoing service delivery protests to register their discontent and press for improved access to adequate food.
- **Role of civil society:** activists from social movements, community-based organisations (CBOs), non-governmental organisations (NGOs) have a key role to play in the realisation of the right to food, especially through education about socioeconomic rights in general and the freedom from hunger in particular. For instance, the formulation of national framework

- **Legislation** must involve broad coalition of different stakeholders, actors and civil societies such as academia, social movements, CBOs and NGOs. Such greater participation by the non-state actors alongside the state will facilitate its effective operationalisation once the law is passed in parliament. Thus, in a state like South Africa where the right to food is justiciable and civil society is vibrant, a steering group or national task force comprised of representatives of the South African Human Rights Commission and Commission on Gender Equality, politicians, activist-lawyers, academia, representatives of social movements, CBOs and NGOs) can be formed to monitor the operationalisation of food security policies. The impartial composition of such a steering group would provide it with a broad political and social legitimacy, and bring together multiple experts to enhance the political recognition of the concept of right to food. The key obligation of the group among others would comprise dissemination of information and raising public awareness around human rights in general, and the right to food specifically, through a broad campaign of sensitization. Issues of interest around which CSOs can be mobilised with the aim of heightening awareness on chronic hunger include lack of access to social security programmes, high price of staple food, unemployment and redistribution of agricultural lands. Other strategies of mobilisation for the right to food by CSOs range from intense lobbying of government authorities, workshops for politicians and decision-makers, rallies and protest actions.⁴ In summary, CSOs have a key role to play in advancing the right to food through food campaigns, influencing the drafting of food-related policy while monitoring the operationalisation of such legislation.
- **The media as conscious participant in protest:** An important actor in any potential food protest is the media. The mass media is the single most vital tool for enhancing the visibility of mass discontent. The media coverage can systematically boost the recognition of the nature and scale of discontent. For instance, as demonstrated in the Haiti and Egyptian protests, an informed and sympathetic journalists can be the vanguard of a successful food rights struggle. Against this backdrop, leaders of protest movements should enlist a few prominent print or broadcast media to pick up

⁴ F Coomans & K Yakpo 'Framework Law on the Right to Food-An International and South African Perspective' (2004) 4 *African Human Rights Law Journal* 17.

the discontent of protesters as articulated through online memes, street graffiti, jokes or songs.

Once the masses have been mobilised and have taken to the streets, protesters should make relevant demands and should not demobilize until their demands have been. The four cardinal demands which the food protesters should table are:

- **Adoption of a framework law:** Certainly, the existence of a framework law is a precondition for claiming a violation of citizen's rights to food. Consequently, protesters must demand for the immediate formulation and adoption of a Food Security Act, which will adequately guarantee their access to legal remedies once their access to adequate food is denied by the state.
- **Children's access to food:** Food protesters must further demand for an expansion of the school feeding programme. The scope of the school feeding programme needs to be broadened into a comprehensive nutrition programme for every child in desperate need. It is the obligation of the state to address chronic hunger and malnutrition among children, especially through the adoption of supplementary feeding programmes. Consequently, vulnerable children (including those internally displaced, refugee children, child-headed households, children with disabilities and street children) may deserve special measures, such as food parcels and effective conditional cash transfers (CCTs). Moreover, it is important that the state provides adequate food to women during pregnancy and lactation, especially considering that the baby of an under-fed or malnourished pregnant mother may inherit mental or physical deficiencies which are not easily curable.
- **Expanding the scope and coverage of the Social Security Act:** They must press for the amendment of the Social Security Act in order to provide financial assistance to the unemployed and lacks income to access food.
- **Department of Food Security:** Finally, they must call for the establishment of a specialized right to food department, ministry or unit within the Presidency which would be well positioned to ensure the effective coordination needed for the successful operationalisation of food security policies and programmes. This demand is relevant considering that in order to adequately eradicate chronic hunger from South Africa, there is the need for increased political will at the highest levels of

government with strong, funded departmental mandate to enhance the implementation of right to food related policies and programmes. This department, will begin by ensuring integration of cross-sectoral responsibilities into the performance appraisal of the various sectors involved in food security before assuming full control of these programmes.

6. Areas for further research

A number of areas for further research can be identified within the domain of this dissertation. Many of these areas tie up with the recommendations made earlier in this chapter.

- As regards the case studies on food protests, it was mentioned that both women and men participated in protest. Further analysis should be done to uncover whether there are any consistent gendered patterns of food protests. Further studies are needed to determine whether class and gender interacted to shape how protesters behaved.
- Further research will also be needed to determine whether women protesters alone are more successful in pressing for food reforms.
- Chapter two brings to bear two tasks for researchers: (i) assess whether there is a specific strategy for mobilizing large numbers of protesters; (ii) assess whether there is a distinct response of (democratic and autocratic) government to protest actions.

Potential pitfalls and questions left unanswered as a result of the delimitations of this study that need to be addressed are:

- Laura Rawlings and Gloria Rubio affirmed that conditional cash transfers contingent on education and health care are effective means of addressing poverty and chronic hunger. Further studies will be needed to determine what conditions should be applied in the implementation of universal cash transfer or food parcels in South Africa.
- Further studies need to address the practical problems, which may arise during the sporadic, disruptive protest against high food prices described in the recommendation, and elsewhere in this chapter.

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