

# ESR

## REVIEW

Economic and Social Rights in South Africa

vol 5 no 1 March 2004

## Editorial

Sibonile Khoza

Welcome to the first of five issues of the *ESR Review* planned for 2004. Presented in its new look, this special issue is on the right to food.

This widely articulated right is meaningless to those who still face endemic hunger, malnutrition and food insecurity. To them, it is a mere aspiration.

Recent developments, however, demonstrate that serious attention is being given to this problem from various angles. In this edition, we feature articles that analyse the potential of these developments for ensuring increased access to food by everyone.

The feature article explores the role of framework legislation in protecting the constitutional right to food in South Africa. In doing so, it discusses the international jurisprudence on the elements of framework law and explore its advantages for South Africa's food situation, particularly regarding the current legislative drafting process on

this right. In essence, it argues that framework legislation will go a long way to surmount the problems of fragmented, poorly co-ordinated and implemented policies and programmes related to food security.

Christopher Mbazira evaluates the implications of the African Commission's decision in the *SERAC* case for the enjoyment of other rights enshrined in the African Charter. For example, he discusses the importance of recognising the links between food and housing rights in the African context. In his concluding remarks, he commends the Commission's innovative and progressive reading of the right to food into the African Charter

[to page 2](#)

## CONTENTS

Protecting the right to food in South Africa	3
Reading the right to food into the African Charter on Human and Peoples' Rights	5
Enforcing the right to food in India	7
Towards Voluntary Guidelines on the right to adequate food	11
Update	15
Book review	15

### Sandra and Danwood's new appointments

The Project congratulates two former project staff members and former editors of the *ESR Review*, Sandra Liebenberg and Danwood Chirwa, on their new appointments for 2004. Sandra is appointed HF Oppenheimer Chair in Human Rights Law at Stellenbosch University, while Danwood is lecturing in the Law Faculty at the University of Cape Town. The Project wishes them all the best in their new challenges.

The Project's new research staff are Annette Christmas, Kevin Iles and Christopher Mbazira.

ISSN: 1684-260X

A publication of the Community Law Centre  
(University of the Western Cape)

**Editors of this issue**

Sibonile Khoza and Christopher Mbazira

**External editor**

Danwood Mzikenge Chirwa

**Contact the Socio-Economic Rights Project**

**Address**

Community Law Centre  
University of the Western Cape  
New Social Sciences Building  
Private Bag X17, Bellville, 7335  
Tel (021) 959 2950; Fax (021) 959 2411

**Internet**

[www.communitylawcentre.org.za](http://www.communitylawcentre.org.za)

**ESR Review online**

[www.communitylawcentre.org.za/ser/  
esr\\_review.php](http://www.communitylawcentre.org.za/ser/esr_review.php)

**Project staff**

Sibonile Khoza: [skhoza@uwc.ac.za](mailto:skhoza@uwc.ac.za)  
Annette Christmas: [achristmas@uwc.ac.za](mailto:achristmas@uwc.ac.za)  
Kevin Iles: [kiles@uwc.ac.za](mailto:kiles@uwc.ac.za)  
Christopher Mbazira: [cmbazira@uwc.ac.za](mailto:cmbazira@uwc.ac.za)  
Gaynor Arie: [garie@uwc.ac.za](mailto:garie@uwc.ac.za)

**ESR Review**

*ESR Review* is produced by the Socio-Economic Rights Project of the Community Law Centre. The Project, through the Centre, receives supplementary funding from the Ford Foundation. This issue is produced with the financial support of the Norwegian Agency for Development Cooperation (NORAD) through the Norwegian Centre for Human Rights (NCHR). The views expressed herein do not necessarily represent the official views of NORAD/NCHR or the Ford Foundation.

**Production**

Design and layout: Page Arts cc  
Printing: Logo Print

**Copyright**

Copyright © Community Law Centre  
(University of the Western Cape)



as a cure for one of the glaring weaknesses of this instrument.

The evolving body of jurisprudence in India demonstrates the extent to which its judiciary is prepared to go to hold the Government accountable for that country's endemic hunger and malnutrition. Kamayani Bali Mahabal provides a stimulating account of court decisions on the right to food and an insight into the role that has been played by civil society in this regard.

The right to food and the obligations that go with it have been the subject of heated debates internationally. Margret Vidar highlights some of the most important international events relating to this right. She primarily discusses the process leading to, and contentious issues that have surfaced in,

the development of the Voluntary Guidelines on the Right to Adequate Food for National Food Security.

In the updates section, we present the latest developments on the Voluntary Guidelines process.

We also introduce our newly produced publication, *Realising the right of children growing up in child-headed households*.

We trust that this issue will stimulate innovative strategies aimed at improving access to food by the poor and by marginalised households in South Africa, and elsewhere.

We would like to thank all the contributors to this issue. Our special thanks also go to our ex-colleague, Danwood Chirwa, for his valuable external editing of this issue.

ONLINE

## ESR REVIEW ONLINE

This and previous issues of the *ESR Review* are available online.

Please visit our website at:

[www.communitylawcentre.org/za/ser/index/php](http://www.communitylawcentre.org/za/ser/index/php)

LETTERS &

## CONTRIBUTIONS

We welcome contributions and letters relating to socio-economic rights.

They must be no longer than 1 500 words in length and written in plain, accessible language.

All contributions are edited.

Please e-mail Sibonile Khoza at [skhoza@uwc.ac.za](mailto:skhoza@uwc.ac.za)

# Protecting the right to food in South Africa

## The role of framework legislation

Sibonile Khoza

The advent of constitutional democracy means little to the majority of South Africans, who still face endemic hunger and malnutrition. For them, the constitutional protection of the right to food remains an aspiration.

The Government has developed and implemented a range of policies and national strategies to address this problem. They range from a number of long-term capacity building initiatives aimed at enhancing people's ability to produce food for consumption (e.g. information and education programmes) to a few short-term measures that provide material – including financial – assistance to poor households (e.g. direct food transfer projects).

In addition, several pieces of sectoral legislation have been enacted that address matters relating to food.

Thus far, these measures have failed to overcome the problem of malnutrition and hunger. This is because, it is argued, they have been adopted and implemented in a fragmented and poorly co-ordinated manner.

The 1996 Constitution of South Africa expressly places an obligation on the State to take legislative and other measures to ensure that everyone has access to food at all times (s 27(2)). In an attempt to discharge this duty, the Government has taken steps to adopt legislation on food, currently in the form of the National Food

Security Draft Bill (the draft Bill). The draft Bill is a plausible attempt to enact a comprehensive piece of legislation that addresses food issues holistically. To achieve its objective, it would be useful for the Government to draw inspiration from the international jurisprudence on the elements of framework law.

### Introducing framework legislation

Framework legislation is increasingly regarded as necessary to give effect to given human rights guarantees.

At the international level, the UN Committee on Economic, Social and Cultural Rights (CESCR) has recommended that States should consider the adoption of framework law as a means of implementing the rights to housing, education, health, water and food respectively.

As noted, the South African Constitution not only recognises the right of access to sufficient food as justiciable but also requires the State to take reasonable legisla-

tive and other measures to achieve the progressive realisation of the right. In *Government of South Africa v Grootboom and others* (2000) (*Grootboom*), the Constitutional Court emphasised the importance of framework legislation in realising socio-economic rights.

The Bill's drafting signifies the Government's commitment to meeting the constitutional obligations engendered by the right to food.

### Purposes and aims

Framework legislation provides an overarching and co-ordinated tool for implementing national strate-

gies and policies related to a particular right. It establishes principles with which policies and laws related to a given socio-economic right must conform. It also creates structures for ensuring co-ordination among, and accountability of, different State organs and relevant non-State actors

involved in implementing the right of access to food.

### Content

The CESCR's General Comment No 12 provides an insight into what framework law should contain:

*The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of the targets; the means by which the purpose could be achieved described in broad terms, in particular the in-*

**Framework legislation provides an overarching and co-ordinated tool for implementing national strategies related to a particular right.**

*tended collaboration with civil society and the private sector and with international organisations; institutional responsibility for the process; and the national mechanisms for its monitoring; as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organisations (para 12).*

It is also generally accepted that framework law should also include principles relating to such specific sectors of the right to food as trade regulation, market systems and food price monitoring, consumer protection, food production, conservation and distribution, food aid schemes and the integration of national poverty strategies.

### Controversial elements

Controversy still surrounds the issue of whether benchmarks, monitoring mechanisms, goals, timeframes and targets should be included in framework law. Those who argue in the negative contend that these features are more suitable for inclusion in national strategies and policies developed in accordance with the broad principles stated in framework law, than in the legislation itself.

However, these elements are important in facilitating the process of achieving the progressive realisation of the right. Without setting benchmarks, goals and targets, it is difficult to measure or

monitor progress in realising socio-economic rights.

These elements can be incorporated in framework law in two ways. The first, which is the radically transformative approach, requires benchmarks, goals, targets and timeframes to be included in legislation in much the same way as they normally appear in national strategies, policies and regulations. On the other hand, the second way, which is the moderately transformative approach, requires that legislation should place an obligation on the relevant min-

isters or institutions to make regulations or develop policy that includes benchmarks, goals, targets and timeframes for realising the right to sufficient food. This legal obligation should also state timeframes for developing such regulations, policies and benchmarks. It should also stipulate the process and prin-

ciples to be followed. In particular, framework law should stress the importance of complying with the democratic principles of multi-stakeholder participation, transparency, empowerment and accountability.

### Advantages of adopting framework law in South Africa

Framework law has many benefits, including:

- it signifies Government's commitment to discharging its broadly-framed constitutional

obligations;

- it helps in defining the scope of the right;
- it re-enforces the justiciability (or the enforceability) of the right by providing for concrete remedies to redress violations;
- by emphasising the democratic principles of transparency, participation and empowerment, framework law once again compels observance of human rights norms and democratic practices;
- by allocating specific responsibilities to different organs of State and other institutions, it ensures their better co-ordination and enhanced accountability;
- it provides a viable tool for measuring and monitoring progress in realising a socio-economic right by making provision for benchmarks, targets, goals and timeframes; and
- it prohibits and prevents violations of the right by the State and private persons.

In the South African context, many factors can be pinpointed that make the adoption of framework law on food a necessity. As noted earlier, South Africa faces enormous challenges of food insecurity and malnutrition. Many households struggle to meet basic subsistence needs. The widespread lack of access to food constitutes a *prima facie* violation by the State of the right to food.

To mention a few factors, Government efforts to combat hunger have been characterised by poor co-ordination and implementation. Various departments have devised and implemented food-related policies and programmes without

**Without setting benchmarks, goals and targets, it is difficult to measure or monitor progress in realising socio-economic rights.**

proper co-ordination. For example, the Emergency Food Relief Programme was devised in 2002 by the Department of Social Development in anticipation that it would receive support from the Seed and Plant Programme of the Department of Agriculture, and the Public Works programme of the Department of Public Works. However, it was rolled out without the support of the latter programmes during the implementation phase. There is, in fact, no comprehensive minimum food programme at present.

Moreover, structural and institutional obstacles have been encountered in implementing certain programmes, such as social grants, that enable people to access food. A wide range of administrative and bureaucratic hurdles in administering these grants has resulted in many eligible people being deprived of their benefits.

In the land and agricultural sector, problems are either that people do not have access to productive land to produce their own food or that they lack agricultural support and development programmes to use the available land effectively. Many commentators have observed that land restitution is taking place at a slow pace, and that land reform and agricultural development programmes are not reaching the intended beneficiaries satisfactorily. Government's preference for commercial farming over subsistence farming also raises concerns for some

**The South African food situation requires a comprehensive and revolutionary response.**

commentators with regard to ensuring food security for poor communities.

There is therefore an urgent need for a comprehensive evaluation of existing cross-sectoral legislative and policy measures per-

taining to the right to food. Duplications, gaps and obstacles should be identified so that they can be dealt with once and for all in the forthcoming comprehensive legislation.

### Conclusion

The South African food situation requires a comprehensive and revolutionary response. Current measures are incapable of addressing the problem. A comprehensive piece of legislation will go a long way towards surmounting the problems of fragmentation, poor co-ordination and implementation and the inadequacies of policies and programmes. For this reason, the initial steps undertaken by the Government to enact national food security legislation are commendable.

However, there is need to speed up the process leading to its adoption by Parliament. More importantly, international jurisprudence relating to the elements of framework law should also be fully incorporated in the upcoming legislation.

**Sibonile Khoza is Co-ordinator and Researcher in the Socio-Economic Rights Project, Community Law Centre, UWC.**

## Reading the right to food into the African Charter on Human and Peoples' Rights

Christopher Mbazira

The African Charter on Human and Peoples' Rights (the Charter) of 1981 is the principal regional instrument protecting human and peoples' rights in Africa. It incorporates a wide range of socio-economic rights, including the rights to property, to work under favourable conditions and equal pay for equal work, to health, to education, family rights and the right to self-determination.

However, the Charter does not expressly recognise the right to food. It also does not recognise the right to an adequate standard of living. In contrast, the African Charter on the Rights and Welfare of the Child of 1990 binds State parties to provide adequate nutrition and safe drinking water in partial discharge of the duties engendered by the right to health.

## The role of the African Commission

The African Commission on Human and Peoples' Rights (the Commission) is entrusted with the responsibility of monitoring and promoting the implementation of the African Charter. It has power, for example, to receive and adjudicate complaints alleging violations of human rights by States. Thus far, the Commission has entertained and decided a wide range of individual complaints involving interpretations of various provisions of the Charter.

Recent jurisprudence of the Commission establishes a growing commitment by this body to interpret the Charter progressively. For example, in the landmark decision of the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights vs Nigeria (SERAC)*, the Commission found a violation of the right to food, which, as noted, is not expressly recognised by the Charter.

### The facts in *SERAC*

The Nigerian Government was directly involved in oil production through the Nigerian National Petroleum Company (NNPC), which was the majority shareholder in a consortium with Shell Development Corporation (SPDC). The consortium exploited oil with no regard for the health or environment of local communities. It also neglected and failed to maintain its facilities, causing numerous avoidable spills in the proximity of villages. As a result, water, soil and

air became contaminated resulting in serious short- and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, an increased risk of cancers, as well as neurological and reproductive problems.

The Government of Nigeria condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies. In attempting to stop non-violent protests by the Ogoni people against these harmful activities, the Nigerian security forces attacked, burned and destroyed the protesters' villages, food and livestock. Many people were also killed in the process. The communication alleged violations of a range of rights, including the rights to housing and food.

### The decision

The Commission found that the Nigerian Government had violated the right to food, among other rights. The Commission held that the right to food is implicitly recognised in such provisions as the right to life, the right to health and the right to economic, social and cultural development, which are expressly recognised under the Charter. The right to food, according to the Commission, is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.

This right, it was held, bound the

Nigerian Government to protect and improve existing food sources and to ensure access to adequate food for all citizens. Its minimum

core required the Government not to destroy or contaminate food sources or allow private parties to do so, or to prevent people's efforts to feed themselves.

Thus, the Nigerian Government was found liable for destroying food sources

through its security forces and the State oil company, allowing private oil companies to destroy food sources, and creating significant obstacles to attempts by Ogoni communities to feed themselves.

Like the right to food, the Commission held that the right to housing or shelter is implicitly recognised by the Charter. It reasoned that this right can be derived from a combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, the right to property, and the protection accorded to the family, which are explicitly recognised under the Charter. The Commission noted that destruction of houses adversely affects people's property, their health and families. Furthermore, shelter means more than a roof over one's head. It embodies the right to be let alone and to live in peace - whether under a roof or not.

It was held that the Government violated the minimum core obligation implicit in the right to food by destroying the houses and villages of the Ogoni people and by obstructing, harassing, beating and, in some cases, shooting and

**By holding that this right is implicitly protected, the Commission has cured one of the Charter's glaring weaknesses.**

For a review of this case see the *ESR Review*, Vol. 3 No 2.

killing those that attempted to return to rebuild their ruined homes. The forced displacements caused by the destruction of homes also amounted to a violation of this right.

### The importance of recognising the links between food and housing in the African context

Most African communities survive on subsistence agriculture. Food sources are often close to their houses. Some societies ensure food security by storing and preserving the excess of their harvest in granaries, constructed with traditional techniques. Others plant crops in such a manner that some mature before others, in order to ensure a steady supply of food. Forced evictions and denial of access to housing interfere with this process.

### Concluding remarks

SERAC is one of the most progressive decisions rendered by the Commission. The right to food is arguably a most important right in the African context, where the majority of the people live in poverty. By holding that this right is implicitly protected, the Commission has cured one of the Charter's glaring weaknesses.

The next step is expanding its content and ensuring its implementation. Owing to the nature of the facts, the Commission focussed largely on the negative obligations generated by this right. It did not elaborate on the positive obligations.

Most of the provisions in the Charter have remained mere aspirations. Implementation should therefore not only be done through

the protective mandate of the Commission but also through its promotional mandate, because litigation has limited potential to ensure the full realisation of rights. The Commission, during its consideration of periodic State reports, should require States to report on the steps taken to implement this right. The current reporting guidelines are very broad in nature. There is a need to provide guidelines on how each of the rights should be reported on. For instance, in reporting on the right to food the State should be required to report on all the processes involved in realising this right, beginning with production and proceeding through processing, marketing and distribution, access and storage.

There is also a need for the Commission to elaborate on the nature and content of this right and its obligations.

The UN Committee on Economic, Social and Cultural Rights' General Comment No 12 could provide a useful guide in this regard, but due consideration should be given to African contexts.

African States must also take concrete steps towards implementing this right at the domestic level. Relevant legislative and other measures must be put in place to ensure that the beneficiaries of the right enjoy it. Framework legislation, as discussed by Sibonile Khoza in this issue, is one such prerequisite.

**Christopher Mbazira** is a doctoral research fellow in the Social-Economic Rights Project, Community Law Centre, UWC.

## Enforcing the right to food in India

### The impact of social activism

#### Kamayani Bali Mahabal

There is an extremely high prevalence of hunger in India. Natural disasters such as floods and droughts worsen the situation. A large section of the population leads a hand-to-mouth existence on a daily basis. Although the country's food stocks have increased to more than 65 million tonnes in recent years and the food subsidy is nearing Rupees 30,000 crores (1 crore= 100 000; 1 Rupee= R6.77 or US \$0.022 as at 18 March 2003), hunger and malnutrition continue to terrorise poor people.

Hunger in India has gender and age dimensions. Half of the country's women suffer from anaemia and maternal under-nourishment. In relation to the latter its record is among the worst, resulting in under-weight babies and a high frequency of cardiovascular diseases in later life. Research shows further that more than half of the children suffer from

chronic under-nourishment and anaemia. This phenomenon has become popularly known as 'hunger amidst plenty'. Against this backdrop, it seems evident that the violation of the right to food is taking place in its worst form in India.

Hunger and starvation also have regional and geographical dimensions. These social evils not only recur persistently in particular regions, but also across much of India. Indeed, India is worse off than sub-Saharan Africa. For instance, estimates of under-nourishment (protein-energy malnutrition) are nearly twice as high. It is astonishing that despite the intermittent occurrence of famine, Africa manages to ensure a much higher level of regular nourishment than India does.

### Links between market systems, agriculture and food (in)security

With a population of over a billion, India prides itself on being the largest democracy in the world. Like many developing countries, it focuses much of its productive resources on exports. It is encouraged to do so by international agencies,

such as the World Bank, who argue that it is necessary for becoming more fully engaged in the global marketplace. This notion has sparked a heated debate. Its critics have argued that focusing on exports means neglecting needs at home. However, its advocates have contended that selling products outside the country, to those who have the most money, will strengthen the country's economy and, eventually, benefit its citizens.

However, the pattern of growth in agriculture has brought uneven development across regions in its wake and is characterised by low levels of productivity and degradation of natural resources in some areas. Lack of adequate capital, infrastructural support, and demand-side constraints (such as controls on the movement, storage and sale of agricultural products), continue to affect the economic viability of the agricultural sector. Consequently, agriculture has also slackened since the 1990s. Agriculture has also become a relatively unrewarding profession due to a generally unfavourable price regime and low value

addition, causing increased migration from rural areas as farmers abandon farming. Unless immediate corrective steps are taken, the situation is likely to be exacerbated in the wake of the integration of agricultural trade in the global system.

### Lack of resources or lack of political will?

In another recent development, India's huge foreign exchange surplus has prompted the Government to consider pre-paying some of the aid received while at the same time turning from an aid-receiving nation to an aid-giving nation. This is rather ironic, considering that spending in the social sector in India has either been stagnant or abysmally low.

The availability of food grains does not seem to be a problem. India has more than 50 million tonnes of food grains. It is true that most of the State governments have fiscal problems. However, a lack of political will is the problem, rather than the lack of resources. Unfortunately, the institutional structures that could undertake appropriate delivery systems have been eroded over the years and there is an urgent need to reinvent them along appropriate lines.

### Judicial decisions on hunger and starvation

The Indian Constitution does not expressly recognise the fundamental right to food. However, cases brought before the Supreme Court alleging violations of this right have been premised on a much broader 'right to life and liberty', enshrined in article 21 of the Constitution. The Supreme Court has been flooded with many such cases, one of which is outlined below.

#### Studies and statistics on hunger and starvation

Studies conducted by the Centre for Enquiry into Health and Allied Themes reveal that:

- 20% of tribal women suffer from chronic energy deficiency;
- 74 per cent of tribal children are underweight; and
- 64% of tribal women and 37% of women in non-slum areas of Mumbai suffer from anemia.

The poor health status of tribal people is not due to poverty and under-nutrition alone, but also to the dismal state of health facilities in their areas. This, in turn, reflects the lack of political power of these communities.



### The *People's Union* case

In May 2001, the People's Union for Civil Liberties (PUCL) filed a landmark public interest petition in the Supreme Court. The case revealed that over 50 million tonnes of food grains were lying idle in the premises of the Food Corporation of

India (FCI), although there was widespread hunger in the country, especially in the drought-affected areas of Rajasthan and Orissa. Initially, the case was brought against the Government of India, the FCI, and six State governments. Subsequently, the list of respondents was extended to include all States and Union territories.

### Arguments before Court

The petition alleged that the State was negligent in providing food security. It was argued that the public distribution system (PDS) was restricted to families living below the poverty line (BPL). Yet the monthly quota per family could not meet the nutritional standards set by the Indian Council of Medical Research. Even then, the system was implemented erratically. A survey in Rajasthan indicated that only a third of the sampled villages had regular distribution in the preceding three months, with no distribution at all in a sixth of villages. The identification of BPL households was also highly unreliable. Altogether, the assistance provided to BPL households through the PDS amounted to less than five rupees per person per month (about RO.73c or US \$0.11 c).

**The violations of the right to food in India have been premised on a much broader right to life and liberty enshrined in Art 21 of the Constitution.**

The petition also alleged that the Government's relief works were inadequate. Famine Codes operational in various States governed the provision of these works, and made them mandatory when drought was declared. Despite being required to give work to 'every person who comes for work

on a relief work', the Rajasthan Government followed a policy of 'labour ceilings'. By the Government's own statistics, this policy restricted employment to less than 5% of the drought-affected population. Actual employment was even lower, and failure to pay the legal minimum wage was reported at many places.

### The Court's decision: A call for drastic action

The Supreme Court found as a fact that surplus food stocks were available and, at the same time, that deaths from starvation were also occurring in a number of locations. It then issued an interim order directing the States to implement fully eight different centrally-sponsored schemes for food security, and to introduce cooked mid-day meals in all Government and government-assisted schools.

Since 2001, the Court has issued a number of other interim orders that have prodded the Union and the State governments into action. The orders have directed the State governments to complete the identification of the beneficiaries of certain welfare programmes, and to improve the implementation of food schemes and

employment programmes. The food scheme provides for Rupees 5,000 crores in cash and 5 million tonnes of food grain, and for the appointment of commissioners to monitor progress in executing the Court's rulings.

### Implementing the interim orders

In August 2001, the central Government felt the need to take concrete steps towards addressing the problem of 'hunger amidst plenty'. On 15 August, the Prime Minister announced a massive programme of employment generation, the Sampoorna Grameen Rozgar Yojana (SGRY). On 31 August, the central Government passed a fairly draconian order aimed at streamlining the public distribution system.

However, nothing has happened since then. If anything, the early positive steps were reversed. For instance, the way the SGRY guidelines are designed will ensure that State governments fail to implement the programme.

Similarly, according to the 2001-2 *Economic Survey* the release of food grains through the public distribution system was lower in 2001 than at any other time during the last 20 years. As for food stocks, they have increased further since the beginning of Supreme Court's hearing in the *People's Union* case.

### Monitoring the implementation of welfare programmes

In May 2002, another order was issued directing the States to refrain from diverting central funds meant for food and employment

schemes to other purposes. The Gram Sabha (village councils) were authorised to conduct social audits of all food and employment schemes implemented in their area. In addition, two reputable individuals, Dr N C Saxena and Mr S R Sankaran, were appointed as Commissioners to monitor the implementation of the schemes and to provide redress, on behalf of the Court, in respect of complaints arising from the schemes. The Commissioners were also expected to submit reports to the Supreme Court and seek interventions beyond existing parameters and on the larger issue of the right to food in India.

In their report to the Supreme Court submitted on 29 October 2002, the Commissioners stated that the States of Bihar, Jharkhand, Uttar Pradesh, Andhra Pradesh, Assam, West Bengal, Chhattisgarh and Gujarat had not given reasons for the PDS's failure to ensure food grains reached the poor. Nor did they provide any feedback on their compliance with the order to introduce mid-day meals, or with the process of identifying the poor for BPL ration cards.

The report reaffirms the States' lacklustre approach in eliminating hunger and starvation and ensuring the right to adequate food.

Thus far, the Commissioners have submitted four reports that have evaluated the implementation of food and employment related schemes. A follow-up to the fourth report was submitted in August 2003 with recommendations for immediate orders, as there had been flagrant cases of non-compliance with orders including the discontinuation of grain exports and a ban on the use of

labour-displacing machines for public works. The public, and even the Commissioners' investigation teams, are still being routinely denied access to documents pertaining to food and employment related schemes. These bureaucratic hurdles and obstacles clearly indicate a lack of political will on the part of the State governments.

### **Famine Codes given more teeth**

In the most recent interim order of May 2003, the Court directed the Governments to follow famine Codes in providing drought relief for the interim period of three months between May and July 2003. Thus, famine Codes, which have been serving as administrative guidelines, were given a binding force by the Supreme Court during that period. Many of these Codes were developed almost a century ago and revised by some States in the late 1980s.

Furthermore, the Court came down heavily on the current public distribution system. It directed the State governments to cancel the licences of retail ration shop dealers if they did not open on time, if they overcharged, made false entries on BPL cards, or engaged in black marketing. BPL households were permitted to buy grain on instalment.

### **A rights-based social welfare system for vulnerable groups**

The Court's directions have pushed the Government a step closer to

a rights-based social welfare system. The food security scheme cards are to be given to several categories of people who either have no regular support or no assured means of subsistence, or both.

In addition, the Court also lashed out at Jharkhand, Bihar and Uttar Pradesh States for not having initiated mid-day meal schemes at all, and provided guidelines on practical steps forward. The States have been directed to start providing mid-day meals immediately in at least 25% of their districts (with priority being given to poorest districts).

### **The Right to Food Campaign and the role of civil society**

Quietly and effectively, a nationwide public campaign has emerged over the past couple of years to pressurise the State to

address nutritional deficiencies, hunger and deaths arising from starvation. The Right to Food Campaign (the Campaign) operates on the premise that everyone has a fundamental right to be free from hunger and

under-nutrition. Realising this right requires not only equitable and sustainable food systems, but also a guarantee of livelihood security such as the right to work, land and social security. The Campaign pursues its goals through a wide range of activities, including initiating public hearings, action-orientated research, media advocacy and lobbying, as well as participating

**The Court came down heavily on the current public distribution system.**

in public interest litigation on the right to food. In relation to the latter activity, the Campaign has a small 'legal support group' which handles Supreme Court hearings.

The Campaign has already made some significant strides. It has forced some changes on the central and State governments. Rajasthan, for example, is not exactly a trailblazer in the field of social development, but it did take the lead last year in implementing a Supreme Court order directing State governments to introduce mid-day meals in all primary schools.

Further, efforts have continued to link the right to food with the right to work, and in particular, to campaign for 'employment guarantee acts' in various States. There is hope for progress on this matter, as it lies high on the political agenda.

Also, the 'mid-day meal movement' has continued to grow. According to official data, 50 million children now get a free school lunch, with another 50 million or so in the queue.

The role of civil society is indispensable in eliminating hunger and deaths from starvation. Re-

cently, social mobilisation has begun in the form of public hearings on the right to food campaign in India. Public pressure through public hearings is effective in asserting the right to food. However, what is really needed is the participation of civil society in planning, executing, monitoring and evaluating public policies relevant to this right.

Only a participatory approach will give the Government's policies on food and food security a more humane shape and a much-needed impetus.

Moreover, due recognition should be given to the fact that all pivotal rights - such as the rights to food, health, education and any other economic or social right - are interdependent. For example, providing sufficient food to eliminate under-nutrition will not really eliminate the chronic health disorders that have already set in. Providing adequate health care is also necessary. Similarly, to realise the right to food people should have access to education and information.

Last, but not least, the process of realising the right to adequate food should not violate any other socio-economic, civil or political rights.

**Only a participatory approach will give the Government's policies on food and food security a more humane shape and the much needed impetus.**

Access the Right to Food Campaign on [www.righttofood.com](http://www.righttofood.com)

**Kamayani Bali Mahabal** is an Advocate and a Senior Research officer at the Centre for Enquiry into Health and Allied Themes (CEHAT).

## Towards Voluntary Guidelines on the right to adequate food

Margret Vidar

The right to an adequate standard of living, including food, clothing and housing, was proclaimed in the Universal Declaration of Human Rights in 1948. It was subsequently codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 (art. 11). It has also been recognised expressly or implicitly in a number of other regional and international instruments.

However, the global reaffirmation and recognition of the right to food is not sufficient by itself. The right must be understood and the corresponding obligations implemented and enforced.

### The NGO Code of Conduct

In the preparations for the World Food Summit (WFS), some countries and non-governmental organisations (NGOs) attempted to obtain agreement on the adoption of a Code of Conduct regarding the

right to food. However, the idea was not politically feasible at the time. As a result, the Plan of Action of the WFS contains only a rather vague reference to such a Code.

The Rome Declaration on World Food Security reaffirmed the right to adequate food and the right to be free from hunger. It also recognised the role of democracy and all human rights in creating the environment for achieving food security.

At the NGO Forum during the WFS, NGOs adopted a declaration that called for the drafting of a Code of Conduct on the right to adequate food. After the WFS, three NGOs (FIAN International, WANHR and the International Jacques Maritain Institute) took the lead in preparing the Code. A draft was produced in 1997, which has gained the support of more than 800 NGOs.

The WFS gave rise to increased interest and momentum within the Food and Agriculture Organisation (FAO) of the United Nations and the human rights community. FAO took an active role in collaborating with the High Commissioner for Human Rights in implementing her mandate (Objective 7.4 of the WFS Plan of Action) to clarify the content of the right to adequate food and the means of its implementation, as a follow-up to the WFS. A series of Expert Consultations were held in 1997, 1998 and 2001. The first two - along with the NGO Code of Conduct - inspired the work of the Committee on Economic, Social and Cultural Rights (CESCR), which in May 1999 issued General Comment 12 (GC12) on the right to adequate food. This document gives an authoritative interpretation of that

right as contained in Article 11 of the ICESCR. In 2000, the Commission on Human Rights established the mandate of a Special Rapporteur on the Right to Food.

These developments increased the pressure for further negotiations on the Code of Conduct on the right, hence the elaboration of the Voluntary Guidelines for Food Security for All (the Guidelines).

### Establishment of an intergovernmental working group

At the World Food Summit: Five Years Later in 2002 (WFS 2002), it was decided that an Intergovernmental Working Group (IGWG) should be established within FAO to elaborate a set of Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security. The FAO Council formally established the IGWG in November 2002. Looking at its mandate in more detail, the following observations may be made:

- The Guidelines shall be “voluntary”. They shall not create any new, legally binding obligations. This is of particular relevance to States that are not parties to the ICESCR, but may also be used as an argument for using non-obligatory language (“may wish” rather than “should”).
- They shall give guidance on the “progressive realisation” of the right, which may imply that there are no immediate obligations.
- They shall address the right to “adequate” food, which may imply that there is no such thing as a right to food without qualifications.
- They shall be in the “context of national food security”, which

may imply that no international aspects should be discussed.

- They shall be drafted “with the participation of various stakeholders” including international NGOs with a relevant mandate.

The IGWG was instructed by the WFS 2002 and by Council to complete its task in two years, a time frame that already looks very optimistic. The First Session of the IGWG (IGWG 1) was convened in Rome in March 2003. IGWG 1 held a general debate on the various opinions and views submitted by States and stakeholders. The general debate was conducted in an innovative way that enabled both State and non-State participants to contribute on an equal and constructive footing. IGWG 1 then instructed its Bureau to prepare the first draft of the Guidelines in time for its Second Session.

The draft was finalised in September and submitted to the Second Session of the IGWG (IGWG 2), which was held in Rome in October 2003. At this Session, members and observers gave their views on the draft and made suggestions for amendments. While in the end IGWG 2 decided that the Bureau draft should form the basis of negotiations, numerous suggestions were made on the scope, language, structure and overall approach of the draft. Many considered that the draft was not sufficiently rights-based and that its language should be strengthened. Others stressed the voluntary nature of the guidelines and that they should not influence the legal obligations of States, hence the inappropriateness of strong language.

Some participants expressed concern over language that could

undermine internationally-agreed human rights standards and existing obligations. Others felt that provisions on national legal remedies and institutions needed strengthening. Furthermore, others noted imbalances between the different provisions, for instance, that more attention was being paid to markets and food safety than to structural causes of food insecurity, access to income, livelihood and assets.

No negotiations took place at IGWG 2. Instead, it was decided to establish an Open-Ended Working Group consisting of spokespersons for members and observers with the mandate to start the negotiations in preparation for the Third and Final Session of the IGWG in July 2004. The Open Ended Working Group would meet from 2-5 February 2004.

### The big issues in the negotiations

A fundamental difference of opinion as to the nature of the right to food and its corresponding obligations has surfaced in the IGWG. There is pressure for as narrow an interpretation as possible of the terms of the mandate of the IGWG.

The status of GC 12 has, in particular, been the subject of much discussion, including whether it should be explicitly or even implicitly referred to in the Guidelines. This is a fundamental question, as many maintain that GC 12 contains an authoritative interpretation of Article 11 of the ICESCR.

On the other hand, it should also be recognised that the ICESCR has 148 State parties, which is far less than the total number of members States to FAO and the UN respectively, all of which have the right to participate in the IGWG.

Another fundamental question relates to how to treat the international dimensions of the right to food. Even though the ICESCR explicitly refers to the importance of international co-operation, richer countries have never accepted

**Richer countries have never accepted that there are specific, legally binding obligations to render assistance to persons in other countries, not even in a state of emergency.**

that there are specific, legally binding obligations to render assistance to persons in other countries, not even in a state of emergency. In this regard, many commentators stress that the mandate of the IGWG does not extend beyond national borders in light of the wording "in the context of national food security".

One of the practical questions arising from the drafting process is how to structure the Guidelines. A number of suggestions have been made, for instance, to use the levels of obligations rather than the different sectors, as is the case with the current draft, as the basis of the Guidelines. There are also conflicts as to whether the Guidelines should be short and clear or whether they should provide practical guidance as well. Without some level of detail, the guidance provided will be minimal. While members and observers generally agree that the Guidelines should

be practical, there is no consensus on the implications of that word. Some, for instance, would take it to exclude or minimise references to legislative measures.

There are also inherent difficulties with the notion of 'margin of appreciation', which is a well-developed legal concept and especially applicable to national implementation of socio-economic rights, and the need for flexibility so that the Guidelines can apply to all countries, no matter what their situation, climate or level of development. At the same time, many maintain that the language should not render already binding obligations facultative. All these questions will have to be discussed further and resolved by the IGWG.

### Underlying complexities

Enjoyment of the right to food by everyone depends on the proper functioning of many institutions. Breakdowns in production, distribution, pricing, information and general poverty may all contribute to hunger. Access to food depends not only on land rights and food production and marketing, but also relies on income security and access to education. Rights-based approaches to product labelling and food safety would require consumer participation and respect for culture and free choice. Moreover, good nutrition depends on access to health care, clean water and sanitation. As obesity becomes a major public health threat, questions also arise concerning access to information about balanced diets and sedentary lifestyles. At each step in the process, States play an important protection and regulatory role, while the private sector, individu-

als and associations must also flourish. The exact role of State institutions, however, may depend on the level of development and wealth of different countries, as well as on political systems.

The right to food is also difficult because of the greater asymmetry it involves than do many other rights, in that the right of one person may not imply a corresponding obligation by anyone in particular. There may, in some instances, be a right to be fed, as there is often a legal obligation to feed one's children. Generally, however, the individual is responsible for feeding himself or herself. However, the State does have an obligation to step in under certain circumstances. There is also a more general right to live in an environment in which one may feed oneself, a claim for which it is difficult to assign responsibility between the private and the public, as well as among public institutions. International human rights law stipulates that the State must take steps to realise progressively the right to adequate food, but within a given State, different institutions may play a role, which can lead to responsibility at the national level.

While no human right comes without cost, food distinguishes itself by its very nature as a private good in the sense that it is produced by (mostly private) farmers and distributed through markets. Viewed thus, food can be regarded as the most commodified right. Other rights (such as health and education rights) are seen as 'naturally' or 'inherently' public services in the sense that the role of States is not fundamentally disputed. Its private goods nature may be one of the reasons for problems that some have with the right to food. It

is feared that the right lays an untenable burden on the State to provide food, which in turn could lead to disastrous interventions in market forces. However, as explained in GC12, the right to be fed should always be seen as a last resort.

A related possible objection to the notion of the right to food relates to 'efficiency'. The experiments in social markets and blanket food subsidies in the 1970s are widely thought to have been an expensive failure. Economists argue that private markets should allocate private goods like food. Since the early 1980s, international organisations have been urging their member States to abolish the old marketing parastatals and pull out of food markets.

However, to say that the Government must ensure that the food system works does not mean markets should be micro-managed. There are numerous instruments for ensuring the realisation of food rights that do not conflict with market liberalisation and deregulation and the principles of efficiency. Furthermore, it should be kept in mind that the right to food is an economic right, which demands the freedom for the individual to pursue economic activities in order to produce and procure food.

### Applicability of the Guidelines

As mentioned above, the Guidelines should apply to all States, whether or not they have ratified the ICESCR. Some have raised a concern, however, that the Bureau draft seems to be more applicable to developing countries. Even the most food-secure countries could improve individual enjoyment of the right to adequate food through rights-based approaches. There is always scope for more empowerment, better participation and stronger accountability. The FAO's position is that the Guidelines process is a unique opportunity to bring human rights and food security expertise together to produce a practical tool for States that want to adopt a rights-based approach to food security and implement the right to food. The Voluntary Guidelines should assist States in reviewing their strategies, policies, institutions and laws. However, for the Guidelines to be of any use, they must avoid reflecting the lowest common denominator.

**Margret Vidar is a Legal Officer at the Food and Agriculture Organisation of the UN.**

For more information, access the following web sites:

**IGWG:**

[www.fao.org/righttofood](http://www.fao.org/righttofood)

**FAO Legal Office Right to Food:**

[www.fao.org/Legal/rtf/rtf-e.htm](http://www.fao.org/Legal/rtf/rtf-e.htm)

**Office of the UN High Commissioner for Human Rights:**

[www.unhchr.ch](http://www.unhchr.ch)

**UN Special Rapporteur on the Right to Food:**

[www.righttofood.org](http://www.righttofood.org)

## Open-Ended Working Group session on Voluntary Guidelines on Right to Adequate Food

The Open-Ended Working Group of the Intergovernmental Working Group (IGWG) for the Elaboration of a set of Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security held its inter-sessional meeting on 2 to 5 February 2004 in Rome.

The meeting was attended by delegates from the United Nations, including representatives of the UN Special Rapporteur on the Right

to Food, delegates from 93 members of the UN's Food and Agriculture Organisation (FAO), observers from the Holy See and representatives of 17 international non-governmental organisations.

The meeting was a follow-up to the second IGWG session held on 27-29 October 2003, at which delegates and stakeholders gave their views on the draft Voluntary Guidelines prepared by the Bureau. At this meeting, it was agreed that negotiations would be conducted on the basis of the

draft prepared by the Bureau.

It was also agreed that the secretariat would summarise the debate and compile the proposals into a report to be circulated.

The Bureau was mandated to consolidate all the proposals but without changing them.

The third session is scheduled to take place from 5-9 July 2004 in Rome. At this session, the draft guidelines will be negotiated and finalised for submission to the Committee on World Food Security in September 2004.

See the full article on the Voluntary Guidelines on page 11.

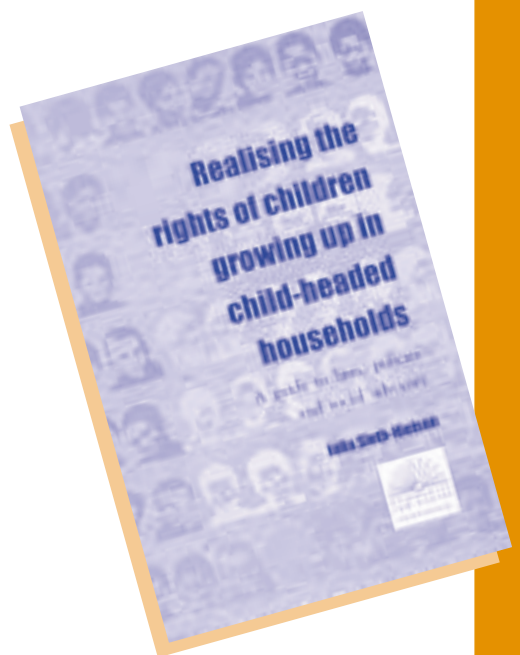
## Realising the rights of children growing up in child-headed households

The Project is glad to announce the release of its new lay publication, entitled *Realising the right of children growing up in child-headed households*. Written by Prof. Julia Sloth Nielson and edited by Sibonile Khoza and Sandra Liebenberg, this publication is aimed at presenting, in an accessible form, some of the main legal and policy issues concerning to child-headed households. It highlights some of the barriers that affect the rights of this group of children and explores areas where advocacy initiatives could promote a better legal framework.

The publication comprises six parts. Part 1 provides a brief introduction to the plight of, and challenges faced by, children living in child-headed households. Part 2 reviews international law,

which is increasingly beginning to provide a framework for the responsibilities of States facing large-scale orphanhood. Part 3 explores the dependence of realising children's legal rights on Government's constitutional obligations. Part 4 deals with the legislative and policy frameworks that have been established to steer Government's responses to child-headed households. It also reflects on the current law reform that would assist these children to gain access to resources, and would address existing gaps in the law. Part 5 tackles specific issues relevant to realising children's socio-economic rights in the context of child-headed households. Lastly, Part 6 highlights areas of concern where strategic advocacy can potentially play a role.

### BOOK REVIEW



The publication is accessible to a broad readership, not necessarily only those who know the law and legal debates.

The full text is available online: [www.communitylawcentre.org.za/ser/publications.php](http://www.communitylawcentre.org.za/ser/publications.php)

## REVIEW ONLINE

This and previous issues of the *ESR Review* are available online.

Please visit our website at:

[www.communitylawcentre.org.za/ser/index/php](http://www.communitylawcentre.org.za/ser/index/php)

## CONTRIBUTIONS

We welcome contributions and letters relating to socio-economic rights. Contributions must be no longer than 1 500 words in length, written in plain, accessible language, and e-mailed to Sibonile Khoza at [skhoza@uwc.ac.za](mailto:skhoza@uwc.ac.za). All contributions are edited.

## SUBSCRIBE

Subscribe to our electronic newsletter by filling in the subscription form at [www.communitylawcentre.org.za/ser/index/php](http://www.communitylawcentre.org.za/ser/index/php), which requires only your first name and e-mail address.

## FEEDBACK

Please take time to complete a simple questionnaire to help us improve *ESR Review*. It is available online at the address below and can be submitted by simply clicking on 'send' after completion.  
[www.communitylawcentre.org.za/ser/esr/esr\\_review.php](http://www.communitylawcentre.org.za/ser/esr/esr_review.php)