

Towards a Framework Law on the Right to Adequate Food in South Africa

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Seminar Report



FIAN - FoodFirst Information and Action Network

FoodFirst

promotes the fundamental human right to food. This human right is enshrined in the International Covenant on Economic, Social and Cultural Rights of the United Nations.

Information

FIAN informs victims about their right to feed themselves and alerts the general public about violations of this right.

Action

This is the centre piece of FIAN's work. Through its activities, FIAN supports the struggle of victims' groups against violations of their right to feed themselves and a lot of interventions were successful. With the help of FIAN, the victims' situation got better.

Network

FIAN is a network of members, sections and co-ordinations in more than 60 countries of the world joining hands for the realisation of the right to feed oneself.

FIAN: The international Human Rights Organisation working internationally for the realisation of the right to feed oneself

FIAN: Independent of governments, political parties, ideologies and without religious affiliation.

FIAN: Has consultative status with the United Nations, the Council of Europe, the African Commission of Human Rights

FIAN: Is active in all continents against hunger and malnutrition. Its work is unique

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7th March 2003

Thematic introduction

Kofi Yakpo, FIAN International

A cross-section of South African civil society organisations has come together in this seminar which are in one way or the other involved in the struggle for the realisation of the right to food. The South African Constitution entitles everyone to access to sufficient food and South Africa has signed the International Covenant on Economic, Social and Cultural Rights (ICESCR), which includes the right to food. At the same time, large parts of the South African population suffer from continuous hunger and malnutrition or experience periods of severe food shortage. The Constitutional text also provides for the progressive realisation of the right to food through legislative and other measures and in that it again mirrors the realisation obligation of the ICESCR. However, the South African state has so far not taken any concrete steps to specifically implement the right to food. The idea of a framework law on the right to food is to initiate and follow through such an implementation process. Going beyond the very general constitutional statement, it would contain elements such as a list of existing legislation relevant to the right to food; a list of "missing" legislation and remedies; an enumeration of targets to be achieved, a time-frame and benchmarks against which progress could be measured; institutional responsibilities and monitoring arrangements, etc. In that sense, the main aim of a framework law is the formulation of a political and legislative commitment to achieve the full realisation of the right to food within a specified time. The seminar provides the chance for South African civil society representatives to discuss the possibility of promoting the adoption of a framework law and assessing whether a framework law is at this point at all an appropriate rallying point in the struggle for the realisation of the right to food in South Africa. The search for civil society forms of action in the struggle for the right to food will therefore be a main focus of this seminar.

Introduction of participants

Marc Wegerif, NKUZI Development Association

See attached list of participants at the end of the report

Summary of Sessions

Implementing the Right to Food: international obligations

Fons Coomans, Centre for Human Rights, Maastricht University

In his keynote address, Mr. Coomans gave an overview of the content of the right to food and the obligations emanating for states from the principal international provisions that contain the right to food in particular Article 11 International Covenant on Economic, Social and Cultural Rights [1966]; Article 27 Convention on the rights of the Child [1989] – ratified by South Africa.

The right to adequate food, defined as the following: "The right to adequate food is realised when every man, woman, and child alone or in community with others, has physical and economic access to adequate food or means for its procurement." (CESCR, General Comment no. 12 section 6 1999). This entails the following specific obligations: the Obligation to Respect, Protect and to fulfil. Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights obliges the states to progressively realise the right to food. "Each state party to the present covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means, including particularly the adoption of legislative measures".

During question time, participants were particularly interested in the possibilities of sanctioning states' breaches of obligations. Sanctions were found to be very limited although there are now efforts underway by civil society for states to adopt an "optional protocol" that would allow individuals and organisations to submit complaints. However, there was general agreement about the shortcomings of a too "legalistic approach" and the need was recognised to use other forms of action to realise the right to food. Also, the lack of accountability of supra state entities such as the IMF, World Bank and the WTO was remarked.

Implementing the right to food: national obligations

Danie Brand, Pretoria University, Centre for Human Rights

The right to food in the SA constitution draws on international law for its content 27 (1) –Everyone has the right to access to sufficient food. Other rights are indirectly linked to this right: S25(5) fosters equitable access to land; right to water; right to social assistance, S24 a safe and healthy environment. Sec 27 is however limited by Sec 27 (2): realisation of this right is subject to reasonable legislative and other measures within available resources. Nevertheless, S 28 (1) gives children direct legal protection. Therefore the right to food is qualified for everyone and unqualified for children. The duties of the SA state can broadly be characterised as: fostering the availability of food and fostering access to food. Until now, there has however been no court case on the right to food, although the Grootboom case was on socio-economic rights. In the case, the court demanded reasonable measures to progressively realise rights.

The ensuing discussion raised the limitations of the law in spite of a favourable decision by the Constitutional Court in the Grootboom case. In particular, it was noted that implementation of the court orders was extremely slow or not at all happening. It was agreed that the law needs to be used strategically in litigating although there should not be any reliance on positive outcomes of such litigation.

Food security, hunger and malnutrition in SA – an overview

Cobus de Swardt, Programme for Land and Agrarian Studies, University of the Western Cape

Since the end of apartheid in 1994 there is political stability and social services but poverty and racial inequality have increased fairly dramatically: Average white has increased by 15%, while black income has decreased by 19%. The top third has been doing fairly well while there is extreme distress of bottom third. The presentation was based on a long term study of Mr de Swardt's team on poverty and focused in particular on long durational poverty in exemplary community. Some of the elements are: apartheid era spatial planning has lack of access to social grants due to cost of travel involved, food expenditure of up to 44% with a simultaneously high level of monetarisation of the rural economy and corresponding lack of money. Unemployment levels of over 60% compound poverty, while in some areas 67% of wage earners even do not earn enough to push their household average the poverty line. The cycle of poverty is such that even the level of education appears to have an insignificant impact on ability to find work. Likewise 68% of deaths are due to HIV, tuberculosis and assault. Hunger and malnutrition are an integral part of the poverty complex: 70% of population in these areas experience a hungry period at some time in the year, while high salt food and the high intake of refined carbohydrates are major causes of obesity and the associated effects. During the presentation and the discussion the following elements were identified that may help combat long durational poverty:

- increased direct access to the resources for basic household food production – agrarian reform and the distribution of idle state land
- Sustainable strategies for making social services appropriate and affordable and ensuring the social security system works more effectively
- Development of the density and depth of civil society through community based organisations and ensuring safety from violence
- Strategies that address the long-term impacts of the HIV/AIDS pandemic

Food price monitoring

Josephilda Nhlapo-Hlope, COSATU

The Food Price Monitoring Committee was established in December 2002 because the Government was concerned that the lack of access to food may cause social unrest. It is made up of academics, community representatives and COSATU. It reports to the Minister of Agriculture and Land Affairs and was created by the Marketing of Agricultural Products Act. A basket of basic food stuffs is monitored which includes staple foods such as maize, oil and meat but also apples and coffee, the appropriateness of which was doubtful to Ms Nhlapo-Hlope. The task of the Committee are in particular: the monitoring of sharp increases and decreases of food stuffs, the investigation of price formation mechanisms, recommendations on productivity improvements and the investigation of incidents of monopoly, etc. In particular the causes of high food prices are to be investigated.

The effects of high food prices are manifold: switching to less nutritious food stuff, slashing of the sumptuous Sunday lunch, and even people pulling their children out of school, due to financial problems. At the height of the recent food crisis, government responded by distributing food parcels for three months to the most vulnerable families but this was a temporary solution

The recent food crisis in Southern and South Africa raised some pertinent issues: are price changes symmetric or not? What were the exact reasons for the food price hikes during the crisis since there was no slump in production and the food export business was thriving? Some of the proposals brought forward by COSATU within the Committee in order to deal with the food crisis were the following: setting up of a parastatal on the supply side to store grain for times of need; the introduction of a Basic Income Grant scheme and promoting the uptake of social grants in general and the strengthening of the Committees legal standing, which so far lacks the bite necessary to actively influence public policy.

The ensuing discussion raised the issue of direct state intervention in the food market and it was found that the economic liberalisation policies have greatly narrowed the state's ability to intervene in the formation of food prices.

The interlinkage between the rights to nutrition and health care

Sibonile Khoza, Community Law Centre

The following extract from the Report on the People's Voice National Speak out on Poverty Hearings 1998" summarises very well a basic problem with respect to food in SA: "After we advise people about proper nutrition people say 'where can we get the food you are recommending because we don't have money to buy that food'".

The report highlights that awareness and educational initiatives of the health sector on nutrition could be undermined by lack of nutritional intake in poor households and communities. In that sense there is a complementarity of the role of access to nutrition and food for health care, and vice versa. Children and infants are particularly vulnerable to hunger and with regards to them two contrasting health concerns are raised: one, breastfeeding imposes risks of HIV transmission

from a mother to a child; two, breast milk substitutes – formula milk – is largely associated with infant mortality and morbidity, especially in poor resource settings. The Constitution protects both the right of children to nutrition and everyone's right to sufficient food. Inherent to the protection is the obligation to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of the right to sufficient food. However coherent legislation on food and nutrition is non-existent – what does exist is a host of piece-meal policies here and there. Current measures are poorly implemented, fragmented and do not necessarily respond to the needs of vulnerable groups. Measures aimed at fulfilling the right should be evaluated against the constitutional principles for the test of reasonableness as laid down in *Government of South Africa v Grootboom*. These require, amongst others, that a government policy or programme must be comprehensive, co-ordinated, coherent, flexible and balanced, respond to the urgent needs of those in desperate situations, reasonably formulated and implemented.

The following can therefore be concluded: Current policy measures are crucial steps in ensuring the realisation of the right to food in SA. However, the absence of legislation on both the right to food and nutrition falls foul of constitutional obligations. The implementation of current policies and the identified gaps would hardly pass the constitutional muster, particularly in the light of the *Grootboom* principles. The crucial nature of these rights in the enjoyment of other rights strongly suggests that a lot more needs to be done in this regard.

The Basic Income Grant Campaign

Karen Kallmann, The Black Sash

In South Africa 10% of Africans are malnourished and 25% of children have severe to moderate stunting. The Basic Income Grant (BIG) coalition, a national coalition of intersectoral civil society organisations representing the human rights sector, the aged, children, labour, HIV/AIDS organisations, the youth sector and religious sector, is campaigning for a minimum of R100 (approximately \$12) per person per month from the cradle to the grave as part of a comprehensive social security system that will address income poverty, capability poverty (such as healthcare, education, water and sanitation, transport, housing and jobs and skills training); asset poverty (land, credit and community infrastructure) and special needs. The Coalitions call for a BIG is founded on the following fundamental principles: *Universal Coverage*: It should be available to everyone, from cradle to grave, and should not be subject to a means test; It should *expand the social security net*: no individual should receive less in social and assistance grants than before the introduction of the Basic Income Grant; the grant should be *no less than R100 per person per month* on introduction and should be inflation indexed; Payments should be *facilitated through Public Institutions* such as Post Bank.

The BIG has many benefits: it will eliminate destitution and alleviate poverty and favour the largest, poorest households because everyone in a household receives it. It enables the poor access to other services offered by government and stimulates equitable economic development. Substantial work has been undertaken on the costs and financing options for a BIG and it has been found that the BIG is affordable and indeed essential in terms of promoting local demand and hence local economic development. The South African context demands that income security be addressed in the struggle towards realising the right to food as entrenched in our constitution. The BIG provides a programme which is based on the principles espoused in our landmark constitutional judgement on socio-economic rights (the *Grootboom* judgment) and would make a substantial contribution to realising the right to food.

In the ensuing discussion a controversy arose over the basic idea of handing out money to the poor, rather than securing poor people's access to resources such as land or credit. In response, it was pointed out that a BIG would always be complementary to other redistributive programmes such as land reform. In any case a universal BIG would be an essential element in alleviating the poverty of the most poor.

Open Forum

In the open forum at the end of the 7th March session, the following issues were raised:

- The role of fish as a source of nutrition must be considered. can feed the whole of Africa as well as solving nutritional issues
- The role of GMOs threatening food security and access to land needs to be closely looked at.
- The question of how to mobilise civil society for the right to food is of a great importance.
- The Right to Food vs Food Security: the former confers an entitlement to citizens and creates an obligation for the state, while the latter term says nothing about the state's legal commitment. The latter term should therefore be avoided.
- Inter-linkages between the different strategies that we adopt should be made. Likewise, we must develop collaborative strategies for the Right to Food in accordance with our strengths and resources etc.
- A support group should be formed that meets periodically and a multi-faceted strategy can evolve from there.
- Most importantly objectives and procedures of any future strategy to realise the right to food must be linked with the daily struggles of the people.

March 8th 2003

The Right to food in South Africa

Charlotte McClain, South African Human Rights Commission

South Africa's experience in the right to food has been supported by one of the most progressive constitutions, which entrenches a range of economic, social and cultural rights including the right to food (Section 27 (1)(b); Section 28 (1)(c); Sections 35 (2))

The South African Human Rights Commission is a constitutionally entrenched body which is impartial and independent. Its functions and activities in the RtF domain may be summarised as following: monitoring the realisation of the right to food, reporting to Parliament on its realisation, making recommendations on how to realise the right to food. Likewise, it is important to find out who the most vulnerable groups affected by hunger and malnutrition. People must be educated about the RtF. More resources, both material and human, and partnerships with stakeholders are needed. An important challenge is to ensure that current and forthcoming policies and legislation are actually implemented, amongst them the draft bill on food security, which is a kind of framework law . For this to happen, the monitoring process must be improved, and a set of reliable RtF indicators developed. Certain general factors are conducive to the better implementation of the right to food: maintaining good governance, social justice and public participation, engendering a culture of human rights, better resource and strengthen national institutions, fostering a political climate that is conducive to the realisation of the rtf and has more redistributive thrust. In general, the RtF has a great potential to be used as a tool to achieve social transformation.

In the ensuing question round, participants were particularly interested in knowing more about the SAHRC's relationship to the Government and Parliament, is it really independent, what are its powers of sanction when the RtF is violated by the state? In response, Ms McClain pointed out that Government has never interfered in the Commission's work. The Commission itself has few powers of sanction but it can support mediation, arbitration and litigation of groups or individuals whose RtF has been violated. In that sense, it is essential that civil society comes forward with cases for the Commission to act.

Land reform and the Right to Food

Zakes Hlatshwayo, National Land Committee (NLC)

Mr Hlatshwayo started by pointing out that the state is not a neutral player and represents a set of interests which are not necessarily the interests of the poor. The Basic Income Grant is an interim and short term solution but structural issues need to be addressed – one is land reform. The statistics of poverty are disgusting and disturbing and they indicate a growing incidence of poverty amongst the poor. Transformation has not been achieved with respect to land in the last ten years. Racial inequalities persist. The search for solutions must be centred on land reform, and in fact land rights and agrarian reform and the economy are in an intimate relationship. Land reform goes beyond the simple allocation of land to people. It encompasses access to credit and to markets and should involve the creation of a means of wealth accumulation as well as livelihood sustainability. Therefore land reform is not only necessary to redress the injustice of the past. It can also change the economic reality of the poor and plays an essential role in the struggle for the realisation of the right to food.

However, so far barely 2% of land have been transferred to landless people and restitution is not taking place at the expected pace. In fact, there is considerable resistance to land reform. Vested interests are increasingly pursuing the conversion of agricultural land to conservation and game parks rather than agricultural sustainability. A major problem is that vulnerable groups do not have the means to voice their grievances.

Questions from the audience focussed on the reasons for the slow implementation of land reform in particular since the World Bank has been forced to admit that the market-driven model of land reform has not worked well in South Africa. It was pointed out by Mr. Hlatshwayo that the negotiated settlement that ended apartheid put a limit on direct state intervention, in particular through the commitment to market driven land reform. According to the speaker, even though market forces and land reform can work together, the government is not proactive enough in looking for land for redistributive purposes. A discussion emerged on the role of human rights law in promoting land reform in the course of which participants agreed that mass mobilisation had a crucial role to play in driving and complementing any litigation to enforce the right to food. The question about the value of land was also raised. For rural South Africans, land has an intrinsic value beyond its productive and commercial value. In this sense, subsistence production must also be given its place in any land policy. However, the Department of Land Affairs has lately been reacting to the problems identified above and is moving towards a more proactive role of the state in acquiring land for distribution and the decentralisation of the process.

Minimum wages in the agricultural sector

Sipho Khumalo, South African Plantation and Allied Workers Union (SAAPAWU)

Minimum wages are determined by way of collective bargaining by workers, employers and their representatives. A minister may also investigate wages in sector or industry and determine minimum wages and conditions of employment in that particular sector. However the Union prefers workers and employers to come together around the table instead of a minister investigating and putting legislation on minimum wages in place. Rather workers must actively participate and negotiate the price of their labour. However, the problem of enforcement overshadows any agreement struck between the parties. Collective bargaining agreements are fully enforceable but vulnerable workers such as farm workers, but also domestic workers and workers in the commercial and catering sector often face eviction and dismissal in employers' responses to minimum wages. Likewise, although workers in agriculture are now allowed to form or join unions, commercial farmers are deliberately and consistently refuse to adhere to legislation that exists to protect farm workers. Farms are until today 'no-go' areas for Unions, access is often dangerous and it is extremely difficult to increase unionisation on them.

In general, employers vigorously oppose minimum wage laws, although the current minimum wage is way below what the unions have been suggesting. The policy of dividing up South African territory into different areas with different minimum wages determined according to a list of factors leads to the absurd situation where you have wage differences on a one farm of up to a third because the farm is split between two minimum wage areas. For workers in the agricultural sector the situation of the right to food is therefore very bad. The very low incomes in the sector make it nearly impossible to feed the family by buying sufficient food, and there are only very limited possibilities for growing food on the farms for subsistence since the land and resources, such as water, on the farms are controlled by the farmers.

International trade agreements and the right to food

Phenyo Rakate, International Lawyer and Vusi Shabalala, SAHRC

The end of the cold war heralded a shift in international relations: states are no longer as powerful as they used to be. Multi-lateral trade rules have been devised under a global, liberalised trade regime, with effects on poorer countries. In this context, the Southern African Development Community (SADC) has an important role to play. The SADC protocol on trade attempts to ensure harmony to protect its markets through rules of origin. For example, products that are up to 35% of Southern African origin have preferential access to SADC markets. In order to prevent non SADC companies from overusing South Africa as a gateway to access other markets of the trade area, the SADC adopted rules of origin. In the Washington Consensus era of today South Africa is to focus on its "comparative advantage" and export agricultural products. The protection of their markets by Northern countries has however led to a situation where Southern countries are being obliged to open their markets for agricultural and other produce while Northern countries' markets are heavily protected.

What is the impact on the situation of the right to food in South Africa? The US and European Union pay enormous subsidies to their farmers which add up to the high tariff barriers erected against agricultural imports from the South. Meanwhile adherence in South Africa to the liberal economic model means that the exportation of food is encouraged and massive amounts of agricultural produce are exported – notwithstanding the recent food emergency and hunger crisis in of the country. In the view of the speakers, government has to play an active role in regulating food production and the export market in order to promote the realisation of the right to food.

A Draft Bill on Food Security for South Africa

Kosie van Zyl, Consultant on Agricultural Legislation

The draft Bill on Food Security was commissioned by the Ministry of Agriculture and was written in 2001, with a last draft being submitted in June 2002. Mr van Zyl, the principal drafter of the Bill, pointed out that he drafted the bill more or less off the top of his head, given that no such document existed in any other jurisdiction so far. In its preamble, the food security draft bill reiterates the constitutional right of access to sufficient food and the progressive realisation obligation. Essentially, the draft bill creates three government appointed institutions a national advisory forum, a steering committee and a national co-ordinator. These with advisory, monitoring and managerial responsibility for "food security implementation and management plans" as well as outlining the institutional procedures of cooperation between different government departments and delineating competences. These food security plans are policies aimed at achieving food security, the details of which are to be elaborated by the relevant government departments. Other sections deal with conflict management between the involved institutions, funding (composed of budget funding, donor funding and development funding), and administration.

The right to food in India

Colin Gonsalves, Human Rights Law Network, New Dehli

Mr Gonsalves opened his talk by stating that South Africa and India had much in common: both countries are self sufficient in grain; export grain but also have hungry populations, they both have a history of freedom movements who are now in power and not living up to their promises, their constitutional courts are excellent and in fact the present South African Constitution Court might be the best that SA will ever again have. Finally both Constitutions contain the right to food and therefore make it a justiciable right. Therefore the road is open in both countries for a mixed strategy of struggle and litigation. Globalisation has also imposed a similar set-up on both countries: they need not produce food crops for themselves but rather concentrate on growing flowers and cash crops. As a result of these policies, India today has 60 million tons of grain rotting and 300 million people starving. In fact starvation is a necessary corollary of market liberalisation policies.

In spite of the above facts, there are still some elements in Indian public policy that have been inherited from the post-independence era, in which the poor and starving are given some support: The Indian Public distribution system (PDS) is a government programme through which government collects grain from farmers and then distributes it to the poorest of the poor. The Midday meal for children programme has a massive impact on attendance in school. The extension of the Food for work programme is the principle demand of the ongoing Right to Food Campaign in India, since people unwilling to ask for money because of corruption and the unwillingness of government to give. Through the latter programme, villages decides what public works must be done and the government gives work at the minimum wage which is paid in kind, mostly grain. The recent first-ever Court Order on the right to food by the Indian Constitutional Court forced the government to effectively continue with these public programmes, which is a first victory for the right to food in the country.

The role of Indian civil society is crucial. Civil society must be empowered. A proposal is that village committees monitor if rights are implemented and should take government ministers to court if not. Likewise civil society must be informed about their rights in various languages and through different mediums. Through the above-mentioned court order the Indian Right to Food Campaign has been given momentum. The same could apply for South Africa: Why not find a

good case of a violation of the right to food and take it to the Constitutional Court? Alternative policies must also be developed and proposed by civil society: "this is the problem, this is the solution, this is what we want from government". Here civil society should focus on the major emergency areas. The duties of both the Indian and the South African governments are clear. They are to sustain producers, to avoid food imports, to maintain prices, to maintain subsidies, and to say no to genetically manipulated crops.

Questions from the audience focussed on the issue how to mobilise support of the people and civil society for such a right to food campaign. Mr Gonsalves was quick to point out that any campaign ought to follow a dual strategy of mass mobilisation of all relevant movements and stakeholders and strategic litigation. The probability to loose a case in the Constitutional Court is very high, in fact winning a right to food case should be counted on at all. Rather litigation is a mobilising factor and it can expose the deficiencies of the current system.

The way forward

Facilitated by Mu-arfia Jonas, TCOE

In the final session, participants brain-stormed in order to find ways to carry the right to food forward. The following main suggestions were made:

Take stock of the current situation of the right to food:

- what are the immediate survivalist needs of the poor
- Identify vulnerable groups
- Communities rights to land and oceans

How collaborate and bring other stakeholders into the process?:

- Position paper to circulate to SANGOCO and others
- what strategies can be employed to look at short and long term interventions
- Need for community involvement
- Coordinate efforts of like-minded organisations and people
- Form a steering committee
- Decentralise campaign to provincial level and below
- introduce RtF approach into organisations' ongoing work
- Identify interest groups – each organisation should try and identify CBO's
- look at what a test case would look like on the right to food,
- create network of organisations
- create coordinating mechanisms which can support each other.
- Getting other organisations on board.
- Set clear and specific objectives

Create a support group/ steering committee with the following task:

- Coordinate activities
- organise campaign in each province
- research and administer
- prepare litigation

Proposed slogans:

- Not one more death due to a lack of safe food
- No one should be limited in reaching their full potential due to a lack of food
- Every person should have the opportunity and access to resources to produce sufficient food to sustain themselves or choose to access to income enabling them to buy sufficient food to sustain themselves

Finally, a steering group was formed which included the following members: Karen Kallmann (The Black Sash), Fatemah Shaikh (NKUZI), Andy Johnston (Artisanal Fishers Association), Navy Simukonda (TRALSO), Eric Watkinson (NALEDI), Sibonile Khoza (Community Law Centre), Kofi Yakpo (FIAN International). The steering group decided to begin organising a National Right to Food Campaign in South Africa.

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