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Advocating for the Right to Food in South Africa

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An Analysis of Judicial Activism, Public Interest Litigation and Collective Action in South Africa as a Strategy to Secure the Right to Food

A dissertation submitted in fulfilment of the requirements for the degree of Masters of Arts by Dissertation to the School of Social Sciences, University of the Witwatersrand, Johannesburg.

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March, 2016

Declaration

I declare that this dissertation is my own unaided work. It is submitted for the degree of Master of Arts in Human Rights at the University of the Witwatersrand, Johannesburg.

It has not been submitted before for any other degree or examination at any other University.

Signed_____ This 11th day of March 2016

Busiso Helard Moyo

Abstract

This dissertation is an investigation of the conditions that would bring about the legal enforcement of the right to access sufficient food in South Africa as premised on the Constitution. This is motivated by the fact that modern-society has seen a gradual increase in the occurrence of socio-economic rights being protected through the legal opportunity structure of countries, ultimately leading to public interest litigation.

At present, the right to food is being violated in South Africa. Taking into account the ambit of the constitution and several international instruments that speak to its realisation and the fact that there has been litigation on other socio-economic rights, suggesting that tools for litigation are in place, it is perplexing that right to food litigation has not taken place.

The research question of this paper is therefore: which factors and conditions would have to be present for there to arise public interest litigation on the right to food in South Africa?

Due to the fact that literature on right to food litigation is almost non-existent, especially for the African context, this is an explorative case study. The dissertation utilises an analytical framework to study the prospect of litigation on the right to food becoming a reality. The study is largely theory-driven, relying on various sources of evidence: secondary literature, conducted-research and official state documents speaking to the countries right to food narrative.

The analysis reveals that there are many barriers to right to food litigation in South Africa. These mainly have to do with the conditions that impact the manner in which right to food violations are understood by the poor and marginalised in society on one hand and the responsiveness of the courts to the voice of the marginalised and poor on the other. The dissertation concludes that the most crucial factors for right to food litigation in South Africa to arise are the need for more information and awareness around the right to food; improved legal assistance for the hungry and poor; more trust in the legal system amongst those at the bottom of the pyramid; the need for a stronger focus on litigation strategies by civil society and advocacy groups and the need for judges to be more innovative in carrying-out their duties. The conclusions of this study have relevance for those working actively for the promotion and realisation of the right to food in South Africa.

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To Lotakani and Aunty-Grace, I doubt that I will ever be able to convey my appreciation fully, thank you so much for everything. I shall forever be indebted to the Kanjo family.

To Gogo, Mama and Mamo this is for you. Love you guys!

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Why is the food of the people so scarce? . . . Where does the blame lie? . . . I have been unable to attain a proper balance between important and unimportant affairs. Let this matter be debated. . . . Let all exhaust their efforts and ponder deeply whether there is some way to aid the people.

Edict of **Emperor Wen**

On the Primacy of Agriculture (163 B.C.)

1. Introduction

The world has experienced an increase in global food hunger levels over the last decade, the Food and Agriculture Organization of the United Nations (FAO) in its 2008 report on *The State of Food Insecurity in the World* stipulates that the world has experienced a rise of hunger levels to 923 million malnourished children, men and women in contrast to 848 million in 2007, notwithstanding cautions in 2003 of a "setback in the war against hunger[1]." Additionally, it was noted in the year 2009 that over one billion people were malnourished in the world with the majority of the affected people coming from the developing world. Interestingly, the paradox lies in the fact that the world now has an equal amount of people who are overweight, with estimates at more or less one billion, further exhibiting the inequality of global food consumption[2]. Coupled with the 2007-2008 world food crises it is evident that the current reality is that the fight against hunger is a regressive-one "rather than the progressive realization of the right to food.[3]" The aforementioned is occurring in a world food system that is at the mercy of a handful of agribusinesses, oriented toward large-scale homogenized farming that is chemical and capital intensive, and has caused volatile food prices that are particularly harmful to the poor[4].

For South Africa, the dawn of democracy led to the drafting of the Constitution of the Republic of South Africa - Act 108 of 1996 (Constitution), a written record of the need to redress past injustices and forge a new culture of respect, equality and freedom. Two conceptual approaches became embedded in the Constitution, namely, constitutionalism and the entrenchment of fundamental rights. Significantly, one of the fundamental characteristics of the Constitution has been the inclusion of economic and social rights. This means that the country has strong constitutional guarantees and legal frameworks for the realisation of socio-economic rights like the right to food. Notably, South Africa "is one of just 20 countries in the world with constitutions that recognize the right to food and of

[1] FAO, The State of Food insecurity in the World 2008, Rome, FAO, 2008, pp.6 - 12
[2] Schanbacher, W. 2013.Conceptualizing the Human Right to Food in the Food Sovereignty Framework, Food Sovereignty: A Critical Dialogue – Conference Paper no. 53, p2. International Conference September 14-15. Available at: http://www.yale.edu/agrarianstudies/foodsovereignty/pprs/53_Schanbacher_2013.pdf (Accessed 26 May 2014)
[3] Ziegler, J., Golay, C., Mahon C and Way, S. 2011. The fight for the right to food. Lessons learned. London: Palgrave MacMillan, p1
[4] Loc cit

these one of the only two with provisions that are justiciable[5].” As such, the State’s basic duty as detailed under section 27 of the Constitution is to take reasonable steps, within its available resources, to realise the right to food over time. To meet these duties, the State must simply use whichever measures it sees fit that will lead to food security. Since the democratic dispensation, the country has received praise globally for its ‘model’ Constitution and the pioneering of litigation on economic and social rights. Yet despite this constitutional achievement, the right to food has not been litigated in the courts of the country.

1.1 Focal Research Question/Problem

The aim of this paper is to investigate the conditions for legal enforcement of the right to food in South Africa. The right to food is a human right protected and advocated for in the global human rights dispensation, recognized in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Social, Economic and Cultural Rights (ICSECR), and further elaborated-on in General Comments of the Committee on Economic, Social and Cultural Rights as well as in declarations of global inter-governmental meetings. However, in South Africa, there is no legislation regulating food security; it is only safeguarded under the Constitution. While this right can be said to be one of the most basic rights (basic in the sense that it is universally recognised) there is a need for practical implementation of human rights principles through the entire food-value-chain to ensure the success of this guaranteed right that so few people have genuinely seen realized. The country is described as food secure according to global estimates of food security, yet the country still harbours pockets of severe hunger cases, this is substantiated by the fact that while the country is a major agricultural producer and a net food exporter, many households and individuals are food insecure as shown in data on child under-nutrition and stunting[6]. Poignantly, the South African situation is dire – the South African National Health and Nutrition Examination

[5] Fukuda-Parr, S. 2012. Debate on the right to food in South Africa: Entitlements, endowments and the role of economic and social policy. Community Law Centre ESR Review, Vol. 13 No. 2, University of the Western Cape, p6. Available at: www.communitylawcentre.org.za/projects/...rights/...2_2012.../download (Accessed 26 May 2014)

[6] There have been three national nutrition surveys in the last 20 years: The 1999 National Food Consumption Survey (NFCS), the 2005 NFCS-Fortification Baseline-I and the 2012 South African National Health and Nutrition Examination Survey (SANHANES-1). Comparing results from the first two surveys shows that stunting and underweight remain by far the most common nutritional disorders affecting almost one in five and almost one in ten children respectively.

Survey (SANHANES-1) that was conducted in 2012 notes that "nutrition-specific and nutrition-sensitive interventions are needed to address the dual problems of chronic under-nutrition (stunting) and the rapidly rising trend of overweight and obesity among children in South Africa[7]." As substantiation to the aforementioned the study noted that "the youngest boys and girls (0-3 years of age) had the highest prevalence of stunting (26.9% and 25.9%), with the lowest prevalence recorded in the 7-9 year age group (10% and 8.7%, respectively).[8]" On the other hand, in the midst of the turmoil it appears a positive is that "under-nutrition in children younger than ten years of age has decreased since 2005, with the exception of stunting among the youngest age group (0-3 years).[9]"

All the same, the human tragedy of the country's food security situation was graphically illustrated by the Sowetan newspaper in November 2011, when it reported on the untimely death of four siblings in the North West province, caused by hunger. Reports state that they died in their quest to find their mother and sister who had left in search of food. The post mortem results revealed that the cause of death was hunger and dehydration after they had walked a distance of more than 10 km[10]. Such headlines only serve to highlight the urgency needed in bringing-about accountability in the realisation of the right to food in South Africa. Amongst the many strategies that activists working on the right to food may choose to adopt in challenging the state in this regard is the use of public interest litigation, a strategy that has proved to be a credible tool in the promotion of socio-economic rights throughout many parts of the world, not least in South Africa.

Although the country has opted for a robust set of constitutional guarantees, it appears that its economic and social policies to date have largely focused on cash transfers, public provisioning to support consumption of the most marginalized and vulnerable (children, aged and the disabled) and the provision of public goods (housing, water, education, and

[7] Human Sciences Research Council (HSRC). 2013. Nutritional Status of Children. SANHANES-1 Media Release 6 August 2013. Available at http://www.hsrc.ac.za/uploads/pageContent/3895/02%20NUTRITIONAL%20STATUS%20OF%20CHILDREN.pdf (Accessed 30 September 2014)
[8] Ibid, p2
[9] Loc cit.
[10] The Sowetan. Hunger killed them. 11 November 2011. See: http://www.sowetanlive.co.za/news/2011/11/11/hunger-killed-4-children?filter=all_comments

health)[11]. Subsequently, it follows that the public interest litigation that has defined South Africa's human rights framework thus far has been geared towards the provision of the said public goods. This is commendable for a fledgling democracy like South Africa, however, a concern for this dissertation is that public interest litigation on the right to food is yet to take place. With the right to food far from being realized - despite being formally guaranteed both in international law and the country's constitution - the lack of public interest litigation is a bit of a mystery. Therefore, this dissertation will investigate the factors that inhibit right-to-food litigation. However, this will not be a debate over the merits of litigation as a great strategy but will simply unpack litigation as a tactic that has the potential to bring about the realisation of the right to food because it has been successful in strengthening other socio-economic rights in South Africa.

Due to the appropriate conditions in the country that seem to favour litigation on the right to food, the research of this paper is driven by the curiosity of why this has not taken place. The investigation revolves around the "opportunity situation" of activists working on the promotion of the right to food, the research question of this paper is therefore as follows:

Which factors and conditions would have to be present for public interest litigation on the right to food to arise in South Africa?

1.1.2 Hypotheses and Questions

It has been acknowledged by the UN FAO that currently more than one billion people globally are seriously undernourished, juxtaposed with the fact that the FAO also notes that world agriculture could relieve approximately 12 billion people currently[12], it becomes evident that world hunger is not an issue of the world failing to feed the global population but rather it has to do with poor distribution of food and the inability of the poor to purchase food[13]. Also, worth noting is that in the year 2000, as a result of the UN

[11] Fukuda-Parr, S. 2012. Economic and Social Rights: Obstacles or Handmaiden of Growth, The Right to Food in South Africa: Entitlements, Endowments and the Role of Economic and Social Policy. Seminar held at the University of Cape Town, Department of Social Development May 30-31, p11. See: http://www.serfindex.org/wp-content/uploads/2012/07/Fukuda-Parr-Policy-Issues-may-2012.pdf

[12] Ziegler, J., Golay, C., Mahon C and Way, S. 2011. Op Cit.

[13] Brandt LCM, 2011. Enough food is not enough: Litigation as a strategy to secure the right to food in Guatemala, Department of Comparative Politics, University of Bergen, p2. Available at http://www.cmi.no/publications/publication/?4215=enough-food-is-not-enough-litigation-as-a-strategy (Accessed 27 April 2014)

Millennium Declaration[14] the world committed to, in principle, halving the proportion of undernourished people in the world by the year 2015. With the 2015 deadline upon us, this objective is evidently far from being reached. Brandt notes that whilst the proportion of people living in severe poverty decreased throughout the 1990s and beginning of the 2000s[15], the number of undernourished people has increased ever since the mid-1990s, and in recent years, in the context of a food price crisis (e.g 2008 food riots in Egypt) and the on-going global economic crisis, the situation has deteriorated[16]. Significantly, latest data from the World Bank (WB) regarding poverty levels and global food pricing notes that there has been negative improvement in the world's attempt at addressing poverty and hunger woes. The WB warns that the surge in food pricing, driven in part by global oil prices which have had a knock-on effect on fuel costs, are driving many people into extreme poverty[17]. More-so, a growing concern amongst activists globally is that the rise in levels of hunger and malnutrition implicitly mean that poor people spend all of their money on food[18]. Action contre la Faim (Action against Hunger) vividly painted the picture of the struggle against hunger globally when they wrote: "many poor people around the world do not get enough to eat because food production is geared to cash payment[19]." As such, it follows that those who have capital eat and those without suffer from hunger and the consequences thereof and often die. "This silent tragedy occurs daily in a world overflowing with riches, in a world which already produces enough food to feed the global population[20]."

Former president of the WB, Robert Zoellick, stressed that more than anything else the food price crisis was one of the biggest threats facing the so called "third-world"[21]. He underscored the seriousness of the situation by emphasizing the fact that if food woes are not addressed in earnest, countries risk losing a generation. This has also been echoed in recent world development reports, where one of the main conclusions stresses the need to

[14] In 2000, 189 nations made a promise to free people from extreme poverty and multiple deprivations. This pledge turned into the eight Millennium Development Goals.
[15] Brandt LCM, 2011. Op Cit
[16] Ibid, p2
[17] British Broadcasting Corporation News (BBC). 2011. Food prices: World Bank warns millions face poverty. Available at http://www.bbc.co.uk/news/business-13086979 (Accessed 26 May 2014)
[18] Poor people have smaller, more irregular, and often more unreliable incomes, the great bulk of which may be spent as soon as it is received on food and the means to cook it.
[19] Ziegler, J., Golay, C., Mahon C and Way, S. 2011. Op Cit.
[20] Ibid, p3
[21] British Broadcasting Corporation News (BBC). 2011. World Bank president: 'One shock away from crisis'. Available at http://www.bbc.co.uk/news/business-13108166 (Accessed 26 May 2014)

work for more citizen security, justice and jobs – highlighting the link between cash and employment as relating to the question of access to food[22]. It is in this context, that this dissertation seeks to delve deeper into the subject of hunger and food, and how to secure the right to food for the South African context.

For South Africa, the right to food provides a particularly useful framework for analysis of food insecurity and hunger in the country. It highlights the problem of lack of access and entitlement failures; the multiple aspects of a food system that determines availability, access, adequacy and sustainability that go beyond production to distribution to income poverty and inequality and the capacity to consume quality food. What many people don't realise is that even more people suffer from "hidden hunger" in South Africa – due to a lack of a nourishing food system available to those at the bottom of the pyramid. Therefore a rights framework focuses our attention on the multiple dimensions of food insecurity for individuals and households, and the multiple aspects of government policy effort required to improve food security whilst also tapping into the issues of power dynamics. Thus the rights framework provides a more holistic and richer perspective than production-oriented or basic-needs-oriented analysis that would focus on systemic sources of hunger.

Interestingly, the ICESCR goes further, saying that states must do everything possible to ensure adequate nutrition - and legislate to that effect. However, hungry citizens cannot prosecute their government under the Covenant, only under their country's own rule of law. Nonetheless, if we are to judge the South African government on the international instruments the country has ratified thus far, it appears prominence is given to civil and political rights than on socio-economic rights. This is substantiated by the fact that South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR) yet there's been a reluctance to ratify the ICESCR. Furthermore, although the ratification of the IESCR serves as a pre-condition to the ratification of the Optional Protocol to the IESCR, it must be acknowledged that the optional protocol opens up avenues for fighting poverty. The protocol provides the ideal platform for bringing-about accountability for poverty and strengthens the manner in which violations related to socio-economic rights can be identified and addressed.

[22] Ibid, p1

> Ratification of the Optional Protocol would serve to strengthen the domestic protection of socio-economic rights through policy, legislation and jurisprudence. Article 3 of the Protocol requires the exhaustion of all available domestic remedies before a complaint can be heard by the UN Committee on Economic, Social and Cultural Rights. This as a result encourages the use, development and strengthening of mechanisms at the national level for the enforcement of these rights[23].

Even so, it must be acknowledged that adjudication of socio-economic rights is still possible within the South African context, though, victims ought to be given the choice of approaching an international body in instances where they have not been able to obtain appropriate remedy from domestic courts. All the same, the inclusion of the right to food under section 27 of the South African constitution offers citizens seeking to prosecute the state a platform to do so. In a ground-breaking legal case, *Government of the Republic of South Africa v. Irene Grootboom and others* (Grootboom), the court ruled that the Government had violated the Constitution by not making 'reasonable' provision for persons in desperate need[24]. Although the case concerned the right to housing, the inference is that due to the fact that the right to food enjoys similar constitutional protection the outcome of the case has relevance for the realisation of the right to food in South Africa. Consequently, it needs no mention that it is a difficult and almost impossible task for the starving and poor to take the state to court but it must be acknowledged that Non-Governmental Organisations (NGO's) and other bodies can use the law in order to protect the poor. Yet, in the South African context, the law has not been utilised to be the bridge between the hungry and the food they need – unpacking this is the central inquiry of this paper.

There are several avenues human rights activists seeking to promote and safeguard the right to food can adopt in their efforts to make-real the realization of this right. Noteworthy avenues revolve around mobilization of society, advocacy campaigns seeking to lobby political entities, government negotiations, vibrant and vocal civil society activism validated by powerful media-involvement, among others. On the other hand, public interest litigation has also gradually become a credible avenue for ensuring that governments are accountable

[23] University of the Western Cape. 2014. Community Law Centre. Parliamentary Programme: Human Rights Dialogue, Why Should South Africa Ratify the ICESCR and its Optional Protocol, p6. Available at http://www.peopletoparliament.org.za/focus-areas/socio-economic-rights/campaigns/ICESCR-20-20why-20should-20SA-20ratify-20-2031.08.2010-1.PDF/view (Accessed 30 September 2014)
[24] See: http://www.fao.org/worldfoodsummit/english/newsroom/focus/focus6.htm

to those they serve. Increasingly, activists and change agents are resorting to this tool when dealing with socio-economic woes. However, this is not to imply that litigation is innately useful or the preferred way of bringing about social justice among campaigners or that it will necessarily bring about desired outcomes. However, observing the potential litigation has to make an impact, this dissertation will delve into the dynamics of public interest litigation - providing more knowledge on how it operates and in what kind of environment/s it is most likely to triumph, contextually in the quest to safeguard and protect the right to food. Generally speaking, it must be understood that all victims of violations of the right to food should have access to effective remedies, including access to justice to claim their right[25]. Notably, countries such as India have vigorously pursued this line of thought in that the right to life has been interpreted extensively by the Supreme Court of the country to include the right to food[26].

Through the study of a "negative case" – in which human rights violations have occurred and the legal foundations appear to be in place – this thesis gives an analysis of the conditions that could bring about public interest litigation on the right to food. South Africa is an interesting case in this regard, food insecurity at the moment is already quite precarious in that it affects 26 percent of South Africans and stalks a further 28.3 percent according to the SANHANES study[27]. Moreover, according to the General Household Survey (GHS) of 2012, StatsSA noted that 22 percent of the households in South Africa ran out of money to buy food, with 20 percent having to skip or cut meals, and 17 percent having skipped a meal during the reporting period[28]. Therefore, in light of such findings, an understanding of the knowledge of factors and conditions that work against food litigation in South Africa is the key aim of this dissertation. The underlying motive is to provide a better understanding of which strategies are more likely to succeed in promoting and securing the right to food in light of available data depicting the gravity of food insecurity in South Africa. Emphasis is placed on the fact that the world produces enough food to feed

[25] Ziegler, J., Golay, C., Mahon C and Way, S. 2011. Op Cit, p265
[26] Ibid, p265
[27] Human Sciences Research Council. 2012.The South African National Health and Nutrition Examination Survey: SANHANES-1: the health and nutritional status of the nation. See: http://www.hsrcpress.ac.za/product.php?productid=2314&cat=0&page=1&featured&freedownload=1 (Accessed 01 November 2013)
[28] Statistics South Africa. 2012. General Household Survey. Available at http://www.statssa.gov.za/publications/P0318/P0318August2012.pdf (Accessed 01 November 2013)

the entire global population – evidently, there is a need for stronger pressure on governments to be more responsive to food insecurity, it is in this context that the findings presented in this study maybe of relevance to other democracies in similar circumstances. The findings of this paper also provide a knowledge base for those who are actively involved in the promotion of food rights in the country and the region.

1.1.3 Thesis structure and outline

This thesis is structured as follows: Chapter one, the Introduction, defines food security and contextualises the prevalence of hunger at the global and national levels. In so doing, it highlights the severity of the challenge and more importantly it identifies the involvement of various global institutions in defining and engaging with the problem of hunger thus far.

The second chapter will focus on the research design and methodology, outlining the research methodology that has been adopted in researching this thesis. Additionally, social rights jurisprudence and the justiciability of the right to food will also be elaborated on. The underlying motive is to present a thorough, but concise, overview and discussion of the most important scholarly thinking around issues pertaining to the right to food, strategies in the promotion of socio-economic rights and social rights jurisprudence and justiciability. The chapter concludes with a presentation of the theoretical and analytical framework that functions as a guideline for the analysis presented in this paper.

Furthermore, chapter three accounts for the scientific method that is used in the analysis of the research question, and discusses how the data that is being used in the study has been collected.

The fourth chapter presents the South African case. Beginning with an overview of the food security context of the country, the chapter provides a good starting point for understanding the case and elaborates on the state of hunger and food insecurity, the state's obligations in fulfilling the right to food, and the state of the judiciary and litigation in South Africa. The aim of the fourth chapter is to provide a knowledge-base for the subsequent analysis and a context within which the analysis is to be understood.

The fifth chapter then serves as an exploration of the research question. Namely, factors that are favourable to the emergence of right to food litigation in South Africa, as well as

those factors that are either not conducive or not present, for litigation to take place. This chapter provides an understanding of what the main obstacles against right-to-food litigation in South Africa are, and which factors it appears would have to be present for such litigation to arise.

Lastly, the sixth chapter, focusses on findings and recommendations - providing a summary of the key findings and recommendations regarding which factors and conditions have to be in place for there to arise public interest litigation on the right to food in South Africa. In other words, the chapter sums up the findings and suggests further and broader implications of this case study.

1.2 Theoretical framework

The purpose of this study is to tackle South Africa's socio-economic rights framework as it relates to the right to food. The promotion of socio-economic rights has been characterized by major contestation and debate in the country. As such, there is a need to understand how food poverty has been treated in South Africa thus far but more importantly what the role of public interest litigation could be in the fight for this right. A clear understanding of the aforementioned necessitates an examination of a rights-based approach in addressing the issue of food poverty in South Africa. Therefore, central to this study is an analysis of the conditions and factors that would facilitate effective public interest litigation on the right to food, in this regard the central theoretical components of this research are detailed in the following section, providing the framework that is utilised in analysing the research question posed.

Important to note is that the scope of the research is inevitably limited. It must be recognised that the realization of the right to food is a vast terrain and the research seeks to only speak to an aspect of the narrative. An example that speaks to the limitations of the research is that, it does not focus directly on market mechanisms for allocating food, or issues of supply and production or on regulation challenges.

2. The right to food

Crucial to the realization of a nourishing food system for all is the 'buy-in' of a range of actors at the global, regional and national spheres. When the question of access to food is framed through a human rights lens – the fulfilment of the right to food ultimately becomes an obligation of the state, although the fact remains that human rights norms apply to all actors across the food-value-chain too. The right to food in international law and in South Africa's constitution, forms part of a more holistic conception of food as an element of an adequate standard of living to which citizens are entitled. This idea of entitlement is the key distinction between a right to food and food security. While a rights-based conception of food access imparts on states a positive obligation to fulfil this right, food security does not imply such a concrete obligation, or imply the responsibility of any specific actor.

Food security and the fulfilment of the right to food are not mutually exclusive pursuits, however. Rather, according to the thinking of the UN FAO and a number of international actors, the two concepts are treated as mutually reinforcing[29]. Significantly, the 1996 World Food Summit also articulated a commitment to the right to food which resulted in the adoption of an International Code of Conduct on the Human Right to Adequate Food that had been drafted by a coalition of NGO's[30]. As a result of these decisions, the FAO has drafted 'voluntary guidelines' to support the progressive realization of the right to food in the context of national food security. Although non-binding, the principles provide a framework for states for the implementation of the right to food, and articulate a human rights approach to be used by agencies working on food and agriculture[31]. The FAO has also established an intergovernmental working group to assist states in implementing these guidelines, and national-level consultations have taken place in a number of states, including South Africa[32].

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[29] Burns, R. 2012. Realizing the Right to Food in South Africa: An Analysis of Available Frameworks and Strategies, Catholic Parliamentary Liaison Office, p12.

[30] McClain-Nhlapo, C. 2004. Implementing a Human Rights Approach to Food Security, International Food Policy Research Institute. Available at http://www.ifpri.org/publication/implementing-human-rights-approach-food-security (Accessed 26 May 2014)

[31] United Nations Food and Agriculture Organization (FAO). 2005. Voluntary Guidelines of the Progressive Realization of the Right to Food in the Context of National Food Security, Rome. See: http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.HTM

[32] Loc cit

As part of the economic, social and cultural rights cluster – the right to food is a positive human right – insofar as the fulfilment of the right goes, it is understood that in one-way or another it is highly dependent on substantial transfers. Scholars have argued that positive rights actively prescribe government activity and prioritization of scarce resources[33]. However, it must be noted that the aforementioned is strongly contested, particularly in light of rebuttals stemming from supporters of negative human rights (often viewed as 'first generational' rights, namely – civil and political rights). The underlying motive fuelling the debate is that all rights require a positive role by the government as it is the organ of state obliged to initiate and account for an environment in which human rights are respected, protected and fulfilled. Interestingly, Brandt notes that negative rights, just like positive rights, also require positive action and resources from the state, the implicit claim being that all legally enshrined rights ought to be viewed as positive rights[34].

Amid the above, the 1966-adopted ICESCR defines the right to food as the right to be free from hunger and the right to adequate food, as having sustainable access to food in quantity and quality as determined by one's dietary and cultural needs[35]. Therefore, it becomes evident that food security and the right to food, though originating in different conceptual realms are closely related through a common focus on the individual. But there are substantive differences. When looking at food insecurity on the other hand it's important to note that it has short-term and long-term manifestations requiring different types of policy responses. Short-term insecurity is often caused by drought and other natural catastrophes that create supply shortages, or sharp rise in prices. But much of food insecurity in the world today is long term, resulting from chronic or recurring difficulty to access appropriate food. As such, the intention of this research is to highlight the urgency needed in tackling the latter definition of food insecurity using the human rights framework.

[33] Gargarella, R., Domingo, P and Roux, T. 2006. Conclusion. In: Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor? Ed: Roberto Gargarella, Pilar Domingo and Theunis Roux. Hampshire: Ashgate Publishing Limited. pp: 255-282, p258.
[34] Brandt LCM, 2011. Op Cit, p8
[35] Ibid, p8

2.1 The development of the right to food

Since the inception of the UDHR in 1948 the human right to food has been acknowledged globally. Paragraph 1 of Article 25 of the UDHR speaks to the right to food in the flowing manner:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control[36]

Although the right to food was acknowledged in the 1948 declaration, it was only until the World Food Summit of 1996 whereby 180 countries in attendance formally pledged to eradicate the problem of hunger and half the global population of malnourished and starving people by 2015[37]. The Summit adopted what came to be known as the Rome Declaration on World Food Security - a declaration detailing the commitment to implement, monitor and follow-up on the Summit's Plan of Action by all states that were in attendance. The Summit served to reaffirm the right of people to safe and nutritious food, adequate food as determined by one's cultural and dietary needs and most importantly the freedom from hunger[38]. Half a decade after the 1996 Summit was another Summit also held in Rome that was initiated to review progress made on the conclusions from the 1996 gathering. Sadly, the 2002 Summit brought to light the lack of worthwhile progress that had been made since 1996; the most significant target of halving the number of undernourished people in the world by 2015 had not seen significant progress and it was becoming evident that the target would not be met[39]. Consequently, the 'World Food Summit: five years later' called for the creation of an International Alliance against Hunger to join forces in an attempt to bring an end to the issue of world hunger. This resulted in a glimmer of hope for the world as governments agreed to draw-up voluntary guidelines for the implementation of the right to food[40]. However, such a conclusion did not come without contestation as

[36] United Nations. 1948. Universal Declaration on Human Rights: Article 25. See: http://www.un.org/en/documents/udhr/
[37] Ziegler, J., Golay, C., Mahon C and Way, S. 2011. Op Cit, p5.
[38] Ibid, p5
[39] Ibid, p6
[40] Ibid, P6

many governments felt the concept of the right to food needed to be replaced with the concept of food security. Fortunately, that did not take place as the concept of food security is a much narrower concept than that of the right to food. The right to food is an all-encompassing narrative that engages with issues of availability, accessibility and utilization/sustainability of food, and distinctly moves beyond the concept of food security as it places emphasis on accountability and jurisprudence in the manner that it's conceptualised[41]. Moving on, in 2004 the Voluntary Guidelines were adopted by the UN FAO Council and formally approved by all governments of the Summit[42]. In essence this meant that governments[43] had once again made a solid commitment to and had concluded on a global consensus on a definition of the right to food. Significantly, the Voluntary Guidelines definition of the right to food is in-tune with the description adopted by the Committee on Economic, Social and Cultural Rights, and also follows the interpretation offered by the Committee that stipulates that states have the obligation to respect, protect and fulfil the right to adequate food[44].

2.1.2 The right to food in international law

The right to food is indivisibly linked with other socio-economic rights. Asbjørn Eide, author of several UN reports on the right to food notes that although rights are always linked, "this is particularly the case with the right to food in international law.[45]" As such, a meaningful point of departure in understanding the notion of the right to food as it relates to sufficient food is to engage the United Nations Committee on Economic, Cultural and Social Rights which stipulates that everyone has the right to:

> 'physical and economic access to adequate food or means for its procurement[46].'

[41] Ibid, p7
[42] Ibid, p8
[43] The Voluntary Guidelines on the Right to Food in the context of national food security is a document that seeks to guide states in implementing the right to food. Important to note is that it is not legally binding, but directed to states' obligations to the right to food under international law.
[44] Ibid, p8
[45] Holness, DR. 2007. The Constitutional Right to Food in South Africa, Nelson Mandela Metropolitan University, p46.
[46] 1999 General Comment 12 of the Committee on Economic, Cultural and Social Rights cited in The Right to Food The South African Human Rights Commission Fifth Economic and Social Rights Report Series, 2002/2003 (2004), p9.

The Committee places emphasis on the fact that the right to food should not be interpreted narrowly in that the obligation of states even applies to requisite action in the mitigation and reduction of hunger, particularly in times of natural and man-made disasters[47]. However, inasmuch as the Committee's commentary creates the ideal platform for dialogue on the right to food, clarity is still to be provided on what exactly it means or to be required to have adequate or sufficient food. The General Comment of the former United Nations Special Rapporteur on the Right to Food Mr Jean Zigler is more specific in providing a comprehensive and satisfactory definition of the right to food as:

> The right to have regular, permanent and unobstructed access, either directly or indirectly by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free from anxiety.[48]

Notably, the World Food Summit of 1996 led to a series of political and legal initiatives for the implementation of the right to food. Since then, the right has been the object of a number of international legal instruments. Accordingly, South Africa has ratified a number of these international human rights instruments, which are thus directly applicable in the fight for the right to food. Amongst these are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child and most recently, the ICESCR which was ratified in early 2015. These are also supported by a number of international declarations, including the UDHR, the Rome Declaration on World Food Security and the Declaration of the World Food Summit: five years later. Domestically, the Constitutional Court has developed an interpretation of the economic, social and cultural rights contained in the Constitution. However, conventions such as those of the CRC oblige the state "to care for children and to combat disease and malnutrition through, among others, the provision of adequate nutritious foods and nutritional support programmes.[49]" In the same line of thought the CEDAW, commits states to take special measures to

[47] Ibid, p9
[48] The Right to Food, Report by the United Nations Special Rapporteur 2000/10, 7 February 2001.
[49] United Nations. 1989. Convention on the Rights of the Child: Article 24. See: http://www.ohchr.org/en/professionalinterest/pages/crc.aspx

eliminate discrimination against women, including assurance of equal access by women to food security measures and appropriate nutrition, particularly during pregnancy and lactation.

Furthermore, a number of bills and laws are under review before Parliament; of particular relevance is the Food Security Bill, which was drafted in 2001. Although it is unclear whether this Bill is still a priority for the government it essentially recognizes the need for proper coordination and integration and seeks to achieve more effective coordination. While the Food Security Bill still requires input, in its current form, it has taken into consideration the spirit of general Comment No. 12 of the Committee on Economic, Social and Cultural Rights. In light of the gaps in international law in relation to the provision of sufficient food, Golay notes that the normative framework on the right to adequate food is inclusive of three essential elements: adequacy, availability and the permanent access to food with dignity[50]. Golay argues that food must be accessible to all in ways that are sustainable and that do not interfere with the enjoyment of other human rights[51]. Consequently, for him, two components are connected to the accessibility to food, that is, economic accessibility and physical accessibility. Economic accessibility to food implies that personal or household financial costs related to the acquisition of food required for an adequate diet should be at a level that does not threaten or compromise the enjoyment of other socio-economic rights, such as access to healthcare, education or housing[52]. On the other hand, physical accessibility to food implies that everyone, including physically vulnerable individuals, such as infants and young children, elderly, persons living with disabilities, and persons with persistent medical problems such as mental disabilities, should be guaranteed access to adequate food[53].

2.1.3 The right to food and the State

Thus far the above has served to illustrate what the parameters of the right to food dictate. The following is a discussion of the legal obligations of the state. Eide, comprehensively

[50] Golay, C. 2009. The Right to Food and Access to Justice: Examples at the national, regional and international levels. Rome: Food and Agriculture Organization of the United Nations, p12. Available at http://www.fao.org/docrep/016/k7286e/k7286e.pdf (Accessed 01 November 2013)
[51] Ibid, p12
[52] Ibid, p13
[53] Ibid, p13

expounds on what is the duty of the state in protecting, respecting and fulfilling the right to food[54]. Regarding the obligation to respect the right to food, the government should not arbitrarily take away people's right to food or make it difficult for them to gain access to food[55]. In other words this speaks to the notion of non-interference in that states are not to interfere or jeopardize existing access to food and are urged to refrain from measures that would prevent such access. Interestingly, this could be interpreted as meaning that the right to food is a negative right as it imposes limits on the exercise of state power in people's access to food through the food-value-chain or otherwise. Nonetheless, engaging with all three elements of the right to food reinforces it as a positive right. The obligation to protect the right to food means that governments must pass and enforce laws to prevent powerful individuals or corporations from violating the right to food[56]. The duty to protect demands that states actively regulate non-state actors, who may threaten the progressive realisation of the right to food and more importantly people's access to food. Moreover, the creation of state institutions that are to investigate and provide effective remedies, including access to justice, when the right has been violated is crucial[57]. Furthermore, the protection of the right to food means that governments must proactively intervene in instances whereby people are denied access to food on discriminatory grounds such as gender or racial discrimination. Evidently, the aforementioned requires positive action from the state - taking the scope beyond the 'negative right' connotation attached to respecting the right to food.

On the other hand, regarding the fulfilment of the right to food, the state is required to make provision and facilitate the ability of vulnerable groups to feed themselves – this is achieved through the adoption of policies that seek to identify vulnerable groups and ensure their access to adequate and nutritious food. Once again the aforementioned serves as substantiation to the fact that the realization of the right to food is dependent on 'positive actions' taken by governments[58]. Significantly, General Comment No. 12 of the ICESCR further stresses the need for states to intervene in moments of distress as part of

[54] Narula S. 2006. The Right to Food: Holding Global Actors Accountable under International Law, Centre for Human Rights and Global Justice, Working Paper No. 7, p12. Available at http://www.chrgj.org/publications/docs/wp/WPS_NYU_CHRGJ_Narula_Final.pdf (Accessed 27 April 2014)
[55] Ziegler, J., Golay, C., Mahon C and Way, S. 2011. Op Cit, p19.
[56] Ibid, p19
[57] Loc cit
[58] Ibid, p20

the obligation to fulfil the right to food when it notes the following: "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) [the right to food] directly[59]." Strikingly, the issue of access to food in South Africa has largely been framed as a question of affordability, and therefore income. Improving employment prospects by way of introducing an agrarian reform programme for landless groups or promoting alternative employment opportunities could be a worthwhile response[60]. Whilst taking into account that the fulfilment of the right to food, like all other socio-economic rights is subject to progressive realisation, this concept cannot be used to justify persistent injustice and inequality[61]. As illustrated by Randolph and Hertel, "some states opt for a robust set of social welfare guarantees in the constitution and a correspondingly dense network of institutions, policies and programs aimed at undergirding state-sponsored social welfare delivery.[62]" He goes further to state that "other states emphasize a minimalist approach in which the market principally determines the allocation of food and only the most marginalized people are directly provided for by government[63]." Consequently, it has been noted elsewhere that the role of the state in South Africa has been minimalist with regards to the right to food, although this is not necessarily the case for other socio-economic rights[64]. According to Fukuda-Parr, "the radical liberalisation of South Africa's agricultural policy has followed international trends but has taken the form of dismantling rather than reforming and reorienting the support structures as other countries have done.[65]" Therefore it appears that the non-interventionist approach to both production and to food markets has the potential to be regressive.

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[59] Ibid, p20

[60] Loc cit

[61] De Schutter, O. 2010. Countries tackling hunger with a right to food approach. Significant progress in implementing the right to food at national scale in Africa, Latin America and South Asia. Briefing note by the United Nations Special Rapporteur on the right to food. Available at http://www.srfood.org/index.php/en/component/content/article/684-revising-the-cfa-five-proposals-for-the-dublin-consultation (Accessed 01 November 2013)

[62] Randolph S and Hertel S. 2012. The Right to Food: A Global Overview. A revised version of this paper also appears in: Minkler, L. (Ed), 2012. The State of Economic and Social Human Rights: A Global Overview, Cambridge: Cambridge University Press, p10

[63] Ibid, p10

[64] Fukuda-Parr, S. 2012. Economic and Social Rights: Obstacles or Handmaiden of Growth, The Right to Food in South Africa: Entitlements, Endowments and the Role of Economic and Social Policy. Seminar held at the University of Cape Town, Department of Social Development May 30-31, p11 See: http://www.serfindex.org/wp-content/uploads/2012/07/Fukuda-Parr-Policy-Issues-may-2012.pdf

[65] Ibid, p11

2.1.4 Constitutional Obligations

Today South Africa enjoys a Constitution, which enjoins the State to progressively realize the economic and social rights as well as civil and political rights contained in the Bill of Rights. This Constitutional foundation serves as the basis of all other laws and policies in the country. The Bill of Rights includes the following economic and social rights; the right to water, the right to housing, the right to a healthy environment and the right to adequate food amongst others. However unlike the other economic and social rights the right to food is not the responsibility of one single department but rather is a cross-cutting issue.

Section 27(1) requires the State to take reasonable legislative and other measures, within its available resources, to progressively realize everyone's right to sufficient food and water, whilst Section 28(1) (c) provides the right to every child to basic nutrition, shelter, basic health care services and social services. Section 35(2) (e) makes provision for every detained person and sentenced prisoner to have adequate nutrition[66].

As such, the obligation to protect the right to food requires the State to actively prevent violations by third parties. The failure to ensure that third parties conform with the standards set out in the Constitution by adopting relevant legislation and providing the effective remedies that seek to protect beneficiaries of the protected right would amount to a breach of the obligation to protect. Following from the above-mentioned there is the second positive obligation; to promote. The obligation to promote essentially enjoins the State to create an enabling environment in which beneficiaries are able to exercise their rights[67]. This requires the State to educate people about their rights and how to seek redress in the event that there has been a violation. However, attention should be drawn to an over dependence on the law as the option of challenge can be lengthy and expensive and often not accessible to those most in need.

[66] McClain-Nhlapo. 2004. Right to Food Case Study: South Africa. Intergovernmental working group 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. Food and Agriculture Organization of the UN, p15 Available at: http://www.fao.org/docrep/meeting/008/j2475e.htm (Accessed 23 April 2014)
[67] Ibid, p15

The following will provide an analysis into possible strategies that human rights defenders and movements may adopt in seeking worthwhile inroads in safeguarding and protecting the right to food for the people of South Africa.

2.2 Human Rights-Based Approach to Development

The right to food is often viewed as a precursor for development. As such, explicitly or implicitly it is a factor in many discussions pertaining to development, issues regarding land and agrarian reform, environmental concerns and labour woes among others serve as substantiation. Therefore, this paper emphasizes a human rights based approach to development apposite to the right to food. Significantly, this perspective puts individual's first and places emphasis on liberty, equality and empowerment. A human rights-based approach delves into the realization of human rights in the development process of countries and is of significance in the debate about the right to food[68].

2.2.1 Collective Action and Social Movements

Promotion of the right to food brings with it the allure of using different strategies and avenues for its realisation. Lobbyists, campaigners and activists committed to realising the right to food can mobilize support and bring attention to the scandal of food poverty in various ways. Collective action or social mobilization has been understood to achieve a number of objectives by scholars and interestingly has been used loosely as a concept. However, its significance has to do with the rallying and mobilization of collective support for issues that have social relevance[69]. Significantly, social movements are usually characterized by networks of informal connections that revolve around a diverse group of individuals, organizations/groups, confronting a particular political and/or cultural conflict, on the premise of shared identity (collective). Interestingly, when it comes to collective identity "social movements are not merely the sum of protest of events on certain issues, or even specific campaigns but a social movement process is in place only when collective

[68] Kierkels, B. 2010. The Evolution of the Right to Food in the Human Rights Paradigm: Human rights in the context of globalization, Wageningen University and Research Centre, p14. Available at http://edepot.wur.nl/143862 (Accessed 27 April 2014)
[69] Della Porta, D and Mario, D. 2006. Social Movements. An Introduction. Oxford: Blackwell Publishing.

identities develop, which go beyond specific events and initiatives[70]." As such, the notion of social movements just as that of social mobilization can be defined as a process in which "several different actors, be they individuals, informal groups and/or organizations, come to elaborate, through either joint action and/or communication, a shared definition of themselves as being part of the same side in a social conflict[71]."

When single episodes of collective action are viewed as "components of longer-lasting action rather than discrete events; and when those who are engaged in them feel linked by ties of solidarity and of ideal communion with protagonists of other analogous mobilizations" then we have what Della Porta and Diani term a social movement dynamic[72]. However, insisting on the presence of conflict as a distinctive trait of movements should not necessarily deter social movement analysts from embarking on an inquiry of those circumstances in which collective action is not explicitly driven by conflict such as those instances that are characterized by a focus on the delivery of some kind of help or assistance to an aggrieved collective, an example being solidarity movements[73]. Nonetheless, it must also be noted that in some instances the two scenarios can occur simultaneously. Theories on collective action, social mobilization and social movements are very complex and have been used to explain various inquiries in a number of ways. Further elaboration on the said theories is beyond the scope of this dissertation. Contextually, the above serves to illustrate that these ideas serve as a theoretical base for the subject of this paper. The following will provide theoretic narratives that best shed light on potential strategies that can be adopted by activists in mobilizing around an issue.

2.2.2 The concept of 'political opportunity structure'

The 2008 food price riots were the flashpoint in which food security received serious political attention in the world, as riots occurred in over thirty countries. The last time food security received global attention was in the early 1970's when the first Middle East oil crisis, coupled with low stock levels and crop failures which in-turn drove world food prices

[70] Ibid, p21
[71] Brandt LCM, 2011. Op Cit, p14
[72] Della Porta, D and Mario, D . Op Cit, p23
[73] Ibid, p23

to unprecedented levels confronted the world[74]. Interestingly, according to the FAO - the period that followed this crisis between 1974 and 2005, in accordance with adjusted inflation, saw the index of real food prices fall by 75%[75]. Noting that food security has once again moved to the political centre stage over the last couple of years, both at national and international level, this paper makes an attempt at finding the key political factors serving as obstacles to public interest litigation on the right to food. It also seeks to delve into the dynamics of the changing policy landscape in South Africa as it relates to the realisation of the right to food juxtaposing this with the power of advocacy in changing politics and policy. Nonetheless, this is not to imply that advocacy alone has the power to bring about the change in politics and policy. The combination of shifting political priorities in response to changes in the real world, and costs and benefits of particular policies should be noted.

The concept of 'political opportunity structure' has been advanced by the social movement theory and is defined as "the set of social and institutional variables that are likely to affect the development of collective action[76]." Broadly speaking, this structure refers to the institutional and sociocultural factors that influence the manner in which social movements strategize, delving into dynamics that inform, how and which, strategies movements adopt. Bosce makes a clear distinction between the domestic and the international political opportunity structure[77]. The domestic opportunity structure is defined as "how open or closed domestic political institutions[78] are to domestic social movement or NGO influence.[79]" It must be noted that in a given democracy, the larger the number of parties, the more likely it is that the legislative branch will be viewed as independent. Moreover, the less bureaucratic the procedures with which to build policy coalitions, the more open the

[74] Arnold, T. 2013. Chapter Ten: The Power of Advocacy. In Manfred Eggersdofer… [Et al.] 2013. The Road to Good Nutrition, A Global Perspective, Karger, p129
[75] Ibid, p129
[76] Alexandra-Maria Bocşe. 2011. Understanding Transnational Advocacy Networks: How the Political Opportunity Structure Impacts their emergence, p122. Available at: http://www.drcsummerschool.eu/proceedings?order=getLinks&categoryId=61 (Accessed 16 June 2014)
[77] Ibid, p122
[78] Domestic political institutions, generally speaking, are organizations which create, enforce, and apply laws; that mediate conflict; make (governmental) policy on the economy and social systems; and otherwise provide representation for the populous. Examples of such political institutions include political parties, trade unions, and the (legal) courts. The term 'Political Institutions' may also refer to the recognized structure of rules and principles within which the above organizations operate, including such concepts as the right to vote, responsible government, and accountability.
[79] Loc cit

political opportunity structure will be to different interest groups[80]. Scholars go further in breaking down the political situation structure by stating that at the international level it "refers mainly to the degree of openness of international institutions to the participation of transnational NGOs, networks and coalitions'' and is most often comprised of: "a number of international governmental organizations like the UN, the EU, the World Bank and the IMF, establishing a number of formal treaties, international regimes, systems of global governance, as well as, sometimes, structures of norms and values.[81]" Therefore, it is in this context that the political configuration of the state determines the windows of opportunity for activists and movements. But more importantly, favourable political opportunity structures are not only found but can also be created, meaning social movements too, can influence the political configuration of the state, and forge opportunities through their actions[82]. For instance in South America, human rights activists from Argentina and Chile brought cases of human rights abuse committed by their governments to the Spanish National Audience Court, which accepted their cases and in this way opened new arenas for the activists' actions[83].

Political opportunity structure revolves around three main dimensions, namely, "access to the formal institutional structure, availability of allies, and the configuration of power with respect to relevant issues/challenges[84]." As such, it is in relation to these dynamics that the theory of political opportunity structure is worth analysing in seeking to understand the lack (or presence) of viable strategies for activists working on the realisation of the right to food. In other words, political opportunity structure provides the platform to review the interaction between the state and activists. Important to note however is that the said dimensions revolve around a "certain cultural frame; a sort of underlying premise on which the claims are understood[85]." Bosce further elaborates on this by stating the following:

> The ability of social movements to get their voice heard depends on the availability of cultural frames. In this way, movements draw on the stock of existing cultural frames to create ideas of what is unjust or to suggest directions for change. Political opportunity

[80] Loc cit
[81] Loc cit
[82] Brandt LCM, 2011. Op Cit, p15
[83] Alexandra-Maria Bocşe. 2011. Op Cit, p123
[84] Loc cit
[85] Ibid, p16

> structure is therefore a concept that refers to a field in which focus is on institutional and sociocultural factors that shape the options with regard to possible action of activists. In this way the concept has to do with political opportunities affecting the choice of strategies for promoting issues and influencing policies through political channels[86].

It becomes evident that an analysis of the political opportunity structure offers a practical way of explaining the existence of social movements and the networks that characterize their presence in South Africa. But moreover an investigation of the political opportunity structure is crucial in also providing an understanding of successful advocacy campaigns that have taken place in the country post-1994.

2.2.3 The concept of 'legal opportunity structure'

Adjunct to the political opportunity structure as detailed above, social movements often pursue court-centred activism when the 'opportunity situation' perceives litigation as the best available option. Known as the legal opportunity structure, this strategy usually serves as a complementary option in furthering a particular cause[87]. However, it should be noted that the success of this strategy is usually dependent on how favourable the legal opportunity structure of a given country is[88]. In other words, it depends on the types of barriers social movements face in voicing their concerns as court cases. Examples of this are noted by Gloppen in the following manner:

> … lack of rights awareness; the nature of the law; thresholds of access to court—rules of standing, procedural requirements, costs, time, need for legal expertise; the resources available to movements for overcoming these barriers (organizational and financial resources and legal support structures–including intellectual, political, and financial support from activist networks); and the potential gain from pursuing a legal strategy (prospects for succeeding/ advancing the cause, based on previous experience and perceptions of judicial independence and effectiveness)[89].

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[86] Ibid, p16

[87] Gloppen, S. 2013. Social Movement Activism and the Courts, Mobilizing Ideas, p1. Available at http://mobilizingideas.wordpress.com/2013/02/04/social-movement-activism-and-the-courts/ (Accessed 17 June 2014)

[88] Ibid

[89] Gloppen, S. 2008. Public Interest Litigation, Social Rights and Social Policy in Dani and a. De Haan (eds,) Inclusive States. Social Policy and Structural Inequalities. Washington DC: World Bank, pp343-368.

Amid the above, important to note is that the field of legal opportunity structure is not limited to litigation-outcomes only. It must be understood that the legal opportunity structure often forms part of a broader political mobilization strategy[90]. The legal opportunity structure places emphasis on the socio-legal structures that shape movement strategies, and in-turn it delves into the dynamics of structures that are shaped by movement strategies. As such, the inference would be that "the more unlikely social and political mobilization is to yield results, the more likely social movements are to engage in litigation—even when the legal opportunity structure seems relatively unfavourable.[91]" This is often the situation for marginalized and unpopular groups who lack political clout. Deliberative space provided by the courts may be their best option, even if chances of success are small[92]. Then again, litigation is not necessarily a case of all or nothing. A court case may be pursued less for the actual outcome itself than for its mobilization and agenda-setting potential - usually because having a case before the courts provides social movements access to decision-making forums and adds leverage to their demands. Hence, Gloppen notes that decisions to litigate are not necessarily based on prospects for court victory - even if a case is likely to be lost, gains could be made[93].

As is the case with the political opportunity structure, the legal opportunity structure also focuses on the fact that movements seeking to bring-about change ought to engage the existing cultural stock in the framing of their claims[94]. However, what makes the legal opportunity structure distinct is that it has an additional frame to take account of, namely, the legal frame[95]. Therefore, this means that activists looking to use litigation as a tool for effecting change are not only controlled by the cultural stock, but also the availability of the legal stock[96]. In other words, "they must articulate their claims so that they fall within the categories previously established by an amalgam of constitutional, statutory, administrative, common, and case law.[97]" On another note, it must be noted that there is no hierarchy however between the legal and cultural frames - mainly because the two are mutually

[90] Brandt LCM, 2011. Op Cit, p15
[91] Gloppen, S. 2013. Op Cit
[92] Ibid, p1
[93] Ibid, p1
[94] Brandt LCM, 2011. Op Cit, p18
[95] Ibid, p18
[96] Ibid, p18
[97] Loc cit

constitutive. This means that cultural symbols and discourses shape legal understandings just as legal discourses and symbols shape cultural understandings[98]. The aforementioned makes sense when considering the fact that legal norms and practices have been known to promote social change, and conversely, shifting social norms have many times been followed by shifting interpretations of what the law requires.

The above section has served to illustrate the different avenues of engaging issues of mobilisation and different kinds of activity in promoting social issues. As shown, some use political avenues while others focus on bringing about change through legal avenues. Nevertheless, it has been argued elsewhere that both avenues could be utilised - the underlying motive being that while tactics might dictate how a particular group chooses a course of action, two strategies running side by side could be more fruitful in bringing about the desired outcome, provided the resources allow. Significantly, the above has relevance for the research on public interest litigation that will be conducted in this dissertation, particularly the legal opportunity structure. The following will be an analysis of public interest litigation as a strategy that is seemingly gaining favour in the promotion of socio-economic rights among social movements in South Africa - a strategy seeking to influence policy through the legal channel. There is a need to gain a better understanding of this approach as it relates to the realization of economic, social and cultural rights, and the following will speak to this.

2.3 Public interest litigation

Primarily because of its effectiveness, public interest litigation has emerged as a credible and versatile tool for seeking judicial intervention and subsequent government action to address the various socio-economic challenges of the unorganized and powerless segments of society[99]. A scholar such as Zhuwarara further notes that "public interest litigation has not only enabled public-spirited individuals, groups or conscious citizens to litigate in the

[98] Loc cit
[99] Zhuwarara, T. 2011. Public Interest Litigation Manual, p3. Available at: http://www.scribd.com/doc/60522716/Public-Interest-Litigation-Manual (Accessed 17 June 2014)

interests of the poor and disadvantaged but has also widened the scope for NGO's and civil society to participate in formulating pro-poor policies and legal rules[100]."

Concomitantly, public interest litigation has an elaborate and interesting history dating back to the 18th century whereby it was used in the fight for the end of slavery in England[101]. However, the 1990's in particular brought about a steady increase in public interest litigation on a range of different issues and rights[102]. The 1990's brought about a remarkable shift in the social justice domain as activists began to favour taking human rights violations to court - to be solved by judicial bodies as compared to political institutions/organs. All the same, the debate it is still ongoing amongst scholars as to whether litigation is a positive tool for the promotion of socio-economic rights. Gauri notes that others still view the courts as an inappropriate platform for such activities, mainly because cases are often of a political nature and when juxtaposed with the notion of separation of powers, judicial capacity, and inequality it's not as clear if litigation is the most viable tool for effecting change[103]. Interestingly, other criticisms stem from the old-fashioned view of legal rights which stipulates that most socio-economic matters do not involve genuine rights because they require positive actions and not merely restraint. As illustrated briefly above, because of the fact that positive obligations entail significant expenditures by the state, the argument is that courts should steer clear of the socio-economic concerns at the heart of public interest litigation. Yet Gauri argues that "for their fulfilment all rights require restraint, protection, and aid from the entity from whom rights are claimed, and that a reasonably effective and well-funded state is a sine qua non for all rights.[104]" Generally speaking, it becomes evident that the empirical capacity of litigation to bring-about social reform remains a major contestation amongst scholars. As such, the following, will provide an analysis of arguments in favour of and cynical of public interest litigation whilst also discussing the potential functions of litigation.

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[100] Ibid, p3

[101] Loc cit

[102] Gloppen, S. 2008. Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health, Harvard School of Public Health, Health and Human Rights, 10 (2): 21-36. p21 Available at: http://www.jstor.org/stable/20460101 (Accessed 16 June 2014)

[103] Gauri, Varun. 2009. Public Interest Litigation in India: Overreaching or Underachieving? p1. Available at: http://works.bepress.com/varun_gauri/3/ (Accessed 16 June 2014)

[104] Gauri, Varun. 2004. Social Rights and Economics: Claims to Health Care and Education in Developing Countries, World Development Vol. 32, No. 3, pp. 465–477, Elsevier Ltd, p467.

2.3.1 The concept of 'public interest litigation'

Nussbaum reiterates that any definition in social sciences should not be general so as to avoid the definition losing its value. Therefore, a definition of public interest litigation must be flexible enough to adapt and remain significant in a constantly changing society[105]. However, due to the fact that a precise definition of public interest litigation is difficult, a worthwhile approach to unpacking the concept is by analysing the characteristics that are common to cases which scholars classify as being in the public interest[106].

According to Nussbaum the first defining characteristic of public interest litigation is that it revolves around issues that are generally understood to be extremely important and in need of urgent intervention (these issues are often safeguarded by the Constitution or relating to the very essence of life)[107]. Secondly, the outcomes of the given cases are of such a nature that the final decision not only impacts on the complainant but has significance for a substantial number of other people as well[108]. This is usually evidenced in those cases whereby the suit is initiated as a class action and in-turn the outcome has a bearing on all class members, or those individuals who are faced with similar circumstances to those of the complainant with the original case serving as a precedent. The final defining characteristic of public interest litigation is that it is driven by non-state plaintiffs, these can be individuals, groups or organization who desire to use public interest litigation as part of a broader political mobilisation strategy and view court-based activism as a more appropriate route to social change[109].

2.3.2 Pessimists and Idealists

When unpacking public interest litigation the fact that it looks to judicial organs to bring about social reforms of a very important nature that have far reaching consequences means that the judicial sphere, practically speaking, takes on issues that many scholars would argue explicitly belong to the political domain. As such, the debate is on-going as there are camps that advance arguments from both ends of the scale. Notably, the debate is argued on

[105] Brandt LCM, 2011. Op Cit, p19
[106] Ibid, p19
[107] Loc cit
[108] Loc cit
[109] Loc cit

several terms but mainly revolving around two schools of thought, those who view litigation-centred activism as a positive contribution to social justice and those who argue that it is an ill-fated mix-up of the judicial and political responsibilities and spheres.

Critics argue that in a democratic setting it is the sole duty of the legislature and not the judiciary to oversee redress of a social character[110]. The underlying motive being that for judicial bodies to interfere in the political domain it undermines democratic principles – seeing as lawsuits in the public interest are often of a political nature. Moreover, the inference is that democratic control is threatened and democratic institutions are undermined when the judiciary interferes due to the fact that such interference renders the said institutions irrelevant in core political matters[111]. It also follows that the question of democratic legitimacy is soon brought under scrutiny as scholars have noted elsewhere that "courts are fundamentally elitist and non-democratic and, therefore, should always defer to the allegedly democratic legislature.[112]" Interestingly, another concern is directed to judges who are scrutinized on their technical competence to adjudicate on issues that are usually technically difficult and politically divisive[113]. In this regard, Galanter and Rosenberg proceed further to state that public interest litigation should be given careful consideration as the 'haves' often come out ahead in court and that "even when social movement litigation succeeds, court victories are hollow hopes bringing no real change[114]." Another argument that has been proposed against public interest litigation has more to do with the nature of courts, rather than any fundamental critique of public interest litigation as such. This argument states that courts, because of institutional limitations and political vulnerability, are fated to see their reform efforts frustrated in the middle or long term coupled with the fact that particular cases politicize the courts in ways that undermine their legitimacy.[115]. Furthermore, Gloppen notes critics as emphasizing that "fears are not only that [public interest litigation] is ineffective and a waste of resources, but also that it may be counterproductive in that courts-centred activism will legitimize the system, circumscribe the struggle in ways that prevent radical challenges to the status quo, and change and de-

[110] Ibid, p20
[111] Gloppen, S. 2008b. Op Cit, p24
[112] Loc cit
[113] Loc cit
[114] Gloppen, S. 2013. Op Cit, p1
[115] Gloppen, S. 2008b. Op Cit, p24

radicalize the movement itself.[116]" She goes further to note that even in those instances whereby the courts may adjudicate in favour of the complainant those successes, due to litigation's casuistic nature, are still disposed to privilege other groups above others in-turn further contributing to inequality[117]. Consequently, another criticism of public interest litigation has been that "court-initiated social reform may undermine long-term planning and rational priority setting in the policy areas that are being litigated.[118]" Critics proceed further to claim that whilst potentially consolidating the rights of a select group or individuals within the populace public interest litigation may weaken the overall justice of the system[119].

On the contrary, scholars in support of public interest litigation argue that litigation is a worthwhile tool for holding states accountable in light of what is usually referred to as policy and implementation gaps[120]. The underlying motive is that litigation has a positive effect, particularly in the socio-economic sphere, as policy gaps often present themselves in the disjuncture between the states' international obligations and national constitutions on the one end and the legal framework in place to respect, protect, and fulfil socio-economic rights on the other end. Therefore the argument is that "litigation can contribute to bridge these gaps and bring national laws and policies in line with international obligations and norms[121]." Implementation gaps speak to the disconnection between stated policy and implemented policy. As such, the rationale is that court-centred activism may play catalyst to holding the state accountable to its policies and may fast-track the process of implementation by empowering the citizenry to use the law in engaging policy-objectives more directly[122]. For South Africa in particular, inspiration is drawn from court cases where social movements have succeeded, and where this has served as a catalyst for transformation - such as the Treatment Action Campaign's (*TAC*) court case on access to HIV/AIDS medication amongst others[123]. The *TAC* example serves as substantiation to the

[116] Loc cit
[117] Loc cit
[118] Ibid, p24
[119] Ibid, p24
[120] Loc cit
[121] Loc cit
[122] Loc cit
[123] Gloppen, S. 2013. Op Cit, p1

fact that litigation and court adjudications on cases with political or social connotations can have the effect of bringing about real social change for the better.

Paradoxically, in light of the arguments advanced by critics of public interest litigation stating that courts are fundamentally elitist and non-democratic and that court victories are hollow hopes bringing no real change, supporters of litigation view the use of courts as having the potential to attract international visibility and assistance from transnational activist networks[124]. Also, with regards to domestic litigation, even when it is unsuccessful it can provide an avenue to regional courts and treaty bodies that may well give high visibility and a prospect for redress[125]. So, even when domestic courts are used to further objectives of the elite and lack independence and are unlikely to rule in favour of social movements they might still be useful arenas.

The above has served to illustrate both ends of the debate surrounding the credibility of public interest litigation in effecting social change. Supporters of public interest litigation argue that it is an effective tool for social redress/reform and should be adopted by activists in the promotion and protection of human rights, particularly socio-economic rights. Therefore, it is in this regard that this dissertation seeks to delve into the dynamics of the litigation-tool as an avenue for the realization of the right to food. Again, it must be emphasized, that litigation is not the only, or the most viable, tool to promote such a right, but rather that it can contribute to a positive development in the protection of the right to food.

2.3.3 Theoretical Contentions

It must be stressed that in the struggle for social justice, public interest litigation has played an indisputably important role. For South Africa, during the past two decades, critics from both the left and right have challenged its capacity to secure systemic change. The critiques have varied, but have largely revolved around two schools of thought. The first is that litigation cannot itself reform social institutions[126]. The second related concern is that over-

[124] Ibid, p1
[125] Ibid, p1
[126] Cummings, S.L and Rhode, D.L. 2009. Public Interest Litigation: Insights from Theory and Practice. Fordham Urban Law Journal, Vol. XXXVI, UCLA School of Law Research Paper No. 09-19; NYLS Clinical Research Institute Paper No. 08/09 #19, p604. Available at SSRN: http://ssrn.com/abstract=1425097 (Accessed 9 October 2014)

reliance on courts diverts effort from potentially more productive political strategies and disempowers the groups that advocates are seeking to assist. The result is too much law and too little justice they say. For Cummings and Rhoda, "these critiques, although powerful in their analysis of the limits of litigation, have generally failed to adequately acknowledge its contributions and the complex ways in which legal proceedings can support political mobilization.[127]" This paper seeks to move beyond these critiques by situating the public interest litigation debate in a richer theoretical and empirical context. In essence, the argument being put forth in this analysis is that litigation is an imperfect but indispensable strategy of social change. Its effectiveness can only be realised through a more nuanced approach to its capacities and constraints. In its theoretical dimension, the research will draw on the sociology of law and social movements to explore the interplay between legal proceedings and political mobilization.

2.3.4 Potential functions of litigation in the realisation of the right to food

The right to food involves the existence of a multiplicity of actors, right-holders but also other private actors, particularly those who are involved in the distribution and production of food, actors influencing the procurement of food and of course the state[128]. Therefore, it follows that litigation can serve as a credible attempt at unpacking the complex difficulties of realising the right to food. When it comes to the government it serves to confront the array of state duties involved in safeguarding the right to food. According to Denvir the potential function of litigation is that it brings about publicity and embarks on a fact-finding agenda. This means that the very act of litigating regardless of the judiciary outcome brings about the disclosure of facts which in-turn create awareness in the public sphere and actually generate a political dynamic with wide-ranging consequences than those envisaged in the lawsuit itself[129]. Likewise, it is important to note that state institutions usually have an institutional bias towards low visibility decisions which, despite their far-reaching effects, often escape public notice. Therefore initiating litigation against the state may very well be a

[127] Ibid, p604
[128] Courtis, C. 2007. The Right to Food as a Justiciable Right: Challenges and Strategies, In A. von Bogdandy and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Volume 11, pp 317-337, Koninklijke N.V, p324
[129] Brandt LCM, 2011. Op Cit, p23

newsworthy event that might end up highlighting actions that may be considered morally and politically indefensible in the public sphere[130].

Additionally, litigation also has the potential of making state institutions more receptive as it is often the case that the said institutions tend to shield themselves from pressure emanating from the public they are meant to be serving. This could take place without necessarily demanding the courts to get involved in the countless substantive issues. Also, public interest litigation may assume the role of being a catalyst to legislative reform by getting the attention of state institutions and the legislature to recognize a given need for new legislation[131]. For South Africa, this may well translate itself in addressing the need for right to food legislation that goes beyond the ambit of the Constitution.

The above section has briefly touched on the diverse nature of actors involved in the realization of the right to food, the following sections will look at jurisprudence of the right to food through the broader economic and social rights lens. Interestingly though, pessimists may well argue that such an array of complex interrelations when dealing with the right to food makes it difficult to view the right as a coherent unity with defined limits. However, the following will serve to illustrate that such a characteristic is not explicit for the right to food only, but many other rights as well. Interestingly, Courtis acknowledges that "the fact that rights are [multitudinous], and cannot be reduced to a single, nuclear duty, is common to many rights, *inter alia*, such as the right to life, right to liberty and security of the person, labour rights, right to health and the right to education among others.[132]"

2.4 Jurisprudence and Socio-Economic Rights

Beginning with the UDHR and more explicitly in the ICESCR, economic and social rights have been recognized as being part of human rights norms. Significantly, the adoption of the ICESCR encountered a number of obstacles[133]. A number of countries mostly from the 'West', argued that these rights were incapable of legal enforcement due to the fact that the realisation of socio-economic rights is dependent on resources albeit the fact that they

[130] Ibid, p23
[131] Loc cit
[132] Courtis, C. 2007. Op Cit, p325
[133] Mbazira, C. 2009. Litigating Socio-Economic Rights in South Africa: A choice between corrective and distributive justice, PULP, p15

are imprecise in nature[134]. In contrast, countries from the 'East' were in support of the legal protection of socio-economic rights as they looked to these rights to guarantee people's socio-economic development and for the protection of the basic needs of the poor such as shelter, food, clothing, access to healthcare and work[135].

It follows that the compromise in the acceptance of economic and social rights was as a result of the adoption of the ICESCR separate from the ICCPR in spite of earlier directions from the UN General Assembly (GA) that a single covenant inclusive of both categories of rights be adopted[136]. The alleged distinction between the two covenants is evident when analysis is given to their respective obligations. The human rights stipulated in the ICESCR are to be progressively realised subject to maximum available resources whilst the ICCPR is to be respected by states with no express limitation given on the obligations stipulated[137]. Significantly, the distinction also plays itself out in the manner that the two covenants are to be enforced; the ICCPR was adopted together with an optional protocol establishing an individual complaints mechanism[138] whereas no such mechanism was put in place for the ICESCR. The reason behind the lack of an individual complaints mechanism for the ICESCR was driven by the misconception that economic and social rights obligations were incapable of judicial enforcement as it was thought that these rights required extensive state action[139].

The objection to the judicial enforcement of socio-economic rights has taken two avenues. The first is that which can be described as having to do with legitimacy and the second revolves around the institutional competence aspect[140]. The institutional competence narrative is rooted in the philosophical foundations of human rights and brings about objections that are meant to challenge socio-economic rights as being part of human rights norms – the question being the legitimacy of conferring constitutional status on socio-

[134] Ibid, p15
[135] Loc cit
[136] Loc cit
[137] Loc cit
[138] Optional Protocol to the International Covenant on Civil and Political Rights adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entered into force on 23 March 1976. This protocol empowers the Human Rights Committee, as established by ICCPR, to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a state party of any of the rights set forth in the Covenant (Art 1)
[139] Loc cit
[140] Ibid, p16

economic rights in light of their nature[141]. The reasoning is that socio-economic rights are considered illegitimate due to the fact that they revolve around the redistribution of wealth and the intervention of the state in the free market[142]. The argument is that redress and redistribution of wealth or the forces of the free market should never be subjected to the discipline of the Constitution[143]. The market economy is viewed as providing the platform in which aspects pertaining to the individual's protection from the state are endorsed. According to Mbazira, "socio-economic rights are believed to engender an affirmative feature, which makes them dangerous to the market economy.[144]" Regarding the institutional competence debate, critics view the courts as inappropriate to deal with the complex matters whose determination is within the jurisdiction of the representatives of the people and not the unelected judges[145]. On this point, it must pointed-out that the "free-market" debate has dissenting views for and against the free-market which could not be delved into in this paper due to the scope of this research.

Another argument opposed to the judicial enforcement of economic and social rights stems from the difficulty associated with bringing about worthwhile socio-economic remedies. Critics argue that unlike civil and political rights whereby backwards-looking compensatory remedies can be afforded to aggrieved individuals this cannot be said for socio-economic rights[146]. The debate revolves around the fact that conventionally the said remedies fall within the jurisdictions of domestic courts and are in-tune with the remedial process and aims of private law[147]. The rationale is that socio-economic rights demand more complex remedies such as declarations or injunctions that necessitate positive and comprehensive governmental action. For those opposed to this narrative; socio-economic rights highlight the dilemma of achieving corrective justice vis-à-vis distributive justice. The difficulty lies in seeking corrective justice for individuals before the court as opposed to distributive justice for larger groups not before the court[148]. Additionally, tensions also stem from the difficulty that lies in ordering compensation/remedies for past violations and ensuring compliance in

[141] Ibid, p16
[142] Loc cit
[143] Ibid, p17
[144] Ibid, p17
[145] Loc cit
[146] Brandt LCM, 2011. Op Cit, p25
[147] Ibid, p25
[148] Loc cit

the future, whilst also acknowledging tensions in achieving instant remedies that correct discrete violations as opposed to an outcome that seeks to reform the system. As such, it is in-light of the above-mentioned that those opposed to socio-economic rights deem them to be more suitable for political enforcement which is amenable to international law and is subject to persuasion and negotiation as opposed to domestic law which is monological and coercive in realising rights[149].

2.4.1 Why social rights jurisprudence?

The previous section served as an analysis of the obstacles and difficulties regarding the broader judicial enforcement of socio-economic rights. However, in light of the above-discussed, the last three decades have seen an explosion of cases dealing with socio-economic matters globally – both at the local and international levels. The following will delve into the factors that have contributed to the prominence and authority of social rights.

There are a couple of factors in an intricate interplay that have contributed to the eminence of social rights[150]. The first has to do with the nature of social organizations as major drivers of litigation, Brandt notes that the last few decades have been a gateway for a broad but distinctive movement for economic, social and cultural rights as social movements, lawyers and human rights advocates have adopted litigation strategies that vary from jurisdiction to jurisdiction to advance socio-economic issues[151]. This movement has not only sought to use courts, but has been active in sharing information on comparative experiences. In the case of South Africa, scholars have described the courts approach as 'minimalist' in that it only engages in what is necessary in a given case and shies-away from laying down any abstract rules and theories[152]. Generally speaking, this approach is considered ideal in protecting democracy due to the fact that it leaves contentious issues open for democratic deliberation[153]. For Mbazira, the court's approach is therefore perceived as capable of both respecting the separation of powers and realising the transformative vision of the

[149] Ibid, p26
[150] Ibid, p26
[151] Loc cit
[152] Mbazira, C. 2009. Op Cit, p56
[153] Ibid, p56

Constitution[154]. Speaking to the South African experience, he further writes that "the Constitutional Courts' confirmation of socio-economic rights as justiciable and the development of its reasonableness review approach as a means of assessing the state's obligations has strengthened the position of advocates of socio-economic rights in both domestic and international arenas[155]." This approach not only has confirmed that socio-economic rights are capable of constitutional protection, but also that they are amenable to judicial enforcement. This particular shift in the way movements for socio-economic rights operate, is part of the explanation for the rise of socio-economic jurisdiction.

The second factor is that in the South African context in particular the Constitutional Court has held that in socio-economic rights litigation, the question should not always be one of whether or not these rights are justiciable but rather how best to enforce them in a given case[156]. The Court has dismissed submissions that socio-economic rights cannot be justiciable because they have budgetary implications. For the courts, when enforcing socio-economic rights the task is no different from that which is conferred on them when adjudicating on civil and political rights[157]. The reasoning is that just like socio-economic rights orders, to enforce civil and political rights may have budgetary implications too. It is important to note that "courts remain pro-majoritarian actors, and their actions narrow the gap between widely shared social beliefs and incomplete or inchoate policy preferences on the part of the government, or between the behaviour of private firms and expressed political commitments[158]." Moreover, the judicial culture itself also has a vital role to play in the judicial enforcement of socio-economic rights in that the establishment of a culture of litigation for human rights within a jurisdiction makes the induction of new rights much easier.

Similar to the judicial culture narrative, the general culture of a society also contributes to the judicial enforcement of socio-economic rights. According to Langford, the manner in which a society understands and values human rights will determine the extent to which human rights permeation takes place in that given context. Usually, this takes place on the

[154] Loc cit
[155] Loc cit
[156] Ibid, p57
[157] Ibid, p57
[158] Brandt LCM, 2011. Op Cit, p27

backdrop of society's repulsion at, or experience of, particular manifestations of human indignity in the past[159]. Interestingly, Langford still places emphasis on the fact that some cultures might be more perceptive to social rights claims, while others again may be more resistant to such claims[160]. Therefore, culture plays a significant role in socio-economic jurisprudence and also serves as an explanation for the absence of judicial enforcement in a given society.

The above has been a discussion of social rights jurisprudence with a particular focus on the factors that influence the judicial enforcement of socio-economic rights. The paper now seeks to turn to an analysis of the human right that is the focus of the research - the right to food and the judicial enforcement of this right.

2.4.2 Justiciability of the right to food

Inspection of the socio-economic rights in the Constitution serves as evidence to the fact that they are intended to amount to more than promises on paper; they are to serve as useful tools that seek to empower the populace to gain access to the basic resources and social services needed to live a life consistent with human dignity. Notably, the strategic importance of socio-economic rights as tools for addressing poverty is set to diminish if courts are to interpret these rights as merely imposing weak obligations on the state and fail to protect them as robustly as they do other rights in the Bill of Rights[161]. This study explicitly speaking to the right to food seeks to highlight the fact that socio-economic rights were incorporated into the Bill of Rights as justiciable. Therefore, the research focuses on the role of public interest litigation in promoting the realisation of the right to food as a socio-economic right in South Africa.

In the human rights field justiciability is defined as follows: "the possibility for alleged victims of violations of rights to file a complaint before an impartial body, and request

[159] Ibid, p28
[160] Ibid, p28
[161] Liebenberg, S. 2002. South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty? 6 Law, Democracy and Development 159 – 191, p160. Available at: http://www.saflii.org/za/journals/LDD/2002/2.pdf (Accessed 16 June 2014)

adequate remedies or redress if a violation is deemed to have occurred.[162]" Significantly, Vivero notes that although there are more than a few treaties, covenants and various agreements speaking to the importance of respecting, protecting and fulfilling the right to food, the justiciability of the right remains uncertain[163]. The main challenge lies in the fact that for a right to be considered a right it must be amenable to an interpretation by the courts and should be able to be subjected to litigation. Regarding the right to food the challenge lies in seeking to claim against violations in the courts. The following unpacks the judicial enforcement of the right to food and provides a review of arguments in support and opposed to the justiciability of this right.

2.4.3 The right to food and judicial enforcement

It must be acknowledged that while socio-economic jurisprudence has gained prominence over the last three decades there has not been corresponding growth on the judicial enforcement of the right to food[164]. Noting the challenges that have led to the stagnant growth of the right to food, scholars have noted the first of these challenges as what has been termed the "rule of judgement". In light of other socio-economic rights documented in the ICESCR scholars note that efforts to develop and clarify the judicial enforcement of the right to food have only gained momentum recently especially when compared to the fact that clarity and exactness of content has been achieved for the other human rights documented in the same Covenant[165].

According to Courtis, the lack of momentum on the judicial enforcement of the right to food may be alluded to the fact that socio-economic rights are often viewed to be indivisible; as such, when engaging the right to food as is the case with many other socio-economic rights, it was viewed as a right related to work and endowments, the underlying motive being that people are part of the workforce and in-turn receive a decent income and the main purpose of this income is to satisfy basic needs such as housing, access to healthcare and nutrition[166]. All the same, he further notes that the belief that progressive inclusion of the

[162] Courtis, C. 2007. Op Cit, p318
[163] Brandt LCM, 2011. Op Cit, p29
[164] Ibid, p30
[165] Courtis, C. 2007. Op Cit, p321
[166] Ibid, pp321-322

masses into the workforce as a response to the realisation of socio-economic rights is nothing other than wishful thinking. The political strategy to peg socio-economic rights to the position of the worker simply serves as hindrance to those who are incapable of partaking in the formal economy and it also follows that this particular group is often those at the bottom of the pyramid – those heavily affected by the burden of poverty in society. It is in this context that the last two decades have seen a renewed commitment to the development of socio-economic rights as distinct claims outside of the formal labour contract[167].

Another difficulty in the judicial enforcement of the right to food lies in the fact that the constitutional premise safeguarding the right to food is generally weak globally, especially when juxtaposed to other socio-economic rights such as the right to education and access to healthcare, amongst others[168]. As noted above, express constitutional provision on the right to food only exists in a handful of countries with South Africa being one of only two countries whereby justiciability of the right to food is a possibility. The fact that statutes speaking to issues of food security and other food woes are often geared towards public policy objectives and hardly articulate an individual or collective right to food is a major obstacle in the litigation of this right[169]. Nonetheless, the difficulties that have been discussed above are not complicated but merely serve to illustrate the general challenge of reaching an explicit legal-base on the right to food. As indicated above, the right to food is a relatively 'young' right and lacks a consistent case law body on which to draw in order to frame a new case and apply law to a new set of facts[170]

Although the above gives an account of issues surrounding the judicial enforcement of the right to food, the issues are not necessarily overwhelming as most of them are actually a result of a lack of an interpretive tradition acknowledging the right to food as an autonomous human right[171]. For Courtis, there is no conceptual weakness in giving clarity to the content and nature of the right to food in legislative statutes and constitutions[172]. He substantiates this by noting that "the experience of directly applying international human

[167] Ibid, p322
[168] Ibid, p322
[169] Loc cit
[170] Ibid, p323
[171] Ibid, p323
[172] Loc cit

rights instruments and standards is also a growing practice in domestic courts in different parts of the world.[173]" Additionally, "the absence of case law is just a state of affairs that can change gradually, when cases start being decided by courts and therefore accumulate.[174]" Therefore it becomes evident that the right to food, as is the case with a select number of socio-economic rights, is a convoluted right, but this is not a distinct characteristic of the right due to the fact that many other human rights are just as complicated. The right to food is a fully justiciable right.

Scholars continue to advance the right to food as justiciable on the premise that economic, social and cultural rights, generally speaking, should be judicial enforced[175]. The Indian and South African trajectory on the right to food serves as illustration of the fact that the right to food is indeed justiciable[176]. Recent developments in countries such as Switzerland, Colombia, Paraguay, Fiji and Argentina have also led to isolated cases that serve as litigation on the right to food[177]. Interestingly, the right to food in some instances has been framed as the right to life and when interpreted strictly this strategy only covers those cases where lack of food is life threatening – freedom from hunger. However, Courtis notes that a broader interpretation of the right to life, as a right to a dignified life, may encompass a wider variety of aspects of the right to food such as those relating to food adequacy[178]. Moreover, in legal systems where the right to health is deemed justiciable similar connections could be made between food and health[179].

Evidently, judicial enforcement on the right to food is still going through development and much progress has been made over the last few years, noting experiences of litigation in a select few countries. The lack of judicial enforcement of this right on a larger scale necessitates introspection into public interest litigation and the dynamics that are vital for this type of litigation to arise. Namely, what factors have to be present for public interest litigation to exist on the right to food? Accordingly, the following section delves into the

[173] Loc cit
[174] Loc cit
[175] Golay, C.2009. The Right to Food and Access to Justice: Examples at the national, regional and international levels. Rome: Food and Agriculture Organization of the United Nations.
[176] Gauri, Varun. 2009. Public Interest Litigation in India: Overreaching or Underachieving? Available at: http://works.bepress.com/varun_gauri/3/ (Accessed 16 June 2014)
[177] De Schutter, O. 2010. Op Cit, p10
[178]Courtis, C. 2007. Op Cit, p328
[179] Ibid, p328

framework that guides this dissertation in explaining the conditions and factors that need to exist for public interest litigation on the right to food to occur in South Africa, the framework is both theoretical and analytical.

2.5 Theoretical and analytical framework – Conditions for public interest litigation

The analytical and theory framework that has been adopted in this research was constructed by Siri Gloppen (2006) and further utilised by Siri Gloppen and Fidelis Kanyongolo in their research inquiry on *Courts and the Poor in Malawi: Marginalization, vulnerability and the law* (2007). In their research on the courts and the poor in Malawi the framework served to illustrate the factors that should be taken into account when assessing how socio-economic cases find their way to the courts and in-turn the factors that influence the manner in which courts respond to the said cases. Significantly, the framework is particularly useful for unpacking the dynamics of legal mobilization as an avenue of giving agency to the most vulnerable in society. The said framework serves as a credible tool for an analysis of the factors and conditions that affect and/or influence the rise of public interest litigation in a democracy – giving a theory-driven and structured analysis of the topic.

In their use of the framework the authors break down the process of litigation into five distinct stages. For Gloppen and Kanyongolo, there exists' at least five factors that are to be investigated in order for social litigation to arise and be successful. Important to note is that the said stages practically follow each other and often overlap as the litigation process unfolds, the first stage of the process has to do with the identifying the marginalized groups at the centre of the litigation matter[180]. Also, activists should be able to identify and communicate their grievance as a human rights issue and progress further to garner enough resources that would enable them to make a legal claim in the courts. Additionally, as the process unfolds it is important for legal institutions to view the concerned/alleged violation raised as worthy of being adjudicated within the judicial domain and most importantly judges must be able to find effective remedies where applicable. Gloppen and Kanyongolo further stress that for adjudication to have a social impact it must be accepted,

[180] Gloppen, S. and Kanyongolo, FE. 2007.Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law. ICON, Vol. 5, No. 2, pp. 258–293, Oxford University Press and New York University School of Law, p272. Available at http://icon.oxfordjournals.org (Accessed 27 May 2014)

implemented, adhered to and translated into real change in the social policy sphere[181]. Every stage of the litigation process is dependent on the outcome of the previous stage/s[182]. Therefore, the division of the litigation process into the five stages provides a snapshot of the various components and intricacies of the litigation process.

For each of the five stages, a number of factors combine to determine the outcome of the legal process. In this way, the framework can be used to study litigation and the legal process in a specific case, as it serves to identify relevant aspects of a human rights issue that should be subjected to litigation. In the South African context adopting the framework in inspecting which conditions and factors would need to be present for there to arise public interest litigation on the right to food is a worthwhile endeavour. However, due to the fact the legal system is yet to explicitly deliberate on the right to food in the country, this discussion will only focus on the first two stages proposed by Gloppen and Kanyongolo, namely, what shapes the legal voice of the marginalized and the responsiveness of judicial institutions on socio-economic matters with a focus on the right to food.

Analytical framework

2.5.1 Stage 1 - What shapes the legal voice of the poor?

The framework to be utilised zones in on the importance of the opportunity situation as a determining factor of the people's ability to make human rights claims[183]. Issues related to formal or informal barriers and the question of resources influence the marginalised people's ability to be litigants in the legal process. The success of a legal claim, from the onset, often depends on the affected group's ability to garner resources that enable the group to give credibility to their claim by way of mobilizing around and articulating their particular grievance. More importantly resources determine the type of engagement the group will have with public interest litigators. It also follows that expertise is crucial when seeking remedies for socio-economic violations which are often difficult and complicated by the fact that there's hardly worthwhile domestic jurisprudence to draw from when dealing

[181] Ibid, p272
[182] Gloppen, S. 2008b. Op Cit, p25
[183] Gloppen, S and Kanyongolo, FE. 2007. Op Cit, p273

with these matters[184]. As such, the people need to be cognisant of the fact that their supposed violation can be addressed within the judicial system, but significantly, they must be able to have a legal base for their grievance with a clear understanding of who bears legal responsibility for the violation. Therefore, it is in this context that the marginalised group should be able to use its resources to translate their grievance into a sound legal claim before the courts.

When unpacking the issue of formal barriers, introspection of the legal system is vital. The ways in which judicial institutions operate and the types of laws legislated in a democracy have a direct impact on the marginalized people's ability to voice their claims. Notably, for a country like South Africa with a clear legal basis for social rights - it provides the ideal environment for rights-asserting litigation. The social rights narrative in South Africa makes class action suits a possibility; when analysis is given to previous socio-economic matters that have made their way to the courts it becomes evident that the courts have a somewhat lenient criterion for "locus standi[185]", as the system allows for organizations and individuals to litigate on behalf of others[186].

Amid the above-mentioned, for Gloppen and Kanyongolo a lack of knowledge all too often serves as a practical barrier to the formulation of social-rights claims as people hardly view their issues and concerns as violations that are worthy of litigation[187]. The understanding is that there is usually lack of information speaking to who must be held accountable, the availability of institutions[188] that handle claims and remedies available. Unfortunately, in tune with the notion that the 'haves' come out ahead in court, many of the poor often view the legal system with distrust and fear, with good reason seeing as the law often has an anti-poor bias in its application[189]. Significantly, it must be noted that scholars have asserted that "the legal system lacks legitimacy, because it is perceived as a tool of domination which is at odds with socially entrenched customary law, and may well be

[184] Ibid p273
[185] In law, locus standi means the right to bring an action, to be heard in court, or to address the Court on a matter before it.
[186] Ibid, p275
[187] Ibid, p274
[188] As an example, in South Africa this would be lack of information on institutions supporting constitutional democracy, also known as Chapter 9 Institutions.
[189] Ibid, p276

deemed a barrier to the articulation of social rights claims.[190]" Interestingly, another factor that impacts the legal voice of the marginalised is the existence of other options that harbour potential to bring about social change. Socio-economic claims may, given the political opportunity situation, achieve their objective via electoral mobilization, media campaigns, strikes, lobbying of political parties, demonstrations and the use of alternative judicial institutions such as, in the South African case, institutions supporting constitutional democracy (South African Human Rights Commission, Public Protector, Commission for Gender Equality, etc.)[191].

In analysing the legal voice of the poor the framework acknowledges the issue of resources as an obvious concern that may serve as an obstacle to the poor expressing their grievances. In this regard, the framework notes what is termed 'associative capacity' as important in addressing the resource challenge. Associative capacity is the ability of the poor to join forces with those actively involved in the legal sphere that identify with their struggles and generate resources and sustain collective action[192]. The above, combined with internal group dynamics of poor people on leadership and personal agency serves as illustration of the factors that enable or disable marginalized groups from legally voicing their grievances as violations. Therefore, the above serves as a good start for analysing the initiating stage of human rights claims posed for the litigation process. In the context of the right to food, the above is ideal for looking at how those affected by hunger and their supporters can join forces and credibly formulate and voice their claims, or why there is an absence of voices emanating from those facing the injustice of food insecurity.

2.5.2 Stage 2: What makes courts responsive to the voice of the poor?

The second stage of the framework seeks to delve into the dynamics that influence the way in which judicial institutions, particularly the courts, respond to the legal voice of the marginalised and poor in society. The underlying motive is that legal systems are not consistent comparatively and the courts' willingness to engage public interest litigation and socio-economic cases is not always guaranteed due to the fact that some courts may view

[190] Ibid, p277
[191] Ibid, p277
[192] Ibid, p279

such matters as not falling within their jurisdictions. In most instances this is driven by a formal criteria of standing and admissibility, to the formal status of the right/s in question, and to the judges' understanding and application of the law[193]. Implicit in this is that the responsiveness of courts to socio-economic claims is largely influenced by how the particular claim is voiced, the legal strategy adopted, the skill with which the claim is articulated and the merits of the case[194]. In-turn, this highlights the need for credible legal representation for the claimants, crucially so, in environments where the system is not accommodative to socio-economic claims. For Gloppen and Kanyongolo, poignantly, the judicial systems' responsiveness is dependent on two factors: the formal characteristics of the system and the nature of the judiciary[195].

The formal characteristics refer to the relevance of the law and the legal system in addressing the marginalised people's grievances. Factors for the marginalised to consider in this regard are the status of social rights, rules of standing, legal procedure and evidence and the legal basis for litigating collective claims in the public interest, notwithstanding provisions that regulate the courts' competences and jurisdictions.[196] Therefore, in deciphering the courts' responsiveness to the voice of the marginalised an analysis of the given case (i.e. the right to food) taking into account of the above noted factors is important. Although there is no consensus amongst scholars on whether rational self-interest, norms or personal history influence the judges understanding of the law it must be acknowledged that the nature of the judiciary has an influence on the courts[197]. In dealing with the question of judicial interpretation, the framework notes the following three points as significantly vital on the way the courts respond to the poor: "the legal culture, the sensitization of judges, and the composition of the bench[198]."

> How legal norms are interpreted in a particular case is linked to the individual judge's personal, ideological, and professional values, which combine with the legal culture to shape his or her perception of the judges' own role, the understanding of what is the appropriate

[193] Ibid, p282
[194] Ibid, p282
[195] Loc cit
[196] Ibid, p283
[197] Ibid, p285
[198] Ibid, p285

way to deal with social rights, the relationship between law and politics, and to what extent social rights are within the proper domain of the courts[199].

In light of the above, judicial independence becomes central when inspecting how judges adjudicate on socio-economic claims made by the poor or marginalised. It follows that a legal system subjected to external influences, political or otherwise, would serve to disadvantage marginalised litigants. Origin of the judges', social, cultural, ideological, and educational backgrounds all impact and influence their perspectives, professional qualities, integrity and commitment[200]. The holistic characteristic of the bench coupled with the institutional practises serve as major factors that determine how courts will respond to socio-economic rights litigation. On the subject of institutional culture, transparent appointments of the bench often create diverse and socially sensitive courts[201]. All the same, it must be acknowledged that the weight put on all these factors should be contextualised to the institutional vision, strategy and general conferment of the obligations of the court as prescribed in the Constitution. Lastly, it must also be understood that when it comes to transparency of appointments the abovementioned is merely a general inclination as formal procedures do not necessarily result in responsiveness of the courts to the grievances of the poor. The above has served as an analysis of the key factors that this paper investigates in explaining the courts potential responsiveness to litigation on the right to food.

The dissertation is theory-driven and explorative as it investigates the issue of public interest litigation on the right to food in South Africa. The theoretical framework provided, which was developed specifically for analysing public interest litigation on social rights, is utilised in understanding what shapes the legal voice of the poor and their social rights claims contrasted with the responsiveness of the courts to the claims of the marginalised. In-turn, this provides a thorough and sound understanding of the factors that need to be engaged-in for public interest litigation on the right to food to arise and be deliberated in the courts. The theoretical framework of the paper has been provided above. Therefore, the following will provide the methodological considerations for the research.

[199] Ibid, p286
[200] Ibid, p288
[201] Ibid, p288

2.6 Methodology

This study is of an explorative nature as indicated above, but more specifically it is a qualitative case study seeking to answer the question of which factors and conditions would have to be present for there to arise public interest litigation on the right to food in South Africa. In answering the question, conditions for public interest litigation in one particular case - South Africa - will be investigated. By definition, this is a case study. Therefore, in-light of the fact that limited research speaking to public interest litigation on the right to food has been conducted in Southern Africa the research will utilise the qualitative case method study in answering the research question posed.

In adopting the analytical and theoretical framework introduced in the previous section the research will be explorative and theory-driven, in so doing providing an analysis of a topic that, until now, has not been thoroughly pursued in South Africa, namely, the judicial enforcement of the right to food. The qualitative method adopted therefore enables the research to be a thorough analysis, steered by an analytical framework developed to explain what influences the prospects for social rights litigation. Particularly, data has been gathered through searches in public documents and secondary literature to assess the existence or lack thereof, of factors that lead to litigation of social rights, as identified by the theory. This has been conducted in a manner that explicitly translates the framework to the South African context. Consequently, the aforementioned provides a platform to examine the likelihood of successful litigation on the right to food emerging in South Africa. In so doing, it also provides clarity on how credible, as a strategy, public interest litigation is in the realisation of the right to food. Interestingly, the enquiry also serves to show alternative avenues for realising the right in question. Noteworthy, is that this theory-driven research contributes to the continuous development of pinning theory of litigation to empirical research through its focus on public interest litigation.

2.6.1 Case study

The use of the qualitative case study as a research method is substantiated by the fact that the research is of an explorative nature[202]. Seeing as throughout Southern Africa research on public interest litigation is yet to gain prominence, this research takes advantage of this fact and explores the phenomenon and generates new knowledge on the posed question. According to Gerring, this is the strength of the qualitative case study method; it has an advantage when utilised for exploratory research[203]. Primarily, the case study method in its definition is inclusive of both within-case analysis of individual cases and also evaluations of a select number of smaller cases[204]. In reference to this study, the focus is on the first noted definition – within-case analysis. Attention is given to particular features of South African society that influence conditions for the judicial enforcement of the right to food. While hard generalizations are not necessarily strengths of qualitative investigations, the case study method allows for progressive generalizations about social life[205]. Therefore, the in-depth analysis provided by the qualitative case study method enables for generalizations to occur across a wider set of similar cases. As such, it is in this sense that this research produces implied propositions about what influences socio-economic litigation in countries similar to South Africa.

Significantly, Yin goes further to define the case study in the following manner: "A case study is an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident.[206]" In-tune with the said definition, the case study gives insight into the factors that impact on the judicial enforcement of the right to food in South Africa, and the context in which these factors operate – as opportunities and/or obstacles juxtaposed to the socio-political relations of the country.

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[202] Gerring, J. 2004. What Is a Case Study and What Is It Good for? The American Political Science Review, Vol. 98, No. 2, May, pp. 341-354, p349. Available at: http://www.jstor.org/stable/4145316 (Accessed 9 July 2014)
[203] Ibid, p350
[204] George, AL. and Bennett, A. 2005. Case Studies and Theory Development in the Social Sciences. Cambridge: MIT Press, p18 Available at https://mitpress.mit.edu/sites/default/files/titles/content/9780262572224_sch_0001.pdf (Accessed 8 July 2014)
[205] Ibid, p19
[206] Yin, R. 1994. Case Study Research: Design and methods. Second Edition. California: SAGE, p18

2.6.2 Data and methods of collection

Yin, speaking to data collection and data analysis approaches further breaks down his definition of the case study when he notes that the case study inquiry copes well with the technically distinctive situation in which the research is forced to grapple with the many variables of interest than data points that emerge during the study. The outcome of this is that the research then relies on multiple sources of evidence with the collected data converging in a triangulating way, but moreover the research benefits from prior developments of theoretical propositions to guide data collection and analysis[207]. Obviously, it is in this context that the adopted analytical framework offers the privilege of engaging prior developments that speak to the factors and conditions that have to be analysed when dealing with socio-economic litigation. It follows that this then facilitates structured data collection and data analysis.

Regarding data collection, scholars note the recording and reporting of the process through which data is collected as important[208]. The underlying motive is that improved data quality gives validity to the conclusions of the inquiry. Significantly, scholars also note that collecting data from several sources is just as important in providing sound evidence[209]. As such, in seeking to unpack the factors that affect the legal voice of the marginalised and the responsiveness of the courts to their grievances this dissertation depends on a combination of various data – mainly, existing literature and research. The aforementioned, coupled with official documents such as the South African Constitution, media publications, statistical data (where applicable) and statements at the global and local levels about the South African context are referenced in this research.

In-reference to the uncertainty regarding the extent to which observed policy changes are caused by the litigation process or by other parallel processes and noting that the uncertainty is ever greater when dealing with the more indirect policy impact of litigation. Gloppen notes that in order to assess the causal complexities, "in-depth qualitative case studies are particularly useful, because the case study has the advantage of gaining in-depth

[207] Ibid, p18
[208] King, G., Keohane, R and Verba, S. 1994. Designing Social Inquiry: Scientific Inference in Qualitative Research, New Jersey: Princeton University Press, p23
[209] Ibid, p24

knowledge and investigates the contextual factors that are difficult to measure in quantitative research[210]." She further notes that another major strength of case studies is that they give a high conceptual validity, this gives the researcher the possibility "to identify and measure the indicators that best represent the theoretical concepts that the researcher intents to measure.[211]" Consequently, this study also relies on interviews - open and/or semi-structured interviews. Interviews were conducted with key actors in civil society and the litigation process, such as representatives of Non-Governmental Organizations (NGOs) that have been involved in other socio-economic public litigation matters. The interviews have been an invaluable source in getting to know the contested issues surrounding public interest litigation on the right to food from the points of view of actors that have different roles in the realisation of the right to food in South Africa. The list below presents the names and positions of informants who availed themselves to be interviewed.

Table of Interviews:

Name	**Position Held**	**Date (2014)**	**Location**
Sasha Stevenson	Attorney: Section 27	Oct - Dec	Johannesburg
Isobel Frye	Director: Studies for Poverty and Inequality Institute	Oct - Dec	Johannesburg
Karam Jeet Singh	Former Head of Research: South African Human Rights Commission	Oct - Dec	Johannesburg
Florian Kroll	Programme Head: Siyakhana Initiative for Ecological Health and Food Security, University of the Witwatersrand	Oct - Dec	Johannesburg

[210] (Gloppen 2009: 476).
[211] George and Bennett 2005: 19).

Scott Drimie	Sustainability Institute: University of Stellenbosch	Oct – Dec	Johannesburg
Nokutula Rachel Mhene	Economic Justice Manager: Oxfam GB	Oct – Dec	Johannesburg

A challenge that was taken into account when conducting interviews during the research process was that the interview situation could influence the quality of data and the information gathered. The research process has been critical of information coming from informants who may have a biased view of why litigation on the right to food has not taken place due to the space they occupy in civil society or simply because they may have wanted to be placed in a favourable light. To counteract this, interviews were conducted with actors that engage with the realisation of the right to food from different outlooks. A problem sometimes encountered in case study research is that data requirements are missing altogether or inadequately formulated[212]. The general questions posed reflected the theoretical framework employed and the data needed to satisfy the research objective of the study, and the kind of contribution to theory that the researcher intended to make.

2.6.3 Validity and bias

Whilst noting that case study methods do not necessarily result in strong high external validity, in other words, firm generalizations, Brandt notes that using this method lets the researcher identify and measure indicators that best represent the theory-driven ideas intended to be measured in the study[213]. In simply terms, validity is about whether we are measuring what we set-out to measure[214]. Therefore, when dealing with the case study method, inspection of contextual factors enables the researcher to be confident the he is measuring what he set-out to measure. In so doing, scholars note that the researcher side-steps what has been termed conceptual stretching – turning concepts into pointless terms,

[212] George, A.L and Bennett, A. 2004. Case Studies and Theory Development in the Social Sciences. Chapter 4 - Phase One: Designing the Case Study Research. MIT Press, p86-87
[213] Brandt LCM, 2011. Op Cit, p41
[214] King et al. 1994. Op Cit, p25

this in turn serves as substantiation to the added advantage of using the case method in achieving high levels of conceptual validity[215].

Amidst the above-mentioned reliability of data must also be taken into account especially when referencing secondary literature as the basis for data collection. Scrutiny of secondary literature is vital in the researcher avoiding the biases that may come as a result of the views the referenced author holds. As such, it is in this context that this dissertation has utilised several sources so as to minimize the risk of referencing literature that is excessively biased towards a particular outlook. Preliminary reading for this research as shown in this document indicates that data referenced has not been overly biased, as most of the readings consulted are in agreement and generally serve to reflect similar broad patterns with regard to the issue of socio-economic litigation.

2.6.4 Schedule of activities and time frame

ACTIVITIES	**MONTH**
Proposal development	January – December (2014)
Interviews and data collection	October - December (2014)
Proposal presentation	March (2015)
Write up of chapters one and two	March - April
Write up of chapter three and four	April - June
Write up of chapter five	July - September
Review, edits and correction of chapters	October - December
Submission of final draft	January 2016

[215] George, AL and Bennett, A. 2005. Op Cit, p19

When I give food to the poor, they call me a saint. When I ask why the poor have no food, they call me a communist.

- **Helder Camara,** Dom Helder Camara: Essential Writings

3. Introduction

South Africa is officially classified as an upper middle income country and measured by per capita income, the average citizen appears to be fairly well off. However, there is consensus by most economic and political analysts that approximately 40% of South Africans are living in poverty with the poorest 15% in a desperate struggle to survive.[216] Depending on the definition that one uses, the unemployment rate in South Africa ranges between 23% and 35%.[217] In addition, South Africa is also classified as one of the most unequal countries in the world and is characterized by extreme degrees of inequality in the distribution of income, assets and opportunities. Therefore, for the majority of the citizens in South Africa, the progressive realisation of economic and social rights is fundamental to their daily survival. As a testament to this, the past couple of years has seen an increase in service delivery protests across the country with each one becoming more violent. In addition, social movements have re-emerged and are beginning to forcefully occupy a civil and political space.

May 2008 and again April 2015 bore witness to the most horrific scenes of xenophobic attacks. Although the state has downplayed the probable reasons for the attacks, history has shown that the lived experience of poverty, deprivation, marginalization and social exclusion often manifests itself outwardly into feelings of racism, racial discrimination and xenophobia. Workers have also taken to the streets to fight for better wages and improved conditions of employment. In 2009, and in the midst of a recessionary climate, the strike season lasted much longer than usual as many bargaining councils failed to reach an agreement, this has now been further validated by the Marikana massacre[218] that took

[216] See for example, Meth, C. 2004. In Desai, A. 2005. Uprooting or re-rooting poverty in post-apartheid South Africa? A literature Review. Prepared for SANPAD Poverty Reduction Workshop; South African Institute of Race Relations. South Africa Survey 2006/2007.

[217] See McCord, A. & van Seventer, D. 2004. The Economy-wide impacts of the Labour Intensification and Infrastructure and Expenditure in South Africa. Forum Paper for the Conference on African Development and Poverty Reduction, the Macro-Micro Linkages, 13 – 15 October 2004. Also see Du Toit, A. 2005. Chronic and structural poverty in South Africa: Challenges for action and research. Centre for Social Science Research. Working Paper No. 121; South African Institute of Race Relations. South Africa Survey 2006/2007.

[218] The Marikana massacre started as a wildcat strike at a mine owned by Lonmin in the Marikana area, close to Rustenburg, South Africa in 2012. The event garnered international attention following a series of violent incidents between the South African Police Service, Lonmin security and the leadership of the National Union of Mineworkers (NUM) on the one side and strikers themselves on the other, which resulted in the deaths of

place in 2012 - the single most lethal use of force by South African security forces against civilians since the 1960's.

The prolonged strikes are perhaps indicative of the subjective experience of workers slipping further and further into the abyss of an underclass when at the same time they see so much opulence in the form of palatial houses and luxury cars. The stark reality is that South Africa is a divided society because of gross economic disparities with pockets of a first, third and an increasingly peripheral fourth world[219].

South Africa is currently facing deep uncertainty regarding its food security situation; food security defined as "when all people, at all times, have physical and economic access to sufficient, safe, and nutritious food that meets their dietary needs and food preferences for an active and healthy life.[220]" Poor food availability, access and use represent three pillars of the country's food security. Furthermore, climate change impacts, income disparity, population growth, increasing urbanization and a lack of access to affordable food all represent factors that place stresses upon South Africa's food system.

This chapter acknowledges that determining what to do to bolster South African food security and the realisation of the right to food is difficult due to the complexity of the issue. However, the following seeks to identify and understand the issues that could potentially serve as a catalyst to participatory engagement and collective action around the right to food in South Africa. From the onset, the research process revealed that an understanding of the issue, pathways and solutions geared towards addressing the problem of hunger in the country vary widely among different stakeholders featuring myriad perspectives, values and priorities. Consequently, views regarding what constitutes success in judicial activism

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44 people, 41 of whom were striking mineworkers killed by police. Also, during the same incident, at least 78 additional workers were injured. The total number of injuries during the strike remains unknown.

[219] The term Fourth World is synonymous with stateless, poor, and marginal nations. Since 1979, think tanks such as the Centre for World Indigenous Studies have used the term in defining the relationships between ancient, tribal, and non-industrial nations and modern industrialised nation-states. With the 2007 UN Declaration on the Rights of Indigenous Peoples, communications and organizing amongst Fourth World peoples have accelerated in the form of international treaties between aboriginal nations for the purposes of trade, travel, and security.

[220] World Food Summit. 1996. Rome Declaration on World Food Security and World Food Summit Plan of Action. Rome. 13-17 November.

and public interest litigation as a strategy to secure the right to food in South Africa also differ extensively.

3.1 Defining the Problem: South African Food Security

From 1999 to 2008, the proportion of South Africans at risk of experiencing food insecurity remained static in both rural and urban areas, despite reductions of national food insecurity from 52.3% to 25.9%[221]. Such revelations were interesting for the research process in that they led to the question: what are the primary causes of food insecurity in South Africa today?

It seems, income and access to food are the most important determinants of food availability in the country[222]. Given that the estimated average income of the poor is less than R1000 (US$127) per month[223], poor households find it very difficult to purchase sufficient, nutritious food. In this way, access to food is strongly linked to food availability in South Africa.

As a result, food prices represent an important lever in South African food security. Recent history has demonstrated the effect of food price volatility in relation to access to affordable food across the globe. In the case of South Africa this was demonstrated by the drought in 1992, which resulted in a 20-30 percent increase in South African food prices[224]. It was again illustrated in 2002, when regional food crisis was intensified by exchange rate shocks[225] and signals of increased exports to the SADC region, pushing local food prices approximately 16

[221] Labadarios, D., et at. 2011. Food Security in South Africa: a review of national surveys. Bulletin of the World Health Organisation, 89:899

[222] Ibid

[223] Labadarios, D., editor. The National Food Consumption Survey (NFCS): children aged 1 – 9 years, South Africa, 1999. Stellenbosch: Directorate: Nutrition, Department of Health, National Food Consumption Survey Consortium; 2000.

[224] Vink, N. and J. Kirsten. 2002. Pricing behaviour in the South African food and agricultural sector: A Report to the National Treasury. South Africa: 113

[225] BFAP. 2010. The South African Agricultural Baseline. Tech. Rep., Bureau for Food and Agricultural Policy, Pretoria, South Africa. Available at http://www.bfap.co.za/FINAL%20Agricultural%20Outlook.pdf (Accessed 16/09/15) as quoted in Pereira, L. 2012. Private Sector adaptive capacity to climate change impacts in the food system: food security implications for South Africa and Brazil. School of Geography and the Environment. Oxford, UK, University of Oxford. DPhil.

percent and doubling maize prices[226]. At that time, South Africa experienced rapid food price inflation despite suffering no drastic changes in local supply.

In addition to food prices and income, nutrition is also strongly linked to South African food security. Providing access to nutritious food, as well as food use knowledge regarding basic nutrition and care, are big challenges for the country. For example, the majority of South African children are currently malnourished due to insufficient intake of nutrients, low food variety and household dietary diversity[227]. Despite government food fortification, food supplementation, school feeding programmes, day care schemes, and food grants, dietary intake and overall macronutrient intake are low. As a result stunting affects 26.5% of South African children under four years of age[228]. Additional factors include: limited access to electricity for refrigeration of fresh food by the poor; land shortages for subsistence and smallholder food production, lack of time to travel where nutritious food is, rising obesity rates, and lack of time and space to exercise all represent challenges to the country's food security situation.

Current challenges to South African food security are further exacerbated by global environmental impacts that include climate change stress, population growth, increasing urbanization, and growing migration. Global crop yields are expected to decline due to long-term changes in temperature, rainfall and increased climate irregularity. Concurrently, the global population is predicted to grow by an additional 2 billion people by 2050[229], creating a need for 60% more food by weight than in 2005[230]. The outcome may be higher food prices, along with chronic poverty and under nutrition[231]. South Africa's open economy, rising uncertainty in the agriculture sector, and vulnerability to climate change impacts such

[226] Watkinson, E. & Makgetla, N. 2002. South Africa's food security crisis. South Africa, National Labour & Economic Development Institute, p3.
[227] McLaren, D. & Moyo, B. 2014. Monitoring and Evaluating Progressive Realisation of the Right to Sufficient Food and Basic Nutrition in South Africa. Policy Brief 8. Indicators for the Right to Food. See: www.spii.org.za
[228] Ibid, p14
[229] United Nations Department of Economic and Social Affairs (UNDESA). 2011. World population prospects: the 2010 revision. New York.
[230] Alexandratos, N. and Bruisma, J. 2012. World agriculture towards 2030/2050, the 2012 revision. Rome, Food and Agriculture Organization of the United Nations (FAO).
[231] Beddington, J., et al. 2012. Achieving food security in the face of climate change: final report from the Commission on Sustainable Agriculture and Climate Change. CGIAR Research Program on Climate Change, Agriculture and Food Security. Copenhagen, CGIAR; Carter, M. and C. Barret. 2006. The economics of poverty traps and persistent poverty: An asset based approach. Journal of Development Studies 42:21.

as water shortages and desertification in certain parts of the country pose difficult policy and governance challenges that will require innovative thinking and bold action over the short and long-term future. Interestingly, speaking to the need for a credible response to South Africa's food security woes, one of the respondents during the research process echoed the fact that food security is a complex social issue in South Africa saying, "I think the problem is that there are many different interest groups in South African food security, with very different ideas about the problem, and priorities regarding what should be done."

The research process in essence reveals that bettering South African food security requires that "Mrs Constantia" engage with "Mrs Khayelitsha" and that "Mr. Soweto" work together with "Mr. Illovo." Why? Because food security is intrinsically linked to peace and prosperity. High food prices and uncertainty have been shown to correlate with increased political instability[232]. Poignantly, the recent food price volatility has thrown an additional 44 million people into extreme poverty globally[233].

Important to note is that the abovementioned realities affect all South Africans, not merely the poor and hungry. They affect market stability, and the ability of South African business to function. They affect government legitimacy and its ability to implement policy and carry out its mandate. They affect all South Africans. To paraphrase Adam Habib's warning, "South Africans must deal with the challenges [of food security] and accept these challenges, or the whole place will burn[234]." This warning is not a harbinger of doom, but a call to action – to collective action. There are myriad ways to improve South African food security. There exist clear levers for engaging with the challenges of improved access to sufficient nutritious food for all. There are local successes and global examples from which

[232] Lagi, M. et al. 2011. The Food Crises and Political Instability in North Africa and the Middle East. Cambridge, MA, New England Complex Systems Institute: 15; and Lagi, M., et al. 2011. The Food Crises: A quantitative model of food prices including speculators and ethanol conversion. Cambridge MA, New England Complex Systems Institute: 56. And Lagi, M., et al. 2012. UPDATE February 2012 – The Food Crises: Predictive validation of a quantitative model of food prices including speculators and ethanol conversion. Cambridge, MA, New England Complex Systems Institute: and Arezki, R. and Bruckner, M. 2011. Food Prices and Political Instability, International Monetary Fund: 23.

[233] World Bank. 2011. World Development Report 2011: Conflict, Security, and Development. World Bank. © World Bank. https://openknowledge.worldbank.org/handle/10986/4389 (Accessed 28/09/2015) License: CC BY 3.0 IGO.

[234] Statement by Adam Habib during Adam Kahane 'Transformative Scenarios' book launch at the Gordon Institute of Business Science (GIBS) on February 18, 2013 in Illovo, Johannesburg, South Africa.

human rights defenders could learn. Time and scale appear to be the crucial factors in addressing these issues. So too are commitments for collective action by key stakeholders with an interest in the food system.

3.1.2 The Role of the Private Sector

The food economy in South Africa is largely commercialised and privatised. Actors within the food-value-chain act in ways that protect their profit motive, often to the detriment of rights-holders. In this regard, a respondent during the research process noted that the private sector needs to play a bigger role, specifically in terms of wages and affordable food prices. The private sector has a responsibility to invest in communities, particularly as it derives its benefits or profits from ordinary citizens. This responsibility requires a much more concerted effort on the part of business, and this need should extend beyond Corporate Social Investment (CSI) programmes. To this end, the private sector should start by applying a human rights-based approach in all their business activities.

Applying a human rights-based approach will entail factors such as paying employees 'decent wages', investing in the development of skills in surrounding communities and ensuring that the basic human rights of individuals are not violated, in the pursuit of profits. To ensure this, government has to drastically improve on its regulation of the private sector through the establishment of more effective punitive measures when businesses are responsible for a violation of human rights.

During the 2001/02 food price hikes in South Africa, the Food Price Monitoring Committee found evidence of asymmetric pricing of maize meal. The Competition Commission subsequently found that from 1999 – 2007, Tiger Brands, Pioneer Foods and Premier Foods fixed the price of maize meal and bread[235]. Despite this finding**,** respondents indicated that the profit margins of maize millers and retailers had increased since this time. Further,

[235] See: Competition Commission. 2012. Competition Commission settles milling case with Foodcorp. Press Release, 13 December 2012. Available at: http://www.compcom.co.za/wp-content/uploads/2014/09/Commission-settles-milling-case-with-Foodcorp-.pdf (Accessed 18/09/15)

respondents noted that the profit margins in the milling and baking divisions of Tiger Brands and Pioneer Foods were significantly higher than overall group profits[236].

When maize and other staple foods are traded as commodities internationally, rising food prices largely become driven by currency and market exchange fluctuations. For South Africa, fluctuations in the rand leads to fluctuations in food prices, particularly of maize and wheat, which are the staple diet of the poor in the country. This in turn poses serious problems for the urban and rural poor. In addition to reducing the spending power of poor people, higher food prices have an impact on the calorie intake of the poor. As prices become more volatile, vulnerable households find their consumption decisions affected by higher prices in the markets. Therefore, when the price fixing scandal was exposed by the Competition Commission in 2013, it presented an opportune moment for mobilisation and collective action to emerge around the right to food in South Africa particularly seeing as small scale bread distributors were quick in resorting to legal action against the said corporates. Sadly, Pioneer and Tiger Brands both reached settlements out of court and although small scale bread distributors wanted to put forward a lawsuit for the losses they suffered as a result of the said corporations uncompetitive behaviour - both the Western Cape High Court and the Supreme Court of Appeals rejected the ability of a small distributor to bring forward a class action law suit against the companies[237]. The Constitutional Court, however, overturned this decision on the basis that the judgment was based not around the price of food or peoples access to it, but rather on business damages. The argument revolved around the fact that the court had applied the incorrect test to small bread distributor, Imraahn Mukaddam's application to bring a class action against Pioneer Foods, Tiger Brands and Premier Foods as that the correct standard is to determine if the instituting of a class action would be in the interest of justice[238].

[236] Gareth Jones (African Centre for Biosafety), presentation at the South African Human Rights Commission (SAHRC) National Dialogue on the Right to Food, 20 March 2014. Johannesburg, South Africa.
[237] See: Children's Resource Centre Trust v Pioneer Food (50/12) [2012] ZASCA 182 (29 November 2012), Available at: http://www.justice.gov.za/sca/judgments/judgem_sca_2012.html
[238] Steyn, L. 2013. Bread cartels: ConCourt ruling leaves big brands open to lawsuits. Mail & Guardian. Available at http://mg.co.za/article/2013-06-27-bread-cartels-concourt-ruling-leaves-big-brands-open-to-lawsuits (Accessed 19/09/15)

Despite concerted efforts by small scale bread distributors to confront the abovementioned capital interests it appears that civil society, generally speaking, did not consider this particular case as potential for litigation on the right to food. A respondent during the research process spoke to the fact that ultimately the courts would've adjudicated on the case based on its merit and the High Court and Supreme Court rulings had served as indication of the difficulty of holding the said companies accountable. Interestingly, the respondent further alluded to the fact that had the lawsuit been directed towards the state the outcome may have been different. The argument made being that the state must be better geared towards addressing factors that negatively impact on the countries' food security situation. The emphasis should be to correctly diagnose the problem of price-fixing within the food system as early on in the process as possible and thereafter undertake a rapid response rather than simply reacting to sensational and visible crises within the food-value-chain.

Furthermore, in April 2013 the headline Consumer Price Index (CPI) released by Statistics South Africa (Stats SA) was at 5.9% between April 2012 and April 2013[239]. According to the Food Price Monitor conducted by the National Agricultural Marketing Council (NAMC), the inflation rate for food and non-alcoholic beverages increased to 6.2% in April 2013[240]. According to NAMC, this means that "the cost of the food basket expressed as a share of the average monthly income of the poorest 30% of the population increased from 37.7% in April 2012 to 39.2% in April 2013[241]." During this analysis period, it also documented that "the cost of the food basket expressed as a share of the average monthly income of the wealthiest 30% of the population increased from 3.0% to 3.1%[242]." These statistics help to demonstrate that the poorest are disproportionately impacted by price fluctuations[243][244]. According to DAFF in 2011,

[239] Consumer Price Index – Statistics South Africa. See: www.statssa.gov.za/publications2/P0141/P0141April2013.pdf.
[240] See: http://www.namc.co.za/upload/food_price_monitoring/NAMC%20-%20Food%20Price%20Monitor-%20May%202013.pdf
[241] National Agricultural Marketing Council (NAMC). Food Price Monitor: May 2013. Executive Summary. Press Release. NAMC. Available at http://www.namc.co.za/upload/food_price_monitoring/NAMC%20-%20Food%20Price%20Monitor-%20May%202013.pdf (Accessed 18/09/15)
[242] Ibid
[243] The cost of the typical food basket was expressed as a share of estimated average monthly income of Income Deciles 1 to 3, the poorest 30% of the population, as calculated from the STATSSA survey: 'Income & Expenditure of households 2005/2006.

> …. approximately 80% of households could not afford to buy a basic nutritional basket of food costing an average of R262 per person per month, and with increasing food prices, we can expect this figure to increase[245].

Shockingly, according to the African Food Security Urban Network (AFSUN), four wheat millers control 87% of the market-share in South Africa and the ten largest company's produce 52% of all packaged food sold in the country (the global average is 26%)[246]. The African Centre for BioSafety (ACBF) on the other hand further adds that the food value chain is dominated by a handful of powerful corporations. Monsanto and Pioneer Hi Bred (DuPont) control seeds, while mainly Shoprite/Checkers, Pick and Pay, Spar, Woolworths and Massmart control retail[247].

Significantly, in South Africa access to basic foods is facilitated by zero-rating Value Added Tax (VAT) on food items such as maize meal, brown-bread, unprocessed fruit and vegetables, maize-rice and samp. However, poor households spend a disproportionate portion of their income on food, and can be thrown into a state of chronic food insecurity with increases in food prices, fuel and electricity[248]. Therefore, VAT zero-rating does afford some benefit to low income households, but these benefits have been eroded by a lack of compliance by business and shifts in consumption expenditure (i.e. the VAT zero-rated basket has stayed the same since 1994, while consumption patterns have shifted significantly[249]). Additional state intervention is required to prevent consumer subsidies from being eroded by increased food prices.

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[244] When analysing the distribution of expenditure by income group, the Bureau for Market Research (BMR) at the University of South Africa (UNISA) shows that households in the poorest income group spend nearly half (47.7%) of their income on food whereas those in the affluent categories spend only 7% of their total income on similar food items.

[245] Rowena Joemat (Department of Agriculture, Forestry and Fisheries), presentation at the South African Human Rights Commission (SAHRC) National Dialogue on the Right to Food, 20 March 2014. Johannesburg, South Africa.

[246] Gareth Haysom (African Food Security Urban Network), presentation at the South African Human Rights Commission (SAHRC) National Dialogue on the Right to Food, 20 March 2014. Johannesburg, South Africa.

[247] See: http://acbio.org.za/cartels/

[248] Hendricks, M. & Bourne, L. 2009. An integrated approach to malnutrition in childhood. Part 2: Healthy Children. South African Child Gauge 2009/2010, p49 Available at: http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2009-10/sa_child_gauge_09-10_malnutrition.pdf (Accessed 15/01/15)

[249] Watkinson, E. 2003. Overview of the current food security crisis in South Africa. National Labour and Economic Development Institute (NALEDI), p8. Available at: http://www.sarpn.org/documents/d0000222/watkinson/Watkinson_SA_food_crisis.pdf (Accessed 15/01/15)

Research conducted by South Africa's Competition Commission further suggests that an increase in anti-competitive behaviour, negatively impacts food productivity, food availability and affordability within the country. High food prices may therefore not be a function of low levels of production, climate change and profitability alone. Although a credible analysis is yet to be conducted in the country that speaks to pricing and costing structures across the production value chain, the research process revealed that there is a need for an in-depth analysis into market costing and pricing structures as they relate to issues of food demand and production levels. The underlying motive being that there are disparities between production levels, food availability, and food affordability.

3.1.3 Challenges Related to Production

There was consensus amongst all the respondents during the research process that the government's response to a lack of access to food has been supply-side driven. This means that currently, in responding to the problem of hunger the state consistently brings forth a response that is set on supporting agricultural production in terms of outputs as a solution. The country is food secure in the short-term, meaning that enough food is being produced to feed the entire population and foodstuffs could be imported in the case of a shortfall on a particular food at the national level. However, a significant number of South African households on a daily basis are unable to access food. The assumption that increasing production will ensure universal access to food is therefore erroneous and will not ensure access to food for many poor and struggling households in South Africa.

In the main, South Africa's agricultural policy - as a response to food insecurity, has lost its potential efficacy as a result of the conditions of severe inequality that characterize South African society[250]. The alleviation of inequality therefore becomes an important first step in ensuring the success of agriculture as a means of dealing with a lack of access to food. Inequality in South Africa is a systemic problem and adequately responding to such a challenge requires a concerted effort on the part of the state and other relevant parties, an effort, which will most likely, only yield results in the long-term. Even so, change agents

[250] United Nations Food and Agriculture Organisation (FAO). 2011. The State of Food Security in the World, United Nations.

within the food-value-chain ought to acknowledge that the processes necessary to bring about change need to be initiated immediately. Consequently, the effective implementation of agricultural policies aimed at ensuring the right to food, particularly at household level, becomes essential in the short to medium term.

3.1.4 Agriculture and Small-Scale Farmers

The above illustrates that any discussion of access to the right to food has to take into consideration the dynamics of the country's agricultural sector. Although it's a little bit more complicated due to the fact that small scale farmers are not necessarily subsistence farmers respondents noted that the South African agricultural landscape is characterised by a dual system. It consists of a small group of, mostly rural, emerging, small-scale farmers, who farm for subsistence purposes and are mainly the beneficiaries of land reform policies. The second group consists of successful, well-resourced, well-developed commercial farmers that produce food for both local and international markets. As such, both commercial and small-scale farmers should be able to coexist within a thriving agricultural system. In a system that would allow both to farm in such a manner that contributes to food security at the national level and access to food at the local level, particularly for vulnerable communities.

Some respondents argued that the manner in which the current system functions, however, favours commercial farmers, despite various programmes implemented by the government to provide an enabling environment for small-scale farmers. This view has been reiterated by the DAFF, which explains that:

> While deregulation, liberalisation and the resulting competitive pressures on the sector have eliminated many of the privileges of the large-scale farm sector, various aspects of policy and legislation still reinforce the legacy of the past[251].

Small-scale farmers, with support from government, have an important role to play in realising the right to food, particularly for the rural poor. Rural communities specifically, are

[251] See note 30 above.

encouraged to engage in small-scale farming as a means to realise their right to food. However, rural communities face various challenges, which mean that they are often unable to compete with big commercial farmers. For instance, it is often not cost-effective for small-scale farmers to farm with limited resources under the current agricultural system. One of the respondents during the research process noted that as part of their work in the North West province they discovered that many community representatives were frustrated with the state in that resources to assist small-scale farmers, such as seeds, often do not make it to the farmer, mainly due to inefficiencies at the local tier of government.

The respondent further noted that there is a lack of monitoring of agricultural programmes at the local level, specifically of cooperatives and that, this negatively affected the success of local agricultural projects. Instead of providing continuous support during implementation, it seems the DAFF only engages communities after problems have surfaced, and when the project is near failure. As a result, the DAFF is not able to identify potential risks and to provide support to mitigate such risks before it leads to the failure of a project. This lack of systematic monitoring has led not just to a failure of various local projects, but also to a waste of valuable government resources.

Further, speaking to the above - a DAFF official at the South African Human Rights Commission (SAHRC) National Dialogue on the Right to Food event in March 2014 acknowledged that monitoring tends to happen post-implementation. In addition, in terms of the type of support it gives to small-scale farmers, the DAFF provides educational and/or advisory support. This means that it can advise farmers on improving farming techniques, but in the absence of sufficient legislation, is unable to enforce the implementation of recommendations. In addition, the official also made public the fact that some units within the DAFF work in head office, but implement at district level, which further complicates the monitoring of local projects. There was consensus amongst all respondents in noting that the government has been asking NGOs to motivate communities to form cooperatives, but has not provided the adequate support. For example, cooperatives struggle to access government grants because of the complex process involved. Each cooperative has to produce a business plan to apply for grant funding. The project targets poor rural communities, some of whom are uneducated and do not necessarily possess the technical

and business skills necessary to successfully apply or implement the project without support. Moreover, there are challenges such as the mismanagement of funds, competition for leadership and management of resources amongst cooperative members, and a lack of access to information. On the other hand, it was also recognised that in some instances farmers may be enthusiastic about farming, but may not have the necessary skills to farm – pointing to a need for more rigorous implementation of extension services[252] in agriculture by the DAFF. As will be discussed further below, a lack of access to other resources such as land, water and markets are additional challenges cooperatives and small-scale farmers face, which hampers the success of these projects. Although the government does provide some level of support to cooperatives and small-scale farmers, this is clearly not sufficient. Given the significant role that cooperatives, if successful, can play in alleviating rural poverty, assistance must be improved. There is a need for increased access to technical support, farming resources and market access.

Challenges that small-scale farmers experience include a lack of access to financial resources to sustain their operations, the high cost of electricity and diesel, and theft. For instance, securing subsidisation is often a long and complex process, after which small-scale farmers may still be unsuccessful. Banks ask for too much collateral, which the rural poor obviously cannot afford. In addition, the Land Bank, which exists to provide support to small-scale farmers, only provides funding for 'input' materials. Farmers are therefore unable to secure funds to purchase farming equipment such as tractors, which would make farming less labour intensive and more productive. Given these challenges, respondents identified a need for innovative financing schemes, which are less onerous with suggestions that subsistence farmers should also qualify for preferential interest rates.

The research process also revealed that small-scale farmers who experience successes also have to deal with the problem of theft of their equipment or livestock. At the SAHRC dialogue on the right to food and Oxfam's hidden hunger event small-scale farming participants complained that there is little support coming from the South African Police

[252] Agricultural extension is a general term meaning the application of scientific research and new knowledge to agricultural practices through farmer education. The field of 'extension' now encompasses a wider range of communication and learning activities organized for rural people by educators from different disciplines, including agriculture, agricultural marketing, health, and business studies.

Service (SAPS) and/or the Department of Justice and Constitutional Development (DoJCD) in this regard. The argument brought forward was that these departments are not doing enough to support farmers in arresting and prosecuting criminals. It was further recognised that there's a need to create greater awareness within communities of the value and quality of local produce (i.e. from vegetable gardens). In other words, there is a need to mobilise 'the hungry' to produce their own food. Unfortunately, for the most part, agricultural policy responses such as food gardens have shown a low success rate, as not everyone wants to grow their own food (a major factor behind this being how highly the South African economy has been monetised). However, from the perspective of the state there are workshops to educate communities on starting their own gardens. Communities, cooperatives and/or farmers are encouraged to approach the Department of Social Development (DSD) when they experience challenges. The DSD also educates farmers on what to grow in particular conditions (i.e. which crops are most appropriate), the importance of conserving water and methods of rainwater harvesting (in tanks or drums).

Lastly, in discussing agriculture and small-scale farming respondents lamented the lack of involvement of the youth in agricultural projects. It appears, only a few schools offer agriculture as a subject and only a few agricultural colleges still exist. The youth do not seem to view these institutions as prestigious institutions. However, in order to consider pursuing a career in farming, the youth need to see a clear career path in this regard. Given the decline in agricultural activities and increased modernisation, it remains unlikely this trend will reverse. Therefore, it follows that the state needs to decisively intervene in appetising the youth about agriculture. It goes without saying that young African men and women are critical to the development of agriculture in Africa and for efforts to ensure food security. They are the future farmers, future policy makers, future leaders, future researchers and future drivers of Africa's social and economic development. Agriculture holds untold opportunities for the youth.

3.2 Gender and the Right to Food

Amidst the above, the research process also revealed that there is also a lack of gender mainstreaming in policy responses, particularly the DAFF's agricultural programmes that

seek to promote access to food. This is despite the fact that poverty affects woman so greatly. Women, specifically in rural areas, carry the burden of poverty. Respondents argued that government policies and programmes must purposively target women, if it truly aims to shift poverty. Interviewees suggested the establishment of forums for women that would discuss issues that affect women and possible solutions to these problems as good starting point for the government. In addition, initiatives to ensure security of tenure and finance for women must also be implemented.

Women are excessively affected by hunger, food insecurity and poverty, as a result of gender inequality and their lack of access to economic and social rights[253]. This situation is particularly difficult for rural women. Research has shown that the girl child is more likely to die from malnutrition and preventable childhood diseases and that women are more likely than men to suffer from malnutrition[254]. In most instances, malnourished women are more likely to give birth to malnourished and underdeveloped babies[255] and the generational cycle of malnutrition continues. It is clear that children depend largely on women in order to enjoy an environment that is healthy, clean and safe for their growth. The right to food for children also takes priority for most women as they are mothers.

It is important to note that the right to food plays a vital role for women as the main caregivers in the home. Furthermore, it must also be recognised that women's right to the realisation of food also depends largely on access to basic services under a progressive economic and social rights environment. If women are denied access to land, property, housing, water and sanitation, then women are disadvantaged in society since they carry the burden of accessing food and clean water for domestic purposes. The link between the right to food and the right to health is also explicit in this regard. The right to food is essential to one's health and wellbeing and food is essential to the survival of all living beings. People, particularly children, require a specific level of nutrition for nourishment and

[253] Ziegler, J., Golay, C., Mahon C and Way, S. 2011. The fight for the right to food. Lessons learned. London: Palgrave MacMillan, p23.
[254] Ransom, E.I & Elder, L.K. 2003. Nutrition of Women and Adolescent Girls: Why It Matters. Population Reference Bureau. Available at: http://www.prb.org/Publications/Articles/2003/NutritionofWomenandAdolescentGirlsWhyItMatters.aspx (Accessed 21/09/15)
[255] Ibid.

development. According to the United Nations Office of the High Commissioner for Human Rights (UNOHCHR),

> When a pregnant or breastfeeding woman is denied access to nutritious food, she and her baby can be malnourished even if she receives pre- and post-natal care. When a child is suffering from diarrhoeal disease but denied access to medical treatment, it cannot enjoy an adequate nutritional status even if he or she has access to food.[256]

The right to food cannot exist if people lack access to basic services such as water. Water is essential for the preparation of food and for the cultivation of crops on a small or large scale. Livestock farming also requires large amounts of water. Available literature clearly indicates that poverty is negatively skewed towards poor, African women, particularly those who reside in rural contexts[257]. According to StatsSA[258], 38, 9 per cent of South African households are female headed, however 53, 1 per cent of poor households are female headed[259]. The ultra-poor live in households where over half the members are pensioners, and where the household is supported by women. Hence the burden on women providing for their families in rural areas is greater and so is their vulnerability to price shocks, particularly an increase in food prices[260]. Women in developing countries play a significant role in maintaining food security, namely, through food production, economic access to available food, and nutrition security. They play these roles in the face of enormous social, cultural and economic constraints[261].

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[256] United Nations Office of the High Commissioner for Human Rights (UNOHCHR) and the Food and Agriculture Organisation (FAO). The Right to Adequate Food. Fact Sheet 24, 5: http://www.ohchr.org/Documents/Publications/FactSheet34en.pdf (Accessed 21/09/15)

[257] Reddy, V. & Moletsane, R. 2009. The Gendered Dimension of Food Security in South Africa: A Review of the Literature, Human Sciences Research Council (HSRC), p2. Available at: http://www.hsrc.ac.za/uploads/pageContent/3325/2011The%20gendered%20dimensions%20of%20food%20security%20in%20SA.pdf (Accessed 21/09/15)

[258] Statistics South Africa, Income and Expenditure Survey of Households 2005/2006, p42. Available at: http://www.statssa.gov.za/publications/P0100/P01002005.pdf (Accessed 21/09/15)

[259] Armstrong, P., Lekezwa, B & Siebrits, K. 2008. Poverty in South Africa: A Profile Based on Recent Household Surveys, Working Papers (04/08), Department of Economics, Stellenbosch University. Available at www.ekon.sun.ac.za/wpapers/2008/wp042008/wp-04-2008.pdf (Accessed 21/09/15)

[260] Watkinson, E & Makgetla, N. 2002. South Africa's Food Security Crisis. National Labour and Economic Development Institute Research Report, p1 Available at: http://www.sarpn.org/documents/d0000077/index.php (Accessed 21/09/15)

[261] Quisumbing, A.R., Brown, L.R., Feldstein, H.S., Haddad, L & Pena, C. 1995. Women: The Key to Food Security, Washington, DC: International Food Policy Research Institute. p1. Available at: http://core.ac.uk/download/pdf/6289051.pdf (Accessed 21/09/15)

Researchers estimate that women produce half of the world's food and, in developing countries, between 60 and 80 per cent of food crops[262]. They achieve this despite unequal access to land, to inputs such as improved seeds and fertiliser, and to information. In South Africa, women make up to 60 per cent of all those involved in subsistence farming[263], and subsistence farming is the main source of food for about 250 000 women[264]. About four million black subsistence farmers or over 2,5 million households depend on subsistence farming as a means of supplementing household food supplies[265]. 2,2million (65 per cent more than men) say that their main reason for farming is to provide an extra source of food for the family[266]. Interestingly, a study done by Wim van Averbeke found that in urban areas, farming is done mainly by middle aged and elderly women[267].

3.3 Access to Land

As much as individuals may want to produce their own food, this is often near impossible, as they lack access to land, water and other rights. The SAHRC Mpumalanga office reports that 26% of the province's high-potential arable land has been lost to mining activities and mines use much of the potable water[268]. Notwithstanding the importance of mining as a driver of economic development and employment, there is a need to balance related activities with the realisation of other essential rights such as the right to land, water and food. Respondents called for sustainable policies and legislation to regulate economic activities such as mining, which affect food production. Similarly, *Abilimi Bezekhaya* - an urban agriculture and environmental action association operating in the socio-economically neglected townships of Khayelitsha, Nyanga and surrounding areas on the Cape Flats, near

[262] United Nations Food and Agriculture Organisation (FAO). 1997. FAO Focus on Women and Food Security. FAO. See: http://www.fao.org/focus/e/women/sustin-e.htm (Accessed 21/09/15)
[263] Labour Force Survey, March 2007 analysed in Aliber, M & Hart, TGB. 2009. Should Subsistence Agriculture be supported as a Strategy to Address Rural Food Insecurity? Vol. 48. No. 4, Agrekon 434-458, p440. Available at: http://ageconsearch.umn.edu/bitstream/58215/2/5.%20Aliber%20&%20Hart.pdf
[264] Ibid.
[265] Ibid, p439
[266] Loc cit
[267] Van Averbeke, W. 2007. Urban Farming in the Informal Settlements of Atteridgeville. Water SA Vol. 33. No. 3. ISSN 0378-4738, pp337-339. Available at: http://www.wrc.org.za
[268] Notes taken at the SAHRC National Dialogue on the Right to Food, 20 March 2014 at the Sandton Convention, Johannesburg, South Africa.

Cape Town, argues that access to land is problematic as the 'best' land is used to build houses, rather than for farming. These issues and discussions during the research exercise illustrated the importance of an equitable allocation of resources.

It follows from above that access to land is problematic and a lack thereof is often the single most important factor preventing communities from engaging in agricultural activities. Respondents further alluded to the fact that the process of securing land, specifically for food gardens, is cumbersome and time consuming coupled with the fact that the city-design does not support sustainable urban agricultural practises. Interestingly, speaking to land availability for food gardens the Gauteng Department of Agriculture, Rural and Social Development (GDARSD) noted that they often have individuals who do not have access to land trying to access the resources they offer. The GDARSD says people notice that land support will be given freely and therefore request this assistance[269]. In such cases, the GDARSD refers individuals to the land reform process. However, according to the GDARSD as soon as these individuals realise the effort required for farming, they are reluctant to take on the responsibility[270].

Two decades and much sobering experience later, the concept of land reform in South Africa has spawned an industry of thinking and practice, undergoing much evolution. Although debatable, it has become evident across the political and social spectrum that the country's program of land reform after 20 years of democracy is in severe difficulties. "Almost since its inception, the program has failed to reach its targets or deliver on its multiple objectives of historical redress, redistribution of wealth and opportunities, and economic growth.[271]" Particular weaknesses in the land reform discourse have been the slow pace of land redistribution, the failure to impact significantly on the land tenure systems prevailing on commercial farms and in the communal areas, and the widespread perception that the redistribution of land that has taken place has not been translated into improvements in agricultural productivity or livelihood benefits for the majority of

[269] Ibid
[270] Loc cit
[271] Lahiff E. 2008. Land Reform in South Africa: A Status Report 2008, Programme for Land and Agrarian Studies research no. 38, School of Government, University of the Western Cape, p3.

beneficiaries[272]. All the same, despite much political bargaining and some changes in direction, the policy fundamentals with regards to land reform remain largely unchanged from the formula that was put in place at the time of achieving democracy in South Africa.

Respondents noted that it might be time for the government to reconsider the 30% target in terms of the redistribution of land through the land reform policy as there is a need for a credible land audit to assess ownership and the allocation of title deeds that have been provided to the beneficiaries of the land reform process**.** In particular, it was noted that the transfer of title deeds would bring security of tenure for previously disadvantaged farmers and communal areas. Furthermore, on the issue of title deeds emphasis was made on the fact that title deeds are an important tool in securing financial assistance for small-scale and subsistence farmers. The handover of title-deeds can thus potentially play a significant role in securing financing when farmers want to expand farming operations.

In the context of extreme inequality in landholding, in a country such as South Africa with a relatively high rural population, the redistribution of land assets must be understood as a central element of a land reform program and consequently, food security[273]. Redistribution is potentially the most important and far-reaching component of land reform in South Africa. In line with Section 25(5) of the Constitution, the objective of the land redistribution program is ‘‘to foster conditions which enable citizens to gain access to land on an equitable basis.[274]’’ In practice, this is generally taken to imply the redistribution of land from white to non-white owners. Given the extreme racial imbalance in landholding at the end of apartheid, when close to 90% of agricultural land was controlled by the white minority; it follows that this potentially has implications for most of the national territory and much of the population. A common conclusion from all respondents was that more importantly, the government must create a stabilised political environment, insofar as land and agrarian reform is concerned.

[272] Ibid, p3

[273]Du Toit A. 2011. Real Acts, Imagined Landscapes: Reflections on South African Land Reform Discourse, Institute for Poverty Land and Agrarian Studies (PLAAS). Available at: www.plaas.org.za (7/10/2011) p6

[274] Ibid

3.4 Access to Water

The ability to produce food is also heavily dependent on access to clean water. Subsequent to access to land, respondents raised a lack of access to clean water as a significant obstacle to food production. Delving into the normative content of the rights to food and water, and looking in particular at the progressive realisation of these rights, it becomes clear that those who suffer from violations of the right to food or the right to water are typically those who are poor, vulnerable, and experience a "rights deficit" more generally. Looking at the interdependency of rights through the right to food, it is worth remembering that the call of the Universal Declaration of Human Rights (UDHR) is not simply for food, but for an adequate standard of living. The right to food is one amongst several rights, including the rights to housing, water, education and access to healthcare that need to be fulfilled in order to achieve this, and must be viewed as part of a cluster of mutually reinforcing socio-economic rights. It requires extensive, cross-sectoral public provisioning by the State that goes well beyond securing food intake, to securing and enhancing access to the full complex of basic necessities that influence a human being's ability to live without under-nourishment. These include shelter, clean water, sanitation, adequate health care and education[275].

A respondent with working relations with the organisation *Women on Farms* based in the Northern Cape reported that cooperatives and the women that their organisation supports to produce their own food, are severely limited by a lack of access to water. The respondent noted that the province is characterised by a shortage of water due to its low annual rainfall. Available resources should be used optimally and allocated equally among all who require it. However, big commercial farmers seem to benefit disproportionately, at the expense of communities and subsistence farmers, in terms of available water sources.

The disproportionate allocation affects homes too, as communities are forced to walk long distances to get to water sources further afield. Water user associations manage water canals, and use sophisticated equipment to which ordinary individuals do not have access.

[275] Chopra. S. 2009. Holding the State Accountable for Hunger. Economic & Political Weekly. Vol XLIV, No. 33, August 15, 2009. See: http://www.epw.in/ejournal/show/1/_/2018

This makes it possible for farmers to pump water from canals/dams for commercial purposes, leading to a shortage of water for subsistence farmers. There is a need for the active involvement of municipalities in the management of available water sources, especially in water-scarce areas.

In the Mpumalanga province during the SAHRC's public hearing on the right to food, a community representative complained about the poor quality of the water, which could not be used for farming and further complained about the poor maintenance of water infrastructure and sewage. In some instances, it was noted that clean water is diverted to mining, at the expense of communities who want to grow their own food. The community representative stressed that government should not accuse poor communities of being dependent when it does not provide potable water for drinking and farming. Generally speaking, participants at the public hearing referred to the challenge of water scarcity and noted that there is a need for increased investment in improved irrigation systems and raising awareness and education in communities about rainwater harvesting and the safe use of water.

Responding to the above, officials from the Department of Water Affairs (DWA) in the province noted that the DWA has programmes in place to deal with water issues. Officials spoke to the fact that if there were any complaints, the community should approach the council with a letter and the municipality will submit the letter to the DWA. The underlying motive being that the department expects communities to report water problems to the municipality who in-turn should respond to these complaints. However, access to water is also problematic due to water wastage. An official explained that large units of water that could have been used in farming, 'disappear' into underground leakages. Communities also have a responsibility to protect available water resources and to ensure that this precious resource is not wasted. Although the DWA provides support to municipalities through its War on Leaks Programme, communities also have to play their part in this regard it seems.

Municipalities have a legal mandate to provide basic services to local communities. The DWA has an oversight role and cannot overstep its authority. However, local government lacks the skills and capacity to respond adequately to service delivery challenges. The

challenges concerning access to water, clearly illustrate a lack of adequate oversight and monitoring in terms of delivery. The DWA can and should intervene when a municipality fails to deliver services. The over-reliance on community members to report problems and a lack of access to water is not sufficient as a monitoring tool. The DWA therefore must implement a sustainable and more efficient monitoring mechanism to monitor access to clean water.

Interestingly, the departments of Basic Education (DBE) and Health (DoH), in the same province, also complained of a lack of access to water for food gardens at schools and clinics. Even among government departments, it appears there is a lack of communication and cooperation for the purposes of ensuring access to adequate water for the realisation of the right to food.

3.5 Supporting Farmers: Extension Services

Respondents agreed that government's extension services are inadequate. Currently, the need for extension support, particularly among emerging black farmers who benefitted from land reform, far outweighs the availability of support. The limited number of available Extension Officers (EOs) is thinly spread amongst a number of farmers. As a result, EOs are unable to provide the kind of constant support required by emerging farmers.

Moreover, the quality of extension support and advice given to farmers is also questionable. The main purpose of EOs' is to provide support in terms of technical expertise to farmers. However, due to a lack of adequate training, EOs do not always possess the requisite skills and knowledge to provide this service. As such, many commercial farmers do not make use of extension services but instead contract the services of expert consultants, at high costs. Due to their limited finances, and lack of other resources, emerging farmers are often unable to access similar services and are further disadvantaged.

Further, it must be also be acknowledged that inappropriate support is not always due to shortcomings on the part of EOs. Respondents indicated that EOs do not always receive adequate support from the DAFF to be effective in fulfilling their duties. For instance, EOs

are sometimes blamed when (small-scale) farmers do not get the assistance they request. However, when finance is made available, it is often distributed very differently from the needs EOs identify. In the Western Cape, *Abilimi Bezekhaya* has called for training of EOs and efficient services when and where needed. In terms of ensuring the latter, processes around extension support must be less bureaucratic. The need for excellent extension services is critical when one considers the challenges many emerging farmers face in trying to gain access to markets to sell their produce.

Challenges Related to Distribution

3.5.1 Market Access for Local Retailers

The research process further revealed that markets favour large-scale commercial farmers often at the expense of small-scale farmers. The market is complex. It has various requirements with which small-scale emerging farmers are not necessarily able to comply. According to a respondent with Section 27, in retail, there is an over-concentration in the hands of a few corporate entities. The virtual monopoly of a handful of corporates in the market allows them to control their own prices and effectively prevents the entry of other producers into the market.

Secondly, supermarkets require produce of a certain quality and appearance. If farmers including small-scale farmers do not meet the standards, supermarkets will not stock their product. Unfortunately, small-scale farmers are often unable to meet these quality specifications. For instance, transport is a major issue in rural areas, where most poor small-scale farmers are situated. These farmers are not always able to get their produce to markets within the specified time. Although their produce may still be adequate for consumption, it is likely small-scale farmers' produce is rejected by large supermarkets, at a loss to the farmer. There is no question that the market should be more hospitable to small-scale farmers. However, it is equally important that small-scale farmers produce products that meet quality specifications. Small-scale farmers therefore need assistance to produce the best quality product and get it to markets within good time.

Emerging farmers, particularly the beneficiaries of land reform programmes lack marketing skills and have a weaker bargaining position as compared to large-scale commercial farmers. It is therefore necessary to consider a model of agriculture, which is not necessarily competitive and strictly profit driven. Elsewhere it has been argued that the provision of guaranteed market access for small-scale farmers is necessary. The idea is that the market would allow small-scale farmers to by-pass the competitive market. The underlying motive being that peasants should be the driving force in such a market and only those who want to step over into commercial farming should have to do so, such a market would function at an informal trader level. This means that it can be established without massive education and huge costs.

To sell their produce, there is a need for well-managed local markets. Thus, there is a need for more emphasis on local food systems and its potential to address food security. Respondents indicated that there is a misconception that food sold at supermarkets is of a higher quality. As a result, despite paying higher prices communities prefer to buy from these supermarkets. One of the respondents during the study referred to the lack of support from communities to the local farmers. They explained that farmers grow food, but the community chooses to buy from larger stores rather than the local farmers.

The spread of larger retailers into rural areas, also poses a challenge for small-scale producers. *Abilimi Bezekhaya* has noted that in the last few years there has been a gradual spread of the corporate food distribution systems into rural areas and that the government, at the highest level, seems unaware of this problem. The organisation argues that the government implements policies that seem counterintuitive. For example, street traders, who are often small-scale farmers, are evicted from trading in areas where they provide healthy affordable food, while earning an income. Again, respondents called for policy implementation that speaks to the issues of the poor and most vulnerable, and more importantly the effective implementation of such policies.

The GDARSD further points out that despite the challenges noted above, there have been some successes where small-scale farmers grew into commercial farmers producing for big

retailers such as Woolworths[276]. However, the GDARSD has found that often when farmers gain access to the market and get a contract these farmers are unable to sustain production based on demand in the market. This factor underscores the importance of sustained support and monitoring to farmers, specifically those who have aspirations for commercial farming.

Additional Challenges

3.5.2 Climate Change

Efforts geared towards the eradication of global hunger and food insecurity are proving to be a challenge that national and international actors, local households and individuals are struggling to address. Presently, we have the answers to questions concerning how many people lack food security and why this is, who they are, and where they live, but we have not been able to trigger action that provides expected and agreed results. Amidst the above analysis on the where South Africa finds itself in the fight for the right to food is the issue of climate change which threatens to make the already difficult situation of food (in)security in the world even worse. Climate change will have adverse effects on the access to sufficient food of those who are already the most food-insecure, increasing the number of hungry and malnourished people and the likelihood of new famines. Failure to tackle climate change threatens all aspects of food security – availability, accessibility, and adequacy[277]. The changing climate is already jeopardising gains in the fight against hunger, and this situation is expected to worsen. It threatens the production and distribution of food and people's ability to access food by undermining livelihoods and destabilising prices[278].

The *3rd Global Conference on Agriculture, Food Security, and Climate Change*[279] organized by the governments of the Republic of South Africa, the Netherlands, and in collaboration with other partners, including FAO and the World Bank held in South Africa in 2013 noted

[276] See note 53 above.
[277] Oxfam Issue Briefing. 2013. Growing Disruption: Climate change, food, and the fight against hunger. Available at: www.oxfam.org
[278] Ibid.
[279] 3rd Global Conference on Agriculture, Food Security, and Climate Change. See: http://afcconference.agric.za/

that the developing world would need to be the area of focus for increasing agricultural yields and productivity. It is understood that without appropriate intervention, global agricultural production yields will not meet population demands by 2050 as a result of climate change. To address the challenges ahead, the conference noted that the aim is for:

1. The transformation of information into knowledge, which can only take place by catering for all stakeholders, especially farmers and those that work on the land;
2. The exploration of innovation approaches, such as integration of indigenous / traditional knowledge, experience, and expertise with science and technology;
3. Building on existing approaches to sustainable agricultural production;
4. The adoption of systems approaches on a much greater scale, based on agro-ecological zones;
5. The promotion of an integrated climate smart approach, to encourage greater financial support and funding;
6. The increase of food production and nutritious food through sustainable management of the agricultural natural resources including soil, land cover, and water;
7. Building resilience and disaster risk reduction; and
8. The mainstreaming of "climate smartness" in agricultural development[280]

Important to note is that although climate change impacts are widespread, it is the rural and urban poor who will feel the impacts of climate change the most. Rural communities are already vulnerable to climatic variability and have least resilience to changes in their environment, which affects their ability to grow food. Notably, Oxfam has produced a series of publications noting the following:

a) Small-scale farmers are already confirming unpredictable rainfall;
b) Flash flooding washes away crops and soil;
c) Extremely hot days or cold frosts destroys crops; and
d) Dramatic changes in the seasons has affected fishing.[281]

[280] Adapted from resolutions taken at the 3rd Global Conference on Agriculture, Food Security and Climate Change. Available at: http://afcconference.agric.za/
[281] Oxfam Issue Briefing. 2013. Growing Disruption: Climate change, food, and the fight against hunger. Available at: www.oxfam.org

Climate change will put increasing pressure on South Africa's ability to grow food so the need to ensure climate change adaptation and mitigation as a priority concern of the State is important.

It follows that food security on the other hand will be affected in a devastating way. It is predicted that there will be change in availability of certain food products, increasing food prices, seasonal variations in food supply as well as increased post-harvest loss, and reduced shelf life. This all means that the vulnerability of the poor and marginalised in South Africa's dual economy will be further exacerbated. In this context, future food security is under threat and African mitigation and adaptation strategies are required.

3.5.3 Genetically Modified Organisms (GMOs)

Globally, there is an ongoing debate about the acceptability of genetically modified organisms (GMOs), and whether they pose a threat to the health of consumers and to the natural environment[282]. GMOs sometimes referred to as modern biotechnology, "are organisms in which the genetic material (DNA) has been altered in a way that does not occur naturally[283]." Various actors are in some way or another involved or affected by the use of the genetic modification (GM) of food. These include governments, international corporations, the scientific community, civil society organisations, farmers, and finally, consumers.

These entities hold differing views based on either economic interests or values and attitudes toward risk. Proponents of the use of GMOs refer to the ecological and economic benefits that can be derived from genetic modification of food. They further argue that European consumers who have little to gain or lose dominate the debate against GMOs, and that these consumers offer their criticism not considering the potential benefits that the rural population, particularly in the global South, can get from GMOs. Opponents to GMOs

[282] Fukuda-Parr, S. & Orr, A. 2012. GM Crops for Food Security in Africa – The Path Not Yet Taken. Working Paper, United Nations Development Programme (UNDP). Regional Bureau for Africa, WP 2012-018: January 2012.

[283] The technology is also often called "gene technology", sometimes also "recombinant DNA technology" or "genetic engineering". See: http://www.who.int/foodsafety/publications/biotech/20questions/en/

refer to factors including environmental safety, corporate takeover of agriculture, and moral or ethical concerns such as 'moral tampering with nature' in their opposition.

South Africa has a long history of involvement in GMOs. GMOs have been officially permitted in the country since 1992[284]. The country is the 10th largest producer of GMO crops in the world and South Africa has become a gateway for introducing GMOs to Africa. Furthermore, South Africa remains the only country in the world that allows GM varieties of its national staple food, white maize, to be grown commercially[285].

Discussions with respondents on this issue revealed a general lack of clarity and information around GMOs and the links between genetically modified foods and the right to access to sufficient food. There is a lack of awareness by the government on the pros and cons of GMOs as well, further scrutiny of this scientific development is needed. As such, respondents identified a need for further research on GMOs that is locally informed and that considers the long-term effects on individuals and the environment.

In terms of labelling, respondents called for the establishment of a single entity that would take responsibility for dissemination of information of GMOs. Such an entity would ensure the proper labelling of all foods that contain GMOs. This will ensure that people's access to information is realised. In-turn, this will further ensure that people are able to exercise their right to choice, it may be necessary to not only inform them of what GMO labels of food mean, but also why it is important for them to read the labels. One of the respondents during the study referred to the Cartagena Protocol[286] and noted the importance of complying with this treaty, which South Africa has ratified.

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284 The Department of Trade and Industry (DTI), Genetically Modified Organisms (GMOs) Presentation, 13 September 2013. Available at: http://www.agbiz.co.za/uploads/documents/legislation/parliament/parliamentary-presentations/gmos.pdf (Accessed 21/09/15)

285 Ibid.

286 The Cartagena Protocol on Biosafety to the Convention on Biological Diversity is an international agreement on biosafety, as a supplement to the Convention on Biological Diversity. The Biosafety Protocol seeks to protect biological diversity from the potential risks posed by genetically modified organisms resulting from modern biotechnology. The Biosafety Protocol makes clear that products from new technologies must be based on the precautionary principle and allow developing nations to balance public health against economic benefits. It will for example let countries ban imports of a genetically modified organisms if they feel there is

3.6 A Way Forward: Food Sovereignty?

Fascinatingly, in South Africa there now exists a growing sect within the public domain that has embarked on a programme of action consisting of phases of rolling action to confront the key contradictions of the country's food system, namely "rising food prices and corporate control, declining nutrition, increasing use of GMOs and corporate control of seeds, lack of land, water, and agrarian reform, destructiveness of industrial agriculture, labour exploitation on farms, and lack of finance for small scale farmers and cooperatives[287]" – under the banner of 'food sovereignty'.

This particular sect of civil society is advancing an understanding that South Africa has a crisis-ridden corporate and globalised food system that is responsible for worsening social, health and climate challenges, and which is coinciding with increasing state failure in relation to regulating the country's food regime and ensuring much needed agrarian transformation[288]. The underlying motive for food sovereignty supporters is that with the climate crisis worsening and without any genuine solutions coming to the fore from the South African state, the corporate-controlled food system and the United Nations, there is a need to advance food sovereignty, to ensure our food and water needs are not compromised and that ordinary citizens have the means to meet food production and consumption needs on their terms in the midst of the climate crisis. In-tune with the food sovereignty narrative, there was major criticism of the current food system amongst all respondents. Generally speaking, South Africa's food system is characterised by the following:

a) Poor access to food, particularly for poorer households;

b) Limited access to information;

c) Unequal bargaining power and market access;

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not enough scientific evidence that the product is safe and requires exporters to label shipments containing genetically altered commodities such as corn or cotton.

[287] Cooperative and Policy Alternative Centre (COPAC). 2015. Declaration of the South African Food Sovereignty Campaign and Alliance. COPAC, p1. Available at: http://www.copac.org.za/news/2015/declaration-south-african-food-sovereignty-campaign-and-alliance

[288] See: http://www.safsc.org.za/ (Soon to be launched South African food sovereignty campaign website).

d) Collusion and price fixing; and

e) Massive food system concentration

Research has indicated that despite South Africa's food security status, access to food is low, particularly for poor informal households. Concomitantly, South Africa's burden of disease is also exacerbated by poor nutrition and access to food. Consumers largely lack access to sufficient information on nutrition, price fixing and access to agriculture opportunities. There is also a lack of information on GMOs.

Research has further shown that there is concentrated ownership, price collusion and limited access for market entrants, particularly small-scale farmers as depicted above. The DAFF explains that "monopolistic practices also reinforce the recent rises in food prices, which undermines economic growth and the fight against hunger and poverty[289]." Proponents of food sovereignty cite this as a problem to the global and national food system dilemmas cited above.

Food sovereignty is defined as:

> The right of peoples, communities, and countries to define their own agricultural, labor, fishing, food and land policies, which are ecologically, socially, economically and culturally appropriate to their unique circumstances. It includes the true right to food and to produce food, which means that all people have the right to safe, nutritious and culturally appropriate food and to food-producing resources and the ability to sustain themselves and their societies[290].

Vishwas Satgar an academic from the University of Witwatersrand and a board member of the Cooperative and Policy Alternative Center (COPAC) believes that an alternate form of activism is required to change the food system and that food sovereignty will decentralise food production, building local capacity, preserving resources and challenging international

[289] See note 30 above.

[290] La Via Campesina. 2002. Food Sovereignty: A Right for All, Political Statement of the NGO/CSO Forum for Food Sovereignty", Rome, p1. Available at: http://viacampesina.org/en/index.php/main-issues-mainmenu-27/food-sovereignty-and-trade-mainmenu-38/398-declaration-ngo-forum-fao-summit-rome5 (Accessed 21/09/15)

agencies with democracy and rights as a base[291]. This view is shared by many civil society representatives and academics working to realise the right to food and more broadly, to alter the food system to ensure great access and equitability.

All the same, there's contention amongst activists working on land and agrarian reform matters in that food sovereignty champions consider that food security is limited to only one aspect of the agro-food system – the practical concern with getting food to people. Whereas, critics of food sovereignty (food security campaigners) in turn ask whether its proponents are able to organise the technical aspects of production and distribution to large non-farming populations. Herein lies the matter that has divided civil society insofar as the fight for the right to food goes.

Still, it must be acknowledged that food sovereignty credibility lies in its objective of achieving a solidarity economy. Food sovereignty supporters understand the power dynamic that comes with a corporate-ridden food system. These individuals assert that large financial and corporate interests, linked closely to state elites, define the terms of agro-food investment and select technologies[292] that reinforce their power and control over resources.

3.7 Conclusion

The Constitution guarantees to everyone the right to access to sufficient food, subject to the principle of 'progressive realisation'. This guarantee places on the government an obligation to ensure that it creates an enabling environment, which allows individuals to realise their right to access to food. It does not mean that the government physically has to feed people. It merely means that government must provide conditions such that people can feed themselves. Contentious areas that the government needs to respond to in order to ensure access to sufficient food have been the focus of this analysis.

[291] Vishwas Satgar (Cooperative and Policy Alternative Centre), presentation at the South African Human Rights Commission (SAHRC) National Dialogue on the Right to Food, 20 March 2014. Johannesburg, South Africa.
[292] Technology is not entirely neutral, it can be used in different ways.

This study, from engaging respondents and various institutions working on the right to food has found that the issue of access to food lacks a common definition and understanding among all the different actors involved. As each actor applies a different definition when trying to engage with the right to food, actors cite different results about the full extent of the problem. To address this challenge, perhaps it is the work of Institutions like the Studies in Poverty and Inequality Institute (SPII) a small research think-tank NGO based in Newtown Johannesburg which is concerned with the development of a socio-economic rights monitoring tool to measure access to rights such as the right to food. Such a tool could be used universally and hopefully bring forth a shared understanding and more reliable data on the extent of food insecurity in the country.

While debate may exist on the most appropriate policy responses, for a middle-income country that is nationally food secure, there is certain agreement that too many South Africans suffer from a lack of access to the right to food. Sufficient food is available, but not everyone is able to access food. Poverty, unemployment and high levels of inequality play a major role in this regard. Government efforts towards ensuring an enabling environment to access the right to food should therefore be geared towards squarely addressing this situation.

Poverty and inequality remain structural issues in South Africa. It has become endemic to the country's socio-political economy that immediate eradication of these challenges appears unlikely. Instead, in all likelihood addressing these challenges is going to be a long-term process and will require sustained efforts for many years. Yet the challenge is that the hungry need to eat now, they cannot wait until policies and programmes yield intended outcomes in the long-term. For this reason, the strengthening of efforts towards eradicating poverty, unemployment, and high levels of inequality is urgent. Furthermore, the need for improved coordination and implementation of government policies and programmes that seek to address these issues is required.

The above analysis indicates that policies and programmes on the right to food are implemented in a fragmented manner and that there is a lack of a coherent response amongst all actors involved in the food value chain. A lack of communication between

government departments implementing food policies and programmes further exacerbates the problem. The result is poor implementation all around and a violation of the right to food. There is a disjuncture between policy and implementation. Nevertheless, it must also be considered that policy failure might also be due to the absence of authentic public participation in developing government responses to the right food meaning responses do not speak to the specific conditions on the ground**.**

Policy implementation failures are further evidenced in the fact that government's response to a lack of access to food has been mainly supply-side driven characterised by inadequate support to subsistence and small-scale farmers. Commercial farmers tend to produce for the national market, thus ensuring food security at the national level. To ensure access at the household level, the government is promoting either own food production or small-scale production through cooperatives. However, the latter group lacks access to resources such as supply inputs, affordable financing, clean water, arable land, etc. In addition, extension support that could play a big role in ensuring the sustainability of such projects – is completely inadequate. Should a farmer somehow overcome these challenges and make a success of the farming operation, she or he may still be unable to gain an income from their produce, as access to the market is problematic.

Clearly, there is need for a much more holistic and systemic approach to dealing with the right to food. There is need for integration of community voices in policy development, for improved communication and cooperation between relevant actors and more importantly, a more concerted committed effort aimed at realising sufficient access to the right to food for all. A dedicated Ministry of Food or Commission on Food Security that would take primary responsibility for implementation is therefore a recommendation that deserves government's measured consideration**.** Notably, for the SADC region - Zambia has a National Food and Nutrition Commission, a government parastatal that was was set up in 1967 as an advisory body to the Zambian government on all matters relating to food and nutrition[293]. For South Africa, not only would the establishment of such an authority potentially do away with fragmented policy implementation and lack of communication, but it would also

[293] See: http://www.nfnc.org.zm/

provide ordinary citizens with a focal point that it can hold accountable for realising the right to food.

It is not enough for these rights to be contained in documents.

They have to be functional in people's lives, and this has to be done in a more aggressive manner than is being done.

The journey is certainly not going to be easy as you shall be making incursions into a system where the rights of the underprivileged have never been a priority; where the underprivileged have no voice.

You shall come against pressure groups in your bid to alter the status quo.

You have to be steadfast and unbowed.

You have a name to protect and a cause to fight for.

You have to be bold and innovative in your recourse to the courts.

You may come against unfavourable decisions in the courts.

Your weapon however is to be armed with formidable case law on the subject, both local and international.

You have to be ready when you lose a case to proceed to the highest court of the land.

You have to be ready to test repeatedly unfavourable government policies until social and economic rights have become recognised and implemented.

- **Honourable Justice O. A. Adefope-Okorie, Nigeria**[294]

[294] Keynote Address to Legal Action Program Network (LAPNET) Workshop '98

4. Public Interest Litigation

It is widely accepted that the right to food forms one of the basic economic and social rights essential to achieve what some scholars have called 'economic democracy[295]' in South Africa. However, the right to food unlike other socio-economic rights, does not easily translate into well-defined entitlements and responsibilities. It must be acknowledged that serious challenges are involved in making the right to food fully justiciable. As such, it must be noted that new interventions are possible in at least three ways – through legal action, through democratic practice and through changing public perceptions about the gravity of the situation. More importantly, the right to food when linked to other socio-economic rights holds the promise of radical change in public priorities and democratic politics.

As illustrated in the previous chapters, the realisation of the right to food in the country can be seen from at least three different perspectives. One, is the perspective of the South African Constitution. Secondly, we can refer to international declarations and conventions on this matter, starting with the Universal Declaration of Human Rights (UDHR). Thirdly, it is possible to argue for the right to food as a moral and social right, independently of all these documents. Indeed, it is a basic premise of the human rights movement that all human beings have some fundamental rights, whether or not these rights are already incorporated in national or international law. These three perspectives, of course, are not mutually exclusive. In fact, they complement each other. In this chapter, however, I shall concentrate on the first approach, and particularly on the right to food as one of the economic and social rights that need to be litigated and unpacked in the Constitutional Court of South Africa.

The following will be unpacking the nature of public interest litigation in South Africa. This chapter seeks to understand in what context the sector operates and more importantly how can its value and impact be characterised and measured? Answering this question will in-

[295] Economic democracy is a socioeconomic philosophy that proposes to shift decision-making power from corporate managers and corporate shareholders to a larger group of public stakeholders that includes workers, customers, suppliers, neighbours and the broader public. No single definition or approach encompasses economic democracy, but most proponents claim that modern property relations externalize costs, subordinate the general well-being to private profit, and deny the polity a democratic voice in economic policy decisions. In addition to these moral concerns, economic democracy makes practical claims, such as that it can compensate for capitalism's inherent effective demand gap.

turn offer insight into how organisations, other groupings and individuals within the public interest litigation sphere co-ordinate activities and collaborate with each other. The following ultimately seeks to shed light on the role public interest litigation has in expanding access to justice in South Africa and what this means for the right to food.

Important to note is that despite the relatively high number of public interest litigation organisations in South Africa, there is surprisingly little scholarship that reflects systematically on the questions posed above[296]. However, important to note is that this study does not arise from scepticism about the value and impact of public interest litigation, but from a clear recognition that, in a relatively new Constitutional democracy, public interest litigation is essential.

4.1 Law and Transformation

The law has been assigned a central role in the transformation of South African society, because the primary vehicle for social transformation in South Africa is the Constitution[297]. Apartheid oppressed through law and it's been noted elsewhere that "the architects of the post-Apartheid settlement laid great emphasis on law as a vehicle through which to achieve transformation.[298]" This double-headed nature of law has long been recognised but hopes invested in law continue to be evident in post-Apartheid politics, especially in the arena of socio-economic rights.

> Some of the worst failures of the state and private sector have been corrected by the courts through public interest litigation, which itself has been accompanied by effective legal activism. Among other efforts, the failure to respond to the HIV/AIDS crisis with effective

[296] Some literature (including comparative) has sought to draw out potential lessons from individual or samples of cases in South Africa: for example, see Heywood, M. 2003. Preventing Mother to Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the TAC Case against the Minister of Health, 19 SAJHR 278; Langford, M (ed). 2003. Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies, Geneva: Centre on Housing Rights & Evictions; Berger, J. Litigating for Social Justice in Post-apartheid South Africa: A Focus on Health and Education in Gauri, V & Brinks, D (eds). 2008. Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World 38.
[297] Socio Economic Rights Institute (SERI). 2015. Project Report: Public Interest Legal Services in South Africa, SERI. P7. Available at: http://www.raith.org.za/docs/Seri-Pils-report-final.pdf (Accessed 28/09/15)
[298] Ibid, p8

programmes to provide anti-retroviral medication[299], the failure to address the needs of those who face homelessness through eviction or disaster[300], exclusionary[301] and administratively unjust[302] aspects of the social security regime, inadequate provision of water[303], and unlawful disconnections of electricity[304], have all been addressed through public interest litigation, as have unfair banking practices[305]. Beyond socio-economic rights, civil society participation in Commissions of Inquiry – most notably after Marikana, in Khayelitsha and in connection with the Arms Deal – has also underscored the need for a renewed defence of civil and political rights[306].

Amidst the above, it must also be understood that debates are ongoing on how public interest litigation could be more effective in bringing about systemic change and social justice in South Africa. As such, what is essential is an understanding of the opportunities and constraints that public interest litigation faces in bringing-about change and redistributing power in the country. This research has considered what relevant literature has to say about the prospects of the law in engineering social change. This part of the research expounds on the fact that more recently "scholars have developed a nuanced, contextual approach to the use of public interest legal services, recognising that these services, although imperfect, are indispensable for social change.[307]" In both the South African and international debates on public interest litigation, it is not whether or not public interest litigation has value, but how that value is best characterised, understood and maximised. Therefore, although public interest litigation may have limits, there is an understanding that under the right circumstances it is a powerful vehicle to facilitate social change[308].

[299] Minister of Health v Treatment Action Campaign (No. 2) (2002) 5 SA 721 (CC).
[300] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC); City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC).
[301] Khosa v Minister of Social Development 2004 (6) SA 505 (CC).
[302] MEC for the Department of Welfare v Kate 2006 (4) SA 478 (SCA).
[303] Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC)
[304] Joseph v City of Johannesburg 2010 (4) SA 55 (CC)
[305] Gundwana v Steko Development 2011 (3) SA 608 (CC); Sebola v Standard Bank 2012 (5) SA 142
[306] Socio Economic Rights Institute (SERI). 2015. Op Cit, p9
[307] Ibid, p10
[308] Ibid, p14

4.1.2 Legal Services, Economy and Society in South Africa

South Africa faces a range of complex social and economic challenges: mainly inequality, poverty, state incapacity, discrimination against, or the exclusion of, a range of vulnerable social groups, joblessness, and abuse of private power, recalcitrance and corruption. The public interest litigation sphere is involved with a broad arena of work across multiple fronts. Meaning every major area of social concern is the subject of some form of public interest litigation work, which, is often met with real success, including "the expansion of access to housing, healthcare services, particularly essential medicines, widened access to social grants, challenging xenophobia, racism and gender-based violence, enhancing youth and educational opportunity, protecting the environment and so on.[309]"

Notably, a range of fundamental social needs have given rise to important work within the public interest litigation sphere particularly in the areas of healthcare, education and housing. According to a report by the Socio-Economic Rights Institute (SERI) commissioned by the Raith Foundation, health systems in provinces across South Africa are collapsing, leading to unnecessary deaths and other rights violations[310], the crisis has been viewed as one of mismanagement rather than a shortage of funds. Pointedly, in the past, the right to health which just like the right to food is also enshrined in section 27 of the South African Constitution has been progressively upheld and strengthened in a constitutional challenge to ensure the provision of access to anti-retroviral medicines[311]. However, at the moment, health officials are very rarely held accountable nor are interventions launched to stem the crisis[312]. On the other hand, a look at the education sector in South Africa reveals a highly unequal sector in which the legacy of apartheid is deeply entrenched. Additionally, legally binding Norms and Standards for School Infrastructure were published after an extensive campaign was mounted by a variety of public interest law organisations, including a series of

[309] Socio Economic Rights Institute (SERI). 2015. Project Report: Public Interest Legal Services in South Africa, SERI. P40. Available at: http://www.raith.org.za/docs/Seri-Pils-report-final.pdf (Accessed 28/09/15)
[310] Ibid, p18
[311] Minister of Health v Treat Action Campaign (No.2) (2002) 5 SA 721 (CC)
[312] Interestingly, in 2013 the Treatment Action Campaign (TAC) and SECTION27 published a report called 'Death and Dying in the Eastern Cape'. The report made waves at parliament and in the office of the Minister of Health. Consequently, the Minister sent a task team to the Eastern Cape and soon after announced a number of emergency interventions in the province. The MEC for health Sicelo Gqobana was not reappointed after the May 2014 elections.

legal interventions[313]. Notwithstanding a housing construction programme that has been relatively successful in statistical terms, housing and land tenure issues are the most frequently litigated social and economic rights issues in the Constitutional Court. As such, it must be acknowledged that socio-economic legal developments and crucial policy reforms have largely come-about as a result of the significant role of public interest litigation organisations[314].

Amid the abovementioned, public interest litigation in South Africa has further addressed the needs of a range of vulnerable groups, including foreign nationals in South Africa, gender based violence, gay, lesbian, bisexual, transgendered and intersex (LGBTIQ+[315]) rights, and rural communities. However, in reference to gender-based violence, the supply of public interest legal services does not correspond to the alarming rates of gender-based violence in South Africa, particularly for individual cases[316]. Additionally, attitudes against foreign nationals appear to be hardening. Although South Africa has progressive legislation in place protecting the rights of foreign migrants, the laws are ignored in practice on the ground, leaving foreign nationals vulnerable and unable to claim their rights[317]. Social stigma is also an ongoing concern despite South Africa being regarded as possessing a progressive Constitution and policies in terms of the equality and anti-discrimination rights afforded to LGBTIQ+ people. Although there has been considerable efforts on the part of the state to implement programmes and policies that enhance the lives of rural communities, these have largely failed and a variety of considerable challenges face communities in rural areas. Intrinsically linked to the right to food and perhaps one of the most pronounced issues facing rural communities is the alarming levels of tenure insecurity in relation to farmworkers and rural communities.

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[313] These legal interventions were undertaken by civil society organisations such as Equal Education (EE), Equal Education Law Centre (EELC), the Legal Resources Centre (LRC) and Section 27.

[314] These organisations include the Legal Resources Centre (LRC), Centre for Applied Legal Studies (CALS), Lawyers for Human Rights (LHR) and the Socio-Economic Rights Institute (SERI)

[315] LGBTIQ+ is an inclusive acronym encompassing all minority sexual and gender identities, as well as atypical biological sex or Intersex. Q+ includes all other identities including Asexual, Pansexual, Genderqueer, Non-binary, Questioning etc. There is no international agreement on how to extend LGBT to be more inclusive of all Gender and Sexual Diversities.

[316] Socio Economic Rights Institute (SERI). 2015. Op Cit, p23

[317] See: CoRMSA, "Statement on International Human Rights Day" (10 December 2014): http:// www.cormsa.org.za/2014/12/10/cormsa-statement-on-international-human-rights-day-10-december-2014/ (Accessed 28/09/15)

Although the challenges in the public sector are complex, it seems undeniable that "litigation against the state will continue to mount as it fails – whether through unwillingness or inability – to execute its obligations.[318]" Lack of water, electricity, sanitation and housing, along with corruption, are the most common issues driving mobilised dissent in townships and shack settlements[319]. Participatory local democracy has floundered because ward committees have become dominated by political parties and leaders are more accountable to political parties than to the citizenry[320]. The work done by public interest litigation organisations in ensuring access to basic services, the protection of livelihoods and defending the masses against evictions and displacement address these local government failings. Moreover, public interest litigation organisations have also had to devise new ways to hold local government accountable, by, for example, holding local government office bearers individually responsible for the implementation of court orders[321].

South Africa has seen a significant surge in protests in poor urban areas which can be viewed as a claim for the realisation of socio-economic rights by poor people. Moreover, according to the Raith Foundation report, "the South African government, through the police, has responded to the surge in protests with growing intolerance, ranging from overtly brutal repression, including the use of disproportionate and sometimes lethal force, to suppression through less visible means[322]." It appears that the state is increasingly exploiting the criminal justice system not so much for the genuine prosecution of criminal activity, but rather to deter, intimidate and suppress popular dissent[323]. Significantly, public interest litigation organisations have also alluded to the fact that they are experiencing growing demand for criminal defence services, including bail applications. Consequently,

[318] Socio Economic Rights Institute (SERI). 2015. Op Cit, p29.
[319]Jain, H. 2010. Community Protests in South Africa: Trends, Analysis and Explanations, Local Government Working Paper Series No. 1, Community Law Centre, University of the Western Cape.
[320] Alexander, P. 2010. Rebellion of the Poor: South Africa's Service Delivery Protests – A Preliminary Analysis, Review of African Political Economy, 37(2), pp.25-40.
[321] See, for example, Mchunu v Executive Mayor, eThekwini Municipality 2013 (1) SA 555 (KZD); Hlophe and Others v City of Johannesburg and Others 2013 (4) SA 212 (GSJ).
[322] Socio Economic Rights Institute (SERI). 2015. Op Cit, p32.
[323] Ibid, p32

they have also publicised systemic failings in policing, including police partiality and brutality[324].

In dealing with the right to food - noting the lack of accountability within the food-value-chain and despite the progressive constitutional measures to address the issue of unconstrained private power (seeing as the provisions of the Bill of Rights are applicable to corporate entities and private parties too), there seems to be a perception amongst scholars that public interest litigation has not fully utilised existing accountability measures to curb the severe abuses of private power. Herein lies the potential for litigators to bring about conditions that would see the right to food contested in the courts of South Africa. Significantly, a large number of public interest litigation organisations have embarked on, and continue to, curb the more severe abuses of private power through litigation. Examples of work in the sector include litigation relating to the following;

> … sales in execution of homes or bank repossessions[325], addressing unfair landlord-tenant relationships[326], challenging the harmful environmental[327] and social impacts[328] of extractive industries, challenging unfair micro-lending practices of banks and garnishee orders[329], and challenging the excessive pricing regimes and exclusive patent laws pertaining to live-saving pharmaceuticals[330][331].

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[324] See: Clark, M. 2014. An Anatomy of Dissent and Repression: The Criminal Justice System and the 2011 Thembelihle Protest, Socio Economic Rights Institute and Ndifuna Ukwazi. 2014. Our Struggle for Safety and Justice in Khayelitsha.

[325] See, for example, SERI's work in relation to sales in execution of homes: http://www.seri-sa.org/index.php/litigation-9/cases.

[326] See, for example, SERI's work in on landlord-tenant relations: http://www.seri-sa.org/index.php/litigation-9/cases.

[327] See, for example, the work done by LRC (http://www.lrc.org.za/focus-areas/environment), CER (http://cer.org.za/programmes/mining) and the Centre for Applied Legal Studies (CALS) (http://www.wits.ac.za/academic/clm/law/cals/newcalssite/16867/environment.html).

[328] See, in particular, the work done by the LRC in relation to the silicosis class action, a case involving a large number of mineworkers who contracted silicosis while working in a gold mine in the Free State: http://www.leighday.co.uk/News/2012/April-2012/SA-miners-suffering-lung-disease-bring-their-deman.

[329] See: RDM News Wire. 2015. Garnishee order ruling a 'victory for the poor'. *BDlive*. Available at: http://www.bdlive.co.za/national/2015/07/12/garnishee-order-ruling-a-victory-for-the-poor

[330] In this regard the work of SECTION27 and the Treatment Action Campaign (TAC) have been crucial. See, for example, TAC "TAC intervention leads to important legal advance: Public interest concerns relevant in determining interim interdict in patent cases" Press Release (31 July 2012); A Berner-Roderedo "'Big Pharma' trying to impede South Africa's overdue patent law reform" Brot fűr die Welt (20 March 2014).

[331] Socio Economic Rights Institute (SERI). 2015. Op Cit, p34.

4.2 Relationships between the public interest litigation sector, the judiciary and the state

Regarding the relationship between public interest litigating institutions and the state, the research process revealed a few positive stories on the engagements the two sectors share. However, the overwhelming picture painted is that the state is "unresponsive" and "recalcitrant", indicating an apparent unwillingness, inability or refusal on the part of the state to fulfil its legal obligations. Whether this is as a result of incapacity or recalcitrance remains unclear. In this context, it comes as no surprise that interactions between civil society organisations and the state have become politically charged of late. The relationship between civil society organisations and the state is further strained by the rising instances of non-compliance or "malicious compliance" with court orders, raising doubts about whether a court victory will necessarily translate into the relief sought by those who are victims of human rights violations. A further concern is a growing trend on the part of the state towards an attitude of increased secrecy, with the state frequently failing, or actively refusing, to provide access to state-held information.

Regarding the judiciary, the research revealed that the courts, and particularly the Constitutional Court have in certain instances developed potentially progressive and transformative judgments over the years. However, despite the progressive impulse of the courts, many scholars have pointed to a number of critical failings in the jurisprudence of the South African courts that limit the transformative potential of the Constitution or fail to interpret the law in a more expansive manner. As such, "there is growing concern that South Africa's judiciary seems to have become increasingly reticent and restrained in realising its transformative mandate[332]." Another point of unease is the apparent increase in government commissions or tribunals established by the president, including the Arms Procurement Commission, the Marikana Commission of Inquiry, the Khayelitsha Commission and the Lwandle Commission of Inquiry. Although this is not always the case, commissions have frequently been used to circumvent legal scrutiny and accountability in various ways.

[332] Socio Economic Rights Institute (SERI). 2015. Op Cit, p39.

4.3 Current South African Debates

Generally speaking, the legal sector as a whole holds a wide variety of approaches in understanding the value and impact of public interest litigation in South Africa. Some within the sector characterise their work as being influenced by the debate between the materialist and legal mobilisation approaches to public interest litigation.

Materialist[333] approaches seek to identify a linear cause-effect relationship between a particular intervention (given that the intervention would have achieved its set objectives), and what measurable direct benefits can be attributed to that particular intervention. From this perspective, public interest litigation becomes valuable in that it achieves a result which would demonstrably not have been achieved without it although it must be noted that it is possible to isolate specific methods and circumstances that would make a particular outcome more or less likely. On the other hand, the legal mobilisation approach[334] casts the net wider, and emphasises the indirect, symbolic and political impact of public interest litigation, including the extent to which it results in greater social mobilisation and consciousness-raising, which in itself leads to more widespread political effects. This means it is under the theme of legal mobilisation that public interest litigators can strengthen grassroots movements, focus campaigns for change, and amplify hitherto unheard voices.

> Fascinatingly, materialist and legal mobilisation approaches do share some common ground. They agree that concrete benefits matter. They also agree that the methods and resources deployed in public interest litigation work can predict the success or failure of a particular intervention. Where they differ is what counts as "success", and which legal, rather than political, methods and resources are capable of predicting favourable judicial outcomes[335].

[333] Budlender, S., Marcus, G SC., & Ferreira, N. 2014. Public interest litigation and social change in South Africa: Strategies, tactics and lessons, The Atlantic Philanthropies; Wilson, S. 2011. Litigating Housing Rights in Johannesburg's Inner City: 2004-2008, SAJHR, vol. 27, pp. 127-151.
[334] Dugard, J. & Langford, M. 2011. Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism, SAJHR, vol. 27, pp. 57-60.
[335] Socio Economic Rights Institute (SERI). 2015. Op Cit, p46.

Additionally, the research process also revealed a much broader range of influences, beyond the "materialist" / "legal mobilization" debate sketched out above, many of which have yet to be captured in public interest litigation literature. For example, people active in the sector tend to discuss their labour in terms of issues and controversies rather than in terms of particular legal cases. They also emphasise a wider range of methods and 'sites' of impact than have traditionally been considered. Emphasis is also placed on the potential of public interest litigation in influencing and creating power in a range of facets of social life, the emancipation of individuals and communities, and the progressive realisation of change across multiple dimensions.

4.4.1 How respondents characterised the sector

All of the respondents during the research process who are engaged in public interest litigation processes spoke to the fact that they employ a wide variety of methods, including scrutinising legislation, policy analysis, advisory work, research, public education, advocacy and engaging in media campaigns[336]. The consensus within civil society is that social change requires the employment of a wide variety of complementary methods[337].

Many respondents highlighted the plurality within the sector, as a site of great variety and experimentation. Two broad kinds of public interest litigation avenues were identified during the research process: generalist and specialist. There appears to be broad consensus that there is a need for both kinds of organisations, and at times, there are even different strategies and approaches to litigation undertaken by different departments within some organisations.

During the interview process with respondents the use of litigation as a strategy to secure the right to food was by far the most controversial and discussed topic. Those engaged in litigation defended its value and impact, while those not directly engaged in it were much more critical emphasising the limits of litigation and the law, the need to look elsewhere for solutions and different types of mobilisation.

[336] See: Socio Economic Rights Institute (SERI). 2015. Op Cit, p47.
[337] Ibid, p47

As well, most respondents acknowledged that there is a clear conceptual and theoretical distinction between strategic and clinical legal services. "Clinical litigation aims to serve a particular client's needs. Strategic legal services aim to have an impact far beyond the immediate parties to a case, usually by changing policy or law, or influencing the behaviour of the state or private sector institutions.[338]" Overwhelmingly however, the view is that there is not always a clear divide in practice. A number of respondents stressed the importance of clinical legal services for their own sake. A general observation among respondents is that they generally felt that clinical legal services were undervalued.

4.4.2 How respondents characterised value and impact

Most of the respondents characterised the value and impact of public interest litigation as relating to judicial activism by talking to the fact that litigation is of value but it needs to be discussed as part of a process that involves a variety of methods. Other methods, such as research, advisory work, scrutinising legislation, policy analysis, public education and advocacy in partnership with the state, and engaging in media campaigns, were discussed and are employed extensively by public interest litigation organisations. Notably, these were considered to be simple, obviously valuable and uncontroversial. Respondents also discussed the value of litigation across a number of dimensions. The value of getting good precedent and changing the law was emphasised, but always supplemented by an analysis of the other ways in which public interest litigation is important. A number of respondents even chose to discuss the value that flows from cases that never make it to court, or in which there has been an adverse decision. Many respondents stressed the non-material value in litigation, including ventilation of disputes in a forum that raises public awareness, mobilising communities and facilitating a broader, holistic response to a specific issue.

Another important by-product of litigation is that it entails research that can be useful in itself. A number of respondents mentioned raising public awareness as an important measure of value, referring to how public interest litigation creates public discourse and raises the level of debate on issues, which in turn helps give organisations and movement's

[338] Socio Economic Rights Institute (SERI). 2015. Op Cit, p48.

power when engaging decision-makers. Finally, even the prospect of litigation can catalyse change, as government and the private sector are very alive to the threat of litigation and much can be achieved as a result.

4.5 Value and Impact: A Multidimensional Approach

In discussing value and impact within the public interest litigation sphere respondents focused on issues rather than specific cases; emphasising the fact that impact can only be credibly measured over a long term. Rather than placing emphasis on a consistent theory of social change, reference was made to what is referred to as "sites" of impact.

> Discussing cases often means adopting litigation as a lens through which to evaluate success, which leaves out a great deal of important work being done outside the litigious process. While examining an issue through the facts and legal principles raised in a particular case can be useful, it will not capture the full complexity of a particular social issue[339]. Public interest litigation organisations are working on a very broad range of issues. These include: environmental justice (including mining, climate change, pollution), health-care (including public health systems, HIV/AIDS), public accountability, access to information and open governance, gender (including gender-based violence, discrimination, sexual violence), housing and land, basic services, corruption, education and schools, refugee and migrant rights, rural justice (traditional leaders, land woes), security of farm workers and social security, policing and the criminal justice system[340].

The various organisations within the public interest litigation sphere, use a range of tools to address the abovementioned issues, as noted above. Understanding the value of litigation therefore means understanding how all of these methods work together. And it is in this context that it becomes evident that assessing the potential value and impact of litigation in realising the right to food is only possible when focus is on the issue of hunger as a problematic issue rather than considering individual cases which would only be settled on merit. A discussion on issues and tools, rather than cases and litigation, necessitates a different approach to measuring value and impact. Respondents stressed the importance of

[339] Socio Economic Rights Institute (SERI). 2015. Op Cit, p56.
[340] Ibid, pp 55-56.

developing appropriate measures for long-term results and impact, stressing how difficult it is to attribute outcomes to an intervention or interventions by a single organisation.

The Raith Foundation goes further to note that, "although it is important to recognise that public interest litigation work often has immediate, measureable impact, the issue-based approach reveals the complex interactions between public interest legal work and social change over time[341]." Beyond obtaining immediate benefits, it must be noted that interventions which are successful in the short term can also change the opportunity structure for public interest litigators so as to obtain even greater benefits in the longer term[342]. Sometimes interventions which appear to have "failed" in the short term can also reshape opportunities for future work which may yield benefits in the longer term[343].

Measuring the impact of public interest litigation organisations in this way helps us understand how the sector continually reshapes the terms on which pressing social issues are discussed, while at the same time measuring the extent to which real change takes place on the ground. It helps chart the institutional reforms achieved, and those still necessary in relation to a particular issue, while at the same time characterising the democratic spaces with which those reforms must interact. The 'sites' of impact approach, captures the complexity of the public interest litigation sphere, while at the same time allowing for a meaningful discussion of how to unpack progress within the sector.

4.6 Coordination and Collaboration in the Public Interest Litigation Sector

Traditionally, legal service providers tend to work alone. In the realm of public interest litigation, however, several incentives exist to explore the opportunities to structure greater collaboration and coordination. Respondents stressed, that effective coordination and collaboration has to be voluntary and organic – touching on the fact that funders often have an important role to play in creating and fostering spaces in which public interest law organisations can come together to discuss matters of mutual concern. However,

[341] Ibid, p56
[342] Ibid, p56
[343] Loc cit

interestingly, a major concern was that funders often adopt an 'acontextual' approach to coordination and collaboration, and in so doing usually force it when it is not necessarily warranted by the context.

Furthermore, respondents indicated three important practices of coordination and collaboration. These are: collaboration within the public interest litigation sphere, collaboration with other civil society organisations outside the public interest litigation sphere, and collaboration with donor agencies. Notably, working with the state was also discussed by respondents but only as relating to bargaining processes.

4.6.1 Collaboration within the Sector

There are a wide range of collaborative activities happening among different organisations within the public interest litigation sector. The research identifies these as being referral networks, collaboration with community advice offices, information sharing and strategic reflection, developing collaborative strategies, collaborating in litigation specifically and commissions of inquiry[344].

4.6.2 Referral Networks

Firstly, existing referral networks demonstrate the extent of current coordination and collaboration within the sector. Two examples are the work of Pro-Bono.org, the most prominent referral network in the sector, which refers matters to various public interest legal organisations based on areas of expertise, as well as Legal Aid SA's coordination with pro bono attorneys, through their work with "cooperation partners" such as community-based advice offices and the provision of nationwide call centres and paralegal advisors at each of Legal Aid's offices.

[344] Socio Economic Rights Institute (SERI). 2015. Op Cit, pp68-99.

4.6.3 Collaboration with Community Advice Offices

Secondly, community-based advice offices (CAOs) have a crucial role - both currently and historically - in the provision of legal services to poor and marginalised communities across the country. Staffed almost inevitably by paralegals, they are often the sole provider of such services in rural areas. Collaboration between metropolitan organisations and CAOs is thus an important aspect of broader coordination within the sector.

CAOs can play an important role in identifying core issues that affect large numbers of ordinary persons. They also play a role in ensuring that public interest legal services are responsive and legitimate. Unfortunately, however, the community-based advice service sector is substantially underfunded and often overlooked as a provider of effective public interest legal services[345]. There are also criticisms of the services provided by CAOs, and some CAOs have certain concerns about NGOs as well, often relating to lack of feedback from public interest litigation NGOs after a case has been referred to them. Despite these occasions of tension, there are several existing models of collaboration and cooperation between providers of community based advice services and other providers of public interest legal services. These examples suggest that successful collaborations between community-based advices offices, community-based paralegals, and metropolitan providers of public interest legal services necessitate regular interaction between the partners.

4.6.4 Information Sharing and Strategic Reflection

The third kind of collaborative relationship within the sector is information sharing and strategic reflection. Many respondents cited the Public Interest Law Gathering (PILG), hosted by the University of the Witwatersrand, as an ideal site of such information-sharing and knowledge management. There are others such as Ndifuna Ukwazi's recent Urban Land Question[346] workshop and the weekly meetings held between organisations in Cape Town

[345] Ibid, p71

[346] Ndifuna Ukwazi is campaigning for an inclusive city of Cape Town where poor and working class people have access to a range of housing opportunities close to CBDs, living in mixed income neighbourhoods close to good hospitals, schools and jobs, where access is defined on the basis of a household's need, rather than on its financial means.

that gave birth to the idea for the Khayelitsha Commission[347]. These provide several different models on which future information sharing events could be structured.

4.6.5 Developing Collaborative Strategies

In the past, events such as those mentioned above have had a significant influence on the development of collaborative strategies between public interest litigation organisations. Examples cited by respondents include the work of a large number of public interest litigation organisations on the right to education, SERI's convening's around land and housing, positive collaborations driven by the Centre for Child Law, collaborations spearheaded by the Centre for Environmental Right's (CER) Working Group on Mining, referred to as the Mining-Environment-Community Alliance[348] (MECA) and a number of effective collaborations within the refugee sphere. Several organisations have coordinated their efforts around refugee law in the recent past including the Coalition for Refugee and Migrants in South Africa (CoRMSA), the African Centre for Migration Studies (ACMS), the Legal Resources Centre (LRC) in Cape Town, the Centre for Child Law, SECTION27, university law clinics and the Centre for Applied Legal Studies (CALS)[349].

It is clear that, although there remains some scepticism about the possibility of effectively coordinating the provision of public interest litigation on specific issues, a wide range of collaborative efforts are being undertaken by most organisations in the public interest litigation domain[350]. Many of these collaborations have emerged in an organic fashion and respondents felt strongly that these ad-hoc relationship-based interactions would be able to

[347] The Khayelitsha Commission, also known as the O'Regan/Pikoli Commission, was a commission of inquiry appointed by the Premier of the Western Cape Helen Zille to investigate allegations of police inefficiency in Khayelitsha and the breakdown in relations between the Khayelitsha community and the police.
[348] Since 2013, there has been ongoing engagement between civil society, community organisations, academic institutions and law clinics increasingly concerned about the impacts of mining on the environment and on the communities that rely on those natural resources. This coalition has now evolved into a Mining-Environment-Community Alliance that works together to implement a civil society legal strategy to promote environmental compliance, transparency and accountability in mining. This strategy consists of a range of interventions, implemented independently and collaboratively by the project participants, ranging from national networking and coordination, research, advocacy and litigation.
[349] Socio Economic Rights Institute (SERI). 2015. Op Cit, pp75-77.
[350] Ibid, p76

continue in confronting South Africa's human rights woes for example in advocating for the right to food, provided the context allows for such.

Subsequently, amicus interventions were provided as examples of collaboration in litigation specifically. Examples given were the *Lee v Minister of Correctional Services*[351] and the 'ukuthwala[352]' saga that showcased seven amicus interventions. Most of the respondents within the sector believe amicus interventions can play an important role in ensuring that key constitutional and/or international law issues are raised in court, and in broadening the social horizon of a particular dispute.

4.6.6 Commissions of Inquiry

In-light of the timing of this research, it was unavoidable that the Marikana Commission of Inquiry would be discussed and used as a demonstrative example. Respondents spoke to the fact that the Marikana Commission presented an inquiry that was virtually unique, both in its scale and the speed with which it was set up. In the end, a strong civil society presence at the Commission was very important, both to hold the Commission to account, and to ensure that victims' voices were heard. The Khayelitsha Commission was also mentioned as representing something significant because it was led by community-based organisations, and because the Commission dealt with numerous individual cases in a systemic fashion.

4.6.7 Opportunities for further collaboration

The need for developing credible paralegal training structures and for continuing engagement with community-based advice offices loomed large in discussions with respondents. An appropriate framework for regulation and training for community-based advice office services was widely identified as being important in responding to the need of

[351] The Constitutional Court (CC) recently overturned a ruling of the Supreme Court of Appeal (SCA) in the landmark matter of Dudley Lee v the Minister of Correctional Services. Legal scholars have asserted that the case not only highlights the State's responsibility for ensuring that the constitutional rights of detainees are maintained and safeguarded, but also brings important considerations regarding causation to the fore.

[352] In South Africa, 'Ukuthwala' is the practice of abducting young girls and forcing them into marriage, often with the consent of their parents. The practice occurs mainly in rural parts of South Africa, in particular the Eastern Cape and KwaZulu-Natal.

public interest litigation organisations being more responsive in their role. Respondents felt that the public interest litigation sector should assist with crafting regulations for paralegals, guiding state provision of resources for CAOs, providing a clear mandate for community paralegals and linking the mandatory community service provisions of the Legal Practice Act[353] and CAOs.

Finally, some respondents mentioned further engagement with Chapter 9 institutions[354], the Law Society of South Africa, the General Council of the Bar, and the courts.

4.7 Collaboration with Academic Institutions

As with any collaboration, there are clear benefits and drawbacks to partnerships established between NGOs and academic institutions yet some serious problems have arisen in partnerships between academic research centres and litigating NGOs. One such experience concerns a particular case involving the Communal Land Rights Act (CLRA)[355]. Tensions have previously arisen around the deposing of expert affidavits. Other issues have had to do with the different imperatives and timeframes of legal work and academic research, the "brokering role" that academics are expected to play between legal NGOs and the communities with which they have worked long to build trust and the enormous pressure researchers are placed under - in the adversarial litigation process when their work comes under scrutiny on cross-examination[356]. Sometimes legal NGOs use the "client attorney relationship" to support their right to enter communities, relegating academic researchers to just serving as the "experts[357]."

[353] According to the Department of Justice and Constitutional Development (DOJCD), the Legal Practice Act is to provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic amongst other objectives.
[354] Chapter nine institutions refer to a group of organisations established in terms of Chapter 9 of the South African Constitution to guard democracy. The institutions are: the Public Protector, the South African Human Rights Commission (SAHRC), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality (CGE), the Auditor-General and the Independent Electoral Commission (IEC)
[355] Socio Economic Rights Institute (SERI). 2015. Op Cit, p84.
[356] Ibid, p84
[357] Loc cit

4.9 Collaboration with Community-Based Organisations and Social Movements

Many collaborations between public interest litigation organisations take the form of the provisions of legal services to community-based organisations and social movements. Community based organisations and social movements are the "clients" in these situations. Poignantly, concerns were raised about how attorneys deal with cases once the court process has been concluded. The research process revealed that NGOs need to maintain their relationships with communities beyond litigation. Significantly, at the launch of Oxfam's report on South Africa's hidden hunger, community representatives raised worthwhile suggestions when speaking to the manner in which NGO's respond to their grievances. First, it was noted that NGOs must recognise the importance of protecting human rights defenders in social movements, particularly those individuals who are at the forefront of cases. Secondly, NGOs have to provide more guidance to community leaders about how they can guide communities to support litigation and lastly, NGOs should facilitate training about clients' roles before and after litigation. In toying with the idea of building a coalition campaign on the right to food, participants at Oxfam's hidden hunger report launch also stressed the need for public interest litigation organisations to collaborate with social movements in a manner that empowers and does not disempower communities.

4.10 Working with the State

The majority of public interest litigation work is centred on the state, as the government is the primary duty-bearer in giving effect to the rights contained in the Constitution. It has the primary responsibility for ensuring access to food, healthcare, education, housing, basic services, safety and security and so on.

The research process discovered that there are many different views about the best strategies to engage the state and how to hold it accountable. Most respondents acknowledged the adversarial and antagonistic nature of litigation and how this impacts on organisations' relationships with government officials and politicians. Litigation against the state does not always damage relationships however. A number of respondents stated that

in the current socio-political context, progressive officials whose 'hands are tied' as a result of political will use litigation as justification for pushing more progressive developments, and sometimes encourage public interest law organisations to litigate. On the other hand, some respondents spoke to the dangers of "collaboration" with the state. The unease was that NGO's could easily find themselves being passive and accepting the state's agenda, even when it is inappropriate. Most respondents emphasised the need for a balanced approach.

> There is a wide variety of views and practices on the way in which public interest litigation organisations work together with each other, and with people and organisations outside the sector in achieving a balanced approach. Public interest law organisations make finely balanced judgments about when collaboration and coordination should take place, and what form it should take. However, it must be noted that funders have a bigger role to play in supporting these decisions, and providing more spaces in which they can be discussed and reflected on. Consequently, effective, planned, long-term coordination and collaboration within the sector works best when organisations feel financially secure, and are able to rely on long-term donor support. This does not mean that donors have to write blank cheques. However, it does mean that the way in which funders relate to organisations within the sector, how they structure their application processes and what form their financial support takes, has a direct impact on the ability and willingness of public interest litigation organisations to work with each other, and with actors outside the sector[358].

Generally speaking, within the NGO environment small value, short-term grants, distributed through competitive programmes against inflexible line items, lead to low-value, short-term work, which is unlikely to include fully thought-out collaborative interventions. Generous, multi-year general support, however, would reduce organisations' financial insecurity, and make them more likely to work together towards long-term strategies to sustainably address a range of social problems.

[358] Socio Economic Rights Institute (SERI). 2015. Op Cit, pp97-99.

4.11 Public Interest Litigation and the Legal Profession

Amidst the above it must also be understood that public interest litigation organisations facilitate access to justice in two principal ways. First, public interest law organisations provide specialised legal services that are not generally available on the commercial legal services market[359]. Second, they do so free of charge to the victims of human rights violations[360]. According to SERI's report, "the ordinary commercial bar, and most law firms tailor their operations to paying clients [whilst] public interest law organisations on the other hand represent the vulnerable and the excluded, as the inability to afford legal representation is itself a hallmark of social exclusion.[361]" It follows that this has consequences for the way in which they work.

According to a respondent working with Section 27, public interest law organisations provide longer-term, issue driven support to a wide variety of social groups. Their work goes beyond the case-based resolution of specific commercial disputes. They seek specific changes to law and policy that favour large groups of people, rather than individual clients. They provide services that go beyond legal advice and representation. These services include public education, research, policy advocacy, capacity building and social campaign planning[362]. They are staffed by qualified legal professionals who are prepared to work for a fraction of the income they could attract in the private sector, thus making the provision of free legal services at scale financially viable within donor funded budgets.

These features of public interest litigation organisations differentiate them from the rest of the legal profession, and often place their interests at odds with those of the rest of the profession generally.

[359] Ibid, p101
[360] Ibid, p101
[361] Loc cit
[362] Loc cit

4.12 Conclusion

There is a growing scholarship that speaks to how, litigation is anchored in mobilisation. Over the years there has been several efforts geared towards the development of a more nuanced and contextual analysis of the impact of litigation that includes much more than simply the material effects arising from a judicial decision[363]. It must be acknowledged that litigation is unpredictable but, when linked to legal mobilisation, it has the potential for diverse and reverberating impacts. Sadly, in many cases, particularly those at the local or provincial level, this may simply not be possible as many socio-economic rights are realised through local and provincial governments and their policies and strategic alliances may be more difficult to form across class or location[364].

Important to note is that public interest litigation does not necessarily have to start with a case. It can start with a judgment. This has been the experience of right to food advocates litigating on the right to food in India. Looking at the Indian narrative, in the build up to the right to food case in the Supreme Court there was little social mobilisation or information sharing across coalitions in that country. However, the judgment helped stimulate country-wide social mobilisation and follow-up litigation to ensure enforcement[365]. This was certainly assisted by the supervisory orders of the courts, but the post-judgment legal mobilisation has gone beyond the initial orders and/or process. The aforementioned is substantiated by the fact that they exist some compelling accounts of how, for example, the Constitutional Court in Costa Rica has helped engineer remarkable social change through its judgments in the almost complete absence of organised civil society[366]. According to Malcolm Langford and Jackie Dugard, "the reason for this is found in the flexible procedures for accessing the court, the ability to access immediate orders and the court's own

[363] Rodríguez-Garavito, C. 2011. Beyond the Courtroom: The Impact of Judicial Activism on Social and Economic Rights in Latin America, 89(7), Texas LR. Available at: http://www.corteidh.or.cr/tablas/r27171.pdf (Accessed 28/09/15)

[364] Dugard, J. & Langford, M. 2011. Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism, SAJHR, vol. 27, p61.

[365] For an account of this case and others, see Muralidhar, S. 2008. India: The Expectations and Challenges of Judicial Enforcement of Social Rights in Langford, M (ed). 2008. Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge University Press, 102–24 and Rodríguez- Garavito (note 126 above).

[366] Dugard, J. & Langford, M. 2011. Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism, SAJHR, vol. 27, p62.

unrelenting follow-up procedures[367]." While South Africa may not follow the Costa Rican approach, lessons can be learnt in ensuring that courts are more responsive, particularly in rural and poorer areas where they are serious challenges when it comes to social mobilisation for litigation. On the other hand, it must also be understood that the rules of the game in the rural areas of South Africa have not necessarily changed with the advent of some legal aid support – commercial farmers are simply more adept at using legal procedures[368]. Therefore, policy objectives ought to be more focused on ensuring that courts are more responsive to litigants, wherever they find themselves, with or without a social movement or mobilisation.

When the country gained democracy, Rick Abel author of *Politics by Other Means: Law in the struggle against Apartheid 1980-1994* noted that "law has been a terrain of political contestation throughout South African history[369]" and simply asked: "is the law, like war, merely politics by other means?[370]" 21 years later, in a context of gross inequality, the words of Abel and his question still resonate. Jackie Dugard, associate professor of Law at the University of the Witwatersrand recalls that "under apartheid, jurisprudential debates were waged about the role of law under an authoritarian regime[371]," further stating that "today, similar debates are beginning to emerge about the role of rights in the context of extreme social and economic inequality.[372]" The concluding premise of this study is that rights-based public interest litigation can be a relevant and effective resource in struggles to forge a more equal society. But in order to reveal the real value of rights-based public interest litigation, the frame needs to be widened to take many more factors into account than dealt with in this chapter.

It is important that public interest litigation donors, too, acknowledge the broader role for public interest litigation and do not reduce evaluations to superficial formulas. Successful public interest litigation is not about ticking boxes. Nor is it only about winning in court. It is not a science. At best it is a craft that requires long-term engagement with a much larger

[367] Ibid, p62
[368] Loc cit
[369] Abel, R. 1995. Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994, New York and London: Routledge, p9
[370] Ibid, p14
[371] Dugard, J. & Langford, M. 2011. Op Cit, p63
[372] Ibid, p63.

range of factors than the traditional legalist approach suggests. Meaning, when contextually located and especially when anchored in broader mobilisation, public interest litigation may be understood to constitute politics by other means as evidenced by the wide-array of factors and strategies required for it to be successful discussed above.

Freedom is meaningless if people cannot put food in their stomachs, if they can have no shelter, if illiteracy and disease continue to dog them. – Nelson Mandela from an interview, Circa 1994.

Nelson Mandela: 1918 - 2013.

5. Analysis – How are the conditions for right-to-food litigation?

Having provided an in-depth analysis on the theoretical and socio-economic context in which to engage public interest litigation and the right to food, and after having presented the situational analysis for South Africa, it is now time to turn more directly to the research question of this paper. The previous chapters have demonstrated that they exists several issues that hinder the realisation of the right to food in South Africa. Meaningfully, this paper has shown that the right to food, like other socio-economic rights, is undeniably justiciable. For South Africa, the struggle against poverty and hunger as premised on the right to food is informed by "rich international law jurisprudence and a Constitutional Court which has shown a willingness to give socio-economic rights substance[373][374]." However, amidst the praises there is also major negatives. The State has in place several policies and programmes which could potentially see the right to food being realised, however, the implementation thereof coupled with failures in other spheres of service delivery, such as the slow pace of agrarian reform and the poor provision of social safety nets have left the majority of South Africans hungry and malnourished. As such, the paradox facing modern-day South Africa is that there exists a "disparity between the most admirable constitution in the history of the world and an increasingly harsh reality for common South Africans.[375]" The previous chapters have posed serious questions as to whether the state can be said to be meeting its constitutional obligations as they relate to the right to food. At the very least, what this analysis has illustrated is that the food security context in the country is broken seeing as there remain many hungry and malnourished people in South Africa.

What this final chapter aims to do is to present the analytical framework presented at the end of the theoretical chapter – unpacking the different factors that are assumed to influence the initiating phase of a litigation process, in so doing, providing some suggestions as to how the right to food can be better realised. In the first part of the concluding chapter the focus of the analysis will be on studying and understanding the factors influencing the legal voice of the hungry and malnourished in South Africa. Secondly, will be a commentary

[373] I have in mind here the aforementioned Grootboom and TAC judgments particularly.
[374] Holness, D. R., 2007. The Constitutional Right to Food in South Africa, Magister Legum thesis, Nelson Mandela Metropolitan University, p167
[375] Coomans, F & Yapko, K. 2004. A Framework on the Right to Food- An International and South African Perspective, African Human Rights Law Journal 4, 18, p33.

of the factors that influence the response of the courts in South Africa's socio-economic litigation matters. These two parts of the analysis, put together, form the basis of the answers this dissertation will be able to provide in reference to the research question posed.

5.1 The legal voice of the hungry and malnourished in South Africa

As outlined in the theory chapter, there are several factors that shape and influence the legal voice of the poor. These usually present themselves in the form of formal, practical and motivational barriers. Important to note is that these barriers, if not addressed, often influence the legal voice of the poor and hungry in a way that often leaves them discouraged from claiming their social rights and contesting them in court. Consequently, an understanding of what shapes the legal voice of the poor also demands a study of alternative arenas in which the battle for the realisation of the right to food can take centre-stage.

5.1.1 Formal barriers

A look at the formal barriers affecting the ability of the poor and marginalised to voice their legal claims draws our attention to the nature of the legal system and the manner in which courts operate in South Africa. As discussed earlier in this paper, other than the Constitutional imperative and the ambit of several international conventions and agreements there is no national legislation framework that is explicitly geared towards the realisation of the right to food in the country. Furthermore, is that in order to embark on a credible socio-economic rights challenge in the South African courts, it is crucial that human rights victims are able to demonstrate that there's been an unfair denial of the right in question. As such, regarding the claim for a right to sufficient food as premised on section 27 and section 28 of the constitution the question becomes what are the prospects of such a challenge getting a favourable-outcome in the courts. It follows that the most obvious indicators that can be utilised in assessing the success of such a constitutional challenge are the key socio-economic rights cases referenced in Chapter 4 of this study. It can be said that the cited cases indicate that existing law or policy which unreasonably denies a socio-economic right will not pass the constitutional muster.

Contextually, scholars have demonstrated that the South African government's food policy efforts to date have failed to cater for people in crisis situations[376]. Analysing the governments' socio-economic rights policy, Blitchitz also puts forth the argument that such policy ought to prioritise the immediate demands of those in dire circumstances whose very survival is threatened by the status-quo[377]. It is therefore useful to provide a critique of the country's recently adopted Food Security and Nutrition Policy for the Republic of South Africa (the Policy) which has failed to prioritise the voices of hungry people in its formulation. Ushered-through in 2014 under a veil of secrecy, the said Policy (in its current form) is a major formal barrier to the realisation of the right to food in the country. The Policy having been gazetted on 22 August 2014 without any consultation process being entered into before the Policy was passed by Cabinet and then gazetted is a major shortcoming on the part of the South African government, particularly as the world ushers-in the Sustainable Development Goals (SDG) era – a major missed opportunity for the country to be at the forefront of the right to food agenda-setting in the world. It follows that the adopted Policy presents the possibility of public interest litigation on the right to food ensuing in the country – contested on the constitutionality of the policy document. A critique of the Policy and its shortcomings is done immediately below.

5.1.1.1 The National Policy on Food and Nutrition Security for the Republic of South Africa

Led by the Department of Social Development (DSD) and the Department of Agriculture, Forestry and Fisheries (DAFF) the new Policy seeks to pave the way towards a food secure South Africa in which the right to food is realised for all. The development of the country's Food Security and Nutrition Policy is welcome as it occurs at a time when the problem of hunger is understood to be at a worrying-level in the country. Namely, that one in four

[376] See generally, Brand, D and Heyns, C (editors). 2005. Socio-Economic Rights in South Africa, Pretoria University Law Press, Cape Town. Brand, D Chapter 5: "The Right to Food".
[377] Bilchitz, D. 2003. Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence, Vol. 19, Part 1, SAJHR, p1.

South Africans go hungry everyday[378]. Notably, challenges listed by the Policy that hinder the realisation of the right to food include:

- Inadequate safety nets and emergency management systems to provide for those who cannot meet their immediate food needs;
- A lack of knowledge and resources for people to make good choices for nutritious diets;
- Productive land available is not being used optimally;
- Limited access to processing facilities and markets for small-scale farming;
- Climate change; and
- A lack of timely and relevant information on food security

As the government of South Africa begins to make steps towards achieving food security through the implementation of the Policy it must be noted that the development-process of this policy has not been transparent. The Policy was developed behind closed-doors and as a result is not known by most people, especially those that are living with hunger. Yet, the government has already begun to develop an Implementation Plan for the Policy which due to civil society protests on the lack of consultation on the Policy document itself was haphazardly taken out for consultation during the course of 2015. The general lack of public and civil society participation and engagement in the drafting of the country's Food Security and Nutrition Policy, is a cause for concern. It must be acknowledged that the responsibility to advance, protect and defend the right to food rests both on the government and on people who have the right. People who benefit from the right to food must be consulted in the drafting of policies and legislation that will impact on their right to food. At the time of writing, the DAFF had only held a very limited consultation on the Implementation Plan with a few civil society organisations and academic institutions in the Gauteng province only. Not only is this insufficient procedurally (consultation on implementation cannot make up for a failure to consult on policy), but the consultation process entered into on the Implementation Plan is also wholly inadequate.

[378] Oxfam. 2014. Hidden Hunger in South Africa: The faces of hunger and malnutrition in a food-secure nation. Oxfam. See: http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/hidden_hunger_in_south_africa_0.pdf.

Important to note is that the adopted consultation plan by the DAFF is inconsistent with the Constitution, which states in its Preamble that:

> '…government is based on the will of the people[379]'

And in section 195 that:

> '… [p]eople's needs must be responded to and the public must be encouraged to participate in policy-making'.[380]

The approach taken by the DAFF is also not in line with the Promotion of Administrative Justice Act ("PAJA").[381] The PAJA requires that people whose rights are affected be granted a reasonable opportunity to make representations on decisions that affect them.[382] Furthermore, the Constitutional Court has pronounced on the importance and significance of public involvement in legislative processes in a number of cases including *Doctors for Life International v Speaker of Parliament and Another*[383] where the Court held that:

> "The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people... Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."[384]

The Constitutional Court went on to state "the very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process in a manner consistent with our democracy".[385] The objectives of a meaningful consultation on the Policy and the Implementation Plan should be to discuss the documents, the rights of those affected and the obligations on the state and others as they

[379] Constitution of the Republic of South Africa, 1996. Preamble, p1.
[380] Ibid, Section 195(1)(e).
[381] Promotion of Administrative Justice Act 3 of 2000.
[382] Section 3(2)(b)(ii).
[383] 2006 (12) BCLR 1399 (CC).
[384] Ibid paragraph 115.
[385] Paragraph 135.

relate to the realisation of the right to have access to sufficient food. This should be done to establish a way in which these rights and obligations can be clarified and given meaning through the Policy and the Implementation Plan. Public participation through consultation as envisaged by the Constitution demands no less than this.

5.1.1.2 The Policy and the National Development Plan: Vision 2030 (NDP)

Nonetheless, in-tune with the definition of food security given earlier in this dissertation, the Policy for the country revolves around the four specific dimensions of availability, accessibility, utilisation and stability. Notwithstanding, the Policy fails to credibly engage with what these four pillars mean for the South African context. There is an urgent need for a deeper awareness and understanding of this policy's objectives and desired outcomes. The lack of clarity on how objectives of the Policy will be achieved and the veil of secrecy on the processes that will inform procedures is criticised as this is contrary to what a human-rights based approach to food security entails. In its defence, the drafters of the Policy assert that it has been compiled within the spirit of *the National Development Plan: Vision 2030 (NDP)* which identifies food and nutrition security as a key element of both poverty and inequality eradication in South Africa.

The NDP seeks, among other outcomes, to harness the country's resources and capabilities to raise the living standard of the population. Significantly, nutrition programmes that target vulnerable children and pregnant women feature prominently in the list of interventions to tackle acute poverty[386]. The NDP even goes further to distinguish national food self-sufficiency from the ability of households to access the quantity and quality of foods for healthy lives. Yet, for the NDP, the core indicator to measure food security is "to maintain a positive trade balance for primary and processed agricultural products.[387]" It must therefore be noted that sustaining agriculture does not automatically translate into secured access to food at the household or individual levels, as other dynamics impact the food system that have consequences for food affordability and adequate access. Although the NDP has been hailed as the grand master-plan for South Africa's economic prosperity it needs to be

[386] National Planning Commission. 2012. National Development Plan: Vision 2030 See: http://www.thepresidency.gov.za/
[387] Ibid, p230

understood that insofar as the realisation of the right to food goes, it is somewhat premised on the misconception that food security is primarily a rural and agricultural issue.

Therefore it must be understood that a human rights based approach to food security expresses a paradigm shift that recognises that agricultural production and food security at the national level are not the only considerations, but that a more complex range of circumstances may contribute to food insecurity, such as the failure of people's incomes to guarantee access to sufficient food. The rights framework focuses attention on the multiple dimensions of food insecurity for individuals and households, and multiple aspects of government policy effort required to improve food security. Sadly, the Policy fails to engage with this framework. If only the process of adopting the Policy had been transparent and democratic the final policy may have provided the ideal platform to trigger conversations that go beyond conventional economic analysis to a focus on who the food insecure are and what appropriate policy interventions are required to address this situation in the country.

Interestingly, the emergence of the Policy comes on the backdrop of the 2002 Integrated Food Security Strategy (IFSS) for South Africa. The adopted Policy goes further to state that "… global economic slowdown, increased food price volatility and the impact of extreme climatic events… have compelled a review of the IFSS and the development of a comprehensive Food Security and Nutrition Policy for South Africa.[388]" As such, it is unclear whether the Policy will be replacing the IFSS or will serve as a compliment. Emphasis must be placed on the fact that the drafting of a new strategy has to be done on an understanding of why previous strategies failed. Significantly, the IFSS's shortcomings were driven by its limited references to specific measurements or parameters for food security in its policy framework. It is difficult to ascertain how the new policy will address issues of food (in)security in a distinct manner that will take the conversation forward, towards sustainable solutions geared for the realisation of the right to food.

[388] Department of Agriculture, Forestry and Fisheries. 2013. National Policy on Food and Nutrition Security. Republic of South Africa, p3 See: http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutririon%20security.pdf

5.1.1.3 Towards a National Legislative framework on the Right to Food

Furthermore, the Policy makes vague and little reference to the enactment of legislation that is aimed at facilitating access to sufficient healthy food for everyone as required by the Constitution. The language used in the Policy in relation to the enactment of legislation implies that DAFF has a lesser duty than that placed on it by the Constitution in this regard. The Policy merely states that the approval of the Policy "could" be an initial step towards a Food and Nutrition Security Act for South Africa. This is a major concern as it must be recalled that the Constitution requires that the state "must" take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.[389] There are no time commitments stated in the Policy as to when action directed towards enacting the intended legislation will commence. Such a commitment by the DAFF is important for accountability because it would be after this period of time that the public would be able to assess the progress made by the DAFF towards the enactment of the envisaged Food and Nutrition Security Act.

Lest we forget, in 2001, the parliament of South Africa tabled a Draft Food Security Bill[390] that provided for the fulfilment of the right to food as a basic human need and also provided for the availability, accessibility and utilisation of safe, nutritious and quality food, including providing for the following:

- procurement and maintenance of emergency food supplies in the interest of human health;
- co-operative food security governance establishing principles for decision making matters affecting food security;
- institutions that will promote co-operative governance and procedures for coordinating food security functions exercised by organs of state; and
- the environment and capacity to ensure the creation and maintaining of an honest and responsible food trading system.

[389] Section 27(2)

[390] South African Human Rights Commission (SAHRC). Chapter 5: The Right to have access to sufficient food. Right to Food – Period: April 2000 - March 2002. 4th Economic and Social Right Report, p141 Available at: http://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_5.pdf, (Accessed 19/01/15)

More than a decade later, it is yet to be seen whether the Draft Food Security Bill will ever be translated into official legislation on the right to food (seeing as the bill has not been officially discarded). Granted, the new Policy speaks to the need for legislation on the right to access sufficient food, however, it must be noted that it is a well-known fact that millions of people all over the world do not have access to food on a daily basis or face hunger, malnutrition and starvation, despite the fact that their governments have ratified international treaties in which the right to food takes a prominent place. There is thus a big gap between rhetoric and reality, between theoretically having the right to food and enjoying it in practice. As such, the said Policy simply serves to reinforce this gap.

A call for the immediate overhaul of the Policy could see the right to food being contested in the courts of South Africa. On the other hand, it must also be noted that a call for legislation on the right to food would achieve coherence and transparency in all initiatives that speak to the realisation of the right to food in the country. Particularly, a framework law could also serve as a formal safeguard against abrupt and sudden changes in governmental policy, because the law would stipulate the basic principles of the national food policy that may only be amended with the legislature's approval.

5.1.1.4 Conclusion

The large number of issues raised in this dissertation thus far, many of which warrant further research of their own, show how complicated the issue of realizing the right to food actually is. Challenging the state on the shortcomings of its newly adopted food policy for the country appears to be the first obvious avenue in which public interest litigation on the right to food could take place in South Africa. A court challenge seeking to force the state to review its policy document and to enact right to food legislation would definitely bring-about a more co-ordinated and comprehensive response to South Africa’s numerous food challenges.

Coomans and Yapko argue that “framework legislation on food in South Africa is called for in light of what they consider to be a lack of coherent law and policy on food. They also deem existing food programmes to be inadequate, especially the inaccessibility of such

programmes to those in most need.[391]" It must be acknowledged that the sole purpose of any form of framework legislation is to provide a "single, all-encompassing and co-ordinated means for implementing national policy and strategy relating to a particular right.[392]" "Framework law on food should cover the complete range of matters associated with the right to create a holistic, harmonized response to its challenges.[393]"

To elaborate, a hungry or malnourished person not benefitting from the state's social safety nets ought to able to legally contest the states' action or inaction in his own interests. By the same token, it could also be said that such an affected person could be a minor or old person or sickly individual unable to act on his own, in which case someone could act on their behalf[394]. It is in this regard that the possibility of public interest litigation on the right to food could ensue in the country seeing as a class action could be formed by a solidarity network of those in a similar position. Poignantly, an organization like the Legal Resources Centre is well placed to assist such affected persons. A precedent for locus standi in relation to a socio-economic right being successfully based upon public interest standing is *Nomala v Permanent Secretary, Department of Welfare, and another*[395].

What is more is that the possibility exists that those purportedly being denied their right to food could be affiliates of an association, such an association could act in the interest of its members. An example of this would be a particular civic organization representing its members who fall outside the realm of government social safety nets. It is therefore submitted that these broad *locus standi* options triggered by the country's poorly conceptualised Food Security and Nutrition Policy provide a useful tool to enforce the right to food by means of a direct court challenge, in other words they present various scenarios in which public interest litigation on the right to food could emerge in South Africa as result of the contested policy document.

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[391] Coomans, F & Yapko, K. 2004. Op Cit, p31.
[392] Khoza, S. 2004. Realising the Right to Food in South Africa: Not by Policy Alone - A Need for Framework Legislation. Vol. 20, SAJHR 664, p670.
[393] Coomans, F & Yapko, K. 2004. Op Cit, p20
[394] The Soobramoney case (supra) is precedent for locus standi being grounded on such a basis.
[395] 2001 (8) BCLR 844 (E). This case related to the unlawful cancelling of social grants. Justice Pillay held that the applicant had locus standi, based on acting in the public interest, to challenge the purported reasons given in a pro forma letter for the cancellation or rejection of grant applications.

5.2 Practical barriers

A look at the practical barriers influencing the legal voice of marginalized people in the country immediately reveals that there's a lack of knowledge regarding human rights violations. Many hungry and malnourished people in South Africa hardly see their problems as human rights violations, this, coupled with a general lack of publicly available information on how to lodge claims and how to hold the state (as the principle duty bearer) accountable, simply means many of the hungry people in the country have to stomach hunger pains. Also, the cost of litigation is a practical barrier to the voice of the poor. The South African Constitution, in its preamble, guarantees access to justice, however, the "lived reality/actual practice that holds dominant sway in the country is one in which the ability to access justice is tied directly to political and economic position, power and wealth.[396]" This means that access to justice has largely become politically and socio-economically commodified. For many people in the country (who are poor or working class) this has meant that access to justice has become more of an occasional privilege, often dependent on others, rather than a regularly enjoyed and independently realised right in itself. Poignantly, "recent studies indicate that the average South African household would need to save a week's income in order to afford a one-hour consultation with an average attorney[397]." **"**Even worse, for black households (who are mostly poorer than the average) the barrier to access to court is even higher[398]."

Likewise, another factor that restricts the right of access to courts in South Africa has to do with the long distances that many marginalised people have to travel in order to access the courts and related services[399]. Generally speaking, in South Africa the courts are located in places that are not easily accessible to poor and marginalised human rights applicants. Only

[396] McKinley, D.T. 2015. Civil Society and the Constitution – whither access to justice? *Daily Maverick,* p1 Available at: http://www.dailymaverick.co.za/opinionista/2015-05-21-civil-society-and-the-constitution-whither-access-to-justice/#.VpRLnfl97IU (Accessed 22/01/16)
[397] Klaaren, J. 2014. The Cost of Justice: Briefing Paper for Public Positions Theme Event, Wiser, History Workshop & Wits Political Studies Department, University of the Witwatersrand. Available at: http://wiser.wits.ac.za/system/files/documents/Klaaren%20-%20Cost%20of%20Justice%20-%20%202014.pdf (Accessed 22/01/16)
[398] Nyenti, M. 2013. Access to justice in the South African social security system: Towards a conceptual approach, 46, Vol. 4, pp 901. Available at: http://www.dejure.up.ac.za/index.php/volumes/46-volume-4-2013/36-volumes/46-volume-4-2013/216-access-to-justice-in-the-south-african-social-security-system-towards-a-conceptual-approach (Accessed 22/01/16)
[399] Ibid, p1

the magistrates' courts have a nation-wide reach whereas the high courts which arbitrate most constitutional rights cases are largely limited to metropolitan areas, meaning they are less accessible to those who are desperate to use such fora who are poor and marginalised[400]. Accordingly, the Department of Justice and Constitutional Development (DoJCD) has taken cognisance of the impact of geography on access to courts, as it identified the establishment of suitable courts in rural and township areas as a priority as far back as 1999[401]. "In this respect, human rights lawyer Simon Delaney reminds us the vast majority of courts are themselves still "located in places [that] are there to serve a (privileged) minority … it's still the domain of middle class and upper class folk.[402]"

Amidst the above, this paper also submits that public interest litigation on the right to food would present a significantly different contest in the courts when juxtaposed to successful litigation in the constitutional court that has dealt with the right to housing and access to health-care (in the form of HIV-Aids drugs) in the *Grootboom* and *TAC* cases, respectively. The underlying motive is that in the said cases "the state did not have in place a policy or satisfactory policy for catering for the category of harmed persons in question.[403]" Yet, in relation to the right to food, whilst it is still a debated point whether the state's newly adopted food policy can be considered reasonable, it must be recognised that there are in place the IFSS and insofar as social safety nets go - the Draft Procedure Manual for Social Relief of Distress[404][405].

As such, it is the recommendation of this paper that a court challenge on the right to food in South Africa should be focussed on the country's newly adopted Policy rather than attacking the constitutionality of the State's response to hunger woes in the general sense. Practically, a focus on specific instances of failing to implement sound policies appears more worthwhile seeing as there is a dearth in existing literature on what litigation on other grounds would entail for the fight for the right to food. On the other hand, scholars have also asserted that the realisation of the right to food is a multi-pronged problem that

[400] Loc cit.
[401] Loc cit
[402] McKinley, D.T. 2015. Op Cit, p1
[403] Holness, D. R., 2007. Op Cit, p172
[404] Social relief of distress is a form of social assistance that is aimed at assisting needy individuals and households by providing access to food by means of a food voucher, food parcel or cash-in-kind.
[405] Draft Procedure Manual for Social Relief of Distress. February 2006. See: www.gov.za

involves a complex web of various stakeholders and entities who need to account for their actions throughout the food value chain. Therefore, in light of these complexities and seeing that the courts of South Africa have avoided a 'jurisprudence of exasperation' in pursuit of a 'jurisprudence of accountability'[406][407], it must be understood that a call for litigation on the right to food in South may not yield the desired outcome as the courts sometimes fall short of being arbitrators of fair play in the political game between government and the governed.

5.3 Motivational barriers

The motivational barriers to the articulation of socio-economic rights claims by the poor have to do with the way marginalized and poor people view the legal system in the country. It must be understood that poor people often view the legal system with a sense of distrust and fear, which in-turn functions as a barrier to their articulation of legal claims. It follows that if one does not trust the legal system, why bother with turning to it. South Africans tend to see the law as something that operates to the benefit of powerful individuals and groups rather than as something to which they could make effective recourse to protect their fundamental rights. For those at the bottom of the pyramid, the legal system in South Africa is arbitrary, distant and ineffective. This is substantiated by the fact that an in-depth analysis carried-out by the Human Sciences Research Council (HSRC) using the annual South African Social Attitude Surveys (SASAS), analysing trends in the level of trust that citizens place in the courts over a 15-year period from 1998 reveals that,

> … disadvantaged and vulnerable groups are less likely to perceive the justice system as impartial and fair and therefore, were found to be less trusting of the courts'. About two in

[406] O'Regan, K. 2011. A forum for reason: Reflections on the role and work of the Constitutional Court, Helen Suzman Memorial Lecture, Johannesburg, South Africa, p39. Available at: http://www.ahrlj.up.ac.za/table-of-contents-volume-14-no-2-2014/42-issues/volume-14-no-2-2014/461-judicial-enforcement-of-socio-economic-rights-in-south-africa-and-the-separation-of-powers-objection-the-obligation-to-take-other-measures (Accessed 22/01/16)

[407] A jurisprudence of exasperation, as O'Regan explains, refers to the tendency of judges to base their judgments on exasperation with the state of affairs in the country rather than on reasoned arguments based on the possibilities and limits of the law. Applying this approach in adjudication has the tendency of leading the courts to apply a more stringent measure of accountability on the government. It is cautioned that, if not properly crafted, a jurisprudence of exasperation may 'produce worse outcomes' or have a more devastating effect than the presumed bad government policy that the courts may intend to remedy. A jurisprudence of accountability, on the other hand, recognises that the political branches are responsible for government action, which must be subject to judicial scrutiny, especially when contestation is raised in court challenging such action. From these explanations, I take for granted that the difference between exasperation and accountability lies in the degree of scrutiny that the courts may apply in testing government action in relation to its obligations.

> five respondents (44%) believed that the courts would be more likely to find persons guilty if they were black and 51% felt people were more likely to be found guilty if they were poor. Only a little more than one in three (38%) felt that the rich and the poor would be treated equally before the courts.[408]

As such, if the above quoted is credible it comes as no surprise that the hungry and malnourished do not turn to the state courts to address their grievances. "As veteran Pretoria-based community and union activist Mashao Chauke argues: "My experience, which has been shared by most of the poor people out there, is that we feel alienated, you know, side-lined … I think that the system itself [is built so] a few people will benefit at the expense of the majority.[409]" Yet, even when that 'system' is accessed the generalised experience is one of prejudice and hostility and most often undermining of both personal and collective human dignity. This is further supported by scholar David McKinley, writing for the *Daily Maverick* who notes the following:

> … So for example, while the Constitution itself has been hailed and affirmed by many as 'transformative', the very judiciary that is constitutionally mandated and entrusted to administer justice - through the Constitution - has struggled to transform, on racial, gender and ideological grounds. The quality and character of the judiciary becomes crucial precisely because it is that judiciary's interpretation of the rights framework (at whatever level) as well as the separation and boundaries of their powers in the Constitution that directly impacts on those seeking justice and equality through the legal system[410].

The above analysis serves as an indication that there exists a very uncomfortable reality for many previously disadvantaged South Africans who look to the Constitution as the foundation of and primary catalyst for, socio-economic and political transformation in South Africa. As a result, It must be recognised that the adoption of a Constitution that protects a range of rights and lays down an institutional, democratic architecture in the country has not translated to reliable access to justice for the very people it was engineered to empower, namely, the poor black majority who were historically excluded, oppressed and discriminated against under the Apartheid system.

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[408] Institute for Security Studies. 2013. Twenty years of justice reform in South Africa: what is there to show for it? ISS Today, p1. Available at: https://www.issafrica.org/iss-today/twenty-years-of-justice-reform-in-south-africa-what-is-there-to-show-for-it (Accessed 22/01/16)
[409] McKinley, D.T. 2015. Op Cit, p1
[410] Ibid, p1

5.4 The Responsiveness of the Courts to the voice of the hungry and malnourished

In-tune with the analytical framework that has guided this dissertation, there are a number of factors that are assumed to impact on the responsiveness of courts to social and economic claims such as the right to food. As noted earlier in this paper, the response of the South African courts to food rights violations would largely be dependent on how violations are voiced, the merits of the case and the legal strategies utilised. Again, this highlights the importance of access to quality legal services for those whose right to food has been denied. As such, when it comes to considering ways to provide greater access to sufficient food for all as required by section 27 of the Constitution and adequate nutrition for children as stipulated in section 28, and considering that the right to food is intrinsically linked to other socio-economic rights, a potential strategy for activists would be to improve access to other socio-economic rights in such ways that improve access to food.

Scholars such as Danie Brand further note that the right to food commonly finds protection through other constitutional rights[411]. It goes without saying that "the right to food can and does overlap in general terms with the rights to life, equality, dignity, property, social security (including social assistance), water, health care and education.[412]" However, contextually, the realisation of socio-economic rights in South Africa has had to grapple with the challenge of state resource limitations imposed by the internal limitations of section 27(2) of the Constitution. Meaning, the realisation of the right to food, like other social and economic rights, would prove to be a somewhat difficult task for the courts. Therefore, insofar as the responsiveness of the courts to the voice of the hungry and malnourished goes what is called for is "creative judicial decision making which both acknowledges resource limitations whilst at the same time converts the rights in question into reality.[413]" Providing academic authority on the abovementioned Scott and Alston put forth the argument that "by applying such creative judicial decision-making court decisions would reflect the need to avoid starvation and suffering.[414]" The underlying motive is that the

[411] Brand, D and Heyns, C (editors). 2005. Socio-Economic Rights in South Africa, Pretoria University Law Press, Cape Town. Brand, D Chapter 5: "The Right to Food", pp164-165.
[412] Holness, D. R., 2007. Op Cit, p175
[413] Ibid, p182
[414] Scott, C., & Alston, P. 2000. Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise, Vol. 16, Part 2 SAJHR, 206, pp217-218.

courts with constitutional jurisdiction need to come up with creative ways of promoting the better enforcement of the right to food. The following will unpack possible progressive judicial remedies through which the right to food could be safeguarded and preserved. However, prior to a discussion on this, a consideration of how such remedies would potentially impact on the traditional conception of separation of powers amongst the different arms of government will be briefly touched-on.

A study of the separation of powers doctrine makes known that it is orthodoxly the role of the executive arm of the state to make state policy. Therefore, in making a call for creative court decisions one must be mindful of a possible intrusion by the courts into the sphere of the executive arm[415]. "Such a reconception of the separation of powers was envisaged by the Constitutional Court in the *TAC* case which held that the courts may make policy when the circumstances necessitate it and when the normal mechanisms of a democratic society do not solve the problem.[416]" The court then further stated that since the Constitution in section 7(2) mandates government to "respect, protect, promote, and fulfil the rights in the Bill of Rights" any incursion by the court into the executive's sphere:

> "… is an intrusion mandated by the Constitution itself[417]".

Therefore, the *TAC* contest illustrated that the courts can intervene in socio-economic policy formulation, albeit only in extraordinary circumstances[418]. Furthermore, scholars such as Hopkins bring forth the argument that "exceptional circumstances which would warrant such intervention include urgency and the existence of vulnerable people unable to help themselves.[419]" He further alludes to this as being the "South Africanised doctrine of the separation of powers, which is more apposite to South Africa's particular socio-economic needs.[420]" Significantly, for the right to food, this means that there now appears to be a precedent compelling litigation in the Constitutional Court on the current Food Security and Nutrition Policy for the country seeing as there is consensus amongst civil-society practitioners on the documents' unreasonableness. Provided the courts make a finding that agrees with the views of activists and "analogous with the facts in the *TAC* case that those

[415] Loc cit.
[416] Ibid, pp182-183
[417] Ibid, p183
[418] Ibid, p183
[419] Hopkins, K. 2002. Democracy in Post-TAC Society, De Rebus 14, p17.
[420] Ibid, p17

suffering from hunger and malnutrition cannot wait until the next election to exercise their displeasure with government policy held to be unreasonable[421]", the courts would have to create a reasonable food policy.

Concomitantly, according to David Holness,

> "… there are vulnerable groups, such as hungry children, who do not have the democratic platform in which to effectively express their opinion on government policy; the courts might well have to speak for them. Thus existing problems relating to the right to food can be considered exceptional enough to warrant the courts to issue remedies which have an impact on government's food policy.[422]"

Such a viewpoint becomes even more important when juxtaposed with the fact that many legal practitioners in the country are of the opinion that there currently exists no effective remedies to give substance to the concept of "appropriate relief", particularly as it relates to the realisation of socio-economic rights[423]. The following, taken from a matter in the courts - *Fose v Minister of Safety and Security* - offers insight into the forms of relief that could bear fruits for the realisation of the right to food in South Africa. Justice Ackermann noted the following in his judgement:

> "… appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.[424]"

Seeing as the content of the right to food is yet to be unpacked in the courts, a recommendation of this paper is that "a declaration of rights" as envisaged above - indicating the nature and extent of a particular right would prove ideal for the virtually untested nature of the right to food in the country. This means that "if a person who is unable to feed him/herself goes to court indicating that her right to food is being denied, it may be useful for the court hearing the matter to delineate the nature of the applicant's right to food by way of a declaration of rights.[425]" All the same, just as this dissertation has

[421] Holness, D. R., 2007. Op Cit, p183
[422] Ibid, p183
[423] Ibid, p184
[424] Ibid, p184
[425] Loc cit.

continually stressed the need for rights on paper to be turned into reality, so a declaration of rights it seems would be an insufficient remedy without some further proposition of how the right should be realised in practice.

5.5 Paralegal Advice Offices

Closely aligned to the responsiveness of the courts to the voice of the hungry and malnourished is the role of community-based paralegal advice offices in this process. Having already unpacked the role they play in socio-economic litigation matters earlier in this paper, it must be noted that paralegal employees are well suited to run workshops on the ambit of the right to food as well as government food programmes available. Scholars such as Plasket go further in identifying the crucial role of paralegals in educating the masses and assisting advice offices by stating that:

> "They are also more in touch with the real problems of people than lawyers can ever hope to be.[426]"

It is hard to think of a problem more real to people than that of having insufficient access to food. At present, The Rhodes University Legal Aid Clinic (RULAC) in Grahamstown, in the Eastern Cape Province serves as an excellent example of the manner in which advice offices can be utilised in the fight for the right to food. RULAC has embarked on setting-up what it has coined a network of clusters between the university and advice offices in that province and has also forged relationships between the advice offices themselves[427]. Explicitly, RULAC provides assistance to the said parties in the following manner – firstly, "week-long certificates of competence are currently offered to paralegals on areas of law frequently encountered by the offices[428]." Additionally, "on-site visits are made to the advice offices by RULAC staff members to assess competence in areas of training received and to assist the advice offices with their clients' problems.[429]" Lastly, similar to the on-site visits undertaken, "the paralegals are able to contact RULAC professional legal staff, telephonically or in a

[426] Plasket, M. 1997. "Accessibility Through Public Interest Litigation" in Corder, H & Maluwa, T (eds), Administrative Justice in Southern Africa, Department of Public Law, University of Cape Town, p119.
[427] See: Rhodes University Legal Aid Clinic. Available at https://www.ru.ac.za/lawclinic/ (Accessed 22/01/16)
[428] Holness, D. R., 2007. Op Cit, p192
[429] Ibid, p192

similar fashion for advice in urgent matters.[430]" As such, a *modus operandi* such as this holds potential to significantly enhance the efforts of activists and human rights defenders working on the right to food.

The relationship between university legal aid clinics (or similarly placed legal service providers) and advice offices presents the ideal platform for education on the content of the right to food, the state's current food programmes and what the protection of the right to food entails, to be accessed by the majority of impoverished South Africans who at present are oblivious of their status as rights-holders. What is more, once equipped with this knowledge and understanding paralegals are then well-suited to lobby the government to address its shortcomings on the realisation of the right to food such as in calling for food framework legislation amongst other struggles. Additionally, the on-site visitation of advice offices and other contact between the organizations would assist in identifying potential applicants for court challenges on government's existing food policies or objectionable implementation of government programmes. It is therefore a recommendation of this paper that with the necessary training and support paralegals in advice offices can play a meaningful role in the realization of the right to food in South Africa.

The above serves to demonstrate the role that advice offices could occupy in raising awareness in communities on the right to food. However, that is not to say that the burden of improved awareness of the right to food cannot be carried by other organizations too. For example, the Street Law programme[431] housed within the University of Kwazulu-Natal has been involved with massive human rights awareness initiatives for many years now[432]. Pointedly, Coomans and Yapko further call for an educational right to food campaign to be launched on a large-scale in the media by civil society organisations working on the right to food. For them, the underlying motive being that in the *TAC* case there was an analogous campaign launched in the media speaking to the anti-retroviral treatment of HIV and Aids

[430] Loc cit

[431] Previously known as the Centre for Socio-Legal Studies, Street Law South Africa is a non-profit company that specialises in presenting participatory legal, human rights and democracy education. It also provides opportunities for training in democracy, participatory development and policy development. The project provides preventative legal education to both formal and informal communities, promoting fundamental rights, freedoms, participation and democratic cultures.

[432] See: Street Law, South Africa's Website, www.streetlaw.org.za

victims that helped amplify the voice of the *TAC*[433]. It could also be argued that such an initiative assisted in the coming together of interested groups and in fundraising efforts for strategic litigation.

5.6 Alternative arenas

Thus far, the barriers that shape the legal voice of the hungry and malnourished people in South Africa have been examined. However, there are also other factors that impact on the voice of poor people in claiming their rights that do not necessarily translate to barriers to litigation. An analysis speaking to this shifts our attention to alternative arenas whereby the fight for the right to food could hold sway. The rationale is that the existence of alternative arenas when it comes to contesting the right to food compels one to assume that the lack of litigation on the right to food to date through may well be influenced by the existence of other channels for social change.

In South Africa there are other possible avenues open for mobilization on an issue such as the realisation of the right to food. Electoral mobilization is one such avenue, as South Africa is formally a democracy that holds elections, although this arena has obvious limitations. Important to note is that the state of political parties in South Africa can generally be described as fragile[434]. "South African parties are often characterised by high levels of factionalism and by top heavy leadership structures with historically communal patterns of mobilisation, as opposed to mobilisation around core values or shared interests[435]." Speaking to the aforementioned, Manny da Camara goes further to state that "seemingly immobilised by our past's continuing legacies, our political parties have stagnated, unable to cross boundaries set by apartheid.[436]" As a result, unique to South Africa is the country's recent past, which has had a profound effect on the state of our parties and our politics in general. Post-1994 politicking has seen mobilisation for electoral support taking place on a basis of "historical racial divisions, rather than on any differing policy alternatives offered, leaving little distinction between parties on the basis of values, discernable ideology or

[433] Coomans, F & Yapko, K. 2004. Op Cit, p33.
[434] Da Camara, M. 2012. The state of political parties and electoral politics in South Africa, Focus: State and Nation, The Journal of the Helen Suzman Foundation. Issue 67, pp17-23 Available at http://hsf.org.za/resource-centre/focus/focus-67/Focus_67_web.pdf/view (Accessed 22/01/16)
[435] Ibid, pp17-23
[436] Loc cit

shared interests[437]." Thus, in such circumstances, using electoral mobilization as a way to mobilize the advancement of food rights is at best, highly uncertain, and probably not very effective.

Another possible political channel, other than the electoral system, but which also has its limitations is protest action. Neil Louw, writing for *theSouthAfrican.com*, states that "it is clear that the number of protests per year is steadily rising, but for the time being we are not yet the most prone to protestation in the world, neither nominally nor per capita, although we are still high up on the list for a developing country of our size.[438]" In light of this it must therefore be noted that regular protest action is a characteristic of a socially developed country and it shows the existence of a vibrant civic responsibility that allows for freedom to voice dissenting opinions[439]. However, the snag for South Africa has been that protests have gradually become violent over the years indicative of more insidious, underlying societal problems. This is further aggravated by the South African government's response to protests which has been poor and has shown a detachment from reality. It could even be said that the state's response to protest action lacks a human rights grounding as evidenced by the brutal death of Andries Tatane during a service delivery protest in Ficksburg[440] and the biggest massacre by police of civilians in post-apartheid South Africa in Marikana whereby 34 miners protesting for better wages were butchered. More recently, South Africa has also seen a more evolved wave of protests driven by what has become known as the "fallists" who have harnessed the power of conventional methods of protest with that of social media. The "fallists" have led a somewhat successful protest for accessible and affordable tertiary education, however, it appears a major problem for South Africa is that, generally speaking, protests have become less about the demand for a directed resolution on specific issues, and more about an underlying prevalence of disenchantment, disenfranchisement and disillusionment aimed at the government and democratic values as a whole.

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[437] Loc cit.

[438] Louw, N. 2015. Protest Nation: Is South Africa the protest capital of the world? *thesouthafrican.com,* p1. Available at: http://www.thesouthafrican.com/protest-nation-is-south-africa-the-protest-capital-of-the-world/ (Accessed 22/01/16)

[439] Ibid, p1.

[440] Andries Tatane was a 33-year-old South African citizen who died during a service delivery protest in Ficksburg. Seven police officers accused of his murder and assault were acquitted in the Ficksburg Regional Court in March 2013.

All the same, following months of attempts to ensure that the DAFF consults on its food policy and implementation plan, on 17 April 2015 civil society groups, namely, Oxfam, Gender CC, Ekhuruleni Environmental Organisation, Studies in Poverty and Inequality Institute (SPII) and SECTION27 held a picket outside the DAFF offices in Pretoria. The parties presented a memorandum to the Deputy Director General (DDG) and were told that they would receive a response in seven days. Despite numerous follow ups and the re-presentation of the memorandum to a newly appointed DDG on the 23rd of July 2015 whose promise was to respond in five days; the group is yet to receive a response to this day. Therefore, in-light of such apathy by the state and the potential militancy in its response to protests there is reason to believe that activists might be reluctant to participate in protest action. Such scepticism is also driven by the fact that, thus far, the protest action that has ensued around the newly adopted food policy for the country has not been effective.

Furthermore, there also exists the South African Human Rights Commission (SAHRC), an organisations established in terms of chapter 9 of the South African Constitution to guard constitutional democracy. The SAHRC having produced its Food Rights Report (1999/2003) noted that they are both economic and physical barriers that prevent many South Africans from enjoying, in particular, access to food. The SAHRC's report established definitions of economic and physical accesses as the following:

> Economic access refers to the individual or household's financial means needed to acquire adequate food, whereas physical access refers to the access that will enable vulnerable groups such as children, the elderly and the disabled to have food. This also includes people with unrelenting medical problems.

Whilst acknowledging the states' role in assuring access to food, the SAHRC went on to state that, "such access requires the elimination of barriers to food acquisition[441]" and compelled the state to employ a variety of intervention schema to ensure the citizens' ability to enjoy and exercise the right to food[442]. The SAHRC may not have the statutory authority to enforce a recommendation, but it remains an agency trusted by society to review and adjudicate human rights complaints. Its broad investigatory powers give it a public

[441] SAHRC. 1999/2000. 3rd Economic and Social Rights Report. Chapter 4: The Right to Food. A South African Human Rights Report, Johannesburg, p144. Available at: www.sahrc.org.za (Accessed 22/01/2016)
[442] Ibid, p144

legitimacy equal to a court of law. Unfortunately, the public's confidence in the agency has not translated to a better life for the poor. A major obstacle for the SAHRC in its attempt to monitor and assess economic and social rights has been the obtuse way in which state obligations have been defined in international law. It goes without saying that there has been little attempt by international and national human rights institutions such as the SAHRC to add value to the content of fulfillment and enjoyment of human rights and to hold states accountable to their obligations. As a consequence, the SAHRC, at times, is deemed to exist in a legal gray area. It has the statutory authority to investigate an incident and to educate the public about the country's human rights laws but it cannot prosecute any human rights offender as it has no legal mechanism in place to force a guilty party to be punished for violating human rights laws. The above simply serves to illustrate the challenge that comes with pinning the fight for the right to food on an institution like the SAHRC.

Lastly, the United Nations system is represented in South Africa through its specialized agencies, such as the United Nations Development Programme (UNDP), the Food and Agriculture Organization (FAO) and the World Food Programme (WFP) amongst others. These organizations, could be of use in highlighting the states shortcomings in the fight for the right to food and in placing pressure on the state to meet its human rights obligations more so as the world enters into the SDG era. Significantly, of the 17 SDG goals that have been concluded-on, food security is at the centre of the achievement of 15 of those goals! Therefore, a recommendation of this paper is that activists and human rights defenders need to forge credible partnerships with such agencies when it comes to the realisation of the right to food.

There are people in the world so hungry, that God cannot appear to them except in the form of bread.

- **Mahatma Gandhi**

6. Which factors would have to be present in South Africa?

It follows from the above analysis that the struggle of the poor and marginalised in South Africa for genuine equal standing in society still has a long way to go. Based on the analysis conducted in this dissertation, this last part of the concluding chapter will present the most crucial factors that need to be present for public interest litigation on the right to food to emerge in South Africa.

From the onset it must be acknowledged that activists and human rights defenders working on the realisation of the right to food still have a lot of work to do regarding the information spreading and the awareness of the right to food to the masses. Hungry and poor people in South Africa need to be informed that their grievances are rights violations which, under the right circumstances, could be actionable. Granted, there seems to be a gradual understanding of the problem of hunger in the country in light of *Oxfam's Hidden Hunger* report that made headline news in 2014 and the recent frenzy in the media triggered by the precarious drought affecting Southern Africa in 2016. However, the knowledge and information publicly available speaking to concerns around South Africa's trajectory on the right to food is still inadequate. Hopefully, as civil society organisations and institutions such as the SAHRC continue their work, this situation will improve. This seems necessary if mobilisation on the right to food is to occur on a large-scale and the fight for the right to food is to gain social currency with groupings in South African society like the "fallists" among others and also if litigation on the right to food has a chance to be reality.

In addition, the analysis provided in this dissertation suggests that the most crucial challenge facing the realisation of the right to food in South Africa is the lack of confidence and distrust that exists amongst those at the bottom of the pyramid when engaging the justice system. There is a pressing need for the DoJCD to build up credibility in the system. Although this has been a central-aim of the state post-1994, and many reforms have been introduced to the legal system that address this, it still remains a big obstacle for victims experiencing socio-economic violations. Furthermore, the transformation of the South African judiciary to be more reflective of its populace has been debated for a long time now, and is likely to carry-on for some time. Although this paper acknowledges that such institutional and attitudinal changes are not quick to fix, and in all likelihood will be an issue

in the country for some time to come it must still be understood that such changes need to be prioritised in order for South Africa to be more accommodative of those with socio-economic grievances. It follows, that once these concerns are addressed, this would lead to the occurrence of broader socio-economic litigation in the country. Until potential food litigants see the law and the courts as something to which they can make effective recourse to protect their fundamental rights, and not as something that operates solely to the benefit of powerful individuals and groups, only then will they turn to the courts with their complaints.

In-line with the above-mentioned, another set of crucial factors that seem necessary for litigation on the right to food to ensue, concerns the judges and their willingness to push the envelope as far as possible within the confines of constitutional democracy. It cannot be understated that judges and lawyers need to be able to work independently without political and/or elite influences. As such, what is important is that the judiciary ought to be immersed in constantly advancing its legal education and training so as to lead-out with jurisprudential innovations and in holding the state accountable to its international human rights commitments, this is particularly important for the realisation of the right to food. It must be recognised that landmark cases speaking to the realisation of the right to food in countries such as India and Costa Rica have demanded bold creative judicial decision-making on the part of the judiciary.

On the contrary, the joining of forces of different sects of society with a vested interest in socio-economic rights, linking them up with legal experts and mobilising around the right to food; generating resources and sustaining collective action seems possible. However, if the recent confrontations that have been directed to the state regarding its newly adopted food policy are anything to go by what is key is that civil society groups working on human rights advocacy need to focus their attention more specifically towards litigation and litigation strategies. Thus far, these groups have focused much of their attention towards the political opportunities of influence that exist in the country and it must be acknowledged that they have had successes in this regard. However, unlike other socio-economic woes bedevilling the country, the right to food needs to be channelled towards the legal opportunities that exist in the country as matter of urgency. Social safety nets have failed many of the poor and hungry in South Africa and taking into account that there is enough food in this country

to sufficiently feed everyone, government's current response to the country's food challenges needs to be challenged in the courts, mainly, by calling for framework legislation on the right to food. Implementation of any policy by the state has to be aided by framework legislation which would provide specific methods of implementation, including powers, policies and implementation benchmarks[443] in-turn translating the right on paper into food on the tables of all living in South Africa.

6.1 Concluding remarks – An answer to the research question

This study started-off with an obvious puzzle that seeing as the right to food is formally enshrined in the South African Constitution and is also safeguarded in a number of international conventions that South Africa is party-to and in light of the fact that amidst such legal protections this right is still being violated, the assumption was that conditions ought to be favourable for food rights litigation in the country. However, seeing as there is an absence of litigation speaking to food woes in the country, the aim of this paper was therefore to study *which factors and conditions would have to be present for there to arise public interest litigation on the right to food in South Africa*. Having provided an in-depth analysis to the question posed, the puzzle does not seem so much of a puzzle anymore.

This study has served to illustrate that there are many barriers to the litigation of the right to food in South Africa. These barriers have to do with both the fact that violations of the right to food largely occur amongst the poor and marginalized in society, who generally do not have resources, and that the legal system in South Africa can be characterized as not being 'friendly' to the litigation needs of this sect within society. Hungry and poor people are amongst those with the least resources in society, and this means they are faced with major difficulties in bringing their cases before the courts. It also follows, that this group of society would therefore be very dependent on assistance throughout the entire litigation process if a claim on their right to food is to be commenced. Also, because they are formalistic requirements to the articulation of legal claims, marginalized people are even more dependent on support from more professional litigators. As such, in a country like South Africa in which access to legal resources and assistance is limited, this obviously poses a challenge to potential food rights litigators. Consequently, this study has revealed, that for

[443] Khoza, S. 2004. Op Cit, p673

food rights litigation to arise, there is also a need for more awareness and consciousness-raising around the topic of the right to food generally among the poor. Civil society organisations working on the right to food also need to be more focussed on litigation assistance and strategies if those whose right to food is currently being violated are to be heard in the courts of South Africa.

Critically, this dissertation has revealed that they are two distinct factors that are arguably essential to social change for the realization of the right to food in South Africa. The first is that although this paper has made a call for framework legislation on the right to food in South Africa to be effected what should be understood is that legislation and enforcement of legal rights can only go so far in realizing socio-economic rights. A major limitation is that successful litigation can only oblige government to take a specific measure but the problem of food insecurity in South Africa is chronic and results from the structure and operations of the market economy. There is enough food on the planet to adequately feed everyone alive today but the rules governing national agricultural policy and international trade, along with the economic incentives in the global food production system, do not currently result in the fulfilment of access to adequate food for all. On this premise, it therefore becomes clear that the promotion of income generation has to form part of the strategies that activists have adopted in the fight for the right to food. The second is that although there has been much activism on the right to access healthcare and the right to water and sanitation amongst others, food has not been one around which people have properly mobilized. Until there's a concerted effort by civil society groups to truly rally behind the call for a nourishing food system for all in South Africa, the realization of the right to food will remain a pipedream. The current situation in the country contrasted with the experiences in India, Brazil and other countries where right to food campaigns have been an important force leaves a lot to be desired.

6.2 What next?

South Africa is still a relatively new democracy, and many of the issues that have been raised in this paper must be understood in the context of a country still grappling with the developmental-state agenda. However, the fact that many of the issues discussed are under development, or rather under improvement, does not help the situation of the millions of

individuals suffering from hunger and malnutrition today. In fact, these may face even more serious problems in the foreseeable future especially when taking into account that experts have already warned that rapidly rising prices for the essentials of life are already weighing heavily on the poor and could represent a security risk[444].

This analysis has demonstrated that the chances of food litigation taking place in South Africa at present are limited, and it has also shown the issues in the country that need to be addressed if the prospect for litigation is to improve. It is also the position of this dissertation that litigation as a tool for social transformation does not come with guarantees. Neither is it necessarily a desirable way to promote social change as demonstrated in the discussion. Important to note is that there are many possible strategies for effecting social change, and litigation is not necessarily the best way. For South Africa, civil society organisations, human rights defenders and institutions working on social justice and the promotion of the right to food should continue their various work of making the situation in South Africa with regard to the food security context better.

Also, this paper has not delved into the unintended consequences that litigation on the right to food could bring to the current status-quo. As such, there is a need for more knowledge on the effects and consequences of litigation in general, particularly on South Africa's food-value-chain. Lastly, on the 12th of January 2015 the South African government finally ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR). This takes place almost two decades after South Africa signed the ICESCR, this significant decision means that the ICESCR, and the economic and social rights it contains, will be legally binding for South Africa. It follows that implementing its provisions is the next step, and this could significantly enhance the framework available to ordinary South Africans for enforcing their rights to food, health, social protection, housing and more. As a concluding remark, this paper presents the view that the ratification of the ICESCR presents a great opportunity for South African social and economic policy and jurisprudence to develop in harmony with the normative standards set by the leading international treaty on these rights. Moreover, government will now be subjected to the reporting procedures carried out by the United Nations Committee on Economic, Social and Cultural Rights through assessments of State

[444] See: The Times. 2016. Food shortages are looming: Millions on the edge of poverty, living only on maize. Wednesday January 20*, The Times.*

reports. This system of supervision, which obliges South Africa to submit its initial report within two years of ratification, detailing the manner in which the country is implementing the rights protected under the ICESCR, presents an opportune moment for government, civil society and human rights defenders to forge worthwhile partnerships that ensure a strong human rights trajectory for the country and a unified and credible process of monitoring progress.

Few scholars have studied the empirical effects of the ICESCR, the main linchpin of the international economic and social rights regime on the realisation for the right to food. All the same, in South Africa effective means need to be developed to close the gap between having the right to food in theory and the realisation of the right in practice. Realising the right to food forms part of a broader challenge in this country of meeting all social and economic rights for the many people for whom they remain elusive[445].

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- Vishwas Satgar (Cooperative and Policy Alternative Centre), presentation at the South African Human Rights Commission (SAHRC) National Dialogue on the Right to Food, 20 March 2014. Johannesburg, South Africa.

APPENDIX: INTERVIEW GUIDE

Key-Expert Interview Schedule

Rights Focused Questions: Access to the Right to Food – Policy, Social and Legislation Environment

Advocating for the Right to Food in South Africa

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An Analysis of the relationship between Judicial Activism, Public Interest Litigation and Collective Action in South Africa as a Strategy to Secure the Right to Food

Student: Busiso Moyo

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Key informant Interview Questions

1. Understanding of food insecurity

- What is your understanding of food insecurity in South Africa considering that South Africa is widely regarded as a food secure nation?

    - What is the state of knowledge on food security including availability of data and how it is measured; does it give a true reflection of the extent of the problem?
    - How does this understanding differ from that shared by policy makers and others working on food security

2. State of Food Insecurity in SA, who is affected, how are they affected and how are they coping with it?

- In the case of South Africa what are the key characteristics that one can use to identify which communities and individuals are food insecure, when and why?
    - If we are to put a face to food insecurity in South Africa's disadvantaged communities, how does it look like?
    - Which population groups are the most vulnerable to food insecurity in South Africa? (Gender, income, spatial characteristics, household profile, race, education etc.)
    - What are the economic characteristics of food insecurity in terms of level of employment status, poverty and deprivation?

- What is the prevalence and severity of food (in)security in these communities
    - What is the state of food availability, access, reliability and distribution in South Africa's poor communities?

3. How has climate change affected food insecurity of the poor communities in South Africa over the last couple of years?
    - To what extent is climate change a key determinant of food insecurity among poor communities in South Africa?
    - Which aspects of climate change are mostly responsible for food insecurity for poor communities in South Africa
    - Do the affected groups have a full appreciation of the impact of climate change on food insecurity?

- Does climate change affect the food insecurity situation of poor communities directly or indirectly?
- What is being done to address this situation by the government, municipality and the poor communities themselves

4. Please provide me with a snapshot of the differences between urban and rural food insecurity and its underlying causes?

    - How does food insecurity differ in terms of severity, prevalence and nature between urban, peri-urban and rural households?
    - How does food insecurity differ by demographic groups, gender and economic characteristics among urban, peri-urban and rural households

5. What are the underlying causes of food insecurity in South Africa and how have these changed over the last couple of years?
    - Currently, what could be classified as the most salient determinants of food insecurity in South Africa?
    - What are the paths ways through which these determinants influence food insecurity?
    - How have fluctuations in the rand impacted on food prices and thus food security in the country?

6. What is the impact of gender inequality on food security?
    - Which aspects of gender inequality play a role in food insecurity in poor communities of South Africa?
    - Are these inequalities similar among urban, rural and peri-urban areas
    - What needs to be done to address this?

7. What are some of the ways and means that poor households use to cope with food insecurity and how effective are these?
    - Intra household resource allocation
    - Borrowing, etc.
    - subsistence farming
    - kitchen gardens and gathering and processing own food
    - processed foods and cheap flavourings
    - buy cheaply regardless of quality
    - buy a smaller quantity of food, switch to different types of food, reduce dietary diversity and skip meals

8. State of Government policy in dealing with food insecurity in the country in terms of appropriateness and effectiveness

- Could you please evaluate the impact of government policies on the food security situation of the poor?
    - Are they appropriate or/and effective for delivering the 'the right to food' enshrined in section 27 of the constitution?
- What are the strengths and gaps in terms of policy formulation and implementation?
    - What are the shortfalls, if any, in the Integrated Food Security Strategy (IFSS) for South Africa framework which is supposed to guide the government food security strategies
    - Where policies should be targeted to improve food insecurity in the country?

9. Are there some organizations or materials on food security you wish to refer me to? Please also provide any available statistics or stories to collaborate any of the above issues?

10. What needs to be done to comprehensively address the food (in) security situation of poor households in South Africa?

- What should be the role of non-state actors(private sector and CSOs) and what factors could provide an enabling environment for their effective contribution or 'smart partnerships' envisioned in the IFSS
- What role can town planners play in improving urban food security given that one of the main factors that impact food insecurity is spatial planning in urban areas?

The following questions pertain to steps the Department of Forestry, Fisheries and Agriculture (DAFF) has taken in realising the right to access to sufficient food. In particular, the focus is on how civil society has been engaging with the current policy environment in light of the newly proposed National Policy on Food and Nutrition Security for the Republic of South Africa.

The Food and Nutrition Security Policy, gazetted in August 2013 notes that the policy *"provides a broad framework for the fulfilment of the Constitutional imperative"* – which is to provide access to food – *"and should serve as a guide to national, provincial and local government in pursuing food security at every level".*[446]

[446] The Department of Forestry, Fisheries and Agriculture (DAFF). (2013). National Policy on Food and Nutrition Security, August 2013.

1. Describe the process – from inception to now – that was followed to develop the Food and Nutrition Security Policy.

   Probe:

   a. What is the current status of the draft policy and explain planned future developments of the policy.
   b. Who are/were the actors involved in developing the draft policy?
   c. Explain the rationale underpinning the confidential nature of the draft policy?
   d. Public participation is an important aspect of policy development. To what extent has public participation been incorporated in developing the draft policy?

The State's response to food security is often criticised for having an overemphasis on agricultural production, thus resulting in food security at national level while insufficient food access remains a challenge at household level.

2. Explain according to your understanding the State's position on the linkage between food and nutrition security, particularly at household level, and agricultural production.
3. In your opinion, how credible are the objectives geared towards realisation of the right to food at household level, as envisioned in the draft policy?
4. Explain how each of these objectives will be achieved.

The draft policy has been criticised for suggesting that food insecurity will be monitored through anthropometric data and hunger indices, only. For instance, UNICEF argues that "*The limitations of these indicators as measurements could limit the efficacy of improving the nutritional status of the population as lack of hunger and an adequate supply and consumption of energy does not equate to a well-nourished individual*".[447]

5. What is DAFF's position on this criticism?

The draft policy identifies four specific dimensions as determinants of food security. The dimensions are: 1) adequate ***availability*** of food, 2) ***accessibility*** (physical, social and

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http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutririon%20security.pdf

[447] United Nations Standing Committee on Nutrition. (2013). Country Policy Analysis Nutrition Impact of Agriculture and Food Systems South Africa, August 2013. UN System Standing Committee on Nutrition country study for the second International Conference on Nutrition. http://unscn.org/files/Publications/Country_Case_Studies/UNSCN-Country-Case-Study-South-Africa-FINAL.pdf. Date downloaded: 16 January 2015.

economic), 3) ***utilisation, quality, nutrition and safety*** of food, and 4) ***stability of the food supply***.

6. How should each of these determinants of food security be measured and monitored?
7. Which government-department should be responsible for monitoring fulfilment of these determinants?
8. It's evident that additional resources (finances/budget, human resources, infrastructure, etc.) will be necessary for the implementation of the draft policy?

    Probe:
    a. In your opinion, which resources should be allocated and why these?
    b. Given the multi-sectoral/departmental approach towards ensuring food security, which state departments should be the recipients of such resources?
    c. How should the appropriate use of resources be monitored?

The draft policy notes that food and nutrition security will require "*well-managed inter-sectoral co-ordination, and the genuine integration of existing policies and programmes in health, education, and environmental protection, as well as in agrarian reform and agricultural development*".[448]

9. How should the State give effect to its oversight role – conferred on DAFF by the draft policy – specifically in ensuring improved coordination and genuine integration of existing policies and programmes?

The draft policy also indicates that strategy documents detailing the programmes and activities that will ensure food security will be developed.[449] Further, a Household Food and Nutrition Strategy and a Food Production Intervention have been developed.

10. Which department/s will be responsible for developing and executing/implementing each of the Strategy documents?
11. Which department will be responsible for monitoring implementation of each of the Strategy documents?
12. Explain, in brief, what the major components of the Household Food and Nutrition Strategy and the Food Production Intervention documents are.

[448] Ibid.

[449] According to the draft policy, strategy documents will be developed on each of the five pillars through which attaining food security will be achieved. The five pillars are: improved nutritional safety nets, nutrition education, investment in agriculture, improved market participation, and food and nutrition risk management.