

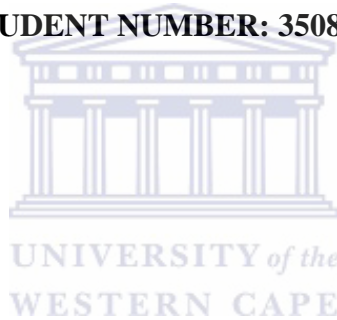
**ACCESS TO SAFE FOOD IN SOUTH AFRICA AS A HUMAN RIGHTS IMPERATIVE**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE  
DEGREE OF MASTERS IN LAW (LLM)**

**BY**

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## DECLARATION

I, Adeniyi Oluwafunmilola Foluke, declare that '**Access to Safe Food in South Africa as a Human Rights Imperative**', is my work and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used are duly acknowledged and properly referenced.

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Signature: 

Date: 24/03/2016



## **DEDICATION**

This thesis is dedicated to the memory of my late sister, Olubukola Yemisi Oni (29 April 1982- 5 October 2013). You encouraged me to reach for the stars and never stopped reminding me why I had to take the next step and study for my LLM. Well Sis, I finally did. I hope this makes you smile down at me.



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## LIST OF ACRONYMS AND ABBREVIATION

ACHPR	African Charter on Human and Peoples' Rights
CAC	Codex Alimentarius Commission
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
EMA	Economic Motivated Adulteration
FAO	Food and Agricultural Organisation
GATT	General Agreement on Tariffs and Trade
GM	Genetically Modified
GMO	Genetically Modified Organisms
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SPS	Sanitary and Phytosanitary (Agreement)
TBT	Technical Barriers to Trade (Agreement)
UDHR	Universal Declaration on Human Rights
UN	United Nations
WFS	World Food Summit
WTO	World Trade Organisation
WHO	World Health Organisation

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# CHAPTER ONE

## INTRODUCTION

### 1.1 BACKGROUND

The formal recognition of the individuals' right to food dates back to as early as 1215 in *Magna Carta*,<sup>1</sup> where it stated 'no one shall be amerced [*fined*] to the extent that they are deprived of their means of living'. This has been narrowly interpreted by scholars as implying the right to obtain food unhindered through one's own efforts.<sup>2</sup> In 1941, the then US president, Franklin D Roosevelt, included in his 'Four Freedoms Speech', the 'Freedom from Want'.<sup>3,4</sup> This freedom was later enunciated in the United Nations (UN) Charter of 1945.<sup>5</sup> The 1948 Universal Declaration of Human Rights (UDHR) recognises the right to food as part of the right to an adequate standard of living to ensure the health and wellbeing of every individual.<sup>6</sup>

In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>7</sup> specifically recognised the right to food- this time not only as an aspect of the right to an adequate standard of living. It provides for the right to adequate food<sup>8</sup> and the right to be free from hunger<sup>9</sup> and upon its entry into force in 1976 has been ratified by over 160 countries<sup>10</sup> - South Africa inclusive- and remains an international instrument that deals with the right to food in a most comprehensive manner.

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<sup>1</sup>Magna Carta originated as a potential peace treaty between royalist and rebel factions in England in 1215

<sup>2</sup> Food and Agriculture Organisation 2002: 'The road from Magna Carta.' Available at <http://www.fao.org/worldfoodsummit/english/newsroom/focus/focus6.htm> (Accessed 10 March 2015)

<sup>3</sup>The 'State of the Union' message was delivered on 26 January 1941

<sup>4</sup> Roosevelt F 'War—an aid to democracies,' in Rosenman S, *The Public Papers and Addresses of Franklin Roosevelt* (1941) 672

<sup>5</sup>Article 1(3) Charter of the United Nations (1945) 1 UNTS XVI

<sup>6</sup>Article 25(1) Universal Declaration of Human Rights (1948) 217A (III)

<sup>7</sup>International Convention on Economic, Social and Cultural Rights UN General Assembly Resolution 2200A (XXI), 16 December 1966

<sup>8</sup>Article 11 (1) International Covenant on Economic, Social and Cultural Rights (1966) United Nations, Treaty Series, vol. 993

<sup>9</sup> Article 11(2) International Covenant on Economic, Social and Cultural Rights (1966) United Nations, Treaty Series, vol. 993

<sup>10</sup>As at the time of this study, the Covenant had 164 parties, as well as six others which had signed but not yet ratified it. For more details see [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (Accessed 26 November 2015)

Spurred by Members request at the closing of the 1996 World Food Summit (WFS), the Committee on Economic, Social and Cultural Rights (CESCR),<sup>11</sup> issued General Comment 12 in 1999, to explain the normative content of article 11 of the ICESCR.<sup>12</sup> Randolph opines that

General Comment 12 provides the most comprehensive definition of the substantive content of the right to food under international law and expands on the three core dimensions of the right— food availability, food access, and food use. The aim was to provide guidance on the sorts of information that States Parties to the ICESCR would need to monitor implementation of Article 11 of the Covenant and to further delineate other core elements of the right to food beyond food security. It thus offers a detailed interpretation of the nature and scope of the right to food included in the ICESCR, drawing both on the Committee’s analysis of country reports submitted by States Parties to that treaty since 1979 and on the accumulation of knowledge to date regarding the economic, social, political, environmental and other factors that influence the fulfilment of the right to food.<sup>13</sup>

Indeed, it can be stated that General Comment 12 has served as a focal tool in the interpretation and implementation of the right to food to date.

The year 2015 is significant as a ‘review year’ in which quantifiable commitments made by States will be assessed on the progress made in halving the number of hungry,<sup>14</sup> as well as the number of under nourished people in the world.<sup>15</sup> According to recent statistics from the Food and Agriculture Organisation (FAO), the trend with global hunger reduction continues

...about 805 million people are estimated to be chronically undernourished in 2012–14, down more than 100 million over the last decade, and 209 million lower than in 1990–92. In the same period, the prevalence of undernourishment has fallen from 18.7 to 11.3 percent globally and from 23.4 to 13.5 percent for developing countries. Since 1990-92, 63 countries have reached the hunger target of MDG-1 and 25 countries have achieved the more stringent WFS target. ....The figures demonstrate that the hunger target of the Millennium Development Goal – of halving the proportion of undernourished people in developing countries by 2015 – is within reach.<sup>16</sup>

As encouraging as the current trend is, the fight to end hunger and malnutrition has encountered a lot of detours in progress already made.<sup>17</sup> Advocacy to end hunger and guarantee food for all,

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<sup>11</sup>The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant

<sup>12</sup>Randolph S ‘The right to food: a global overview’ in Minkler L (Ed) *The State of Economic and Social Human Rights: A Global Overview* (2013) 21-60

<sup>13</sup> Randolph S (2013) 21-60

<sup>14</sup>Article 19 (1), United Nations Millennium Declaration

<sup>15</sup>1996 Rome Declaration on World Food Security and the World Food Summit Plan of Action Available at <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM> (Accessed 15 March 2015)

<sup>16</sup>2014 SOFI in Brief Available at <http://www.fao.org/3/a-i4037e.pdf> (Accessed 15 March 2015)

<sup>17</sup>Before the global food crisis of 2008, experts had opined that the quantifiable commitments made were at best difficult to achieve. Between the early 1990s up to 2006, a lot of progress was made in reducing the number of under nourished people the world over. From 2007-2008 however, there was a skyrocketing in food prices, leading to inaccess for so many, as well a new food crisis which ravaged the Horn of Africa in 2011

manifested in various ways, has over the years culminated to ensuring that every human- man, woman, child, great or small- is at least guaranteed the right to feed his/herself with dignity, adequately and safely. It is against this background that the right to safe food is discussed in this study.

## 1.2 PROBLEM STATEMENT

South Africa (SA) has strong constitutional and legal frameworks for the successful realisation of the right to food for its citizenry.<sup>18</sup> In spite of these guarantees, the challenge to realise the right to food is overwhelming. For instance, SA is ranked 67<sup>th</sup> out of 99 countries and has a SERF index<sup>19</sup> and global hunger index of 61.7 and 6.4, respectively.<sup>20</sup> The right to accessing safe food in South Africa especially for the vulnerable and marginalised groups such as women and children remains unrealised. In spite of SA being signatory to a plethora of existing laws and international treaties, a continued system of weak enforcement mechanisms leave consumers at the mercy of retailers with regard to food safety.

A recent study<sup>21</sup> by meat researchers at the University of Stellenbosch, found fraudulent practices are rife in the meat industry, ranging from mislabelling of processed meat products to false claims. The study found a range of undeclared non-beef substances, labelled as beef including soya, donkey, pork and water buffalo;<sup>22</sup> they were found in up to 68 percent of the 139 minced meats, burger patties, deli meats, sausages and dried meats that were tested. In other cases, undeclared plant matter was detected. Of great concern - regulatory and health related- was the undeclared donkey, sold as beef; this is in direct contravention to the consumers' right to protection against false, misleading and deceptive representations as guaranteed under the Consumer Protection Act No 68 of 2008 (CPA).<sup>23</sup> More so, donkey is not commercially sold for human consumption in South Africa- this points to intentional substitution for economic gain.<sup>24</sup>

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<sup>18</sup>South Africa is one of just 23 countries with constitutions that specifically recognises the right to food

<sup>19</sup>The measures of state performance for fulfilling economic and social rights (the SERF Index - [www.serfindex.org](http://www.serfindex.org))

<sup>20</sup>Fukuda-Parr S 'Debate on the right to food in South Africa; entitlements, endowments and the role of economic and social policy' (2012) 13 *ESR Review* 6

<sup>21</sup>Cawthorn D, Steinman H and Hoffman L 'A high incidence of species substitution and mislabeling detected in meat products sold in South Africa' (2013) 32 *Food Control* 440- 9

<sup>22</sup>Cawthorn D, Steinman H and Hoffman L (2013) 443

<sup>23</sup>Sections 24 (1)(b) and 41 (1)(a) Consumer Protection Act

<sup>24</sup>Cawthorn D, Steinman H and Hoffman L (2013) 447

More recently, concerns have been raised about the proliferation of top brands of bread in South Africa- one of South Africa's staple foods<sup>25</sup> - with Genetically Modified (GM) soya.<sup>26</sup> Of the top nine brands tested, only one brand- (Sasko) - conformed to the GM labelling law. All other brands- which had no GM labelling- tested positive for GM content in the soya flour used, ranging between 91.09 and 20.46 percent GM content. Ironically, the brand which conformed to the labelling requirement had an unquantifiable amount of GM content such that it need not had labelled its brand. This practice is clearly in contravention of the consumers' right to information contained in the CPA, as well as Regulation 7 on the labelling of goods produced using Genetically Modified Organisms (GMOs).<sup>27</sup> These findings raise serious concern on the effectiveness of the current regulatory framework on the food supply chain in South Africa. In most countries, GM labelling is not solely about consumer safety, but more about consumer information and choice<sup>28</sup>- whether the voluntary or mandatory regime for labelling is imposed, the crux is safeguarding the consumers' right to know and to choose.

It is apparent that the food chain in South Africa frequently undermines the rights to health, life and dignity as well as the right to information of consumers. Insufficient alignment of internal laws, policies and practice with both constitutional and international obligations hinders access to safe food, particularly for vulnerable and marginalised groups within the context of the South African society. Identified challenges to implementing the CPA and Regulations, as well as other Acts safeguarding food safety in South Africa include-

- The high risk of losing in sale due to heightened consumer awareness on GM food.<sup>29</sup>
- Increased production costs due to labelling requirements.<sup>30</sup> A study was conducted by De Leon, Manalo, and Guilatco on the potential economic effects of labelling options in the Philippines, a country that produces GM maize (similar to SA) and imports large volumes of potentially GM commodities. The study showed that labelling would result in an

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<sup>25</sup> African Centre for Biosafety 'Below the belt, below the breadline – South Africa's inequitable and GM contaminated bread industry' (2014) Available at <http://www.acbio.org.za/index.php/media/64-media-releases/458-below-the-belt-below-the-breadline-south-africas-inequitable-and-gm-contaminated-bread-industry> (Accessed 2 April 2015)

<sup>26</sup> African Centre for Biosafety (2014)

<sup>27</sup> Section 22 Consumer Protection Act, Regulation 7

<sup>28</sup> Gruere G, Rao S 'A review of international labeling policies of genetically modified food to evaluate India's proposed rule' (2007) 10(1) *Ag BioForum* 56

<sup>29</sup> Gruere G, Rao S (2007) 57

<sup>30</sup> Gruere G, Rao S (2007) 60

increase of manufacturing costs by 11–12%, which would lead to increases of 10% in consumer prices for certain products.<sup>31</sup>

- The high cost of insurance on the part of distributors and retailers, tailored to the ‘no fault’ liability contained in the CPA.<sup>32</sup>
- Weak monitoring mechanisms especially at municipal levels.

Furthermore, there is very little targeted policy engagement towards the realisation of the right to adequate and safe food in South Africa. Very few civil society groups base their advocacy squarely on the right to adequate and safe food. As a result, policy engagement does not benefit from the added impetus of a dedicated and specific rights and accountability framework surrounding this. There is a dearth of litigation on the right to food in South Africa.

### 1.3 WHAT IS THE RIGHT TO FOOD?

A discussion on the right to food emanates from the recognition of the right to food as a human right. Scholars typically classify human rights into three broad categories -first, second and third generation rights.<sup>33</sup> First generation rights, also known as negative rights, are the well enunciated civil and political rights; recognised in majority of constitutions the world over. They are termed negative rights in the sense that they prohibit political authority from carrying out certain acts against its citizens.<sup>34</sup>

Second generation rights, are socio-economic rights, otherwise termed positive rights. They include rights which cover the social, economic and cultural sphere of human existence including the right to education, the right to food, the right to health. They are termed positive rights because they require positive affirmative action from political authority for their realisation.<sup>35</sup> The justiciability of these rights has elicited much debate from the academia over the years. It is

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<sup>31</sup>De Leon A, Manalo A, and Guilatco F ‘The cost implications of GM food labelling in the Philippines’(2004) Study commissioned by the Bureau of Food and Drugs, Department of Health, Republic of The Philippines. Available at <http://www.isaaa.org/kc/Publications/pdfs/briefs/Brief4-2.pdf> (Accessed 7 April 2015)

<sup>32</sup> Luterek J ‘Impact of the Consumer Protection Act on the food industry’ Available at <http://www.thefoodsafetynetwork.co.za/component/content/article/144-main-navigation-consumer/291-impact-of-the-consumer-protection-act-on-the-food-industry.html> (Accessed 7 April 2015)

<sup>33</sup>Davidson S *Human Rights* (1993) 39-45; Dlamini C *Human Rights in Africa: Which Way South Africa* (1995) 5; and Kent G *Freedom from Want; The Human Right to Adequate Food* (2005) 29-31

<sup>34</sup>Kent G ( 2005) 29-31

<sup>35</sup>Kent G (2005) 29- 31

important to note that as far as South Africa is concerned, the justiciability of these rights is not in question as was elucidated in the defining case of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)- socioeconomic rights are justiciable in South Africa. As a second generation right, the right to food is a unit identified within the broader category of the ‘right to an adequate standard of living’. In this respect, Article 25 (1), of the UDHR provides that

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.

This was further elaborated in Article 11(1) of the ICESCR. Kent explains that the aim is not delimited to realising the right to food independently but generally a right to an adequate standard of living, which implies adequate health, social welfare, education and of course food.<sup>36</sup> Achieving the balance between each of these interdependent units is key to realising an adequate standard of living.

Third generation or solidarity rights are rights of groups or clusters rather than individuals, such as the rights to development, environment and peace. These are regarded as rights attaching to communities rather than individual persons.<sup>37</sup> In spite of these classifications, it is widely accepted that all human rights are indivisible and interconnected<sup>38</sup> as recognised in Paragraph 5 of the Vienna Declaration and Program of Action.<sup>39</sup> The right to food is a fundamental human right recognised in the constitutions of many countries, <sup>40</sup>including South Africa.<sup>41</sup>

Kent highlights the difference in meeting the basic biological need for food and realising the human right to food. The human right to food cannot be said to be realised if citizens cannot

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<sup>36</sup> Kent G (2005) 46

<sup>37</sup> Kent G (2005) 29-31

<sup>38</sup> Whelan D ‘Untangling the indivisibility, interdependency, and interrelatedness of human rights’ 2008 *Economic Rights Working Paper Series*. The Human Rights Institute, University of Connecticut Hendrix College Working Paper 1

<sup>39</sup> Vienna Declaration and Programme of Action, (1993) A/CONF.157/23

<sup>40</sup> 23 countries recognise the right to food explicitly as an individual human right; Nine of these countries recognise the right as an independent right applicable to everyone; ten stipulate the right to food for a specific category of the population only, such as children or prisoners; five countries have constitutional provisions that stipulate the right to food explicitly as being part of another human right.

<sup>41</sup> Section 27, Constitution of the Republic of South Africa Act 108 of 1996

influence the ‘what’ and ‘how’ of their food. For instance, serving pork to a Muslim prisoner would violate his human right to food, despite the basic nutritional requirements being met.<sup>42</sup> At the core of human rights in general and the right to food specifically, is upholding human dignity as against meeting physiological needs. From the right to food perspective, dignity does not emanate from being fed, but from being empowered to feed one’s self. Citizens should have a say in what and how they should feed, as well as institutionalised systems through which they can seek redress.<sup>43</sup> Well-structured egalitarian societies encourage the movement towards self-sufficiency in providing for one’s own food; this can only be actualised where food security is guaranteed.

The right to food is realised if food security exists.<sup>44</sup> The idea of food security although predominant since the 1980s, has gradually shifted focus over the years. The core concept of food security has evolved but in general covers both supply and access, food safety and in some instances cultural suitability of food.<sup>45</sup> The FAO in the 1996 World Food Summit (WFS) redefined the concept of food security as follows-

Food security exists when all people, at all times, have physical and economic access to sufficient, [*safe and nutritious food*] to meet their dietary needs and food preferences for an active and healthy life.<sup>46</sup>

The interplay between food safety in today’s economy and the role of policy and adequate legislation in regulating as well as putting in place the appropriate monitoring mechanisms cannot be overemphasised. It remains ever increasingly important to maintain the fragile balance between safeguarding the consumers’ right to safe food and yet ensuring that policy and regulation do not hamper the accessibility of citizens to food.

## 1.4 LITERATURE REVIEW

From a human rights perspective, not much has been written on the right to safe food in South Africa. The literature that does exist, points to the use of labels as an effective regulatory tool in

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<sup>42</sup> Kent G (2005) 46

<sup>43</sup> Kent G (2005) 47

<sup>44</sup> Sibonile K (Ed) *Socio-Economic Rights in South Africa* (2007) 321

<sup>45</sup> Maxwell S, Slater R ‘Food policy: old and new’ (2003) 21(5-6) *Development Policy Review* 532

<sup>46</sup> FAO Corporate Document Repository Available at <http://www.fao.org/docrep/005/y4671e/y4671e06.htm> (Accessed 16 March 2015)

guaranteeing the safety of consumers. Kempen's studies on food labelling in South Africa indicate a direct influence of food labels on purchasing decision. This is particularly significant in the light of mislabelling and how this can wrongly induce consumers to purchase products which they otherwise would not purchase.<sup>47</sup> Where perceptions of food quality and safety are incorrect, consumers lose the utility for which food was purchased in the first instance.<sup>48</sup> Kempen's assertions hold true for majority of consumers with educational backgrounds but falls flat in the light of illiterate consumers, who cannot in the first instance read labels. While this study does not imply that a tighter rein on food labelling laws has become unnecessary, it suggests actions beyond government regulation of labels as key to ensuring the right to safety of food in South Africa.

Caswell cautions that labels as a food safety regulatory tool should be reserved for elemental attributes related directly to human health.<sup>49</sup> Caswell explains that this is important because the use of labels is limited in three respects- first space on labels is limited in terms of size and in demand by food marketers. Secondly, there is the perception that mandatory labelling requirements are an infringement on a company's free speech and use of its own label space as it deem fit. Lastly, consumers themselves devote only a limited amount of time (where they do at all) to reading through labels, especially at the point of purchase.<sup>50</sup> In the light of this, therefore, if labelling requirements are to properly safeguard the' right to safe food, then they must be judiciously utilised. This study highlights that delimiting regulation of food labels to important attributes related to human health only as proposed by Caswell, negates the idea of the indivisibility of all human rights. While regulation should actively seek to ensure the protection of citizens health, the protection of the right to information and the right to choose- influenced by information provided on labels- should not be watered down. This study highlights that mislabelling portends a deflection from the human right to safe food and other human rights as well as remedial actions.

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<sup>47</sup>Kempen E, Bosman M, Bouwer C et al 'An exploration on the influence of food labels on South African consumers' purchasing behaviour' (2011) 35 *International Journal of Consumer Studies* 69

<sup>48</sup> Caswell J, Mojduszka E 'Using informational labeling to influence the market for quality in food products' (1996) 78 (5) *American Journal of Agricultural Economics* 1248

<sup>49</sup> Caswell J 'How labeling of safety and process attributes affects markets for foods'(1998) 27 (2) *Agricultural and Resource Economics Review* 151- 58

<sup>50</sup> Caswell J (1998) 157-8



Hall argues for the public promotion of private governance of food safety as a preferred alternative to ensuring accessibility and safety of food for citizens.<sup>51</sup> This is based on the concept of non-State market driven governance regimes, which derives legitimacy from customer decisions in the market place.<sup>52</sup> While this approach may provide the desired result in some instances, this may not be the case in certain climates. First, this concept makes the assumption that the marketplace is largely made up of informed consumers who based on knowledge make the right decisions. This is not true of every market place and definitely does not apply to consumers in the South African context. Jacobs' studies on food labelling amongst South African consumers indicates that consumers did not always understand how to use the information on food labels in order to make informed food choices.<sup>53</sup> Further, this concept may not hold in jurisdictions where the flagrant abuse of food safety control laws continues unabated: South Africa is a prime example of one such jurisdiction.

In spite of the milieu of government commitment in terms of legislative and policy action and apparent justiciability on the right to food in South Africa, the right to safe food as a human rights imperative remains a knotty issue, and largely unrealised. The issues are multi-faceted. The apartheid history of South Africa has put the majority black population below the poverty index.<sup>54</sup> The last 21 years has seen the government making commendable strides towards correcting this past of socioeconomic neglect of a greater part of the population- this comes with its own set of problems. As highlighted earlier in this discourse, the right to food is unpacked within a broader category of socioeconomic needs categorised as the right to an adequate standard of living. Balancing interests and needs of the vulnerable and marginalised groups in South Africa within the context of all socioeconomic needs is not always achievable. What takes priority and what takes a back seat? Coomans and Yakpo explain that several social security

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<sup>51</sup> Hall D 'Food with a visible face: traceability and the public promotion of private governance in the Japanese food system' (2010) 41 *Geoforum* 823-65

<sup>52</sup> Cashore B, Egan E, Auld G, Newsome D 'Revising theories of non-state market driven governance: lessons from the Finnish Forest certification experience' (2007) 7(1) *Global Environmental Politics* 1- 44

<sup>53</sup> Jacobs S, de Beer H, Larney M 'Adults consumers understanding and use of information on food labels: a study among consumers living in Potchefstroom and Klerksdorp regions, South Africa' (2010) 14 (3) *Public Health Nutrition* 510-22

<sup>54</sup> Vusi G 'Poverty, inequality and human development in a post-apartheid South Africa' Conference paper presented at 'Overcoming inequality and structural poverty in South Africa: Towards inclusive growth and development' Institute for Poverty, Land and Agrarian Studies. Available at <http://www.plaas.org.za/sites/default/files/publications-landpdf/summary%202010%20conf%20ep.pdf> (Accessed 26 March 2015)

programs targeted at ensuring an adequate standard of living, and indeed the realisation of the right to food for vulnerable groups in South Africa are fraught with management, policy, as well as legislative challenges and end up not delivering.<sup>55</sup> This study points to harmonised legislation and enforcement as key to ensuring food safety.

## **1.5 RESEARCH QUESTIONS**

In the light of the above, this study sets out to answer the general research question of whether South African laws, policy and current practices sufficiently guarantee access to safe food of its citizens. Adopting a human rights approach, the study will seek to answer these questions-

1. What are the existing laws on food safety in South Africa?
2. What are the obligations of the South African Government under international, regional and national law to ensure safe and nutritious food for its citizenry?
3. Have these laws and policies been properly implemented?
4. What are the challenges militating against proper implementation of laws and policies on food safety in SA?
5. How can we ensure accountability in the context of food safety in South Africa?

## **1.6 AIM OF RESEARCH**

The aim of this study is to examine laws and policies relating to food safety in South Africa, specifically with regard to labelling requirements in the food industry. It is hoped that this research will serve as a pointer for policy and legislative reforms in a bid to identify weak areas as well as encourage accountability and strengthen government's response to the realisation of the right to safe food as a human right imperative.

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<sup>55</sup>Coomans F, Yakpo K 'A framework law on the right to food- an international and South African perspective' (2004) 1 *African Human Rights Law Journal* 29-31

## **1.7 SIGNIFICANCE OF STUDY**

This study is significant in adding to the body of knowledge on the current legislative regime addressing access to safe food in South Africa. A continued system of mislabelling and misinformation leaves consumers at the mercy of fraudulent suppliers and distributors. The Consumer Protection Act (CPA) and Regulations contains relevant provisions to address this including penalties to be imposed for contravention under the Act as well as regulations relating to crucial issues on food safety such as labelling of Genetically Modified (GM) products. In spite of the current legislative safeguards specifically through the CPA, the safety of food in South Africa is largely unrealised and dismal. This study addresses the loopholes in the current legislative framework that promotes a weakened enforcement system and highlight possible areas for policy and legislative intervention.

## **1.8 LIMITATION OF STUDY**

This study is limited to specific international and national legislation which governs the right to food and does not exhaustively cover other legislation which deals with interrelated rights. This study is specifically delimited to examining legislation related to labeling of food with regard to its impact on accessing safe food. Specifically, local legislation covered is the Constitution and the CPA and Regulations. International instruments which will be critically examined in this study are the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter on Human and peoples Rights<sup>56</sup> and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa<sup>57</sup>. Further, this study only examines South Africa in its analysis of access to safe food and the whole dimension of food security.

## **1.9 RESEARCH METHODOLOGY**

The proposed study will comprise of a desktop review of the literature on the right to food in general and more specifically citizens' rights on access to safe food in South Africa. The study will consider relevant international and national legislation governing food rights as well as the

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<sup>56</sup> African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986

<sup>57</sup> Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa CAB/LEG/66.6 (Sept. 13, 2000)

access to safe food in South Africa. The method of analysis to be applied includes the assessment and discussion of South African local law against international legal instruments providing for the rights to food and access to safe food. The review will include a review of books and articles as well as electronic materials obtained from various internet sites.

The research will not make use of questionnaires but rather utilise results from already conducted studies, especially from international organisations as the Food and Agricultural Organisation (FAO), World Health Organisation (WHO) and the Codex Alimentarius Commission (CAC).

## **1.10 CHAPTER OVERVIEW**

### **Chapter 1: Introduction**

This chapter will present an overview of and a background to the study.

### **Chapter 2: Safety of Food in Today's World**

Recently, there have been incidents of mislabeling and misinformation about contents of food items in countries all over the world from the United Kingdom to South Africa. This chapter will focus on the main problems by citing specific incidents, both within and outside of South Africa, and the implications for consumers, especially vulnerable and marginalised groups as well as the urgent need for an intervention.

### **Chapter 3: The International Legal Framework on the Right to Safe Food**

This chapter will outline and discuss the legislative framework on access to safe food through the lens of international human rights and other instruments. The Chapter also considers relevant actors on the food safety network internationally such as the United Nations, The World Health Organisation and the Codex Alimentarius Commission.

### **Chapter 4: The South African Legal Framework on Food Safety and the Realisation of the Right to Safe Food**

This chapter will examine the realisation of the right to safe food in South Africa. The chapter will assess the current legislative and policy framework guaranteeing the right to accessing safe food in South Africa. More specifically, the chapter will analyse the strengths, gaps and

challenges with regard to implementation of the right to safe food in the South African legislative framework and whether South Africa has lived up to its international obligations to ensure safe food for its people.

## **Chapter 5: Observations, Recommendations and Conclusions**

Based on the outcome of the preceding chapters, this chapter will draw observations, while making recommendations for the future.

### **1.11 KEYWORDS**

Access, Food Rights, Food Security, Genetically Modified Organisms (GMOs) Human Rights



## **CHAPTER TWO**

### **SAFETY OF FOOD IN TODAY'S WORLD**

#### **2.1 INTRODUCTION**

In the past, eating was a basic part of everyday life to meet physiological and caloric needs, without much thought to safety concerns. Today, this is not the case for the average citizen as incidences of global food malpractice have been on the rise.<sup>58</sup> International and domestic regulatory authorities battle with keeping abreast of new developments to ensure citizens access to safe food. Global incidences of the effect of unsafe food manifested in food malpractice have been documented in media reports as well as scientific literature.

The malpractice is manifested mainly in the form of economic motivated adulteration (EMA) and false food label claims, otherwise termed food mislabelling. Food mislabelling is manifested in varied forms ranging from falsified claims on origin, to contents and/or expiry dates. EMA is the intentional, albeit concealed, adulteration of food for financial gain<sup>59</sup> and has also garnered substantial interest in recent years. More often than not, cases of EMA and food mislabelling are interlinked-EMA is usually mislabelled with regard to contents. This study focuses specifically on food mislabelling.

This chapter will examine in detail documented incidences of food malpractices; both on global and national levels, as well as examining the implications especially for the vulnerable and marginalised groups in society.

#### **2.2 MISLABELLING PRACTICES IN JURISDICTIONS OUTSIDE SOUTH AFRICA**

Food malpractice is not peculiar to certain countries and alien to others. While there is no denial that factors such as weak policies and weak enforcement mechanism promotes higher incidences in certain countries compared to others, the rise in international trade substantially promotes food malpractices across borders with its resultant effects.<sup>60</sup> There are numerous documented reports

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<sup>58</sup>Premanandh J 'Horse meat scandal- a wake-up call for regulatory authorities' (2013) 34 *Food Control* 568-69

<sup>59</sup>Everstine K, Spink J, Kennedy S 'Economically motivated adulteration (EMA) of food: common characteristics of EMA incidents' (2013) 76(4) *Journal of Food Protection* 723

<sup>60</sup>Spriggs J, Isaac G *Food Safety and International Competitiveness: The Case of Beef* (2001) 3

of food malpractices the world over, both in main stream media and in scientific literature. This section of this chapter will examine some of these reports, specifically with regard to mislabelling. Rather than an incidence-by incidence approach, this section groups the incidences under broad categories and examines their manifestation in different countries. Four categories of food mislabelling practices around the world are examined in this section - infant formula, fish and sea food, oils and fats and grain products. An examination of each of these categories follows.

### **2.2.1 *Infant formula***

It is cognised that parents particularly mothers, strive to provide their infants with the best nutrition possible, sometimes at the detriment of their own nutrition. Although the World Health Organisation (WHO) advisory standard for breast milk only for infants less than six months remains, parents feed their children with infant formula- both before and after the advised six month mark. There are varied reasons for a seeming preference for formula feeding and academic debate on these issues, which is not the focus of this study.

With the 21<sup>st</sup> century parents' reliance on formula, the market and demand for infant formula has grown over the years. The global baby food market amounted to \$36.7 billion in 2011, and has significantly risen to \$55 billion by 2015.<sup>61</sup> A major percentage of the share of sales is credited to infant formula. Growing demand prompted standardisation bodies the world over to publish minimum requirements for infant formula, to ensure infancy nutrition is not sacrificed for bloated profit margins.

One of such minimum requirements is the specified amount of protein which must be present in infant formula. In 2008, over 300,000 infants in China fell ill and there were six confirmed deaths. Infant formula was adulterated with high melamine contents in a bid to disguise the short fall in benchmark protein levels.<sup>62</sup> This was only detected after an unusually high amount of infants fell ill with kidney stones.<sup>63</sup> Twenty two Chinese food companies were involved in this

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<sup>61</sup> The Statistics Portal 'Global baby food market size in 2010 and 2015, based on sales' Available at <http://www.statista.com/statistics/249469/global-baby-food-market-size-2015/> ( Accessed 2 July 2015)

<sup>62</sup>Everstine K (2013) 725

<sup>63</sup>Bradsher K 'China begins inquiry into tainted baby formula.' 13 September 2008 *The New York Times* 10

incidence. The labels of all infant formula falsely indicated compliance with quality benchmark protein levels. Testing available at the time indicated that benchmark levels were complied with as per the labels. The two main tests to determine the protein content of dairy products at the time both did not distinguish between nitrogen from protein sources and nitrogen from non-protein sources.<sup>64</sup>

Indeed this was one of the recent cases of food malpractice with far reaching consequences, especially as there were fatalities of some of the most vulnerable members of society- infants. While the adulterated products may not have been mislabelled with the intention to cause harm, they did in fact cause harm. The incident was not limited to China- at least 47 countries received the adulterated milk, many of whom responded by imposing bans and restrictions of varying degrees, added to recalls.<sup>65</sup>

Again in 2004, concerned parents in China sent samples of infant formula used in feeding their children for testing. For at least a year prior to this, China had recorded higher incidences of malnutrition amongst children and infants.<sup>66</sup> The tests carried out on about 55 brands of infant formula indicated that they did not meet nutritional standards and contained low levels of protein, fat, calcium and magnesium.<sup>67</sup> This incidence resulted in the malnourishment of hundreds of babies and the death of at least 10. It was discovered that the supply of the substandard formula were made to grocery stores in rural localities, putting mainly infants of financially disadvantaged parents at risk.<sup>68</sup>

In 1995, prompted by reports from concerned and vigilant parents through the baby food manufacturing group, Simlac, the United States Food and Drug Administration (FDA) seized 20 430 kilograms of counterfeit baby formula and uncovered a series of operation which were repackaging the formula with false label claims.<sup>69</sup> No deaths were linked to this particular

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<sup>64</sup>Gossner C, Schlundt P, Embarek S et al. 'The melamine incident: implications for international food and feed safety(2009) *Environmental Health Perspective* 117

<sup>65</sup>Everstine K (2013) 725

<sup>66</sup> Yardley J 'Infants in Chinese city starve on protein-short formula' 5 May 2004 *The New York Times* 3

<sup>67</sup>Wang I 'Infants are dying from poor-quality baby milk' 17 April 2004 *South China Morning Post* 7

<sup>68</sup> Ying L 'Testing system for milk powder fails villagers' 3 May 2004 *South China Morning Post* 7

<sup>69</sup> Burros M 'Eating well- FDA target: baby formula' 6 September 1995 *The New York Times* 1



incidence, however, the widespread network of the counterfeit operation and the volume of seized counterfeit formula brought to the fore the severity of the issue.

The above incidences are examples amongst many of the dangers which mislabelling of food poses to the most vulnerable group in society- infants. Infants naturally are unable to express verbally or coherently what ails them. They are fully reliant on the vigilance of parents to detect mislabelled food. Quick and early detection by parents is linked to a combination of factors, including educational and socioeconomic backgrounds. The Simlac incidence in the United States and malnutrition incidence in rural China are exemplary of this fact. This raises even further concerns with regard to infants of parents from disadvantaged socioeconomic and/or educational backgrounds.

### **2.2.2 Fish and sea food**

Fish and seafood are perhaps some of the most popular food items prone to food malpractice in form of mislabelling, for a variety of reasons. First, many consumers are most times unfamiliar with the varied species of fish and seafood, this therefore leaves ample opportunity, for continued mislabelling to go unchallenged.<sup>70</sup> Secondly, financial incentives remain a strong motivation for mislabelling of fish and seafood. Often cheap fish is mislabelled for high end fish, costing the average consumer almost five times more than what should ordinarily be paid.<sup>71</sup> Thirdly, conservation efforts of endangered species of fish and continued demand for these species encourages mislabelling, in a bid to avoid hefty import levies or the detection of illegal harvesting of the species.<sup>72</sup> A further complicating factor is that many regulations on labelling of sea food apply only to wholesalers and not restaurants, where most of the high end fish are prepared and wrongly represented to consumers<sup>73</sup>

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<sup>70</sup>Jacquet J, Pauly D 'Trade secrets: renaming and mislabelling of seafood' (2007) 32 *Marine Policy* 309

<sup>71</sup>Cohen A 'Sturgeon poaching and black market caviar: a case study' (1997) 48 *Environmental Biology of Fishes* 425

<sup>72</sup>National Oceanic and Atmospheric Administration (NOAA) 'Seafood importer and associated corporations receive imprisonment and fines' Available at <http://www.publicaffairs.noaa.gov/releases2007/jan07/noaa07-r101.html> (Accessed 2 July 2015)

<sup>73</sup>Jacquet J (2007) 309

Mislabelling of fish is not a recent trend; as far back as the 1930s, canned mackerel was labelled and sold as salmon.<sup>74</sup> In November 1990, a case of illegally harvested caviar by a poaching ring and mislabelling was brought to the notice of the United States authorities.<sup>75</sup> Records indicated that when the illegally harvested American sturgeon caviar were repacked, they were relabelled as imported beluga or osetra caviar and sold to unassuming consumers who were unable to easily pick up the subtle differences.<sup>76</sup>

In 2008 and 2009, a study was conducted on 500 samples of retail fish which were compared with the Barcode of Life DNA at the University of Guelph, Canada. Samples were collected from varied points including supermarkets, fish stores, and restaurants. Tests showed that about 25% of the total samples were mislabelled. All mislabelled samples were species of lower market value than what they were originally labelled as.<sup>77</sup> A 10-year study by the National Seafood Inspection Laboratory of the United States showed that 37% of fish and 13% of other seafood were labelled incorrectly.<sup>78</sup>

Mislabelling of seafood beyond economic impacts portends health risks for consumers with regard to allergen reactions and physiological conditions such as pregnancy in women. In the US, consumers have been warned against canned tuna, specifically albacore tuna, which is often passed off as white tuna, as being highest in mercury content.<sup>79</sup> Cans of 'light tuna' are deemed safer for consumption, supposedly containing tuna species with lower mercury content.<sup>80</sup> Unfortunately, approximately 90 million cans of light tuna sold in the US contain yellow fin tuna, with the same levels of mercury as albacore tuna.<sup>81</sup> This has serious health implications specifically for women and their unborn children. Women are advised to limit sea food intake in

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<sup>74</sup> Croker R 'The California mackerel fishery' Available at <http://content.cdlib.org/view?docId=kt758005bw;NAAN=13030&doc.view=frames&chunk.id=d0e797&toc.id=0&brand=calisphere> (Accessed 2 July 2015)

<sup>75</sup> Cohen A (1997) 424

<sup>76</sup> Cohen A (1997) 425

<sup>77</sup> Sampson S, Star T 'Something's fishy at seafood counter: A cross-country DNA probe shows a quarter of fresh and frozen samples were not as advertised' 11 November 2009 *The Toronto Star* 1

<sup>78</sup> Jacquet J (2007) 309-18

<sup>79</sup> Warner K, Timme W, Lowell B et al 'Oceana study reveals seafood fraud nationwide' *Oceana* (2013) Available at <http://oceana.org/en/news-media/publications/reports/oceana-study-reveals-seafood-fraud-nationwide> (Accessed 26 November 2015) 7

<sup>80</sup> Warner K, Timme W, Lowell B et al (2013) 16-17

<sup>81</sup> Burger J, Gochfield M, 'Mercury in canned tuna: white versus light and temporal variations' (2004) 96 *Environmental Research* 239-49

pregnancy and totally avoid certain types because of high mercury content which may have a direct impact on the unborn ranging from- abortion of pregnancy, to still births and malformation of foetus.<sup>82</sup> The intentional mislabelling of oily fish (which mostly have a higher concentration of mercury and other pesticides) for high end demand fish can in fact prove injurious to the pregnant woman and her unborn.

### **2.2.3 Oils and fats**

Besides being a staple in most homes used for cooking, oils and fats feature in a wide range of products from pastries to ready- to- eat meals. The economic margin derived from substandard or even toxic (as the case sometimes) oils passed off as genuine, healthy oil, is usually substantial. Owing to growing education on healthier food choices, many consumers began to lean towards the use of healthier cooking oils. The choice oil in this regard is olive oil. Growing demand and potentially wider profit margins saw the influx of fraudulently mislabelled olive oil- reports of lower grade olive oil (non virgin or olive pomace oil) sold as extra virgin olive oil or even counterfeit olive oil have become common place.<sup>83</sup>

In a tragic incidence in 1981, denatured oil for industrial use was packaged, re labelled and sold door to door in Spain as olive oil. This led to over 200 000 illnesses and about 300 deaths.<sup>84</sup> In 1992, authorities in the United States received a tip off of mislabelled olive oil. Analysis by the FDA revealed that the vegetable oil distributor in Ohio was blending canola oil into oil labelled as olive oil at a ratio of 68 percent canola oil to 42 percent olive oil.<sup>85</sup>

Even more recently, China has been involved in cracking down on a cartel involved in the wide spread adulteration and mislabelling (with fake brand names) of discarded carcinogenic cooking oil.<sup>86</sup> Apparently, it was difficult to distinguish between real edible oil from the illegal cooking oil by colour and appearance and there were no viable technical standards available in China to

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<sup>82</sup> US Food and Drug Administration ‘Food safety for pregnant women’ Available at <http://www.fda.gov/food/foodborneillnesscontaminants/peopleatrisk/ucm312704.htm> (Accessed 16 April 2015)

<sup>83</sup>Everstine K (2013) 726

<sup>84</sup> Posada de la Paz M, Philen R, Borda I ‘Toxic oil syndrome: the perspective after 20 years’ (2001) 23 *Epidemiol Review* 231–247

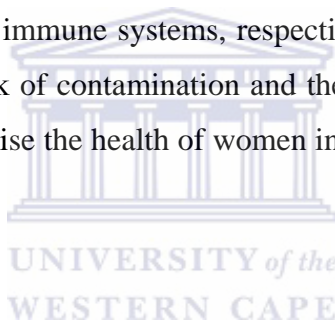
<sup>85</sup>Henkel. J ‘Olive oil distributor sentenced’ (1994) 28 *FDA Consumer* 10

<sup>86</sup> Yan Z, Yin C ‘32 Held in ‘gutter oil’ crackdown’ Available at: [http://www.chinadaily.com.cn/bizchina/2011-09/14/content\\_13681222.htm](http://www.chinadaily.com.cn/bizchina/2011-09/14/content_13681222.htm) (Accessed 6 July 2015)

identify the illegal oil. This created ample room for widespread sale of the oil despite its obvious toxic effects.

In 2000, a large scale fraud involving butter was uncovered in Europe.<sup>87</sup> Apparently, the suppliers benefitted from EU subsidies by wrongly labelling the origin of the butter- 22 of the 25 samples tested indicated that the butter had not originated from Estonia (which was then not a member of the EU) as claimed on the packaging.<sup>88</sup>

Beyond the obvious health risks practices like this carry for consumers in general, it portends further risks for certain vulnerable groups of society. Women generally have impaired immunities in times of gestation and are therefore more susceptible to the food borne illnesses.<sup>89</sup> Children, as well as the aged, are known to be more susceptible to food borne illnesses due to underdeveloped and compromised immune systems, respectively. Thus, the substitution of food with other produces carries the risk of contamination and the introduction of bacterial and viral loads<sup>90</sup> which can in turn compromise the health of women in gestation, children, as well as aged citizens.



#### **2.2.4 Grain products**

In 2002, a survey by scientists at the University of Bangor, United Kingdom, on behalf of the Food Standards Agency (FSA) in the United Kingdom, revealed that 46 percent of tested samples of bags of basmati rice had been adulterated with inferior value of rice, some by up to 60 percent. Another survey by the FSA in 2004 revealed that about 17 percent of 196 samples of basmati rice at retail contained an above 20 percent ratio of non-basmati rice not indicated on the labels.<sup>91</sup>

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<sup>87</sup>Finch M 'Massive EU butter fraud' 14 July 2000 *Farmers Guardian* 1; Linton L 'Mafia fake butter scam' 7 July 2000 *The Express*

<sup>88</sup>Ravilious K 'The truth about food fraud' Available at <http://www.iol.co.za/scitech/technology/the-truth-about-food-fraud-1.303934#.VZph60Zh5uM> (Accessed 6 July 2015)

<sup>89</sup> Dean J, Kendall P 'Food safety during pregnancy' Available at <http://www.ext.colostate.edu/pubs/foodnut/09372.html> (Accessed 16 April 2015)

<sup>90</sup>Cawthorn D, Steinman H and Hoffman L 'A high incidence of species substitution and mislabeling detected in meat products sold in South Africa' (2013) 32 *Food Control* 448

<sup>91</sup>Ravilious K 'The truth about food fraud' Available at <http://www.iol.co.za/scitech/technology/the-truth-about-food-fraud-1.303934#.VZph60Zh5uM> (Accessed 6 July 2015)

A Chinese food company- Shenglu Foods Co. Ltd. - was shut down on April 13 2011 for producing supposed ‘steamed corn buns’, as indicated on the labels, which were actually produced from a mix of wheat flour, artificial colouring and artificial corn flavouring.<sup>92</sup> No actual corn was used in the production of the ‘corn buns’.

There is a large and growing body of literature which points to the adverse potential health risks of consuming GM products. Health conscious consumers therefore pay premium prices for organic alternatives of most foods in today’s world, grains and grain products inclusive. Media attention has been drawn to the fact that most consumers opting for organic products may unfortunately be paying extra for false label claims. The advent in scientific quality assessment tests has revealed that many claims on organic products are false. In 2011, Italy uncovered a food fraud chain which involved false certifications of organic foods, including grains. The said products had crossed Italian borders and been exported to Netherlands, Germany, Spain, France, Belgium, Hungary, Austria and Switzerland,<sup>93</sup> thus amplifying the magnitude of risk in terms of number and spread of this incidence for consumers allergic to non organic food products.

This highlights the fact that with the advent of international trade, there is no telling how far the effects of mislabelled food may stretch. What starts out as the mislabelling of food in one country has far reaching implications for consumers not only in that country but also worldwide. This must be borne in mind when considering mislabelling incidences in a particular jurisdiction. A consideration of the effects of food mislabelling in a specific jurisdiction does not imply that such effects are limited to that jurisdiction. The section that follows examines food mislabelling incidences in South Africa.

### **2.3 MISLABELLING IN THE SOUTH AFRICAN FOOD INDUSTRY**

Food malpractice is not alien to the South African food industry. Practices in the South African food industry have been shown to negatively impact access to safe and nutritious food free from adverse effects. While the relevant laws aim to protect citizens, poor implementation and weak

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<sup>92</sup> The Epoch Times ‘More tainted buns found in China’ Available at <http://www.theepochtimes.com/n2/china-news/more-tainted-buns-found-in-china-54972.html> (Accessed 6 July 2015)

<sup>93</sup> The Associated Press ‘Italy cops seize 2500 tons of false organic food’ Available at <http://www.businessweek.com/ap/financialnews/D9RFP2MO2.htm> (Accessed 6 July 2015)

accountability mechanisms result in malpractices such as mislabelling of food products, misinformation with regard to food substances, continue unabated. This undermines the rights to health, life and dignity of consumers. Below is an examination of South Africa- specific food mislabelling incidences.

### **2.3.1 Fish industry**

Besides poultry, fish is an alternative source of cheap protein for the majority of South African citizens who live in poverty. Thus, fish remains one of the major sources of protein in the average South African's diet. While certain species of fish are readily and cheaply available, others have been strictly designated as high risk and thus more expensive. Mislabelling in the South African fish industry thus substitutes mostly low priced fish for high end fish.

A study has brought to the open mislabelling and substitution practices in the fishing industry in Southern Africa.<sup>94</sup> Of about 178 samples tested of supposedly 'high- marketed priced fish', about half of all fillets were mislabelled, many of which were illegally sourced from outside of South Africa. The study also found - substitution of yellow tail for dorado; fillets sold as barracuda were most likely mackerel; so called red sniper fillets included fillets of river sniper, and; 84% of kob provided belonged to other species including mackerel, croaker and warehaou.<sup>95</sup> The study also revealed that many of the fishes sold in South African markets were from foreign sources, with more than half the species sold not even occurring in the South African Exclusive Economic Zone (EEZ). The mislabelled fish thus mask their illegal sources.<sup>96</sup>

Von der Heyden's study noted that existing quality standards applicable to frozen fish aimed at the prevention of misleading the market are vague and provide no specific guidelines on names, as well as not covering closely related or imported seafood products. This encourages a market conducive to mislabelling, posing a threat to bio diversity conservation as well as consumer health vis a vis food safety.<sup>97</sup>

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<sup>94</sup>Von der Heyden S, Seebregts A and Matthee C 'Misleading the masses: detection of mislabeled and substituted frozen fish products in South Africa' (2009) 67 *ICES Journal of Marine Science* 176–185

<sup>95</sup>Von der Heyden S (2009) 182

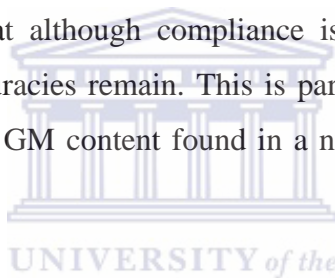
<sup>96</sup> Von der Heyden S (2009) 182

<sup>97</sup>Von der Heyden S (2009)177-80

Again, the implication for vulnerable groups in society as discussed above applies also in the South African context of fish mislabelling.

### 2.3.2 Grain products

Maize is known as South Africa's staple food, dating back to the early part of the twentieth century. This is particularly true with regard to the diet of the average black South African, majority of who live below the poverty line.<sup>98</sup> The majority of South Africa's low income population rely on maize to provide necessary daily kilojoules. The South African government has come under severe criticism by civil society as the first country in the world which cultivated the genetically modified variant of its staple food.<sup>99</sup> Research by the African Centre for Biosafety (ACB) indicated that as at 2014, 87 percent of total production of maize crop planted in South Africa was GM.<sup>100</sup> A recent spot check of labelling conducted by the ACB to assess compliance with GM regulation indicated that although compliance is better in relation to its previous reports, inconsistencies and inaccuracies remain. This is particularly concerning with regard to above five percent threshold limit GM content found in a number of baby and toddler cereals, with no corresponding labelling.<sup>101</sup>



The average South African citizen eats 68 loafs of bread on the average per year and bread remains the second most important supplier of energy in terms of kilojoules to the average citizen.<sup>102</sup> Recently, concerns have been raised about the proliferation of most top brands of bread in South Africa- one of South Africa's staple foods<sup>103</sup> - with GM soya.<sup>104</sup> Of the top nine

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<sup>98</sup>Isaacson C 'The change of the staple diet of black South Africans from sorghum to maize (corn) is the cause of the epidemic of squamous carcinoma of the oesophagus' (2005) 64 (3) *Medical Hypotheses* 660

<sup>99</sup> African Centre for Biosafety 'GM maize: lessons for Africa. Cartels, collusion and control of South Africa's staple food' Available at <http://acbio.org.za/wp-content/uploads/2014/12/GM-Maize-Report.pdf> (Accessed 10 July 2015) 4

<sup>100</sup> African Centre for Biosafety 'Are food producers abandoning GMOs in breakfast cereals but force feeding risk GM staple food to South Africans?' Press release, June 4 2015 Available at <http://acbio.org.za/are-food-producers-abandoning-gmos-in-breakfast-cereals-but-force-feeding-risky-gm-staple-food-to-south-africans/> (Accessed 10 July 2015)

<sup>101</sup> African Centre for Biosafety (2015)

<sup>102</sup> South African Chamber of Baking 'The bread industry in South Africa' Available at [http://www.sacb.co.za/webroot/main/history\\_of\\_bread.html#](http://www.sacb.co.za/webroot/main/history_of_bread.html#) (Accessed 10 July 2015)

<sup>103</sup> African Centre for Biosafety 'Below the belt, below the breadline – South Africa's inequitable and GM contaminated bread industry' (2014) Available at <http://www.acbio.org.za/index.php/media/64-media-releases/458-below-the-belt-below-the-breadline-south-africas-inequitable-and-gm-contaminated-bread-industry> (Accessed 2 April 2015)

<sup>104</sup> African Centre for Biosafety (2014)

brands tested by the ACB, only one brand- (Sasko) - conformed to the GM labelling law. All other brands- which had no GM labelling- tested positive for GM content in the soya flour used, ranging between 91.09- 20.46 percent GM content. Ironically, the brand which conformed to the labelling requirement had an unquantifiable amount of GM content such that it need not had labelled its brand. A report by the ACB indicated that a chemical compound- glyphosate- used in the production of GM Soya is linked to many health risks such as kidney diseases and birth defects in both humans and animals.<sup>105</sup>

It is thus clear that for the vast majority of South Africans who eat maize (in varied forms) or bread on a daily basis, there is no alternative to eating GM food. This practice is clearly in contravention of consumers' right to information contained in the CPA, as well as Regulation 7 on the labelling of goods produced using Genetically Modified Organisms (GMOs).<sup>106</sup> While the jury is still out on the safety or otherwise of GM foods, regulation requires that consumers be put on notice via labels where products incorporating above five percent content of GM products are used. The continued disregard for regulation of GM is worrisome specifically with regard to the future effects this might have on babies and children if proven that GM products are in fact inimical to human health.



### **2.3.3 Probiotics**

In recent times, probiotics have been marketed as a preferred alternative to old medical treatment of infections, including antibiotics, especially with the rise in antibiotic resistant bacteria.<sup>107</sup> Many health conscious consumers gravitate towards a preference for probiotics over antibiotics, based on the 'prevent rather than treat' mantra. There is thus the proliferation of many supermarkets and pharmacies with probiotic products ranging from infant formula to yogurt. Probiotics have been clinically proven to be beneficial. However, many of the benefits are also strain specific benefits and not generalised to all laboratory organisms.<sup>108</sup>

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<sup>105</sup> African Centre for Biosafety (2014)

<sup>106</sup> Section 22 Consumer Protection Act, Regulation 7

<sup>107</sup> McDermott P et al 'The food safety perspective of antibiotic resistance' (2002) 13(1) *Animal Biotechnology*

<sup>108</sup> Elliott E, Teversham K 'An evaluation of nine probiotics available in South Africa' (2003) 94 (2) *SAMJ* 124



A study by Elliot confirmed that the contents of many probiotic available in South Africa did not correspond to the claims made on their labels.<sup>109</sup> Specific strains necessary for the needed gains advertised on the labels of the tested products were missing. Perhaps most worrisome was the finding of the use of a specific probiotic strain in one of the tested samples, for which the World Health Organisation (WHO) had advised discontinuance due to adverse effects specifically in immune compromised consumers.<sup>110</sup> The effect of this is far reaching if viewed in the light of probiotics being preferred for use in persons with already weakened or compromised immune systems such as children or sickly persons.

## 2.4 CONCLUSION

This chapter has examined documented incidences of food malpractice, specifically mislabelling in the food industry on a worldwide and national scale, as well as its impact on vulnerable and marginalised groups within society. From whatever perspective- worldwide or South African- one views the issue of food safety in today's world, it is apparent that gross food malpractice is rife in the food industry. These experiences forces one to question the presence or adequacy of regulation in the food industry on a global scale.

The Chapter that follows considers the international legal framework for food safety and how this addresses concerns within the food industry for State implementation.

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<sup>109</sup> Elliot E (2003) 121

<sup>110</sup> Elliot E (2003) 123-4

## CHAPTER THREE

### THE INTERNATIONAL LEGAL FRAMEWORK ON THE RIGHT TO SAFE FOOD

#### 3.1 INTRODUCTION

The terrain of food safety regulation comes with the politics of determining what qualifies as safe and what does not.<sup>111</sup> Food may be safe for one group of persons but not another, may be safe at one time but not another or may even be safe at a specified quantity but not others. This births the all-important process of regulating what may be regarded as safe and not safe for everyone, at all times and at any quantity. Generally, safe food may be assumed to be one which would not exceed an acceptable level of risk.<sup>112</sup> If regulation on food safety is thus to be fair, amid varied perceptions and values on what is safe and not safe, it must be based on scientific approaches of risk acceptability.<sup>113</sup>

The right to food in general and more specifically the right to safe food is regulated internationally through international actors in the food sector as well as through instruments acceded to by States. States are obliged to adhere to and implement the terms of the stated objectives in these instruments. This chapter will examine in the sections that follow international and regional instruments as well as actors governing the right to food in general and to safe food particularly. Specifically, the following instruments will be examined in this chapter- the International Convention on Economic, Social and Cultural Rights (ICESCR)<sup>114</sup> and the African Charter on Human and Peoples' Rights.<sup>115</sup> Other instruments, (some non-binding but with persuasive effect and popular buy in by States) to be examined in this chapter are the Food and Agriculture Organisation Right to Food Guidelines ,World Trade Organisation Technical Barriers to Trade Agreement and Agreement on the Application of Sanitary and Phytosanitary Measures.

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<sup>111</sup> Marion N *Safe Food: Bacteria, Biotechnology and Bioterrorism* (2003) 16

<sup>112</sup> Marion N (2003) 16

<sup>113</sup> Marion N (2003) 18

<sup>114</sup> International Convention on Economic, Social and Cultural Rights UN General Assembly Resolution 2200A (XXI), 16 December 1966

<sup>115</sup> African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986

### 3.2 INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS ON THE RIGHT TO SAFE FOOD

This section examines the right to safe food through international and regional human rights instruments. On the International perspective, the right to safe food is examined under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Suffice to state here that other international instrument of the United Nations deals with the right to food including- (1) The Universal Declaration on Human Rights<sup>116</sup> which provides for the right to an adequate standard of living, within which is the right to food. (2) The International Covenant on Civil and Political Rights (ICCPR),<sup>117</sup> which guarantees a right to freedom from deprivation of means of subsistence for all<sup>118</sup>, as well as the inherent right to life<sup>119</sup>- both of which are interlinked with the right to food. (3) The Convention on the Right of the Child (CRC),<sup>120</sup> which contains specific provisions on the nutritional needs of children in Articles 26 and 27. (4) The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>121</sup> which specifically touches on deprivation of access to food for vulnerable group of women.<sup>122</sup> (6) Other global declarations and commitments, including (but not limited to)- Standard Minimum Rules for the Treatment of Prisoners (United Nations Economic and Social Council, 1977), International Code of Marketing of Breast milk Substitutes (World Health Assembly, 1981), The *Innocenti Declaration* as affirmed by the World Health Assembly, 1996 and paragraph 19 of the United Nations Millennium Declaration 2000.

The examination of the right to safe food on the international fora in this study will focus mainly on the provisions of the ICESCR and all discussions on the ICESCR are considered to apply to the other instruments listed above (but not discussed in detail in this study). Regionally, the right to safe food is examined through the lens of the African Human and Peoples' Rights Charter, as

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<sup>116</sup> Article 25 (1) UDHR

<sup>117</sup> International Covenant on Civil and Political Rights GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52 UN Doc. A/6316 1966

<sup>118</sup> Article 1, Para 2, ICCPR

<sup>119</sup> Article 6, ICCPR

<sup>120</sup> Convention on the Rights of the Child GA Res 25 (XLIV), UN GAOR Supp No 49 UN Doc A/RES/44/25 1989

<sup>121</sup> Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/46 1980

<sup>122</sup> Articles 12 and 14 (g) CEDAW

well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (African Women Charter).<sup>123</sup>

### **3.2.1 *The Right to Safe Food under the International Covenant on Economic, Social and Cultural Rights***

The right to food is generally governed under the International Covenant on Economic, Social and Cultural Rights (ICESCR) by article 11 which provides-

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

From the foregoing, it is apparent that the contemplation of the right to food is more encompassing under paragraph 1 of article 11 than it is under paragraph 2; paragraph 2 presupposes a basic freedom from hunger, whereas paragraph 1 raises the bar to encompass other aspects of meeting the right to food, including food safety.<sup>124</sup> The Committee on Economic, Social and Cultural Rights (CESCR), affirms this when it states -

The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.<sup>125</sup>

On what exactly is encompassed within the 'right to food', the CESCR's interpretation has been recognised as the most instructive interpretation in international law. Thus, spurred by Members request at the closing of the 1996 World Food Summit (WFS), the Committee on Economic,

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<sup>123</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women CAB/LEG/66.6/Rev. 1(2003)

<sup>124</sup> Sollner S 'The 'breakthrough' of the right to food: the meaning of general comment 12 and the voluntary guidelines for the interpretation of the human right to food' in Bogdandy A, Wolfrum R (eds) *Max Planck Yearbook of United Nations Law* (2007) 398

<sup>125</sup> Para 6, General Comment 12 of the CESCR

Social and Cultural Rights,<sup>126</sup> issued General Comment 12 (GC 12) in May 1999.<sup>127</sup> GC 12 provides a definition on the meaning of the right to food, elaborates on the normative content of the right, as well as spells out States obligations in respect to the right. In this respect, Randolph surmises that <sup>128</sup>General Comment 12 explains succinctly the most comprehensive definition as well as outlines the substantive content of the right to food under international law, expanding on the three core dimensions of the right—food availability, food access, and food use.<sup>129</sup>

In its definition, the CESCR defines the right to adequate food as follows-

The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. ...<sup>130</sup>

Thus, the core content of the right to adequate food has been described to encompass-

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, *free from adverse substances*, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>131</sup>

Adequacy is multi-dimensional; First, for food to be adequate, it must contain sufficient macro and micro nutrients for optimal physical and mental development, maintenance as well as support desired activity levels.<sup>132</sup> Secondly, food adequacy requires that food be *'free from adverse substances.'* Hence, the necessary regulatory framework and protective mechanisms must be in place to counter unsafe elements or additives and possible contamination within the food chain from production up to consumption.<sup>133</sup> Finally, food adequacy requires that access to food be ensured in a way that meets the respective consumer acceptability standards- be it culturally, religiously or otherwise- and does not violate social norms.<sup>134</sup>

The CESCR, elaborating on the concept of *'free from adverse substances'* explained

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<sup>126</sup> The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant

<sup>127</sup> Committee on Economic, Social and Cultural Rights, *General Comment 12, the Right to Adequate Food (Article 11 of the Covenant)*, UN Document No E/C/12/1999/5, 12 May 1999

<sup>128</sup> Randolph S 'The right to food: a global overview' in Minkler L (Ed) *The State of Economic and Social Human Rights: A Global Overview* (2013) 21-60

<sup>129</sup> Randolph S (2013) 21-60

<sup>130</sup> Para 6 General Comment 12 of the CESCR

<sup>131</sup> Para 8 General Comment 12 of the CESCR

<sup>132</sup> Para 9 General Comment 12 of the ICESCR

<sup>133</sup> Para 10 General Comment 12 of the ICESCR

<sup>134</sup> Para 11 General Comment 12 of the ICESCR

*Free from adverse substances* sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.<sup>135</sup>

It is clear from the above, that the right to adequate food contemplates within its normative context, the right to safe food. In other words, the right to adequate food is only realisable where the right to safe food is guaranteed. State obligations in the realisation of the right to food would thus impliedly cover the realisation of the right to safe food. Drawing from the obligations defined in GC 12, the obligation of States as interpreted by the CESCR, in relation to safe food would require that States respect, protect and fulfil the right to safe food.

Paragraph 15 of GC 12 discusses States obligation to respect the individual's access to adequate food and enjoins States not to take any steps resulting in preventing such access. In the context of food safety, this places an obligation on States to respect individuals' access to safe food. This obligation perhaps may become evident in the light of consumers perceptions of certain foods as safe and others as unsafe- such as the preference within the European Union for organic rather than bioengineered foods- and a corresponding obligation on governments not to hinder consumers access to their preferred options of safe food.

The obligation to protect requires measures from States preventing third parties from depriving individuals of the right to food. Thus, from a right to safe food lens, this would require affirmative action from States- including legislative and policy action, prosecution of offending parties and public enlightening campaigns- to ensure that every individual is guaranteed access to safe food.

The obligation to fulfil as described by the CESCR requires that 'States proactively engage in measures geared at the promotion of individuals' access to, as well as the utilisation of resources to ensure their livelihood, including food security'.<sup>136</sup> From the perspective of the right to safe

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<sup>135</sup> Para 10, General Comment 12 of the CESCR

<sup>136</sup> Para 15, General Comment 12 of the CESCR

food, this impresses on States an obligation to promote higher standards to ensure across board access to safe food for all individuals.

Implementation strategies addressed in GC 12 admonishes States to adopt strategies best suited to their peculiar situations within specified guidelines and benchmarks.<sup>137</sup> Specifically, Paragraph 25 of GC 12 provides that such strategy addresses critical issues within the food chain system, ‘including the production, processing, distribution, *marketing* and consumption of *safe food....*’ Thus implementation of the right to food within the national context of member States to the ICESCR, must take into consideration marketing of safe food which would naturally include the way food is labelled as a marketing tool to prospective consumers.

In addition to the efforts at the international scene to safeguard guarantees on the right to food in general and more specifically the right to safe food, regional and national institutions have also developed norms and standards in this regard. The regional instruments on the right to food address the right specifically within the context of the corresponding regions, hence giving better effect to the cultural and economic interpretation of the right to food.<sup>138</sup> Key regional documents in this regard include- the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 (Protocol of San Salvador), the Cairo Declaration on Human Rights in Islam 1990, the European Charter of Fundamental Rights of the European Union 2000, The African Charter on Human and peoples’ Rights 1986 and the Protocol to the African Charter on Human and peoples’ Rights on the Rights of Women in Africa, 2000. The next section of this chapter will consider The African Charter on Human and Peoples’ Rights as well as the Protocol to the African Charter on Human and peoples’ Rights on the Rights of Women in Africa as regional human rights instruments in this regard.

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<sup>137</sup> Paras 21-28, General Comment 12 of the CESCR

<sup>138</sup> Sollner S (2007) 395

### ***3.2.2 The Right to Safe Food under the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa***

The African Charter on Human and Peoples' Rights 1986<sup>139</sup> (African Charter) is an international human rights document which seeks to promote and protect human rights on the African continent. The African Commission on Human and Peoples Rights (the African Commission), established in 1987 under the African Charter, is tasked with oversight and interpretation of the Charter.<sup>140</sup> The African Charter recognises a wide range of human rights but also incorporates distinctive recognition of certain rights not found in similar international instrument.

The African Charter like most similarly peered international instruments recognises civil and political rights and this area has over the years received the most attention from the African Commission.<sup>141</sup> With regard to civil and political rights, the Charter was mostly criticised for its approach to gender issues wherein in typical African patriarchal style, women and children's rights were lumped together in one clause and not sufficiently outlined. This was partially responsible for the call for a Protocol to the African Charter on the Rights of Women<sup>142</sup>, which was adopted 1 July 2003.

The African Charter addresses socioeconomic rights and its preamble lays the groundwork for the inclusion of socioeconomic rights in the agenda of the Commission when it states-

'...It is henceforth essential to pay particular attention to the right of development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights...'

Odinkalu notes that the formulation of the above clause within the preamble appears to suggest the superiority of socioeconomic rights over political and civil rights, giving credence to the alarmist theories that the Charter as a whole may restrict or violate civil and political rights in

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<sup>139</sup> African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986

<sup>140</sup> Heyns C 'The African regional human rights' system: the African charter' *Pennsylvania Law Review* 108 (2004) 682

<sup>141</sup> Heyn C 'Civil and political rights in the African Charter' in Evans M, Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice* (2002) 137

<sup>142</sup> Heyn C (2004) 688



Africa.<sup>143</sup> He argues that while on the face of it this appeared to be the meaning, such sentiments were only reflective of the suspicion surrounding the nature of socioeconomic rights and their place in the jurisprudence of human rights.<sup>144</sup> In actual fact, they only reinforce the indivisibility of all human rights- in whatever nature/form they may be manifested.

Like in most other international human rights instruments, States obligations to the fulfilment of socioeconomic rights in the African Charter has been described in the tripartite nature of respecting, protecting and fulfilling.<sup>145</sup>

Although the Charter does not explicitly provide for the right to food, the interpretation on the right to food provided by the Commission in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*<sup>146</sup>(SERAC case) is instructive. The case was lodged by the Social and Economic Rights Action Centre (SERAC), based in Nigeria and the Centre for Economic and Social Rights (CESR) in New York, against the Nigerian Government on behalf of the people of Ogoni. The complaint dealt with a number of violations by the Nigerian Government through its irresponsible oil drilling practices in the Ogoni region of Nigeria. On the right to food violation by the Nigerian government, the Commission interpreted Articles 4 (right to life), 16 (right to health) and 22 (rights of all people to their economic, social and cultural development) as encompassing the right to food, while finding that the Nigerian government had violated the three minimum core obligations of this right.<sup>147</sup> The minimum core obligations for States on this right identified by the Commission were- the duty not to destroy or contaminate food resources; not to allow private parties to destroy or contaminate food resources; and not to prevent peoples' efforts to feed themselves.<sup>148</sup> It can be said that the SERAC decision indirectly contemplates a right to safe food approach by outlining the failure of the Nigerian government to prohibit third parties from the contamination of food resources of the

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<sup>143</sup> Odinkalu C 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in Evans M, Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice* (2002) 188

<sup>144</sup> Odinkalu C (2002) 189

<sup>145</sup> Odinkalu C (2002) 196, See all also Paras 4- 12 Guiding Principles on the Implementation of Socioeconomic Rights under the African Charter

<sup>146</sup> (2001) AHRLR 60 (ACHPR 2001)

<sup>147</sup> Coomans F 'The Ogoni case before the African Commission on Human and Peoples' Rights'(2003) 52 *International and Comparative Law Quarterly* 756

<sup>148</sup> Coomans F (2003) 756

Ogoni people. Hence, within the general interpretation of the right to food given by the Commission, a right to safe food would also fall within the purview of the African Charter.

The Principles and Guidelines on the Implementation of Socioeconomic Rights under the African Charter (Guiding Principles) provides further clarification on the nature of the right to food generally, and the right to safe food specifically, within the African Charter.<sup>149</sup> The right to adequate food is similarly defined in the Guiding Principles as under GC 12 of the CESR. Minimum core obligations of States as outlined in Para 86 (a) - (c) of the Guiding Principles are

- a. Take the necessary action to guarantee the right of everyone to be free from hunger and to mitigate and alleviate hunger even in times of natural or other disasters;
- b. Refrain from and protect against destruction and/or contamination of food sources;
- c. Refrain from using access to food as a political tool to reward supporters, punish opponents or recruit militias.

Furthermore, on the implementation of national policies, the Guiding Principles addresses food safety concerns in general and the marketing and labelling of food in a manner similar to GC 12 under the ICESCR, when it enjoins State parties to develop policies which:

...address critical issues and measures in regard to all aspects of the food system, ***including the production, processing, distribution, marketing and consumption of safe food***, as well as parallel measures in the fields of nutrition, health, education, employment and social security;<sup>150</sup>

Ensure that food is free from adverse substances through establishing requirements for food safety and for a range of protective measures by both public and private means;<sup>151</sup>

Take measures (including the adoption of food standards and transparent labelling) to reduce food adulteration and contamination and to improve the quality and safety of food, at market and storage levels, as well as food hygiene at all levels;<sup>152</sup>

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa<sup>153</sup> (African Women Charter), adopted in July 2003, supplements the African Charter as a human rights instrument addressing specifically the rights of women in Africa. The African Women Charter unlike the African Charter contains specific provisions on the right to food,

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<sup>149</sup> Paras 83-86 Guiding Principles on the Implementation of Socioeconomic Rights under the African Charter

<sup>150</sup> Para 86 (e) Guiding Principles on the Implementation of Socioeconomic Rights under the African Charter

<sup>151</sup> Para 86 (t) Guiding Principles on the Implementation of Socioeconomic Rights under the African Charter

<sup>152</sup> Para 86 (u) Guiding Principles on the Implementation of Socioeconomic Rights under the African Charter

<sup>153</sup> Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa CAB/LEG/66.6 (Sept. 13, 2000)

albeit of women as a specific group addressed within this Charter. Article 15 provides that State parties shall

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

The African Women Charter thus has within its contemplation the right to adequate food and in essence the right to safe food, albeit specifically relating to African women.

The importance of the international and regional instruments examined above in guaranteeing the right to safe food is underpinned by the indivisibility of all human rights. The right to food is linked to a host of other rights. The fundamental right to life is contingent upon the right to food -for without adequate food, the possibility of existing is obliterated- and the right to health, as a healthy lifestyle becomes impossible without adequate and safe nutrition. In this light, a United Nations Development Programme (UNDP) Report of 2000 indicated that hunger and malnourishment, directly or indirectly, accounts for over half of the deaths in the world.<sup>154</sup> This underscores the importance of the right to safe food. Hence, the Supreme Court of Bangladesh in the case of *Dr Mohiuddin Farooque V Bangladesh and Others*<sup>155</sup> in its interpretation of the Constitutional provision on the right to life, held the government of Bangladesh duty bound to remove threats posed by a consignment of powdered milk within the food chain which exhibited radiation levels above acceptable limits. The Court specifically stated that the right to life contemplated within its provision the protection of health and normal longevity of ordinary humans, both of which are threatened by the consumption and marketing of unsafe food and drink injurious to health.

The right to safe food is also linked to the right to information as a safeguard to guaranteeing the right to health and the right to life. Consumers may only make informed choices based on the information available to them on food (labels) at the point of purchase. The international jurisprudence on consumer law indicates that it has been one of the distinctive ways in which adequacy of food products has been addressed before Courts.<sup>156</sup>

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<sup>154</sup>United Nations Development Programme, *Human Development Report 2000* (2000)

<sup>155</sup> (No 1), of 1 July 1996

<sup>156</sup> Max P (2007) 336

Further, the enjoyment of many other rights including the right to education and work is contingent upon the realisation of the right to food. Alaimo highlights that malnutrition is an impediment to successful learning as well as psycho social development.<sup>157</sup> Poor health which gives rise to defective education backgrounds in turn limits access to securing decent jobs and standard wages to secure living above the poverty limit. Thus the Argentine Supreme Court in the *Sanchez*<sup>158</sup> case, made an interlink between the minimum wage and the access to food, housing and healthcare, holding unconstitutional a bar on readjustment of social security payments in accordance with inflation rates and ordering a recalculation of such payments.

### 3.3 INTERNATIONAL ACTORS ON THE FOOD SAFETY NETWORK

There is an intersection of various actors on the global scene with regard to food laws and food control systems, some with duplicity of roles. This research identifies three major relevant actors to be discussed in this chapter - the United Nations, the World Trade and the Codex Alimentarius Commission (CAC). Relevant instruments as well as promotional agencies under the auspices of the former two organisations are also discussed in this section.

#### 3.3.1 *The United Nations*

The United Nations (UN) headquartered in New York, is possibly the most inclusive of all international organisations, with almost all nations of the world as member states.<sup>159</sup> It is charged with the objectives of maintaining peace and security as well as respect for human rights and developing healthy relationships between nations.<sup>160</sup> The Universal Declaration of Human Rights (UDHR)<sup>161</sup> was adopted by the General Assembly of the UN in 1948 as a foundation for establishing the legal norms to govern international behaviour with respect to human rights.<sup>162</sup> From this stemmed two covenants which specify these rights- they are the International

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<sup>157</sup> Alaimo K, Olson C and Frongillo A 'Food insufficiency and American school-aged children's cognitive, academic, and psychosocial development', (2001) 108 *Paediatrics* 44-53

<sup>158</sup> Sanchez, Maria del Carmen c. ANSeS, of 17 May 2005

<sup>159</sup> Van der Meulen B 'The global arena of food law: emerging contours of a meta-framework' (2010) 3(4) *Erasmus Law Review* 219

<sup>160</sup> Baehr P 'The United Nations' in Hawkesworth M, Kogan M *Encyclopaedia of Government and Politics* 2 ed (1992) 887

<sup>161</sup> Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (10 December 1948)

<sup>162</sup> Baehr P (1992) 893

Covenant on Civil and Political Rights (ICCPR)<sup>163</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>164</sup> Together, these three instruments constitute the ‘Bills of Rights’ of the UN. Socioeconomic rights in general and the right to food specifically, are delineated in the ICESCR<sup>165</sup> and other international instruments of the UN.<sup>166</sup>

Although the ICESCR creates an obligation particularly for States, the promotion of the right to safe food is an issue well within the purview of the United Nations (UN). Sub organisations within the UN such as the Food and Agricultural Organisation (FAO), the World Health Organisation (WHO) and World Food Programme (WFP) are mandated to deal with specific themes within the right to food discourse. This section discusses in turn the FAO and WHO as actors within the UN system promoting the right to safe food.

### **3.3.2 *The Food and Agriculture Organisation of the United Nations***

The Food and Agriculture Organisation (FAO) of the United Nations is an association of nation States committed to eradicating hunger, as well as improving the living standards and nutrition of their people.<sup>167</sup> The FAO achieves its objectives by offering technical assistance to member states, gathering facts on food to help member states formulate relevant food production plans and promoting concerted international action through scientific means.<sup>168</sup> The FAO focuses on food in both developed and developing nations. It supports the development of agriculture and food related internal policies of member states by providing an unbiased platform for negotiation and information.<sup>169</sup>

In 2004, the FAO published the Right to Food Guidelines, adopted by the 127<sup>th</sup> session of the FAO Council, as a framework to guide states on the successful implementation of the right to food. Specifically, the guidelines are directed towards states parties to the ICESCR.<sup>170</sup> These

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<sup>163</sup> International Covenant on Civil and Political Rights GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 1966

<sup>164</sup> International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976)

<sup>165</sup> Article 11 of the ICESCR

<sup>166</sup> See discussion above on international instruments regulating the right to safe food.

<sup>167</sup> Mayne J ‘Review of marketing and agricultural economics’ (1948) 16 (11) *AgEcon* 617

<sup>168</sup> Mayne J (1948) 617-8

<sup>169</sup> Van der Meulen (2010) 220

<sup>170</sup> FAO *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* (2005) 2

guidelines have been described as a tool to provide practical guidance to States in the progressive implementation of the right to food.<sup>171</sup> The text contains 19 guidelines in all on the implementation of the right to food. Guideline nine distinctively covers food safety and consumer protection within the context of the right to safe food.

Specifically, Guideline 9.3 and 9.7 are relevant to the discourse in this study. Guideline 9.3 states in part-

States are encouraged to take action to streamline institutional procedures for food control and food safety at national level and eliminate gaps and overlaps in inspection systems and in the legislative and regulatory framework for food. States are encouraged to adopt scientifically based food safety standards, including standards for additives, contaminants, residues of veterinary drugs and pesticides, and microbiological hazards, and to ***[establish standards for the packaging, labelling and advertising of food]***. These standards should take into consideration internationally accepted food standards (Codex Alimentarius) in accordance with the WTO Sanitary and Phytosanitary Agreement (SPS).... .

Guideline 9.7 provides that-

States should ***[adopt measures to protect consumers from deception and misrepresentation in the packaging, labelling, advertising and sale of food and facilitate consumers' choice by ensuring appropriate information on marketed food]***, and provide recourse for any harm caused by unsafe or adulterated food, ***[including food offered by street sellers]***. Such measures should not be used as unjustified barriers to trade; they should be in conformity with the WTO agreements (in particular SPS and TBT).

The import of Guideline 9.3 enjoining member states to formulate scientifically based standards for packaging, labelling and advertising of food is recognition of the discussion earlier in this chapter on the complexities of food safety regulation.<sup>172</sup> In this regard, member states are urged to use international standards such as the *Codex Alimentarius* as a benchmark in accordance with the World Trade Organisation Sanitary and Phytosanitary Agreement (to be discussed later in this chapter).

Interestingly, Guideline 9.7 places the responsibility of protecting citizens from deceptive labelling, packaging and advertising on member states for marketed food within their jurisdictions. The guideline also expects states to facilitate consumer choice on marketed food- in the author's opinion this implies a responsibility on the part of the state to promote policies and

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<sup>171</sup> FAO (2005) iii

<sup>172</sup> See Para 3.1 of this study above

mechanisms which create positive awareness on the part of consumers and the ability to make informed choices. A noteworthy provision in this guideline is the obligation on states to extend these same measures to street food, including the provision of recourse from harm caused by derogation from the obligation. The practicality of regulating the packaging, labelling and advertising of street food, especially in the context of developing societies like South Africa, remains to be seen.

### **3.3.3 *The World Health Organisation***

The World Health Organisation (WHO) was established by the UN in 1948<sup>173</sup> with a mandate to monitor global health trends and promote health of the world's population. It derives its powers vis a vis its member states from the International Health Regulations (IHR), last revised in 2005. The WHO plays an active role in the regulation of global crises threatening public health such as incidences of food safety. A classic example in this regard is the melamine incident of baby food highlighted in Chapter 2 of this study.

The IHR is an international agreement of the WHO binding on all signatories to prevent the international spread of disease- it is also open to third countries. Although its application when initially crafted in 1969 was limited to three major disease outbreaks- cholera, plague and yellow fever- recent revisions have broadened its scope, extending its applicability to all diseases including food related diseases and diseases from new and unknown causes.<sup>174</sup> Article 2 of the IHR delineates it as a global legal framework aimed at detecting and responding to international public health risks and potential public health emergencies of global concern. Signatories are enjoined to prevent and control the spread of diseases within and without their borders. Signatories also benefit from the alert system developed by the WHO and report dissemination on health risks from other jurisdictions.<sup>175</sup>

The WHO in conjunction with the FAO developed the International Food Safety Authorities Network (INFOSAN) as a mechanism to promote exchange of food safety information between

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<sup>173</sup> See <http://www.fao.org> (Accessed 15 August 2015)

<sup>174</sup> WHO 'International health regulations: guidance for national policy-makers and partners' Available at: <http://www.who.int/csr/IHR%20Guidance%20for%20national%20policy%20makers%20and%20partners.pdf> (Accessed 15 August 2015)

<sup>175</sup> Van der Meulen (2010) 239

countries on routine and emerging food safety concerns. During emergencies, INFOSAN Emergency provides swift access to information on food safety crisis. There are currently 181 member states each with (a) dedicated INSOFAN focal point(s).<sup>176</sup> The European Rapid Alert System for Food and Feed (RASFF), established 18 March 2005, is the dedicated INSOFAN focal point for all European Union (EU) and European Free Trade Association (EFTA) member states.<sup>177</sup>

### 3.3.4 *The World Trade Organisation*

The World Trade Organisation (WTO) came into being on 1 January 1995 and serves as the only international body which effectively regulates the conduct of international trade in goods and services.<sup>178</sup> Prior to the formal establishment of the WTO, international trade had been carried out between nations mainly through the multilateral trading system of the General Agreement on Tariffs and Trade (GATT), 1947.<sup>179</sup> The GATT functioned through negotiating rounds and the Uruguay negotiating round (held from 1986 to 1994) of the GATT birthed the WTO as a full-fledged organisation, with the duty to regulate trade between nations. The GATT 1947 was incorporated into the laws of the current WTO system, albeit with certain modifications. South Africa acceded to the WTO on 1 January 1995, although it was a founding member of the GATT.<sup>180</sup> The WTO has a single undertaking principle in which members joining the WTO agree to all its agreements or none at all. Hence subject to some stringent exceptions, all WTO agreements are binding on all its members.

The WTO is highly acclaimed for its reduction in its tariff barriers to trade over its twenty years of existence.<sup>181</sup> The situation with non-tariff barriers has not been the same. The WTO recognises the need for countries to act in the interest of their citizens in a bid to protect human, animal and plant life which may otherwise be exposed in the absence of proper trade regulation

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<sup>176</sup> See generally [http://www.who.int/foodsafety/areas\\_work/infosan/en/](http://www.who.int/foodsafety/areas_work/infosan/en/) (Accessed 29 September 2015)

<sup>177</sup> Pursuant to a decision reached by the Standing Committee for the Safety of Food Chain and Animal Health on 20 September 2005. See further Article 58 of Regulation (EC) No. 178/2002

<sup>178</sup> WTO 'Understanding the WTO' Available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf) (Accessed 9 May 2015) 9

<sup>179</sup> See generally [https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr01\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm) (Accessed 3 November 2015)

<sup>180</sup> See generally [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (Accessed 3 November 2015)

<sup>181</sup> WTO 'Understanding the WTO' Available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf) (Accessed 9 May 2015) 11



and even sometimes, restrictions.<sup>182</sup> To this extent, the WTO's Technical Barriers to Trade Agreement (TBT Agreement) and Sanitary and Phytosanitary Agreement (SPS Agreement) becomes important in the international food safety law discourse, as tools for safeguarding life, even when they pose as potential barriers to trade.

#### ***3.3.4.1 The Technical Barriers to Trade Agreement***

The Technical Barriers to Trade Agreement (TBT) Agreement codifies permitted barriers to trade which member states may institute with the objective of the protection of life, the environment, consumers and other societal norms or values. Technical barriers to trade (TBTs) are manifested in form of either mandatory requirements enforced by government, or as is the case most times, rules by national standardising bodies in the concerned sectors which although not mandatory, are adopted as business practices in that country.<sup>183</sup> The agreement addresses technical regulations, standards and conformity. With regard to food safety regulation, the TBT Agreement focuses on standardisation requirements for packaging and labelling of food items.<sup>184</sup> The TBT Agreement recognises and protects the right of members of the WTO to safeguard human, animal and plant lives within their constituent territories. However, in a bid to create a balance with ensuring trade, TBTs are to be applied transparently and non-discriminatorily.<sup>185</sup> The TBT Agreement enhances international harmonisation standards by imposing a notification requirement on WTO members for proposed technical standards and conformity assessments. The TBT agreement complements the SPS agreement.

#### ***3.3.4.2 The Sanitary and Phytosanitary Agreement***

The Sanitary and Phytosanitary Agreement (SPS) Agreement was negotiated during the Uruguay Round of the WTO negotiations.<sup>186</sup> It became necessary to negotiate the agreement because existing WTO laws, including GATT Article XX and the TBT Agreement, had not sufficiently addressed the issue of food safety control laws within the multilateral framework.<sup>187</sup> The SPS

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<sup>182</sup> Van den Bossche P, Zdouc W *The Law and Policy of the World Trade Organization Text, Cases and Materials* (2013) 851

<sup>183</sup> Van den Bossche P, Zdouc W (2013) 852

<sup>184</sup> Van der Meulen (2010) 224

<sup>185</sup> See Article 2.1 of the TBT Agreement

<sup>186</sup> The Uruguay Round was negotiated between 1986 and 1993

<sup>187</sup> Skogstad G 'The WTO and food safety regulatory policy intervention in the European Union' *Journal of Common Market Studies* (2001) 39 (3) 492-3

Agreement is perhaps more relevant to the food safety discourse because it aims to lay the foundation for encouraging trade promoting implementation of food safety standards on the global arena, whilst protecting consumer wellbeing.<sup>188</sup> The non-discriminatory approach and science based application of SPS measures in the SPS Agreement ensures the continuance of fair, unhindered trade in spite of government actions aimed at protection of life.<sup>189</sup> Suffice to state that within the context of the SPS Agreement, a central core is that food safety measures must be based on scientific principles and evidence.<sup>190</sup>

While Article 2 of the SPS Agreement affirms the right of members to develop their own standards, the SPS Agreement further urges members to base applied SPS measures on internationally recognised standards as the preferred option. For this reason, three ‘sister organisations’ are identified within the SPS as responsible for setting international standards. Annex A of the SPS Agreement outlines them as follows-

- (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;
- (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
- (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and
- (d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

The necessity of proposed deviations by member states of the WTO from standards set by these organisations must be substantiated by scientific evidence.<sup>191</sup> In the *EC-HORMONES*<sup>192</sup> dispute, the European Union’s (EU) rejection of meat injected with hormones from the United States (US) was challenged through the dispute settlement mechanism of the WTO. The US complaint was upheld on the basis that the *Codex Alimentarius* as the international recognised standard,

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<sup>188</sup> Athukorala P, Jayasuriya S ‘Food safety issues, trade and WTO rules: a developing country perspective’(2003) 26(9) *The World Economy* 1409

<sup>189</sup> Athukorala P, Jayasuriya S (2003) 1409

<sup>190</sup> See Article 2 of the SPS Agreement

<sup>191</sup> Van der Meulen (2010) 228

<sup>192</sup> WT/DS321/AB/R

allowed the use of limited number of hormones, within restrictions and the EU could not prove that its concerns were scientifically based.

Thus it may be concluded that the WTO through the TBT and SPS Agreements, subjects State measures to guarantee the right to safe food to international scientific standards, rather than mere subjective standards. It would be recalled that at the beginning of this chapter, the need for food safety regulations to be based on scientific approaches of risk acceptability was highlighted- this is what the WTO framework on food safety does, through the element of the *Codex Alimentarius*.<sup>193</sup> It is worthwhile to briefly examine the *Codex Alimentarius* as it applies to the international food safety discourse.

### **3.3.5 *Codex Alimentarius Commission***

Of the three identified standard setting organisations, this study is most concerned with the Codex Alimentarius Commission (CAC) as an important standardisation body on international food safety. The CAC was established in 1961 through joint cooperation of the WHO and the FAO.<sup>194</sup> About 175 countries, in conjunction with nongovernmental organisations, (who have observer status at the CAC) are engaged in the work of the CAC.<sup>195</sup> The CAC establishes food standards, collectively known as Codex Alimentarius,<sup>196</sup> through a negotiating process amongst members. The Codex Alimentarius comprises of food codes, codes of practices addressed at food businesses but also adopted by national regulators, as well as requirements on food labelling, presentation, methods of analysis and sampling.<sup>197</sup>

The CAC's efforts over the years have given rise to a vast collection of internationally unified food standards. Standards under the Codex Alimentarius are mostly vertical standards, which apply to all kinds of food in that range, regardless of the process of production.<sup>198</sup> Horizontal standards on the other hand are standards of a more general nature, such as CODEX-STAN 1 1985 (revised 1991), which is the 'General Standard for the Labelling of Pre-Packaged Foods.'

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<sup>193</sup> See Para 3.1 of this study

<sup>194</sup> Van der Meulen (2010) 232

<sup>195</sup> See generally <http://www.CodexAlimentarius.net>

<sup>196</sup> Latin for Food Code

<sup>197</sup> Kimbrell E 'What is Codex Alimentarius' (2000) 3(4) *AgBioForum* 197-202

<sup>198</sup> Van der Meulen (2010) 234

This general standard specifies information to be included on labelling of pre packaged foods as- name of the food, list of ingredients including specifying contained allergens, net content, name and address of business, country of origin for situations where an omission may mislead consumers, lot identification, storage instructions, date marking and instructions for use.

Although not legally binding, Codex standards as negotiated and agreed between parties, are models for national legislation.<sup>199</sup> No sanctions however apply where they are not directly implemented or translated in national legislation. Van der Meulen argues that in spite of the non binding obligation, the codex standards have helped overtime to develop unified food nomenclature, which aids negotiations on food safety on the international scene. This in turn has an impact on the drafting of food laws in national legislation as well.<sup>200</sup>

### **3.4 CONCLUSION**

A rights approach to the guarantee of safe food is essential- it ensures state obligations are enshrined within corresponding instruments guaranteeing the right to safe food. It also encourages participation on citizen's part and gives a voice to otherwise vulnerable and marginalised groups in society. It ensures that citizens can hold state governments accountable to fulfilling a minimum core in guaranteeing safety of food within the food supply chain.

The next chapter employs the human rights standards and principles discussed in this chapter to measure South Africa's compliance with its obligations to realise the right to food.

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<sup>199</sup> Van der Meulen (2010) 235

<sup>200</sup> Van der Meulen (2010) 235

## CHAPTER FOUR

### THE SOUTH AFRICAN LEGAL FRAMEWORK ON FOOD SAFETY AND THE REALISATION OF THE RIGHT TO SAFE FOOD

#### 4.1 INTRODUCTION

South Africa is a diverse society with pluralistic cultures and a wide range of public health disorders ranging from infectious and chronic diseases to lifestyle diseases.<sup>201</sup> It is cognised that food labelling forms an integral part of the decision making process for many consumers purchasing food be it at supermarkets or other purchase outlets where food is generally sold, as it provides information to consumers to make qualitative choices. An apparent lack of informed consumers in South Africa further complicates the public health burden and thus necessitates the need for proper education and regulation on food choices and labelling, respectively.<sup>202</sup>

Weatherspoon and Reardon indicate that the safety of food for the ordinary citizen today cuts across a spectrum of issues on the agenda of food security to include concern for the commercialisation and industrialisation of food systems, a stronger focus on the institutional actors in food trade, including supermarkets.<sup>203</sup> Warnings about the environmental consequences of new technologies (including salinisation, pesticides, and the risk of mono-cropping, as well as more recent worries about GMOs), and issues to do with health, including problems of food safety and the increase in nutrition-related illnesses, such as heart disease and diabetes, all fall within the purview of concerns on food safety.<sup>204</sup>

Supermarkets play a key role in the value chain and not just simply as purchasers. Reardon and others<sup>205</sup> innovative research documents the growing importance of supermarkets in the food value chain in developing countries. In Latin America, for example, supermarkets controlled 50-60 percent of food marketing in 2000. The trend in Africa has seen a growing percentage of

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<sup>201</sup> Bradshaw D, Gronewalt P, Labuscher R et al 'Initial burden of disease estimates for South Africa, 2000' (2003) 9 *South African Medical Journal* 682, 688

<sup>202</sup> Spowart S 'A system of nutritional labeling to improve food choices and nutritional status of South Africans (1998) PhD Thesis, Northwest University, Potchefstroom Campus

<sup>203</sup> Weatherspoon D and Reardon T 'The rise of supermarkets in Africa: implications for agrifood systems and the rural poor' (2003) 21 (3) *Development Policy Review* 333-355

<sup>204</sup> Maxwell S, Slater R 'Food policy: old and new' (2003) 21(5-6) *Development Policy Review* 533

<sup>205</sup> Reardon T, Berdegué J and Farrington J 'Supermarkets and farming in Latin America: pointing directions for elsewhere?' (2002) 81 *Natural Resource Perspectives* 2002 371

supermarkets within the food retail chain: in South Africa, supermarkets controlled 55 percent of food retailing in the early part of the last decade.<sup>206</sup> Between 2008 and 2010, formal retail's share of the food market in South Africa increased from 62 percent to 68 percent.<sup>207</sup> More so, a good number of supermarket chains in developing countries now multi task as multinationals - a good example is the South African chain, Shoprite which currently has over 1,800 outlets in Southern Africa alone<sup>208</sup> and presence in 14 countries outside South Africa. Wherever supermarkets enter the market, the supply chain is greatly changed, driven by issues like quality standards and traceability, as well as by the need to deliver large quantities to tight schedules.<sup>209</sup>

Even for less advantaged or rural citizens who do not often shop in supermarkets, studies have shown that rich and poor households acquire significant shares of calories outside the home, often in the form of 'street foods', with the share often being higher for the poor.<sup>210</sup> The consumption of street food heightens concerns of safety<sup>211</sup> issues including food preparation, handling and storage, as well as a dismal lack of enlightenment on these concerns both on the part of food handlers and consumers of street food.

South Africa is signatory to a number of international and regional conventions<sup>212</sup> on food safety and has a plethora of national legislation and policies on food security, some of which touches on food safety. This chapter examines South Africa's national legal framework on food safety vis a vis the international framework discussed in Chapter Three of this study. The Chapter examines current laws and policies on food safety in South Africa and critiques South Africa's current laws from the right to safe food perspective.

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<sup>206</sup> Weatherspoon D (2003) 3

<sup>207</sup> Planting S. 'Into the trolley' 2010 *Financial Mail* 34

<sup>208</sup> Thomas White International Limited 'Retail in South Africa: Making an Impression'. *Emerging Market Spotlight* Available at <http://www.thomaswhite.com/global-perspectives/retail-in-south-africa-making-an-impression/> (2011) Accessed 26 March 2015

<sup>209</sup> Maxwell S (2003) 535

<sup>210</sup> See Haddad's study in Maxwell S (2003) 536

<sup>211</sup> Joint FAO/WHO Publication 'Assuring Food Safety and Quality: Guidelines for Strengthening National Food Control Systems. Available at [http://www.wpro.who.int/foodsafety/documents/docs/English\\_Guidelines\\_Food\\_control.pdf](http://www.wpro.who.int/foodsafety/documents/docs/English_Guidelines_Food_control.pdf) (Accessed 26 March 2015) 17

<sup>212</sup> See full discussion on this in Chapter Three of this study

## 4.2 PROTECTING THE RIGHT TO SAFE FOOD UNDER SOUTH AFRICAN LAW

The right to food is a fundamental human right.<sup>213</sup> It is intrinsically linked with other fundamental rights such as the right to life and the right to health. Food is a basic need for the continuance of life. Without the guarantees to safe food, the right to food in itself cannot be said to have been realised. Adequately sufficient and safe food is a necessity for a healthy and qualitative life style. This section considers the provision for the guarantees of the right to food in general and to safe food specifically under current South African law.

### 4.2.1 *The Constitution*

The South African Constitution<sup>214</sup> has consistently been described as one of the most revolutionary and progressive constitutions of recent times. The Constitution as at the time of its drafting, sought to balance the inequities inherited from the apartheid history of South Africa. Thus, the Constitution was a direct response to both the history and the aspired future of South Africa. The South African Constitution was one of the first few Constitutions the world over to spur the movement towards the inclusion of socioeconomic rights. More so, the Constitutional Court in the defining case of *Government of Republic of South Africa and Others V Grootboom and Others*<sup>215</sup> (Grootboom Case), reaffirmed the justiciability of all socioeconomic rights contained in the Constitution.

The overarching law on the right to food in South Africa is contained in three sections of the Bill of Rights in the Constitution. The inclusion of the right to food in the Constitution was a response to the growing discontent pervasive amongst the people that the end of apartheid had not ushered in a regime of peace and prosperity, specifically for the majority black population.<sup>216</sup> Hence, amongst other socioeconomic rights to address this discontentment, the right to food was included in the Constitution. The Constitutional provisions on the right to food are contained in three sections, viz-

Section 27 (1) (b) - *everyone has the right to have access to sufficient food* and water;

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<sup>213</sup>Fukuda-Parr S (2012) 6

<sup>214</sup> Act 108 of 1996

<sup>215</sup> 200 (11)BCLR 1169 CC

<sup>216</sup> Coomans F, Yakpo K 'A framework law on the right to food- an international and South African perspective' (2004) 1 *African Human Rights Law Journal* 29

Section 28 (1) (c) - *every child has the right to basic nutrition*, shelter, basic healthcare services and social service; and

Section 35 (2) (e) - *everyone who is detained, including every sentenced prisoner, has the right to* conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, *nutrition*, reading material and medical treatment

The interpretation of these rights – and other socioeconomic rights- as guaranteed in the Constitution has elicited both judicial and academic discourse over the years. Fukuda-Parr succinctly describes the constitutional duty of the State in ensuring the right to food when she opines that

...According to both the South African Constitution and international human rights law, states have obligations to fulfil the right to food. This implies that states must take ‘all appropriate measures’ encompassing a broad range of policy actions. This obligation to fulfil the right to food goes far beyond the provision of food in situations of emergency shortages to a broader range of interventions to secure a more permanent right to food. The Committee on Economic, Social and Cultural Rights (CESCR) has noted that ‘every man, woman and child, alone or in community with others, has the physical and economic access at all times to adequate food or means for its procurement.’ Thus, states may adopt different approaches to taking measures, from a minimalist response to a thick web of constitutional guarantees, incentive policies and investment programmes.<sup>217</sup>

However, a cursory look at the constitutional provision of section 27 (1) (b) guaranteeing the right to food for everyone, reveals that it falls short of guaranteeing the right to safe food. Food sufficiency and food adequacy do not mean the same thing- thus guaranteeing the right to access sufficient food as contained under section 27 (1) (b) may be interpreted as the right to accessing food in sufficient quantities. The discussion on the meaning of the right to food conducted in Chapter Three of this study, examined the CESCR’s definition of the right to adequate food, which amongst other things, requires that for food to be adequate it must be *free from adverse substances*, i.e. be safe for consumption. When this is contrasted with the wording of Section 27 (1) (b) it is apparent that sufficiency of food does not automatically incorporate the adequacy of food. The access to sufficient food in this context would only imply the access to ample quantities of food. While ample quantities of food to satisfy caloric requirements of individuals will satisfy the standard of section 27 (1) (b), the question is whether a contravention can be implied within the section where such ample quantities are not free from adverse substances. It would seem not.

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<sup>217</sup>Fukuda-Parr S (2012) 8



This assertion holds more certainty when compared with section 35 (2) (e) which guarantees the right to *adequate* nutrition for detained persons and prisoners. While it may be argued that this was probably a move on the part of constitutional drafters to ensure guarantees of the right to food for a vulnerable group- persons in prison- it raises the question as to whether this same right should not have been extended to ‘everyone’, especially as other categories of vulnerable groups exist within the broader category of society at large contemplated under section 27 (1) (b).

Thus while it is commendable that guarantees for the right to food in general exist within the South African constitutional framework, this perceived guarantee fails to provide for the right to adequate food for the generality of the population and restricts this right to only detained persons and perhaps children. Therefore, the South African constitutional provision of the right to food, falls short of promoting the right to adequate food- within which the right to safe food is encompassed- which is one of the minimum core obligations on the right as explained within GC 12 of the CESCR, emanating from article 11 of the ICESCR.

Notwithstanding constitutional guarantees, jurisprudential challenges on the right to food in South Africa have been apathetic. Many reasons have been adduced for this, one of which is a dearth of focused civil society participation on the right to food in South Africa and a corresponding absence of citizens’ participation on this right. Currently, there are about three reported cases on the right to food, none of which directly touches on the issue of food adequacy and in essence food safety. Two of the cases entailed upholding the livelihood of small scale producers, one of which was *Kenneth George and Others V Minister of Environmental Affairs and Tourism*.<sup>218</sup> In this case, artisanal fishers challenged a law before the High Court which in effect stripped them of their fishing rights without the provision of suitable alternatives. They argued that the law in effect violated their right of access to sufficient food for themselves, their household and the communities which depended on their incomes as a source of livelihood. The Court ordered an immediate reinstatement of the community’s access to the sea and the establishment of a participatory process between the government and the community to draft a new law, which would take cognisance of the rights of the community.

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<sup>218</sup> 2006 SCA 57

In the case of *Mukaddam v Pioneer Foods (Pty) Ltd and Others*,<sup>219</sup> following a decision by the Competition Commission that three large bread companies (Pioneer Foods, Premier Foods and Tiger Brands) were guilty of collusion to fix the price of bread in the market, some small scale bread producers sought leave of the Court to institute a suit for losses which they had suffered as a result of the uncompetitive behaviour of the indicted companies. The Western Cape High Court and the Supreme Court of Appeal rejected the argument that a class action suit could be brought against the companies. The Constitutional Court however overturned this decision, albeit not on a right to food basis, but on the basis of allowing business damages to be claimed by those affected.

Although the lack of jurisprudential challenges on this right can be attributed to a host of factors including the absence of civil society participation and dismal consumer awareness, in the light of the overwhelming statistics on non-attainment of the right to food in South Africa the government is complicit. South Africa has international obligations to ensure the attainment of the right to food, albeit progressively, under the international instruments it has acceded to as examined in Chapter Three of this study. It is therefore not enough to blame civil society and uniformed consumers; the question should be what the South African government is doing to guarantee the right to safe food for consumers. In the light of the discussion from Chapter Two of this study on the flagrant malpractice in the South African food industry, apparently not enough.

Beyond its constitutional obligation, the South African government has made efforts to enact laws, as well as develop policies and programmes in a bid to guarantee the right to adequate food and ensure food security for its citizens. Legislation specific to food security and safety in South Africa is examined within the rest of this section.<sup>220</sup>

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<sup>219</sup> (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC)

<sup>220</sup> Source: Department of Health, Directorate: Food Control, Available at [http://www.thefoodsafetynetwork.co.za/images/stories/docs/consumers/Directorate\\_Food\\_Control\\_information.pdf](http://www.thefoodsafetynetwork.co.za/images/stories/docs/consumers/Directorate_Food_Control_information.pdf) (Accessed 26 March 2015)

#### **4.2.2 Consumer Protection Act No 68 of 2008 and Regulations**

The Consumer Protection Act (CPA) has been described as an Act with possibly the widest coverage in South Africa,<sup>221</sup> regulating the conduct of purchasing relations on goods and services on many different sectoral levels. The National Consumer Commission, established within the framework of the CPA, acts as a regulatory body to intervene on the day to day commercial transactions of consumers, ensuring compliance by suppliers and service providers.

Section 2 of the CPA provides that the CPA in its entirety be interpreted in a way that gives effect to the purpose of the CPA. Section 3 details the purpose and policy of the CPA as follows-

**3.** (1) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

- (a) establishing a legal framework for the achievement and maintenance of a market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers—
  - (i) who are low-income persons or persons comprising low-income communities;
  - (ii) who live in remote, isolated or low-density population areas or communities;
  - (iii) who are minors, seniors or other similarly vulnerable consumers; or
  - (iv) whose ability to read and comprehend any advertisement, agreement, mark, instruction, label, warning, notice or other visual representation is limited by reason of low literacy, vision impairment or limited fluency in the language in which the representation is produced, published or presented;
- (c) promoting fair business practices;
- (d) protecting consumers from—
  - (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
  - (ii) deceptive, misleading, unfair or fraudulent conduct;
- (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;
- (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
- (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.

On the broad meaning of the words ‘goods’ as defined within the CPA, it provides that ‘goods include anything marketed for human consumption’. Thus, a joint reading of the purpose of the CPA and the definition of ‘goods’ contained within the CPA, highlights that the labelling of food

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<sup>221</sup> Campbell N, Logan S *Consumer Protection Guide for Lawyers* (2011) 1

items falls within the scope of the CPA. Specifically, section 24 makes specific provisions on product labelling and trade description of goods. A trade description as defined in the CPA is

- (a) any description, statement or other direct or indirect indication, other than a trade mark, as to—
  - (i) the number, quantity, measure, weight or gauge of any goods;
  - (ii) the name of the producer or producer of any goods;
  - (iii) the ingredients of which any goods consist, or material of which any goods are made;
  - (iv) the place or country of origin of any goods;
  - (v) the mode of manufacturing or producing any goods; or
  - (vi) any goods being the subject of any patent, privilege or copyright; or
- (b) any figure, work or mark, other than a trade mark, that, according to the custom of the trade, is commonly understood to be an indication of any matter contemplated in paragraph (a);

Thus, section 24 (2) and (3) specifically provide in this regard-

- (2) A person must not—
  - (a) knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description; or
  - (b) alter, deface, cover, remove or obscure a trade description or trade mark applied to any goods in a manner calculated to mislead consumers.
- (3) A retailer of goods must—
  - (a) not offer to supply, display or supply any particular goods if the retailer knows, reasonably could determine or has reason to suspect that—
    - (i) a trade description applied to those goods is likely to mislead the consumer as to any matter implied or expressed in that trade description;
  - or
  - (ii) a trade description or trade mark applied to those goods has been altered as contemplated in subsection (2)(b); and
  - (b) with respect to any goods within the retailer's control, take reasonable steps to prevent any other person from doing anything contemplated in paragraph (a) or subsection (2)(b).

In this light, the CPA provides for consumers right to fair value, good quality and safety as well as to the disclosure of information. Specifically, section 22 provides for the consumers right to information in plain and understandable language. Again, Section 41 bars suppliers or any persons acting on behalf of suppliers from false, misleading or deceptive representation of goods to consumers. On what false, misleading or deceptive representation means in the context of food safety, section 41 (3) provides in part-

- (3) Without limiting the generality of subsections (1) and (2), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that—
  - (a) the supplier of any goods or services has any particular status, affiliation, connection, sponsorship or approval that they do not have;
  - (b) any goods or services—

- (i) have ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
- (ii) are of a particular standard, quality, grade, style or model;

Thus this sub section contemplates within its meaning misleading claims on food products through labels with the purpose of inducing customers to purchase, where in fact such products do not deliver the said claims. A typical example in this regard would be the claims by many probiotic products in the food chain industry in South Africa, or the claim by many product to be 'GM free' when in fact they contain considerable traces of GM products.<sup>222</sup> Section 52 provides for recourse to the courts where this section has been contravened, in instances where the Act does not provide sufficient remedy.

For every right which a consumer possesses in the CPA, corresponding obligations to ensure the realisation of this right rests on the supplier or retailer as applicable. Thus the CPA in section 55 creates the consumers right to safe, good quality goods and in section 56 creates an implied warranty of quality. In this respect, the CPAs provision stands out as a novel provision within the South African legal framework, creating a definite rights approach to safety of food. However, a drawback of section 55 is the delimitation in sub clauses (1) and (6) which excludes the application of the right to safe goods on goods bought at an auction and for defective goods bought with the consumers' knowledge or consent, respectively. Section 55(2) thus provides the extent of this right as follows-

- (2) Except to the extent contemplated in subsection (6), every consumer has a right to receive goods that—
  - (a) are reasonably suitable for the purposes for which they are generally intended;
  - (b) are of good quality, in good working order and free of any defects;
  - (c) will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and
  - (d) comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993), or any other public regulation.

Thus, besides the obligation created within the CPA, the supplier of food products also has an obligation pursuant to section 55 (2) (d) to comply with other regulations on food safety. In this regard, regulations such as the Genetically Modified Organisms Act,<sup>223</sup> the International Health

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<sup>222</sup> As examined in Chapter Two of this study

<sup>223</sup> Act No 15 of 1997

Regulations Act,<sup>224</sup> the Health Act<sup>225</sup> and the Foodstuffs, Cosmetics and Disinfectants Act,<sup>226</sup> with their corresponding regulations on food safety will apply to food suppliers.

The CPA in section 61 creates a strict ‘no fault’ liability of unsafe, defective or hazardous goods as well as extending this liability beyond the reach of the CPA to both civil and criminal liability for contraventions. Some of the causes from which this can arise include allergic reactions arising from the consumer, for which no warnings on allergens had been indicated on food labels, foreign objects in food and food poisoning.<sup>227</sup> The liability in this case is strict because the producer, importer, distributor or retailer may be held liable irrespective of whether the fault arises from the negligence of any of the producer, importer, distributor or retailer. The liability in this case is joint and several. Harm for which liability will arise is specified in section 61(5) as-

- (5) Harm for which a person may be held liable in terms of this section includes—
  - (a) the death of, or injury to, any natural person;
  - (b) an illness of any natural person;
  - (c) any loss of, or physical damage to, any property, irrespective of whether it is movable or immovable; and
  - (d) any economic loss that results from harm contemplated in paragraph (a), (b) or (c).

The Act also provides for implied warranties as well as the right of the consumer to return goods not fit for purpose, irrespective of whether the product failure is latent, patent or was discoverable upon purchase. Penalties to be imposed for contravention under the Act include the greater of either a fine of one million rand or 10 percent of the total turnover of the business.

The provisions on misrepresentation within the CPA examined above seeking to protect consumers in general, and more specifically of food products consumers, commendably lives up to certain aspects of the established framework on the right to food as discussed in human rights instruments under Chapter Three of this study, such as the ICESCR and the African Charter, as well as the explanatory GC 12 of the CDESCR and Guiding Principles on Socioeconomic Rights of the African Charter. Under these instruments, States are obliged to protect citizens from actions of third parties which may hamper the right to food in general, and safe food,

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<sup>224</sup> Act No 28 of 1974

<sup>225</sup> Act No 63 of 1977

<sup>226</sup> Act No 54 of 1972

<sup>227</sup> Luterek J ‘Impact of the Consumer Protection Act on the food industry’ Available at <http://www.thefoodsafetynetwork.co.za/component/content/article/144-main-navigation-consumer/291-impact-of-the-consumer-protection-act-on-the-food-industry.html> (Accessed 7 April 2015)

specifically. States have a wide room of discretion in deciding which tools or mechanisms to use in the fulfilment of their protective obligation, one of which is legislative measures. Hence, the inclusion of the forgoing provisions in the CPA, demonstrates South Africa's fulfilment of its obligation under international human rights law to protect citizens from the actions of third parties which might hamper their right to safe food. Furthermore, these provisions align with the provision of Guideline 9.7 of the Right to Food Guidelines of the FAO, enjoining members to adopt measures to protect consumers from deceptive labelling, as well as providing recourse for harm cause as a result of such misrepresentations.<sup>228</sup>

However, in the wake of continued flagrant malpractice in the food industry as examined under Chapter Two of this study, it is apparent that the legislative measures within the CPA have not sufficiently addressed food safety concerns in the South African context. The CESCR under GC12 explained that a State has at its disposal a wide pool of discretionary measures to ensure implementation and is not restricted to legislative measures only.<sup>229</sup> Specifically, South Africa has a duty to protect consumers from infringements of the right to safe food. South Africa's constitutional democracy has a place for institutions established in terms of Chapter Nine of the Constitution to safeguard its democracy. Some of these institutions such as the South African Human Rights Commission and the Commission for Gender Equality have firmly within their mandate the promotion of human rights.<sup>230</sup> It is thus questionable why an institution such as the South African Human Rights Commission (SAHRC) is yet to conduct investigations or institute proceedings<sup>231</sup> against violators of the right to safe food, including marketers and producers, in the wake of wide spread media attention being drawn to several incidences as the meat and GM bread scandals discussed in Chapter Two of this study.

Furthermore, the creation of a rights approach to the issue of food safety with corresponding redress mechanisms is in conjunction with the approach of many of the international instruments considered under Chapter Three of this study. To this extent therefore, the CPA as a piece of legislation in South Africa, although not strictly applicable to the food safety discourse, complies

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<sup>228</sup> See Chapter Three of this study for a discussion on the FAO Right to Food Guidelines

<sup>229</sup> See Paras 21-28 of General Comment 12

<sup>230</sup> See sections 184 and 187 of the Constitution

<sup>231</sup> Pursuant to its powers under sections 9 and 7 of its enabling Act, respectively- Human Rights Commission Act 54 of 1994

with the normative content of the right to safe food as a mechanism of the South African government to protect the right to safe food and provide for redress in cases of violation. It however stops short of actualising the obligations to fulfil and promote the right to safe food as required under international law. While the obligation to protect is well covered within the context of the CPA, the other two obligations are unfortunately not sufficiently addressed. This shortcoming is relevant in the light of the lack of jurisprudential challenges on the right to food in South Africa attributable to factors including the absence of civil society participation and dismal consumer awareness. Without the government fulfilling its promotional mandate on the right to safe food, a large, disadvantaged proportion of the society will remain uninformed of their rights under the CPA and at the receiving end of food manufacturers' and producers deceptive misrepresentation.

#### ***4.2.2.1 R 293: The Consumer Protection Act (Act No 68 of 2008) Regulations***

The regulations under the CPA<sup>232</sup> also relate to crucial issues on food safety such as labelling of Genetically Modified (GM) products where the GM content is in excess of five percent. Section 24 (6) of the CPA contains a mandatory disclosure provision for labels or notices on products with GM ingredients or components, as applicable. This provision applies to the producers, importers, suppliers or packagers of such goods or products.. Further to this, regulation 7 makes specific provisions on the product labelling and trade description of goods produced using GMOs.

The labelling provisions under the regulation applies to goods approved for by the executive council<sup>233</sup> and containing at least five percent GM content, irrespective of whether they were produced in South Africa or elsewhere, as well as to the marketing material of such goods.<sup>234</sup> Thus the regulations impose a mandatory regulatory regime where the product contains a threshold of five percent or higher GM content- in such instances, labelling must carry 'contains GMOs.'<sup>235</sup> Where food is produced directly from GM products and testing is unnecessary then it

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<sup>232</sup> R 293 The Consumer Protection Act (Act No 68 of 2008) Regulations

<sup>233</sup> Regulation 7(2), CPA Regulations

<sup>234</sup> Regulation 7(3), CPA Regulations

<sup>235</sup> Regulation 7(4), CPA Regulations



must bear on the label ‘produced using genetic modification.’<sup>236</sup> In circumstances where it is scientifically impractical to test the GM content, then the labels must read ‘May contain GMOs’. Where the GM content in a product is less than one percent, it is permissible to state that the product does not contain GMOS.<sup>237</sup>

The regulations as it concerns food safety and specifically GMO labelling have not been without criticism. Although the regulation came to redress apparent gaps in the GMO Act 1997, it still failed to address certain crucial issues surrounding the safety of GM products and their placement in the food chain in South Africa. First, the regulation fails to address precisely the responsible party for labelling of GM foods. Given the complex nature of the food processing chain, the introduction of GMOs into food products is possible at any point as there may be a chain of producers or suppliers for a singular end product, it thus begs the question where liability rests in case of damage. The responsibility of States to protect the right to safe food as examined under Chapter Three of this study implies the creation of a redress system for violations. It would be impossible to seek for redress where the liable party is not identifiable. Thus in this regard, the regulation does not live up to the standard set under international law.

Secondly, the regulation has been criticised for its failure to create a specific mandatory regime for the disclosure of the use of GM growth hormones in livestock and other animal by products. There is an apparent tolerance of the domestic use of rBST or genetically engineered bovine growth hormone in South Africa. With research indicating a link between human consumption of the milk of rBST treated cows and the increased cancer incidences, it is concerning at the least that this was not covered by the regulations. In the same vein, the regulations fail to provide for labelling requirements for animal and dairy products obtained from livestock fed with GM feed. Again, the failure by the regulation to adequately cover weighty issues as these which may likely have an impact on the health of consumers is obviously an abdication of the governments protective mandate as set out under international law.

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<sup>236</sup> Regulation 7(5), CPA Regulations

<sup>237</sup> Regulation 7(6), CPA Regulations

Other legislation highlighted briefly in the discussion on the CPA above- including the Genetically Modified Organisms Act,<sup>238</sup> the International Health Regulations Act,<sup>239</sup> the Health Act<sup>240</sup> and the Foodstuffs, Cosmetics and Disinfectants Act,<sup>241</sup> - also touch on issues of food safety within the South African legal framework. Although they do not per se create a rights approach like the Constitution and the CPA, they do cover certain important elements and are briefly highlighted below because of their importance to this study.

#### **4.2.3 *Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No 54 of 1972)***

This Act addresses the manufacture, sale and importation of foodstuffs, as well as regulating a wide range of issues including the labelling of goods in this respect. New regulations relating to the labelling of food products were drafted under section 15 (1) of this Act, i.e. Regulations Relating to the Labelling and Advertising of Foodstuffs.<sup>242</sup>

The regulations address in detail issues regarding the labelling of foodstuffs, disinfectants and cosmetics, including the general presentation of labels, letter sizes, country of origin, batch identification, date marking, prohibited statements, storage instructions, allergens, nutritional information, negative claims and other special provisions.

#### **4.2.4 *The Health Act, 1977 (Act No 63 of 1977)***

This legislation provides for amongst other things, powers of the Minister to make regulations related to the hygienic handling of food, the packaging of food and the inspection of food premises and food handlers.<sup>243</sup>

#### **4.2.5 *The International Health Regulations Act, 1974 (Act No 28 of 1974)***

This Act provides for the approval by the Department of Health of the source of food for consumption at ports, airports, on vessels and on aircraft, as well as for the inspection of such premises and the sampling of food by local authorities.

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<sup>238</sup> Act No 15 of 1997

<sup>239</sup> Act No 28 of 1974

<sup>240</sup> Act No 63 of 1977

<sup>241</sup> Act No 54 of 1972

<sup>242</sup> GN R 146 of 1 March 2010

<sup>243</sup> See section 35 Health Act, No 63 of 1977

#### **4.2.6 *Genetically Modified Organisms Act No 15 of 1997***

Amongst other things, the Act provides for measures to promote the responsible development, production, use and application of GMOs and ensure that all activities involving the use of GMOs are carried out in such a way as to limit possible harmful consequences to the environment, human, as well as animal health.

The CPA regulations (as examined above) have however expanded the scope of this Act with further detailed provisions on GMO labelling.

### **4.3 POLICY INTERVENTIONS ON FOOD SAFETY IN SOUTH AFRICA**

Besides a defined legislative framework on food safety in South Africa, the South African government also strives to create policy interventions on this issue. Although there is currently no single overarching policy framework on the right to food in South Africa, a fragmented approach has seen the roll out of several policies addressing this right from several National Departments over the years.<sup>244</sup> Key examples of policy intervention programmes coordinated by a multi sectoral approach across National Departments are the Social Security Programme, the Household Food Production programme- One Home, One Garden, National School Nutrition Programme, Food for All Programme and the Integrated Food Security Strategy (IFSS) of 2002. Amongst these, the IFSS has the most coordinated approach to addressing food security in South Africa, specifically in rural areas.<sup>245</sup>

The IFSS goals are tied in to the Millennium Development Goals, specifically the first goal of eradicating hunger, and halving malnutrition and food insecurity by the year 2015. The IFSS in achieving food security in South Africa has five broad pillars<sup>246</sup>; specifically, pillar three- Nutrition and Safety- speaks to attainment of the right to safe food. The Department of health is charged with the oversight responsibility in this pillar, in conjunction with the Departments of

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<sup>244</sup> Brand D 'Between availability and entitlement: the Constitution, Grootboom and the right to food' (2003) 7 *Law Democracy and Development* 11

<sup>245</sup>Koch J 'The food security policy context in South Africa' 2011 *Country Study* International Policy Centre for Inclusive Growth 7

<sup>246</sup>Pillar One- production and trading; Pillar Two- income opportunities; Pillar Three- nutrition and food safety; Pillar Four- safety nets and food emergency; Pillar five- information and communication

Agriculture, Water Affairs and Forestry, Trade and Industry as cluster members.<sup>247</sup> This pillar stems from the understanding that the availability of food does not imply its adequacy. Hence, its primary objectives include public enlightenment, improvement in food and nutrition monitoring mechanisms, targeted interventions for vulnerable and marginalised groups with specific emphasis on children below the age of six years, at-risk pregnant and lactating women, primary school children from poor households, chronic disease sufferers- whether lifestyle or communicable and at-risk elderly persons.

Although without legislative backing, the IFSS as a policy document guides the South African government in the fulfilment of its promotional mandate of the right to food in general and to safe food specifically, through its public enlightenment programs on food adequacy, which also encompasses food safety, especially for vulnerable groups in the South Africa. Its implementation has however been widely criticised as being disjunctive from the policy plans as mapped out on paper. The failure to adequately lay out responsibilities within the IFSS and ensure accountability mechanisms for coordinating departments were in place created gross implementation challenges for the strategy.

There is currently a proposed replacement for the IFSS- the National Policy on Food and Nutrition Security (National Policy), 2014- which seeks to address some of the identified shortcomings of the IFSS. It has largely been developed without public consultation. The National Policy acknowledges the need for a framework law on the right to food in South Africa<sup>248</sup> and calls for proper coordination of governments' initiative by a National Food and Nutrition Advisory Committee, comprised of experts skilled in an interdisciplinary approach to food security. The National Policy has five pillars, with its third pillar focused on improved nutrition education and consumer literacy on food and nutrition. One identified shortcoming of the proposed policy is its lack of attention to the nutritional needs of children and other marginalised groups in spite of constitutional obligations under section 28 (1) (c) of the Constitution. The biggest challenge which the policy would face as was the case with the IFSS,

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<sup>247</sup>Koch J (2011) 10

<sup>248</sup> This is in tandem with the suggestions by the CESCR in GC 12 on implementation strategies on the right to food by State parties.

would be proper coordination on an intersectoral and inter departmental level to ensure the policy goals are achieved.

#### **4.4 CONCLUSION**

This Chapter has examined South Africa's legislative and policy framework on the right to safe food vis a vis the standards set by international human rights and other instruments examined under Chapter Three of this study. While it cannot be said that South Africa has done nothing to guarantee the right to safe food through its national legislation, it may be concluded that when the national standards are compared against international standards, there are no sufficient guarantees- more needs to be done.

The Chapter that follows draws observations from this study so far and proffers recommendations on what South Africa can do to ensure guarantees for the right to safe food.



## **CHAPTER FIVE**

### **OBSERVATIONS, RECOMMENDATIONS AND CONCLUSIONS**

#### **5.1 INTRODUCTION**

The preceding chapters of this study has created a trajectory on discussion of the right to food, to the safety of food in today's world and the international, regional and national protection of the right to safe food.

This concluding chapter highlights the observations made in the course of this study, proffers recommendations drawing from the observations and provides a general conclusion.

#### **5.2 OBSERVATIONS**

Generally, this study has observed that-

1. A rights approach to the safety of food is contained within international and regional human rights instruments within the broader category of the right to adequate food, and although the focus has often been on other elements of adequacy, this does not in any way diminish the guarantees to the right to safe food.
2. The safety of food is more often viewed from a regulatory and consumer awareness perspective rather than a rights approach, despite guarantees in international and regional human rights instruments, and sometimes even constitutional guarantees.
3. Notwithstanding, in the light of widespread malpractice within the food industry, it has become more pertinent to establish and create greater awareness across a rights approach to guaranteeing safety of food.
4. This is only achievable from a proper understanding of what the right to safe food as outlined in international and regional human rights instruments entails and measuring this against National standards of implementation.

5. Although South Africa has in some instances through its legislative measures lived up to the international normative content on the right to safe food, it is still lacking, specifically in respect to implementation and legislative loopholes. Identified challenges in the South African legal framework on the right to food pertinent to this study are-
- Failure of the constitutional provision under section 27 (1) (b) to provide for the right to *adequate* food for everyone, (it rather provides for the right to access *sufficient* food) thus missing a key opportunity to create a constitutional rights approach to safety of food.
  - A fragmented legislative approach and documentation on the right to food and the right to safe food in South Africa.
  - An over reliance on legislative measures only without corresponding enforcement mechanisms to guarantee the right to safe food in South Africa.
  - An abdication by the government of its mandate to fulfil and promote the right to safe food in South Africa under the CPA.
  - A failure in the redress system under the regulations to the CPA to identify liable parties in the violation of the right to safe food in a GM labelling context.
  - Failure on the part of the government in its protective mandate, with regard to the regulations to the CPA to legislate on weightier matters of GM uses which border on safety of food for human consumption.
  - The lackadaisical attitude of Chapter Nine institutions charged with the protection of human rights such as the SAHRC, to address rights violations in the wake of continued food malpractice within the South African food industry.
  - A lack of jurisprudential challenges on the right to food generally in South Africa despite its constitutional codification.
  - Apathetic civil society participation and consumer awareness on the right to food.
  - Fragmented and disjointed policy approach of the government in the right to food discourse in South Africa, thus further weakening systems of enforcement and accountability.

### 5.3 RECOMMENDATIONS

The observations above call for a concerted effort by government, civil society and even consumers if the right to safe food is to be realised in South Africa. In this regard, this study proposes specific recommendations as follows-

1. An amendment of the constitutional provision of section 27 (1) (c) to guarantee the right to access *adequate* food for all. This would ensure that a food safety context to the right to food is encompassed within the constitutional guarantees on the right to food in South Africa.
2. A framework law to address the right to food discourse in one centralised and specified piece of legislation in South Africa.
3. A redraft of the highlighted sections within the regulations to the CPA to ensure proper coverage of weighty issues on GM use within the South African food industry.
4. Departmental accountability for enforcing the rights as contained in the various pieces of legislation contingent upon the right to food need to be ensured. In this respect, Parliamentary oversight is useful to ensure that departments carry out their duties of enforcement.
5. Urgent coordinated inter departmental awareness programs on food safety and consumer awareness issues across all provinces, down to grass roots levels to ensure effective coverage of marginalised and vulnerable groups.
6. Chapter nine institutions such as the SAHRC and civil society need to be encouraged to proactively encourage the development of the jurisprudence on issues surrounding the right to food and specifically the right to safe food.

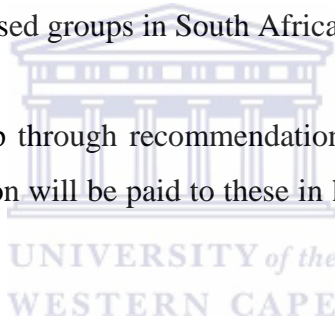


7. Encouraging public participation towards the final output of the National Policy on Food and Nutrition Security, while addressing issues of child nutrition and proper inter sectoral coordination within the policy.

#### **5.4 CONCLUSION**

The general constitutional provision on the right to food within the South African Constitution underscores the potential for a rights approach to food safety in South Africa. While factors such as legislative drawbacks, fragmented policies, weak enforcement mechanisms, executive abdication of mandates under international instruments, apathetic civil society participation and dismal consumer awareness continue to pose as challenges to realising the right to access safe food, they are not insurmountable. A dedicated and concerted effort by all parties involved in addressing the challenges identified will ensure that the right to food is guaranteed for all, including vulnerable and marginalised groups in South Africa.

This study has created a road map through recommendations proffered- it is hoped that going forward positive, dedicated attention will be paid to these in helping to realise the right to access safe food in South Africa.



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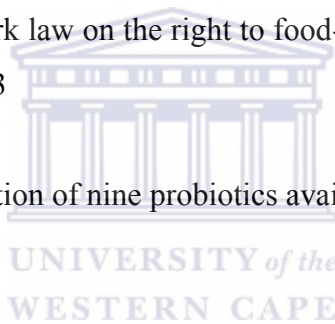
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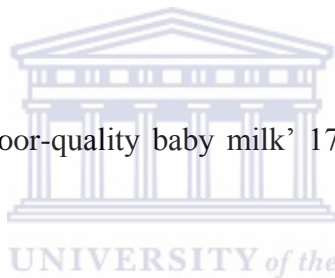
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