

**IMPLEMENTING ARTICLE 43(1) (C) OF THE CONSTITUTION; RIGHT TO
FOOD IN KENYA**

BY

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DECLARATION

I, Grace Karimi Njiru declare that this is my original work and that it has not been submitted for any award to any institution or university. The sources I have used or quoted have been indicated, acknowledged and well cited

Signed

Date

This thesis has been submitted with the approval of my university supervisor

Signed

Date

Dr. Agnes Meroka

DEDICATION

This thesis is dedicated to all Kenyans struggling to enjoy the right to food and to those who have lost their loved ones to food insecurity.

ACKNOWLEDGMENT

First, I acknowledge the Almighty God for the far He has brought me in life and particularly in my studies. He has granted me good health and the ability to pursue this course. I wish to also convey my special gratitude to my supervisor, Dr. Agnes Meroka for her wise counsel and guidance as I developed this paper. She was very instrumental in developing every aspect of the paper and committed her time to read through, correct and shape this piece of work to what it is. I am also grateful to all my lecturers at the University of Nairobi for their dedicated support towards my course.

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TABLE OF CONTENTS

DEDICATION.....	III
ACKNOWLEDGMENT	IV
TABLE OF CONTENTS	V
LIST OF LEGAL INSTRUMENTS	IX
NATIONAL LAWS AND STATUTES.....	X
LIST OF ACRONYMS	XI
LIST OF CASES	XII
CHAPTER ONE: GENERAL INTRODUCTION	1
1.0 BACKGROUND OF THE STUDY.....	1
1.1 STATEMENT OF THE PROBLEM	3
1.2 PURPOSE OF THE STUDY	4
1.3 OBJECTIVES OF THE STUDY	5
1.3.1 Main objective	5
1.3.2 Specific Objectives	5
1.4 RESEARCH QUESTIONS"	5
1.5 HYPOTHESIS OF THE STUDY	5
1.5.1 Null hypothesis.....	5
1.5.2 Alternative hypothesis.....	5
1.6 SIGNIFICANCE OF THE STUDY	5
1.7 SCOPE OF STUDY	6
1.8 LIMITATIONS OF STUDY	6
1.9 THEORETICAL FRAMEWORK.....	6
1.10.0 Natural Law Theory of Rights	6
1.10.1 Distributive Justice Theory.....	8
1.11 LITERATURE REVIEW	9
1.11.0 Introduction	9
1.11.1 Right to Food	9
1.11.3 Availability of food.....	11
1.11.4 Progressive realization of the right to adequate food.....	12
1.11.5 FOOD SECURITY	13
1.12 RESEARCH METHODOLOGY	17
1.13 CHAPTER BREAKDOWN	17
1.13.0 Chapter one: General Introduction	17
1.13.1 Chapter Two: The right to food under International and Regional Framework"	18
1.13.2 Chapter three: Right to food in Kenya.....	18
1.13.3 Chapter Four: right to food in other jurisdictions	18
1.13.4 Chapter Five: findings, Summary, Conclusion and Recommendations	18

CHAPTER TWO: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK ..19

2.0 INTRODUCTION	19
2.1 RIGHT TO FOOD UNDER INTERNATIONAL AND REGIONAL FRAMEWORK	19
2.2 INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS	21
2.3.1 MINIMUM CORE OBLIGATION	25
2.3.2 ACCESSIBILITY	26
2.3.3 <i>Availability</i>	28
2.3.4 <i>Adequacy</i>	29
2.3.5 <i>Quality</i>	30
2.4 REMEDIES FOR VIOLATION OF THE RIGHT TO FOOD UNDER THE ICESCR	31
2.5 RIGHT TO FOOD IN THE AFRICAN REGION	31
2.6 CONCLUSION	34

CHAPTER THREE: RIGHT TO FOOD IN KENYA35

3.0 INTRODUCTION	35
3.1 HISTORICAL DEVELOPMENT OF THE RIGHT TO FOOD IN KENYA	36
3.2 RIGHT TO FOOD UNDER THE L2010 CONSTITUTION OF KENYA	39
3.2.1 <i>State obligations under the Constitution</i>	42
3.2.2 <i>Progressive Realisation of the Right to Food</i>	45
3.2.3 <i>Minimum core obligation of the right to food under the Constitution</i>	47
3.2.4 <i>Remedies for violation of the right to food under the Constitution</i>	48
3.4 THE NATIONAL FOOD AND NUTRITION SECURITY POLICY 2011	49
3.5 THE FOOD SECURITY BILL, 2014	50
3.6 CONCLUSION	52

CHAPTER FOUR: RIGHT TO FOOD IN OTHER JURISDICTIONS53

4.0 INTRODUCTION	53
4.1 RIGHT TO FOOD IN SOUTH AFRICA	53
4.1.1 <i>Introduction</i>	53
4.1.2 <i>Adjudicating the right to food in South Africa</i>	54
4.2 NORMATIVE CONTENT OF THE RIGHT TO FOOD IN SOUTH AFRICA	55
4.3 REASONABLENESS TEST	56
4.3.1 <i>Components of Reasonableness</i>	57
4.4 LESSONS FOR KENYA FROM SOUTH AFRICA	59
4.5 RIGHT TO FOOD IN INDIA	59
4.5.1 <i>Introduction</i>	59
4.6 ADJUDICATION OF THE RIGHT TO FOOD IN INDIA	60
4.7 LESSONS FOR KENYA FROM INDIA	61
4.8 CONCLUSION	62

CHAPTER FIVE: FINDINGS, SUMMARY, RECOMMENDATIONS AND CONCLUSION64

5.0 INTRODUCTION.....64

5.1 FINDINGS	64
5.2 SUMMARY	65
5.2 CONCLUSION	67
5.3 RECOMMENDATIONS	69
5.3.1 <i>General Recommendations</i>	69
5.3.2 <i>Recommendation for future research</i>	72
REFERENCES BOOKS	73
ARTICLES, JOURNALS AND REPORTS	75

ABSTRACT

Access to adequate and nutritional food is essential in sustaining human life and ensuring that people live a life of dignity.¹ People cannot live without food and they not only need food, but to have access to adequate and nutritious food. The right to food is given adequate protection both nationally and internationally. It is a justiciable right in Kenya pursuant to Articles 23 and 165 of the Constitution. To ensure enjoyment of the right, the state is expected to “protect, respect, promote and fulfil the right to food”.² In pursuit of these duties, the government should ensure all people in Kenya enjoy at the very least the essential levels of the right to food. The right to food requires positive action to be undertaken by the state in order for the right to be actualised. The state should allocate resources and to enact laws that ensure realisation of the right.

However, estimates have it that at least 16 million people in Kenya face the challenge of either lack of food or the food accessible to them does not meet the minimum nutritional standards.³ This caused the president in December 2017 to set out the Big Four Agenda which aims at “increasing manufacturing, achieving universal healthcare, expanding affordable housing and achieving 100 percent food and nutrition security.”⁴ Despite the effort, Kenya has not achieved food security and communities are calling upon the government and other stake holders to aid them with food donations.

This paper examines the duties of states in actualization of the right to food, discusses the normative content of the right and explores the state of the right to food in Kenya. It also analyses how the right to food has been implemented in other jurisdictions and concludes by giving recommendations on how the right to food can be actualised in Kenya.

¹ T Keifer and Roaf, “The Human Right to water and Sanitation: Benefits and limitations” citing *M Mancisidor* (2005).

² Article 21(1) of the Constitution of Kenya.

³ Human Rights Food Workshop report available at <https://ke.boell.org/2015/03/20/16-million-kenyans-face-hunger-who-will-uphold-their-right-food>?Accessed 24 July, 2017.

⁴ The Big Four Agenda , available at <https://kepsa.or.ke/download/highlights-of-the-big-four-agenda-of-h-e-presi> Accessed on 04/08/2018.

LIST OF LEGAL INSTRUMENTS

International Instruments

1. African Charter on Human and Peoples Rights(Banjul Charter) Adopted by the Organisation of African Union on 27th June 1981 and entered into force on 12/10/1986.
2. African Charter on the Rights and Welfare of the Child Adopted by the Organisation of African Union in 1990 and entered into force in 1999.
3. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Adopted and opened for signature On 18 December 1979 and entered into force on 3 September 1981.
4. Convention on the Rights of the Child (CRC) Adopted and opened for signature by General Assembly resolution 44/25 of November 1989. Entered into force in October 1990.
5. International Convention on the Protection and Promotion of the Rights of Persons with Disabilities , 2006.
6. The United Nations General Assembly, International Covenant on Civil and Political Rights (ICCPR) 1966
7. The United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, (ICESCR) 1966.
8. The United Nations General Assembly, Universal Declaration of Human Rights , GA Res 217(III) 1948.
9. The United Nations , United Nations Charter, 1945.

NATIONAL LAWS AND STATUTES

1. Constitution of Kenya, 2010.
2. Plant Protection Act, Cap 324.
3. Public Health Act, Chapter 242 Laws of Kenya.
4. Food, Drugs and Chemical Substances Act, Chapter 254 Laws of Kenya.
5. Public Health Act, Chapter 242 Laws of Kenya.
6. Agriculture Act, Chapter 318 Laws of Kenya.

LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples Rights (Banjul Charter)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CESCR	Committee on Economic, Social and Cultural Rights
FAO	Food and Agricultural Organisation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SCN	United Nations Sub-Committee on Nutrition
UDHR	Universal Declaration of Human Rights
UN	United Nations

LIST OF CASES

1. Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001).
2. Centre for Minority Rights Development & Minority Rights Group International v Kenya on behalf of Endorois Welfare 276/2003 .
3. Chameli Singh v State of Uttar Pradesh (1995)SC.
4. Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others, High Court Petition No. 88 of 2011 (COFEK case) .
5. Francis Coralie v Administrator; Union Territory of Delhi (1981)2 SCR 516.
6. Government of South Africa v Grootboom & others 2001 11 BCLR 1169 (CC).
7. Kabui Mwai and 3 others v Kenya National Examinations Council & Other Petition No. 15 of 2011 [2011]e KLR.
8. Kenya Society for the Mentally Handicapped v Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported).
9. Malawi African Association and others v Mauritania African Commission on Human and Peoples' Rights Comm (2000) AHRLR 149.
10. Mathew Okwanda v Minister of Health and Medical Services and 3 others [2013]e KLR.
11. Mazibuko and others v City of Johannesburg and others (2010)4 SA (CC).
12. Mitu Bell Welfare Society v Attorney General & 2 others, Nairobi Petition No. 164 of 2011 (Unreported) .
13. Mwai and 3 others v Kenya National Examinations Council & Others Petition No. 15 of 2011 [2011]e KLR.
14. People's Union For Civil Liberty v Union of India & others (2001)SC.
15. Social and Economic Rights Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others, High Court Petition No. 88 of 2011 (COFEK case).
16. Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001).

CHAPTER ONE: GENERAL INTRODUCTION

1.0 BACKGROUND OF THE STUDY

Access to adequate food of acceptable quality is fundamental for human survival.⁵ For human beings to live, and live a healthy life, they must have access to adequate and nutritional food. Access to adequate food of suitable quality is “therefore essential in sustaining human life and ensuring that people live a life of dignity.”⁶ Enjoyment of this right guarantees the enjoyment of other rights like the right to life because individuals cannot live without food. It also supports the right the right to education since children and other learners cannot go to school and learn while hungry. With regard to the right to health, adequate and nutritional food guards people against malnutrition and boosts their immunity. It also prevents people from physical and mental impairment caused by lack of access to adequate and safe food. Access to adequate and nutritional food also promotes development of the society in general since a healthy population is sound, empowered and productive.

The right to food is given international, regional and national protection. The right is provided for under Article 25 of the UDHR which stipulates 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. Further, Article 11(1) of the ICESCR states that “every person has the right to an adequate standard of living which includes the right to food.” Article 11 (2) of the ICESCR vests an obligation “on states to take steps to progressively achieve the full realization of the right to adequate food”. Additionally, Article 28 of the International Convention on the Protection and Promotion of the Dignity and Rights of Persons with Disability⁷ provides that, state Parties to the Convention recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of their living conditions

⁵ T Keifer and Roaf, “The Human Right to water and Sanitation: Benefits and limitations” citing *M Mancisidor* (2005).

⁶ *ibid.*

⁷ International Convention on the Protection and Promotion of the right of Persons with Disabilities , 20006.

Article 24 of the Convention on the Rights of the Child⁸ stipulates that, “children have the right to good quality health care, safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy.” The right is also inferred from Article 14(h) of the Convention on the Elimination of All Forms of Discrimination Against Women⁹ which provides that “women have the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...” Regionally the right is encapsulated under Article 14 of the African Charter on the Rights and Welfare of the Child¹⁰ and may be inferred from Article 16 and 24 of the Banjul Charter.¹¹ African Heads of state also made a commitment to allocate at least 10% of the national budgets to agriculture in order to increase food production and alleviate hunger.¹²

Nationally, Chapter Four of the Kenyan Constitution envisages the Bill of Rights which encapsulates various categories of rights including “Civil and Political Rights and Economic, Social and Cultural Rights.”¹³ Article 19(1) of the Constitution provides that “the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.”¹⁴ This engenders the government and its agencies while making laws and policies, to ensure that they conform to the Bill of Rights .

Inclusion of socio-economic Rights under the Constitution manifests the weight accorded to the rights by Kenyans.¹⁵ This is so because being the supreme law in the country which binds all persons and state organs, such inclusion exhibits the high status of the rights and the commitment of Kenyans to actualise the right.¹⁶ The inclusion also gives all Kenyans a legal basis for “seeking enforcement of the right” since the Constitution “provides an authoritative

⁸ Article 24 and 27 of the Convention on the Rights of the Child.

⁹ Articles 12 and 14 of the Convention on the Elimination of all Forms of Discrimination Against Women, 1979.

¹⁰ African Charter on Human and Peoples Rights (Banjul Charter), adopted by the Organisation of African Union in 1990 in Banjul the Gambia and entered into force in 1999.

¹¹ Adopted by members of the Organisation of African Union in Banjul, the Gambia and was opened for signature on 1st June 1981; came into force on 21st October 1986. Available at: <http://www.au.int/en/treaties> Accessed on 10/10/2017.

¹² Maputo Declaration on Agriculture and Food Security in Africa; (Assembly/AU/Decl.7(II)) passed in the Second Ordinary Summit of the African Union in July, 2003. Available at <http://www.nepad.org/caadp/publication/au-2003-maputo-declaration-agriculture-and-food-security>. Accessed on 12/05/19.

¹³ Chapter Four of the Constitution of Kenya (2010), Articles 19-57; H Steiner and others, (eds) The categorisation of human rights : International human rights in context: Law, Politics, morals (2007)269.

¹⁴ Constitution of Kenya, 2010 .

¹⁵ Steiner & Alston, *International human Rights in context: Law, Politics and Morals*(1996) 304.

¹⁶ Article 2 of the Constitution of Kenya.

ground for claiming enjoyment of these rights.”¹⁷ Among the Economic, Social and Cultural Rights provided under the Constitution, is the “right to be free from hunger and to have adequate food of acceptable quality.”¹⁸

Being a socio-economic right, realization of the right to adequate food of acceptable quality requires the Kenyan government to develop policies and enact measures that safeguard the right. Lack of a legal framework has been one of the main reasons why most African states and Kenya in particular, have not actualised this right. The right is positive to the state and the state should allocate resources towards its realization since failure to allocate would deny the citizenry the right; especially those that lack the ability to produce and access the food on their own.¹⁹

Other factors that have exacerbated lack of access to quality and adequate food to Kenyans is “corruption, population growth, rapid urbanization and industrialization, climate variability, poverty, high cost of living, neglect of the agricultural sector and poor eating habits.”²⁰ The Final Report of the Constitution of Kenya Review Commission noted that “social injustices and exclusion were the major factors affecting Kenyans.”²¹ The report further indicates that, “poverty hinders Kenyans from accessing their basic needs like medical care, food and water.”²²

This paper examines the role of the government in actualization of the right to food. The researcher seeks to establish the mechanisms and measures put in place by the Kenyan government to actualize the right to food. In addition, she investigates how the law can be used to actualise the right.

1.1 STATEMENT OF THE PROBLEM

Article 43(1) (c) of the Constitution" provides that, “every person has the right to be free from hunger; and to have adequate food of acceptable quality.” Since the promulgation of the Constitution in 2010, the Kenyan" parliament has not enacted any meaningful framework to give

¹⁷Article 22(1) of the Constitution states that every person has the right to institute court proceedings claiming that his right under the Bill of Rights has been denied, threatened, infringed or violated. Article 21(2) adds that a person may institute such a claim while acting on behalf of another, acting as a member of a particular group, acting in public interest or being an association representing its members.

¹⁸ Article 43(1)(c) of the Constitution of Kenya, 2010.

¹⁹ Steiner & Alston (n3).

²⁰ Owuor&Foeken, “Water Reforms and Interventions in Urban Kenya: Institutional set- up, emerging impact and challenges” [ASC Working Paper 83/2009] pp10.

²¹ The Final Report of the Constitution of Kenya Review Commission (2005) 103.

²² *ibid.*

effect to Article 43(1)(c). This is despite the fact that the right to food "cannot be enjoyed in the absence of proper legislation.

In 2011 the National Food and Nutrition Security Policy was enacted to aid "actualization of the right to food."²³ In 2014, parliament enacted the Food Security Bill²⁴ whose intention was to give effect to Article 43(1) (c), Article 53 (1) (c) and Article 21 of the Constitution.²⁵ However, the Bill was not passed into law and is still pending at the Senate. Absence of legislation causes a lacuna in the Kenyan legal framework in regard to actualization of the right to food and it renders implementation of the right unclear.

The intention of the Constitution in being a tool of social transformation and ensuring everyone's right to be free from hunger and to have adequate food of acceptable quality has not been realised. Estimates have it that "at least 16 million people in Kenya face the challenge of either lack of food or the food accessible by them does not meet the minimum nutritional standards".²⁶ This is evidenced by the fact that despite the constitutional requirements obligating the state to guarantee the "right to be free from hunger and to have adequate food of acceptable quality," majority of Kenyan citizens are still grappling with food insecurity.

1.2 PURPOSE OF THE STUDY

The purpose of this study is to explore the status of the right to food in Kenya. In this regard, the paper examines the normative content of the right to food and the obligations of the Kenyan government in actualization of the right.. It also explores implementation of the right to food by other jurisdictions and offers recommendations for better implementation of the right in Kenya.

²³National Food and Nutrition Security Policy 2011 .

²⁴ Republic of Kenya Gazette supplement, senate 2014, Nairobi. 30th May, 2014- Food Security Bill.

²⁵Article 53 (1) (c) of the Constitution provides that the right of every child to basic nutrition while Article 21(1) stipulates that the state shall respect, protect, promote and observe the Rights and freedoms in the Bill of Rights. Article 21(2) provides that the state shall take legislative, policy and other measures to achieve progressive realisation of the rights under Article 43. Article 21(3) adds that the state shall enact and implement legislation to fulfil its international obligations in respect of human rights.

²⁶Human Rights Food Workshop report available at <https://ke.boell.org/2015/03/20/16-million-kenyans-face-hunger-who-will-uphold-their-right-food>?Accessed 24 November, 2018.

1.3 OBJECTIVES OF THE STUDY

1.3.1 MAIN OBJECTIVE

To critically examine implementation of the "right to be free from hunger and to have adequate food of acceptable quality in Kenya"

1.3.2 SPECIFIC OBJECTIVES

The study will be guided by the following objectives :

1. To evaluate state obligations with regard to the right to food .
2. To examine the normative content of the right to food.
3. To give appropriate recommendations to enhance the right to food in Kenya.

1.4 RESEARCH QUESTIONS

1. What obligations does Kenya have in the realization of the right to food?
2. What is the normative content of the right to food ?
3. How can the law be used to actualize the right to food in Kenya?

1.5 HYPOTHESIS OF THE STUDY

1.5.1 NULL HYPOTHESIS

Kenya lacks a legal framework to actualize the right to adequate food of acceptable quality .

1.5.2 ALTERNATIVE HYPOTHESIS

The legal framework in Kenya is sufficient to actualise the right to food in the country.

1.6 SIGNIFICANCE OF THE STUDY

Food insecurity has been one of the greatest challenges facing a majority of Kenyans.²⁷ Food insecurity challenges facing the country require proper and implementable legal framework and policy guidelines. This study aims to assist in the understanding of the role of the state in actualization of the right to food and it also explains the normative content of the right. The study also offers recommendations that may be adopted by the government to realise the right to adequate food of acceptable quality in the country. The study is also important in the academic

²⁷Human Rights Food Workshop report available at <https://ke.boell.org/2015/03/20/16-million-kenyans-face-hunger-who-will-uphold-their-right-food>?Accessed 24 November, 2018.

field because it offers an in-depth understanding of the right to be free from hunger, and to have adequate food of acceptable quality. Consequently, the study may be used by scholars and researchers to develop new areas of research with reference to the right to food.

1.7 SCOPE OF STUDY

This study focuses on the status of the right to food in Kenya with reference to the normative content of the right to food. It also explores the role of the government in actualization of the right. The researcher will use primary and secondary sources of data which will be reviewed to shed light on the status of the right to food in the Country. The researcher also examines how the right to food has been implemented in India and South Africa in order to draw better practices for Kenya in actualization of the right.

1.8 LIMITATIONS OF STUDY

1. The time within which this study should be conducted is inadequate.
2. The researcher does not have sufficient resources to cater for the cost to be incurred in conducting the research.

1.9 THEORETICAL FRAMEWORK

In order to develop an in depth understanding of the right to adequate food of acceptable quality, the researcher discusses the Natural Law theory, and the theory of distributive justice since the two theories safeguard the right to food. The theories will also help the researcher to get answers to the research questions and meet the objectives of the study.

1.10.0 NATURAL LAW THEORY OF RIGHTS

Natural law theory of rights is a legal theory which posits that law originates from a supreme being and is known by man through reason. Naturalists hold that “the peoples moral which constitutes of practices, values and norms which the people consider right, good, just or appropriate inform the peoples laws.”²⁸ According to them, “morality distinguishes between right and wrong, acceptable and un-acceptable behavior, and valid and invalid practices and ultimately legal and illegal behavior.”²⁹ They hold that law derives its validity from morality thus only moral and just laws are valid while immoral or unjust laws is invalid and should not be

²⁸ Ibid.

²⁹ Aquinas Thomas et al, “ Law, Morality, and Politics” (Hackett Publishing 2003).

obeyed by subjects.³⁰ Consequently “people obey laws because it they inhere in them, they are moral and just; all human beings by virtue of being reasonable have the ability to know the law and abide by it.”³¹

According to natural lawyers, peoples morals and laws are grounded on their reasonable practices.³² These are the practices that they engage in because they are reasonable beings. Natural lawyers hold that human rights are God given and belong to every person who is human. According to them, “they are basic human goods which should be equally enjoyed by all human beings”.³³ Being a creation of nature, human rights are neither created nor granted by an earthly entity like the state or the government. This makes these entities lack the ability to take away the rights.

Nussbaum argues that since every individual is born with his or her rights, the role of the government in relation to the rights is to safeguard them from violation.³⁴ Omony holds a similar opinion by observing that the relationship between states and human rights is akin to that of a beneficiary and trustee; a superior being who grants human rights, being the settler, the state being the trustee with the duty to hold the rights in trust for the people and the people being beneficiaries. The state should therefore protect and enforce the rights but it lacks the ability to deny or prevent individuals from enjoying them since as a trustee it did not vest them on the people.³⁵ This argument presents the duty that states have to respect and protect human rights against violation by non-state actors.

From the Natural Law perspective, the right to food inheres in every human being and should be enjoyed by all human beings. It is Godly, moral, good, right and appropriate for everyone to have access to adequate and nutritional food. To quote the Bible, before God created man, he ensured there was food for him.³⁶ It is immoral, wrong and unacceptable for people to lack access

³⁰ *ibid.*

³¹ *ibid.*

³² Kant Immanuel, "The Moral Law, trans"(HJ Paton, London: Hutchinson 1948).

³³ John Finnis, "Natural Law and Natural Rights" 2nd edn (Oxford University Press).

³⁴ Nussbaum M "Hiding from Humanity: Disgust, Shame, And The Law" (Princeton University Press 2009)9.

³⁵ Omony John Paul, "Key Issues in Jurisprudence"(2005)1st edition : referring to natural law propositions as argued by Aquinas and Cicero

³⁶ Genesis Chapter 1: 29 states that when God created man he said to him, "See, I have given you every herb that yields seed which is on the face of all the earth, and every tree whose fruit yields seed; to you it shall be for food. Also, to every beast of the earth, to every bird of the air, and to everything that creeps on the earth, in which there is life, I have given every green herb for food."

to food. Since they cannot survive without food they should be empowered to not only access food but have food that meets their dietary needs. There should be no discrimination in the enjoyment of the right since no person can survive without food. Since the right is God given and not granted by the state, the state's role in relation to the right is an obligation to put in place measures that promote and protect enjoyment of the right. Also, the state should not engage in any acts that violate, deny or threaten the right to food.

1.10.1 DISTRIBUTIVE JUSTICE THEORY

Distributive justice relates to the equitable distribution of benefits and obligations among all individuals in all aspects of social life .

This entails distribution of basic goods like education, shelter, food, health care, and water in an equitable manner among all individuals.³⁷To guarantee equity, this theory also advocates for “laws, measures and policies that guarantee equitable distribution of resources.”³⁸ This ensures substantive equality among all people because it addresses all forms of injustices suffered by any individual including the marginalised.³⁹

For instance, developing a policy on minimum wage ensures all employees are paid a salary equal to, or above the stipulated minimum remuneration. This guarantees every employee's right to reasonable wage with which they get the ability to access adequate and nutritional food. Affirmative action⁴⁰ policies on the other hand, protect the vulnerable in society by taking deliberate measures to ensure they access food directly especially through government aid. John Rawls argues that justice cannot be realized if resources are not distributed to all individuals in an equitable manner; paying tribute to every individual's needs.⁴¹This requires the government to enact policies and measures under which all benefits are equally distributed save where an unequal distribution would benefit the least privileged.

In relation to the right to adequate and nutritious food, this theory obligates the government to put in place measures, policies and programmes that enhance realisation of the right to food by

³⁷Aristotle, the Nicomachean, Book 5.

³⁸James Konow, 'Distributive Justice' <<http://myweb.lmu.edu/jkonow/Distributive%20Justice.pdf>> accessed on 27 November 2018.

³⁹ ibid.

⁴⁰ Affirmative action is by definition a preferential treatment for disadvantaged groups of people whose intention is to lift the group to the level of other groups.

⁴¹John Rawls, *Political Liberalism* (Columbia University Press, 1993) 223-227.

everyone. It requires initiation of special programmes to address lack of adequate and nutritional food by members of marginalised communities and the vulnerable members of society such as women, persons with disability, children, the youth and the elderly. All people must be given the opportunity to access adequate and healthy food without discrimination while those who cannot access the food on their own, the government should create policies that ensure they access it. Further, where individuals' right to food is violated, this theory requires courts as the enforcement body for human rights to grant appropriate remedies to the victims.

1.11 LITERATURE REVIEW

1.11.0 INTRODUCTION

This section reviews literature written by different scholars on the right to food. It considers the concept of the right to food as addressed by different writers globally as well as in the Kenyan context. It also reviews strategies discussed by writers in enhancing food security and the contemporary issues affecting the right to food including availability of food and progressive realisation of the right.

1.11.1 RIGHT TO FOOD

The Constitution of Kenya recognizes the “right to be free from hunger, and to have adequate food of acceptable quality.”⁴² Food in Kenya is therefore a human rights issue by virtue of national and international legislation and protection. For individuals to enjoy this right, food should be available and accessible to them whenever they want it and without discrimination. Beeckman, holds that, human rights like the right to water are grounded on human needs which are fundamental for survival.⁴³ He further posits that, “protection of such human rights ensures everybody in the society including the needy and the vulnerable secure basic living standards.”⁴⁴ Consequently, states are required to put in place mechanisms that enhance satisfaction of everyone's basic needs.

Writing in the perspective of interdependence of human rights Beeckman notes that, “since human rights are interdependent individuals should enjoy all rights at the same time.” According to him, all rights are equally important and a person cannot therefore enjoy one set of rights

⁴² Article 43(1)(c) of the Constitution .

⁴³ Beeckman K, “Millenium development goals and human rights: Interdependent commitments. In Monitoring implementation of the right to water: A framework for developing countries.”(2015) Global Issue Paper No. 14 Heinrich Böll Foundation. Berlin, Germany: 1-36

⁴⁴ *ibid.*

while the others are denied or infringed or threatened.⁴⁵ According to him, “if an individual lacks access to clean and safe water or adequate and healthy food, the person cannot neither enjoy the right to life nor the right to dignity.”⁴⁶ For instance, an individual cannot enjoy the right to life, right to dignity or the right to food if he does not have access to adequate clean and safe water to drink, bathe, cook, or even farm with and if he survives his life would be incomplete.

SCN notes that since the right to adequate food is one of the human rights protected in the Universal Declaration of Human Rights (UDHR), it is given international protection and it should be enjoyed by all people in the world.⁴⁷ The United Nations Committee on Economic, Social and Cultural Rights (CESCR) observes that the “state as the duty bearer should ensure that everyone has an opportunity to access adequate food”.⁴⁸ In this regard, the ECSCR provides that the states obligations towards the right to food include “the obligation to respect, to protect and to fulfil the right to food.”⁴⁹ These duties engender the state not to interfere with peoples enjoyment of the right, prevent interference of the right by non state actors and provide food to those who cannot access it privately.

Currie postulates that, “for individuals to enjoy human rights, the state has the primary duty to perform certain obligations while the individual, his society, family and private entities have secondary liability.”⁵⁰ These obligations are, “to avoid depriving, to protect from deprivation and to aid the deprived.”⁵¹ These obligations require the government not to interfere with peoples enjoyment of the right to food, to protect the right from violation by non state actors and to provide food to the vulnerable who cannot enjoy the right on their own. SCN reasoning is that when people are unable to access adequate food of quality standards on their own, the state has an obligation to offer assistance.

Further, SCN argues that, “the state has an obligation of empowering people who are food insecure with mechanisms and measures that will enable them enjoy food security.”⁵² However

⁴⁵ Beeckman K(note 43 above).

⁴⁶ibid.

⁴⁷ SCN, Closing the gap on the right to adequate food: Voluntary Guidelines(2015)SCN NEWS, .

⁴⁸ ibid.

⁴⁹ UNCESCR, General Comment No. 12.

⁵⁰Currie Ian & John De Waal, “Socio-economic Rights: Bill of Rights Handbook” Juta, Cape Town(2005) (5th ed) p 567.

⁵¹ ibid.

⁵² SCN 2005.

some scholars have critiqued the aspect of obligating the state to provide food as a cause for overreliance by people on the state in matters that they should take care of.⁵³ On the issue of direct food provision by the government, Engler opines that it should only arise in circumstances beyond citizens like famine, hunger and other calamities.”⁵⁴ In respect to this argument, the primary responsibility of accessing food lies with an individual while the state’s responsibility is collateral and it should only arise when it is impossible for a person to access food by him or herself.

1.11.3 AVAILABILITY OF FOOD

Wakibi, Gichuhi & Kabira argue that the core of realizing the right to food is “ensuring that citizens have both the means and factors of production.”⁵⁵ According to them all people should always have physical and, or economic access to adequate and nutritious food.⁵⁶ This means that individuals cannot feed themselves if they lack finances to facilitate food production or procurement and land on which to produce the food. In the same vein, Musembi & Scott postulate that, “the right to food can be realized by resolving issues of deprivation and ensuring that citizens claims are honoured.”⁵⁷ They hold that, “land rights and access to land issues must be addressed to realize the right to food because people lack access to food due to denial of land rights.” They give examples of women in Africa who lack the ability to provide for their families because they have no land ownership.

According to Kabubo et al, “one of the challenges threatening realization of the right to adequate food is land grabbing in the country which denies poor people their main source of livelihood.”⁵⁸ According to Musembi & Scotts, “the right to food is realized when everyone despite his/her social status is able to either produce food or procure it from those that have; whenever they need it.”⁵⁹ This implies that for a person to enjoy the right to food, he or she should have access to

⁵³Jonson 2003.

⁵⁴Engler S, Okitoi J,&Sommer B, *Climate Change, Drought, and Famine in Kenya: A Socio-Ecological Analysis*(Working Paper NR 1/2015).

⁵⁵Wakibi S, Gichuhi W,&KabiraW, (2015) *Food Security Score for Kenya*. African Women's Studies Center.

⁵⁶Wakibi, Gichuhi&Kabira(n.56).

⁵⁷Musembi C & Scott-Villiers P ‘The Constitution Lies To Us: Securing Accountability for the Right to Food in Kenya’(2014).

⁵⁸ Kabubo-Mariara J, Mwabu G, &Kimuyu P, “Farm productivity and poverty in Kenya: the effect of soil conservation “. *Journal of Food, Agriculture and Environment* (2006)(2): 291-297

⁵⁹Musembi Celestine& Scott-Villiers, “Food Riots and Food Rights: The Moral and Political Economy of Accountability for Hunger in Kenya” (2015).

land and, or the means of production or he should have the economic ability to purchase the food.

The argument advanced by these scholars, that an individual cannot enjoy the right to food if he or she does not own land fails to appreciate the fact that there are individuals who have huge pieces of land but are not able to produce food for themselves. The inability may be as a result of ignorance, inadequate rainfall, emphasis on crops that do not thrive in their area and financial incapacity to farm and maintain the crops. Hence, though land is the main factor of production and equity in land would give more Kenyans the ability to produce and access food, establishment of a legal framework to implement Article 43(1)(c) of the Constitution would best actualise the right to nutritional food for all Kenyans.⁶⁰ The legal framework would not only focus on food production but also provide guidance on food imports and exports, food quality, storage, distribution and market for farm produce.

1.11.4 PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD

Right to food is one of the social economic rights that are protected by law both nationally and internationally. According to Alston, in regard to General Comment No. 3 of the ECSCR “the right to food is supposed to be realized progressively.”⁶¹ Sepulveda,⁶² holds that progressive realization of the right to food obligates the state to take deliberate, concrete, adequately financed, feasible, practical and timely measures to actualize the right.” He adds that, the state must not take any retrogressive measure since such measures would impede realization of the right. This means that the state must take steps towards actualization of the right.

Beeckman holds that “progressive realization of the right to adequate food does not mean gradual realisation but doing things progressively with an aim of eradicating food insecurity and hunger.”⁶³ He adds that “the state has a duty to put in place measures and programmes that not only ensure progressive realisation of the right to food but equip people to access adequate and quality food by themselves.”⁶⁴ This means that the right to food cannot be realized if individuals are not empowered to access the food on their own. Musembi & Scott posit that, “lack of meaningful income to support peoples livelihood exposes people to food insecurity

⁶⁰ Article 60 of the Constitution provides for equitable, efficient, productive and sustainable use of land.

⁶¹ Alston, “International Law and The Human Right To Food,” in P. Alston and K. Tomasevski (eds): *The Right to Food- The Hague*(1984) MartinusNijhoff.

⁶² M Sepulveda (n 34 above).

⁶³ Beeckman (n 44 above).

⁶⁴ *ibid.*

especially during periods of crisis and it forces them to adapt to poor feeding patterns in order to survive.”⁶⁵

Musembi & Scott do not support the principle of progressive realisation of the right to food and hold that “since the right is fundamental for human survival, it cannot be carried forward and be enjoyed at a future date.”⁶⁶ Thus according to them the right to food should be realized immediately since people cannot live without food. They further argue that, “a state is supposed to take necessary action to mitigate and alleviate hunger and famine.” In this, Bellows adds that “individuals cannot live without accessing adequate and nutritious food.”⁶⁷

However, Musembi and Scott do not appreciate the fact both internationally and nationally, the law advocates for progressive realisation of the right to food. The right is positive to the state and it requires resource allocation for its actualization hence instant enjoyment of the right may be curtailed by inadequacy of resources. Additionally the obligation of states with regard to this right is secondary hence it would be unfair to hold the state primarily responsible for the right. The state should be allowed to start putting up reasonable measures, programmes and policies by with an objective of ultimate enjoyment of the right to food by everyone.

1.11.5 FOOD SECURITY

Food insecurity is one of the main challenges affecting Africa as a continent, a majority of developing countries and Kenya in particular.⁶⁸ Food security has been defined by FAO as a situation “where...all people, at all times have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.”⁶⁹ SCN reports that “the right to adequate food in the context of food security achieved a major step in 2004 through adoption of Voluntary Guidelines by FAO on progressive realisation of obligations.”⁷⁰

⁶⁵ Musembi (n 57).

⁶⁶ Musembi & Scott-Villiers(n 57 above).

⁶⁷ Bellows A, Lemke S, Jenderedjian A & Scherbaum V , “Violence as an Under-Recognized Barrier to Women’s Realization of Their Right to Adequate Food and Nutrition: Case Studies From Georgia and South Africa. *Violence against women*” (2015)21(10), 1194-1217.

⁶⁸ Riches (ed) ‘First World Hunger: Food Security and Welfare Politics’ (2016)Springer.

⁶⁹ FAO, Declaration of the World Summit on food security. World Summit on food security,(2009)16-18 November, Rome, Italy.

⁷⁰SCN 2005.

Ladimer postulates that “food security is the moral access by all people at all times to ready, available, nutritional, adequate and safe food and an assured ability to acquire acceptable food in moral ways.”⁷¹ This means that the means by which people acquire food should be dignified and the food should not be acquired whenever an individual needs it⁷² Musembi & Scott add that, “food security in Kenya can only be realized when every Kenyan is able to access food.”⁷³

According to Bellows “food security cannot be realized if women are not included in food production.”⁷⁴ She holds that women must be centrally included in policy discussions about food in order to build a society that is food secure.⁷⁵ In support of her assertion, Bellows holds that “a woman is respected only if she provides food for her family.”⁷⁶ To protect the land rights of the Kenyan woman, the government must, for instance, ensure that the provisions of the Matrimonial Property Act are complied with and that women are protected from discriminatory cultural practices.

Right to have food has also been discussed by holding that the right is realized when people have regular, permanent and unrestricted access to quantitatively and qualitatively adequate and sufficient food.⁷⁷ The food must also be acceptable to the traditions, social and cultural perspectives of the people in question. Giving an account of Canada and Argentina, Damaan claims that government policies have affected some people since the government enacted food policies with total disregard of their culture.⁷⁸ Damaan further argues that “the approach on policies and programmes adopted by the governments to increase food production was infringing on indigenous peoples’ way of life by interfering with their livelihoods and territories.”⁷⁹ Similarly these government programmes undermined the economic system, values and solidarity networks of the indigenous people.⁸⁰

⁷¹ Ladimer Kathy Public Health Nutrition, vol 5 (6A), pp 859-864.

⁷² Note 74 above.

⁷³ Musembi (n 57).

⁷⁴ Bellows A, Lemke S, Jenderedjian A, & Scherbaum V, “Violence as an Under-Recognized Barrier to Women’s Realization of Their Right to Adequate Food and Nutrition: Case Studies From Georgia and South Africa.” *Violence against women*, (2015)10, 1194-1217.

⁷⁵ *ibid.*

⁷⁶ Note 74 above.

⁷⁷ Damman Siri, Wenche Barth Eide & Harriet V Kuhnlein. Indigenous peoples’ nutrition transition in a right to food perspective. *Food Policy* 33.2 (2008): 135-155.

⁷⁸ *ibid.*

⁷⁹ Note 77 above.

⁸⁰ *ibid.*

Damaan however fails to explore the role of courts in protecting indigenous peoples' right to food and examining whether the policies adopted by the government are reasonable.

Some writers have also attributed other factors beyond government programmes as determinant. For example, Engler claims that, "climatic changes and global warming have really affected food security in Kenya and the larger parts of the horn of Africa."⁸¹ He identifies "technical inadequacies like seed and fertilizer quality, high input costs and lack of capital, poor research investments in livestock and crop production and unstable production systems as some of the challenges leading to food insecurity in the country."⁸²

Nyoro criticizes the Kenyan policies on food as being "inadequate and not cognizant of the contemporary challenges facing the country."⁸³ According to Nyoro, "the Kenya's local level food security policies have evolved through Sessional Paper No. 4 of 1981 through to Sessional Paper No. 2 of 1994 and finally to the Food Security and Nutrition policy of 2011."⁸⁴ Nyoro argues that, "adoption of a comprehensive food policy development, investment in increased crop and animal production can help alleviate food insecurity in the country." He further suggests that "the state needs to develop climate change mitigation strategies, to improve access to affordable seeds, fertilizers and farm inputs for farmers."⁸⁵

Unfortunately his work does not provide a detailed solution on how all these will be achieved. He also fails to give guidelines on the strategies to be adopted in actualising right to food so as to produce a good and effective framework. This argument is supported by Musembi & Scott who noted the gap and recommended moral and political accountability on hunger.

According to Damaan Siri, "food should be culturally and socially acceptable".⁸⁶ Nevertheless, Alemu et al opine that majority of people are not ready to embrace new items in their diet, a factor that exacerbates inadequacy of food.⁸⁷ SCN holds that, "right to adequate food can be

⁸¹ *ibid.*

⁸² Nyoro James (n. 83 above).

⁸³ Nyoro James, "Agriculture and rural growth in Kenya." *DFID Kenya commissioned study, Tegemeo Institute, Egerton University* (2002).

⁸⁴ *ibid.*

⁸⁵ Note 83 above.

⁸⁶ Damaan (n. 62 above).

⁸⁷ Alemu M and others, "Consumer acceptance and willingness to pay for edible insects as food in Kenya: the case of white winged termites." IFRO Working Paper 2015/10. Department of Food and Resource Economics (IFRO), University of Copenhagen.

realized through measures and mechanisms that enable every man, woman and child alone or in community with others are able to afford adequate and nutritious food.”⁸⁸

Quite a number of citizens are unable to afford adequate and nutritious food due to vulnerability.⁸⁹ “They are poor, unemployed, expectant and unhealthy and are worse hit by impacts of acute crises of climatic changes and food prices.”⁹⁰ Amartya Sen argues that the law is instrumental in enforcement of development.⁹¹ According to Sen, though states have recognized the right to food as a human right, majority of them have not actualised it.⁹² Sen posits that “economic and social security cannot be realized without actualization of socio-economic rights.”⁹³ He holds that “in times of major economic disasters like famine people agitate for their right to food more which prompts the government to intervene but it only gives a temporary solution which is withdrawn once public outcry fades.”

The literature reviewed in this section lacks clarity on specific strategies that may be adopted in Kenya in regard to realisation of the right to food. The studies do not provide a detailed account on why the measures and strategies that have been adopted by the Kenya have not solved the challenge of food security in the country. Sen fails to address how courts may be used to implement and actualize the right to food. For instance, though the right to food is not justiciable in India, the Indian Supreme Court has decided cases on violation of the right. In so doing, the court has laid down a precedent under which the right to food has been realized for Indian citizens.

Additionally, his work has a gap in that it does not consider deficiencies in policies adopted by the government and strategies adopted in alleviating poverty as a contributor to food insecurity. There also exists a gap in relation to restructuring and development of programmes that are culturally and socially acceptable. Further, the literature neither recommends the reasonableness test as advanced by the South African court in *Government of South Africa v Grootboom &*

⁸⁸ SCN, “Closing the gap on the right to adequate food.” Voluntary Guidelines (2005)30: 5-66.

⁸⁹ Rojas M, & Guardiola J, “Hunger and the Experience of Being Well: Absolute and Relative Concerns”. *World Development*, (2017)78-86 .

⁹⁰ Kimani-Murage et al, “Vulnerability to food insecurity in urban slums: experiences from Nairobi, Kenya.” *Journal of Urban Health*, (2014)6, 1098-1113.

⁹¹ Amartya Sen (n 36 above).

⁹² Amartya Sen, “Poverty and Famines: An Essay on entitlement and deprivation” (1981) Oxford: Oxford University Press.

⁹³ *ibid.*

*other*⁹⁴ case nor the minimum core content approach as proposed by the ECSCR in examining government policies and programmes.

This study addresses the research gap by offering appropriate strategies that may be adopted for the realization of the right to food. This will in turn offer sustainable solutions and demands that are appropriate in an era of global changes and emerging issues in food security. Having noted these gaps in the literature, this study addresses them by formulating appropriate recommendations in addressing the right to be free from hunger and to have adequate food of acceptable quality.

1.12 RESEARCH METHODOLOGY

This study is based on desk review of research. It relies on both primary and secondary sources of data. This approach was used because it gives an in depth understanding of the right to food as espoused by the law and different scholars. The researcher also studies and analyses how the right to food has been actualised in other jurisdictions. The researcher examines how South Africa and India have implemented the right to food.. South Africa has been selected because before the Constitution of Kenya 2010 was passed, the Constitution of South Africa was the most elaborate on socio economic rights in Africa.

India has been selected due to its judicial enforcement of the right to food. Whereas the right is not justiciable pursuant to Article 37 of the Constitution of India, the Indian Supreme court has linked the right to food to the right to life, right to vote, freedom of movement and right to own property among other enforceable rights; successfully enforcing the right to food.

The researcher will establish better practices that Kenya can learn from the two jurisdictions to actualize the right to food. Data gathered from practices in the two countries will help the researcher in making her conclusion and giving recommendations.

1.13 CHAPTER BREAKDOWN

1.13.0 CHAPTER ONE: GENERAL INTRODUCTION

This chapter provides a general discussion about the right to adequate food of acceptable quality and how the situation is in Kenya. It also gives the general understanding of the concept of food security and theoretical framework explaining the right.

⁹⁴ Grootboom & others (2000)11BCLR 1169(CC); (2001) 1SA 46(CC) .

1.13.1 CHAPTER TWO: THE RIGHT TO FOOD UNDER INTERNATIONAL AND REGIONAL FRAMEWORK"

This chapter discusses the international and regional legal framework on the right to be free from hunger and have adequate food of acceptable quality. The chapter commences by looking at the international instruments and standards providing for the right and the theoretical approaches applied on the right. It also examines the right to food within the African context.

1.13.2 CHAPTER THREE: RIGHT TO FOOD IN KENYA

This chapter examines the legal, policy and institutional framework on the right to food in Kenya. It discusses existing policies on the right as well as any Bills drafted by parliament and their fate. It also critiques the policy and administrative steps taken by the Kenyan government in relation to the right and the challenges of implementation of the right".

1.13.3 CHAPTER FOUR: RIGHT TO FOOD IN OTHER JURISDICTIONS

This chapter discusses how the right to food has been implemented in other jurisdictions. The researcher examines the status of the right to food in South Africa and India. The researcher will examine the decision of the South African Constitutional court in *Government of South Africa v Grootboom & others* and its impact in the realisation of the right to food.⁹⁵ In India the researcher will explore judicial enforcement of the right to food despite of the fact that the right is not justiciable pursuant to Article 37 of the Constitution of India. The researcher will establish better practices that Kenya can learn from the two jurisdictions to actualize the right to food.

1.13.4 CHAPTER FIVE: FINDINGS, SUMMARY, CONCLUSION AND RECOMMENDATIONS

This chapter presents the research findings, gives a summary of the study and the researchers conclusion. It also offers recommendations on the necessary steps to be adopted in order to realize food security in the country.

⁹⁵Grootboom (n.95 above).

CHAPTER TWO: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

2.0 INTRODUCTION

This chapter discusses the international and regional legal framework on the “right to be free from hunger and have adequate food of acceptable quality.” The chapter commences by looking at the international instruments and standards providing for the right and the theoretical approaches applied on the right. It concentrates on the International Covenant on Economic, Social and Cultural Rights,⁹⁶ it being the basic instrument in providing for the right to food under international law. The chapter also examines the right as provided in other international instruments and encompasses the legal provisions and protection of the right within the African context.

2.1 RIGHT TO FOOD UNDER INTERNATIONAL AND REGIONAL FRAMEWORK

The Committee on Economic, Social and Cultural Rights observes in Paragraph 5 of General Comment No. 12 notes that “more than 840 million people in the world, a majority being from developing countries, are chronically hungry and are suffering from famine despite commitments made by the international community to ensure full respect of the right to food.”⁹⁶ There is, therefore, a Universal demand to eradicate poverty and hunger and have people accessing quality and nutritional food in order for them to live a dignified life. One of the pledges made by Heads of State and Government as enshrined in United Nations Millennium Development Goals (MDG) is “to halve, by the year 2015, the proportion of the world’s poor and of people who suffer from hunger...”⁹⁷ However, although this goal ought to have been realized more than halve of the people in the world are still struggling with food insecurity.

Article 25 of the UDHR states 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.” Though just a declaration and not a binding instrument, the UDHR has been recognized as the normative foundation of international laws which provide for human rights. The Declaration led to the adoption of the ICCPR⁹⁸ and the ICESCR⁹⁹ which are binding and

⁹⁶Paragraph 5 of General Comment No. 12 of the UN Committee on Economic, Social and Cultural Rights, available <http://www2.ohchr.org/english/bodies/cesscr/comments.html> 12 May 1999. (accessed on 10th July 2018).

⁹⁷ The United Nations Millennium Declaration, signed in September 2000, Millennium Development Goal NO 1, available at http://www.who.int/topics/millennium_development_goals/.html accessed on 10th July 2018.

⁹⁸International Covenant on Civil and Political Rights, adopted by the UN General Assembly in Resolution 2200A(XXI) of 16/12/1966 and entered into force on 3/01/76.

under which the right to food is encapsulated. Consequently the right to food is provided for under Article 11 of the ICESCR which will be explored further in the next topic.

In the same vein, the right is enshrined under Article 24 of the Convention on the Rights of the Child which stipulates that, “children have the right to good quality health care, safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy.”¹⁰⁰ In addition, the article calls upon developed countries to give aid to countries that struggle in the realization of these rights in order for them to actualize the rights. Article 27 adds that, “children have a right to a standard of living which meets their physical and mental needs.”¹⁰¹ The Article further calls upon the government to help parents and, or guardians in ensuring their children enjoy the right.

Musembi & Scott hold that states have “a minimum core obligation in ensuring that citizens enjoy the right to food right”.¹⁰² They further argue that, “a state is supposed to take necessary action to mitigate and alleviate hunger and famine.”¹⁰³ Article 28 of the International Convention on the Protection and Promotion of the Dignity and Rights of Persons with Disability also states that, “state Parties to the Convention recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of their living conditions.”¹⁰⁴

The right is also inferred from Article 14(h) of the Convention on the Elimination of All Forms of Discrimination Against Women which provides that, “women have the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...”¹⁰⁵ People cannot enjoy adequate living standards if they are experiencing hunger. Lack of food would also make the women not enjoy their right to dignity since as observed by Bellows, a woman feels important and complete when she is able to feed her family.¹⁰⁶

⁹⁹ International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly in Resolution 2200A(XXI) of 16/12/1966 and entered into force on 3/01/76.

¹⁰⁰ Article 24 and 27 of the Convention on the Rights of the Child.

¹⁰¹ Ibid.

¹⁰² Musembi Celestine & Scott-Villiers, (n 6 above)

¹⁰³ Ibid.

¹⁰⁴ International Convention on the Protection and Promotion of the right of Persons with Disabilities, 2006.

¹⁰⁵ Articles 12 and 14 of the Convention on the Elimination of all Forms of Discrimination Against Women, 1979.

¹⁰⁶ Bellows A, et al (n 59 above).

At the African region, the right is protected by the African Charter on Human and Peoples Rights (Banjul Charter)¹⁰⁷ and the African Charter on the Rights and Welfare of the Child.¹⁰⁸ Additionally, African states made a commitment, “to enhance investment finance to agriculture; by allocating at least 10% of public expenditure to agriculture, and to ensure its efficiency and effectiveness.”¹⁰⁹ They also committed to “end hunger in Africa by the year 2025.”¹¹⁰ Provisions of the ICESCR will be discussed further before delving into the regional framework on the right to food.

2.2 INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

Article 11(1) and (2) of the ICESCR states that, “every person has the right to an adequate standard of living for himself and his family which includes the right to adequate food.” The Committee on Economic, Social and Cultural Rights has interpreted and expounded on the right to food in General Comment 12.¹¹¹ Pursuant to paragraph 4 of General Comment No.12 the Committee observes that, “the right to food inheres in every person and like other human rights it is indivisible and cannot therefore be separated from other human rights.” The right to food requires protection by the state for individuals to enjoy other human rights and fundamental freedoms like the right to dignity, right to life, right to vote, freedom of movement, right to health and the right to education among other rights.

An individual’s right to life is threatened by the individual’s inability to meet his dietary needs as he will be exposed to disease and eventually loss of life. On the same vein, a person cannot live in dignity if he lacks the ability to feed himself and those who depend on him while one cannot learn and or take part in voting while hungry. The Committee on Social and Economic Rights opines that the right to adequate food is directly connected to everyone’s right to dignity; and people cannot live a dignified life if they do not enjoy the right to food. In addition, the right cannot be separated from social justice and other human rights.¹¹² The

¹⁰⁷ Adopted by the Organisation of African Union on 27th June 1981 and entered into force on 12/10/1986.

¹⁰⁸ Adopted by the Organisation of African Union in 1990 and entered into force in 1999.

¹⁰⁹ Section 2(1) of the Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods made in June 2014 at the African Union Summit in Malabo, Equatorial Guinea. Available at https://www.resakss.org/sites/default/files/Malabo%20Declaration%20on%20Agriculture%202014_11%2026-.pdf; Accessed on 15/05/2019.

¹¹⁰ *ibid*, Section 3.

¹¹¹ General Comment No. 12 of the UN Committee on Economic, Social and Cultural Rights, available <http://www.ohchr.org/english/bodies/cesscr/comments.html> 12 May 1999. (accessed on 10th July 2018)

¹¹² Para 4 of General Comment No. 12.

committee also notes that the right to food is only realized when “all people and at all times have access to food both physically and economically or they have the means of procuring such food.”¹¹³

Apart from being available at all times, the food must also be sufficient in terms of quality and quantity. In Paragraph 5 the committee notes that “the fundamental problem facing the right to food is not really the ‘lack of food’ but ‘lack of access to food’ for everyone.” This means that although food is available, not every individual has the ability to access it whenever they need it. According to Wakibi, Gichuhi & Kabiru, right to adequate food and of nutritious quality is realized when, “all people have physical and economic access at all times to adequate food or means of acquiring it.”¹¹⁴ Right to food has also been discussed by holding that the “right is realized when people have regular, permanent and unrestricted access to quantitatively and qualitatively adequate and sufficient food.”¹¹⁵ This means that people should always be able to freely access adequate and quality food.

Paragraph 6 of General comment 12 explains that, “states have a minimum core obligation to ensure that all persons within their jurisdiction enjoy the essential elements of the right to food.”¹¹⁶ The minimum core obligation of the right to food is further explained by the committee in Paragraph 8 of General Comment No 12. In the paragraph the ECSCR notes that the “minimum core content of the right to food is access to adequate and quality food which meets the dietary needs of the people.”¹¹⁷ States are therefore expected to take all necessary steps to ensure at the very least all persons access food of a sufficient quantity and quality in a sustainable manner and other human rights like the right to health and right to life are not compromised due to non enjoyment of the right to food. The state must apply resources within its disposal to realize the right immediately and where immediate realization is not possible, it must be seen to be taking steps aimed at progressive realization of the right.¹¹⁸

In addition, the food should be nutritionally adequate and safe and thus it should be balanced to help people develop both physically and mentally. The food should also cater for the dietary

¹¹³ *ibid.*

¹¹⁴ Wakibi et al (n 56 above).

¹¹⁵ Damaan Siri, Wenche Barth Eide & Harriet V Kuhnle "Indigenous peoples' nutrition transition in a right to food perspective" *Food Policy* (2008) 135-155 .

¹¹⁶ UNCESCR, General Comment No 3, para 10.

¹¹⁷ Para 8 of General Comment No. 12.

¹¹⁸ UNCESCR, General Comment No 3 para 10.

needs of special groups like babies, children, expectant women, the elderly, nursing mothers and people with unique health conditions. It should also not be harmful, should be safe and should be acceptable by the customs and practices of the people concerned. For instance people who profess Islam should not be provided with pork as food since though food their faith prohibits them from having such food.

In paragraph 7, the CESCR examines the necessary conditions for enjoyment of the right to food. These include, “availability, adequacy, access and quality.” The Committee notes that adequacy denotes food security or the aspect of people being able to access food that meets their dietary needs and they cannot therefore suffer from hunger. It also encompasses sustainability which is the aspect of enjoying the right to food presently and ensuring food security for future generations is not compromised.

Availability of food is examined under paragraph 12 which states that availability allows a person be able to feed himself directly or be able to procure food from other producers in a manner that is not discriminatory. For individuals to be able to procure food, they must have the capacity to produce it while being able to procure it from others meaning that they are economically empowered to purchase food from those who produce it. The producers have a duty to ensure the food reaches everyone who needs it without discrimination on any ground. Pursuant to paragraph 13, the Committee observes that availability includes both economic and physical availability. Where people are lack economic access, the government should put in place mechanisms to empower them and or directly provide them with food.

2.3 OBLIGATIONS IMPOSED BY THE “RIGHT TO FOOD UNDER” INTERNATIONAL LAW

Article 2 of the ICESCR vests an obligation on “states to take steps to progressively achieve the full realization of the right to adequate food.”¹¹⁹ Henry Shue opines that effective enjoyment of human rights vests upon states both positive and negative obligations.¹²⁰ The essence of these obligations is to guide states in knowing their paramount duties whose performance guarantees enjoyment of human rights. According to the Committee on Economic Social and Cultural Rights, states have three obligations in the actualization and enjoyment of human

¹¹⁹ International Covenant on Economic, Social and Cultural Rights, 1966.

¹²⁰ S LiebendBerg, “Socio-economic Rights: Adjudication under a transformative Constitution” (2010)83.

rights; “obligation to respect, to protect and the obligation to fulfill”.¹²¹ Under the obligation to respect states are required not to interfere with the peoples rights either directly or through their agencies; hence allowing people to fully enjoy their right.

Under this obligation, the state and all its institutions and or agencies should not do anything which interferes with the peoples’ enjoyment of the right to food. In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (SERAC case)*¹²² case the African Commission on Human and Peoples Rights observed that, “the state’s duty to respect obligates the state to respect right holders, their rights, freedoms and their individually or communally owned resources with which they satisfy their human needs”. In the matter the African Commission on Human and Peoples Rights noted that, “by destroying food sources through its security forces and state oil company the and using its security forces to suppress the Ogoni people against campaigns for violation of their rights, the Nigerian government had violated its duty to respect the peoples’ right to food”.

Duty to protect requires states to ensure that the right is not violated by other non state actors thus a state must put in place policies, measures and mechanisms that deter and punish any such violation of the right by a third party. Under this duty the state must ensure that any non state actor who is in control of food does not do anything that violates the right to food and remedies are awarded to victims of any such violation. For instance in the case of a manufacturer or a private food producer, the government must ensure that the food is safe for human consumption, is handled in a hygienic and safe manner and is of an acceptable quality.

Additionally, the “government has a duty to ensure food is made available indiscriminately to all people at a reasonable price.”¹²³ In case of a violation by a third party, the government should provide access to a legal remedy to the aggrieved parties. In the Ogoni Case, the African Commission found that,

“the military Government of Nigeria had also violated its obligation to protect the right to food, as it did not prevent the oil companies from depositing oil and waste products that led to the contamination of

¹²¹Henry Shue, “Basic Rights, Subsistence, affluence and U.S foreign Policy” (1980) Committee on Economic, Social and Cultural Rights; General Comment No 15.

¹²²SERAC case(2001) AHRLR .

¹²³ General Comment 12 of the Committee on Economic , Social and Cultural Rights.

water for farming and fishing, the destruction of crops and the death of farm animals; factors which resulted in malnutrition amongst the Ogoni.”

The obligation to promote and to fulfill require states to facilitate, provide, enhance, create awareness and “put in place deliberate and concrete measures to the maximum of its available resources to guarantee the realization of the right to food.”¹²⁴ States are obligated to empower individuals through informational and educational programmes with the objective of creating awareness of the right¹²⁵. It should offer education and training as well as farm inputs to enhance food production. In addition it should purchase food stuff from farmers at a reasonable price and release to the people at an affordable price in times when food is not readily available or when production is poor due to natural calamities. In cases where people are unable provide for themselves, the state has a duty to provide them with food under the duty to fulfill which also encompasses the duty to provide.¹²⁶

2.3.1 MINIMUM CORE OBLIGATION

The minimum core content in relation to socio-economic rights was developed by the ECSCR as the threshold for determining the very least enjoyment of socio-economic rights that a state must ensure. Article 2 of the ICESCR calls upon states to “use their maximum available resources to ensure enjoyment of socio-economic rights”. In General Comment No 3, the ECSCR stipulates that states have a “minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of socio-economic rights”.¹²⁷

Every state has an obligation to ensure everyone’s enjoyment of socio-economic rights does not fall below the ‘minimum core content’ and that the minimum core content of a right is not interfered with. The minimum core content constitutes the normative content of a basic right without which the individuals in question can neither survive nor live a dignified life. In *SERAC case*¹²⁸ the African Commission on Human Rights observed that the “minimum core obligation on the Nigerian government was an obligation not at the very least to destroy the Ogoni peoples’ food sources.” This means that even if the Nigerian government was not to give food directly to the Ogoni people, it should not, at the minimum, interfere with their food sources

¹²⁴ Committee on Economic, Social and Cultural Rights General Comment No. 3 of 2002 para 10.

¹²⁵ General Comment 12 para 25.

¹²⁶ *ibid.*

¹²⁷ UN ECSCR, General Comment No. 3

¹²⁸ *SERAC Case* (n 122 above).

since such interference would deprive off the people their right to have food that they have invested in its production.

To establish whether a state has applied its maximum available resources to meet the core content of a socio-economic right, the CESCR uses indicators to “compare how different states at the same development level have allocated resources for actualization of the right and how much expenditure has been allocated by the government on realization of socio-economic rights vis a vis amount allocated to other projects”.¹²⁹ The Committee also considers whether non enjoyment of the right was due to breach of the minimum core content of the right; the country’s prevailing economic status, existence of other serious claims on the State party’s limited resources; for example caused by a recent natural disaster or from recent internal or international armed conflict.¹³⁰ It also considers whether the State party had sought to identify low-cost options and aid from the international community.¹³¹

Paragraph 6 of General comment 12 explains that “states have a minimum core obligation to ensure that all persons within their jurisdiction enjoy the essential elements of the right to food”.¹³² The minimum core obligation of the right to food is further explained by the ECSCR in Paragraph 8 of General Comment No 12 where the ECSCR notes that “the minimum core content of the right to food entails access to available, adequate and quality food which meets the dietary needs of the people.”¹³³ This means that all states have an obligation to ensure the people within their jurisdiction have access to available, adequate and quality food without discrimination which is the normative content of the right to food.

2.3.2 ACCESSIBILITY

Access to adequate food of acceptable quality is “indispensable owing to the fact that it is fundamental in sustaining human life and ensuring that people live a life of dignity.”¹³⁴ It also

¹²⁹Committee On Economic, Social And Cultural Rights Thirty-Eighth Session 30 April – 18 May 2007 An Evaluation of the Obligation To Take Steps To The “Maximum Of Available Resources” Under An Optional Protocol to the Covenant Statement.

¹²⁹ibid.

¹³⁰ibid.

¹³¹ibid.

¹³² Developed by the UN Committee on Economic, Social and Cultural Rights in General Comment No 3, para 10.

¹³³ Para 8 of General Comment No. 12.

¹³⁴ UN ECSCR, Paragraph 4 of General Comment No. 3 .

ensures that people live a healthy life which guarantees and promotes other fundamental rights. For instance, the right to food supports the right to life, right to dignity, right to education and the right to development among other fundamental rights and freedoms. This is so because a person who manages to access adequate and food of acceptable quality has a healthy life and is in a position to work and earn a living. It also prevents people from physical and mental impairment caused by lack of access to adequate, nutritional and safe food.

According to Wakibi et al, “the right to adequate, nutritious and quality food is realized when all people have physical and economic access at all times to adequate food or means of acquiring it.”¹³⁵ Damaan Siri adds “that, the right to food is realized when people have regular, permanent and unrestricted access to quantitatively and qualitatively adequate food which is also acceptable to the traditions and culture.”¹³⁶ According to the ECSCR, “accessibility of food encompasses economic and physical access.” Economic access means that every person has economic ability to produce or procure adequate and nutritional food. Physical accessibility means that all persons whether old, young, physically challenged or ill have the ability to access food.¹³⁷

The government must therefore put in place measures and mechanisms to enable every man, woman and child alone or in community with others access adequate food and nutritious food and in cases of .¹³⁸ It should ensure through special programmes that any disadvantaged group, people living in areas that are disaster prone as well as victims of natural disasters are aided in order for them to access nutritional food at all times.¹³⁹ Affordability is therefore an aspect of accessibility since if food is not affordable by all people then it cannot be said to be accessible. To ensure affordability, governments should empower small scale farmers by giving them subsidized farm inputs, training and market for their produce. They also should develop infrastructure to reduce the cost of transportation of farm produce from farmers to the market.

Paragraph 13 of the General Comment provides that “the costs incurred in acquiring food should not be too high that it compromises the acquisition of other basic needs.” Quite a number

¹³⁵Wakibi (n 56 above).

¹³⁶ Damman Siri and others(n 62 above).

¹³⁷ UN ECSCR, Paragraph 13 of General Comment No. 12.

¹³⁸ SCN (2005) Closing the gap on the right to adequate food. Voluntary Guidelines.SCN NEWS, 30: 5-66.

¹³⁹ Supra n. 28.

of citizens are unable to afford adequate and nutritious food as they are vulnerable.¹⁴⁰ They are poor, unemployed, expectant and unhealthy and are worse hit by impacts of acute crises of climatic changes and food prices.¹⁴¹ Musembi & Scott hold that, “lack of sufficient and reliable income makes people lack support for their livelihood and forces them to adapt to poor feeding patterns in order to survive.”¹⁴² High food prices also make access to food discriminatory since the poor, the unemployed and the landless lack regular, permanent and unrestricted access to quantitatively and qualitatively adequate and sufficient food.¹⁴³

Being a socio-economic right, the “realization of the right to adequate food of acceptable quality requires states to employ and or allocate resources.”¹⁴⁴ The right is positive to the state and if the state does not allocate resources towards its realization, the citizenry is not guaranteed to enjoy the right; especially those that lack the ability to produce and access food on their own. Discrimination in access to food negates the aspect of accessibility since not all persons are able to access the food. At times, the food that is accessible to them is not acceptable by their customs hence as much as they may want it, their beliefs and customs refrain them from having it.

2.3.3 AVAILABILITY

Paragraph 7 of the General Comments includes available as a basic component in the enjoyment of the right to food. Pursuant to paragraph 8, availability of food refers to accessibility of adequate, culturally acceptable and quality food which meets the dietary needs of individuals. Paragraph 12 stipulates that availability of food requires food supply be enough, regular and permanent to ensure all individuals may either produce the food and make it available to themselves or they may get the food from other producers at all times and without being discriminated against.

Wakibi, Gichuhi & Kabira argue that, “the core of realizing right to food is ensuring that citizens have both the means and factors of production.”¹⁴⁵ This means that for people to have the ability

¹⁴⁰ Rojas M, & Guardiola J,(2017) “Hunger and the Experience of Being Well: Absolute and Relative Concerns.” *World Development* 96, 78-86.

¹⁴¹ Kimani-Murage et al “Vulnerability to food insecurity in urban slums: experiences from Nairobi, Kenya”(2014) *Journal of Urban Health*, 91(6), 1098-1113.

¹⁴² Musembi & Scotts (n 6 above).

¹⁴³ Damaan (n 62 above).

¹⁴⁴ UNCESCR General Comment No 3.

¹⁴⁵ Wakibi (n 56).

of having food they should be allowed to own and make use of the factors of production without discrimination and interference. Musembi & Scott postulate that “the right to food can be realized by resolving issues of deprivation and ensuring that citizens’ claims are honoured.”¹⁴⁶ For example, land rights and access to land as the main factor of production must be addressed. Women must be allowed to own land and have title documents proving ownership to ensure that they have the means of producing food for themselves and their families.

According to Kabubo et al, “one of the challenges threatening realization of the right to adequate food is land grabbing in the country as it denies poor people their main source of livelihood.”¹⁴⁷ This makes victims of land grabbing not be able to produce food and due to poverty, they are not able to purchase food from other producers. Every individual must therefore be empowered and protected by the government against non state actors who make it impossible for them to produce and or procure food.

2.3.4 ADEQUACY

Paragraph 8 of General Comment No. 8 stipulates “that the right to food requires quality food to be available in a quantity that meets the dietary needs of the people. Food available for access by the people should be sufficient enough to ensure that the people are not underfed and or suffer from malnutrition due to food insecurity. Food security has been defined by FAO as a situation where “... all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.”¹⁴⁸

Ladimer also postulates that “food security is realized where everyone is able to access food that is sufficient enough to enable them live an active and healthy life.”¹⁴⁹ She explains that this includes ready availability of nutritionally adequate and safe food and an assured ability to acquire acceptable food in socially acceptable ways.. She goes further to give an example

¹⁴⁶ Musembi & Scott-Villiers (n 57 above).

¹⁴⁷ Kabubo-Mariara and others “Farm productivity and poverty in Kenya: the effect of soil conservation in Kenya (2015) *Journal of Food, Agriculture and Environment*, 4(2): 291-297

¹⁴⁸ FAO (2009) “Declaration of the World Summit on food security: World summit on food security (2009) 16-18 November, Rome, Italy.”

¹⁴⁹ Ladimer Kathy *Public Health Nutrition*, vol. 5 (6A), pp 859-864.

that “people should not acquire it as emergency food supplies, through scavenging or using means like stealing.”¹⁵⁰

Adequacy of food is therefore an essential requirement in the enjoyment of the right to food since it enables individuals to access quality food whenever they need it. According to the Committee in paragraph 7 of the General Comment Adequacy includes sustainability. The Committee states that “sustainability cannot be divorced from food security whose implication is having food for current and future generations.”¹⁵¹ This means that the manner in which an existing generation procures food, should not affect the ability of future generations to have food. Sustainability entails availability and accessibility of food not only in the present day but also for future generations.

This requires the means through which food is produced and procured not to be injurious to future generations. Policies, measures and mechanisms adopted by the government to promote the right should not only cater for prevailing food insecurity but also take care of availability of adequate and nutritional food in the long term.

2.3.5 QUALITY

Pursuant to Paragraph 8 of General Comment No. 12 the right to food requires quality food to be available in a quantity that meets the dietary needs of the people. Sufficiency of food alone cannot be said to ensure the right to food thus for individuals to enjoy the right, they should access quality food. This means that the food should meet the dietary needs of the individuals, be safe and should not be contaminated. According to paragraph 9 of the General Comment, food that meets the dietary needs of individuals should contain all nutrients that ensure an individual’s physical and mental development, maintenance, and growth. The food should also cater for the individual’s physiological needs at all stages of his life. Paragraph 10 of the General Comment adds that the food should be Free from adverse substances.

The state as well as private actors involved in production and handling food have a duty to ensure the food is not contaminated through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain. Further, the state has a duty to put in place mechanisms and policies which ensure food safety as well as

¹⁵⁰ *ibid.*

¹⁵¹ UN ECSCR, Paragraph 7 of General Comment No. 12.

legislation to criminalise and punish food adulteration The government should also educate and or provide adequate information on the nutritional value of different foods.

2.4 REMEDIES FOR VIOLATION OF THE RIGHT TO FOOD UNDER THE ICESCR

Paragraph 33 of General Comment No. 12 states that any person whose right to food is violated has a right to access effective judicial and quasi-judicial remedies at both national and international law. The paragraph calls upon the judicial arm in a state and its officers to effectively adjudicate cases on violation of the right and ensure they are awarded adequate reparation. Reparation may be in the form of compensation, restitution, satisfaction or issuing an injunction order to restrain the violation of the right. The judicial arm in governments has a duty to establish and ensure the state performs its obligations in relation to the right to adequate and nutritious food.

2.5 RIGHT TO FOOD IN THE AFRICAN REGION

The central document of the African Regional system on human rights is the African Charter on Human and People's rights also known as the Banjul Charter.¹⁵² The Charter borrows largely from other international human rights instruments but it has a "unique reflection on African values of respect, social justice and cultural practices."¹⁵³ The supervisory body of the African Charter is the African Commission constituted in 1987. Unlike other regional human rights instruments, the charter combines both socio-economic and cultural rights together with civil and political rights in the same text.¹⁵⁴ It also contains rights as well as the duties of individuals.¹⁵⁵

However, The Charter does not expressly provide for the right to food. The right may be inferred from Articles 4 which provides for the "right to life", Article 16 which stipulates that "every individual has the right to enjoy the best attainable state of physical and mental health" and Article 22 which provides for the "right to economic, social and cultural development." A

¹⁵²Adopted by members of the Organisation of African Union in Banjul, the Gambia; opened for signature in 1981 and came into force in 1986.

¹⁵³ M Mutua, "The Banjul Charter and the African fingerprint: An evaluation of the language of duties" (1995). Cited in the Preamble of the Banjul Charter, para 5.

¹⁵⁴ Dinah Shelton, "Decision Regarding Communication 155/96" American Journal of International Law 937, (2002).

¹⁵⁵Para 7 of the Banjul Charter under which the African Member states took into consideration that the enjoyment of rights and freedom also implies the performance of duties on the part of everyone;

person cannot enjoy the right to the best attainable mental and physical health if he/she is not able to have adequate and quality food. Lack of adequate and quality food compromises the right to health because it exposes an individual to malnutrition, low immunity and disease and ultimately compromises an individual's right to life.

Further, Article 24 of the Convention provides that, "every person has the right to a general and satisfactory environment favourable for development." With reference to this Article, an individual cannot develop himself if he lacks the ability to access adequate food of an acceptable quality. In 2003, African states passed a resolution to allocate at least 10% of their national budgets to Agriculture and to achieve at least 6% of annual agricultural growth.¹⁵⁶ This move was intended to increase agricultural productivity in the continent and consequently reduce poverty, hunger and starvation for the African people.

In *SERAC VS Nigeria*¹⁵⁷ a matter was filed by the Social and economic Action Centre on behalf of the Ogoni people of Nigeria at the African Commission on Human and Peoples Rights. In the action, it was alleged that the Nigerian National Petroleum Company (NNPC), in a consortium with Shell Petroleum Development Corporation (SPDC), committed, condoned and facilitated acts which caused environmental degradation and health problems to the Ogoni people due to contamination of the environment. It was further alleged that the Nigerian government and Shell Petroleum Development Corporation had committed of irresponsible oil exploitation due to disposal of toxics to the environment and waterways. Nigerian security forces were also said to have attacked Ogoni village due to a campaign against the government and Shell Petroleum Development Corporation in order to stop the villagers from continuing with the campaigns. It was further argued that the consortium had failed and or neglected to maintain its facilities causing oil spills in the village which contaminated water sources, soil, air and had health effects on the villagers.

The African Commission found inter alia that Nigeria had,

"failed to perform its obligations of protecting, respecting and fulfilling the socio-economic rights of the Ogoni villagers. It observed that the manner in which the government's had treated Ogonis violated all

¹⁵⁶ Maputo Declaration Resolution Assembly/AU/ Declaration 7(ii), passed in the Second Ordinary Assembly of the African Union in July 2003.

¹⁵⁷ SERAC case (n 122 above).

three minimum duties of the right to food. The government had destroyed food sources through its security forces and state oil company; had allowed private oil companies to destroy food sources; and, through terror, had created significant obstacles to Ogoni people in feeding themselves. The Nigerian government had failed to perform its national and international human rights obligations of respecting and protecting the right to food and had therefore violated the right to food of the Ogonis. It further observed that the minimum core obligation of the right to food required the Nigerian government not at the very least to contaminate food sources nor allow private entities commit such destruction. The Commission noted that the right to food cannot be separated from the right to dignity and is fundamental to the enjoyment of such rights like the right to health, education, life and work.”

This case illustrates that despite the fact the right to food is not expressly provided for under the Banjul Charter, it is justiciable and protected under it.

In *Malawi African Association and ors vs. Mauritania*¹⁵⁸ It was alleged, among other things, that black Mauritians were enslaved, regularly evicted and or displaced from their lands, which were then confiscated by the government together with their livestock. It was also alleged that black Mauritians were denied access to employment, were subjected to tedious and unremunerated work and were arbitrarily arrested. While in detention they were denied quality and adequate food jeopardizing their right to health. The African Commission on Human and Peoples Rights observed that, “by failing to provide quality and adequate food to prisoners causing their health to deteriorate, Mauritius had violated their right to health and right to food.”

Right to food is expressly provided under the African Charter on the Welfare and Rights of the Child.¹⁵⁹ Article 14 of the Charter provides that, “Parties to the Charter shall undertake to pursue the full implementation of the right to health and in particular take measures to...ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care, to ensure the provision of adequate nutrition and safe drinking water and to among other things combat disease and malnutrition within the framework of primary health care through the application of appropriate technology.”

¹⁵⁸ MALAWI AFRICAN ASSOCIATION AND OTHERS V. MAURITANIA, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS COMM (2000) AHRLR 149.

¹⁵⁹ African Charter on the Welfare and Rights of the Child.

In addition, Article 27(1) stipulates that, “every child has the right to an adequate standard of living.” This right encapsulates the right to food since a child cannot have an adequate standard of living if he or she does not have access to adequate and nutritional food. In the same vein, Article 28 of the Disability Convention calls upon states to “ensure persons with disability together with their families have an adequate standard of living.”

2.6 CONCLUSION

Right to food is given adequate recognition and protection under international law. The law clearly defines the right and through the Committee on International Covenant on Economic, Social and Cultural Rights, it has interpreted and elaborated the “normative content of the right.”¹⁶⁰ This entails availability, access, adequacy and quality. The law also encapsulates the obligations of states in realization of the right to food. These obligations include the duty to respect, duty to protect and the duty to fulfill the right. States have a minimum core obligation upon which they are expected to apply their “maximum available resources to ensure the satisfaction of, at the very least, the minimum essential levels of the right to food by all individuals.”¹⁶¹ They should also put in place special programmes to actualise the right of food for the vulnerable members of society. International law has also set precedents on judicial protection of the right to food as well as remedies that have been awarded in cases where the right has been violated.

¹⁶⁰UN ECSCR, General Comment No 12.

¹⁶¹ UNECSCR, General Comment No. 3.

CHAPTER THREE: RIGHT TO FOOD IN KENYA

3.0 INTRODUCTION

Food in Kenya is now a human rights issue by virtue of national and international law¹⁶² provisions. Article 43 (1)(c) of the Kenyan Constitution¹⁶³ here-in-after referred to as the Constitution, provides that “every person has the right to be free from hunger; and to have adequate food of acceptable quality.” Inclusion of the right under the constitution makes the right a justiciable human right since Article 23(1) as read together with Article 165 of the Constitution stipulates that, “the High Court has the jurisdiction to hear and determine applications for redress of denial, violation, threat or infringement of a human right or fundamental freedom in the Bill of Rights.”

In *Consumer Confederation of Kenya (COFEK) v Attorney General & 4 Others*¹⁶⁴ the case challenged “failure of the relevant governmental agencies to take the necessary fiscal, regulator, good governance and other necessary steps to control, stabilise or reduce high fuel prices, which increased the cost of subsistence goods and services, and violated the right to be free from hunger as enshrined in Article 43 of the Constitution.” In its determination, court affirmed its jurisdiction to adjudicate economic and social rights by stating that inclusion of the rights in the Bill of Rights, and vesting of jurisdiction in the High Court under Articles 165 and Article 23 to determine violation of the rights, was a clear indication of the intention by Kenyans to ensure social transformation through protection of the rights by the court.

Despite inclusion of the right under the Constitution, Kenyans are still struggling with hunger and famine. The Final Report of the Constitution of Kenya Review Commission noted that, “Kenyans were majorly affected by issues of social justice and exclusion”.¹⁶⁵ The report indicates that “poor Kenyans do not have access to basic needs like education, medical care, housing, access to food and access to water.”¹⁶⁶ Estimates have it that at least 16 million people in

¹⁶² Article 25 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’. Further, Article 11 of the ICESCR states that ‘every person has the right to an adequate standard of living for himself and his family which includes the right to adequate food’.

¹⁶³ Constitution of Kenya, Promulgated in August 2010.

¹⁶⁴ Consumer Confederation of Kenya (COFEK case) High Court Petition No. 88 of 2011.

¹⁶⁵ The Final Report of the Constitution of Kenya Review Commission (2005)103.

¹⁶⁶ *ibid.*

Kenya face the challenge of either lack of food or the food accessible by them does not meet the minimum nutritional standards.¹⁶⁷

This Chapter examines the national legal framework on the right to food. It will also discuss the policies, mechanisms and other measures put in place by the government to actualize the right to food in Kenya.

3.1 HISTORICAL DEVELOPMENT OF THE RIGHT TO FOOD IN KENYA

The 1963 Independence Constitution of Kenya did not provide for socio-economic rights and specifically the right to food. However, the Kenyan Government has over the years developed a number of policy measures with the objective of reducing poverty and improving food security in the country. The first Paper to be made was Sessional paper no 10 of 1965 on African Socialism and its application to planning in Kenya. The paper emphasized on “eradication of poverty, disease and ignorance”. It argues that economic development of the people would guarantee food security consequently ensuring a healthy nation. According to the paper, Kenyans required information to guide them on ways of eradicating poverty, disease as well as ignorance.

In 1981, the National food policy¹⁶⁸ was developed with the objective of “maintaining self-sufficiency in major foodstuffs and ensuring equitable distribution of food of nutritional value to all citizens.” This was developed in order to encourage Kenyans to produce staple foodstuff like maize, wheat and rice in large quantities and to ensure that once produced there was no discrimination in distribution of the food. According to this policy paper, once the staple food was adequately produced a majority of Kenyans would feed themselves while the rest would acquire the food from them.

Another Food Policy, the National Food Policy¹⁶⁹ was developed after the 1991-94 drought “to promote a market driven approach to food security”. The paper encouraged production of drought resistant crops like millet and sorghum and having them available to markets so that any Kenyan would access them from.

¹⁶⁷ Human Rights Food Workshop report available at <https://ke.boell.org/2015/03/20/16-million-kenyans-face-hunger-who-will-uphold-their-right-food>? Accessed 24 July, 2017.

¹⁶⁸ Sessional paper no. 4 of 1981.

¹⁶⁹ Sessional paper No.2 of 1994.

In 2002 the Kenya Rural Development Strategy¹⁷⁰ was made with “a long-term framework outlining strategies for the improvement of rural Kenya over the next 15 years.” It emphasized on “food security as the initial step towards poverty reduction and rural development which would consequently promote food production.” It also advocated that rural Kenyans be trained in agriculture in order to increase their ability to produce foodstuff and improve their income.

In 2003, “the Economic Recovery Strategy (ERS) for Wealth and Employment Creation”¹⁷¹ which considered “agriculture and livestock as the main drivers of rural economic development” was developed. It sought to “reduce the cost of food production by lowering the cost of farm inputs, making credit available to farmers and expanding irrigation schemes to increase productivity.”¹⁷² This strategy was also meant to transform the agricultural sector into a commercially viable sector by opening up markets for farmers.

Between 2004-2014, the Strategy for Revitalising Agriculture¹⁷³ whose primary objective was to “provide a framework to increase agricultural productivity, to promote investment and encourage private sector involvement in agriculture” was enacted. Kenya Vision 2030¹⁷⁴ was also launched in 2007 to “consolidate the economic recovery momentum gained from implementation of the ERS”. The blue print identifies agriculture as the key mover of raising Kenya’s GDP to 100%. It also recommends for devolved funds targeting communities with high rates of poverty, unemployed youth, women and all vulnerable groups and investments in arid and semi-arid districts. Further, it acknowledges the 8 Millennium Development Goals which include eradication of extreme poverty and hunger and it notes that Kenya will have realized the MDGs by 2015.¹⁷⁵

In 2010 Kenya promulgated a new Constitution under which an “Equilisation fund” that is intended “to be used for provision of basic services including water, roads and health services to

¹⁷⁰ Kenya Rural Development Strategy (KRDS) 2002-2017.

¹⁷¹ The Economic Recovery Strategy (ERS) for wealth and employment creation, 2003 -2007.

¹⁷² *ibid*,

¹⁷³ Strategy for Revitalising Agriculture (SRA 2004-2014).

¹⁷⁴ Kenya Vision 2030 available at <http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf> . Accessed on 20th October 2018.

¹⁷⁵ United Nations Millennium Development Goals, Available at <https://www.who.int/topics/millennium-development-goals/about/en/>. Accessed on 04/05/2019.

marginalized areas” was established.¹⁷⁶The Constitution also provides for the right to food expressly under Article 43(1)(c).¹⁷⁷ This provision necessitated enactment of the National Food and Nutritional Policy to give effect to the 2010 Constitutional provisions on the right to food.

The 1963 independence Constitution of Kenya did not provide for socio-economic rights. In clamour for a new Constitution that would reflect the peoples’ needs, the Bomas Draft Constitution¹⁷⁸ was enacted and adopted by the National Constitutional Conference. It provided for socio-economic rights under Chapter Six while the right to food was expressly provided for under Article 64. However, the Draft did not see the light of the day and this led to the adoption of another Draft in 2005, the ‘Wako’ Draft.¹⁷⁹The Wako Draft retained the socio-economic rights envisaged under the Bomas Draft with Article 64 of the Draft stating that, every person has the right to be free from hunger and to have adequate food of acceptable quality. The Wako Draft was subjected to a referendum in 2005 but it failed.

Need for a new Constitution was still on and with the abortion of the two Drafts, a Committee of Experts on Constitutional Review was established and tasked to come up with an acceptable form of a Constitution that reflected the needs of the Kenyan people. The committee was set up under implementation of the Constitution of Kenya Review Act.¹⁸⁰ which was enacted after the 2007 post election violence. The Committee came up with a Harmonised Draft¹⁸¹ that was presented to the Parliamentary Select Committee which collapsed all socio economic rights under the Harmonized Draft into one Article, Article 43.

The Draft was subjected to a referendum and was voted for overwhelmingly in August 2010 giving Kenya a new Constitution with justiciable socio-economic rights.

¹⁷⁶ Article 204 (1)(2) of the Constitution.

¹⁷⁷ Article 43(1)(c) of the Constitution of Kenya, 2010.

¹⁷⁸ 2004 National Constitutional Conference, the Draft Constitution of Kenya. Available at www.katibainstitute.org/Archives/index.php/2005-referendum/the-Bomas-draft accessed on 30th July 2018.

¹⁷⁹ 2005 National Constitutional Conference, the Draft Constitution of Kenya. Available at www.katibainstitute.org/Archives/index.php/2005-referendum/the-wako-draft accessed on 30th July 2018.

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¹⁸¹ Harmonised Draft Constitution of Kenya, 2009. Available at www.katibainstitute.org/Archives/index.php/coe-process/about-the-coe-process. Accessed on 30th July 2018.

3.2 RIGHT TO FOOD UNDER THE L2010 CONSTITUTION OF KENYA

Chapter four of the Constitution¹⁸² provides for fundamental rights and freedoms of individuals. Article 43 provides for socio-economic rights with Article 43(1)(c) expressly providing for the "right to food". The Article stipulates that, "every person has the right to be free from hunger; and to have adequate food of acceptable quality." The normative content of the right to food under the Constitution is as explained by the ECSCR in Paragraph 8 of General Comment No. 12. This constitutes "access to available, adequate and quality food that meets the dietary needs of the people." Article 43(1)(c) provides that "the right to food belongs to every person adding that the food should be adequate and nutritional."

Apart from providing for the right to food for all people generally, the Constitution recognizes that the right should also be enjoyed by special groups of people like children, persons with disability and the elderly. Article 53 of the Constitution provides that, "every child has the right to basic nutrition, shelter and health care." Article 54(1) adds that "persons with disability should be treated with dignity....Article 57 provides that, "older people have the right to dignity and to receive reasonable care from their family and the government." Further, Article 43(1)(a) states that "every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care."

Owing to interdependence of human rights, the right to food cannot be separated from the right to health since an individual's health would be jeopardised by non enjoyment of the right to quality and adequate food. In *Mitu-Bell Welfare Society v Attorney General & 2 others*,¹⁸³ the High Court affirmed the importance of the concept of interdependence, indivisibility and interrelatedness of rights.

It pointed paragraph 5 of the Vienna Declaration and Programme of Action, to defeat the argument of the Respondents that, "as third generation rights, economic and social rights were not justiciable."

In finding violation of the right to life, non-discrimination, equal protection and benefit of the law, the right to human dignity and right to personal security as per Articles 26-29 of

¹⁸² Constitution of Kenya, Promulgated in August 2010.

¹⁸³ *Mitu-Bell* Nairobi Petition No. 164 of 2011(unreported).

the Constitution, the Court affirmed that realisation of these rights was not possible without actualisation of the economic and social rights entrenched in Article 43 of the Constitution. To further emphasise the interrelatedness of rights, Court noted that failure by the state to ensure that citizens have access to the rights guaranteed by Article 43 directly impacts on the ability of citizens to enjoy all the other rights set out in the Constitution.

Article 19(1) of the Constitution states that “the Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies”. This provision is fundamental in the actualization of the right to food among other rights provided under the Constitution since no policy whether social, economic or political can be made in a manner that jeopardizes the rights under the Constitution. Article 19(2) stipulates that “the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities, to promote social justice and the realisation of the potential of all human beings”. With reference to the right to food, individuals cannot live a dignified life if they do not have the ability to feed themselves and their families if they only have access to inadequate and food of low quality. According to T Keifer, “access to adequate food of acceptable quality cannot be dispensed with since it is fundamental in sustaining human life and ensuring that people live a life of dignity.”¹⁸⁴

According to Beeckman, “denying an individual one right like the right to food and water affects the individual’s dignity”.¹⁸⁵ By this, states are required to take measures to create opportunities to obtain satisfaction of the basic needs. According to Beeckman, “human rights like right to water are grounded on human needs that are important for existence.”¹⁸⁶ He further holds that, “human rights guarantee a mechanism for those who are needy and vulnerable in the society to secure basic living standards.”¹⁸⁷ In *Kabui Mwai and 3 others v Kenya National Examinations Council & Other*¹⁸⁸ the High Court stated that, “realisation of socio-economic rights means the realization of conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic needs....”

Article 19(3) provides that “the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State and are subject only to the limitations

¹⁸⁴ T Keifer and Roaf, “The Human Right to water and Sanitation: benefits and limitations in M Mancisidor (2005).

¹⁸⁵ Beeckman 2005.

¹⁸⁶ Ibid.

¹⁸⁷ Supra n. 174.

¹⁸⁸ *Kabui Mwai*, Petition No. 15 of 2011 [2011]eKLR.

contemplated in this Constitution”. This implies that that the Kenyan Constitution acknowledges the inherent, universal and natural characteristics of human rights and specifically the right to food upon which the right inheres in every person. Additionally, the right is God given and it cannot be taken away by any earthly entity including the state. Every person despite his social status should enjoy the right and the state has an obligation to ensure that no person is discriminated against in the enjoyment of the right.

Pursuant to Article 20(1) of the Constitution, “the Bill of Rights applies to all law and binds all State organs and all persons.” This enjoins the state and its agencies to respect, protect, promote and fulfill the right to food. It also means that no law can be legislated in contravention with the right to food and every person including other individuals and private entities must respect the right. Article 20(2) of the Article provides that “every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.” The Kenyan government has an obligation to ensure every individual enjoys the right to food to the greatest extent.

The state has a duty to empower individuals to enjoy the right and to provide food to those who lack the ability to access it on their own. Article 23 (1) provides that, “every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” The claim maybe instituted by a person acting in their own interest; a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.

The Constitution vests an obligation upon Kenyan courts to hear and determine cases of violation of the right to food. Where the government alleges that the violation was caused by lack or inadequacy of resources, Article 20(5) provides that, “in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall bear in mind that it is the responsibility of the State to show that the resources are not available.” It should also consider whether in allocating resources, the State prioritised the widest possible enjoyment of the right with respect to prevailing circumstances, including the vulnerability of particular groups or individuals.

3.2.1 STATE OBLIGATIONS UNDER THE CONSTITUTION

Article 21(1) of the Constitution provides that “the state and every state organ has a fundamental duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.” While General Comment No 15 advances a three typology of state obligations in the actualization of the right to food; them being, “obligation to respect, to protect and to fulfill,”¹⁸⁹the Kenyan Constitution provides for five obligations which include the “obligation to respect, obligation to protect, obligation to promote, the obligation to fulfill and the obligation to observe.”¹⁹⁰

In *Kenya Society for the Mentally Handicapped v Attorney General and Others*¹⁹¹the petitioner instituted a suit in which he alleged that the economic and social rights of persons with mental disabilities had been violated. The court noted that it had no duty to impose policies on the government since its jurisdiction was limited to examining whether the policies set by the government met the requirements provided by the constitution. In performing this duty, court would establish whether the government respects, protects, promotes and fulfils fundamental rights and freedoms under the Constitution.

Further in *Mitu-Bell Welfare Society v Attorney General & 2 others*,¹⁹²the petitioners who were residents of Mitumba village near Wilson Airport challenged demolition of their houses and their forced eviction from the village where they had lived for 19 years. They argued that the demolition violated their right to housing, right to human dignity and right to own property. In determining the case, court affirmed that “economic and social rights in Article 43 of the Constitution obligate the government and all its agents to observe, protect, promote and fulfil these rights.”

The obligation to respect requires states not to interfere with the peoples right to food either directly or through their agencies. In *SERAC Case*¹⁹³ the African Commission stated that ‘the duty to respect obligates the state to respect and not interfere with the free use of individual or communal resources which individuals use to satisfy their needs. The state must therefore respect

¹⁸⁹Henry Shue, “Basic Rights; Subsistence, affluence and U.S foreign Policy”(1980); Committee on Economic, Social and Cultural Rights; General Comment No 15.

¹⁹⁰ Article 21(2) of the 2010 Constitution of Kenya.

¹⁹¹Kenya Society for the Mentally Handicapped, Nairobi petition No. 155A of 2011 (unreported).

¹⁹²Mitu-Bell Welfare Society (n 179 above).

¹⁹³ SERAC Case(n 156 above).

the people's right to own property like land which they use to produce food. In *Centre for Minority Rights Development & Minority Rights Group International v Kenya*,¹⁹⁴ the African Commission held that, "by evicting the Endorois people from Mau forest which is their ancestral home was a violation of their right to development, right to life, right to natural resources and right to food among other human rights." The Kenyan government was called upon to respect the right of the Endorois to own and use their ancestral land and to respect its international human rights obligations.

The duty to protect requires the state to ensure that the right is not violated by third parties and to provide redress in cases of violation. Article 46(1)(c) of the Constitution provides that "consumers have a right to goods and services of reasonable quality, to protection of their health, safety and economic interests". The government should also ensure that food being sold to Kenyans by third parties is safe, meets the set quality standards, is distributed without discrimination and is sold at a fair price. In 2017, the Kenyan government put a cap on the price of maize flour and banned exportation of maize in order to ensure Kenyans accessed the product at an affordable price.¹⁹⁵ The government should put in place legislation, policies and other measures to protect individuals against political, economic and social interferences.

Additionally, the state should provide effective remedies where the right is violated by a private person. In *Centre for Minority Rights Development & Minority Rights Group International vs Kenya*,¹⁹⁶ the African Commission observed that:

the government of Kenya had failed in its duty to protect the rights of the endorois by failing and being complicit to the mining of ruby in Endorois land by a private company... The mining had serious ramifications on Endorois land; it had caused pollution to a river which was their source of water and the mining had been allowed by the government without an impact assessment study... Further, no action had been taken by the government against the company after the Endorois people complained...'

The obligation to promote requires the state to create awareness, provide relevant information on availability and access of food. It should also build the necessary infrastructure like roads for efficient transportation and movement of food as well as people to places where food can be

¹⁹⁴ Centre for Minority Rights Development, African Commission on Human & Peoples Rights 276/2003.

¹⁹⁵ Daily Nation, Wednesday 17th May 2017. Available at: <https://www.nation.co.ke/news/Government-brings-price-of-2kg-maize-flour-to-Sh90-/1056-3930080-lo1qugz/index.html>. Accessed on 8/8/2018.

¹⁹⁶ Centre for Minority Rights Development (n 190 above).

found.¹⁹⁷ The obligation to fulfill obligates the state to facilitate and ensure that it has put in place measures to the maximum of its available resources to guarantee the progressive realization of the right to food.¹⁹⁸ It is under the obligation to fulfill that the Kenyan government is expected to provide direct food aid to individuals who cannot access food on their own.

Article 21(4) further states that “the state shall take legislative, policy and other measures including setting of standards to fulfill its international obligations in respect of human rights and fundamental freedoms”. Pursuant to this Article; legislation, policies, programmes and other measures must pay tribute to international law providing for the right to food. Kenyan courts have a duty to establish whether the national legislation conforms with international law and standards. Being a socio-economic right whose actualization is positive to the state, realization of the right to adequate food of acceptable quality requires the Kenyan government to come up with legislation, policies and standards to promote actualization of the right. In this regard, the National Food And Nutrition Security Policy was enacted.¹⁹⁹ The preamble of the Policy states that, “Subject to availability of requisite resources, the Government will ensure that every Kenyan is free from hunger, has adequate supply of food of acceptable quality and has an interrupted supply of clean and safe water in adequate quantities at all times.”²⁰⁰ This policy is instrumental; in the actualization of the right to food but it cannot be implemented in the absence of an Act of parliament on the same subject.

Need for a piece of legislation caused parliament to enact the Food Security Bill in 2014 and a subsequent Bill in 2017.²⁰¹ The objective of enacting the Bills was to create a legal framework that gives effect to Article 43(1) (c), Article 53 (l) (c) and Article 21 of the Constitution of ²⁰² However, the Bills have not been passed into law thus Kenya is yet to have a legal framework which actualise the right to food as enshrined in the Constitution. Provisions of the Policy and the Bills will be discussed further in this Chapter.

¹⁹⁷ The obligation to promote is viewed as part and parcel of the obligation to fulfill as noted by Japhet Biegion et al, “Judiciary Watch Report, Judicial Enforcement of Socio-economic Rights under the New Constitution: Challenges and opportunities for Kenya,” (eds) Kenya Section of the International Commission of Jurists (2011) 10.

¹⁹⁸ Committee on Economic, Social and Cultural Rights General Comment No. 15 of 2002.

¹⁹⁹ National Food and Nutrition Security policy 2011 .

²⁰⁰ Preamble of the National Food and Nutrition Security Policy.

²⁰¹ Republic of Kenya Gazette supplement, senate 2014, Nairobi. 30th May, 2014- Food Security Bill.

²⁰² Article 53 (l) (c) of the Constitution on the right of every child to basic nutrition and Article 21 on the implementation of rights and fundamental under the Constitution, cited in the Preamble of the Food Security Bill 2014.

3.2.2 PROGRESSIVE REALISATION OF THE RIGHT TO FOOD

Article 21(2) of the Constitution provides that ‘the state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the right food’. The Constitution acknowledges that the right to food may be realized progressively but the state must put in place relevant laws and other measures for the right to be realized. General Comment No 3 of the ICESCR provides that progressive realization of a right calls upon states to act expeditiously and effectively to ensure enjoyment of a socio-economic right. This means that though the right is not being enjoyed immediately, the state must act with reasonable speed for the right to be enjoyed.

According to M Sepulveda,²⁰³ progressive realization of rights obligate the state to take deliberate, concrete, adequately financed, feasible, practical and timely measures to actualize a socio-economic right. He adds that the state must not take any retrogressive measure since such measures would impede realization of the right. In addressing the issues of “progressive realisation”, court in *Okwanda vs. Minister of Health and Medical Services & 3 Others*,²⁰⁴ stated that:

‘[A]rticle 21 and 43 of the Constitution require that there be “progressive realisation” of economic and social rights which obligate the state to begin taking steps, and be seen to take such steps towards realisation of socio-economic rights.... The obligation requires the state to assist the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the economic and social rights, and what policies, if any, it has put in place to ensure that the rights are realised progressively...’

Further in *Mitu-Bell Welfare Society v Attorney General & 2 others*,²⁰⁵ Mumbi Ngugi J observed that, despite the fact that socio-economic rights under Article 43 of the Constitution were to be realized progressively, the state was required to begin implementation of the rights since it could not be allowed to enjoy luxury of time and take an unreasonable time in actualizing the rights. She added that:

“Article 21 and 43 of the Constitution require that there should be progressive realization‘ of social economic rights, implying that the state must begin to take steps, and be seen to take steps, towards

²⁰³ M Sepulveda (n.43 above).

²⁰⁴ Mathew Okwanda [2013] eKLR.

²⁰⁵ Mitu Bell (n 179).

realization of these rights.... Although the rights are progressive in nature, there is a constitutional obligation on the state to show the steps it has taken to actualize them.”

The state must apply and or allocate resources since the right is positive to it and if the state does not allocate resources and or take relevant measures towards its realization, some citizens are bound not to enjoy the right; especially those that lack the ability to produce and access the food. For instance, the government should subsidise farm inputs to farmers to allow them produce food at an affordable cost which would make them sell it at an affordable price to other Kenyans. The government should also purchase excess farm produce from farmers at a reasonable price, store it safely and sell it back to the people at an affordable price in times of food shortage without any form of discrimination.

Courts have a duty to ensure the government actualizes and puts in place reasonable measures to actualize the right to food. Courts are obligated to ensure that the government does not hide in the excuse of resource constraints to deny the people the right. The onus is the government to prove that it did not have the resources and that it has adopted mechanisms geared towards the realization of the right. Being a signatory to the ICESCR, the government must also show that it has given priority to the right while allocating resources and that it has sought aid from the international community to actualize the right to food. It must also demonstrate that every effort has been made to actualize the right. Where the government claims that it does not have available resources.

Article 20 (5) of the Constitution states that ‘in establishing whether the state has the resources to enforce the right, courts or other authorities shall be guided by the principles that : it is the responsibility of the state to show that it does not have the required resources, in allocating resources, the state shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.

3.2.3 MINIMUM CORE OBLIGATION OF THE RIGHT TO FOOD UNDER THE CONSTITUTION

The state must meet its minimum core obligation of the right to food. Minimum core obligation has been defined by the ECSCR as the least satisfaction of a right that the government should ensure.²⁰⁶ In General Comment No 3 the ECSCR notes that, “states have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of socio-economic rights.”²⁰⁷ Being a signatory to the ICESCR and having incorporated international law as part of Kenyan laws, the Kenyan government has an obligation to ensure every individual enjoys at the very least, the minimum core content of the right to food which is access to adequate and quality food which meets the peoples dietary needs.

Article 24(2)(c) of the Constitution states that, “any limitation to a right under the Constitution shall not derogate from its minimum core content.” In *SERAC case*²⁰⁸ the African Commission on Human Rights observed “the minimum core obligation on the Nigerian government with regard to the right to food was an obligation not at the very least to destroy the Ogoni peoples’ food sources.” Paragraph 6 of General comment No.12 explains that “states have a minimum core obligation to ensure that all persons within their jurisdiction enjoy the essential elements of the right to food.”²⁰⁹ The minimum core obligation of the right to food is further explained by the committee in Paragraph 8 of General Comment No 12 as constituting access to adequate and quality food which meets the dietary needs of the people.²¹⁰

Pursuant to this paragraph and to Article 43(1)(c) of the Constitution, ‘the government should ensure every Kenyan has access to adequate and nutritional food. All State organs and public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities as enshrined in Article 21(3).

The state and all public officers are obligated by the supreme law to put in place deliberate measures to ensure the right to food of vulnerable members of the society is not prejudiced. Article 53 of the Constitution protects the right of children to food by providing that every child has the right to basic nutrition, shelter and health care. In addition, Article 54(1) states that

²⁰⁶ UN ECSCR General Comment No. 3 para 10.

²⁰⁷ UN ECSCR, General Comment No. 3.

²⁰⁸ SERAC CASE (N 150).

²⁰⁹ Developed by the UN Committee on Economic, Social and Cultural Rights in General Comment No 3, para 10.

²¹⁰ Para 8 of General Comment No. 12.

“persons with disability should be treated with dignity....” Article 57 provides that “older people have the right to dignity and to receive reasonable care from their family and the government.” Persons with disability together with the elderly can only live in dignity if they have access to quality and adequate food.

3.2.4 REMEDIES FOR VIOLATION OF THE RIGHT TO FOOD UNDER THE CONSTITUTION

Article 23(3) stipulates that, “in any proceedings regarding violation, denial, infringement and or threat of a human right, court may grant a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; or an order of judicial review.” With reference to violation of the right to food, courts have the discretion to award either of the above remedies owing to the issue before court.

For instance, if it a case where the issue is whether or not the right to food is justiciable, court may be guided by Article 19 and Article 169 of the Constitution to grant a declaratory order. In a situation where the defendant is engaging in acts that violate the right to food like destroying the peoples food sources, court may issue an injunction restraining the party from such acts. A conservatory order may be issued in a situation where a party pollutes the environment, for instance by releasing poisonous substances to water bodies which the people use for farming. In case parliament passes a law that is contrary to the Bill of Rights under the Constitution , courts have the power to declare such a law as invalid. Where compensation is adequate, court may make an order for compensation to reparate the aggrieved parties. In *SERAC Case*²¹¹ the African Commission held that ‘the Nigerian government had a duty to ensure adequate compensation to victims of human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations. It also called on the Nigerian government to Ensure that appropriate environmental and social impact assessments were prepared for any future oil development and that the safe operation of any further oil development was guaranteed through effective and independent oversight bodies for the petroleum industry’.

²¹¹ SERAC Case (n 150).

3.4 THE NATIONAL FOOD AND NUTRITION SECURITY POLICY 2011

The Kenya Food Security and Nutrition Policy was developed pursuant to Article 43(1)(c) and related articles of the Constitution which provide for the right to food.²¹² The Policy is organized into Chapters with each chapter addressing pertinent issues touching on the right to food.

Chapter two of the Policy addresses issues related to food availability and access; chapter 3 discusses issues of food safety, standards and quality control while Chapter 4 covers nutrition improvement with a focus on nutrient requirements throughout people's life cycle.

Chapter 5 envisages issues related to school nutrition and nutrition awareness. In chapter 6, "food and nutrition security information and related issues" are addressed while Chapter 7 addresses "crucial issues of early warning and emergency management". Chapter 8 presents "issues concerning the institutional, legal and financing frameworks" and finally the Policy concludes with Chapter 9 on 'policy implementation, including monitoring and evaluation".

The preamble of the National Food Security and Nutritional Policy notes that, "over 10 million people in Kenya suffer from chronic food insecurity and poor nutrition, while between two and four million people require emergency food assistance at any given time". It adds that "nearly 30% of Kenya's children are classified as undernourished, and micronutrient deficiencies are widespread." To ensure food security in the country the Policy was developed with the objectives of "achieving adequate and affordable food for all Kenyans at all times but specifically for the vulnerable in society."²¹³ The preamble defines 'food security' as "a situation where all people at all times, have physical and economic access to sufficient, safe and nutritious food that meets the peoples' dietary needs and food preferences". This is in line with Article 43 of the Constitution which provides for the 'right to adequate and quality food for all Kenyans. It also reflects the provisions of General Comment No 12 paragraph 6 on the 'normative content of the right to food' which includes "availability, accessibility, adequacy and quality."

²¹²Article 53 of the Constitution protects the right of children to food by providing that, 'every child has the right to basic nutrition, shelter and health care'. Article 54(1) states that, 'persons with disability should be treated with dignity....' Article 57 provides that, 'older people have the right to dignity and to receive reasonable care from their family and the government'.

²¹³ Objectives of the National Food Security and Nutritional Policy, 2011.

According to the Policy, “the right to adequate and nutritious food is realized when all people have physical and economic access at all times to adequate food or means of acquiring it.”²¹⁴ This reiterates the international law interpretation provided under the ECSCR, accessibility of food encompasses economic and physical access. Economic access means that every person has economic ability to produce or procure adequate and nutritional food while physical accessibility means that all persons whether old, young, physically challenged or ill have the ability to access food.²¹⁵ The Policy calls upon employers to pay their employees a reasonable wage with which they would be able to procure food.

The Policy states that “the Kenyan government will ensure sustainable food production, better storage and processing of harvested farm produce and effective markets that ensure food is distributed to all Kenyans at an affordable price without discrimination”.²¹⁶ These efforts ensure that farmers earn a decent income from the sale of food, food does not go to waste due to lack of market and poor storage and that it reaches all Kenyans who need it at an affordable price. In Paragraph 7 the government commits to put in place regulations, guidelines and set standards that promote and ensure safety and quality of the food accessible to Kenyans. These include developing a regulatory and institutional framework to monitor the safety and quality of food being available to Kenyans and mobilizing sufficient resources to actualise the objectives of the National Food and Nutrition Security Policy (FNNSP).²¹⁷

However, existence of this policy alone, without a piece of legislation in place to give legal effect to it makes the paper a toothless tool for ensuring the right to food. In order for the objectives in the paper to be achieved, a law should be enacted. Need for legislation led to the drafting of the Food Security Bill 2014, and its re-introduction in Senate in 2017.

3.5 THE FOOD SECURITY BILL, 2014

The Food Security Bill was drafted in 2014 to give effect to Article 43(1)(c) of the Constitution and to help implement the Food Policy of 2011. The Bill constitutes a legal framework to actualize the right to food by promoting food production and ensuring all Kenyans at all times

²¹⁴ Paragraph 6 of the National Food Nutritional and Security Policy, 2011.

²¹⁵ UN ECSCR, Paragraph 13 of General Comment No. 12.

²¹⁶ National Food Security Policy(n 191).

²¹⁷ Paragraph 13, National Food Nutritional and Security Policy, 2011.

have access to adequate and nutritional food.²¹⁸ The Bill creates mechanisms for the coordinated implementation of the National Food policy and other programmes on food security within the country and it also creates measures that promote eradication and prevention of discrimination in access and distribution of food.²¹⁹ Section 4 of the Bill provides that, “the Bill shall operate under the principles and national values enshrined under Article 10 of the Constitution”.²²⁰

The Bill stipulates that “children as well as expectant and lactating mothers have the right to access adequate and quality food that meets their dietary needs”.²²¹ These categories of people require a special diet thus according to the law they should access such a diet. Section 9 (e) of the Bill calls upon the government to adopt measures to provide food and nutrition needs of orphaned and vulnerable infants. Section 5(2) retaliates Article 21 of the Constitution by obligating the national and county governments to ‘respect, promote and fulfill the right to food’ by ensuring availability, accessibility and adaptability of food and farm inputs.²²² In Section 10 the Bill requires all government levels not to discriminate against anyone in all matters affecting food.

Section 11 of the Bill provides for the “establishment of the Food Security Authority under the ministry of devolution whose functions are inter alia to formulate, monitor and evaluate implementation of programmes, strategies and plans that facilitate realization of the right to food at all times by all Kenyans.” Section 32 of the Bill establishes the County Food Committees whose duties include to implement the Food Security Policies and Programmes within the counties. In section 44 the Bill prohibits violation of a person’s right to food while Sections 45, 46, 47 and 48 of the incriminate all acts that violate the right to food and prescribe the punishment.

²¹⁸ Section 3 of the Food Security Bill, 2014 Kenya Gazette Supplement No. 81 (Senate Bills No. 23/2014); 30th May, 2014. Available at: parliament.go.ke/the_senate/house...bills/.../717_cf295479de31c6fbf55e58408e8d38d. Accessed on 7/8/2018.

²¹⁹ Ibid.

²²⁰ The national values and principles of governance under Article 10(2) of the Constitution include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.

²²¹ Sections 8 and 9 of the Bill.

²²² Section 5(2) of the Bill.

However, the Bill lapsed before it was passed into law. It was re-introduced in the Senate in 2017 but it has not yet been passed into law.²²³

3.6 CONCLUSION

The Kenya Constitution expressly provides for the right to food. The Supreme law makes the right justiciable under Article 19 and Article 165 thus any person whose right to food is denied, threatened, violated or denied may move to court, and the High Court has the powers to grant an appropriate remedy. The Constitution retaliates General Comment no.12 on the obligations that states have towards the right to food. Although CESCR advances 3 duties, the Kenyan Constitution provides for the duty to respect, duty to protect, duty to promote, duty to fulfill and the duty to observe.²²⁴ Article 21(2) of the Constitution provides that, “the state shall take legislative, policy and other measures including setting of standards to achieve the progressive realization of the right to food.”

A number of policies have been developed in Kenya over the years with the most recent being the National Food and Nutritional Policy of 2011. Efforts have been made by parliament to have a law in place to actualize the right but the Food Security Bill which was drafted and tabled before parliament in 2014 lapsed before it was passed into law. It was re-introduced in the house in 2017 but it is yet to become a law. Therefore Kenya does not have an existing law to actualize the right to food as provided under the Constitution. Despite the right to food being guaranteed under the Constitution, lack of an Act of Parliament to actualize the right makes it impossible for all Kenyans to enjoy the right.

²²³ Food Security Bill, 2017. Available at: kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2017/. Accessed on 9/8/18.

²²⁴ Article 21 of the Constitution of Kenya.

CHAPTER FOUR: RIGHT TO FOOD IN OTHER JURISDICTIONS

4.0 INTRODUCTION

This chapter discusses right to food in other jurisdictions. It focuses on implementation of the right to food in South Africa and India. South Africa was selected by the researcher because before promulgation of the Constitution of Kenya 2010, South Africa had the most progressive constitution on socio economic rights in Africa. In addition the South African Constitutional court in **Government of South Africa v Grootboom & others**,²²⁵ departed from the minimum core content of socio-economic rights and developed the reasonableness test which the researcher will also evaluate.

India has been selected due to its judicial enforcement of socio-economic rights; specifically the right to food. This is of importance since the right is not justiciable pursuant to Article 37 of the Constitution of India but the Indian Supreme court, owing to interrelatedness and interdependence of human rights has linked the right to civil and political rights that are enforceable successfully enforcing the right to food. The researcher will also establish better practices that Kenya can learn from the two jurisdictions. Data gathered from practices in the two countries will help the researcher in making her conclusion and providing recommendations.

4.1 RIGHT TO FOOD IN SOUTH AFRICA

4.1.1 INTRODUCTION

Japhet Biegon et al opine that, “before the promulgation of the Constitution of Kenya, the South African Constitution²²⁶ had the most elaborate and expansive provisions on socio-economic rights in Africa.”²²⁷ Chapter 2 of the South African Constitution provides for the Bill of Rights. Section 7(2) of the Constitution states that, the state has a duty to respect, protect, promote and fulfil the rights and freedoms under the Bill of Rights. Just like the Constitution of Kenya, the South African constitution provides that the Bill of Rights binds all state organs, all persons and applies to all law.²²⁸ Section 27 (1) of the Constitution states that “every person has the right to have access to adequate housing, health care, sufficient food, water and social security . Section 27(2) adds that the state shall take reasonable legislative and other measures, within its available

²²⁵Grootboom &ors(2000)BSLR 1169(CC).

²²⁶ Constitution of South Africa.

²²⁷ Japhet Biegon et al , *Judiciary Watch Report: Judicial Enforcement of Socio-economic Rights under the New Constitution- Challenges and opportunities for Kenya* (2011) Vol 10.

²²⁸ Article 8 of the Constitution of South Africa.

resources, to achieve the progressive realization of each of these rights. Article 28 stipulates that “every child has the right to basic nutrition.....and social services.” According to Section 35(2)(e) of the Constitution prisoners and detainees also have a right to sufficient food.

Right to access to food is therefore given express protection by the South African Constitution which makes the right justiciable. In **Government of South Africa v Grootboom & others**,²²⁹ the Constitutional court of South Africa observed that, “the question as to whether or not socio-economic rights were justiciable in South Africa was addressed by inclusion of those rights under the South African Constitution.”

4.1.2 ADJUDICATING THE RIGHT TO FOOD IN SOUTH AFRICA

Section 27(1) of the Constitution of South Africa provides that, “everyone has the right of access to food.” This provision implies that everyone has the right to access food by himself and the major role of the government is to put in place measures and mechanisms that facilitate individuals to feed themselves. However Section 7 of the South African Constitution stipulates that “the state has a duty to respect, protect, promote and fulfil the right to food.” Additionally, South Africa being a signatory to the ICESCR,²³⁰ and is therefore bound by Article 11 of the Covenant on the right to food. It is also subject to General Comment No.12 of the Committee on Economic Social and Cultural Rights on state obligations on the right to food. The General Comment provides that “states have three obligations in the actualization and enjoyment of the right to food; obligation to respect, to protect and the obligation to fulfill.”²³¹

Under the obligation to respect states are required not to interfere with the peoples rights either directly or through their agencies; hence allowing people to fully enjoy their right. Under this obligation, the government and all its spheres should not do anything that interferes with the peoples enjoyment of the right to food. Duty to protect requires South Africa to ensure that the private actors do not violate the right to food. This requires the state to put in place reasonable legislation, policies, measures and other mechanisms to deter and punish any violation of the right by a third party. The state should also ensure that any non state actor who is in control of

²²⁹ Grootboom (n 220).

²³⁰ South Africa ratified the ICESCR on 12th January 2015, Available at: <http://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights>. Accessed on 17/09/2018.

²³¹ Henry Shue, ‘Basic Rights; Subsistence, affluence and U.S foreign Policy’ (1980); Committee on Economic, Social and Cultural Rights; General Comment No 15.

food makes the food available indiscriminately to all people at a reasonable price.²³² In case of a violation by a third party, the government should provide access to a legal remedy to the aggrieved parties.

The obligation to promote and to fulfill require states to facilitate and put in place reasonable and concrete measures taking into account its available resources to guarantee the realization of the right.²³³ The government must therefore create and ensure an environment that allows South Africans to produce or procure food for themselves. The South African Constitution stipulates that measures taken by the state should be reasonable and within its available resources. The test proposed by the South African Constitution is the ‘reasonable test’.

4.2 NORMATIVE CONTENT OF THE RIGHT TO FOOD IN SOUTH AFRICA

The South African constitutional court has not embraced the minimum core content of the right to food as espoused by the ECSCR in General Comment No 3 and General Comment No.12. In paragraph 10 of the General Comment, the Committee holds that states have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to food with reference to the available resources of each state.”²³⁴ According to Van Bauren as cited by Japhet Biegion et al, “the minimum core content of a right denotes the essential elements of a right without which the right cannot be enjoyed.”²³⁵ It is the least enjoyment of a right that the government should ensure without which the individuals in question cannot enjoy the right to food and consequently cannot live a dignified life. South Africa has instead developed the reasonableness test with which it determines whether the state has met its obligations in relation to a socio-economic right.

Although the South African Constitution does not provide the normative content of the right to food the South African Constitutional court noted that it had a duty to interpret socio-economic rights. In *Mazibuko and others v City of Johannesburg and others*²³⁶ the Constitutional Court of South Africa acknowledged that it had a duty to interpret the rights in the Bill of Rights; especially the socio-economic rights in a manner that promotes and guarantees the maximum

²³²UN ECSCR General Comment 12 of the Committee on Economic , Social and Cultural Rights.

²³³Committee on Economic, Social and Cultural Rights General Comment No. 3 of 2002para 10.

²³⁴ UN ECSCR General Comment No. 3 paragraph 10; Paragraph 6 of General Comment No 12.

²³⁵ Japhet Biegion et al , Judiciary Watch Report; Judicial Enforcement of Socio-economic Rights under the New Constitution: Challenges and opportunities for Kenya, Vol 10 P 41.

²³⁶ *Mazibuko and others v City of Johannesburg and others* (2010)4 SA (CC).

enjoyment of the rights by all citizens. It added that its powers gave it the mandate to construe rights in a manner that all citizens would know the nature of rights and be able to know when the rights are denied, violated or infringed. In the matter, Court held that “the state had a duty to ensure the food available to its citizens meets their dietary needs, is adequate and is accessible to all without discrimination”.

4.3 REASONABLENESS TEST

In **Government of South Africa v Grootboom & others**²³⁷ the petitioners instituted a case at the South African Constitutional Court alleging that their right to housing as provided under section 26 of the Constitution had been violated. They argued that the state had failed to take measures for progressive realization of the right as per section 26(2) of the Constitution. They had been evicted from a private land which the government had earmarked for formal low cost housing project and argued that since they were poor they had nowhere else to move to and means of survival. They applied for an order directing the government to provide them with basic housing and to provide their children with basic nutrition, shelter, healthcare and social services with which they could not live a dignified life. Court rejected the minimum core content of the right to housing as espoused by the ECSCR.²³⁸

Court noted that the constitution provided for the right to access to housing, food, water...It argued that “the minimum core content was unclear as it was developed by the ECSCR after evaluation of numerous states reports on socio-economic rights; reports which the court did not have”. It added that “the minimum core approach ignored the principle of separation of powers since it would cause court to dictate to the executive on what should be done to actualize socio-economic rights.” By this, the court indicated that it was outside its domain to obligate the executive to ensure enjoyment of socio-economic rights to a certain extent. In addition, court stated that it was in the discretion of the legislature and the executive to enact and implement any measures towards realization of socio-economic rights so long as the measures were reasonable.

Further, court added that “it could not find the executive not to had taken reasonable steps towards progressive realization of the rights in question due demand and scarcity of resources.” Court also found “the minimum core content to be limited to the minimum enjoyment of a right without considering efficacy of the programmes and measures adopted by the

²³⁷ Supra n 216.

²³⁸ UN ECSCR, General Comment No. 3 paragraph 10.

government.” In the matter, the Constitutional court developed the reasonableness test under which it considers whether the measures taken by the state in actualizing a socio-economic right were reasonable as to facilitate enjoyment of the right in question.²³⁹

4.3.1 COMPONENTS OF REASONABLENESS

According to the South African Constitutional Court in *Grootboom*, determination of whether the state has actualized a socio-economic right depends on whether or not the actions taken by the state towards realisation of the right were reasonable. Section 27(2) of the South African Constitution provides that, “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of socio-economic rights.” According to the court, “the reasonable test has five components.” These include that, “the acts of the government are comprehensive, coherent and coordinated and capable of facilitating the right in question. By this, the court opines that the executive and the legislature bear the burden of ensuring that laws, policies and other measures cater for all aspects of a socio-economic right and that they can be tested to ascertain whether or not they are effective and if not, court would declare them unreasonable.

According to the test, “the programmes adopted by the executive should be “balanced and flexible.” The programmes should be in such a way that they can be adjusted to cater for everyone’s need and emerging issues. Further, the measures should cater for everyone without discrimination and should ensure that everyone is treated with dignity. Additionally, the measures should allocate responsibilities and avail resources to different authorities to ensure the needs of the people are met and are reasonably formulated and implemented.²⁴⁰

Since the government has different spheres, levels, offices and officers, responsibility must be clearly and rightly placed to avoid confusion as to who bears a particular duty in order to facilitate enjoyment of a right. Further, the office and or officer to whom the responsibility is vested must be allocated appropriate financial and human resources. Finally, court noted that “the measures must ensure progressive realization of the right taking into account the resources available to the state.” This means that court examines whether the state has taken any action aimed at realizing the right subject to the resources available to it.

²³⁹ *Supra* n. 216.

²⁴⁰ South African Constitutional Court in *Grootboom*.

In South Africa a litigant's cause of action cannot be breach of the minimum core obligation of the right to food but rather a claim that the actions taken by the government in the actualization of the right were unreasonable. According to S Liebenberg²⁴¹ "the minimum core test is inadequate because it tends to disregard the concept of separation of powers, it only guarantees survival standards and does not guide states on what constitutes the minimum core content of each socio-economic rights." Court opines that each state has unique reasons based on its economic development as to why it does not ensure enjoyment of a socio-economic right.

Consequently, in cases where an individual does not enjoy the right to food due to lack of means of production like land, does it require the government to grant a piece of land to such an individual?, land in this case being the minimum core. Where an individual lacks access to sufficient food due to unemployment, is it incumbent upon the government to ensure the person secures employment? What about a situation in which individuals access food which does not meet their dietary needs having spent their money in other needs?

The reasonableness test has been critiqued by David Bilchitz who opines that it does not address the content of each socio-economic right.²⁴² He argues that, "the test only considers whether the acts of the state in the realisation of a socio-economic right were reasonable without a standard against which the reasonableness is measured." This is so because the minimum content of the right against which actualization of the right should be determined, is not specified. By this, the executive has the discretion to adopt any measures it deems appropriate, without regard to actualization of the minimum core content of a given right and the role of the court is just to determine whether such measures were reasonable. This leaves the rights of the people open for non enjoyment since their minimum content is not considered by the court. In *Grootboom*, the Constitutional Court of South Africa found the government policy on housing to be unreasonable and made an order directing the government to provide housing to the petitioners. However, the government disregarded the court order and the court failed to supervise compliance with the order in fear that it would be violating the principle of separation of powers.

²⁴¹S Liebenberg, Socio-economic rights: Revisiting the reasonableness/ minimum core debate in Swoolman and M Bishop Constitution Conversations(2008).

²⁴² David Bilchitz, Giving Socio-economic rights teeth: The minimum core and its importance (2002)118 available at https://heinonline.org/hol-cgi-bin/getpdf.cgi?handle=hein.journals/soaf_119...accessed on 20/08/2018.

4.4 LESSONS FOR KENYA FROM SOUTH AFRICA

In Kenya the reasonableness test and the principle of separation of powers in relation to measures undertaken by the government in the actualization of socio-economic rights is applicable by virtue of Article 20(5) of the Constitution which stipulates that, “in establishing whether the state has the resources to enforce a socio-economic right, courts or other authorities shall be guided by the principles that: it is the responsibility of the state to show that it does not have the required resources; in allocating resources, the state shall give priority to ensuring the widest possible enjoyment of a right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.”

The Kenyan Constitution puts the onus on the government to prove lack of resources to actualize a socio-economic right and it also engenders the government to ensure the widest enjoyment of a Right which means the minimum core obligation has been met. By Article 25(c), the Constitution promotes separation of powers by vesting authority on the executive to adopt any measures it deems appropriate and directing courts not to interfere with an executive decision just because it would have had different results. The reasonable test not only supports the principle of separation of powers but also gives court the powers to examine whether the measures adopted by the government in actualizing a right were reasonable and ensuring the measures are especially geared towards actualizing the right for most vulnerable in society.

4.5 RIGHT TO FOOD IN INDIA

4.5.1 INTRODUCTION

India is a signatory to the ICESCR, CEDAW and CRC. It is therefore subject to provisions under the international laws which protect the right to food.²⁴³ According to the Committee on

²⁴³Article 25 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. Further, Article 11 of the ICESCR states that, every person has the right to an adequate standard of living for himself and his family which includes the right to adequate food. Article 24 of the Convention on the Rights of the Child stipulates that, children have the right to good quality health care, safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy. The right is also inferred from Article 14(h) of the Convention on the

Economic Social and Cultural Rights, “states have three obligations in the actualization and enjoyment of human rights; ‘obligation to respect, to protect, to fulfill.’”²⁴⁴ India is bound by these duties which it should perform to ensure enjoyment of the right to food. It should also meet the minimum core content of the right to food as encapsulated by the CESCR in paragraph 8 of General Comment No 12.²⁴⁵

However the Constitution of India does not expressly provide for the right to food. The right is provided for under Part IV of the Constitution²⁴⁶ which contains the Directive Principles of State Policy that envisages state obligations in relation to social goods like health and food. Article 47 of the Directive Principle of State Policy (DPSP) provides that, “the state has a duty to raise the level of nutrition and the standard of living and to improve public health”. However, Article 37 of the Constitution stipulates that, “rights under part IV are not enforceable by any court”. This means that since the right is provided for as a DPSP, it is not enforceable in India.

Nevertheless, the Indian Supreme Court has been hailed for enforcing the right, despite it being provided as a DPSP. Japhet Biegion et al, observe that although the right to food has been provided as a state directive in India, the Indian Supreme Court has enforced the right by linking it to political rights like the right to life.²⁴⁷ Therefore, although the Indian Constitution provides for civil and political rights as justiciable and the economic and social rights as unenforceable, the court has enforced both sets of rights by construing socio-economic rights as an integral part of civil and political rights.

4.6 ADJUDICATION OF THE RIGHT TO FOOD IN INDIA

In *Francis Coralie v. Administrator; Union Territory of Delhi*²⁴⁸ court addressed the aspects of indivisibility, interrelatedness and interdependence of human rights. Court observed that, “right to life includes the right to live in dignity and all that goes with it, the right cannot be enjoyed without realization of basic needs like adequate nutrition and shelter.....” Court pointed that an

Elimination of All Forms of Discrimination Against Women which provides that, women have the right to enjoy adequate living condition,...

²⁴⁴Henry Shue : Basic Rights; Subsistence, affluence and U.S foreign Policy (1980) ., Committee on Economic, Social and Cultural Rights; General Comment No 15.

²⁴⁵The minimum core content of the right to food is access to adequate and quality food which meets the dietary needs of the people.

²⁴⁶ Constitution of India.

²⁴⁷ Japhet Biegion (n221).

²⁴⁸Francis Coralie v Administrator; Union Territory of Delhi (1981)2 SCR 516.

individual cannot enjoy his right to life and the right to dignity if he is denied the basics of life like adequate nutrition, shelter and clothing.

In *People's Union For Civil Liberty vs. Union of India & others*²⁴⁹ People's Union for Civil Liberties in Rajasthan filed a case to the Supreme Court In 2001 due to hunger facing villagers outside Jaipur city. The villagers were eating in rotation thus some members of the family would eat on one day and the remaining persons eat on the other day. The union visited the city and observed that the Food Corporation of India (FCI) godowns which was about 5 KMs. outside the city were overflowing with grains. The grains were rotting due to fermentation of rainwater which had percolated down in the grain stock as it was kept outside the godowns.

The issue before court was whether the right to life guaranteed under Article 21 of the Indian Constitution includes the right to food and whether the government had an obligation to give food to people who could not feed themselves. The Indian Supreme Court held that the right to life could not be divorced from the right to food since food sustains human life and without food people cannot live in dignity. Court ordered the Food Corporation of India (FCI) to ensure that food grains did not go to waste and were provided to the village people in the drought hit area. Court added that whatever sustains human life like food must be treated as part of life and it cannot therefore be denied and the person continues to live.

In *Chameli Singh v. State of Uttar Pradesh*²⁵⁰ court held that the need for a decent and civilized life includes the right to food, water and decent environment. The court has observed in this connection that "In any organized society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth."

4.7 LESSONS FOR KENYA FROM INDIA

Decisions of the Indian Supreme Court on the right to food, show that lack of inclusion of socio-economic rights as justiciable rights in a country's constitution does not mean that the rights cannot be enforced. Owing to interdependence, indivisibility and interrelatedness of human

²⁴⁹People's Union For Civil Liberty vs. Union of India & others (2001)SC.

²⁵⁰Chameli Singh v. State of Uttar Pradesh (1995)SC

rights, civil and political rights cannot be isolated from socio-economic rights. In fact adequate enjoyment of political rights is subject to enjoyment of socio-economic rights. The Kenyan judiciary just like the Kenyan Constitution should be progressive enough to treat the two categories of rights equally and enforce them in a manner that ensures each set of rights supports enjoyment of the other set.

4.8 CONCLUSION

Musila, advances factors that can guide courts in adopting an interpretation approach in respect of economic and social claims. According to him, “courts should consider whether the mode adopted allows determinacy of the socio-economic right in question, whether the mode defines progressive realization of the right in order for states to meet their obligations with regard to the right, whether the mode allows court the discretion to determine the normative content of a right and whether the interpretive approach adopted gives the executive room to decide on the best mechanisms to adopt in realization of the right for respect of the principle of separation of powers”.²⁵¹ Thus, according to Musila, courts have a duty to evaluate the efficacy of the mechanisms adopted by the executive in actualization of the right. In exercising this duty, courts should respect the fact that the executive has the mandate to establish such mechanisms but they should examine whether the mechanisms adopted cater for the normative content of the right. The mechanisms must promote enjoyment of the right leading to full enjoyment of the right by all persons.

The Constitution of Kenya embraces the minimum core approach under Article 24(2)(c) which states that, “any limitation to a right under the Constitution shall not derogate from its minimum core content.” Article 20 (c) of the Constitution adds that “in interpreting the Bill of Rights, court shall adopt the interpretation that most favours enforcement of a right or freedom.” The minimum core approach elucidates the normative content of a right, and it therefore ensures that an individual enjoys, at the very least, the minimum content of a socio-economic right”.

In performing its obligations, the state should not derogate from the minimum core content of the right to food because it ensures that people enjoy the minimum elements of the rights. Enjoyment of the right to food encompasses “enjoyment of adequate, quality, available and accessible food

²⁵¹ Godfrey M Musila, Realizing the transformative promise of the 2010 Constitution and New electoral laws’ in Godfrey M Musila (ed) *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* (2013).

by all people taking special interest in the vulnerable members of society.” It ensures that people do not only feed, but feed in dignity and the food meets their dietary needs. It also ensures that food is available and accessible to everyone without discrimination.

On the other hand, the reasonableness test advanced by the South African Supreme Court helps determine whether the measures adopted by the state in actualizing the right were reasonable. This ensures that the state does not just formulate policies or put in place measures, but enacts policies and programmes that reasonably address the right to food. It also supports the principle of separation of powers by letting the legislature and the executive to enact and implement policies and other measure which actualize the right to food, while court adjudicates on whether such measures were reasonable.

Adoption of both tests would be the most favourable in adjudicating the right to food in Kenya. This is so because it would ensure every Kenyan including the most vulnerable enjoy at the very least their right to food and that the state meets its international and constitutional obligations under the right. Kenyan Courts have a major role in ensuring the people in Kenya enjoy the right to food. The courts may be guided by decisions of the Indian Supreme Court to hold that an individual cannot have a dignified life and would even lose his or her right to life if his right to food is violated. Further, since the right to food is justiciable pursuant to Article 43(1)(c) of the Kenyan Constitution, the High Court should boldly protect this fundamental right bearing in mind that it is an entitlement for all Kenyans.

CHAPTER FIVE: FINDINGS, SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.0 INTRODUCTION

This chapter discusses findings of the study and gives a summary of each chapter. It also makes a general conclusion on the right to be free from hunger and to have adequate food of acceptable quality both in Kenya and under international law. Based on the findings it proceeds to offer recommendations outlining the necessary steps to be taken by Kenya to actualize the right to food.

5.1 FINDINGS

The findings of this study are premised on the research questions. The researcher has established that state obligations with reference to the right to food are provided under the ICESCR as well as the Constitution of Kenya. Article 19 of the Constitution vests upon the “state and its organs the duty to observe, respect, protect, promote and fulfill the right.”²⁵² General Comment No 15 advances a three typology of state obligations in the actualization of the right to food; them being, “obligation to respect, to protect and to fulfill,”²⁵³ The state must perform these duties in order for the people to enjoy the right to food.

In pursuit of these obligations, the government has a minimum core obligation which requires it to use its maximum available resources to ensure that the people in Kenya have, at the very least, access to available, adequate and quality food.²⁵⁴ The Kenyan constitution provides that the minimum core of socio-economic rights should not be derogated from.²⁵⁵ The government should therefore allocate resources in order for the normative content of the right food to be actualised. States should put in place other mechanisms, policies, laws and regulations aimed at progressive actualization of the right to food.

²⁵² Article 21(2) of the 2010 Constitution of Kenya.

²⁵³ Henry Shue, “Basic Rights; Subsistence, affluence and U.S foreign Policy”(1980); Committee on Economic, Social and Cultural Rights; General Comment No 15.

²⁵⁴ UN ECSCR General Comment No. 12.

²⁵⁵ Article 24(2)(c) of the Constitution of Kenya.

Article 21(2) of the Constitution provides that “the state shall take legislative, policy and -other measures, including the setting of standards, to achieve the progressive realisation of the right food.” In addition, Article 21(4) stipulates that “the state shall enact and implement legislation to fulfil its international obligations in respect of human rights.”

Courts also have a duty to determine whether or not the measures taken by the government are reasonable and whether they are geared towards progressive realisation of the right to food. The executive and the legislative arms of government have the discretion to establish policies, laws and other mechanisms while the courts duty is to evaluate the constitutionality and reasonability of those mechanisms. Further, since the right to food is justiciable, any person has the right to move to court seeking enforcement of the right. In this regard, courts have a duty to issue appropriate remedies to the litigants.

The normative content of the right to food entails access to adequate, quality and available food. All people should have the ability to access quality and sufficient food whenever they need it. Every person should have the ability to produce and , or to procure safe and quality food. There should not exist any form of discrimination in access to food since every individual requires it for survival and for good health. Further, food available should be culturally acceptable by different groups of people and it should also meet the dietary needs of special groups of people like the sick, children, the elderly and expectant mothers.

5.2 SUMMARY

Chapter one provided a general discussion on the right to adequate food of acceptable quality. It presented an abstract of the study and the background of the study. The chapter also introduced the research problem, research questions, research objectives, problem statement, justification of the study and the research methodology to be used. It also presented existing literature on the right to food and identified the research gaps which the researcher intended to fill. It also discussed the conceptual and- theoretical framework which supports the right to food.

Chapter two “discussed the international and regional legal framework on the right to be free from hunger and have adequate food of acceptable quality. The chapter examined international instruments and standards providing for the right to food and the theoretical approaches applied on the right. It also discussed how the right to food is protected in the African region. The law clearly defines the right and through the Committee on International Covenant on Social and Political Rights, the normative content of the right includes; availability, accessibility, adequacy and quality. 256 The chapter also encapsulates obligations of states in realization of the right which are the obligation to respect, to protect and to”promote. The chapter concludes with an observation that the right to food is given adequate recognition and protection under international law.

Chapter three examined the legal and policy framework on the right to food in Kenya. The Chapter discussed Constitutional provisions on the right to food and established that the right is justiciable pursuant to Article 19 and Article 165. The chapter established that the Constitution of Kenya retaliates General Comment no.12 on state obligations towards the right to food. The Kenyan Constitution provides for the duty to respect, duty to protect, duty to promote, duty to fulfill and adds a fourth duty which is the duty to observe.²⁵⁷Article 21(2) of the Constitution adds that, “the state should take legislative, policy and other measures including setting of standards to achieve the progressive realization of the right to food”.

By this, the Constitution of Kenya acknowledges that since the right to food is positive to the state, its actualization requires resources and should be realized progressively. The chapter also discussed policies developed in Kenya on the right to food over the years including the National Food and Nutritional Policy of 2011. It also examined the fate of the Food Security Bill which is yet to become a law. The chapter concludes by noting that Kenya lacks legislation to actualize the right to food as provided under the Constitution.

Chapter four examined how the right to food has been implemented in South Africa and India. The researcher interrogated the decision of the South African Constitutional court in *Government of South Africa v Grootboom & others* and its impact in the realisation of the right to food.²⁵⁸ In this case the South African Constitutional Court adopted the reasonableness test in adjudicating

²⁵⁶ UN ECSCR General Comment No. 12 paragraph 8.

²⁵⁷ Article 21 of the Constitution of Kenya.

²⁵⁸ In *Government of South Africa v Grootboom & others* 2001.

socio-economic rights and departed from the minimum core content on the basis that the minimum core content advanced by the ECSCR was vague and ambiguous.

In India, the researcher established that although the right to food is not justiciable pursuant to Article 37 of the Indian Constitution, the Indian Supreme Court has been able to successfully enforce the right. The chapter notes that the Constitution of Kenya embraces the minimum core approach as advanced by the ECSCR under Article 24(2)(c) which states that any limitation to a right under the Constitution shall not derogate from its minimum core content. The Chapter concludes with a recommendation the adoption of the reasonableness test and the minimum core obligation would be the most favourable in adjudicating the right to food in Kenya.

5.2 CONCLUSION

This paper is concluded basing on the purpose and objectives of the study. In light of that, the study concludes that the right to food is given adequate protection both nationally and internationally. It is provided for under the UDHR, ICESCR, CEDAW, CRC, ACHPR as well as the Constitution of Kenya.²⁵⁹ It is a justiciable right in Kenya pursuant to Article 23 and 65 of the Constitution. Any individual has the right move to court if their right to food is violated, denied or infringed and the court has jurisdiction to adjudicate over the matter and grant the appropriate remedy.²⁶⁰ Owing to interrelatedness of human rights, it is a fundamental right which supports all other human rights including the right to life, right to dignity, right to education, freedom of movement and right to vote among others.

Being a human right, the state as the duty bearer has four obligations in the actualization of the right to food.²⁶¹ These include the obligation to protect, obligation to respect, obligation to promote and the obligation to fulfil. In pursuit of these obligations, the government has a minimum core obligation which requires it to use its maximum available resources to ensure that the people in Kenya have, at the very least, access to available, adequate and quality food.²⁶² The Kenyan constitution provides that the minimum core of socio-economic rights should not be

²⁵⁹ Supra n. 228.

²⁶⁰ Article 22(1) of the Constitution states that every person has the right to institute court proceedings claiming that his right under the Bill of Rights has been denied, threatened, infringed or violated. Article 21(2) adds that a person may institute such a claim while acting on behalf of another, acting as a member of a particular group, acting in public interest or being an association representing its members.

²⁶¹ Article 21(1) of the Constitution of Kenya.

²⁶² UN ECSCR General Comment No. 12.

derogated from.²⁶³The government should therefore allocate resources in order for the normative

content of the right food to be actualised.

Article 21(2) of the Constitution provides that “the state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the right food.”In addition, Article 21(4) stipulates that “the state shall enact and implement legislation to fulfil its international obligations in respect of human rights.”This means that the state must put in place measures, laws, policies and programmes aimed towards realisation of the right. In an endeavour to meet this obligation, Kenya has developed a number of policies including the National Food Security Policy 2011 and the Food Security Bill 2014 which has however not been passed into law. Kenya does not therefore have a law to actualize Article 43(1)(c) and other Constitutional Articles providing for the right to food.

Courts have a duty to determine whether or not the measures taken by the government are reasonable. The role of court has been clearly demonstrated by the South African Constitutional Court in *Government of South Africa v Grootboom & others*²⁶⁴ where the court adopted the reasonableness test to examine whether the measures taken by the government in realisation of a socio-economic right were reasonable. Further, courts have the duty to ensure the people in Kenya enjoy the right to food through enforcement of the right and supervisory of implementation of orders issued by court in reference to the right. The Indian supreme court has successfully enforced the right to food in India despite the right being non-justiciable in the country. In addition, court should be guided by Article 10(2) of the Constitution which calls upon state organs, state officers, public officers and all persons to ensure “human dignity, equity, social justice, equality, human rights, non-discrimination and protection of the marginalized in interpreting any law or implementing public policy decisions”.

²⁶³ Article 24(2)(c) of the Constitution of Kenya.

²⁶⁴ In *Government of South Africa v Grootboom & others* 2001.

The Kenyan Constitution acknowledges that the right to food may be realized progressively due to resource constraints but the state must put in place relevant laws and other measures for the right to be realized. General Comment No 3 of the ICESCR provides that, “progressive realization of a right calls upon states to act expeditiously and effectively to ensure enjoyment of a socio-economic right.” Where the government does not have resources, it should prove that the resources are not available but it should also ask for aid from the international community to realize the right. The government should also give priority to ensuring the widest possible enjoyment of the right when allocating resources having regard to vulnerability of particular groups in society.²⁶⁵ It is also the role of government to ensure that no person is discriminated against in access of adequate and quality food.

5.3 RECOMMENDATIONS

5.3.1 GENERAL RECOMMENDATIONS

For the right to food to be realized in Kenya, the researcher recommends that Article 21(2) and (4) of the Constitution be complied with. The Article calls upon the state to make laws policies and other measures with the object of progressively realising the right to food. To this extent, the government through parliament and other state agencies should see to it that Kenya has a legal framework that actualises the right to food. The Food Security Bill pending at the senate should be passed into law and once it becomes law, the executive arm of government has an obligation to give effect to the spirit and letter of the law.

Other policies, for instance policies that promote food production, purchase of produce by the government from farmers, safe storage of farm produce, importation of food and safety of food both in production and distribution should not only be developed and implemented.

The government should also disseminate information to Kenyans on different strategies that they should employ to boost food production. For instance, Kenyans in semi arid areas should be sensitized to grow drought resistant crops and be advised to reduce their livestock to prevent death of the animals in the dry season due to lack of pasture. In the same vein, effective agricultural advisory services should be offered to Kenyans in order to increase their ability to produce foodstuff and improve their income.

²⁶⁵ Article 20(5)(b) of the Constitution.

The government should also formulate a national strategy that addresses the right to food for vulnerable groups in society including women, the elderly, children, persons with disabilities and members of marginalized communities. In this regard, the government should take administrative action to ensure the strategy works. While formulating the strategy, the government should bear it in mind that affirmative action would be key in ensuring enjoyment of the right to food by these individuals. Special programmes on feeding children should be made, programmes that ensure the elderly are economically empowered, persons with disability secure employment to procure food and expectant and lactating mothers access food that meets their dietary needs should be made and implemented without discrimination.

The government should also increase the monetary allocation towards actualization of the right to food. This may be done by effecting the Maputo declaration of having at least 10% of the national budget allocated to agriculture.

Land is a major factor of production and a security for finance acquisition thus all individuals including women should enjoy the right to own land in order for them to be able to produce and, or to procure food on their own. Initiatives and laws that address the plight of women in regard to land ownership should be enacted. Succession laws in the country need to be amended in order to allow women equitable access to land as encapsulated by Article 60(1) of the Constitution. Additionally, the right of marginalized communities to own land as a community should be recognized and protected pursuant to Article 63 of the Constitution. Where the government requires to use the land or part of it, it should actively consult members of the community and in case the government acquires the land, it should compensate the community members adequately and promptly.

The cost of food production should be lowered by subsidising the cost of farm inputs, making credit available and affordable to farmers, opening up markets for farmers and expanding irrigation schemes to increase productivity and to transform the agricultural sector into a commercially viable sector. The government should not only avail resources to large scale farmers but also to small scale farmers who are the majority in the country.

Excess rain water should be harvested during the rainy season and be availed to the people in the dry season and be used for farming. Individuals should also be facilitated and trained on water harvesting and storage.

The government should also introduce different food and food crops to Kenyans and encourage them to embrace the new food so long as it is acceptable within their culture. It should also bench mark with other countries on the best crops that can be grown and train Kenyans on the relevant farming methods.

Further, the government should purchase excess farm produce from farmers at a reasonable price, store it safely and sell it back to the people at an affordable price in times of food shortage without any form of discrimination. The government should also regulate food prices to ensure Kenyans are not exploited by private producers, suppliers and manufacturers.

Kenyan courts should exercise their duty of evaluating whether the policies, measures and laws made by the executive and parliament to address food shortage are reasonable. The Courts should be guided by the decision of the South African Constitutional Court in *Grootboom* to examine whether the measures taken by the executive are ‘comprehensive, coherent, coordinated, feasible, balanced and flexible, and adhere to the national values and principles of good governance enunciated in Article 10(2) of the Constitution. This ensures that the government not only formulates policies, but enacts policies, and programmes that reasonably address the right to food.

Owing to justiciability of the right to food as per Article 23 (1) and Article 165 of the Kenyan Constitution, the High Court should fearlessly protect this fundamental right bearing in mind that it is an entitlement for all Kenyans. Being a signatory to the ICESCR, and having accepted general rules of international law to form part of our Kenyan laws, Courts should ensure the government meets its international and national obligations on the right to food. Court should supervise and ensure that the government respects, protects and fulfils the right to food. Further, courts should also ensure that the government meets the minimum core obligation of the right by ensuring access to available, adequate and quality food by all Kenyans.

In addition, once courts make orders intended to actualise the right to food, they should monitor and supervise to ensure the persons and authorities to whom the orders were made, affect them. The court orders should have a timeframe within which they should be complied with so that

they are not left open for violation. Where court makes a finding that an individual's right to food has been denied, violated, infringed or threatened courts should grant an appropriate remedy to the aggrieved party.

However, courts should uphold the principle of separation of powers by not interfering with executive decisions on allocation of resources to the right to food solely because they would have reached a different conclusion but they should be content that the steps taken by the executive in allocation give priority to actualization of the right and are reasonable.

5.3.2 RECOMMENDATION FOR FUTURE RESEARCH

The study recommends more research to be conducted with regard to the right to food in Kenya. This paper recommends that a similar study be carried out to examine whether the recommendations offered by the researcher in this paper are appropriate and their progress upon implementation.

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