The right to feed oneself

Food in the struggle for Human Rights as entitlements

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'The problem of this world is not shortage in food but shortage in justice.'[1]

Abstract

This paper discusses the interaction between development of doctrine on human rights in general and on the right to food in particular.

In 1948 the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. This declaration listed the rights that were considered to be human rights. Access to food is seen as an element of a right to an adequate standard of living. The declaration was however not legally binding and could not be invoked in judicial proceedings.

Human rights were further elaborated on a regional level. In Europe this was done by the Council of Europe that established the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the European Social Charter (1961). This distribution of the human rights over two treaties embodies a scholarly distinction between civil and political rights on the one hand and social, economic and cultural rights on the other. Neither of these documents mentions a right to food. These two sets of rights have been treated in fundamentally different ways. The European Convention is endowed with an enforcement mechanism including a European Court of Human Rights with jurisdiction over the member states. This mechanism does not apply to the Charter. By consequence a judicial practice developed related to the application of civil and political rights only. This development was in conformity with the opinion that civil and political rights give negative obligations to the state (e.g. obligations not to interfere with the freedoms of citizens), while social, economic and cultural rights give positive obligations (e.g. obligations to provide certain preconditions of life). While it is easy to enforce negative obligations, the same is not true for positive obligations.

In 1966 in the context of the UN two international treaties were concluded that apply the same distinction between civil and political rights versus social, economic and cultural rights: The International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights. The latter recognizes the right to adequate food as an element of the right to an adequate standard of living.

The right to adequate food was the subject of endeavours at UN level to push development of doctrine to such an extent that economic, social and cultural rights empower people just as much as civil and political rights do.

1. Introduction

Academic understanding of human rights has greatly been advanced by discussions focussing on the human right to food (Craven, 1995, p. 110-114).

This paper addresses the development of legal doctrine on human rights in general and the right to food in particular, focussing on the interaction between the two.

2. Human rights

2.1. What are human rights?

Today, in many legal orders human rights are seen as basic norms representing fundamental values. They are found in international treaties of a fundamental nature and in national constitutions. They can be understood to define and protect the position of people within the given legal order, in particular the national state. Each and every person is entitled to a sphere of autonomy (freedom) within the legal order and to minimum conditions of dignified life. For this purpose human rights set limits to the domain of the state and make requirements on the state as well.[2] Although human rights are often further elaborated and detailed in legislation of an ordinary nature, human rights stand out from this legislation in the sense that they set limits to and put requirements on this legislation. Human rights provide a yardstick for the quality of the legal order and a safeguard against its deterioration.

2.2. Inalienable rights

In legal philosophy two different answers are given to the question from where human rights derive their fundamental nature.

For some authors human rights only exist in so far as they are recognised by law. For others they represent values of a pre-legal nature. In this view human rights are part and parcel to human nature. They are inalienable, that is to say they cannot be given[3] or taken away, but remain with each person always. Law can only be law when and if it respects human rights. This view is known as *natural law*. The philosophy of natural law presumes the existence of law independently from human will and creation (see for instance Luhmann 1965, pp. 38-52).[4] By contrast the philosophy of *legal positivism* recognises as law only the rules set by the organs endowed with rule making.

2.3. Human rights in the Concept of law

Without taking a position on the discussion between natural law and legal positivism, this paper focuses on human rights recognised in legal documents. Regardless of one's view on the nature of human rights, in practise to exercise their full force they need to have found form, structure and recognition within the legal order. In other words: positivation is necessary for the realisation of human rights.

By general legal theory, at the heart of the concept of law is that society is organised in a peaceful manner, through regulation of human behaviour by general rules creating enforceable rights and duties. The factor of enforceability distinguishes rules of law from, rules of morality, religion, philosophy and the like.

Legislative requirements that are not enforceable because they are not intended or not suitable (e.g. too vague) to be, are sometimes referred to as 'lex imperfecta'. Such imperfect law may have a symbolic value.

Rules of law are derived from sources of law. Usually four sources are recognised: international treaties, legislation, custom and case law.

The rights of people recognised as human rights correspond to obligations of the state that holds power over the people concerned. Therefore human rights can only flourish in states adhering to the rule of law. The rule of law states that the power of the state is based on and limited by the law and that the law can be enforced against the state.

For human rights to work in this way, it is vital that powers within or over the legal order concerned are willing and able to uphold them against the state.

3. Dawn of modern human rights

3.1. Four freedoms

Although the notion that man has an inherent dignity which is worthy of protection, can be traced back for centuries (see Lewis 2003 and Ishay 2004) and from the era of enlightenment onward a variety of fundamental freedoms found protection in several declarations and constitutions, the Second World War is usually seen as the starting point of the development of human rights as we know them today. In particular the state of the union delivered by president Franklin Delano Roosevelt on 6 January, 1941, is a landmark. In this address to Congress – now referred to as the four freedoms speech[5] – he called for preparedness for war,

but he also presented an outlook on the world as it should be after the expected hostilities would subside:

"In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is freedom of speech and expression -- everywhere in the world.

The second is freedom of every person to worship God in his own way everywhere in the world.

The third is freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants -- everywhere in the world.

The fourth is freedom from fear, which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor -- anywhere in the world.

That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called 'new order' of tyranny which the dictators seek to create with the crash of a bomb.

To that new order we oppose the greater conception -- the moral order. A good society is able to face schemes of world domination and foreign revolutions alike without fear.

Since the beginning of our American history we have been engaged in change, in a perpetual, peaceful revolution, a revolution which goes on steadily, quietly, adjusting itself to changing conditions without the concentration camp or the quicklime in the ditch. The world order which we seek is the cooperation of free countries, working together in a friendly, civilized society.

This nation has placed its destiny in the hands and heads and hearts of its millions of free men and women, and its faith in freedom under the guidance of God. Freedom means the supremacy of human rights everywhere. Our support goes to those who struggle to gain those rights and keep them. Our strength is our unity of purpose.

To that high concept there can be no end save victory."

3.2. The Universal Declaration of Human Rights

The Second World War did change the face of history. To avoid its atrocities from ever occurring again, a serious attempt has been made to bring forth from the ashes a better world. Immediately after the war, on the 24 of October 1945, a new global organization, the 'United Nations' was called into being.[6] Article 1 of the United Nations Charter indicates the purposes of the UN. In the third paragraph it expresses the purpose: *'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'*[7]

Roosevelt did not live to see his vision come true. He had passed away on 12 April 1945. His widow Anna Eleanor Roosevelt, however played an important role. She chaired the UN commission that drew up the Universal Declaration of Human Rights (UDHR). The UDHR gave substance to the up till then rather imprecise notion of 'human rights and fundamental freedoms' by providing a catalogue of the rights and freedoms generally accepted as fundamental to the preservation of human freedom and dignity and the development of the human personality. It did not purport to create new obligations, or to broaden the commitments under the Charter. Indeed every effort was made at the time of the proclamation of the Declaration to deprive it of any legal or compulsory attribute and to safeguard against such an attribution in the future (Moskowitz, 1958, p. 52). In other words: it was not law.

The Declaration was proclaimed by the General Assembly on 10 December 1948 *'as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of the territories under their jurisdiction'* (Moskowitz, 1958, p. 25).

The structure chosen in the UDHR provided a model for later documents on human rights. On the one hand it expresses the individual rights, on the other it gives a clause to determine the limits of these rights. In the UDHR this limitations clause is uniform for all rights. It is given in Article 29:

Article 29 UDHR

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Limitations to the exercise of human rights are only acceptable if they serve a specified worthy purpose. Further limitations may only be set by a heavy procedure predating the acts to which they apply ('determined by law'). In later limitations clauses and in case law the required connection between the purpose and the limitation of the exercise of a human right is further specified ('necessary') and a limit of proportionality is set to the impact of the limitation.

The Article that applies to the subject of this paper, food security, is Article 25:

Article 25

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

The UDHR was intended as a first step towards an international bill of rights. A covenant on human rights with the legally binding force of a treaty was to be the second and decisive step towards achievement of that goal (Moskowitz, 1958, p. 59). However the impact of the cold war within the UN was such that hopes to take this second step soon after the proclamation of the UDHR rapidly evaporated. The UN had to pass on the momentum in the development of human rights to regional organizations like the Council of Europe.[8]

4. Human rights in Europe

4.1. Council of Europe

Within the Council of Europe, the subject matter of the UDHR was split into two groups of human rights. In the language of the four freedoms speech they can be called the 'freedoms of' versus the 'freedoms from'. The 'freedoms of' have been labelled 'civil and political rights', 'the freedoms from' have been labelled 'social, economic and cultural rights'. In this distinction the influence of the cold war is felt. The civil and political rights like the freedom of speech and the freedom of worship embody the values of the first world, while state obligations concerning the welfare of the people, like the right to work and the protection from hunger, stand in a closer relation to the values of the socialist second world (on the socialist concept of human rights see Halász 1966). Or, to put it milder; civil and political rights are at the core of liberal approaches to the rule of law (in German: '*Liberaler Rechtsstaat*') and social, economic and cultural rights of the social approaches to the rule of law (in German: '*Sozialer Rechtsstaat*').[9]

Within the Council of Europe, already on 4 November 1959, less than two years after the proclamation of the UDHR, the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) – also known as the Treaty of Rome[10] – was concluded. It took the Council of Europe another eleven years to agree on a European Social Charter (ESC).

The legal power of the ESC is bleak in comparison to the ECHR. The ECHR is endorsed by a supra national dispute resolution structure including an European Court of Human Rights where both member states and individuals can bring complaints about infringements on human rights by member states. The case law of the European Court of Human Rights has gained great authority. Even though the reasonings of the Court are sometimes criticized, convictions often have a considerable impact in the member states concerned. The precedents set by the Court of Human Rights are by themselves sources of law adding weight and detail to the corpus of human rights law. In this way the provisions in the ECHR developed into hard law that can be successfully invoked by individuals – also – in cases before the national courts of the member states. This will be illustrated by some examples.

4.2. The European Court of Human Rights

The role of the European Court of Human Rights is vital for at least three reasons.

1) it provides an instrument for individuals uphold their rights;
2) it provides a forum where member states can be held accountable for their respect of human rights to the people who's rights are at stake;
3) it's case law is in itself a source of law that further develops the human rights set out in the Convention.

In this section we will focus on the latter. The European Court of Human Rights set out to elaborate in its case law the human rights requirements laid out in the Convention.

A landmark case is ECHR 26 April 1979 'Sunday Times'. The plaintiff was the London based publisher of the newspaper Sunday Times. This newspaper had planned to publish an article concerning a case that was 'sub judice' (pending before the court). The Attorney General issued a writ against Times Newspaper Ltd. in which he claimed an injunction to restrain them from publishing. On 17 November 1972 the court granted the injunction. To prevent the article from affecting and prejudicing the tribunal and the witnesses in the case concerned. After exhausting national remedies the plaintiff engaged in the producers under the ECHR. This interference by public authority in the exercise of the freedom of expression would entail a violation of Article 10 ECHR if it would not fall within one of the exceptions provided in the limitations clause in the second paragraph of this Article. The ECHR had to examine in particular if this interference was 'prescribed by law' and 'necessary in a democratic society'. The first question was answered to the affirmative. The unwritten common law requirements of due process were accepted as 'prescribed by law'.[11] The measure was however considered disproportionate and therefore not 'necessary in a democratic society' as required in the limitations clause. The interference with the freedom of expression was not justified, therefore the judicial authorities in the UK had been beholden to abstain from them. The freedom of speech acquired a strong position in the legal system of the member states of European Council as well. In the Netherlands for instance spatial planning measures to ban TV-antennas (necessary to receive opinions) or neon lights (used to express political views) were successfully contested before the courts.[12]

Another landmark 'Ärtze für das Leben' also concerns free speech. Austrian authorities had banned an anti-abortion demonstration for fear that opponents would cause riots. The Court of Human Rights ruled that in a case like this, authorities may not ban a demonstration but must use their police forces to protect the exercise of the freedom of speech from hostile audiences (ECHR 21 June 1988, A 139). This case had similar impact on practice in the member states (for the Netherlands, see: Van der Meulen 1993).

In a ruling of 1985 the Kingdom of the Netherlands was found to infringe on the right of access to justice (ECHR 23 October 1985 (No. 97), 8 E.H.R.R. 1 'Bethem v. The Netherlands'). Under Dutch administrative law a system of legal protection existed that gave interested parties the possibility to appeal to the Crown from decisions taken by lower administrative authorities. The Crown is the Queen acting under the responsibility of the government e.g. the Minister concerned. Decisions to be taken in Crown appeal were prepared by the Council of State; an independent advisory body to the government. The involvement of the government in deciding conflicts with administrative authorities was branded by the Court of Human Rights as an infringement on the right to a fair trial, as it did not give access to 'an independent and impartial tribunal' as required by Article 6 of the European Convention. As a consequence a major reform of Dutch administrative law had to be – and was – undertaken to ensure that access to an independent and impartial tribunal was provided for everyone who is entitled to this under the convention.

If rulings of the European Court of Human Rights can necessitate member states to rebuild their national legal infrastructure, as this example shows, the impact of the European Convention on Human Rights and Fundamental Freedoms is indeed tremendous. Human rights protected in this Convention provide individuals with legal entitlements which they can uphold against the state. The human rights as set out in the European Convention are being fleshed out and solidified in case law.

4.3. Progressive realisation

The above shows that the promotion of respect for human rights and freedoms *'by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of the territories under their jurisdiction'* as envisaged at the proclamation of the UDHR has advanced within member states of the Council of Europe to the point where civil and political rights are solid legal entitlements that interested parties can uphold in the courts of law.

4.4. The European Social Charter

The European Social Charter was not brought under the jurisdiction of the European Court of Human Rights.

Some aspects mentioned in Article 25 UDHR are discernable in the ESC like the protection of health (Art. 11), social security (Art. 12-14 and 16), protection of families, mothers and children (Art. 16-17) but food is not mentioned as a human right.

The rights included in the ESC never acquired the same legal impact as those included in the ECHR. It seems very likely that the absence of the power of the European Court of Human Right greatly contributed to this state of affairs.

5. The UN bill of rights and the right to adequate food

5.1. Two Covenants

Finally the UN acquired its bill of rights. Despite the principle of indivisibility and interdependence of human rights that was asserted by the UDHR and reaffirmed time and again, the division of the single set of rights set forth in the UDHR, into two distinct categories was continued. The view of the states that were in favour of two separate covenants, in particular the United States and other western states, prevailed over the view of the states that were in favour of creating one single document, including several countries adhering to the socialist line of thought (Arambulo, 1999, p. 17).

On 16 December 1966 two separate UN Treaties were adopted and opened for accession: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

A right to adequate food is recognised in the ICESCR in Article 11.

> *Article 11 ICESCR*
>
> *1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family,* including adequate food*, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*
>
> *2) The States Parties to the present Covenant, recognizing the fundamental* right of everyone to be free from hunger*, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:*
>
> *(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The limitations clause in the ICESCR is Article 4:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

In the clause we recognise the example set in the UDHR in that it makes requirements on the procedure ('determined by law') and the purpose ('promoting the general welfare in a democratic society') of limitations set to the enjoyment of human rights. The requirement of proportionality is expressed clearer than in the UDHR ('only in so far as this may be compatible with the nature of these rights').

5.2. The right to adequate food

Article 11 ICESCR quoted above is the most general and for this reason the most important codification of the human right to adequate food.[13] We have seen above that it is absent in the Treaties of the Council of Europe.

The right to adequate food enjoys particular attention from several UN bodies.[14] The Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Asbjørn Eide as special rapporteur on the right to food. Later the Economic and Social Council appointed Jean Ziegler as special rapporteur on the right to food. The reports of both these special rapporteurs and the General Comments by the Economic and Social Council greatly contributed to the development of understanding of the right to adequate food. They endeavour to make the abstract notions like adequate food sufficiently concrete for application to specific cases and to elaborate on the legal character of the right to food.

5.3. The concept of adequate food

The implementation of the right to food in the member states is supported by general comments by the Committee on Economic, Social and Cultural Rights (UN) and by Voluntary

Guidelines to support the progressive realisation of the right to adequate food in the context of national food security (FAO).

In its 20th session the UN Economic and Social Council approved General Comment 12: The right to adequate food (E/C.12/1999/5, CESCR d.d. 12 May 1999). In this general comment the notion of adequate food in Article 11 ICESCR is further elaborated. The key considerations are:

> Adequacy and sustainability of food availability and access
>
> *7. The concept of* adequacy *is particularly significant in relation to the right to food since it serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of article 11 of the Covenant. The notion of* sustainability *is intrinsically linked to the notion of adequate food or food* security*, implying food being accessible for both present and future generations. The precise meaning of "adequacy" is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while "sustainability" incorporates the notion of long-term availability and accessibility.*
>
> *8. The Committee considers that the core content of the right to adequate food implies:*
>
> *The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;*
>
> *The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.*
>
> *9.* Dietary needs *implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breast-feeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.*
>
> *10.* Free from adverse substances *sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or*

inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

11. Cultural or consumer acceptability *implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.*

12. Availability *refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.*

13. Accessibility *encompasses both economic and physical accessibility*

In short, the right to adequate food is understood as addressing issues of:

- nutrition
- safety
- cultural acceptability

It is interesting to note that although the human right to food is usually regarded in the context of food security in the strict quantitative sense of availability of food, matters of food safety and food ethics can be approached from a human rights angle as well. The latter may come to bear not only with regard to food considered to be kosher or hallal, but also in the contemporary discussion on the acceptability to certain consumers of the application of certain techniques in food production like irradiation, the application of hormones and genetic modification.

5.4. The right to water

The concept of food in human rights law has always included drink. In its General Comment no. 15 (Economic and Social Council 2003) the Economic and Social Council made explicit that the right to water is under the protection of Article 11 (and 12) ICESCR. The right to water encompasses both drinking water and 'access to water for the irrigation of food crops (…) particularly for subsistence farming and vulnerable peoples' (Ziegler 2003; see also Ziegler 2001). See on water the paper by Roth and Warner.

5.5. Access to land

The special rapporteur Ziegler believes that access to land is another of the key elements necessary for eradicating hunger in the world. In his opinion, this means that policy options

such as agrarian reform must play a key part in countries' food security strategies, in which access to land is fundamental (Ziegler, 2002). See on access to land the papers by Paradza and Grossman.

6. Some human rights are more equal than others

As is elaborated in more detail in the paper by Frank Vlemminx, the Netherlands that reformed their legal infrastructure to comply with the requirements of the ECHR, rejected applicability of the right to food in the national legal order out of hand without recourse to the limitations clause. In many other UN member states the right to food does not fare much better. This striking difference with the approach by the European Court of Human Rights described above, is partly explained by the splitting up of the subject matter of the UDHR into civil and political rights on the one hand and social, economic and cultural rights on the other hand.

6.1. Social and economic rights

Unlike civil and political rights, the legal binding character of social, economic and cultural rights is under debate. The underlying argument is that civil and political rights require non-interference from public authorities. Non-interference is called a 'negative' obligation, that is an obligation to abstain from action. It does not require specific resources to abstain from torturing,[15] from persecuting political opponents, from curbing free speech,[16] from curtailing worship,[17] etcetera. The realisation of social, economic and cultural rights on the other hand, requires positive action from the authorities or market parties. Houses must be built, schools equipped, the environment protected and food produced.

Each and every government can live up to negative obligations, but the extent to which positive obligations can be fulfilled largely depends on the availability of resources and the effectiveness of policies. For these and similar reasons, social, economic and cultural rights are perceived as policy guidelines rather than as provisions of law (Bossuyt 1975, Alkema 1982, Koekkoek and Konijnenbelt 1982).

6.2. Limits to the enjoyment of economic, social and cultural rights

It would be entirely in the line of thought set out in the previous section, to argue that where there is no provision of law, there is no reason to label hunger or other non-realisations of economic, social or cultural rights as an 'infringement' or 'violation' of a human right, or even to apply a limitations clause.

Indeed the limited legal weight of economic, social and cultural rights is not defended on the basis of the limitations clause, but of Art. 2 ICESCR. This article reads in its first paragraph:

> *Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

This provision can be read as saying that the obligations of the member state are limited to make an effort to achieve progress. That is precisely how this provision was understood as late as 1990 by the UN Committee on Economic, Social and Cultural Rights itself. General Comments no. 3 addresses 'The Nature of States parties obligations'. A crucial line is found in paragraph 9 of this general comment:

> *The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights.*

7. New doctrine

7.1. The special rapporteurs on the right to food

At the time when General Comment 3 was adopted, another approach to state obligations was already emerging. As mentioned above, Asbjørn Eide was appointed special rapporteur on the right to food by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a sub-commission to the Commission on Human Rights). He delivered his first report in 1987 (Eide 1987). The report was updated in 1998 and 1999. Jean Ziegler, in 2000 appointed special rapporteur on the right to food by the Economic and Social Council,

published his first report in 2001. His analysis of the right to food follows very similar lines to Eide.

Eide contests the view that economic, social and cultural rights are mere policy aims as well as its underlying argument. His first report contained a detailed analysis of the nature of State obligations for human rights, noting that international human rights law, like other parts of international law, is legally binding for States; it is not a set of recommendations, but requirements that have to be implemented. Three levels of obligations of states were identified: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations, according to Eide constitutes a violation of the rights.[18]

The special rapporteurs elaborated a doctrine stating that all human rights entail both negative and positive state obligations. The freedom of speech requires more than non interference. There must be an adequate infrastructure for a free press as well. The right to food does not require that governments feed the whole population. It includes the negative obligation for authorities not to interfere with the population's means to feed themselves.

A fourth state obligation has been identified so that in this doctrine four different obligations are distinguished: an obligation to respect (non interference), to protect (from the interference by third parties), to promote (support self realisation) and to fulfil (provide in case of emergency).

7.2. General comment no. 12

The new approach advocated by the special rapporteurs has been taken up in official UN policy documents. General Comment no. 12 on the right to food – mentioned above – has the following to say on the subject of state obligations:

> The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*. 1 The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil* (*facilitate)* means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable,

for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.

7.3. Justiciability

The analysis of obligations makes the right to food instrumental to rights based approaches to food security only if the individual or group protected by this right can hold the authorities to their obligations, that is to say if they lay a claim to it. For this reason it is an important question whether or not the right to food is justiciable. In the view of the special rapporteurs, the right to food should be accepted – at the very least as far as its negative obligations are concerned – as justiciable. That is to say that individuals should have access to the (national) courts to defend their right to food in case national authorities unduly restrict it. Justiciability of the right to food, turns this right into an entitlement.

Once justiciability of negative obligations is accepted, it is accepted that the right to food in particular and social, economic and cultural rights more in general are a matter that regards the courts. Once that foot is between the door, the question can be addressed to what extent exactly they are a matter of the courts.

The examples from the case law of the European Court mentioned above show that not only strictly negative obligations are suitable for litigation (Sunday Times Case), but the obligation to protect as well (Ärzte für das Leben) and even the obligation to provide (Bethem v. The Netherlands) (see further on positive obligations in the context of the European Convention on Human Rights: D.J. Harris, M. O'Boyle and C. Warbrick 1995, pp. 19-22).

The contribution of Gaynor Paradza provides examples of policy in Zimbabwe that seem clearly to run counter the obligation to respect and therefore would only be in conformity with ICESCR if the policy measures would fall within the limitations clause of Article 4 ICESCR. The details as presented in her contribution make it highly unlikely that the requirements of this clause are met. In other words we have here an example of a violation of the right to food (on allegations of violation of the right to food in Zimbabwe, see also: Ziegler, 2003).

8. The human right to feed oneself

From these discussions emerges a human right to acquire access to food that is sufficient in quality to satisfy ones dietary needs, that is sufficient in safety not to cause adverse effects and that is culturally acceptable. This right can be exercised by applying within the prevailing legal environment all available economic and legal means.

It is the states' duty not to interfere unduly with the exercise of this right and to protect the enjoyment of this right from interference by others. In situations where people due to circumstances beyond their control cannot get sustainable access to adequate food, the state must pursue a policy to improve the situation and in case of emergency must lend a helping hand.

9. Catching up on doctrine

Although the special rapporteurs and several other authors present their analysis as a matter of law – it is law that negative obligations related to social, economic and cultural rights are justiciable – legal practice scarcely confirms this view. Courts seem to adhere to the traditional doctrine described in paragraph 6 rather than to the new doctrine described in paragraph 7. In this sense the new doctrine reflects a legal-political ideal rather than fact.

Experience with the European Convention on Human Rights and Fundamental Freedoms shows that backing by the courts is seminal in giving human rights their place on the forefront of the legal system. The European Court of Human Rights has provided the national courts with the impetus and legitimation to take on their national legal systems and policies. Where no supra national court exists, the development of the human right to food into a legal entitlement has to come from the national courts or the national constitutional legislators. Unfortunately there are few signs that national courts muster the courage to perform this task and also the legislators show little inclination to include the right to food in national constitution.

This observation is not without exceptions. India seems to apply the ICESCR including the right to food (Pooja Ahluwalia, 2004; see also Supreme Court of India, 2000 SOL Case no. 673 mentioned by Ziegler 2003). South-Africa has included the right to food in its constitution (Khoza, 2004). A court in Belgium applied the right to food (arrêt no. 36/98 of 1 April 1998 of the Belgian Court of Arbitration; arrêt no. 51/94 of 29 June 1994 of the Belgian Court of Arbitration). An application of the right to food by the supreme court in Switzerland heralded a change of the constitution to explicitly include it (both mentioned in Vlemminx 2002, p. 31 and 38). There may be one or two other exceptions but the rest is silence.

Currently at UN level discussion is taking place about the possibility of adding an optional protocol to the ICESCR opening the possibility in one form or another for individuals to 'communicate' alleged violation of provisions in the Covenant to an 'expert body' (Economic and Social Council 2005 and 2006). Although it does not seem very likely that at the global level where the UN is operating agreement can be reached on a system comparable to the

European Court of Human Rights, any system that empowers concerned parties to force their state to discussion on the merits of a case in the light of the ICESCR will in all probability propel the development of the rights set out in the ICESCR far beyond the clichés 'too vague, too general to apply as yardstick for dispute resolution'[19] and therewith beyond traditional doctrine.

10. Concluding remarks

The principle of indivisibility, interdependence and interrelatedness of all human rights as advocated by the UN so far is little more than theory.

The legal theory on the human right to feed oneself as recognised in Article 11 ICESCR and several other international documents is well developed and ready for application in practice. This development of theory on the right to food has greatly contributed to the understanding of economic, social and cultural rights in general. History shows that the final push to turn convictions on human rights into positive law, must come from the judiciary. As long as an international body is missing it is up to the national courts to take on this responsibility. Unfortunately in general they seem reluctant to do so.

Civil society and in particular legal scholars must relentlessly point to this responsibility, show the possible ways and mobilise shame.

Some hope may be drawn from initiatives at UN level to create a procedure to address problems with regard to compliance with state obligations under the ICESCR. Such initiatives deserve our full support.

Cases

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- ECHR 21 June 1988, A 139 'Plattform Ärtze für das Leben v. Austria'
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- Supreme Court of India, 2000 SOL Case no. 673

Abbreviations

ARRvS	Afdeling rechtspraak van de Raad van State (Judicial Division of the Council of State: Dutch administrative court)
ECHR	European Convention on the Protection Human Rights and Fundamental Freedoms
ECHR	European Court Of Human Rights
E.H.R.R.	European Human Rights Reports
ESC	European Social Charter
FAO	Food and Agricultural Organisation (UN)
HR	Hoge Raad (Netherlands' supreme court)
HRLJ	Human Rights Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICECSR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

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[1] Oxfam Novib 30 October 2006: quoted in Dutch in Metro 31 October 2006: 'Het probleem van deze wereld is niet gebrek aan voedsel, maar gebrek aan rechtvaardigheid.'

[2] The question if and to what extent human rights have a 'horizontal effect' in that they regulate relations in which the state has no part, is outside the scope of this paper.

[3] By coincidence I am reviewing this line on my flight back from Champaign-Urbana University (Illinois) where among other things I gave a presentation on the human right to feed oneself. When flying in I signed an immigration form, waiving my right to appeal any decision taken by an immigration officer regarding my admissibility. So much for an 'inalienable' right of access to court (Art. 12 ICCPR).

[4] Some authors in this line of thought argue that the ultimate source of law is divine. Others regard is part of the human nature.

[5] The text is published in numerous place in the Internet for instance: http://www.libertynet.org/edcivic/fdr.html; http://www.fdrlibrary.marist.edu/4free.html; http://history.acusd.edu/gen/WW2Text/wwt0047; http://www.roosevelt.nl/en/four_freedoms/; http://www.ourdocuments.gov/doc.php?flash=true&doc=70; http://www.historicaldocuments.com/FourFreedomsSpeech.htm; http://www.quotedb.com/speeches/four-freedoms; http://www.u-s-history.com/pages/h1794.html; http://www.sagehistory.net/worldwar2/docs/FDR4Free.html. An audio version can be found at: http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm.

[6] For a more detailed account of the connection between the Second World War and the emergence of human rights and international organization, see: Kennedy (2005).

[7] On the crucial role of human rights in the framework of the UN see also Articles 13(1), 55(c), 56, 62(2), 68 and 76(c) of the UN Charter.

[8] The Council of Europe is an international organization active in cooperation in human rights and related fields of mutual interest of its member states. The Council of Europe is distinct from the European Union and should in particular not be confused with the EU Council.

[9] The expression 'rule of law' refers to the notion that in order to protect the people from abuse of power, public authorities should be bound by the law setting enforceable requirements and limits on the exercise of power. It is closely related to the separation of powers doctrine (trias politica), demanding that legislative, executive and judiciary powers be distributed over different organs in the state that are capable of keeping each other in check. The expression 'Rechtsstaat' refers to a state where such conditions apply.

[10] Again to be distinguished from the Treaty of Rome that established the European Economic Community.

[11] In other words, the exercise of human rights may not only limited by legislation, but also through other sources of e.g. case law or customary law.

[12] ARRvS 10 October 1978, AA 1979, 477 (Antenneverbod Leerdam); HR 24 January 1967, NJ 67, 270 (Nederland ontwapent).
[13] But it is not the only one. For a further elaboration on the sources of the right to food, see the contribution of Wernaart. Kearns (1998) argues that the right to food can be seen as customary law (as well).
[14] For an overview of the UN bodies engaged in the right to food see the contribution of Wernaart.
[15] Art. 7 ICCPR, Art. 3 ECHR.
[16] Art. 19 ICCPR, Art. 10 ECHR.
[17] Art. 18 and 27 ICCPR.
[18] Eide's report must have been inspired by discussion in literature. See for example the contributions of Shue and Van Hoof to Alston et al (1984) and earlier sources mentioned there, Eide among them.
[19] See Vlemminx.