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Recommended Citation

Cohen, Marc J. and Mary Ashby Brown. "Access to Justice and the Right to Adequate Food: Implementing Millennium Development Goal One." *Sustainable Development Law & Policy*, Fall 2005, 54-56, 80-81.

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ACCESS TO JUSTICE AND THE RIGHT TO ADEQUATE FOOD:

IMPLEMENTING MILLENNIUM DEVELOPMENT GOAL ONE

by Marc J. Cohen and Mary Ashby Brown*

INTRODUCTION

This paper explores the added value of a justiciable right to adequate food for food security and sustainable development. The world is not on track to meet the Millennium Development Goal (“MDG”) hunger target, so new approaches are required. We examine three case studies in this article involving the use of legal institutions to advance the right to adequate food and find that the “rights-based approach to development” is a promising new paradigm.

GLOBAL HUNGER REDUCTION: LOFTY GOALS, DISAPPOINTING TRENDS

The first MDG adopted by the UN General Assembly in 2000 is to “eradicate extreme poverty and hunger,” with a target of “[reducing] by half the proportion of people who suffer from hunger.”¹ The 1996 World Food Summit (“WFS”) had similarly agreed on “reducing the number of undernourished people to half their present level no later than 2015.”²

The reality of the current state of global hunger contrasts starkly with these solemn pledges. According to the Food and Agriculture Organization of the United Nations (“FAO”), 815 million people in developing countries (seventeen percent of the developing world’s population) live in food insecurity, lacking assured access to the calories necessary for active and healthy lives.³ Vitamin and mineral deficiencies afflict over four billion people, reduce school and work performance, and adversely affect public health. Five million malnourished preschool children die annually, and those who survive face impaired mental and physical development.⁴

The overall proportion of food-insecure people in developing countries has dropped since the early 1990s. However, this reduction has slowed as the number of food-insecure people in developing countries increased by twenty million during the second half of the 1990s.⁵ With business as usual, there is no possibility of achieving the 2015 hunger reduction targets.⁶

THE RIGHTS-BASED APPROACH TO DEVELOPMENT

The *rights-based approach* is a new development paradigm that contrasts with conventional approaches to development.⁷ The conventional approach focuses on interventions and service delivery to meet human needs.⁸ It often regards beneficiaries as passive objects of development. By comparison, the rights-based approach emphasizes the realization of internationally recognized human rights that impose obligations on states and empowers rights-holders to assert their claims vis-à-vis state authorities.⁹

The rule of law is a key principle of the rights-based approach. Not only must a legal framework protect and promote

human rights, but rights-holders must have access to competent, impartial, and independent processes that can adjudicate disputes and rule on claims. Put simply, meaningful rights must be enforceable.¹⁰

THE RIGHT TO FOOD AND JUSTICIABILITY

The 1948 Universal Declaration of Human Rights provides both for a right to food and the enforceability of this right through judicial means.¹¹ The International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) of 1966 spells out the rights to adequate food and freedom from hunger.¹² In 1996, the WFS reaffirmed the right to food.¹³ Although such declarations do not create binding international obligations (“hard law”), as statements of international consensus, they do offer guidance for appropriate action (“soft law”).¹⁴

The WFS Plan of Action calls upon the UN system “to better define the rights related to food...and to propose ways to implement and realize these rights..., taking into account the possibility of formulating voluntary guidelines for food security for all.”¹⁵ In response, the UN Committee on Economic, Social, and Cultural Rights (the monitoring body of the ICESCR) adopted General Comment 12 (“GC 12”) in 1999.¹⁶ While the Committee’s General Comments do not create legal obligations, legal experts consider them to have “particular authority.”¹⁷ In addition, GC 12 is unambiguous on justiciability: “Any person or group who is a victim of the violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels.”¹⁸

In 2004, an Intergovernmental Working Group established under FAO auspices agreed to comprehensive voluntary guidelines on implementing the right to adequate food.¹⁹ These guidelines recommend creating “[a]dministrative, quasi-judicial, and judicial mechanisms to provide adequate, effective, and prompt remedies accessible, in particular, to members of vulnerable groups . . . ”²⁰

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OBJECTIONS TO JUSTICIABILITY OF THE RIGHT TO ADEQUATE FOOD

Critics argue that implementing justiciable economic, social, and cultural (“ESC”) rights and the right to adequate food in particular would be costly, whereas the realization of civil and political rights entails minimal costs.²¹ However, the realization of civil and political rights, *e.g.*, holding periodic free and fair elections, actually requires substantial public expenditures.

Moreover, the costs of establishing institutions are distinct from the public expenditures needed to implement programs. The legal institutions needed to enforce human rights facilitate sustainable development and good governance.²² Legal institutions are also needed to enforce contracts, uphold property rights, and prevent corruption.²³

Some critics believe that implementation of the right to adequate food requires that governments provide food to all their citizens, irrespective of the availability of resources.²⁴ However, the human rights framework – to respect, protect, and provide – requires that states refrain from violating human rights and undertake measures to prevent other parties from interfering with those rights.²⁵ Therefore, fulfilling the right to food does not translate into the direct provision of food to all citizens but, rather, describes a broader commitment by the state to create an institutional framework in which citizens can achieve freedom from hunger.

Another objection characterizes the focus on legally enforceable rights as a diversion from achieving food security. For example, in its *Action Plan* on the follow up to the World Food Summit, the U.S. government contends that “the best route to food security, particularly in the most food-insecure countries, is not through legal instruments, but through adoption of sound policies that expand food production, encourage economic development, and improve access to food.”²⁶ Yet, those same policies are needed for the progressive realization of the right to adequate food.²⁷ Moreover, legally binding rights to food can contribute to world food security by prescribing sound national and international policies.²⁸ To explore how a justiciable right to adequate food works in practice, we look at the experiences of India, South Africa, and Brazil.

CASE STUDIES OF JUSTICIABILITY OF THE RIGHT TO ADEQUATE FOOD

INDIA

Hunger and malnutrition in India are severe, with 221 million people (21 percent of the populace) considered food-insecure.²⁹ Half of all Indian children are chronically undernourished.³⁰ Hunger persists amid plenty: many Indians cannot afford food, despite the huge cereal surpluses of recent years.³¹

India’s courts have sought to hold the central and state governments accountable for this stark contradiction. Constitutional jurisprudence provides for the justiciability of ESC rights based on “the right to life.”³² This constitutional right was central to the case of *People’s Union for Civil Liberties (“PUCL”) v. Union of India*.³³ In mid-2001, existing public food and employment programs failed to provide food to destitute people in the impoverished and drought-stricken state of Rajasthan. PUCL petitioned the Supreme Court of India to compel the government to respond to the hunger emergency.³⁴

The Court agreed that “it was the primary responsibility of the Central and State governments to ensure that . . . food grains reached the starving people.”³⁵ Additionally, the Court held that a shortage of funds could not excuse the government’s failure to fulfill obligations.³⁶ Although the case still awaits final judgment, interim court orders have directed the central and state governments to provide food to vulnerable groups through existing programs and enroll unemployed, food-insecure people in food-for-work programs.³⁷ The interim orders have elevated the benefits of public food programs to *legal entitlements*. The case also sparked creation of the Right to Food Campaign, which seeks to foster greater public awareness of the right to food in poor areas.³⁸

SOUTH AFRICA

Although South Africa is food-secure in aggregate terms, 35 percent of all households (14.3 million people) are classified as food-insecure.³⁹ The post-apartheid government’s Integrated Food Security Strategy focuses on both short-term food assistance and long-term capacity building, and intends to implement a constitutional right to food.⁴⁰

The 1996 Constitution makes explicit that the state is obligated to respect, protect, and fulfill human rights. Lawmakers and lobbyists in South Africa were divided regarding the inclusion of ESC rights in the Constitution, concerned that the inclusion of these rights would create expectations by the people that could not be fulfilled. However, the inclusion of ESC rights was strongly supported by South African president Nelson Mandela:

The key . . . to the protection of any minority is to put core civil and political rights, as well as some cultural and economic rights beyond the reach of temporary majorities, and to guarantee them as fundamental individual rights. . . . A simple vote, without food, shelter, and health care, is to use first generation rights as a smokescreen to obscure the deep underlying forces, which dehumanize people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom.⁴¹

The South African Constitution recognizes the justiciability of the right to food, and requires that the state take reasonable measures to achieve its progressive realization.⁴² Like the Indian Constitution, South Africa’s Constitution includes a provision for the right to life.⁴³ The Constitutional Court has upheld the justiciability of several ESC rights; however, thus far, litigation has not addressed the right to food.

Cases have focused on housing (*Government of the Republic of South Africa and Others v. Grootboom and Others*, 1999)⁴⁴ and health (*Treatment Action Campaign (“TAC”) v. Minister of Health*, 2002).⁴⁵ In both cases, the court’s opinion centered on whether the government acted “reasonably” in designing, implementing, and budgeting for programs to address the progressive realization of these rights; this determination was held to outweigh the availability of resources.⁴⁶

In *TAC v. Minister of Health*, the court ordered the government to provide drugs “without delay” to public hospitals and

clinics when medically indicated and to take reasonable measures to provide testing and counseling.⁴⁷ This case not only assures poor people access to HIV/AIDS treatment, but also establishes a conceptual framework for court review and enforcement of ESC rights, including the right to food, in South Africa and elsewhere. The Court faulted the government for not having a plan to address the transmission of HIV/AIDS to infants, since formulation of a plan facilitates resource mobilization.⁴⁸

Despite the court's focus on the state's duty to take "reasonable" actions to realize ESC rights, the reality in South Africa is that unreasonable administrative and bureaucratic hurdles exclude many people from public benefit programs. Critics argue that a framework law on the right to food would provide a firmer political commitment and a comprehensive legislative response to rectify current fragmented, poorly coordinated policies, programs, and legislative measures.⁴⁹

BRAZIL

According to FAO, 15.6 million Brazilians (nine percent of the population) are food insecure.⁵⁰ Brazilian government data indicate that 44 million low-income people are vulnerable to food insecurity.⁵¹ As in India and South Africa, food insecurity is not primarily due to lack of availability, with farm output growing rapidly during the 1990s.⁵²

Unlike India and South Africa, Brazil follows the civil law tradition.⁵³ The country ratified the ICESCR in 1992, and the Constitution automatically incorporated the treaty into national law. Brazil's Constitution also guarantees "inviolability of the right of life" and a 2003 amendment explicitly recognizes the right to food.⁵⁴

Although Brazilian courts have tended to defer ESC rights to the executive and legislative branches, the country's "Public Civil Suit Law" permits municipalities and non-governmental organizations ("NGOs"), for example, to sue government agencies, in order to advance individual or collective ESC rights. Suits have secured access to health care, but public prosecutors have yet to file on the right to food.⁵⁵

Since 1988, state and federal prosecutors have also used public civil "inquiries" to protect and promote human rights. These allow prosecutors to investigate violations of human rights and submit evidence to courts for inquiry. Through this mechanism, public prosecutors are able issue recommendations to government agencies on human rights issues.⁵⁶

A number of these inquiries have focused on the right to food. In 2002 and 2003, prosecutors recommended that the Ministry of Health expand food assistance to children uncov-

ered by the state's *Bolsa Alimentação* program, which provides funds to nutritionally vulnerable families in exchange for participation in health and nutrition education. Public prosecutors also pressed the federal government to extend school feeding programs to 2.5 million children excluded due to mismanagement. In 2003, federal prosecutors used a public civil inquiry to join with civil society organizations to monitor policies and expenditures aimed at realizing the right to food.⁵⁷

JUSTICIABILITY VS. POLITICAL MOBILIZATION

In all three cases discussed above, civil society campaigns (such as the Right to Food Campaign, the Treatment Action Campaign, and a broad array of Brazilian civil society organizations) and public interest lawyers (including Brazil's public prosecutors) played an important role in the efforts to protect and promote the right to food and other ESC rights. Often, such groups pursue other means instead of or in addition to litigation, including legislative lobbying, demonstrations, and public awareness activities.

Political mobilization around the right to adequate food can prove especially important in the absence of justiciability, well-functioning legal systems, and in difficult political circumstances. For instance, in Chile during the Pinochet dictatorship, societal pressure prevented the government from abolishing public nutrition assistance.⁵⁸ Obviously, where an independent and effective judiciary exists, a reliance on courts offers an effective and less risky means for redressing rights-related grievances. Even where the rule of law prevails, other public action is likely needed to complement reliance on the justice system.

CONCLUSION

All three country cases examined here illustrate that in very different political contexts and levels of development, constitutional, economic, social, and cultural rights have helped promote poor people's right to adequate food and expand access to public social assistance. In India and South Africa, single cases had far-reaching effects. In all three countries, the existence of a thriving public interest bar proved crucial in assuring poor people's access to justice.

Effective access to legal institutions facilitates the inclusion of marginalized people in the development process, and provides citizens with a means to file actionable grievances against the government for the failure to progressively meet economic, social, and cultural rights. The rights-based approach therefore offers added value in the quest for food security and sustainable development, as well as a very promising tool for achieving the MDG hunger target.



ENDNOTES: The Right to Adequate Food

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Committee Report recognizing that some Committee members “think that additional measures are warranted,” but nonetheless supporting the Convention’s ratification).

⁵³ Bureau of Public Affairs, U.S. Dep’t of State, U.S. Statement for the Record on the UNCED Agreements, Dep’t St. Dispatch, Supp. No. 14, July 1992, at 35, 35 (refusing to commit to increasing levels of official development assistance to 0.7 percent of gross domestic product).

⁵⁴ See, e.g., Samudu Atapattu, *Sustainable Development, Myth or Reality?*, 14 GEO. INT’L ENVTL. L. REV. 265, 271 (2002), at 271; Jim Bailey, *Sustainable Development: Searching for the Grail or a Wild Goose?*, 24 ENVTL. L. 1159, 1162 (1994), at 1162; Jennifer McIver, *Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?*, 10 GEO. INT’L ENVTL. L. REV. 147, 162-63 (1997) at 162-63.

⁵⁵ JOHN C. DERNBACH, *Sustainable Development: Now More Than Ever*, in STUMBLING TOWARD SUSTAINABILITY, *supra* note 28, at 45. [hereinafter DERNBACH, *Now More Than Ever*].

⁵⁶ See *id.* at 51-53.

⁵⁷ AGENDA 21, *supra* note 4, at ¶¶ 8.5-8.6 (calling for environmental impact assessments); See *Rio Declaration*, *supra* note 4, at princ. 17. For additional discussion, see DERNBACH, *Now More Than Ever*, *supra* note 55, at 52.

⁵⁸ See e.g., RIO DECLARATION, *supra* note 4, at princ. 11 (calling for the enactment of environmental legislation by the States); see also DERNBACH, *Now More Than Ever*, *supra* note 55, at 53.

⁵⁹ See OUR COMMON JOURNEY, *supra* note 5, at 3.

⁶⁰ See DERNBACH, *Now More Than Ever*, *supra* note 55, at 52.

⁶¹ Cf. Nat’l Comm’n on the Env’t, *supra* note 43, at 1 (stating that the national goals of sustainable development are “economic growth and environmental improvement”).

⁶² For discussion of recent examples of such debates, see Jonathan Z. Cannon, *EPA and Congress (1994-2000): Who’s Been Yanking Whose Chain?*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 10, 942 (2001); Thomas O. McGarity, *Deflecting the Assault: How EPA Survived a “Disorganized Revolution” by “Reinventing” Itself a Bit*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 11, 249 (2001).

⁶³ See Kenneth R. Richards, *Framing Environmental Policy Instrument Choice*, 10 DUKE ENVTL. L. & POL’Y F. 221, 222 (2000).

⁶⁴ OUR COMMON JOURNEY, *supra* note 5, at 6-7.

⁶⁵ OUR COMMON JOURNEY, *supra* note 5, at 3.

⁶⁶ OUR COMMON JOURNEY, *supra* note 5, at 59.

⁶⁷ Framework Convention, *supra* note 45, at art. 2.

⁶⁸ See generally Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001).

⁶⁹ 42 U.S.C. § 11,023 (2000).

⁷⁰ LYNN GOLDMAN, *Toxic Chemicals and Pesticides*, in STUMBLING TOWARD SUSTAINABILITY, *supra* note 28, at 403, 415-16.

⁷¹ RIO DECLARATION, *supra* note 4, at princ. 10 (stating the importance to sustainable development of public participation, public information, and access to justice). See also THE NEW “PUBLIC”: THE GLOBALIZATION OF PUBLIC PARTICIPATION (Carl Bruch ed., 2002); ELENA PETKOVA ET AL., WORLD RES. INST., CLOSING THE GAP: INFORMATION, PARTICIPATION, AND JUSTICE IN DECISION-MAKING FOR THE ENVIRONMENT (2002).

⁷² Cf. Pederson, *supra* note 15, at 179 (“[L]ack of goals helps perpetuate captivity of [government] agencies to interest group pressure.”).

⁷³ LAWRENCE E. SUSSKIND ET AL., INTERNATIONAL ENVIRONMENTAL TREATY MAKING (1992).

⁷⁴ RICHARD W. PARKER, *Choosing Norms to Promote Compliance and Effectiveness: The Case for International Environmental Benchmark Standards*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 145, 157-58 (Edith Brown Weiss ed., 1998).

⁷⁵ See John C. Dernbach, *Targets, Timetables, and Effective Implementing Mechanisms: Necessary Building Blocks for Sustainable Development*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 79 Part III. B.

⁷⁶ Pierre-Marie Depuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT’L L. 420 (1991).

⁷⁷ See Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT’L L. 259, 269-70 (1992).

⁷⁸ OUR COMMON JOURNEY, *supra* note 5, at 38-40; Dev. Assistance Comm., Org. For Econ. Cooperation and Dev., *Shaping the 21st Century: the Contribution of Development Co-operation 7-8* (1996), available at <http://www.oecd.org/dataoecd/23/35/2508761.pdf> (last visited Oct. 29, 2005).

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ENDNOTES: THE RIGHT TO ADEQUATE FOOD *Continued from page 56*

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⁶ J. von Braun, *Conclusions of the Workshop Policies Against Hunger* (May 2002), <http://www.verbraucherministerium.de/data/0005C476AC621EDDAAEB6521C0A8D816.0.pdf> (last visited Nov. 1, 2005).

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- ¹⁵ World Food Summit, *supra* note 2, at ¶61 7.4e.
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- ¹⁸ See *Id.*
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- ³⁰ FAO, *supra* note 3; SCN, *supra* note 4.
- ³¹ M. Dev, *supra* note 29.
- ³² INDIA CONST. ART. 21; FAO, RIGHT TO FOOD CASE STUDY: India, UN Doc. IGWG RTFG /INF 4/APP.5 (Feb. 2004) (prepared by A. Kundu and S. Jain), available at http://www.fao.org/righttofood/common/ecg/51629_en_Template_case_study_India.pdf (last visited Nov. 1, 2005).
- ³³ PUCL v. Union of India and Others, Writ Petition (Civil) 196 of 2001, available at <http://www.righttofoodindia.org/case/petition.html> (last visited Nov. 1, 2005). See Center on Housing Rights and Evictions [COHRE], *Litigating Economic, Social, and Cultural Rights: Achievements, Challenges, and Strategies* (2003) (prepared by M. Langford), <http://www.cohre.org/library/Litigating%20ESCR%20Report.pdf> (last visited Nov. 1, 2005); M. Dev, *supra* note 29.
- ³⁴ Government relief works are mandatory in times of famine and should not be denied, according to the Famine Code: “Despite being required to give work to ‘every person who comes for work on a relief work,’ the government of Rajasthan followed a policy of ‘labor ceilings,’ which restrict employment to less than 5 percent of the drought affected population, by the government’s own statistics.” Right to Food Campaign, Summary of the Right to Food Petition, http://www.righttofoodindia.org/case/petition_sum.html (last visited Nov. 1, 2005).
- ³⁵ See PUCL v. Union of India and Others, *supra* note 33.
- ³⁶ M. Dev, *supra* note 29.
- ³⁷ The Right to Food Campaign notes some states are ignoring Court orders. See J. Dreze, *From the Courts to the Streets* (2002) <http://www.righttofoodindia.org/data/dreze-courts.pdf> (last visited Nov. 1, 2005).
- ³⁸ FAO, *supra* note 3.
- ³⁹ FAO, *supra* note 3.
- ⁴⁰ Government of the Republic of South Africa, *Integrated Food Security Strategy of South Africa* (2002), available at <http://www.info.gov.za/otherdocs/2002/foodpol.pdf> (last visited Nov. 1, 2005).
- ⁴¹ NELSON MANDELA, *Address on the Occasion of the African National Congress’s Bill of Rights Conference* (1991), in S. NTHAI, THE IMPLEMENTATION OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA, DE REBUS (Nov. 1999).
- ⁴² S. AFR. CONST. 1996 § 7 [2], 26 [2], and 27 [2].
- ⁴³ S. AFR. CONST. 1996. *id.*, § 10 and 11.
- ⁴⁴ Government of the Republic of South Africa v. Grootboom and Others 2000 (11) BCLR 1169 (CC), 2001 1 SA 46 (CC), *case review available at* http://www.communitylawcentre.org.za/ser/casereviews/2001_1_SA_46.php (last visited Nov. 1, 2005); COHRE, *supra* note 33.
- ⁴⁵ Minister of Health and Others vs. Treatment Action Campaign and Others 2002 (5) SA 721 (CC), 2002 10 BCLR 1033, *case review available at* http://www.communitylawcentre.org.za/ser/casereviews/2002_5_SA_721.php (last visited Nov. 1, 2005); COHRE, *supra* note 33.
- ⁴⁶ *Grootboom*, *supra* note 44, n. 6 para 93-4; see Government of the Republic of South Africa *supra* note 44; COHRE, *supra* note 33 (2003).
- ⁴⁷ Minister of Health *supra* note 45; COHRE, *supra* note 33.
- ⁴⁸ COHRE, *supra* note 33.
- ⁴⁹ Khoza, S., *Protecting the Right to Food in South Africa: The Role of Framework Legislation*, 5 ESR REVIEW (Community Law Center, University of the Western Cape S.A. 2003).
- ⁵⁰ FAO, *supra* note 3.
- ⁵¹ FAO, RIGHT TO FOOD CASE STUDY: BRAZIL, UN Doc. IGWG RTFG /INF 4/APP.1 (Feb. 2004) (prepared by Hernán Gómez Bruera), available at http://www.fao.org/righttofood/common/ecg/51629_en_template_case_study_Brazil_annex.pdf (last visited Nov. 1, 2005).
- ⁵² *Id.*
- ⁵³ Organization of American States [OAS] *The Brazilian Legal System*, http://www.oas.org/juridico/MLA/en/bra/en_bra-int-des-ordrjur.html (last visited Oct. 22, 2005).
- ⁵⁴ FAO, *supra* note 3.
- ⁵⁵ FAO, *supra* note 3; see also Sadek, *supra* note 23.
- ⁵⁶ FAO, *supra* note 3.
- ⁵⁷ FAO, *supra* note 3.
- ⁵⁸ J. DRÈZE AND A. SEN, HUNGER AND PUBLIC ACTION (Oxford University Press 1989).