

A Human-Rights-Based Approach to Front-Of-Package Labelling in South Africa

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SUMMARY

South Africa is facing a rapidly increasing rate of diet-related non-communicable diseases (NCDs), threatening the health, and consequently the protection, promotion and fulfilment of the human rights of South Africans. As part of its response to the growing epidemic, the government has proposed the adoption of a simplified nutrition-labelling system that includes a front-of-package warning label. The use of front-of-package labelling (FOPL) has been shown to improve diets by providing consumers with easy-to-understand information about food products that are generally difficult to interpret as a layperson, and to serve as a basis to adopt other effective obesity-prevention measures, such as marketing restrictions or taxes on unhealthy foods. FOPLs have been successfully implemented in other countries and endorsed as a mechanism to realise the rights to health, food and access to information by international human-rights commentators. A FOPL regime will also complement consumer-protection legislation in South Africa, being aimed at

promoting access to information for South Africans. This article makes a human-rights-based case for FOPL by outlining why implementing FOPL would be a unique and effective mechanism for the South African government to meet its human-rights obligations under the Constitution and international human-rights instruments. Specifically, this article identifies rights that can be used to support the adoption of FOPL, and concretises the obligations and content within these rights to provide a human-rights-based justification for the adoption of simplified nutrition labelling in South Africa.

KEYWORDS: obesity, constitutional rights, right to food

1 INTRODUCTION

Front-of-package labelling (FOPL) has been identified as a potential intervention to improve diets by enabling consumers to more easily identify unhealthy foods and make better decisions about their diets.¹ In addition, FOPL can provide a basis for adopting other obesity-prevention measures such as marketing restrictions or taxes on unhealthy foods.² While there are a range of FOPL systems, it has been recognised that mandatory warning systems are particularly effective in achieving the aims of improving diet and obesity prevention.³ There has also been an increased adoption of FOPL systems globally, with over 10 countries adopting such systems. Uruguay, Peru, Chile and Israel have adopted these warning systems and, in some instances, they are already seeing positive changes in diets as a result.⁴

South Africa first contemplated introducing a FOPL system in 2014 through draft regulations (R429).⁵ At the time, a voluntary traffic-light system was proposed, but this fell short of current best practices.⁶ In early 2023, South Africa published new draft regulations, which sought to introduce a mandatory FOPL scheme for unhealthy food products (R3337).⁷ The proposed scheme draws substantially on FOPL systems adopted elsewhere but uses a purpose-built, nutrient-profiling system to identify foods that

¹ Pan American Health Organization “Front-of-Package Labeling” (undated) <https://www.paho.org/en/topics/front-package-labeling> (accessed 2023-10-18).

² Dintrans, Rodriguez, Clingham-David and Pizarro “Implementing a Food Labeling and Marketing Law in Chile” 2020 6(1) *Health Systems & Reform* e1753159.

³ Hammond, Acton, Rynard, White, Vanderlee, Bhawra, Reyes, Jáuregui, Adams, Roberto, Sacks and Thrasher “Awareness, Use and Understanding of Nutrition Labels Among Children and Youth From Six Countries: Findings From the 2019–2020 International Food Policy Study” 2023 20(55) *International Journal of Behavioral Nutrition and Physical Activity* 1; Song, Brown, Tan, MacGregor, Webster, Campbell, Trieu, Mhurchu, Cobb and He “Impact of Color-Coded and Warning Nutrition Labelling Schemes: A Systematic Review and Network Meta-Analysis” 2021 18(10) *PLOS Medicine* e1003765.

⁴ Reyes, Taillie, Popkin, Kanter, Vandevijvere and Corvalán “Changes in the Amount of Nutrient of Packaged Foods and Beverages After the Initial Implementation of the Chilean Law of Food Labelling and Advertising: A Nonexperimental Prospective Study” 2020 17(7) *PLOS Medicine* e1003220.

⁵ Regulations Relating to the Labelling and Advertising of Foods: Amendment GN R429 in GG 37695 of 2014-05-29.

⁶ Karim, Kruger and Hofman “Some Legal Issues Around the Adoption of Simplified Nutrition Labelling in South Africa: An Analysis of Draft Regulation R429” 2022 23 *ESR Review* 21.

⁷ Regulations Relating to the Labelling and Advertising of Foodstuffs GN R3337 in GG 48460 of 2023-04-21.

should carry a label and also feature a logo developed through consumer engagement.⁸

R3337 also introduces associated restrictions on marketing and the use of health claims for products bearing a label.⁹ R3337 arises in a context where South Africa faces a growing burden of obesity, overweight and associated non-communicable diseases. Previously, South Africa has pioneered regulations aimed at preventing NCDs, particularly diet-related NCDs. Over the past decade, the government has introduced restrictions on the amount of sodium and trans-fats in foods, regulated infant formula and adopted a tax on sugary beverages, all with the goal of preventing NCDs.¹⁰ The adoption of a mandatory FOPL system is the next logical step in the government's effort to prevent NCDs.

However, efforts to adopt mandatory FOPL systems are not without challenges. Governments that have attempted them have often faced extensive opposition from industry and corporate actors.¹¹ This opposition has come in the form of media and lobbying campaigns against mandatory FOPL systems (arguing that diet is a matter of individual choice), and litigation in both domestic and international fora, including challenges in the World Trade Organization.¹² In addition, FOPL and other obesity-prevention measures are frequently framed in opposition to human rights and are often understood to limit human rights.¹³

There is a growing recognition that adopting a human-rights-based approach (HRBA) to NCD prevention, and FOPL specifically, may support governments to adopt these measures and defend them against potential challenges from industry.¹⁴ In addition to the need to manage the tensions between human rights and public-health interventions, human rights also offer an accountability mechanism and can be used to compel government action where the rights involved are justiciable. This article seeks to explore how human rights may support the adoption of a mandatory FOPL system in

⁸ Frank, Thow, Ng, Ostrowski, Bopape and Swart "A Fit-for-Purpose Nutrient Profiling Model to Underpin Food and Nutrition Policies in South Africa" 2021 13(8) *Nutrients* 2584; Bopape, Taillie, Frank, Murukutla, Cotter, Majija and Swart "South African Consumers' Perceptions of Front-of-Package Warning Labels on Unhealthy Foods and Drinks" 2021 16(9) *PloS One* e0257626.

⁹ Regulations 46, 52 and Part V in GN R3337 in GG 48460 of 2023-04-21.

¹⁰ Ndinda, Ndhlovu, Juma, Asiki and Kyobutungi "The Evolution of Non-Communicable Diseases Policies in Post-Apartheid South Africa" 2018 18 *BMC Public Health* 89.

¹¹ Castrunovo, Guarnieri, Tiscornia, Allemanni and Pizzara "Stakeholders' Arguments Against and on Favor FOP Policy: An Analysis Using the Framing Framework in Argentina" (2021) <https://idl-bnc-idrc.dspacedirect.org/handle/10625/60435> (accessed 2021-10-25) 1; Global Health Advocacy Incubator (11 August 2021) <https://advocacyincubator.org/wp-content/uploads/2021/08/Evidence-to-Support-FOPL.pdf> (accessed 2021-10-25) 1; Mialon, Charry, Cedié, Crosbie, Scagliusi and Tamayo "I Had Never Seen so Many Lobbyists": Food Industry Political Practices During the Development of a New Nutrition Front-of-Pack Labelling System in Colombia" 2021 24(9) *Public Health Nutrition* 2737.

¹² Castrunovo *et al* <https://idl-bnc-idrc.dspacedirect.org/handle/10625/60435> 1; Mialon *et al* 2021 *Public Health Nutrition* 2737.

¹³ Patterson, Buse, Magnusson and Toebe "Identifying a Human Rights-Based Approach to Obesity for States and Civil Society" 2019 20 *Obesity Reviews* 45.

¹⁴ Garde and Abdool-Karim "Human Rights and Healthy Diet Research Support Initiative: Scoping Review" (December 2022) <https://idl-bnc-idrc.dspacedirect.org/items/942db36d-7f22-4827-a756-f1138adfeeae> (accessed 2023-12-08) 30.

South Africa. The article begins by discussing FOPL systems and their purpose. Thereafter, the authors outline an HRBA to FOPL and NCDs under international and regional law. This is used as a starting point to concretise the approach under the South African Constitution before outlining the particular obligations that arise from this approach as a means to support the adoption of mandatory FOPL in South Africa.

2 WHAT IS THE PURPOSE OF FOPL WARNING LABELS AND HOW DO THEY WORK?

South Africa, like other countries, is facing an obesity and NCD crisis, with rising levels of diabetes, hypertension and heart disease.¹⁵ These conditions have been linked to the proliferation of ultra-processed foods and beverages that displace local, healthier options on supermarket shelves.¹⁶ Owing to the relatively low cost of these readily available and filling ultra-processed products, many vulnerable people living in poverty opt for them, as healthier alternatives are unaffordable.¹⁷ To counteract the effects of these unhealthy products, a number of countries including Chile,¹⁸ Peru,¹⁹ Israel,²⁰ Mexico,²¹

¹⁵ Roomaney, Van Wyk, Turawa and Pillay-van Wyk "Multimorbidity in South Africa: A Systematic Review of Prevalence Studies" 2021 11(10) *BMJ Open* e048676; Pillay-van Wyk, Msemburi, Laubscher, Dorrington, Groenewald, Glass, Nojilana, Joubert, Matzopoulos, Prinsloo, Nannan, Gwebushe, Vos, Somdyala, Sithole, Neethling, Nicol, Rossouw and Bradshaw "Mortality Trends and Differentials in South Africa from 1997 to 2012: Second National Burden of Disease Study" 2016 4(9) *Lancet Global Health* e642; Statistics South Africa (StatsSA) *South African Demographic and Health Survey (SADHS)* 2016 (Pretoria, 2019).

¹⁶ Baker, Machado, Santos, Sievert, Backholer, Hadjikakou, Russell, Huse, Bell, Scrinis, Worsley, Friel and Lawrence "Ultra-Processed Foods and the Nutrition Transition: Global, Regional and National Trends, Food Systems Transformations and Political Economy Drivers" 2020 21(12) *Obesity Reviews* 1; Adams, Hofman, Moubarac and Thow "Public Health Response to Ultra-Processed Food and Drinks" 2020 *BMJ* m2391; Ronquest-Ross, Vink and Sigge "Food Consumption Changes in South Africa Since 1994" 2015 111(9/10) *South African Journal of Science* 1.

¹⁷ Monteiro, Moubarac, Cannon, Ng and Popkin "Ultra-Processed Products Are Becoming Dominant in the Global Food System" 2013 *Obesity Reviews* 21; Labadarios, Mchiza, Steyn, Gericke, Maunder, Davids and Parker "Food Security in South Africa: A Review of National Surveys" 2011 89(12) *Bulletin World Health Organisation* 891; Temple and Steyn "The Cost of a Healthy Diet: A South African Perspective" 2011 27(5) *Nutrition* 505; Stats SA "National Poverty Lines and Development Methodological Report on Rebasing of National Poverty Lines and Development on Pilot Provincial Poverty Lines Technical Report" (2015) 1; Shisana, Labadarios, Rehle, Simbayi, Zuma, Dhansay, Reddy, Parker, Hooisan, Naidoo, Hongoro, Mchiza, Steyn, Dwane, Makoae, Maluleke, Ramlagan, Zungu, Evans, Jacobs, Faber and SANHANES-1 Team "The South African National Health and Nutrition Examination Survey (SANHANES-1)" (2013) [https://hsr.ac.za/uploads/pageNews/72/SANHANES-launch%20edition%20\(online%20version\).pdf](https://hsr.ac.za/uploads/pageNews/72/SANHANES-launch%20edition%20(online%20version).pdf) (accessed 2023-12-08) 182.

¹⁸ Food and Agriculture Organization and Pan American Health Organization "Approval of a New Food Act in Chile: Process Summary" (2017) <https://www.fao.org/3/i7692e/i7692e.pdf> (accessed 2023-12-08) 2.

¹⁹ Ministerio de Salud del Perú *Aprueban Manual de Advertencias* (2018) 58.

²⁰ Global Agricultural Information Network Information "New Nutritional Labeling Regulation – Israel" (29 January 2018) https://apps.fas.usda.gov/newgainapi/api/report/download_reportbyfilename?filename=New%20Nutritional%20Labeling%20Regulation%20Tel%20Aviv_Israel_1-29-2018.pdf (accessed 2023-12-08) 1.

²¹ Secretaría de Economía *Mexico Regulation NOM-051* (2020) 1 4.

Uruguay²² and Brazil²³ have introduced regulations on mandatory warning labels on the front of packaged food and beverage products. Warning labels are designed to warn consumers about products high in unhealthy nutrients such as saturated fat, sugar or sodium, which are predominantly ultra-processed and linked to poor health outcomes.²⁴

Owing to the increasing volume of ultra-processed products available in supermarkets, it is challenging for consumers to make healthy choices,²⁵ and these warning labels provide easily identifiable information to facilitate informed choices.²⁶ On their own, warning labels support the right to information by improving consumer knowledge and understanding of products that are linked to poor health outcomes and which should be restricted.²⁷ As many South Africans' food choices are dictated by affordability, rather than improved knowledge,²⁸ improved access to information alone may not change consumption patterns. However, when warning labels are used in combination with other regulations, such as those that inform criteria to identify unhealthy products to be restricted in the school food environment, or that restrict marketing to children, they have the potential to improve the health of societies by promoting a healthier food environment.²⁹ In this way, warning labels can be viewed as a tool to protect and promote the right to food and health.³⁰

As warning labels have become more prominent globally, their success has been evident. Chile, the first country to implement warning labels (and the country with the most evidence of their effect) has found that attitudes of low and middle-income mothers towards purchasing have shifted,³¹ and that consumers understand that a product with no warning labels is healthier than a product with warning labels.³² There has been a decline in sugary

²² Ministerio de Salud de Uruguay *Manual Para La Aplicación Del Decreto No 272/018 Sobre Rotulado Frontal de Alimentos* (2018) 32.

²³ National Agency of Sanitary Surveillance (ANVISA) and Ministério da Saúde *Resolution of the Collegiate Board 429 and Normative Instruction 75* (2020).

²⁴ Corvalán, Reyes, Garmendia and Uauy "Structural Responses to the Obesity and Non-Communicable Diseases Epidemic: Update on the Chilean Law of Food Labelling and Advertising" 2019 20(3) *Obesity Reviews* 367.

²⁵ Monteiro *et al* 2013 *Obesity Reviews* 21.

²⁶ Taillie, Hall, Popkin, Ng and Murukutla "Experimental Studies of Front-of-Package Nutrient Warning Labels on Sugar-Sweetened Beverages and Ultra-Processed Foods: A Scoping Review" 2020 12(2) *Nutrients* 569.

²⁷ *Ibid.*

²⁸ Temple and Steyn 2011 *Nutrition* 505.

²⁹ Corvalán *et al* 2019 *Obesity Reviews* 367.

³⁰ Constantin, Cabrera, Ríos, Barbosa, Ramírez, Cinà and Guzmán "A Human Rights-Based Approach to Non-Communicable Diseases: Mandating Front-of-Package Warning Labels" 2021 *Globalization and Health* 1.

³¹ Correa, Fierro, Reyes, Carpentier, Taillie, Corvalan, Taillie and Corvalan "Responses to the Chilean Law of Food Labeling and Advertising: Exploring Knowledge, Perceptions and Behaviors of Mothers of Young Children" 2019 16(1) *International Journal of Behavioral Nutrition and Physical Activity* 1.

³² Uribe, Manzur and Cornejo "Varying the Number of FOP Warnings on Hedonic and Utilitarian Food Products: Evidence from Chile" 2020 26(2) *Journal of Food Product Marketing* 123.

beverage purchases,³³ and of products containing high levels of sodium, energy and saturated fat since implementation of the law.³⁴ In addition, warning labels have improved the healthfulness of packaged products in stores by encouraging manufacturers to reformulate products in order to avoid the warning labels.³⁵ A modelling study in Mexico predicts that the warning-label system could prevent over one million new obesity cases and save 1.8 billion US dollars in health-care costs over five years.³⁶

3 FORMULATING AN HRBA TO FRONT-OF-PACKAGE LABELLING

The development and application of an HRBA to NCDs more broadly, and to FOPL specifically, is a fairly new field, featuring limited scholarship. At its core, an HRBA to NCD prevention seeks to utilise human rights to buttress myriad efforts: from ensuring access to food and health-care services, and protecting individual rights from industry interference, to limiting the availability of harmful products.³⁷ NCD-prevention measures such as FOPL can be supported by referencing the right to health and life, as well as other socio-economic rights such as the right to food or education.³⁸ However, the implementation of these measures or interventions may infringe or negatively implicate other rights.³⁹ For example, limiting or prohibiting the advertising of unhealthy products to children may assist in protecting health but has implications for freedom of speech; these need to be weighed and balanced before adoption. In this sense, a comprehensive HRBA to NCD prevention must not only be anchored in supportive rights but also consider rights negatively impacted by the measures.

When applying human-rights frameworks to FOPL, it is important to identify and distinguish between rights that are supportive of the intervention, such as the rights to health and food, and rights that may impede efforts to prevent NCDs, such as the right to freedom of expression.⁴⁰

In addition, the full value of an HRBA can only be realised if the broad obligations outlined in international instruments are translated to the

³³ Taillie, Reyes, Colchero, Popkin and Corvalán “An Evaluation of Chile’s Law of Food Labeling and Advertising on Sugar-Sweetened Beverage Purchases From 2015 to 2017: A Before-and-After Study” 2020 17(2) *PLOS Medicine* e1003015.

³⁴ Taillie, Bercholz, Popkin, Reyes, Colchero and Corvalán “Changes in Food Purchases After the Chilean Policies on Food Labelling, Marketing, and Sales in Schools: A Before and After Study” 2021 5(8) *Lancet Planet Health* e526.

³⁵ Reyes *et al* 2020 *PLOS Medicine* e1003220.

³⁶ Basto-Abreu, Torres-Alvarez, Reyes-Sánchez, González-Morales, Canto-Osorio, Colchero, Barquera, Rivera and Barrientos-Gutierrez “Predicting Obesity Reduction After Implementing Warning Labels in Mexico: A Modeling Study” 2020 17(7) *PLOS Medicine* e1003221.

³⁷ Vos, Stefanini, Ceukelaire and Schuftan “A Human Right to Health Approach for Non-Communicable Diseases” 2013 381 *The Lancet* 533; Nygren-Krug “A Human Rights-Based Approach to Non-Communicable Diseases” in Grodin, Tarantola, Annas and Gruskin (eds) *Health and Human Rights in a Changing World* (2013); Garde and Abdool-Karim <https://hdl-bnc-idrc.dspace.direct.org/items/942db36d-7f22-4827-a756-f1138adfeeae>.

³⁸ Karim *et al* 2022 *ESR Review* 21.

³⁹ Patterson *et al* 2019 *Obesity Reviews* 45.

⁴⁰ *Ibid.*

domestic context and concretised within domestic legal instruments such as national constitutions and legislation.⁴¹ This requires not only anchoring the approach in the broad human-rights principles but also identifying specific rights in which to locate the NCD-prevention response. As Ferguson outlined:

“Human rights provide an internationally recognised legal framework under which governments have concrete obligations relevant to NCDs. However, these obligations should be further articulated to better address the challenges posed by NCDs, not only in relation to the rights to life, health, food and education but also in relation to the human rights responsibilities of the private sector ... human rights norms should be further and better articulated to incorporate the risk factors and underlying determinants of NCDs.”⁴²

For this reason, there is a need to develop a context-specific HRBA to FOPL by first identifying the specific constitutional rights implicated and then seeking to concretise the obligations that emanate from these rights.

The purposes of FOPL are closely linked to the protection, fulfilment or realisation of human rights.⁴³ For example, ultra-processed foods, predominately produced by multinational corporations for profit, undermine the health of consumers, and in turn, interfere with the realisation of the right to health. The displacement of healthier food options through the proliferation of ultra-processed products can interfere with the right to food. According to General Comment No 12,⁴⁴ the full realisation of the right to adequate food incorporates nutritional quality and safety. More and more evidence links the consumption of ultra-processed foods to poor health outcomes such as obesity, diabetes and hypertension⁴⁵ – in clear contradiction to protecting the right to nutritious and safe food. Although the State has the primary responsibility to protect the realisation of rights, according to the UN Guiding Principles on Business and Human Rights,⁴⁶ food and beverage manufacturers have a responsibility to minimise the negative impacts of their practices on the right to health. Unfortunately, owing to the profit-driven focus of multi-national conglomerates, they are

⁴¹ Ayala and Meier “A Human Rights Approach to the Health Implications of Food and Nutrition Insecurity” 2017 38(10) *Public Health Reviews* e20.

⁴² Ferguson, Tarantola, Hoffmann and Gruskin “Non-Communicable Diseases and Human Rights: Global Synergies, Gaps and Opportunities” 2017 12(10) *Global Public Health* 1200; Vallgård “Why the Concept ‘Lifestyle Diseases’ Should Be Avoided” 2011 39(7) *Scandinavian Journal of Public Health* 773.

⁴³ Karim *et al* 2022 *ESR Review* 21.

⁴⁴ United Nations Committee on Economic Social and Cultural Rights (CESCR) *General Comment No 12: The Right to Adequate Food (Art. 11)* (12 May 1999) E/C.12/1999/5.

⁴⁵ Baker *et al* 2020 *Obesity Reviews* 1; Adams *et al* 2020 *BMJ* m2391.

⁴⁶ United Nations Human Rights Office of the High Commissioner (OHCHR) “Guiding Principles on Business and Human Rights” (2011) https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

failing to respect human rights,⁴⁷ and the onus is on the State to step in and provide protection to citizens.⁴⁸

By implementing mandatory front-of-package warning labels on unhealthy, ultra-processed products, the South African State could make progress towards realising the rights to information, food, and health care. It is imperative that consumers be made aware of harmful products that negatively impact their health: warning labels offer a solution by providing simplified, clear information to support informed decision-making.⁴⁹ This is supported in the proposed regulations by including a context-specific warning label that is appropriate and developed for use in the low-literacy setting of South Africa.⁵⁰ By enacting this step in the realisation of the right to information, the State creates a knock-on effect in protecting other human rights. For instance, when these warning labels are used to underpin restrictive food policies, this promotes the right to food as the consumption of unhealthy foods (which can be regarded as non-nutritious and not safe for consumption) is discouraged. This, in turn, eases the burden on the health-care system, allowing resource reallocation and better performance of the State's obligation to fulfil the right to health care.⁵¹

At a conceptual level, there are several rights implicated in the adoption and implementation of FOPL (see Figure 1 below). Being socio-economic rights, the right to health and the right to food may support adoption of a FOPL system, particularly a mandatory one that is more effective in protecting these rights. A FOPL system, in addition to being linked to improved diet and health, is also immediately an attempt to communicate information more clearly to consumers and improve their understanding of the food they are consuming; thus, the right to information is implicated. Finally, the right to freedom of expression is implicated; if products are required to carry a FOPL logo or symbol, it is a form of compelled speech, which may serve as an impediment to the adoption of the system. Other rights, such as the rights to dignity and life, are also impacted when one considers the real-life consequences of NCDs on mortality and quality of life. The next section discusses some of these rights.

⁴⁷ Constantin *et al* 2021 *Globalization and Health* 1; Igumbor, Sanders, Puoane, Tsolekile, Schwarz, Purdy, Swart, Durão and Hawkes "Big Food', the Consumer Food Environment, Health, and the Policy Response in South Africa" 2012 9(7) *PLoS Medicine* e1001253.

⁴⁸ Elver "The Challenges and Developments of the Right to Food in the 21st Century: Reflections of the United Nations Special Rapporteur on the Right to Food" 2016 20(1) *UCLA Journal of International Law and Foreign Affairs* 1.

⁴⁹ Taillie *et al* 2020 *Nutrients* 569.

⁵⁰ Bopape *et al* 2021 *PLOS ONE* e0257626.

⁵¹ Abdool Karim and Shozi "Is a Right to Health a Means to Protect Public Health? South Africa as a Model for a Communitarian Interpretation of the Right to Health for the Promotion of Public Health" 2023 27(5) *The International Journal of Human Rights* 925.

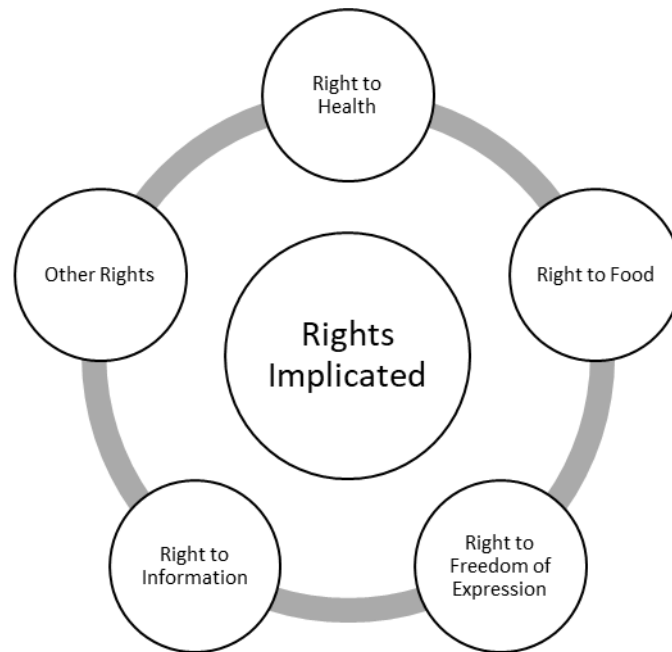


Figure 1: Rights implicated in a mandatory FOPL system (Authors' construction)

4 HUMAN RIGHTS IMPLICATED IN FOPL SYSTEMS: AN INTERNATIONAL-LAW PERSPECTIVE

4.1 The right to health

The right to health is recognised in a number of international treaties and conventions. In 1946, the right to the “highest attainable standard of living” was recognised in the World Health Organization’s Constitution (1946). Two years later, in the Universal Declaration of Human Rights (UDHR),⁵² the “right to a standard of living adequate for the health and well-being” of all people was recognised in article 25.

In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provided that everyone is entitled to the “enjoyment of the highest attainable standard of physical and mental health” as well as a right to food. However, the inclusion of NCDs and the prevention of these diseases remains a point of contention. For example, in General Comment No 14, the Committee on Economic, Social and Cultural Rights (CESCR) appears to exclude illness emanating from “genetic factors, individual

⁵² UN General Assembly (UNGA) *Universal Declaration of Human Rights A/RES217(III)* (10 December 1948).

susceptibility to ill health and the adoption of unhealthy or risky lifestyles” from the ambit of the right to health, placing these causes outside the relationship between the State and individuals.⁵³

This framing of NCDs as lifestyle diseases or attributable to individual behaviours was a dominating narrative that moved the risk factors contributing to NCDs outside the domain of state regulation.⁵⁴ However, there has been a growing recognition that, while NCDs are partly influenced by lifestyles, individual behaviours and genetics, there are modifiable risk factors and obesogenic environments that significantly contribute to the burden of NCDs.⁵⁵ In many respects, the consensus is that if effective state action and regulation are adopted to target the built environment as underlying determinants of NCDs, this burden of disease can be reduced.⁵⁶

The right to health is most often invoked in an HRBA to NCD prevention.⁵⁷ The limited scholarship and discussion of rights supporting the adoption of mandatory FOPL systems also rely heavily on the right to health. In 2020, for example, Dainius Pūras, as United Nations Special Rapporteur on the right to health, issued a statement outlining how mandatory FOPL warning labels were aligned with state obligations under the right to health:

“[NCDs] are a major challenge of this century highly rooted on overweight, obesity and unhealthy diets. As part of their right-to-health duties, States should address the diet-related NCDs preventable risk factors and promote frameworks whereby the food and beverage industry convey accurate, easily understandable, transparent and comprehensible information on their products. Front-of-package warning labelling regulations are much needed in this regard.”⁵⁸

Pūras further outlined how a human-rights-based approach could inform the development of a compliant FOPL system:

⁵³ CESCR *General Comment No 14: The Right to the Highest Attainable Standard of Health* (Art. 12) (11 August 2000) <https://www.refworld.org/pdfid/4538838d0.pdf> (accessed 2021-07-02) par 9.

⁵⁴ Ferguson *et al* 2017 *Global Public Health* 1200; Vallgård 2011 *Scandinavian Journal of Public Health* 773.

⁵⁵ Swinburn and Egger “Preventive Strategies Against Weight Gain and Obesity” 2002 3(4) *Obesity Reviews* 289; Egger and Swinburn “An ‘Ecological’ Approach to the Obesity Pandemic” 1997 315(7106) *BMJ* 477; De Lorenzo, Romano, Di Renzo, Di Lorenzo, Cennamo and Gualtieri “Obesity: A Preventable, Treatable, but Relapsing Disease” 2020 *Nutrition* 110615.

⁵⁶ Gorman and Handsley “International Human Rights Law and the Prevention of Childhood Obesity” 2017 23(3) *Australian Journal of Human Rights* 391; Swinburn and Egger 2002 *Obesity Reviews* 289.

⁵⁷ Ferguson *et al* 2017 *Global Public Health* 1200; Vallgård 2011 *Scandinavian Journal of Public Health* 773; Gruskin, Ferguson, Tarantola and Beaglehole “Noncommunicable Diseases and Human Rights: A Promising Synergy” 2014 104(5) *American Journal of Public Health* 773; Patterson *et al* 2019 *Obesity Reviews* 45; Twinomugisha “Using the Right to Health Framework to Tackle Non-Communicable Diseases in the Era of Neo-Liberalism in Uganda” 2020 20(1) *African Human Rights Law Journal* 147; Durojaye and Aboubakrine “Adopting a Rights-Based Approach to Non-Communicable Diseases Among Indigenous Peoples in Africa” 2019 26(1) *International Journal of Minority Group Rights* 138.

⁵⁸ OHCHR “Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs” (27 July 2020) <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning> (accessed 2022-06-14).

“Within the framework of the right-to-health, States are required to adopt regulatory measures aimed at tackling NCDs, such as front-of-package warning labelling on foods and beverages containing excessive amounts of critical nutrients. Front-of-package warning labelling should follow the best available evidence free from conflicts of interest, as a mechanism through which healthy choices can become the easier and preferred option.”⁵⁹

Constantin *et al* expanded upon the obligations that emanate from the right to health in respect of FOPL systems.⁶⁰ They argue that the food and beverage industry interferes with the right to health when they “convey inaccurate, deceptive, or misleading information on unhealthy products to encourage their consumption”. On this basis, Constantin *et al* argue that under their obligation to protect the right to health, governments are required to regulate these private actors; the obligation to protect the right to health provides a basis upon which states may be required to adopt a FOPL system.⁶¹

4.2 The right to food as a determinant of good health

The right to food has particular relevance to the introduction of FOPL, as FOPL systems are aimed at improving consumer diets. However, it is the relationship between the rights to food and health, and specifically the fact that food is a determinant of health, that is relevant for an HRBA to FOPL. Most human-rights instruments also recognise a right to food, either as an underlying determinant of the right to health, a component of the right to life or as its own self-standing right.⁶² The right to food was first recognised in the UDHR as part of “the right to a standard of living adequate for the health and well-being of [a person] and of his family, including food”.⁶³ Under the ICESCR,⁶⁴ the right to food was developed as part of a composite set of entitlements that includes a right to housing and clothing, which together support the right to an adequate standard of living.⁶⁵ The Convention on the Rights of the Child⁶⁶ (CRC) mandates the combatting of disease and malnutrition through the provision of “adequate nutritious foods” as part of the right of the child to enjoy the highest attainable standard of health.⁶⁷

General Comment No 12 (from the CESCR) recognises that the realisation of the right to adequate food is indispensable to the realisation of other fundamental rights.⁶⁸ The General Comment also states that the

⁵⁹ *Ibid.*

⁶⁰ Constantin *et al* 2021 *Globalization and Health* 1.

⁶¹ *Ibid.*

⁶² Abdool Karim and Kruger “Unsavory: How Effective Are Class Actions in the Protection and Vindication of the Right to Access to Food in South Africa?” 2021 37(1) *South African Journal on Human Rights* 59.

⁶³ Art 25(1) of the UDHR.

⁶⁴ UNGA *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.

⁶⁵ Art 11.1 of the ICESCR.

⁶⁶ UNGA *Convention on the Rights of the Child* E/CN.4/RES/1990/74; 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990.

⁶⁷ Art 24(2)(c) of the CRC.

⁶⁸ CESCR *General Comment No 12 on the Right to Adequate Food* par 4.

adequacy of food should not be determined narrowly as merely a “minimum package of calories, proteins and other specific nutrients”.⁶⁹

This relationship between the right to food and health was noted in Pūras’s statement on FOPL, which stated that states had an obligation to ensure “equal access for all to nutritiously safe food as an underlying determinant of health”.

At a regional level, the African Charter on Human and Peoples’ Rights⁷⁰ (African Charter) recognises the right to health as the right of every individual “to enjoy the best attainable state of physical and mental health”.⁷¹ In *Social and Economic Rights Action Center v Nigeria (SERAC)*, the African Commission on Human and Peoples’ Rights recognised a right to food as being implicitly contained in both article 4 (the right to life) and article 16 (the right to health) of the African Charter.⁷² The African Commission explicitly recognised a conceptualisation of the right to health that was contingent upon the enjoyment of other rights, stating:

“While the right to food is not specifically enumerated in the African Charter, it is implicit in such provisions as the right to life (art.4), the right to health (art. 16) and the right to economic, social and cultural development (art. 22) ... It is undeniable that food is central to the enjoyment of such other rights as health, education, work and political participation.”⁷³

Notably, the *SERAC* decision also underscored the enforceability of the right against private individuals whose actions could result in the infringement of rights under the African Charter.

The African Commission has also acknowledged a clear link between the right to health (and other rights) and access to, not only sufficient, but also nutritious food, by stating in a 2019 resolution that the Commission is concerned that “malnutrition which includes conditions such as under-nutrition, micronutrient deficiencies or excess, overweight, obesity and other diet-related non-communicable diseases seriously affects the health and well-being of individuals.”⁷⁴

Under Resolution 431, the African Commission expressed concern regarding malnutrition and, specifically the growing epidemic of NCDs and their impact on people’s health.⁷⁵ In this resolution, the Commission called for states to take steps to ensure enjoyment of the right to food, including nutrition, and access to adequate food to allow for enjoyment of the right to health.⁷⁶ With regard to NCDs, the Commission indicated that states should regulate the import and marketing of processed foods, efforts that can be

⁶⁹ CESCR *General Comment No 12 on the Right to Adequate Food* par 6.

⁷⁰ Organisation of African Unity (OAU) *African Charter on Human and Peoples’ Rights* 1520 UNTS 217; CAB/LEG/67/3 rev. 5; 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986.

⁷¹ Art 16 of the African Charter.

⁷² *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria*, Communication No 155/96 ACHPR/COMM/A044/1 (27 May 2002).

⁷³ *Ibid.*

⁷⁴ African Commission on Human and Peoples’ Rights *Resolution on the Right to Food and Nutrition in Africa* ACHPR/Res.431(LXV) 2019 (Resolution 431).

⁷⁵ Preamble of Resolution 431.

⁷⁶ Resolution 431 par 1 and 5.

assisted through the adoption of FOPL systems.⁷⁷ The African Charter on the Rights and Welfare of the Child⁷⁸ echoes this concern over malnutrition in a manner similar to the CRC, providing that adequate nutrition is part of the composite right to health and health services.⁷⁹

All of these instruments can inform the content of a somewhat underdeveloped right to food under the South African Constitution so that it can be understood to include a right to nutritious food that does not result in overnutrition or diet-related non-communicable diseases.

4 3 The right to information and freedom of expression

Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) provides:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.”⁸⁰

While this is generally seen as a right to access information held by public bodies, the scope of the right has slowly increased to cover also access to information from private bodies, such as the right to know which private bodies have stored the personal data of a person.⁸¹

Article 9 of the African Charter guarantees that “every individual shall have the right to receive information”.⁸² The Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019⁸³ (Declaration of Principles) specifically provides that states shall ensure protection against acts or omissions of non-state actors that curtail access to information.⁸⁴ It reiterates that information held by private actors is subject to article 9, providing: “Every person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively.”⁸⁵ The Declaration also provides that special measures should be taken to evolve the capacities of children to access information and to address the needs of marginalised groups.⁸⁶

⁷⁷ Resolution 431 par 7.

⁷⁸ Organisation of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* CAB/LEG/24.9/49 (1990). Adopted: 11/07/1990; EIF: 29/11/1999.

⁷⁹ Art 14.2(c) of the African Charter on the Rights and Welfare of the Child.

⁸⁰ UNGA *International Covenant on Civil and Political Rights* 999 UNTS 171; 6 ILM 368 (1967). Adopted: 16/12/1966; EIF: 23/03/1976.

⁸¹ United Nations Human Rights Committee *General Comment No 34, Article 19, Freedoms of Opinion and Expression* (12 September 2011) CCPR/C/GC/34 par 18.

⁸² Art 9 of the African Charter.

⁸³ African Commission on Human and Peoples' Rights *Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019*. Adopted: 10/11/2019; EIF: 17/04/2020 art 19.

⁸⁴ Principle 1.2 of the Declaration of Principles.

⁸⁵ Principle 26.1(b) of the Declaration of Principles.

⁸⁶ Principles 7 and 8 of the Declaration of Principles.

Finally, the Declaration provides that the right to access information is guided by the principle of maximum disclosure.⁸⁷

5 CONSTITUTIONAL RIGHTS IMPLICATED BY FOPL SYSTEMS

5.1 Approach adopted in South African NCD prevention policies

Although most of the literature uses the right to health to anchor an HRBA to NCD prevention and control, there is recognition that multiple rights are implicated and may be used to support different aspects of control and prevention. The question is how this approach can be adapted and formulated to fit within the framework of the South African Bill of Rights and the Constitution.⁸⁸

An HRBA is frequently invoked in the National Department of Health's policies related to NCD prevention. For example, the 2011 Declaration explicitly recognises the human right to health as foundational to preventing and controlling NCDs.⁸⁹ The Draft Strategic Plan invokes the child's right to the highest attainable standard of health to support the adoption of measures that address childhood obesity.⁹⁰ The "Health Promotion Strategy" contained within the Plan anchors the policy objectives in the Constitution under section 24's right to a healthy environment as well as the rights provided for in section 27.⁹¹

The rest of this section discusses how the Bill of Rights may assist in supporting the adoption of FOPL in South Africa.

5.2 A composite right to health

Although the South African Constitution does not explicitly include a right to health, the right is most often discussed in the context of section 27(1)(a), which provides that everyone has a right to access adequate health care, subject to progressive realisation and the resources of the State. Health-related rights are given further recognition in other sections. For example, section 27(3) provides an unqualified right to emergency medical treatment.

⁸⁷ Principle 28 of the Declaration of Principles.

⁸⁸ Ss 8–36 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

⁸⁹ NCD Alliance "South African Declaration on the Prevention and Control of Non-Communicable Diseases" (13 September 2011) <https://ncdalliance.org/sites/default/files/South%20Africa%20Declaration%20on%20NCDs.pdf> (accessed 2023-01-03) 1. The Preamble recognises "the right of all South Africans to the enjoyment of the highest attainable standards of physical and mental health", which echoes the right to health contained in the first WHO Constitution (1946), as well as the wording of art 12 of the ICESCR.

⁹⁰ National Department of Health "Draft National Strategic Plan for the Prevention and Control of Non-Communicable Diseases 2020-2025" (28 October 2019) <https://www.samedical.org/file/1202> (accessed 2023-01-03) 116.

⁹¹ The policy makes mention of the right to health care services as well as the rights to sufficient food, water and social security, although it mistakenly states that these rights fall under s 24 of the Constitution.

The right to bodily integrity under section 12(2) entitles all to the right to make decisions concerning reproductive health and requires informed consent for medical and scientific experiments.⁹² There are also specific rights to medical treatment for children and prisoners under sections 28 and 35, respectively, that are not subject to progressive realisation.

Section 24 provides that every South African is entitled to a healthy environment, which is broadly defined. However, the limited enforceable and justiciable elements outlined in section 24(b) are more clearly linked to promoting sustainability and preventing environmental degradation.⁹³ In addition, section 27(1) encompasses not just a right to access health-care services but also entitlements related to sufficient food and water, social security and electricity.⁹⁴ It has been argued that these rights create a composite right to health,⁹⁵ through the protection of the different determinants, an approach that aligns with the provisions of section 39(2), which requires the courts to consider international law when interpreting the Bill of Rights.

Previous case law related to tobacco-control measures aligns to this interpretation. In *British American Tobacco (Pty) Ltd v Minister of Health*,⁹⁶ the Supreme Court of Appeal relied on both sections 24 and 27 to justify a ban on tobacco products; the finding sought to reduce the consumption of tobacco products and prevent the public-health harms that emanate from the use of tobacco. The court explicitly linked the public-health objectives of the ban to the right to a healthy environment under section 24.

In addition, the court found that the government had an obligation, under the section 27(1) right to health, to implement tobacco-control measures owing to the burden tobacco use placed on the health-care system.⁹⁷ During the COVID-19 pandemic, extensive jurisprudence developed on measures that prevented diseases and reduced the burden on the health-care system, thus assisting in protecting and fulfilling the right to health.⁹⁸

This reasoning could apply equally to measures such as FOPL, which aims to alleviate the burden of disease caused by the consumption of unhealthy products, and can be used to justify the limitations on freedom of expression that may also result from a FOPL system.

⁹² S 12(2) of the Constitution.

⁹³ S 24 of the Constitution.

⁹⁴ S 27(1) of the Constitution.

⁹⁵ Pieterse (*A Benefit-Focused Analysis of Constitutional Health Rights* (doctoral thesis, University of the Witwatersrand) 2005 59) writes: "There is no single provision in the Constitution that simultaneously protects all aspects of the right to 'the enjoyment of the highest attainable standard of physical and mental health'. Rather, chapter 2 of the Constitution contains several scattered provisions aimed at promoting the realisation of the right to health, which ought to be read together when ascertaining the extent of health-related protection awarded by the Bill of Rights."

⁹⁶ *British American Tobacco South Africa (Pty) Ltd v Minister of Health* 2012 (3) All SA 593 (SCA).

⁹⁷ *BATSA v Minister of Health* *supra* par 26.

⁹⁸ Abdool Karim and Kruger "Which Rights? Whose Rights? Public Health and Human Rights Through the Lens of South Africa's Covid-19 Jurisprudence" 2021 11 *Constitutional Court Review* 533.

5.3 Right to food

The Bill of Rights contains a right to food (or nutrition) in three separate sections. Each uses different phrasing and arguably has distinct content. Section 27 contains the general right of access to “sufficient food” for everyone, which is subject to progressive realisation.⁹⁹ The right of children to basic nutrition¹⁰⁰ and of detainees to “adequate nutrition”¹⁰¹ are both unqualified. Despite the fact that the right to food, like the other socio-economic rights contained in the Bill of Rights, is justiciable,¹⁰² there is limited case law delineating the content of the right.

At a minimum, the constitutional right to food includes an entitlement to be free from hunger.¹⁰³ In *Wary Holdings*,¹⁰⁴ the scope of the right was defined to include the means to produce food, and the ability to acquire food, as well as the need for sufficient food to be available.¹⁰⁵ To this extent, the elements of acceptability and accessibility, as defined under international law, form part of the content of the section 27(1)(b) right to access sufficient food. Brand suggests that the interdependent nature of the right to food is central to this:

“In short, the right to food is more or less embedded in other rights – measures to give effect to it are intertwined with measures to give effect to other rights, and its violation is often inseparable from the violation of a range of other rights. As a consequence, the right to food is seldom directly protected, whether through legislation or adjudication.”¹⁰⁶

Section 28(1) of the Constitution provides: “Every child has the right – ... (c) to basic nutrition, shelter, basic health care services and social services; [and] (d) to be protected from maltreatment, neglect, abuse or degradation” This set of rights functions in a manner distinct from the other socio-economic rights in the Constitution – in that they are unqualified rights, but also in that the primary responsibility for protection and fulfilment of the right lies with parents and caregivers rather than the State.¹⁰⁷ However, the State still bears some obligations under this right where parents are unable adequately to meet their obligations towards their children under the right.¹⁰⁸

Case law has recognised interdependence between a child’s access to food and their ability to experience and realise their rights to health and education.¹⁰⁹ This is illustrated in *Equal Education v Minister of Basic*

⁹⁹ S 27 of the Constitution.

¹⁰⁰ S 28 of the Constitution.

¹⁰¹ S 35 of the Constitution.

¹⁰² *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) par 78.

¹⁰³ Khoza “Realising the Right to Food in South Africa: Not by Policy Alone – Need for Framework Legislation” 2004 20(4) *South African Journal on Human Rights* 667.

¹⁰⁴ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2008 (11) BCLR 1123 (CC).

¹⁰⁵ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* *supra* par 85.

¹⁰⁶ Brand “The Right to Food” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 164–165.

¹⁰⁷ May, Witten, Lake and Skelton “The Slow Violence of Malnutrition” in *Children’s Institute South African Child Gauge* (2020) 38–39.

¹⁰⁸ *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) par 77–79.

¹⁰⁹ *May et al* in *Children’s Institute South African Child Gauge* 39.

Education,¹¹⁰ which concerned the suspension of the National School Nutrition Programme (NSNP) during the COVID-19 pandemic and the lockdown when schools were closed.

In respect of the first question, the court went to great lengths to explain the interrelationship and interdependence of the rights to education, nutrition and health.¹¹¹ The court also highlighted the role of food insecurity and hunger in contributing to adverse health conditions, including obesity and micronutrient deficiencies, something that the NSNP assisted in ameliorating.¹¹² The court went on to find that the NSNP was part of the State's constitutional obligations to fulfil the right of children to basic nutrition.¹¹³

This case highlights two integral components of the children's right that are of relevance to supporting NCD prevention measures. The first is that it underscores the interrelated nature of the rights contained in section 28, expressly recognising that there are links between nutrition and health, and, specifically, that there is an obligation on the State to address nutrition and prevent diseases that emanate from malnutrition, including obesity. The second is that the State bears a higher burden in justifying a failure to discharge its obligations under section 28, a justification that must be provided in terms of section 36 of the Constitution and that cannot rely on resource constraints. In particular, where children have been provided with a certain entitlement, the rolling back of that entitlement would be retrogressive. This is important in the context of a changing food system, and may provide a basis upon which existing access to healthier, or less harmful foods, may be preserved on the basis that reduced access may be retrogressive in the context of the right to basic nutrition.

As has been discussed above, there is clear recognition within international law that the nutritional composition of food is central to its sufficiency, and that nutrition is a core component of the right to food, as well as the realisation of other rights such as the rights to life and health. South African case law on socio-economic rights, specifically in respect of food, supports the contention that nutrition and the impact that it has on the realisation of other rights has constitutional protection and that there is a right to nutritious food within the framework of the Bill of Rights. But how does the right to access sufficient food apply within the context of FOPL systems?

¹¹⁰ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP).

¹¹¹ *Equal Education v Minister of Basic Education* *supra* par 34–41.

¹¹² *Equal Education v Minister of Basic Education* *supra* par 30.

¹¹³ *Equal Education v Minister of Basic Education* *supra* par 42.

Table 1 *Matrix of human rights obligations related to FOPL (Adapted from the Food Security Matrix¹¹⁴ and Nutrition Security Matrix)¹¹⁵*

	Nutritional adequacy	Safety	Cultural acceptability	Availability	Accessibility
Respect	Recognise the positive nutritional aspect of existing food patterns	Provide mechanisms to address violations of food-safety codes	Create awareness and social acceptability of traditional diets	Refrain from creating conditions that promote the production of unhealthy foods	Preserve existing pathways of accessing nutritious food (whether informal or formal) Refrain from creating conditions promoting disease and epidemics through the proliferation of unhealthy food
Protect	Prevent private actors from displacing healthier food items with unhealthy foods		Limit the influence of private actors in changing the acceptability of traditional diet and promotion of unhealthy foods	Regulate food production to ensure private food production is meeting the population's nutrition and health needs	Regulate private actors to ensure pricing and accessibility of foods is adequate to make food sufficiently available to the population
Promote	Prevent distortions of positive nutritional aspects of existing food patterns	Create/improve food standards Mandatory (incentivise) reformulation to remove harmful nutrients from food	Counteract influences that may negatively erode positive aspects of existing food culture	Incentivise the production of healthier foods	Make healthy food choices more financially accessible to low-income groups
Fulfil	Correct negative aspects of existing food patterns; guide dietary change when necessary	Improve understanding of the healthfulness of foods and harms from unhealthy nutrients Create an effective mechanism for food control and inspection	Incorporate positive aspects of food culture into relevant development activities	Allow food production at a community / individual level	Provide mechanisms to make healthy food financially accessible

¹¹⁴ Eide, Oshaug and Eide "The Food Security and the Right to Food in International Law and Development Symposium: The Global Food Regime in the 1990s: Efficiency, Stability and Equity" 1991 *Transnational Law & Contemporary Problems* 415 452.

¹¹⁵ Oshaug, Eide and Eide "Human Rights: A Normative Basis for Food and Nutrition-Relevant Policies" 1994 19(6) *Food Policy* 491 512.

Drawing on Eide, Oshaug and Eide's matrix on the right to food, which has a multiplicity of prongs and components such as nutritional adequacy, safety, acceptability, availability and accessibility,¹¹⁶ a FOPL system can be used to promote and protect the right to food in three ways.

- a) A mandatory FOPL system can promote the nutritional sufficiency of diets by making it easier for consumers to make healthier and informed choices about the types of food they consume. Under the ambit of food safety, the reformulation that results from the introduction of FOPL systems can reduce the presence of harmful nutrients and thus reduce the prevalence of disease-causing nutrients in food such as sodium, saturated fats and sugar.
- b) FOPL systems can promote the availability and acceptability of healthier foods by creating an incentive for industries to produce and promote healthier foods that are not subject to FOPL warning labels.
- c) Where FOPL systems are linked to advertising restrictions, FOPL systems can reduce the acceptability of unhealthy foods, thus protecting the cultural norms and acceptability of traditional diets that are frequently displaced by ultra-processed products.

5.4 Right to information

Section 32 of the Constitution provides for a right to information:

- “(1) Everyone has the right of access to—
- (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

Although the Promotion of Access to Information Act¹¹⁷ is the primary mechanism to realise this right, the obligation under 32(1) means that there is also an entitlement to access information required for the exercise or protection of other rights. The right to information is also buttressed by section 16(1)(b), which guarantees “everyone” the right to freedom of expression, including “freedom to receive or impart information or ideas”. In *My Vote Counts NPC v Minister of Justice and Correctional Services*,¹¹⁸ the Constitutional Court underscored this interrelationship in enabling the public to fully enjoy the right to information. The court went further, holding that where the full exercise of one right is dependent on certain kinds of information being made available, there is then an obligation on the State to make that information available to enable citizens to exercise their rights.

In *Clutchco v Davis*,¹¹⁹ the SCA described the Constitution's extension of the right of access to information, imposing a duty not only on the State but

¹¹⁶ See Table 1 above.

¹¹⁷ 2 of 2000.

¹¹⁸ *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 (5) SA 380 (CC).

¹¹⁹ 2005 (3) SA 486 (SCA).

also on private bodies, as “unmatched in human rights jurisprudence”, a characterisation that shows the strength of the right albeit in an exaggerated fashion.¹²⁰ However, the SCA also highlighted that this right is not untrammelled and that access to privately held information only becomes subject to the constitutional duty where the information is “required”, “‘required’ meaning ‘the information does not have to be essential, but it certainly has to be more than ‘useful’ [...] or ‘relevant’ [...] or simply desired’”.¹²¹

However, the right to access information from private parties is not *per se* a right to automatic disclosure, or to disclosure in a certain format such as the simple and accessible format the authors maintain that FOPL will facilitate. In combination with a reading of other rights being promoted by FOPL, the authors submit that access to information is not being serviced through the availability of information upon request or other forms of labels. In *My Vote Counts*, the court noted that disclosure on application of political party funding only poses a barrier to the exercise of the right to access information,¹²² and it held that the mechanism to disclose information should keep the “electorate as a whole meaningfully informed”.¹²³ In *My Vote Counts*, the court specifically highlighted that ease of access to information is a fundamental concern and a substantive part of the broader right.¹²⁴ While this case is not a perfect analogy for accessing information about food, it does highlight the court’s understanding of the right to access information to mean true access, in that the mechanism to provide the information should in fact serve the function of informing the public who needs to exercise a particular right.

How does this duty impact the freedom of expression of companies? The term “compelled speech” is largely used in the United States to indicate that parties are required, against their will, to inform the public of specific information.¹²⁵ Currently, companies are already subjected to compelled speech in various ways, such as in current labelling laws, provision for disclosure duties in terms of the Consumer Protection Act (for example, grey-market goods and GM-labelling), and tobacco and liquor legislation that mandates warning labels.¹²⁶ While South Africa does not have case law on compelled speech, some insights might be gleaned from challenges to commercial speech where regulations seek to restrict the information publicised by companies.

In *City of Cape Town v Ad Outpost*,¹²⁷ the Western Cape division of the High Court had to answer the question whether restricting third-party advertising through municipal by-laws unjustifiably limits freedom of

¹²⁰ *Clutchco (Pty) Ltd v Davis supra* par 10.

¹²¹ *Clutchco v Davis supra* par 11.

¹²² *My Vote Counts v Minister of Justice supra* at par 94, being the judgment of Cameron J and concurring judges.

¹²³ *My Vote Counts v Minister of Justice supra* par 96.

¹²⁴ *My Vote Counts v Minister of Justice supra* par 52.

¹²⁵ Tesis “Compelled Speech and Proportionality” 2021 97(3) *Indiana Law Journal* 3.

¹²⁶ E.g., s 25 of the Consumer Protection Act 68 of 2008; s 9(1) of the Liquor Act 59 of 2003; s 3 of the Tobacco Products Control Act 83 of 1993.

¹²⁷ *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 (2) SA 733 (C).

expression, among other rights. The court stated that “[t]he tendency to conclude uncritically that commercial expression bears less constitutional recognition than political or artistic speech needs to be evaluated carefully”.¹²⁸ However, the Constitutional Court was more critical of the protections awarded to commercial speech where it clashes with public-health concerns. In a challenge to tobacco-marketing restrictions, the court endorsed the view expressed in *Canada (Attorney-General) v JTI-MacDonald Corp* that “[w]hen commercial expression is used ... for the purpose of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.”¹²⁹ It upheld the restrictions and found that the reliance on freedom of expression to protect the ability to promote harmful products is secondary to the right to a healthy environment.¹³⁰

Unlike socio-economic rights such as the right to health and the right to food, which are deemed progressively realisable and therefore subject to resource limitations, the right of access to information and freedom of expression is immediately realisable. The ICCPR provides:

“Where not already provided for by existing legislative or other measures, each State Party [...] undertakes to take the necessary steps [...] to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.”¹³¹

This approach is echoed in the South African Constitution where no internal limitation relating to resources is provided for in relation to the right of access to information.¹³² However, it is apt to recall that a child’s right to basic nutrition is also immediately realisable.¹³³

6 THE DUTY TO LABEL: FOPL AND THE CONSUMER PROTECTION ACT

FOPL is not only supported by the rights encapsulated by the Bill of Rights but also has the ability to give effect to national legislation aimed at protecting South African consumers. The most pertinent example, of course, is the Consumer Protection Act¹³⁴ (CPA). The CPA was passed with several goals, including to realise South Africa’s international-law obligations to “improve access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs” and to “promote and provide for consumer education, including education concerning the social and economic effects of consumer choices”.¹³⁵ The stated purpose of the Act in section 3, *inter alia*, is that the CPA aims to reduce or improve any disadvantages experienced in accessing any supply of goods or services by consumers who are from lower-income groups or who experience lower levels of literacy, and to

¹²⁸ *City of Cape Town v Ad Outpost* supra 749 E.

¹²⁹ *BATSA v Minister of Health* supra par 25.

¹³⁰ *BATSA v Minister of Health* supra par 41.

¹³¹ Art 2.2 of the ICCPR.

¹³² S 16 of the Constitution.

¹³³ S 28(1)(c) of the Constitution.

¹³⁴ 68 of 2008.

¹³⁵ Preamble of the CPA.

improve consumer awareness and information and encourage responsible and informed consumer choice and behaviour.¹³⁶ In South Africa, one in eight adults is illiterate, with the brunt of illiteracy being borne by Black South Africans.¹³⁷

The CPA contains several key sections on the consumer's right to information. Section 58(1) provides:

"The supplier of any activity or facility that is subject to any–

- (a) risk of an unusual character or nature;
 - (b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or
 - (c) risk that could result in serious injury or death,
- must specifically draw the fact, nature, and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49."

It also provides in section 58(2) that the packager of any hazardous or unsafe goods must display on or within that package a notice in plain language providing the consumer with the relevant information to allow for "safe handling". What constitutes plain language? The CPA relies on a clear and comprehensive definition in section 22(2):

"[A] notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to–

- (a) the context, comprehensiveness and consistency of the notice, document or visual representation;
- (b) the organisation, form and style of the notice, document or visual representation;
- (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- (d) the use of any illustrations, examples, headings or other aids to reading and understanding."

Section 58(2)'s definition of "hazardous or unsafe" is surely informed by section 58(1)(a) to (c). However, the reference to "safe handling" does create the impression that "hazardous or unsafe" might potentially refer to products that pose an external risk of harm that can be mitigated by safety protocols.

Much as warning labels on tobacco products, as mandated by the Regulations on Labelling, Advertising and Sale of Tobacco Products, intend to go further than simply restricting positive misrepresentations (such as health claims), and also mandate that consumers be protected from

¹³⁶ S 3(b) & (e) of the CPA.

¹³⁷ Khuluvhe "Adult Illiteracy in South Africa, Department of Higher Education and Training, Pretoria" (March 2021) <https://www.dhet.gov.za/Planning%20Monitoring%20and%20Evaluation%20Coordination/Fact%20Sheet%20on%20Adult%20Illiteracy%20in%20South%20Africa%20-%20March%202021.pdf> (accessed 2023-01-03).

misrepresentations by omission (no health claims, but no warnings or disclosures either),¹³⁸ the importance of providing clear guidance to consumers on the healthfulness or otherwise of products is even more important when the harmful nature of products is not as clear-cut as with cigarettes, for example.

Introducing a more informative labelling system would also promote other important sections of the CPA, including the right to fair and responsible marketing to protect consumers from misleading representations (including omissions),¹³⁹ and against unconscionable conduct by suppliers of goods, which includes a prohibition against taking advantage of illiteracy or ignorance,¹⁴⁰ and the right to be protected against discriminatory marketing practices, especially considering the disproportionate impact of NCDs on poorer communities that have limited access to information from alternative sources based on resources.¹⁴¹

7 CONCLUSION

This article set out to analyse how human rights can support the adoption of mandatory FOPL in South Africa, as recently proposed by the Department of Health. Given that FOPL is a unique policy intervention that fulfils human-rights obligations in terms of the rights to health, food, access to information and freedom of expression (among others), and that NCDs have turned into a catastrophic threat to the enjoyment of rights by a large portion of South Africans, the authors argue that an HRBA not only supports the adoption of FOPL, but mandates it as part of the South African State's duties towards its citizens. FOPL is a low-cost, low-resource solution that creates an opportunity for the South African State immediately to improve the food environment in the country. This will be a step towards better realisation of the rights to food, health and information for South Africans. This will therefore give effect to the State's duty to realise progressively the socio-economic rights of South Africans, but also the State's immediate duty to facilitate adequate access to information and guarantee freedom of expression. South Africa has already moved towards legislating for increased consumer awareness and access to information with the enactment of the CPA. FOPL will give effect to, and build upon, the aims and objectives of national legislation like the CPA.

¹³⁸ GN R1148 in GG 16588 of 1995-08-04 2.

¹³⁹ S 29(a) of the CPA, which protects consumers from marketing that includes packaging of goods in a manner that is reasonably likely to imply or mislead consumers in terms of several components, including the nature, properties and advantages or uses of a product. S 41 provides additional context as to which misrepresentations are prohibited and includes the failure to disclose a material fact (s 41(1)(b)) and the failure to correct an apparent misapprehension on the part of the consumer (s 41(1)(c)). The authors note the limited circumstances in which an omission is actionable, or put differently, where a duty to disclose arises, but highlights that a duty to disclose can arise from policy considerations (*McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) 726A–G). Given that increasing understanding that the right to access food includes the right to access nutritious and safe food, there is scope to argue that food suppliers have a duty to disclose in the form of more expansive product labelling.

¹⁴⁰ S 40(2) of the CPA.

¹⁴¹ S 8(2) of the CPA.