

Child poverty and children's rights of access to food and basic nutrition in South Africa

A contextual, jurisprudential and policy analysis

Danwood Mzikenge Chirwa

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EXECUTIVE SUMMARY

Millions of children in South Africa bear the yoke of extreme forms of poverty and its associated evils, such as malnourishment, stunted growth, nutritional-deficiency diseases and illiteracy. The depreciation of the South African rand towards the end of 2008 and the current global financial crisis have only served to entrench child poverty by pushing poor households into deeper levels of deprivation and relegating those who were previously financially stable to the status of the poor. Despite the prevalence of poverty, malnutrition and hunger-related diseases, there has been no litigation in South Africa on the right to food, unlike other rights such as the rights to housing, water, and social security. There is also no case law directly concerning children's socio-economic rights (hereafter SERs).

In view of the dearth of jurisprudence, this paper sought to tease out the meaning of children's right of access to food as well as their right to basic nutrition, to analyse the significance of, and correlation between, these two rights, and to consider their implications for South African law and policy. It concludes that although the Constitutional Court has held that children's SERs do not create unqualified obligations on the state to provide certain socio-economic goods on demand, this does not mean that these rights have no meaningful implications for the state. In particular, it is argued that the right of the child to basic nutrition under the South African Constitution is not a mere re-statement of the right of everyone to sufficient food, although it is not denied that the two rights interrelate closely. The former is primarily



preoccupied with children's nutritional wellbeing – matters concerning nourishment, dietary needs, food nutrients, and children's bodies' assimilation of food. In contrast, the right to sufficient food is a broad right whose primary concern is with all aspects of food, including its spiritual, recreational and social aspects, in addition to issues of food security or availability, accessibility, acceptability, quality and safety. The right of everyone to sufficient food serves as a ringing reminder that matters of food security, nutrition and accessibility deserve specific programmes, policies and other measures. In turn, children's right to basic nutrition calls attention to the need for general food measures and policies to have as one of their central concerns children's nutritional wellbeing, and to the need for the state to devise child specific measures on basic nutrition.

In line with the emerging trend in international human rights law, children should be given priority allocation in social provisioning. The idea of child prioritisation is different from the notion of minimum core obligations in that the former does not ask of the state to provide certain minimum essential levels of SERs to everyone upon demand. Rather, in addition to requiring states to consider the needs of children adequately in general policies on rights and to adopt specific policies concerning children, it also calls upon the state to identify priority areas for children and develop and implement policies to deal with them. It also implies that the state should take measures that seek to protect the wellbeing and welfare of children in the face of calamities, emergencies and threats to their livelihoods. Where there are competing interests in resource allocation, child prioritisation would entail treating the wellbeing of children as a primary consideration, along with other similarly important state interests.

The rights to food and basic nutrition have been implemented rather unsystematically in South Africa through a hodgepodge of policies and indirectly by legislation. The Food Security Strategy for South Africa 2002 provides a broad policy framework on food security, but the broad goals and strategies it identifies require further elaboration in more specific policies and programmes and an inter-departmental body to coordinate policy development and implementation in this area. The Draft National Food Security Bill promised to provide a legislative blueprint for the implementation of the right to food. This Bill slipped through the legislative ladder unnoticed even by civil society. The Constitution specifically demands that programmes and meas-



ures to realise SERs should be comprehensive and well coordinated. As there is no single department in charge of these two rights, the need for proper coordination and an inter-departmental structure to oversee their implementation cannot be overemphasised. Currently, there are admittedly a number of child-specific policies concerning nutrition and access to food. Their success will remain limited and short-lived as long as no comprehensive legislative and policy framework is put in place to govern the complex terrain of food in general and children's basic nutrition in particular.





1 INTRODUCTION

The South African Constitution, 1996, boldly protects the right of access to food as a self-standing right,¹ departing markedly from established practice in comparative constitutional law and in international human rights law. As if this is not enough, it specifically recognises the right of children to basic nutrition.² Such boldness is understandable given that the Constitution was adopted after decades of the apartheid regime, leaving a legacy of impoverishment among the majority of South Africans. By specifically protecting these rights, the Constitution seeks to ensure that programmes, measures and strategies for reconstructing and rebuilding South African society should not treat access to food as a mere end but as an important parcel of the instrumental mechanisms for creating a new South Africa.

The importance of food is self-evident. Without food, there cannot be human life. For a person to develop properly, mentally and physically, he or she must have adequate food of suitable nutritional value. Thus, for children in particular, the right of access to food is of paramount importance. A malnourished child, if she is fortunate to survive, has no chance of proper development and is consequently doomed to a bleak future of illiteracy, poverty and destitution. With underdeveloped mental faculties, a child cannot go very far with education, which is critical to founding an independent existence and freedom. Proper physical and mental development is the key to realising the child's full potential as a human being and as a useful citizen.



Despite the obvious importance of the right of access to food for children and the significance the Constitution attaches to the right of children to basic nutrition, the right of access to food as it applies to children remains underdeveloped both at the international and domestic levels. Both the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Committee on the Rights of the Child (CRC Committee), which monitors the implementation of the Convention on the Rights of the Child (CRC), have paid little attention, if any, to this aspect of the right to food. In South Africa, a growing body of jurisprudence on economic, social and cultural rights is emerging. However, it largely concerns the rights to health, housing, water and social security, and not the right of access to food in general, let alone the right of children to basic nutrition.

The dearth of litigation and jurisprudence on the right of access to food and children's right to basic nutrition belies the actual situation concerning these rights. Millions of South Africans, representing 26% of the total population, live below the international poverty line of US\$1.25 per day³ and are therefore prone to food insecurity, not knowing where their next plate of food will come from. The current financial crisis has exerted pressure on families that were previously food secure. The loss of jobs and the steep rise in food prices that have accompanied the crisis expose many more South Africans to food insecurity.

This paper teases out the meaning of the right of access to food for children as well their right to basic nutrition. Drawing insights from international human rights law, it analyses the significance of, and correlation between, these two rights as they are defined under sections 27(1)(b) and section 28(1)(c) of the Constitution respectively and then examines what they mean for the state. This leads to an evaluation of the policy and legislative measures the South African government has put in place to realise these two rights.



2 CHILD POVERTY, THE GLOBAL FINANCIAL CRISIS AND CHILDREN'S ACCESS TO FOOD

Child poverty refers to a situation whereby a person below the age of 18 years lacks access to what is required to fulfil basic human needs.⁴ This definition of child poverty considers it as something more than simply material deprivation or a lack of income. It is an expansive depiction of poverty, which takes into account all its manifestations including lack of income and productive resources to support a dignified livelihood, hunger and malnutrition, ill health, lack of access to education, housing, water and other basic services, and lack of participation in public decision-making.⁵ Nevertheless, benchmarks that use income as a basis for measuring poverty are useful, though not conclusive, indicators of the state of poverty in a given society.⁶

Many are familiar with the statistics on poverty in South Africa but these statistics have not become any less appalling. According to the United Nations Development Programme (UNDP)'s human development index, South Africa is ranked 121 out of 177 countries.⁷ Gabon is ranked 119.⁸ UNDP's poverty index places South Africa at number 55 out of 108 developing countries.⁹ There is some evidence that poverty has been on the decline in South Africa since 1994.¹⁰ It has been estimated, for example, that the number of households living below an income of R322 per month has fallen from 18.5 million to 15.4 million.¹¹ Despite this, the total number of people living in poverty remains stubbornly high.

According to recent estimates by the United Nations Children's Fund (UNICEF), about two-thirds of children in South Africa were living in poverty (on R7.75 per day).¹² ACCESS also estimates that nearly 60% (11 million) of all children in South Africa live in dire poverty on less than R200 per month. According to UNICEF, the nutritional status of children has not improved over the past 10 years. For example, in 2007, one in 10 children was underweight, 15% of infants were born with low birthweight and 10% of children under five were under weight.¹³ UNICEF also estimates that the under-five mortality rate was 59 per 1,000 live births and the infant mortality rate was 46 per 1,000 live births in 2007.¹⁴

Poor children face a host of problems, from persistent hunger, lack of access to education and inadequate housing, to lack of access to health care, malnutrition and other forms of illnesses.



The current global economic crisis has not helped to ameliorate the situation of child poverty. The International Monetary Fund and the World Bank were reporting encouraging economic growth in sub-Saharan Africa before the food and fuel price hikes of 2008 to 2009.¹⁵ The financial crisis has hit South Africa's agricultural sector hard with the result that the country has rapidly gravitated from being a net exporter to being a net importer of food.¹⁶ The depreciation of the Rand from mid to end 2008 sparked a series of food price increases which had unpleasant consequences on both poor families and those that were previously considered to be economically stable.¹⁷ As companies faced economic hardships, retrenchments became inevitable, with the mining, real estate and motor vehicle sectors being the most badly affected.¹⁸ The job losses that followed relegated many previously financially secure households into the doldrums of poverty. Financial hardships not only impeded access to food, but also led to loss of homes, means of transport and the capability to care for children. The post-mortem of the full impact of the financial crisis on South Africa generally and on people's access to food has not yet been undertaken by economists and other social scientists. However, there cannot be any gainsaying the fact that it has considerably reversed the gains made by Africa on poverty alleviation over the past decade.

3 PROTECTION OF THE RIGHT TO FOOD IN INTERNATIONAL LAW

Combating malnutrition and hunger and raising standards of living have been at the core of the international community's agenda for a long time. This is partly evidenced by the creation in 1945 of the Food and Agriculture Organisation (FAO) as a specialised agency of the UN. The Preamble to the Constitution of the FAO¹⁹ commits member states to raising the levels of nutrition and standards of living, securing improvements in the efficiency of the production and distribution of all food and agricultural products and ensuring that humanity is free from hunger.

For its part, the Charter of the United Nation (UN Charter), 1945, clearly identified the promotion of 'higher standards of living, full employment, and conditions of economic and social progress and development' as a primary UN objective.²⁰ In addition, it committed member



states to the promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction'.²¹ The Universal Declaration on Human Rights (UDHR), 1948,²² which is regarded as a legal code expounding the rights referred to in the UN Charter, recognises the right of everyone to 'a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services'.²³

At that stage, the right to food was subsumed under the right to an adequate standard of living along with such other (then) sub-rights as the right to housing, clothing, social services and medical care. This was to remain the case until 1966, when the ICESCR was adopted. Like the UDHR, the ICESCR recognised the right to food as an element of the right to an adequate standard of living.²⁴ However, it proceeded to recognise the fundamental right of everyone to be free from hunger in a separate sub-article.²⁵ This aspect of the right to food is an enduring legacy of Roosevelt's four freedoms, which included 'freedom from want', but its definition in the ICESCR is curious in that the right itself is framed in negative terms yet the obligations it engenders on the state are defined in positive terms. The ICESCR explicitly enjoins states parties, in recognising the fundamental right of everyone to be free from hunger, to adopt measures to improve methods of production, conservation and distribution of food, and to ensure an equitable distribution of world food supplies in relation to need.²⁶ This is an early recognition of the close connection between negative and positive obligations at least in relation to the right to food.

The right to food was to receive recognition as an independent right in 1974, when the World Food Conference²⁷ proclaimed that '[e]very man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties'.²⁸ This gain was short-lived as the CRC failed to mention it explicitly in its provisions concerning the right to an adequate standard of living²⁹ and instead enshrined aspects of the right to food under the right of the child to the enjoyment of the highest standard of health.³⁰

The right to food was reaffirmed in the Rome Declaration on World Food Security adopted at the World Food Summit in 1996, where it was stated that everyone has the right of access to 'safe and nutritious food, consistent with the right to adequate food and the fundamental



right of everyone to be free from hunger'. CESCR General Comment 12 adopted in 1999 raised the profile of the right to food significantly by defining its content in a manner that affirmed its separate existence from the right to an adequate standard of living, without necessarily downplaying the linkages between these rights.³¹

At the regional level, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988,³² recognises the right of everyone 'to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, intellectual and emotional development'.³³ Although it is not explicitly recognised in the African Charter on Human and Peoples' Rights (African Charter), 1986,³⁴ the African Commission on Human and Peoples' Rights (African Commission) recently held that the right to food is implicitly recognised by a combined reading of the provisions of the Charter concerning the rights to life, health and development.³⁵ However, the African Charter on the Rights and Welfare of the Child (African Children's Charter), 1990,³⁶ expressly protects the right to adequate nutrition as a sub-set of the right to enjoy the best attainable standard of physical, mental and spiritual health.³⁷ From an international perspective, therefore, one cannot deny the status of this right as a separate and independent right.³⁸

3.1 Significance of recognising the right to food as an independent right

Recognising the right to food as a self-standing right is imperative because it allows for the proper development of its content and the specific obligations of the state. Treating it as a subset of many other rights may obscure its importance and impede the deployment of more specifically targeted measures aimed at implementing it.

At the same time, it must be conceded that implementing the right to food is a particularly complex task because it depends on many factors. Food availability and access is affected by such factors as the economic, political and cultural contexts, access to land, employment opportunities, technological advancement, poverty, and educational opportunities. Thus, the CESCR has observed that the right to food is 'inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and



the fulfilment of all human rights for all'.³⁹ Likewise, the Voluntary Guidelines on the Right to Food⁴⁰ pertinently advise:

*States should consider adopting a holistic and comprehensive approach to hunger and poverty reduction. Such an approach entails, inter alia, direct and immediate measures to ensure access to adequate food as part of a social safety net; investment in productive activities and projects to improve the livelihoods of the poor and hungry in a sustainable manner; the development of appropriate institutions, functioning markets, a conducive legal and regulatory framework; and access to employment, productive resources and appropriate services.*⁴¹

This means that realising the right to food is impossible without simultaneously implementing many other human rights, such as the rights to health,⁴² life,⁴³ a healthy environment, education, work, land, social security, human dignity and to civil and political rights in general.⁴⁴ Recognising the interdependence and linkages between the right to food and other human rights therefore warrants the adoption of comprehensive and crosscutting policies aimed at eliminating poverty in general, as well as illiteracy and ill health. However, the fact that the right to food is an independent right means that specific policies on food and food security must also be formulated and implemented, for without these, it may not be easy to track progress on the actual implementation of this particular right, or at least hold any specific institution or state organ responsible for the failure to implement it.

3.2 Food security, the right to food and the right to nutrition distinguished

3.2.1 Food security

The term 'food security' is often used interchangeably with the phrase 'the right to food', but they do not mean exactly the same thing. The Plan of Action of the World Food Summit adopted in Rome in 1996 described food security as follows: 'Food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.'⁴⁵ The CESCR adopted this description for the right to food in General Comment 12, as if the two terms were



synonymous. It stated: 'The right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means of its procurement'.⁴⁶

Food security is a term commonly used by UN agencies and other international organisations.⁴⁷ It emerged in the mid 1970s in the aftermath of a world food crisis, initially as a label for efforts at resolving world food-supply deficits and problems. Over the years, the term has evolved to apply at the domestic, household and individual levels, and now encompasses food supply as well as access to food, and focuses on the nutritional needs of society. The FAO, for example, holds that food security is essentially a 'phenomenon relating to individuals. It is the nutritional status of the individual household member that is the ultimate focus'.⁴⁸ As it is currently understood, food security is underpinned by the following key principles: food availability, food access and food use.⁴⁹ Availability concerns the adequacy of food quantities on a consistent basis, while accessibility relates to the financial and physical ability of individuals to obtain food. Food use pertains to informed use of food to meet one's nutritional needs.

3.2.2 The right to food

Although the notion of food security has not yet infiltrated the international human rights jurisprudence as far as treaty law is concerned, it can be regarded as having been subsumed under the notion of the right to food. As already noted above, the CESCR has drawn on the notion of food security in defining the right to food, premising this right on the six pillars of adequacy, availability, quality, safety, acceptability and accessibility.

The notion of food adequacy is more or less synonymous with food security. The CESCR has said that adequacy implies that food is accessible for both present and future generations and that food is available on a sustainable basis.⁵⁰

Availability relates to the ease with which food can be found. Food of appropriate quality must be accessible at all times in sufficient quantities as may be necessary to satisfy the nutritional or other needs of society.⁵¹ This notion can also be understood to mean the presence of opportunities 'for feeding oneself directly from productive land or other natural resources, or for well functioning distribution,



processing and market systems that can move food from the site of production to where it is needed in accordance with demand'.⁵²

The principle of quality pertains to the nutritional value of food. Food must have such an array of nutrients as may be required for a person's proper physical and mental growth.⁵³ Related to this is the notion of food safety, which requires foodstuffs to be free from adverse substances.⁵⁴

The concept of acceptability imposes the requirement that such food as is available should be culturally acceptable to the society at hand.⁵⁵ It is thus not enough for the state to make food available if that food is alien to that society.

Lastly, the concept of accessibility connotes both economic and physical accessibility, the former being concerned with the ability of individuals and households to afford foodstuffs while the latter relates to the physical reach of food, especially the ability of individuals, including vulnerable people such as women, children and the disabled and rural dwellers, to access food.⁵⁶

It can therefore be seen that the right to food has broader import than the notion of food security. While the latter has developed over time to encompass issues of food supply, availability, accessibility and use, the right to food incorporates all these important elements in addition to focussing on dietary requirements, food safety and acceptability, as well as opportunities for producing and acquiring food. Despite efforts by UN agencies such as the FAO to bring the notion of food security to bear at the household or individual level, it is the right to food, as a right of an individual, which more precisely and meaningfully brings individual circumstances and food needs to the fore of any discussion on food.

3.2.3 The right to nutrition

As noted earlier, some treaties recognise the right to adequate nutrition in preference to the right to food. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights is a case in point, as seen above. Eide and Kratch have argued that the right to adequate nutrition as defined in this treaty is broader than the right to food.⁵⁷ For them, the right to adequate food is 'a necessary, but not alone sufficient component of "the right to an adequate nutrition"'.⁵⁸ They argue that 'the ultimate



objective of promoting food security and the right to adequate food is to achieve nutritional well-being for the individual'.⁵⁹

It cannot be true that the right to adequate nutrition is broader than the right to food. On the contrary, the opposite must be true. Nutrition is a technical term in the field of health sciences that relates to issues of nourishment, food composition, dietary requirements, food nutrients and the assimilation of food nutrients by the human body. As a right, therefore, the right to nutrition must be concerned with the nutritional well-being of a person. The right to food, by contrast, is far broader than this. While one of the purposes of food is to achieve nutritional well-being, this is by no means its only function. People use food for many other important purposes, including spiritual or religious purposes, at festivities or for entertainment, for social harmony and for agricultural purposes. Thus people do not take food only to live, but also to enjoy it and as a social and cultural good. The CESCR is therefore correct in stating that the right to food should not be interpreted in a narrow and restrictive fashion that reduces it to an entitlement to 'a minimum package of calories, proteins and other specific nutrients'.⁶⁰ To do so would clearly be equating the right to food with the right to nutrition. The right to food is concerned with all aspects of food, including its spiritual, recreational, social and agricultural aspects, in addition to issues of food security, availability, quality, safety and acceptability. For these reasons, nutrition should be regarded as forming part of the broader right to food. Because of its essence to one's well-being or health, it is also often regarded as a vital part of the right to health.

In conclusion, the right to food is an encyclopaedic right subsuming the notions of food security and nutrition.

3.3 Children's socio-economic rights in international law

3.3.1 Children's socio-economic rights and prioritisation

The ICESCR is a general treaty that protects a wide spectrum of SERs that can be claimed by everyone. However, this treaty also recognises a set of specific rights for children. Among other things, article 10(3) of the ICESCR provides that:



*[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation.*⁶¹

Van Bueren has rightly argued that this provision can be interpreted quite broadly and in a manner that advances the rights of the child. She argues that it 'lays down the basic principle that all children, because of their vulnerability, are entitled to special protection and assistance in addition to that provided for adults'.⁶²

The adoption of the CRC in 1989 bolstered the protection of children's SERs in two critical ways. It protects civil, political rights and SERs in one treaty, and adopts a new nomenclature for categorising children's rights. In defiance of the traditional divide between civil and political rights, on one hand, and economic, social and cultural rights, on the other (or first- and second-generation rights, respectively), the CRC is predicated on four key principles: participation, prevention, provision and protection. These principles are inseparable, mutually supporting and interdependent. For instance, aspects of prevention, protection and provision are embedded in the right to survival and development, which is regarded as an umbrella right from which children's SERs can be derived. It protects the right to life in the traditional sense as well as the right to protective and other positive measures that are necessary for children's survival and development.⁶³ In breaking this divide, the CRC raised the profile of SERs in international human rights law and consequently underscored the fact that child poverty was a human rights issue.

However, the CRC can be interpreted as supporting the view that children's SERs are realisable primarily through the agency of adults. In article 18(2), the CRC obligates states parties, for the purpose of guaranteeing and promoting the rights set forth in this treaty, to render 'appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities' and to 'ensure the development of institutions, facilities and services for the care of children'.⁶⁴ Article 27(2) states that parents and others responsible for children 'have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for [their] development'. Likewise, article 20 of the African Children's



Charter posits that the primary responsibility for children's upbringing and development rests with parents. However, it also provides that the state shall assist parents and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, housing and clothing.⁶⁵

The importance of parents to children's upbringing cannot be underestimated, but the acknowledgement of parental responsibility should in no way be interpreted as a claw-back clause on states' direct responsibilities towards children. For one thing, both the CRC and the African Children's Charter clearly grant children a range of SERs claimable directly against the state. These include the right to education, the right to health and the right of disabled children to a full and decent life. Even the right to social security in the CRC is couched in terms that suggest that children have a direct claim against states even when they are under parental care.⁶⁶ Cumulatively, these provisions effectively place an unmistakable obligation on the state both to adopt child-specific policies and to include children as direct beneficiaries of general measures on poverty and social provisioning. In this regard, the CRC Committee has commended the development of a comprehensive national strategy or national plan of action for children underpinned by the principles of the CRC.⁶⁷ To ensure that children benefit from general policies, the CRC Committee has urged states to engage in a continuous process of assessing the impact of any proposed law, policy or budgetary allocation on children, both as a predictive and evaluative practice.⁶⁸

It must be conceded that both the CRC and the African Children's Charter fall short of expressly placing a general obligation on states to accord priority allocation to children. The absence of such an obligation can be attributed to the lack of proper recognition of SERs in international and comparative constitutional law. Van Bueren has attempted to locate the justification for prioritising children's interests in budgeting and allocation of state resources in the principle of the best interests of the child.⁶⁹ It is hereby argued that common sense would also justify such prioritisation. Children are the future of humanity and deserve to live in circumstances that would ensure that they develop optimally and realise their full potential. In situations where a society faces a threat to life or curtailment of rights, the law has usually tended towards granting special rights and privileges to children.⁷⁰



International human rights law now appears to be moving in the direction of imposing an obligation of a 'first call for children' in the arena of SERs. It is a duty that posits that 'the essential needs of children should be given high priority in the allocation of resources, in bad times as well as in good times, at national and international as well as at family levels'.⁷¹ This idea was coined after the CRC was adopted, at the World Summit in 1990, where world leaders agreed that 'the fulfilment of the basic needs of children must receive a high priority' and that '[e]very possible opportunity should be explored to ensure that programmes benefiting children, women and other vulnerable groups are protected in times of structural adjustments and other economic restructuring'.⁷² The CRC Committee is increasingly leaning towards an interpretation of the CRC that manifests this view. For example, while pointing out the practical impact of the CRC on domestic policies and legislation, it has observed that it has changed the perception of children's place in society to one that displays 'a willingness [by states] to give higher political priority to children and an increasing sensitivity to the impact of governance on children and their human rights'.⁷³ Furthermore, the Committee has called for 'particular attention' to be paid to the most vulnerable groups of young children regarding the obligation of states to ensure that all young children are guaranteed access to appropriate and effective services, such as health care and education.⁷⁴ Vulnerable children include:

*girls, children living in poverty, children with disabilities, children belonging to indigenous or minority groups, children from migrant families, children who are orphaned or lack parental care for other reasons, children living in institutions, children with mothers in prison, refugee and asylum-seeking children, children infected with or affected by HIV/Aids, and children of alcohol- or drug-addicted parents.*⁷⁵

More recently, the CRC Committee has recommended that states should:

*make children a priority in the budgetary allocations as a means to ensure the highest return of the limited available resources; and make investment in children visible in the State budget through detailed compilation of resources allocated to them.*⁷⁶



It can thus be concluded that international law recognises the importance of SERs in combatting child poverty. It requires that states should at least adopt and implement child-specific SERs measures as well as make provision for children in general SERs measures. There is an emerging norm in international children's rights law that seeks to impose an obligation on states to accord priority to realising children's rights, including SERs.⁷⁷ The precise nature and implications of this obligation remain hazy, but this issue is revisited in section 4.1.3 below.

3.3.2 The meaning of the right to food or nutrition as it applies to children

Thus far, neither the CESCR nor the CRC Committee has sufficiently considered children in their interpretation and development of the right to food or nutrition and the right to health. The African Committee on the Rights and Welfare of the Child, which monitors the implementation of the African Children's Charter and is the youngest of the three, has not fared any better.⁷⁸ These bodies have tended to interpret these rights in a general fashion, stopping short of calling for special (or at least specific) measures for children, let alone requiring children to be direct beneficiaries in general programmes concerning social provisioning. In General Comment 12, for example, the CESCR alludes to matters of direct concern to children almost by accident in three paragraphs.⁷⁹ For example, in emphasising the need for nutritious food, the CESCR calls upon states to maintain, adapt and strengthen dietary diversity and feeding patterns, including breast-feeding.⁸⁰ It highlights the importance of physical accessibility of food to vulnerable individuals, including infants and young children.⁸¹ Lastly, it urges states to prevent discrimination in access to food on such grounds as age, birth or social origin.⁸²

The right of children to an adequate standard of living or to nutrition is yet to receive specific attention from the CRC Committee both in its general comments and in its programme of annual days of general discussion.⁸³ This is of particular concern given that, as far as children's right to adequate standard of living is concerned, the CRC creates the highly problematic presumption that it is primarily the parents' responsibility to ensure the conditions necessary for children's development and that the state's obligations are secondary, essentially consisting of rendering assistance to parents.⁸⁴



The remainder of this section distils what this means for children from various international human rights instruments concerning the right to food or nutrition.

As noted above, the right to food is a general right that everyone is entitled to. It guarantees individuals food security and adequate nutrition. For children, the nutritional aspects of the right to food are essential for their optimal physical, psychological and mental development. Both the CRC and the African Children's Charter underscore the importance of nutrition to children by requiring states to combat malnutrition, provide adequate nutritious foods and clean drinking water and provide access to education on child health and nutrition and on the advantages of breast-feeding and hygiene.⁸⁵ The right to food, nutrition or health also means that the state should 'assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particular with regard to nutrition ...'.⁸⁶ This provision should be taken to mean that such assistance may be provided to female-headed households as well as child-headed households.

It is self-evident that, as part of the right to food, states have a general obligation to prevent hunger, malnutrition and famine. They also have a specific duty to devise food and nutritional plans and policies that aim to improve constantly the nutritional status of its population. According to the Universal Declaration on the Eradication of Hunger and Malnutrition,⁸⁷ states have the responsibility to take concerted action against malnutrition and deficiency diseases among the vulnerable and lower-income groups, including emphasising the importance of human milk.⁸⁸ Ensuring household food security is crucial to guaranteeing children's nutritional well-being.

If the state has the duty to prevent hunger and combat malnutrition, it also has an obligation to adopt programmes for the supplementary feeding of malnourished children. In this connection, children who are particularly vulnerable (such as street children, children with disabilities, child-headed households, refugee children and those who have been displaced) may need special measures. To improve nutrition in children, there must be adequate household food security, a healthy environment and control of infections and adequate maternal and child care.⁸⁹ The state should also be able to monitor the nutritional needs of children and identify causes of malnutrition and the means of dealing with them.⁹⁰ In particular, the state should imple-



ment measures that seek to eliminate diseases caused by nutrient deficiencies.

The health and nutritional well-being of an infant may be impaired well before its birth. The child of a malnourished or under-fed pregnant mother may inherit physical and mental deficiencies caused by insufficient nutrition that may not be easy to cure or that may impede the child's proper development. Thus, to ensure the right of children to food, attention needs to be paid to pre-natal care. It is therefore important to ensure that adequate food is provided to women during pregnancy and lactation.⁹¹

Hygiene and sanitation are crucial to children's well-being. Many children die from contaminated food. Consequently, it should be regarded as an important element of the right to food or nutrition to require states to ensure that children and their parents have access to sanitary services, safe and clean water, and information on hygiene and nutrition both in rural and urban areas.⁹²

Some international documents emphasise the need to pay attention to gender and sex in measures aimed at implementing the right to food or nutrition. For example, the Beijing Declaration and Platform for Action⁹³ calls upon states to formulate and implement measures that support female-headed households and to ensure an equitable distribution of food for girls and women in the household.⁹⁴ The International Conference on Population and Development also urged countries to develop 'an integrated approach to the special nutritional ... needs of girls and women'.⁹⁵

4 THE PROTECTION OF THE RIGHT TO FOOD UNDER THE SOUTH AFRICAN CONSTITUTION

The South African Constitution contains a panoply of rights that are relevant to the protection, promotion and realisation of the right to food. It enshrines the right to property in such a unique way that the state can expropriate land for purposes of land redistribution to ensure that the poor have security of tenure and the means for feeding themselves.⁹⁶ Recently, the South African Constitutional Court held in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* that excessive fragmentation of agricultural land, be it arable land or grazing land, may adversely affect the availability of food.⁹⁷ The Constitution



also provides for the right to basic and further education, which are necessary for a person to develop the skills and competencies necessary for securing gainful employment.⁹⁸ The rights to housing, health care, water and social security are also entrenched in the Constitution,⁹⁹ and the significance of these rights to ensuring food safety, hygiene and security, as well as access to food, cannot be overemphasised. Procedural rights, such as the right to administrative justice,¹⁰⁰ which are important for securing and defending existing access to food or mechanisms for obtaining food, are also recognised.

In addition to these general rights, the Constitution makes specific provision for the right to food in three main ways:

1. it enshrines the right of everyone 'to have access to sufficient food' in section 27(1)(b);
2. it protects the right of every child to 'basic nutrition' in section 28(1)(c); and
3. it recognises the right of everyone who is detained to 'conditions of detention that are consistent with human dignity, including at least the exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment'.¹⁰¹

This paper is concerned only with the first two guarantees – everyone's right of access to sufficient food and children's right to basic nutrition. Questions of central concern are: what is the significance of the latter right, given that the Constitution already recognises the right of everyone to have access to sufficient food? What is the relationship between the two rights? What specific obligations does the state have in relation to children's right to basic nutrition?

4.1 The right of access to sufficient food and children's right to basic nutrition

In order to understand the meaning, importance and implications of children's right to basic nutrition under section 28(1)(c) of the Constitution, it is necessary to compare this right with the right of everyone to sufficient food protected under section 27(1)(b). Upon reading these two provisions and their surrounding provisions, three main differences are apparent:



1. section 27(1)(b) speaks of the right of access to sufficient food, while section 28(1)(c) talks about the right of the child to basic nutrition;
2. the former is a right of access to *sufficient food* while the latter is a right to *basic nutrition*; and
3. a sub-article accompanies the right of everyone to sufficient food, defining the obligations of the state by reference to the notions of reasonable measures, progressive realisation, and available resources.¹⁰² This is not the case with children's right to basic nutrition.

What are the implications of these differences?

4.1.1 'Access'

As noted above, everyone's right to food is couched as a right of *access* to food while the right of the child to basic nutrition is not defined by reference to the notion of access. In *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*,¹⁰³ the Constitutional Court purported to suggest that the right 'to have access to housing' under section 26 of the South African Constitution was different from the right to adequate housing under article 11(1) of the ICESCR. It drew this distinction while trying to explain its decision not to endorse the idea of minimum core obligations developed by the CESCR. Thus, it emphasised that the right of access to adequate housing recognises that housing entails more than the physical structure: it also requires 'available land, appropriate services such as the provision of water and the removal of sewerage and the financing of these, including the building of the house itself'.¹⁰⁴ The Court added that 'access to' suggests that the state incurs the obligation to empower private individuals and organisations to provide housing.¹⁰⁵

Applied to section 27(1)(b) of the Constitution, the right of access to sufficient food would mean that 'the state has an obligation to provide an environment within which everyone is, within the limits of their abilities, able to acquire food for themselves'.¹⁰⁶ However, this is only one aspect of the state's obligation to fulfil this right, namely the obligation to facilitate the realisation of the right. The state also has the obligation to provide assistance to those who cannot afford food as part of the obligation to fulfil the right, apart from having an obliga-



tion to refrain from interfering with existing access to food or protecting individuals from violations of their right of access to food by third parties.¹⁰⁷ The Constitutional Court itself acknowledged in *Grootboom* that the state's obligations to those who can afford to acquire housing are different from its obligations to those who cannot afford to do so. For the former, the state's responsibility is concerned with 'unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance'.¹⁰⁸ For those who cannot afford housing, the state must provide special assistance, but subject to the availability of resources and progressive realisation.¹⁰⁹

It follows that the word 'access' does not have any meaningful implications for understanding either the right to have access to sufficient nutrition or children's right to basic nutrition. The idea that all rights entail the obligations to respect, protect, promote and fulfil has rendered the words 'access to' in the SERs provisions superfluous, as each of these rights, irrespective of whether they use 'access to' engenders these obligations. The manner in which the Constitutional Court was interpreting 'access to' simply mirrored the content of the duty to facilitate the realisation of a right, which is a mere aspect of the duty to fulfil.

4.1.2 The meaning of food and nutrition

As noted above, children's right is to *basic nutrition* while the right of everyone is one of access to *sufficient food*. The Constitutional Court in *Grootboom* considered the implications of similar textual differences between the right of access to *adequate housing* under section 26 and children's right to *basic shelter* under section 28(1)(c) of the Constitution. At issue in this case was whether the state could be ordered to provide temporary housing to a group of people who were living in intolerable conditions without basic shelter. These homeless people mounted their claim on the general right of everyone to housing and, alternatively, children's right to basic shelter referred to above. The Constitutional Court rejected the view that children's right to basic shelter required the state to provide rudimentary shelter to children and their parents on demand, where those parents were unable to provide the shelter to their children themselves.¹¹⁰ It found that the term 'basic shelter' did not bear any different meaning from the term 'hous-



ing' under section 26 of the Constitution. Rather, 'shelter' in section 28(1)(c) of the Constitution, it was held, embraced shelter in all manifestations, not simply its rudimentary forms.¹¹¹ Furthermore, the Constitutional Court did not endorse the contention that the obligation to provide children and their parents with rudimentary housing exists independently of the state's general obligation to take reasonable legislative and other measures in terms of section 26 of the Constitution, or that it exists irrespective of the availability of resources.¹¹²

It may well be, as the Constitutional Court held, that the terms 'housing' and 'shelter' are synonymous and, therefore, that the right of children to basic shelter does not imply a right to rudimentary housing. However, 'nutrition' cannot be synonymous with 'food'. As has been shown above, nutrition deals with the dietary variety and quality of food in terms of its nutrient composition. It is argued therefore that children's right to basic nutrition means that they are, at the very least, entitled to the minimum amount of food that is necessary to meet dietary requirements for their development, health and wellbeing. This right is, in effect, not a mere restatement for children of the right of everyone to sufficient food. Though these rights are without a doubt interrelated, they serve different but complementary purposes.

The general right of access to sufficient food serves as a ringing reminder that matters of food security, nutrition and accessibility deserve specific programmes, policies and other measures. The state cannot simply point to general socio-economic policies on education, health, the economy, labour and employment or the environment as guarantors of this right. In turn, children's right to basic nutrition calls attention to the need for general food measures and policies to have children as one of their central concerns, and highlights the need for the state to devise child-specific measures on basic nutrition.

4.1.3 The question of child prioritisation, parental responsibility and state duties

It was initially thought that, because children's SERs in section 28 did not have the qualifications that are found to everyone's SERs in sections 26(2) and 27(2) of the Constitution, children were entitled to priority allocation of basic services and goods over everyone. This reasoning was put to the test in *Grootboom*, where it was argued that homeless children were entitled to temporary shelter on demand simply because section 28(1)(c) of the Constitution was unqualified. In



trying to decode the obligations engendered by this section, the Constitutional Court adopted a contextual approach to interpretation and drew insights from international human rights law. It considered this section in light of sections 25(5), 26 and 27 of the Constitution, all of which define certain SERs by reference to the state's obligation to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of those rights. While the Court acknowledged that section 28(1)(c) of the Constitution created separate and independent rights for children, it held that there was an overlap between these rights and the rights of everyone under sections 26 and 27 of the Constitution. For the Court, section 28(1)(c) constitutes a mechanism through which the state fulfils its international obligations under the CRC. This section, the Court said, must be read in conjunction with subsections 28(1)(b) of the Constitution.¹¹³ The latter, it was held, 'contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking'.¹¹⁴ Consequently, the Constitutional Court held that the obligation to provide shelter in section 28(1)(c) rests 'primarily on the parents or family and only alternatively on the State'.¹¹⁵ The state has no primary responsibility for children under the care of parents or families; it only assumes the responsibility for providing shelter to children who, for example, are removed from their families.¹¹⁶ For children who are being cared for by their own parents or families, the state's role is limited to providing support to those parents and families, such as through social welfare programmes or material assistance, and to facilitating the realisation of children's rights through establishing the necessary legal and administrative infrastructure and protective measures against child maltreatment, neglect, abuse and exploitation.¹¹⁷

On one hand, the High Court's decision in *Grootboom*,¹¹⁸ insofar as it held that children were entitled to rudimentary shelter on demand, represents one end of the spectrum, which is pro-children, emphasising the need for prioritising children's socio-economic well-being. At least as regards housing, the Constitutional Court cited legitimate concerns against recognising an unqualified right of children to basic shelter.¹¹⁹ The most important of these was that the High Court decision had the absurd consequence that parents with children were to be accommodated with their children while those who did not have children would not receive any form of housing relief.



On the other hand, the Constitutional Court's decision on this aspect of children's rights could be interpreted as representing the other end of the spectrum, which consigns children's SERs to a status that is subordinate to everyone's rights. According to the Constitutional Court, children who are under the care of parents require no direct attention of the state, which must primarily concern itself with assisting the family with a sanguine expectation that children will benefit indirectly from those family-focussed measures.¹²⁰ By saying that the state does not have primary obligations to children who are under their parents' care, it also means that children's right to basic nutrition is rendered superfluous. At the same time, it robs children of their status as direct beneficiaries of SERs, including the right of everyone to have access to food.

In *Grootboom*, the High Court was faced with the knotty dilemma of separating children from parents so that the children could be given some relief in the form of temporary shelter. This explains why it ordered that parents should join the children in the shelter to be provided by the state. Similarly, food is a very difficult right to implement if both children and their parents are hungry and poor; it would be absurd for the state to provide food parcels to children and not their parents, expecting that it would reach the intended beneficiaries or that the children's welfare would be guaranteed. However, this does not mean that it is impossible for the state to fulfil its direct obligations to children who are under parental care in relation to such rights as the right to basic nutrition. A good example is the National School Nutrition Programme implemented in select primary and secondary schools in poverty-stricken areas, where food is given to learners at school. It is also possible for the state to take responsibility for children whose parents neglect them or are incapable of providing for them. The state also has direct obligations to children whose parents can afford food, for example the duty to provide education on nutrition or to ensure food security, availability or safety not only for parents, but for children as well.

Perhaps more importantly, the language of primary and secondary obligations is arguably not as useful as it first appears in trying to understand the responsibilities of the state in relation to child welfare and wellbeing. For one thing, the Constitutional Court had in mind only the duty to provide shelter when it made pronouncements on the responsibilities of the state in relation to children's access to housing.



State obligations in relation to human rights are often not so easily separable and often operate hand in hand in a complex web of interaction. Such a nuanced understanding of state obligations would suggest that in fact, both the state and parents have direct obligations to children in relation to their right to adequate nutrition, irrespective of whether the children are under parental care or not. For example, it has been shown in this paper that the state has the primary responsibility to provide information on nutrition, sanitation and health. It also has the obligation to adopt child-specific policies on children's access to basic nutrition, in addition to general measures aimed at assisting or making it possible for families to provide food to their children. The obligations to respect and protect children's SERs rest eternally with the state, even when children are under the best care of parents.

In short, the Constitutional Court was correct in holding that children do not have an unqualified right to certain SERs, claimable upon demand. It was also correct in holding that parents have a role to play in ensuring the physical, psychological and mental wellbeing of children. However, its analytical template for the obligations of the state in relation to children's SERs was constrained by its over-reliance on the primary and secondary responsibilities paradigm. For children's SERs to be fully realised, the state's obligations and those of parents must be implemented simultaneously at all times. Furthermore, although in all fairness the Constitutional Court in *Grootboom* did emphasise the need to pay attention to vulnerable and marginalised groups in general measures for implementing SERs, it did not stress the significance of including children and women in such general programmes. This was despite the fact that more than half of the plaintiffs in *Grootboom* were children, as were the intended beneficiaries of the comprehensive programme on HIV and AIDS treatment in the TAC case.¹²¹ The importance of specific SERs and the right of children to basic nutrition, in particular, should be understood in the context of children being a vulnerable group of people, with no political and economic power and dependent on their parents or the state for their survival and development. It should also be understood in the context of a human history that did not recognise children as independent bearers of rights until relatively recently, especially when the CRC and the African Children's Charter were adopted. Recognising their SERs in a separate section in the Constitution at least underscores both the



need to pay particular attention to children in general measures as well as in policies and programmes on social provisioning, and the need for child-specific measures. It also means that children should be given priority in the realisation of their SERs.

The idea of child prioritisation should not be conflated with the notion of minimum core obligations, which demands that states should guarantee minimum essential levels of SERs to everyone even in times of resource constraints. Rather, in addition to requiring states to consider the needs of children adequately in general policies on rights and to adopt specific policies concerning children, it also requires the state to identify priority areas for children and to develop and implement policies to deal with those priorities. It also implies that the state has a duty to take measures that seek to protect the wellbeing and welfare of children even in the face of calamities, emergencies and threats to the livelihoods of children. Where there are competing interests in resource allocation, child prioritisation would entail considering the wellbeing of children as a primary consideration. This means that the state has an obligation to consider child welfare as a state priority deserving of due consideration along with other similarly important state interests.

4.2 The obligations of the state in relation to children's right to basic nutrition

The Constitutional Court has devised reasonableness as the litmus test for measuring the state's compliance with its SERs obligations under the Constitution.¹²² It has also held that children's SERs under section 28 of the Constitution ought to be understood against the backdrop of the requirements of progressive realisation and availability of resources that apply to all other SERs contained in sections 26 and 27.¹²³ Therefore, in determining whether the state is complying with children's right to basic nutrition under section 28(1)(c), the question will be whether the state has devised reasonable policies and programmes aimed at implementing this particular right and whether the implementation itself is reasonable.

This benchmark will operate at various levels as far as children's rights to have access to sufficient food and basic nutrition are concerned. It has been noted in this paper that the right to food is strongly interrelated with other rights. This means that policies and pro-



grammes concerning the implementation of those rights must be so devised as to make adequate provision for children in general and, where necessary and possible, must also relate to children's rights to sufficient food and basic nutrition in particular. Such policies may be comprehensive, as is required by the reasonableness standard, but given the diversity of social programmes that have direct and indirect impacts on access to food, it is reasonable to expect that food-related programmes will be manifold. In this regard, the need for coordination, inter-linkages and proper allocation of responsibilities and cooperation between state organs and institutions is paramount.¹²⁴

Thus far, the approach adopted by the South African Constitutional Court suggests that at the very minimum, the state has an immediate obligation to adopt a reasonable programme or policy or legislation on a given SER. It follows that, in addition to general measures, the state must put in place policies and programmes aimed at implementing the general right to sufficient food as well as children's specific right to basic nutrition. As the former right is of application to everyone, it must be shown that those measures cater for the needs of children as well. Children's right to basic nutrition is quite specific – it is for *children* and concerns *basic nutrition*. It would not be farfetched for the Court to expect the state to develop and implement a comprehensive and well-coordinated programme on this right.

For a programme to be deemed reasonable, the Constitutional Court has hinted, it may be necessary for the state to put in place an appropriate legislative framework.¹²⁵ Likewise, the CESCR has advised:

*... States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organisations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures.*¹²⁶

In projecting the significance of framework law on the right to food, Khoza has argued that it is necessary for creating a comprehensive



and well-coordinated framework for implementing state policies and strategies on this right.¹²⁷ It would set the guidelines and norms that all state policies concerning food should comply with, and establish benchmarks, targets and monitoring mechanisms for gauging progress in implementation and for spotting and addressing challenges to implementation. The CESCR's idea of benchmarks, indicators and impact assessments to determine the prospective and actual impact of policies resonates with the Constitutional Court's view that public policies on SERs should be so designed as to facilitate the progressive realisation of the relevant rights.¹²⁸

Although children are generally all considered vulnerable, some are more vulnerable than others. Examples include street children, child-headed households, orphans, refugee children, displaced children, abandoned children, poor children and children caught up in desperate conditions such as humanitarian disasters and mass evictions. The Constitutional Court has underlined that measures that fail to respond to the needs of those who are most desperate, though statistically impregnable, will not pass the test of reasonableness.¹²⁹ To be reasonable, measures must not exclude a significant segment of society and must make provision for 'those whose needs are most urgent'.¹³⁰ The state therefore has an obligation to ensure that vulnerable children receive special attention in all measures dealing with basic nutrition and access to sufficient food.

5 POLICY ANALYSIS

Food and nutritional security is a crosscutting issue requiring a broad range of policies in specific and crosscutting areas such as health, education, social security, labour, environment, water, energy, trade and agriculture. These general policies should be regularly assessed in terms of their prospective and actual impact on the right to food, especially children's right to basic nutrition. Moreover, the right of access to food and children's right to basic nutrition are specific rights for which comprehensive measures by the state are obligatory.

5.1 Institutional arrangements

One of the challenges faced by the right to have access to food and



children's right to basic nutrition is the lack of an overarching institutional framework for coordinating, overseeing and monitoring policy and legislative programmes concerning these rights.¹³¹ South Africa does not have a department of food security or a department with an overall mandate on food and nutrition issues. By comparison, rights such as water, health and social security have independent departments. Thus, many government departments have a role in these areas. For example, issues of food safety and quality assurance, food security, and food and veterinary services fall under the Department of Agriculture, Forestry and Fisheries. The Department of Health runs the Integrated Nutrition Programme. The Department of Social Development's remit extends to matters of poverty alleviation, social security, social development and provision of welfare services. Other departments whose functions and mandates relate to food security include the Department of Rural Development and Land Reform,¹³² the Department of Water Affairs¹³³ and the Department of Trade and Industry.¹³⁴ These government departments have a vertical accountability structure, which raises the danger that policies concerning food and basic nutrition will always be fragmented, with no single organ of government having an overall mandate and taking the responsibility of implementing the rights to food and basic nutrition in a comprehensive and holistic manner.

The new government led by President Jacob Zuma has created a new department called the Department of Women, Youth, Children and People with Disabilities. To the extent that this department will serve as the coordinating point on all matters concerning children, it can be supposed that it will also have overall competence to coordinate all issues concerning children's rights to food and basic nutrition. However, given the breadth of its mandate, it remains unclear whether it will be effective in dealing with these specific rights unless perhaps it creates a specific unit for this purpose.

The Integrated Food Security Strategy for South Africa (the Strategy)¹³⁵ adopted in 2002 envisaged the establishment of a clear institutional structure and mechanism for coordinating policy development and implementation on food. At the top was a cluster of ministers whose departments had food-related mandates, followed by a national security forum and a cluster of directors-general of departments. Under these would follow the national coordinating units, followed in descending order by provincial coordinating units, district food secu-



rity officers and food security officers. At each level of the coordinating units, security forums constituted by representatives from government, the private sector and civil society were provided for. This is the type of institutional mechanism that has the potential to tackle seriously, forcefully, effectively and comprehensively the many food problems the country faces. This institutional mechanism has not yet been fully established.

5.2 Specific food and nutrition measures

The Integrated Food Security Strategy for South Africa (the Strategy) has been described as ‘the most comprehensive interdepartmental policy statement on food security’.¹³⁶ Its primary aim was to ‘streamline, harmonise and integrate the diverse food security programmes’ into one policy.¹³⁷ The Strategy takes the right to have access to sufficient food as its departure point and isolates, as its overall objective, the attainment of ‘universal physical, social and economic access to sufficient, safe and nutritious food by all South Africans at all times to meet their dietary and food preferences for an active and healthy life’.¹³⁸ This objective mirrors the definition of the right to food given by the CESCR.¹³⁹ As a specific target, it sets as its goal to eradicate hunger, malnutrition and food insecurity by 2015.¹⁴⁰ Its subsidiary objectives include to:

- increase household food production and trading;
- improve income generation and job creation opportunities;
- improve nutrition and food safety;
- increase safety nets and food emergency management systems;
- improve analysis and information management systems;
- build capacity; and
- facilitate stakeholder dialogue.¹⁴¹

Out of these, the Strategy identified four priority areas, namely to:

1. improve household food production, trade and distribution;
2. increase income and job opportunities;
3. improve nutrition and food safety; and
4. enhance safety nets and food emergency management systems.

For each priority area, it specified in broad and general terms the possible policy interventions that could be considered and the depart-



ments that would lead the interventions. The Strategy clearly envisaged interdepartmental cooperation, with the departments of agriculture, public works, health and social development as leaders. As noted earlier, it proposed an institutional structure that would coordinate all the policy development and implementation envisaged in the area of food security.

The Strategy passes the constitutional test of comprehensiveness and in broad terms incorporates human rights concepts in its content. To the extent that it clearly spells out which departments could lead certain interventions and proposes an overarching interdepartmental institutional mechanism, the Strategy underscores the importance of proper coordination in implementing the rights to food and basic nutrition. In terms of substance, the Strategy is a skeleton framework whose broad principles, goals and objectives need more specific policies to be developed and implemented. It thus does not specify the nature of the interventions that will be made in order to realise the noble and worthy goals it sets. This underscores the point made earlier about the need for an overarching institutional mechanism to take the responsibility of driving policy work in the areas of food and nutrition and coordinating their implementation. The four broad areas of priority are impeccable, but overall the policy may not pass the test of reasonableness for not providing for special vulnerable groups, for those in crises or those whose needs are most urgent. Here and there, the Strategy refers to vulnerable groups, but only in passing. To be sure, the Strategy does not specifically and adequately address the specific concerns of children and issues of basic nutrition. It may also be worth pointing out that the Strategy's targets and benchmarks (to eradicate hunger, malnutrition and food insecurity by 2015) are too terse, yet too general and arguably unrealistic.

In sharp contrast to the Strategy, the Infant and Young Child Feeding Policy (the Feeding Policy) adopted by the Department of Health in 2007¹⁴² specifically concerns children. However, unlike the Strategy, the Feeding Policy is directly anchored neither in children's right to basic nutrition, nor in everyone's right to have access to food. It is not intended as a broad policy statement concerning children's right to basic nutrition. It is aimed rather at improving 'the nutritional status, growth, development and health of infants and young children by protecting, promoting and supporting optimal infant feeding practices'.¹⁴³ Among its objectives are:



- increasing rates of exclusive breastfeeding for six months and continued breastfeeding up to two years of age or beyond;
- providing guidance on feeding infants and young children in exceptionally difficult circumstance;
- creating awareness of child survival strategies;
- standardising messages about infant and young child nutrition to health care personnel and organisations involved in health; and
- creating a supportive environment for optimal feeding of infants and young children.

In recognition that children's nutritional wellbeing deserves attention from before birth, the Feeding Policy provides for antenatal care. It also provides for postnatal care, including follow-up support for all mothers. It is commendable that it makes specific provision for HIV-positive women and children as well as children in exceptionally difficult circumstances, hospitalised infants and children, orphans, children in foster care and children separated from their mothers, children suffering from the consequences of emergencies and severely malnourished children. These provisions meet some of the hallmarks of reasonableness insofar as they cater for both long-term and short-term needs, as well as for those in desperate circumstances.

As noted earlier, the Feeding Policy must be understood in the context that it is intended to cover a narrow area of feeding practices, and not as a broad policy statement in the area of child nutrition. Its main preoccupation is with providing the right information on feeding and nutrition and clarifying the relevant procedures and protocols for medical personnel concerning infant and young children feeding practices. As it does not deal with broad issues, such as those of household food security, food distribution, children's access to food, and the state's obligations to provide food to those who cannot afford it, a more comprehensive programme is still necessary in South Africa. Perhaps it is also worth mentioning that the Feeding Policy is located exclusively in the Department of Health, meaning that it is not sufficiently linked to other general and specific policies relating to food. Last, but not least, although it makes provision for monitoring, the Feeding Policy has left the task of developing indicators for measuring progress to national government, provinces and districts, with no specific accountability frameworks.

Other child-specific policies the government has implemented in-



clude the National School Nutrition Programme and the Acute Protein Energy Malnutrition Programme, both authored by the Department of Health. The former is now being implemented by the Department of Basic Education. Both of them target specific groups of children, the former children at qualifying primary and secondary schools in poverty-stricken areas, while the latter targets severely malnourished children.¹⁴⁴ Taken together, these programmes fall short of a comprehensive programme on child nutrition or children's access to food.

The Department of Health's Integrated Nutrition Programme¹⁴⁵ (the Programme) is arguably a broader policy than the child-specific programmes described above insofar as it covers issues of nutrition in general. To this extent, it can be regarded as a programme that seems to give effect to both the right of everyone to food and the right of children to basic nutrition in particular. The Programme's specific goals include contributing to:

- the prevention and reduction of morbidity and mortality rates due to malnutrition, nutrition-related diseases of lifestyle, communicable and infectious diseases and debilitating conditions;
- optimal growth of infants and young children;
- improved nutritional knowledge, behaviour, perceptions and attitudes of the population through awareness of the Integrated Nutrition Programme, its focus areas and nutrition in general;
- the prevention, reduction and control of micronutrient deficiencies;
- the institutional care of clients through food service systems for the provision of balanced nutrition;
- improved child survival and maternal health;
- the improvement of household food security; and
- efficient and effective nutrition information systems for planning, policy formulation and management.

The Programme has a specific Directorate on Nutrition in the Department of Health whose mandate extends to facilitating inter-sectoral collaboration to ensure that nutrition problems are addressed.

In essence, the Programme simply spells out the broad objectives and general strategies that need to be implemented or developed to realise those objectives. It lacks a comprehensive policy foundation, such as a white paper or legislation. It states the objectives in broad terms but does not clearly spell out the mechanisms for achieving



them. The Directorate has the potential to serve as the main mechanism for early warning on the nutritional needs of various groups and on famine and hunger, as well as for identifying the causes of malnutrition and assessing the impacts of various programmes on access to food and basic nutrition. To realise this potential, it would have to develop strategies for gathering reliable and up-to-date information and the means of feeding this information into policies and implementation structures.

6 LEGISLATIVE ANALYSIS

South Africa has a wide range of legislation that indirectly relates to the rights to food and basic nutrition. For example, a series of Acts seek to protect households from eviction.¹⁴⁶ Then, too, one cannot underestimate the importance of legislation in such fields as health, water, environment, social security and education to the rights to food and basic nutrition. In particular, the Social Assistance Act 13 of 2004 is crucial to poor children because it enables them to have access to social grants, which may allow them to purchase food.

Aspects of the rights to food and basic nutrition are also regulated through the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972,¹⁴⁷ which deals with matters of food safety. Competition legislation is also in place to regulate competition in many fields including food.¹⁴⁸ Price regulation is an important means of ensuring that the poor have access to food. The South African Competition Commission has recently sanctioned a number of companies for fixing bread and milk prices.¹⁴⁹

Although there are many pieces of legislation that relate indirectly to the rights to food and basic nutrition, there is no specific legislation on these rights. In comparison, the right to water is governed by the Water Services Act¹⁵⁰ while the right to social security and assistance is governed by the Social Assistance Act and the rights to health and housing are regulated by many Acts, including the National Health Act¹⁵¹ and Housing Act¹⁵² respectively. These Acts not only help to provide an understanding of what the relevant rights mean for the state but also extrapolate the principles and establish institutional mechanisms for ensuring that basic services such as water, health and housing are available and accessible to everyone.

The draft National Food Security Bill promised to be the main cru-



cible for creating a comprehensive legal and policy framework for realising the rights to food and basic nutrition. Had it been passed, it would have provided a legislative stamp to the National Food Security Strategy discussed earlier. However, for some unknown reason, no progress has been made and it seems even to have been taken off the legislative ladder. Although the Constitutional Court and the CESCR has not yet made it a requirement to enact specific legislation on every socio-economic right, these two bodies have stated that such legislation is essential to the implementation of national strategies on these rights. Needless to say that it is probably only the right to food that does not have specific legislation. For this particular right, legislation is vital especially because no specific department currently exists with overall mandate to implement the right. Legislation is needed to establish overarching principles, benchmarks, strategies and an appropriate inter-departmental structure to coordinate all activities concerning the right to food in general and children's rights to basic nutrition in particular.

As far as children's rights in general are concerned, there are two specific Acts: the Child Justice Act¹⁵³ and the Children's Act.¹⁵⁴ The latter aims to give effect to certain, but not all, rights as contained in the Constitution.¹⁵⁵ In the main, it deals with children's civil and political rights, defines parental responsibilities and rights, creates and regulates children's courts, provides for children in need of care and protection, regulates inter-country adoptions and makes provision for protective measures against child abduction and trafficking. In essence, the Act does not expressly make provision for the SERs of the child. For the most part, it deals with these rights indirectly through defining parental responsibilities¹⁵⁶ and the provisions on alternative care,¹⁵⁷ adoption¹⁵⁸ and inter-country adoption.¹⁵⁹

7 CONCLUSION

Child poverty and child hunger are some of the endemic problems South Africa has been struggling to overcome since the dawn of democracy. Many children are trapped in extreme forms of poverty, malnourished, prone to all sorts of otherwise curable illnesses, with no or limited possibilities for accessing education. The global financial crisis has reversed the gains made by many developing countries, including



South Africa, on poverty eradication, hunger and famine. As parents lose their jobs, homes or disposable income and as the prices of food and other important commodities spiral out of control, more children join the ranks of the destitute and the hungry.

This paper has shown that the Constitution made it a government priority to combat poverty, hunger and malnutrition, at least by enshrining the right of everyone to have access to sufficient food and children's right to basic nutrition in sections 27(1)(b) and 28(1)(c), respectively. Despite the prevalence of child poverty, malnutrition and hunger, it is disappointing that there has been no litigation concerning these two important rights. Perhaps the absence of constitutional litigation on children's SERs in general underscores the vulnerability of children and shows why special measures are necessary for them to be able to enjoy their rights.

As there is no direct jurisprudence on children's SERs, it is difficult to tell what the Constitution intended by separately enshrining the right of everyone to have access to sufficient food in section 27(1)(b) and children's right to basic nutrition in section 28(1)(c). With the aid of international law, it has been demonstrated that the right to have access to sufficient food has broader import than the right to basic nutrition. The former is concerned with issues of food security, adequacy, availability, safety and quality while the latter is more specifically focussed on basic nutrition – nourishment, food composition, dietary requirements and the assimilation of food nutrients by the body. The Constitutional Court has held that children's SERs do not create unqualified obligations on the state to provide certain socio-economic goods on demand. However, this paper has shown that this does not mean that children's SERs have no meaningful implications for the state. At the very minimum, by recognising children's right to basic nutrition, the framers of the Constitution, this paper has argued, intended to emphasise the need for child-specific policies on basic nutrition. Thus, in addition to the fact that general policies on the right to food should make adequate provision for children, the Constitution requires that children should benefit from targeted policies which harness and build on general policies. At most, the framers of the Constitution envisaged the development of jurisprudence, as is currently underway in international law, recognising the special place of children in society and the need for according priority allocation to them in social provisioning and benefits. Such prioritisation may not



be equated to the minimum core obligations concept, which the Constitutional Court has clearly rejected, but it may at least be seen as embodying an obligation to consider children in budgeting and policy- and legislation-making as deserving of specific attention on a par with other important state priority areas.

The rights to food and basic nutrition have been implemented largely through a hodgepodge of policies and indirectly by legislation. On one hand, these rights require crosscutting measures and policies from almost all government departments. On the other hand, piecemeal and fragmented policies cannot guarantee the full realisation of these rights. The Constitution specifically demands that programmes and measures to realise SERs should be comprehensive and well coordinated. Moreover, given that there is no single department in charge of these two rights, the need for proper coordination and an inter-departmental structure to oversee their implementation cannot be overemphasised. It is in this light that the National Food Strategy should be assessed. As a national strategy, it identifies admirable goals and objectives and tries as far as possible to adopt a collaborative strategy with clear responsibilities for the departments concerned. This strategy is a good framework, which should form the basis for the development of more specific policies concerning the rights to food and basic nutrition. The inter-departmental structure it proposes is the kind of mechanism needed to pioneer the implementation of these rights. It is therefore disappointing that the National Food Security Act remains a pipedream, having disappeared from the legislative agenda. Currently, there are admittedly a number of child-specific policies concerning nutrition and access to food. The success of these policies will remain limited and short-lived as long as no comprehensive legislative and policy framework is put in place to govern the complex terrain of food in general and children's basic nutrition in particular.



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NOTES

- 1 See section 28(1). This provision can be distinguished from article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, which protects the right to food as a sub-set of the right to an adequate standard of living.
- 2 See section 28(1)(c) of the Constitution.
- 3 See UNICEF, nd., 'Statistics for South Africa – Economic indicators'. See section 2 of this paper for additional statistics on poverty in South Africa.
- 4 Chirwa (2008: 92).
- 5 See the definition of poverty in para 19 of the Programme of Action of the World Summit for Social Development, 1995, Resolution 1 of the World Summit for Social Development, Copenhagen 1995, UN doc. A/CONF 166/9.
- 6 See Southern African Region Poverty Network (2007: 28).
- 7 UNDP (2007/2008).
- 8 Ibid.
- 9 Ibid.
- 10 See, for example, Van der Berg et al. (2006).
- 11 See Policy Coordination and Advisory Services (2006: 14 and also 2008).
- 12 UNICEF, nd., 'Women and children in South Africa.'
- 13 UNICEF (2009: 124).
- 14 Ibid., 120.
- 15 See IMF African Department (2009: 2); Lin (2008).
- 16 See Botha and Maluleke, nd.
- 17 On the impact of price increases on food and nutritional security, see generally UNDP et al. 2009.



- 18 See, for example, Nyanjowa (2008).
- 19 FAO (1980: 3–20). For a discussion of the role of FAO in implementing the right to food, see Traylor (1984: 187).
- 20 See article 55(a) of the UN Charter.
- 21 See article 55(c).
- 22 UN General Assembly Res. 217A (III), UN doc. A/810 at 71.
- 23 Article 25(1).
- 24 See article 11(1) of the ICESCR.
- 25 See article 11(2).
- 26 Ibid.
- 27 The World Food Conference was convened by the UN General Assembly and entrusted with developing ways and means for the international community to resolve the world food problem within the broader context of development and international economic co-operation.
- 28 See paragraph 1 of the Universal Declaration on the Eradication of Hunger and Malnutrition, adopted on 16 November 1974 by the World Food Conference, convened under General Assembly Res. 3180 (XXVIII) of 17 December 1973 and endorsed by General Assembly Res. 3348 (XXIX) of 17 December 1974.
- 29 See article 27.
- 30 See article 24(4) of the CRC, which obligates states parties to take appropriate measures to ‘diminish infant and child mortality’ and to combat disease and malnutrition. See also article 12(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, which also treats nutrition as a component of the right to health.
- 31 General Comment 12, ‘The right to adequate food’, UN doc. E/C.12/1999/5.
- 32 Reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc 6 rev1 at 67 (1992).
- 33 Article 12(1).
- 34 See OAU doc. CAB/LEG/67/3 Rev 5, (1982) 21 *International Legal Materials* 58
- 35 *Social and Economic Rights Action Centre and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case).
- 36 See OAU doc. CAB/LEG/24.9/49.
- 37 Article 14(2)(c).
- 38 For the arguments that were raised against the recognition of a separate right to food, see Alston (1984: 162, 163).
- 39 General Comment 12, para 4.
- 40 Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security,



- adopted by the 127th Session of the FAO Council, November 2004.
- 41 Para 2.4. See also paras 8.8–8.14, which develop this point further.
- 42 As noted earlier, a number of international treaties consider nutrition and food as health issues. See, for example, article 24(4) of the CRC and article 12(2) of CEDAW.
- 43 Thus, the Human Rights Committee (HRC), which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), 1966, has stated at para 5 in relation to the right to life that states have the duty to take measures to ‘reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics’.
- 44 See generally Vidar (2005: 141–159).
- 45 Para 1. Also adopted by the Voluntary Guidelines on the Right to Food, para 15.
- 46 See para 6.
- 47 See, for example, FAO (2003); UNDP (1994); World Bank (1986).
- 48 FAO (2003: 29).
- 49 WHO (nd).
- 50 General Comment 12, para 7.
- 51 Ibid., para 8.
- 52 Ibid., para 12.
- 53 Ibid., para 9.
- 54 Ibid., para 10.
- 55 Ibid., para 11.
- 56 Ibid., para 13.
- 57 Eide and Kratch (2005: 106).
- 58 Ibid.
- 59 Ibid.
- 60 General Comment 12, para 7.
- 61 Van Bueren (1999: 56).
- 62 Ibid.
- 63 Hammerberg (2001: 357).
- 64 Article 27(3) of the CRC provides similarly that states have the obligation, ‘in accordance with national conditions and within their means’, ‘to take appropriate measures to assist parents and others responsible for the child to implement the children’s right to an adequate standard of living and in case of need to provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing’.
- 65 Article 20(2)(a).
- 66 Article 26 provides that ‘States Parties shall recognise for every child the right to benefit from social security, including social assistance’ and that the benefits should be granted considering, among other



- things, the resources and circumstances of the child, and legal guardians.
- 67 CRC General Comment 5, 'General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)', UN doc. CRC/GC/2003/5, para 29.
- 68 Ibid., para 45.
- 69 Van Bueren (2008: 575).
- 70 For example, article 37 of the CRC lists a number of special procedural and substantive rights of children in conflict with the law. Preferential treatment of children can also be seen in article 38, which proscribes the conscription of children below the age of 15 in direct hostilities and imposes limitations on the recruitment of any child aged between 15 and 18 into armed forces.
- 71 Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s (Plan of Action), adopted on 30 September 1990 at the World Summit for Children held in New York, para 33.
- 72 Ibid., para 31.
- 73 CRC General Comment 5, para 10.
- 74 CRC General Comment 7, 'Implementing child rights in early childhood', para 24, UN doc. CRC/C/GC/7/Rev.1.
- 75 Plan of Action, para 33.
- 76 CRC Committee, 'Day of general discussion on "resources for the rights of the child – responsibility of states": Recommendations', 46th session, 17 September–5 October 2007, para 30(a).
- 77 Thus far, the CRC Committee has been rather vague on state budgeting. All it has required is that states provide information on the steps they have taken at all levels of government 'to ensure that economic and social planning and decision-making and budgetary decisions are made with the best interests of children as a primary consideration and that children, including in particular marginalised and disadvantaged groups of children, are protected from the adverse effects of economic policies or financial downturns'. See CRC General Comment 5, para 51. This does not address the difficult problem of what states should do in the event of competing claims on the state's purse and in the context of resource constraints.
- 78 For literature on the work of this Committee see, for example, Mez-mur (2006); Sloth-Nielsen and Mez-mur (2008); Sloth-Nielsen and Mez-mur (2009).
- 79 General Comment 14, 'The right to the highest attainable standard of health', adopted by the CESCR at its 22nd Session on 11 May 2000, is no better in this regard.



- 80 See General Comment 12, para 9.
- 81 Ibid., para 13.
- 82 Ibid.
- 83 Thus far, the CRC Committee has produced 12 general comments in the following areas: aims of education, role of independent human rights institutions, HIV and AIDS and the rights of the child, adolescent health, general measures of implementation, treatment of unaccompanied and separated children outside their country of origin, implementing child rights in early childhood, corporal punishment and other forms of cruel and degrading forms of punishment, children with disabilities, juvenile justice, indigenous children, and children's right to be heard. It has convened 17 general days of discussion on the following themes: resources for the rights of the child, the child's right to be heard, children without parental care, implementing child rights in early childhood, rights of indigenous children, the private sector as a service provider, violence against children within the family and in school, state violence against children, general measures of implementation, HIV and AIDS, children with disabilities, the child and the media, juvenile justice, the girl child, the role of the family, economic exploitation, and children in armed conflict. See generally <http://www2.ohchr.org/english/bodies/crc/index.htm> (accessed: 3 September 2009).
- 84 See article 27 of the CRC.
- 85 See article 14 of the African Children's Charter and article 24(2) of the CRC.
- 86 See article 20(2)(a) of the African Children's Charter and article 27(3) of the CRC.
- 87 Adopted on 16 November 1974 by the World Food Conference convened under General Assembly Res 3180 (XXVIII) of 17 December 1973; and endorsed by General Assembly Res 3348 (XXIX) of 17 December 1974.
- 88 See para 2.
- 89 Plan of Action of the World Food Summit for Children, adopted by the World Summit for Children, 29–30 September 1990, New York, para 13.
- 90 See the World Declaration on Nutrition, adopted by the Ministers and the Plenipotentiaries representing 159 states and the European Economic Community at the International Conference on Nutrition, Rome, December 1992, para 7. See also the Voluntary Guidelines on the Right to Food, para 13.2.
- 91 See Plan of Action of the World Food Summit for Children, para 14.
- 92 See, for example, the Voluntary Guidelines on the Right to Food, para 3.6.



- 93 Fourth World Conference on Women, 15 September 1995, UN doc. A/CONF.177/20 and UN doc. A/CONF.177/20/Add.1.
- 94 See para 60(j). See also the Voluntary Guidelines on the Right to Food, para 8.6.
- 95 Adopted in Cairo, Egypt on 5–13 September 1994. See para 4.20.
- 96 See section 25.
- 97 2008 (11) BCLR 1123 (CC), para 85.
- 98 See section 29.
- 99 See section 27(1).
- 100 See section 33.
- 101 Section 35(2)(e).
- 102 See section 27(2) of the Constitution.
- 103 2001 (1) SA 46 (CC).
- 104 Ibid., para 35. However, the Court did not successfully distinguish these two terms given that the CESCRC has similarly said that shelter does mean ‘merely having a roof over one’s head’ or a commodity. Instead, it has emphasised that shelter should be seen as ‘the right to live somewhere in security, peace and dignity’. Endorsing the views of the Commission on Human Settlements on the Global Strategy for Shelter to the Year 2000, the CESCRC has observed: ‘Adequate shelter should mean ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost’. See General Comment 4, ‘The right to adequate housing (art 11(1) of the Covenant)’, 1991, UN doc. E/1992/23, para 7.
- 105 The Constitutional Court stated that: ‘... it is not only the state who is responsible for the provision of houses, but ... other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.’ *Grootboom*, para 35.
- 106 Brand (2000: 6).
- 107 The duties to respect, protect, promote and fulfil are explicitly recognised under section 7 of the South African Constitution.
- 108 *Grootboom*, para 36.
- 109 Ibid.
- 110 Ibid., para 70.
- 111 Ibid., para 73.
- 112 Ibid.
- 113 Ibid., para 75.
- 114 Ibid., para 77.
- 115 Ibid.
- 116 Ibid.
- 117 Ibid., para 78.
- 118 2000 (3) BCLR 277 (C).



- 119 The Court stated that such a right would produce the anomalous result that those who have children have a direct and enforceable right to housing while those that do not have any children or whose children are old are not entitled to such a right. The Constitutional Court quite understandably also argued that the concept of progressive realisation, which was so central to the constitutional scheme of SER, would be rendered nugatory by recognising an immediately enforceable right of children to housing. Additionally, it flagged the danger that children would become steppingstones for accessing housing by their parents, thereby undermining the dignity of the children concerned. *Ibid.*, para 71.
- 120 The sweeping effect of this decision was mitigated to some limited extent in *Minister of Health and Others v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) (*TAC*), which, among other rights, dealt with the right of the child to basic health care services. It was stated in this case that 'the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services'. Acknowledging that the provision of a single dose of Nevirapine to a mother and her child to prevent transmission of HIV was essential to a child, the Constitutional Court held that the government violated the right to health by adopting and implementing a policy that prevented poor mothers and their children from accessing the drug. This decision can be interpreted to mean that the state has a primary obligation with regard to children's SERs in section 28(1)(c) at least where their parents are indigent and unable to gain access to social services with their own means.
- 121 *Ibid.*
- 122 *Grootboom*, paras 39–44. For critical analyses of this test, see Liebenberg (2002); Wesson (2004); Pieterse (2004).
- 123 *Grootboom*, para 74. Subsequently, in *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), the Constitutional Court (per Justice Mokgoro) emphasised that SERs are closely linked to the founding values of human dignity, equality and freedom. It held, however, that where the rights to life, dignity and equality are implicated in cases dealing with SERs, the former must be considered in light of the available human and financial resources in determining whether the state has complied with the standard of reasonableness.
- 124 *Grootboom*, paras 39–40.
- 125 *Ibid.*, para 40.
- 126 General Comment 12, para 29. See also De Schutter (2008: 10).
- 127 Khoza (2004: 672).
- 128 *Grootboom*, para 41.
- 129 *Ibid.*, para 44.



- 130 Ibid., paras 43–44.
131 Brand (2003: 11–18).
132 Among other things, this department is responsible for land redistribution, land restitution, security of tenure and rural development.
133 Among other things, this department implements the free water policy and regulates use of water.
134 Especially as regards consumer protection and trade in food.
135 Department of Agriculture (2002).
136 Khoza (2004: 681).
137 Department of Agriculture (2002: 5).
138 Ibid., 6 and 13.
139 See section 3.2.2 of this paper above.
140 Department of Agriculture (2002: 13).
141 Ibid., 13.
142 Department of Health (2007).
143 Ibid., 2.
144 For more information on these programmes, see Brand (2005: 183).
145 See Department of Health ‘Integrated Nutrition Programme’, available at <http://www.doh.gov.za/programmes/nutrition-f.html> (accessed: 5 September 2009).
146 See, for example, the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and the Marine Living Resources Act 18 of 1998 (this Act protects the fishing rights of fishermen).
147 This Act is amended regularly.
148 Competition Act 89 of 1998.
149 See, for example, Competition Commission South Africa (2009); Competition Commission South Africa (nd.); and Gedye (2009).
150 Act 108 of 1997.
151 Act 61 of 2003.
152 Act 107 of 1997.
153 Act 75 of 2008. This Act deals with child justice.
154 Act 38 of 2005.
155 See preamble.
156 See chapter 3.
157 See chapter 9.
158 See chapter 15.
159 See chapter 16.