Child poverty and children’s rights of access to food and to basic nutrition in South Africa
A critical analysis of case law, legislation and policy

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The South African Constitution (the Constitution) boldly protects the right of access to food as a self-standing right (section 27(1)(b)), departing markedly from established practice in comparative constitutional law and in international human rights law.
As if this were not enough, it specifically recognises the right of children to basic nutrition (section 28(1)(c)). Despite the obvious importance for children of the right of access to food and the significance the Constitution attaches to their right to basic nutrition, both these rights remain underdeveloped.

This paper aims to tease out the meaning of children’s right of access to food as well as their right to basic nutrition. It analyses the significance of, and correlation between, these two rights as they have been defined under sections 27(1)(b) and section 28(1)(c) of the Constitution, respectively. It then examines what these 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.

**Child poverty in South Africa**

Many are familiar with the statistics on poverty in South Africa, but these statistics have not become any less appalling. According to the human development index of the UN Development Programme (UNDP), South Africa is ranked 121 out of 177 countries (UNDP, 2007/2008). UNDP’s poverty index places South Africa at number 55 out of 108 developing countries (UNDP, 2007/2008).

About two-thirds of children in South Africa live in poverty (on R7.75 per day) (UNICEF, nd). According to the UN Children’s Fund (UNICEF), the nutritional status of children has not improved over the past ten years. For example, in 2007, one in ten children was underweight, 15% of infants were born with low birthweight, and 10% of children under five were underweight (UNICEF, 2009: 124). UNICEF also estimates that the under-five mortality rate in 2007 was 59 per 1,000 live births while the infant mortality rate was 46 per 1,000 live births (UNICEF, 2009: 120).

The depreciation of the South African rand in the second half of 2008 sparked a series of food price increases with unpleasant consequences for both poor families and those previously considered to be economically stable (UNDP et al., 2009). 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. As companies face economic hardships, retrenchments have become inevitable, with the mining, real estate and motor vehicle sectors being some of the most badly affected. The financial hardships experienced by many families have not only impeded their access to food, but also led to the loss of homes, means of transport and the capability to care for children. 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 illness.

**The right to food under the South African Constitution**

The Constitution contains a wide range of rights that are relevant to the protection, promotion and realisation of the right to food. In addition to these general rights, it makes specific provision for the right to food in three main ways. Firstly, it enshrines the right of everyone ‘to have access to sufficient food’ in section 27(1)(b). Secondly, it protects the right of every child to ‘basic nutrition’ in section 28(1)(c). Thirdly, it recognises the right of everyone who is detained to ‘conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment’ (section 35(2)(e)).

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?

**The implications of ‘access’**

In Government of the Republic of South Africa and Others v Grootboom and Others [Grootboom] 2001 (1) SA 46 (CC), the Constitutional Court suggested that to have access to housing under section 26 of the
Constitution was different from the right to adequate housing under article 11(1) of the International Covenant on Economic, Social and Cultural Rights. It could therefore be argued similarly that the right to basic nutrition has different implications from those of the right to access to sufficient food simply because the former does not include the word ‘access’.

However, the manner in which the Court defined the right of access to housing in that case did not clearly demonstrate that the right to housing and the right of access to housing meant different things. In particular, the Court emphasised in Grootboom (para 35) that ‘access to’ signified that it was not only the state that had the responsibility to provide housing but also private actors. It also stressed the obligation of the state to facilitate the realisation of the right of access to housing (paras 35 and 36). The idea of the obligations to respect, protect, promote and fulfil has rendered the words ‘access to’ in the socio-economic rights provisions superfluous, as each of these rights, irrespective of whether they use ‘access to’, engenders these obligations, including the duty to facilitate the realisation of these rights (an element of the duty to fulfil).

Meaning of ‘food’ and ‘nutrition’
Again, in Grootboom, the Constitutional Court held that the terms ‘housing’ and ‘shelter’ were synonymous and therefore that the right of children to basic shelter did not imply a right to rudimentary housing (para 73). It could therefore be argued that the right of everyone to have access to sufficient food has the same meaning and implications as children’s right to basic nutrition.

It is hereby argued that ‘nutrition’ cannot be synonymous with ‘food’. Nutrition is a technical term in the field of health sciences which 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, nutrition must be taken to impose obligations on the state pertaining to ensuring dietary variety and the quality of food in terms of its nutrient composition. The right of the child to basic nutrition means, therefore, that children are, at the very least, entitled to the minimum amount of food necessary to meet the dietary requirements for their development, health and wellbeing.

The general right of access to sufficient food, on the other hand, has broader import. It is concerned not only with nutrition, but also with many other important aspects of food, including the spiritual, recreational, social and agricultural functions of food, in addition to issues of accessibility, availability or security, and the quality and safety of food.

Children’s right to basic nutrition under the South African Constitution is thus not a mere restatement of the right of everyone to sufficient food. If 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, children’s right to basic nutrition in turn calls attention to the need for general food measures and policies to have as one of their central concerns children’s nutritional well-being and for the state to devise child-specific measures on basic nutrition.

The question of child prioritisation
It was initially thought that because children’s socio-economic rights in section 28 did not have the qualifications found in sections 26(2) and 27(2) of the Constitution applicable to everyone’s socio-economic rights, children were entitled to priority over everyone else in the allocation of basic services and goods. At least as regards housing, the Constitutional Court in Grootboom (para 71) cited legitimate concerns against this kind of reasoning, especially if it meant that children had an unqualified right to certain socio-economic rights.

The High Court’s decision in Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C), insofar as it held that children were entitled to rudimentary shelter on demand based on section 28(1)(c) of the Constitution, represents one end of the spectrum which is pro-children, emphasising the need for prioritising children’s socio-economic well-being. As the Constitutional Court correctly pointed out, the High Court’s reasoning had absurd consequences, in that it meant that parents with children were to be accommodated with their children, while those who did not have any children would remain without any form of respite.

In contrast, the Constitutional Court’s decision that the state did not have primary responsibility over children under parental care could be interpreted as representing the other end of the spectrum, which
consigns children’s socio-economic rights to a status that is subordinate to everyone’s rights. Children who are under the care of parents require no direct attention from the state, which, according to the Constitutional Court, must primarily concern itself with assisting the family in the sanguine expectation that children will benefit indirectly from those family-focused measures. This position too produces an absurdity of a different, but no less undesirable, kind. The statement that the state does not have primary obligations to children who are under the care of their parents implies that children’s right to basic nutrition under the Constitution is superfluous and, more importantly, that children are not direct beneficiaries of 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. Similarly, food is a very difficult right to implement if both children and their parents are hungry and poor. However, this does not mean that it is not possible 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 discussed later in this article. It is also possible for the state to take responsibility for children whose parents neglect them or are incapable of providing for them. The ‘primary and secondary responsibilities’ template can be misleading when one is trying to understand the obligations of the state and parents in relation to children’s socio-economic rights. For a child’s socio-economic rights to be fully realised, the state’s obligations and those of parents must be implemented simultaneously at all times.

In fairness, we must record that the Constitutional Court did emphasise the need to pay attention to vulnerable and marginalised groups in general measures for implementing socio-economic rights in its definition of the test of reasonableness. However, it did not underline the significance of including children and women in such general programmes, despite the fact that more than half of the plaintiffs in Grootboom were children and that the intended beneficiaries of the comprehensive programme on HIV and AIDS treatment in Minister of Health and Others v Treatment Action Campaign 2002 (10) BCLR 1033 (CC) were children. Recognising children’s socio-economic rights in a separate section in the Constitution, if not intended to emphasise the priority of children’s well-being, at least underscores the need to pay particular attention to children in general measures, policies and programmes on social provisioning and the need for child-specific measures.

Institutional arrangements

One of the challenges the right to have access to food and children’s right to basic nutrition have faced is the lack of an overarching institutional framework for coordinating, overseeing and monitoring policy and legislative programmes concerning these rights (Brand, 2003: 11–18). South Africa does not have a department of food security or a department with an overall mandate on food and nutrition issues. In comparison, rights such as water, health and social security have independent departments. Thus many government departments have some role in food. These government departments have a vertical accountability structure, which entails the danger that policies concerning food and basic nutrition will always be fragmented.

The Integrated Food Security Strategy for South Africa adopted in 2002 (the Strategy) 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 Food Security Forum and a cluster of directors-general of departments. Under these would follow the National Coordinating Unit, followed in descending order by provincial coordinating units. It is the type of institutional mechanism that has the potential to tackle seriously, forcefully, effectively and comprehensively the many food problems the country faces. But this institutional mechanism has not yet been fully established.

The newly created Department of Women, Youth, Children and People with Disabilities could serve as the coordinating point for all matters concerning...
children and, by extension, their rights to food and basic nutrition. However, given the breadth of this department’s mandate, it remains unclear whether it will be effective in dealing with these specific rights - unless, perhaps, a specific unit is created in the department for this purpose.

Specific food and nutrition measures
The Strategy has been described as ‘the most comprehensive interdepartmental policy statement on food security’ (Khoza, 2004: 681). Its primary aim was to streamline, harmonise and integrate the state’s diverse food security programmes into one policy. The Strategy takes the right to have access to sufficient food as its point of departure 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’ (p 6).

As a specific target, it sets the goal of eradicating hunger, malnutrition and food insecurity by 2015. The Strategy identifies four priority areas and, as noted earlier, it proposes 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 the departments which 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. This underscores the need for an overarching institutional mechanism to pioneer policy development and implementation in a coordinated and holistic fashion. Overall, the policy may not pass the test of reasonableness because it does not provide for special vulnerable groups as well as for those in crises or whose needs are most urgent. In particular, it does not specifically and adequately address the specific concerns of children and issues of basic nutrition.

In sharp contrast to the Strategy, the Infant and Young Child Feeding Policy (Feeding Policy) adopted by the Department of Health in 2007 specifically concerns children. However, unlike the Strategy, the Feeding Policy is anchored neither in children’s right to basic nutrition nor in the right of everyone 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.

The Feeding Policy is concerned with a narrow area of feeding practices and not child nutrition in general. Because it does not deal with broad issues such as household food security, food distribution, children’s access to food, child nutrition and the state’s obligations to provide food to those who cannot afford it, a more comprehensive programme is still needed.

Other child-specific policies that the government has implemented include 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 certain qualifying primary and secondary schools (in poverty stricken areas) and the latter severely malnourished children. Even when taken together, they fall far short of a comprehensive programme on child nutrition or children’s access to food.

The Department of Health’s Integrated Nutrition Programme is arguably a broader policy than the Feeding Policy insofar as it covers issues of nutrition in general. To this extent, the Programme seems to give effect to both the right of everyone to food and children’s right to basic nutrition in particular. The Programme has a specific Directorate on Nutrition in the Department of Health whose mandate extends to facilitating intersectoral 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. The objectives are stated in broad terms but the mechanisms for achieving them are not clearly spelt out. The Directorate has the potential to serve as the main mechanism for early warning on the nutritional needs of various groups, 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.

**Legislative analysis**

South Africa has a wide range of legislation that indirectly relates to the rights to food and basic nutrition. However, there is no specific legislation on these two particular rights. In comparison, the right to water is governed by the Water Services Act 108 of 1997, the right to social security and assistance is governed by the Social Assistance Act 13 of 2004 and the rights to health and housing are regulated by many Acts including the National Health Act 61 of 2003 and the Housing Act 107 of 1997, respectively.

The draft national Food Security Bill promised to be the main legislative mechanism for creating a comprehensive legal and policy framework for realising the rights to food and basic nutrition. However, for unknown reasons, no progress has been made on this draft Bill and it seems even to have been taken off the legislative ladder. Although the Constitutional Court has not yet made it a requirement to enact specific legislation on every socio-economic right, it has clearly stated that such legislation is essential to the implementation of national strategies on these rights. Needless to say, it is probably only the right to food that does not have specific legislation. For this particular right, legislation is vital especially because currently there is no specific department in South Africa with an overall mandate to implement the right to food. Legislation is needed to establish overarching principles, benchmarks, strategies and an appropriate interdepartmental structure that will coordinate all activities concerning the right to food in general and children’s rights to basic nutrition in particular.

**Conclusion**

Many children in South Africa are trapped in extreme forms of poverty, malnourished and prone to all sorts of otherwise curable illnesses, with no or limited possibilities for accessing education. The global financial crisis has not helped the situation. This article has shown that the Constitution makes it a government priority to combat poverty, hunger and malnutrition by at least 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.

This article has demonstrated that the right to have access to sufficient food and the right to basic nutrition are obviously interrelated but also serve different purposes. The former is concerned with issues of food security, adequacy, availability, safety and quality, while the latter is mainly concerned with the nutritional well-being of the child. Although the Constitutional Court has held that children’s socio-economic rights do not create unqualified obligations on the state to provide certain socio-economic goods on demand, this does not mean that children’s socio-economic rights have no meaningful implications for the state. At the very minimum, by recognising their right to basic nutrition, this article has argued that the framers of the Constitution intended to emphasise the need for child-specific policies on basic nutrition and the fact that general policies on the right to food should make adequate provision for children.

The rights to food and basic nutrition have been implemented largely through a hodgepodge of policies and indirectly by legislation. The Constitution specifically demands that programmes and measures to realise socio-economic rights 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 interdepartmental structure to oversee their implementation cannot be overemphasised. 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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**Government documents**


**References**


For further reading on the subject, see Research Series 7 of the Socio-Economic Rights Project (forthcoming, 2009).