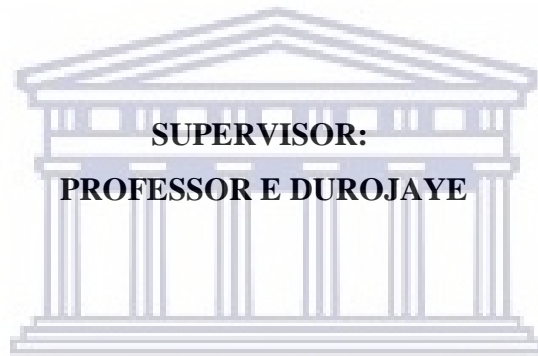


**HUNGRY FOR KNOWLEDGE, HUNGRY FOR BREAD: REALISING THE RIGHT
TO FOOD OF STUDENTS IN SOUTH AFRICAN TERTIARY INSTITUTIONS**

**BY
OLUWAFUNMILOLA FOLUKE ADENIYI**

**A thesis submitted in fulfilment of the requirements for the degree Doctor of Law
(LLD) in the Faculty of Law, University of the Western Cape**



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ABSTRACT

Many of the disadvantaged groups which are impacted by a high burden of poverty and are thereby food insecure in South Africa, have over the years received attention from the government, resulting in many interventionist schemes to guarantee their right to food. These include for instance, social grants for children, the disabled and the elderly, as well as school meals for primary and high school students. Unfortunately, one of such groups has hitherto received little or no attention -that is, students in South African tertiary institutions. Food insecurity among students in tertiary institutions links back to the trajectory of poverty- students in tertiary institutions are food insecure mainly because they come from homes which are food insecure. This is proven in the disparity between the numbers and severity of food insecure students in historically advantaged universities and historically disadvantaged universities in South Africa.

The food insecurity of students has been described as a catalyst for other issues, such as absenteeism, low academic performance, health challenges and the use of transactional sex to secure access to food, all of which puts students at risk of other rights violations and a perpetuated cycle of poverty. It follows that addressing the food insecurity of students in tertiary institutions becomes relevant beyond just addressing nutritional and caloric requirements, but also as a tool to combat poverty in line with the Sustainable Development Goals.

Constitutionally, there is an obligation to realise the right to access, and as a minimum core, to ensure the freedom from hunger, for all. It goes without saying that this constitutional obligation also extends to students in tertiary institutions. Questions abound why this remains a silent, yet pervasive problem on campuses in South Africa and who has to fulfil this obligation of providing access to food for students.

There is also a need to interrogate whether there are obligations on the part of non-state actors to realise the right to food of students in tertiary institutions, where these non-state actors in the course of their operations, directly or indirectly impact on students' access to food.

Therefore, it is imperative to develop an accountability mechanism to identify where the obligation lies and ensure the fulfilment of the right to food for students in tertiary institutions. This mechanism within institutions must foster a stronger coordination across state and non-state entities, from a human rights based approach. It must extend to every student in tertiary institutions that is food insecure. This research, using a rights based framework, identifies where the obligation lies for fulfilling the right to food for students in South African tertiary institutions.



DECLARATION

I, Oluwafunmilola Foluke ADENIYI, declare that this thesis titled: 'Hungry for Knowledge, Hungry for Bread: Realising the Right to Food of Students in South African Tertiary Institutions is my work and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used are duly acknowledged and properly referenced.

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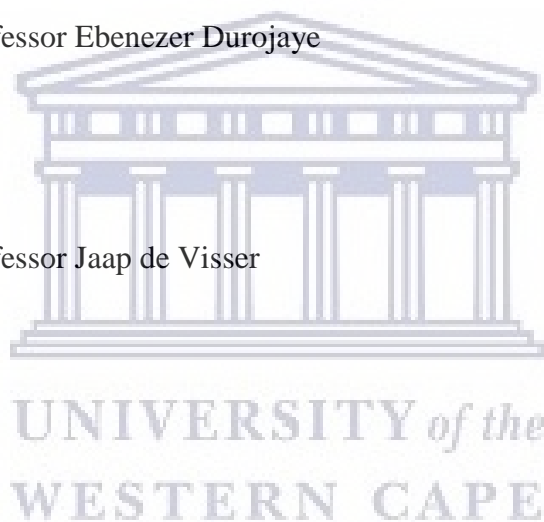
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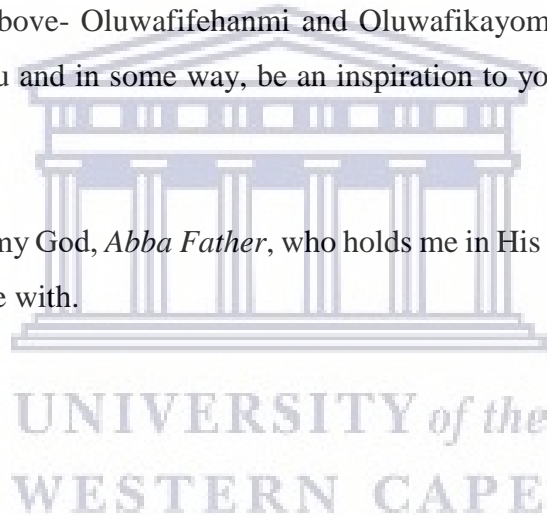
To my parents- thank you for your unflinching belief in me through the years. To my Dad, Prof. O.O. Oni, a girl could not ask for a better father- your support, prayers, chats, the many

articles you will forward with the notes '*Lolly, I think this might be useful for your write up*', all those gestures, little as they may have seemed, kept me going through the rough patches. Mama, you were my greatest motivation for finishing. Thank you for the times you flew in to help with the home front so I could focus; thank you for the times you let me sound off my ideas on the structuring of my chapters and also the times you let me know I was not making much sense; thank you for believing I could do this even when I was not so sure.

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Above all, I'm grateful to my God, *Abba Father*, who holds me in His hands, through the hands of those He has blessed me with.

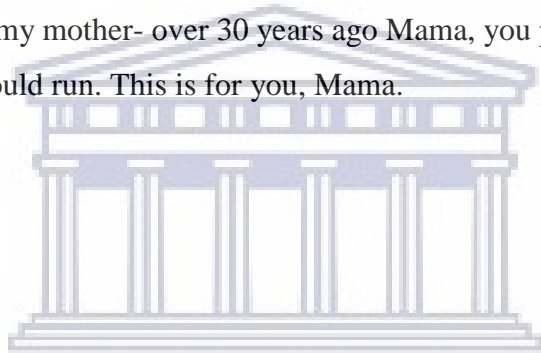


DEDICATION

*I stand
on the sacrifices of a million women before me
thinking
what can I do
to make this mountain taller
so the women after me
can see further*

Legacy- Rupi Kaur (2017)

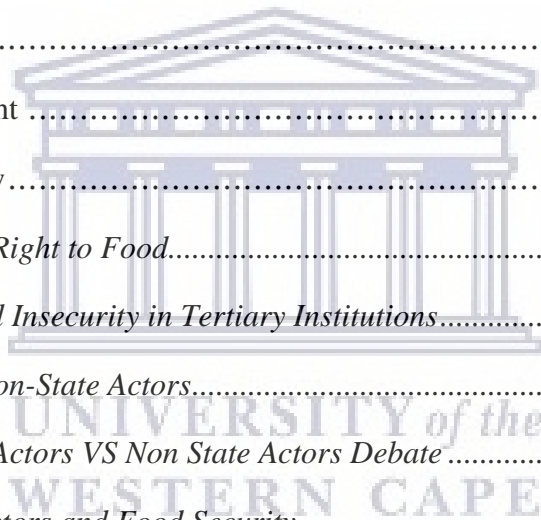
This thesis is dedicated to my mother- over 30 years ago Mama, you put your dreams on hold, for us. You walked, so I could run. This is for you, Mama.



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TABLE OF CONTENTS

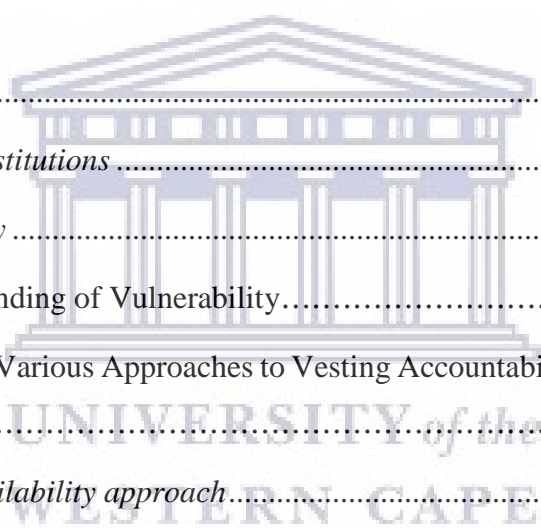
ABSTRACT	i
DECLARATION	iii
ACKNOWLEDGEMENTS	iv
DEDICATION.....	vi
TABLE OF CONTENTS	vii
LIST OF ACRONYMS AND ABBREVIATIONS.....	xii
CHAPTER ONE	1
INTRODUCTION	1
1.1 Background	1
1.2 Problem Statement	3
1.3 Literature Review.....	9
1.3.1 The Human Right to Food.....	9
1.3.2 Student Food Insecurity in Tertiary Institutions.....	14
1.3.3 A Role for Non-State Actors.....	18
1.3.4 The Private Actors VS Non State Actors Debate	19
1.3.5 Non-State Actors and Food Security.....	22
1.3.6 The Realisation of the Right to Food for Marginalised Groups in South Africa 	24
1.4 Theoretical Underpinnings.....	25
1.5 Research Questions.....	26
1.6 Aim of Research	27
1.7 Significance of the Study.....	27
1.8 Limitation of the Study	28
1.9 Research Methodology	28
1.10 Chapter Overview	29



1.11	Key Words	30
CHAPTER 2		31
ANALYSING STUDENTS ACCESS TO FOOD THROUGH A POWER AND VULNERABILITY FRAMEWORK.....		32
2.1	Introduction	32
2.2	Theoretical Underpinnings.....	33
2.2.1	<i>Power in Society</i>	33
2.2.2	<i>Vulnerability</i>	37
2.3	Vulnerability and Human Rights	41
2.4	The Trajectory of Higher Education in South Africa- A Legacy of Power, Contestations and Vulnerability.....	44
2.4.1	<i>Higher Education under Apartheid</i>	45
2.4.2	<i>Higher Education Post-Apartheid</i>	51
2.5	Conclusion	54
CHAPTER 3		56
STAKEHOLDERS AND ACCOUNTABILITY IN ENSURING TERTIARY STUDENTS ACCESS TO FOOD.....		56
3.1	Introduction	56
3.2	Is Tertiary Education a Public Good in South Africa?.....	58
3.3	Stakeholders in Tertiary Education.....	60
3.4	Stakeholders in South African Tertiary Education and Their Role in Guaranteeing the Right to Food of Students	65
3.4.1	<i>Government Regulators</i>	65
3.4.2	<i>Governing Entities and Administrations</i>	75
3.5	Accountability for Food and Nutrition Security in South African Tertiary Institutions	76
3.5.1	<i>An Analysis of the Responsibility in the Different Spheres of Government for Food and Nutrition Security in Tertiary Institutions</i>	78

3.6	Legal Framework for the States' Obligation to Guarantee the Right to Food of Students in Tertiary Institutions	87
3.7	Conclusion	89
CHAPTER 4		91
ENSURING ACCESS TO FOOD FOR STUDENTS IN TERTIARY INSTITUTIONS- A ROLE FOR NON-STATE ACTORS.....		91
4.1	Introduction	91
4.2	The Link between Business and Human Rights	92
4.3	Role of Non-State Actors in Addressing Food Insecurity: A Tertiary Institution Perspective	96
4.3.1	<i>Non-State Actors in a National Context?</i>	97
4.3.2	<i>The extent of the obligations of non-state actors in a national context</i>	98
4.4	Norms and Standards in Relation to Non-State Actors under International Law .	101
4.5	General Comments	101
4.5.1	<i>Committee on Economic, Social and Cultural Rights</i>	102
4.5.2	<i>Committee on the Rights of the Child</i>	106
4.5.3	<i>Committee on the Rights of Persons with Disabilities</i>	108
4.6	Concluding Observations	110
4.6.1	<i>Committee on Economic, Social and Cultural Rights</i>	110
4.6.2	<i>Committee on the Elimination of All Forms of Discrimination against Women</i> 111	
4.7	Jurisprudence	113
4.7.1	<i>The Committee on Economic Social and Cultural Rights</i>	113
4.8	Norms and Standards in Relation to Non-State Actors under the African Human Rights System	114
4.8.1	<i>African Commission on Human and People's Rights</i>	115
4.8.2	<i>The African Court on Human and Peoples' Rights</i>	119
4.8.3	<i>African Committee of Experts on the Rights and Welfare of the Child</i>	120

4.9	Jurisprudence from South African Courts.....	122
4.10	Conclusion	126
CHAPTER 5		128
AN EVALUATION OF VARIOUS APPROACHES TO VESTING ACCOUNTABILITY FOR THE RIGHT TO FOOD IN SOUTH AFRICAN TERTIARY INSTITUTIONS.....		128
5.1	Introduction	128
5.2	The Concept of Accountability in Human Rights Law	129
5.2.1	<i>Defining Accountability</i>	129
5.3	Legal Accountability for the Right to Food in South African Tertiary Institutions 131	
5.3.1	<i>Parliament</i>	132
5.3.2	<i>Chapter 9 Institutions</i>	134
5.3.3	<i>The Judiciary</i>	135
5.4	Judicial Understanding of Vulnerability.....	138
5.5	An Evaluation of Various Approaches to Vesting Accountability for the Right to Food in Tertiary Institutions.....	145
5.5.1	<i>The food availability approach</i>	145
5.5.2	<i>Income-based approach to food security</i>	147
5.5.3	<i>Basic-needs approach to food security</i>	149
5.5.4	<i>Entitlement approach</i>	151
5.5.5	<i>The charitable food system approach</i>	153
5.5.6	<i>Sustainable livelihoods approach</i>	154
5.5.7	<i>The human rights based approach</i>	155
5.6	Adoption of a Human Rights Based Approach to Address Student Hunger: Best Practice Example.....	160
5.7	Conclusion	163
CHAPTER SIX.....		165



CONCLUSION AND RECOMMENDATIONS.....	165
6.1 General Conclusions	165
6.2 Recommendations	167
6.2.1 <i>Recommendations to Government</i>	167
6.2.2 <i>Recommendations to University Administrations</i>	172
6.2.3 <i>Recommendations to Non-State Actors</i>	173
6.2.4 <i>Recommendations to Students</i>	175
7 ANNEXURE 1	177
8 BIBLIOGRAPHY	183



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LIST OF ACRONYMS AND ABBREVIATIONS

AU	African Union
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
CESCR	Committee on Economic Social and Cultural Rights
COVID 19	Corona Virus Disease 2019
CRC	Committee on the Right of the Child
CRPD	Committee on the Rights of Persons with Disabilities
DBE	Department of Basic Education
DHET	Department of Higher Education and Technology
ECtHR	The European Court on Human Rights
FAO	Food and Agricultural Organisation
HEIs	Higher Education Institutions
HESA	Higher Education South Africa
HFIAS	Household Food Insecurity Access Scale
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Law Commission
ILO	International Labour Organisation
NGOs	Non-Governmental Organisations
NSPN	National School Nutrition Programme
NSFAS	National Students Financial Aid Scheme
NAMC	National Agricultural Marketing Council
SAHRC	South African Human Rights Commission
SASSA	South African Social Security Agency
SDGs	Sustainable Development Goals
SRDG	Social Relief of Distress Grant
SA	South Africa
SSA	Sub Saharan Africa
Stats SA	Statistics South Africa
STEM	Science, Technology, Engineering and Mathematics
SOH	Swipe Out Hunger
TVET	Technical and Vocational Education and Training

UDHR	Universal Declaration of Human Rights
UFS	University of the Free State
UKZN	University of KwaZulu - Natal
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
USAF	Universities South Africa
USA	United States of America
UWC	University of the Western Cape
WFS	World Food Summit



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CHAPTER ONE

INTRODUCTION

1.1 Background

The 2015 Sustainable Development Goals (SDGs),¹ list the eradication of hunger worldwide by the year 2030 as one of its goals.² The eradication of hunger implies that food security for all must be guaranteed. Food security as a concept has evolved over time from the more one-dimensional definition in terms of volumes and stability of supply by the United Nations (UN) in 1975,³ to the now expansive definition by the Food and Agricultural Organisation (FAO), which adopts non-nutritive based elements of food security. The FAO in the 1996 Food Summit, 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.⁴

Notwithstanding the strides made in ensuring food security for all, there is still an overwhelming percentage of people around the world who are not food secure. Today, nearly 690 million people around the world suffer from hunger- of these numbers, an overwhelming majority of them live in developing countries.⁵ Furthermore, the statistics indicate that the number of people affected by severe food insecurity is on an upward trend, with about 750 million people (1 in ten persons) being affected.⁶ Currently, about 57% of persons around Sub Saharan Africa (SSA) and Southern Asia are unable to afford health diets.⁷ In this vein, most developing and underdeveloped economies struggle with fulfilling the right to food for a significant part of their citizenry, particularly amongst vulnerable groups, who are mostly food insecure.

¹ For a full list on 2015 Sustainable Development Goals see <https://sustainabledevelopment.un.org/sdgs> (Accessed 23 March 2017).

² Zero hunger is the second sustainable development goal as defined by the United Nations.

³ United Nations 'Report of the World Food Conference' (1975) *World Food Conference*.

⁴ FAO Corporate Document Repository available at <http://www.fao.org/docrep/005/y4671e/y4671e06.htm> (Accessed 21 February 2017).

⁵ FAO 'The State of Food and Nutrition Security in the World 2020: Transforming Food Systems for Affordable Healthy Diets' (2020) Available at <http://www.fao.org/3/ca9692en/online/ca9692en.html> (Accessed 2 September 2020).

⁶ FAO 'The State of Food and Nutrition Security in the World 2020: Transforming Food Systems for Affordable Healthy Diets' (2020) 4 Available at <http://www.fao.org/3/ca9692en/online/ca9692en.html> (Accessed 2 September 2020).

⁷ FAO (2020) 5.

Food insecurity has been defined as ‘the inability to access and procure, through conventional avenues, nutritionally adequate foods capable of supporting an active and healthy lifestyle.’⁸ It is manifested in a plurality of forms including having insufficient quantities of food, experiencing hunger as a result of having no food and having no resources to produce or purchase more food, eating a nutrient-deficient diet, anxiety about acquiring food and reliance on food relief.⁹ Although a country may be regarded as being food secure, sectors of the population within such country may experience varied forms of food insecurity. This is the case with South Africa- which on a national scale is regarded as a food secure country,¹⁰ but yet has devastating levels of food insecurity amongst certain sectors of the population, mostly impacted by structural inequalities.¹¹

Many groups of persons who are impacted by a high burden of poverty and consequently food insecurity in South Africa, have over the years received a range of responses from the government, resulting in many interventionist schemes to guarantee their right to food. These include, for instance, social grants for children, disabled and elderly, as well as the provision of daily school meals for primary and high school students.¹² Unfortunately, one of such groups have hitherto received little or no attention, these are, students in South African tertiary institutions.

Although it is constantly iterated by scholars that ‘hunger does not discriminate’, the opposite is in fact the case.¹³ Hunger hits the hardest and most persistently amongst already vulnerable and disadvantaged groups.¹⁴ The recent lockdown following the outbreak of the COVID-19

⁸ Micevski D, Thornton L, Brockington S ‘Food security among university students in Victoria: a pilot study’ (2014) 71 *Nutrition and Dietetics* 258.

⁹ Hughes R, Serebryanikova I, Donaldson K et al ‘Food insecurity: the skeleton in the university closet’ (2011) 68 *Nutrition and Dietetics* 27.

¹⁰ Human Sciences Research Council (2013) ‘South African National Health and Nutrition Examination Survey’ (SANHANES-1). Cape Town: HSRC Press.

¹¹ Allen P ‘Realizing Justice in Local Food Systems’ (2010) 3 (2) *Cambridge Journal of Regions, Economy and Society* 295-305.

¹² SASSA ‘You and your grants’ Available at <file:///C:/Users/Admin/Downloads/updatedyou%20and%20our%20grants.indd2016-17fin.pdf> (accessed 10 November 2017).

¹³ Raskind I ‘Hunger does discriminate: addressing structural racism and economic inequality in food insecurity’ (2020) 110 (9) *American Journal of Public Health* 1264 -1265

¹⁴ Klaus G, Bernstein J, Brown T, Prasia N, Yohannes Y 2017 *Global Hunger Index: The Inequalities of Hunger* Available at <http://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/131422/filename/131628.pdf> (Accessed 25 October 2017) 3.

pandemic has proven this to be true. Many already vulnerable groups were the first and hardest hit with heart wrenching experiences of hunger and deprivation during most of the lockdown.¹⁵ Most often, it is the people or groups with the least socio-economic power or status who suffer the most ravaging effects of hunger- and many times in silence. This silence is born out of a lack of the resources to amplify their challenges and struggles. This has been the case for many students in tertiary institutions around the world, and specifically in South Africa. There is a crisis of food insecurity amongst students in South African tertiary institutions, which until very recently had received insignificant attention.¹⁶

1.2 Problem Statement

In South Africa, students in tertiary institutions are a particularly vulnerable group. They are mostly unemployed because they are engaged in academic enterprise on a largely full time basis.¹⁷ Furthermore, they do not fall within the age bracket of persons entitled to social grants from the government.¹⁸ Students in tertiary institutions are many times wholly reliant on income from parents or other caregivers, such income being split amongst other contesting needs.¹⁹ In tertiary institutions, besides the shortage of housing, access to food is a major challenge for many students.²⁰ The 2015/16 'FeesMustFall' crises in tertiary institutions around South Africa, has brought to the fore several other issues which students grapple with besides high costs of tuition fees, including a lack of housing and an alarming rate of food insecurity amongst students.²¹ The crisis was precipitated by students' agitations for access to higher

¹⁵ Dahir A "Instead of Coronavirus, the Hunger will Kill Us". A Global Food Crisis Looms' *New York Times* 22 April 2020 Available at <https://www.nytimes.com/2020/04/22/world/africa/coronavirus-hunger-crisis.html> (Accessed 20 September 2020).

¹⁶ Hughes R and ors 'Student food insecurity: the skeleton in the university closet' (2011) 68(1) *Nutrition & Dietetics* 27-32.

¹⁷ The 2017 Education Series Volume V: Higher Education and Skills in South Africa from Statistics SA indicates that 2/3rd of University enrolled university students nationally registered through contact mode of study. See further Statistics SA 'Education Series Volume V: Higher Education and Skills in South Africa' (2017) Available at <http://www.statssa.gov.za/publications/Report-92-01-05/Report-92-01-052017.pdf>.

¹⁸ SASSA 'You and your grants' Available at <file:///C:/Users/Admin/Downloads/updatedyou%20and%20ur%20grants.indd2016-17fin.pdf> (accessed 10 November 2017).

¹⁹ Wegerif M, Adeniyi O 'Student hunger at South African universities needs more attention' *The Conversation* Published 18 September 2019 Available at <https://theconversation.com/student-hunger-at-south-african-universities-needs-more-attention-123378>

²⁰ Dominguez-Whitehead Y 'Food and housing challenges: (re)framing exclusion in higher education' (2017) 68 *Journal of Education* 153-155

²¹ Furlong A 'Homeless and hungry at UWC' *Ground Up* (19 May 2017) Available at <https://www.groundup.org.za/article/homeless-and-hungry-uwc/> (Accessed 24 October 2017).

education for all, though zero tuition and better conditions for learning.²² It is instructive that in spite of the high burden of food insecurity of students across the country, to date there has been no investigation by any Chapter 9 institutions on this issue.

The right to food until very recently had also not been specifically litigated upon in South Africa before the courts, and there is still no litigation about food insecurity in public tertiary institutions.²³ This calls to question why this issue remains a silent, yet pervasive problem on campuses nationwide. In June 2020, an NGO, Equal Education, instituted litigation on children's right to food against the Department of Basic Education in the context of children's right to food during the COVID-19 lockdown. The case specifically touched on the right to food of children within the context of the National School Nutrition Programme (NSNP).²⁴

Students from disadvantaged backgrounds in primary and secondary school are entitled to daily meals under the National School Nutrition Programme (NSNP) (school feeding scheme).²⁵ Nine million children are currently beneficiaries under the NSNP, which is extended to learners in quintile 1 to 3 schools²⁶ and some quintile 4 schools. The same is not extended to disadvantaged students in tertiary institutions. Students who were beneficiaries under the NSNP find themselves without food upon entry into tertiary institutions.

²² Badat S 'Deciphering the Meanings and Explaining the South African Higher Education Students Protests of 2015-16' (2016) *Pax Academia African Journal of Academic Freedom* 71-106.

²³ Indeed, existing South African literature on the right to food, comments on the dearth of litigation in this regard. See further Nevondwe L and Or 'An overview of the constitutional right to food under the South African Constitution' (2014) 5(1) *Mediterranean Journal of Social Sciences* 761-768; Brand D 'Between availability and entitlement: The constitution, Groortboom and the right to food' (2003) *Law, Development and Democracy* 1-26; Nkrumah B 'Opening Pandora's box: A legal analysis of the right to food in South Africa (2019) *De Jure Law Journal* 47-64.

²⁴ *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306 (17 July 2020). The facts of the matter were that schools were shut after the declaration of a national lockdown by the South African government due to the 2020 corona virus pandemic. The NSNP under which up to Nine million identified vulnerable learners accessed at least one meal a day was also halted during the lock down. The claimants argued that the NSNP is designed to fulfil the unqualified rights of children to basic education and basic nutrition under section 28 of the Constitution. The rights to basic nutrition and basic education are fundamental rights which demand more than just a reasonable plan – these rights need a plan capable of making immediate implementation possible. The Court handed down declaratory and supervisory orders, ordering the national and provincial Departments of Basic Education (DBE) to roll out the NSNP to all eligible children without delay, regardless of whether they have returned to school or not. In affirmatively granting the injunctions, the Court noted '...Continued breach by the Minister and MEC's will leave millions of children hungry through the cold winter and as long as lockdown lasts. Hunger is not an issue of charity, but one of justice'.

²⁵ Department of Basic Education 'National School Nutrition Programme' Available at <https://www.education.gov.za/Programmes/NationalSchoolNutritionProgramme.aspx> (Accessed to 24 October 2017).

²⁶ Learners in quintile 1 to 3 school currently make up the poorest 60% of schools based on community poverty ranking.

The National Students Financial Aid Scheme (NSFAS), established to provide financial aid to students from poor and working class homes, has attempted to address some of these gaps-albeit unsuccessfully. The initial funding models of NSFAS were fraught with disparities across institutions, thereby further exacerbating vulnerabilities of students from disadvantaged institutions. Added to this, the benchmark at which students qualify for NSFAS funding, curiously excludes many students who are now described as ‘missing middle’ students. These students come from families that are too rich to qualify for funding, yet too poor to sustainably access tertiary education and the added costs that come with it, including cost of food.

Notwithstanding the 2019 review to amounts allocated to NSFAS qualifying students for subsistence allowance, the inadequacy of these amount, continue to pose a challenge in guaranteeing food security for these students.²⁷ Amounts earmarked as living allowances under the current funding model, are not adequately reflective of what will be sufficient to feed students and cover other living expenses, giving current inflation and food prices rates. Furthermore, not all NSFAS students according to the new regulations qualify for subsistence allowance. NSFAS funded students who live at home (as defined by the regulations), only qualify for transport allowance.²⁸ This approach is problematic as it fails to recognise the cause of food insecurity of students as poverty of students and the fact that students are food insecure because they come from homes that are food insecure. The problem of poverty in general and food poverty in South Africa is intrinsically linked with the racially stratified past of South Africa, with a better part of the mostly black population of South Africa living below the poverty line up to this day. Table 1 below depicts inequality between subgroups in South Africa over an 11 year period (2006 -2015).

²⁷ Department of Higher Education and Training ‘Guidelines for Department of Higher Education and Training Bursary Scheme for Students at Public Universities’ Released 25 January 2019 Available at <file:///C:/Users/Admin/Desktop/CHAPTER%203%20PHD/Guidelines%20for%20the%20DHET%20Bursary%20Scheme%20for%20Students%20at%20Public%20Universities.pdf>.

²⁸ See further Department of Higher Education and Training ‘Guidelines for Department of Higher Education and Training Bursary Scheme for Students at Public Universities’ Released 25 January 2019 Available at <file:///C:/Users/Admin/Desktop/CHAPTER%203%20PHD/Guidelines%20for%20the%20DHET%20Bursary%20Scheme%20for%20Students%20at%20Public%20Universities.pdf>.

Table 1: Distribution of real annual mean and median expenditure by population group (2006, 2009, 2011 & 2015)²⁹

Variable	Sub-group	Mean				Median			
		2006	2009	2011	2015	2006	2009	2011	2015
Population group	Black African	11 005	14 645	18 396	18 291	6 009	7 325	9 659	9 186
	Coloured	19 405	25 207	31 850	31 951	9 702	14 302	17 927	16 878
	Indian/Asian	39 840	51 744	67 386	58 249	22 828	31 802	49 308	37 561
	White	103 012	107 774	142 613	131 198	77 308	85 268	109 835	100 205
Total		20 930	25 245	32 022	29 841	7 124	9 059	11 910	11 149

Flowing from the above, it follows that vulnerability to food insecurity in South African tertiary institutions is exacerbated by the dynamics of race and class. Studies continue to highlight black and coloured students as most vulnerable to food insecurity. For instance, a study in the University of Free State, showed that of the 65% food insecure students, black and coloured students were amongst subgroups with the highest predisposition to food insecurity.³⁰ At University of Witwatersrand (a historically white/privileged university), a 2018 study showed that although food insecurity levels were generally low for the particular institution, there were clear pockets of hunger amongst certain groups of students, especially black male undergraduates from townships, who were on financial aid.³¹

²⁹ Table adapted from Statistics South Africa *Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality* (2019) Report No 03-10-19 26.

³⁰ Van de Berg L, Raubenheimer J 'Food Insecurity among Students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169.

³¹ Rudolph M et al 'Food insecurity and coping strategies among students at University of Witwatersrand' (2018) 6 (1) *Journal of Food Security* 20-25.

The food environment in many tertiary institutions nationwide has also elicited major criticism in recent years, as contributing to the problem of students' food insecurity.³² The food environment refers to an intersection of factors- social, economic, policy, spatial- which directly impacts on an individual's access to food.³³ Many tertiary institutions experience sparse food outlets on campuses, with a leaning towards tuck shops and food take away outlets- many of which do not sell nutritionally appropriate food.³⁴ Further, auditing of retail outlets are not consistently carried out by university managements, hence there is a proliferation of cheap calorie dense, nutrient deficient snacks and meals on campuses as against wholesome, nutritional meals. This impacts directly on health and wellness of students on campus, increasing disease burden and life style diseases.³⁵ It is important to highlight that in a South African context, purchasing more wholesome food tends to be more expensive, particularly if commercially provided. The proliferation of outlets that provides this kind of food will tend to exclude poor students.

In a bid to address this, tertiary institutions in South Africa have recently moved towards favouring the entry of big retail outlets into the campus food environment, rather than small, neighbourhood enterprises. This has again been met with criticisms of further driving up costs of food on campuses, leading to monopolistic, overpriced food environments, where small enterprises are unable to compete, making food economically inaccessible to many students.³⁶ In this context, many students in tertiary institutions are faced with a problem of access to food. They do not have the productive resources with which they can cultivate food to eat, neither do they have sufficient physical access and/or economic resources to buy food.

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- ³² Swanstrom J 'Determining how campus food environments influence eating behaviors utilizing focus groups' (2017) 15 (10) *The Journal of Undergraduate Research* ; Pulz I et al ' Are campus food environments healthy? A novel perspective for qualitatively evaluating the national quality of food at food service facilities at a Brazilian university' (2017) 137 (2) *Perspectives in Public Health* 122-135.
- ³³ Crush J, Frayne B, McLachlan M. 'Rapid urbanization and the nutrition transition in Southern Africa' (2011) 7 *Urban Food Security* Queen's University and AFSUN: Kingston and Cape Town.
- ³⁴ Neko M, Jordan E 'The food environment of students on financial assistance program at the University of Free State, Bloemfontein' (2016) 29 (3) *South African Journal of Clinical Nutrition* 116-117.
- ³⁵ Neko M, Jordan E (2016) 116.
- ³⁶ Borraz F, Dubra J, Ferres D and Zipitria L 'Supermarket entry and the survival of small stores 44 (2014) *Review of Industrial Organization* 73-93

There is a general consensus and acceptance amid stakeholders that food insecurity is pervasive in tertiary institutions nationwide,³⁷ however, research is inadequate to quantify the depth of the problem and present a holistic and nuanced assessment. The research that is available, reviews the problem of food insecurity on campus restrictive basis- i.e. at specific campuses. For instance, researchers formally studying the problem of student food insecurity in South Africa conducted a study at the University of the Free State (UFS).³⁸ The study showed that up to 65% of student respondents at UFS were food insecure, while 60% experienced food insecurity with hunger. Food insecurity was most prevalent in specific categories of students, including- black and coloured, undergraduates, first generation and male students, students on bursaries or loans.

Being cognisant of the high prevalence of food insecurity among students in tertiary institutions, several organisations within and outside of university campuses have attempted to organise different programmes to address this issue. What remains missing is an accountability mechanism within institutions which fosters a sense of coordination, taking into consideration a human rights based approach and extending the schemes to every student that is food insecure on all campuses country wide. Many of the programmes were at the outset met with reported incidences of university administrative resistance and/or non-responsiveness on the part of students due to shame and the stigmatisation around hunger on university campuses.³⁹ Students' refusal or reluctance to access these free feeding schemes is linked to the fear of stigmatisation.⁴⁰ It is important to note that the right to dignity is intrinsically tied to the right to food, as iterated by the jurisprudence of courts and the Committee on Economic Social and Cultural Rights (CESCR).⁴¹

³⁷ Van de Berg L, Raubenheimer J 'Food Insecurity among Students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169 ; Rudolph M et al 'Food insecurity and coping strategies among students at University of Witwatersrand' (2018) 6 (1) *Journal of Food Security* 20-25.

³⁸ Van de Berg L, Raubenheimer J 'Food Insecurity among Students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169.

³⁹ Vakil C 'Learning on an Empty Stomach : Food Insecurity Hits Students Hard' 5 May 2017 *Mail & Guardian* Available at <https://mg.co.za/article/2017-05-05-learning-on-an-empty-stomach-food-insecurity-hits-students-hard> (Accessed 10 November 2017).

⁴⁰ Sabi S, Kolanisi U, Siwela M & Ors 'Students' vulnerability and perceptions of food insecurity at the University of KwaZulu-Natal' (2019) 33(4) *South African Journal of Clinical Nutrition* 144 -151.

⁴¹ Steinmann R 'The core meaning of human dignity' (2016) 19 *Potchefstroom Electronic Law Journal* 2-32.

The continued and systemically entrenched deprivation of access to food for students in South African tertiary institutions is a testament to the denial of their rights to food, dignity and a host of other socio economic rights. The continued prevalence of food insecurity and hunger in tertiary institutions is a violation of the guarantees to the right to food provided under the South African Constitution and other international and regional instruments to which South Africa is a signatory. Specifically, section 27 (1) (b) of the Constitution notes that ‘Everyone has the right to have access to sufficient food and water...’ Furthermore, the United Nations Committee on Economic Social and Cultural Rights in its General Comment 12 (GC12), iterates that the freedom from hunger is immediately realisable ‘... Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.’⁴²

Research by scholars have extensively expounded on the nature states obligation in fulfilling the right to food of other minority groups in South Africa.⁴³ The burning question is who has to fulfil this obligation of providing access to food for students in tertiary institutions. To date, there is no research available in South Africa which explores the legal obligation to guaranteeing students right to food in tertiary institutions and where this obligation is vested. This research fills this gap by expounding on state and non-state actors legal obligation in fulfilling the right to food of students in South African tertiary institutions.

1.3 Literature Review

This literature review will broadly attempt to introduce generally the existing research on the thematic discourses guiding this research.

1.3.1 *The Human Right to Food*

⁴² Para 14, General comment 12.

⁴³ Nevondwe L and Or ‘An overview of the constitutional right to food under the South African Constitution’ (2014) 5(1) *Mediterranean Journal of Social Sciences* 761-768; Brand D ‘Between availability and entitlement: The constitution, Groortboom and the right to food’ (2003) *Law, Development and Democracy* 1-26; Nkrumah B ‘Opening Pandora’s box: A legal analysis of the right to food in South Africa (2019) *De Jure Law Journal* 47-64; Durojaye E and Chilemba E (2018) ‘Accountability and the right to food: a comparative study of India and South Africa’ *Food Security SA Working Paper Series 003* DST-NRF Centre of Excellence in Food Security, South Africa 11.

A discussion on the right to food emanates from the foundational recognition of the right to food as a human right. Scholars initially categorised human rights into three broad categories—first, second and third generation rights.⁴⁴ Suffice to state that for all intents and purposes, this categorisation is merely academic and there has been a move towards the non-categorisation. What used to be known as first generation rights, or negative rights, are the well enunciated civil and political rights; present in majority of constitutions the world over. They are termed negative rights in the sense that they estop political authority from carrying out certain acts against their citizens.⁴⁵ They include the right to life, to dignity, to non-discrimination etc.

What came to be described as second generation rights, are socio economic rights, otherwise termed positive rights. They include rights which cover the social, economic and cultural sphere of human existence, and are tangible rights which impacts directly on the quality of life of persons. They include the right to education, the right to food, the right to health etc. They are termed positive rights because they require positive affirmative action from political authority for their realisation.⁴⁶ The justiciability of these rights has elicited much debate from the academia over the years. It is important to note that as far as South Africa is concerned, the justiciability of these rights is not in question as was elucidated in the defining case of *Government of the Republic of South Africa v Grootboom*⁴⁷ socio economic rights are justiciable in South Africa. The Constitutional Court, reiterated its earlier stance in the Certification judgement,⁴⁸ noting that ‘Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state “to respect, protect, promote and fulfil the rights in the Bill of Rights” and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.’⁴⁹

⁴⁴ Davidson S. *Human Rights* (1993) 39-45; Dlamini C. *Human Rights in Africa: Which way South Africa* (1995) 5; and Kent G *Freedom from Want; the Human Right to Adequate Food*(2005) 29-31.

⁴⁵ Kent G (2005) 29-31.

⁴⁶ Kent G (2005) 46 29- 31.

⁴⁷ 2001 (1) SA 46 (CC), Paragraph 20.

⁴⁸ Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, [1996] ZACC 26; 1996 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) at para 78.

⁴⁹ 2001 (1) SA 46 (CC), Paragraph 20.

Third generation or solidarity rights are rights of groups or clusters rather than individuals, such as the rights to development, environment, peace etc. These are regarded as rights attaching to communities rather than individual persons.⁵⁰

It is widely accepted that all human rights are indivisible and interconnected⁵¹ as recognised in Paragraph 5 of the Vienna Declaration and Program of Action set out upon the conclusion of the World Conference on Human Rights, in 1993 at Vienna, where States are charged with the duty to ‘promote and protect [*all*] human rights and fundamental freedoms.’⁵²

The right to food was recognised as far back as 1215 in *Magna Carta*,⁵³ where it stated- ‘no one shall be amerced [fined] to the extent that they are deprived of their means of living’- this has been narrowly interpreted by scholars as implying the right to obtain food unhindered through one’s own efforts.⁵⁴ In 1941, the then US president, Franklin D Roosevelt, included in his ‘Four Freedoms Speech’, the ‘Freedom from Want’ as one of the freedoms.⁵⁵ This freedom was later enunciated in the United Nations (UN) Charter of 1945.⁵⁶ The 1948 Universal Declaration of Human Rights (UDHR) recognises the Right to Food as part of the rights to an adequate standard of living to ensure the health and wellbeing of every individual.⁵⁷

The last century has witnessed a transition from seeing hunger as merely a part of human existence or punishment for laziness.⁵⁸ Hunger is now construed as a societal problem, requiring a socio-political response. Thus, in 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically recognised the right to food- this time not only as an aspect to the right to an adequate standard of living. It provides for the right to

⁵⁰ Kent G (2005) 29-31.

⁵¹ Whelan D ‘Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights’ (2008) Economic Rights Working Paper Series. The Human Rights Institute, University of Connecticut Hendrix College Working Paper 1.

⁵² United Nations, Office of the High Commissioner for Human Rights, 1993 Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (Accessed 20 March 2017).

⁵³ Magna Carta originated as a potential peace treaty between royalist and rebel factions in England in 1215.

⁵⁴ Food and Agriculture Organization ‘The road from Magna Carta.’ Available at <http://www.fao.org/worldfoodsummit/english/newsroom/focus/focus6.htm> (Accessed 10 March 2017).

⁵⁵ The State of the Union’ message was delivered on 26 January 1941
Roosevelt F ‘War—an aid to democracies,’ in Rosenman S, *The Public Papers and Addresses of Franklin Roosevelt* 672.

⁵⁶ Article 1(3) of the UN Charter 1945.

⁵⁷ Article 25, Paragraph 1 UDHR.

⁵⁸ Anderson M ‘Beyond food security to realizing food rights in the US’ (2013) (29) *Journal of Rural Studies* 113.

adequate food⁵⁹ and the right to be free from hunger.⁶⁰ Upon its entry into force in 1976, and as of mid-2020 has been ratified by 164 countries.⁶¹ It remains an international instrument that deals with the right of food in a most comprehensive manner.

The right to food is realised if food security exists.⁶² The idea of food security although predominant since the 1980s, has gradually shifted focus over the years. The core concept of food security has evolved but in general covers both supply and access, food safety and in some instances cultural suitability of food.⁶³ The FAO in the 1996 World Food Summit (WFS) redefined the concept of 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.'⁶⁴

Based on members request at the closing of the 1996 World Food Summit (WFS), the United Nations Committee on Economic, Social and Cultural Rights (CESCR),⁶⁵ issued General comment 12 in 1999.⁶⁶ Randolph opines that 'General Comment 12 provides the most comprehensive definition of the substantive content of the right to food under international law and expands on three core dimensions of the right - food availability, food access, and food use.' Its aim was to provide guidance to States Parties to the ICESCR to monitor implementation of Article 11 of the Covenant and to further delineate other core elements of the right to food beyond food security.⁶⁷

Brand opines that while the element of food availability is mainly determined by natural and macroeconomic factors, food access is mainly determined by entitlements, which falls within

⁵⁹ Article 11, Paragraph 1, ICESCR.

⁶⁰ Article 11, Paragraph 2 ICESCR.

⁶¹ As at the time of this study the Covenant had 164 parties, as well as six others which had signed but not yet ratified it. See further 'UN Treaty Collection: International Covenant on Economic, Social and Cultural Rights'. UN 3 January 1976.

⁶² Sibonile K (Ed) *Socio-Economic Rights in South Africa* (2007) 321.

⁶³ Maxwell S, Slater R 'Food policy: old and new' (2003) 21(5-6) *Development Policy Review* 532.

⁶⁴ FAO Corporate Document Repository Available at <http://www.fao.org/docrep/005/y4671e/y4671e06.htm> (Accessed 16 March 2015)

⁶⁵ The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

⁶⁶ Randolph S 'The Right to Food: A Global Overview' in Minkler L (Ed) *The State of Economic and Social Human Rights: A Global Overview* (2013) 21-60.

⁶⁷ Randolph S (2013) 21-60.

the domain of legal discourse.⁶⁸ The law is able to control, shape social and economic policy that can facilitate people's access to food.⁶⁹ Kent highlights the difference in meeting the basic biological need for food and realising the human right to food. The human right to food cannot be said to be realised if citizens cannot influence the 'what' and 'how' of their food. Where people have no say in determining the content of their food, their right to food cannot be said to have been respected or fulfilled. For instance, serving pork to a Muslim prisoner would violate his human right to food, despite the basic nutritional requirements being met.⁷⁰ At the core of human rights in general and the right to food specifically, is upholding human dignity and not merely meeting physiological needs. From the right to food perspective, dignity does not emanate from being fed, but from being empowered to feed one's self. Citizens should have a say in what and how they should feed.⁷¹ Well-structured egalitarian societies encourage the movement towards self-sufficiency in providing for one's own food.

A human rights approach is essential if food security for all must be guaranteed, for a number of compelling reasons. First, a rights approach is underpinned by the indivisibility of all human rights. The fundamental right to life is contingent upon the right to food - for without food, the possibility of existing is obliterated- and the right to health, as a healthy lifestyle becomes impossible without adequate nutrition. In this light, a United Nations Development Programme (UNDP) Report of 2000 indicated that hunger and malnourishment, directly or indirectly, accounts for over half of the deaths in the world.⁷² This underscores the importance of the right to food. The right to food is also linked to a milieu of other rights including the right to information as a safeguard to guaranteeing the right to health and the right to life.

The enjoyment of many other rights including the right to education and work is contingent upon the realisation of the right to food. Alaimo highlights that malnutrition is an impediment to successful learning as well as psychosocial development in school aged children.⁷³ This can be assumed to hold true for students in tertiary institutions also. Poor health which gives rise

⁶⁸ Brand D 'Between availability and entitlement: The constitution, Groortboom and the right to food' (2003) *Law, Development and Democracy* 3.

⁶⁹ Brand D (2003) 3.

⁷⁰ Kent G *Freedom from Want; the Human Right to Adequate Food* (2005) 46.

⁷¹ Kent G (2005) 47.

⁷² United Nations Development Programme, *Human Development Report 2000* (2000).

⁷³ Alaimo K, Olson C and Frongillo A 'Food insufficiency and American school-aged children's cognitive, academic, and psychosocial development', (2001) 108 *Paediatrics* 44-53.

to defective education backgrounds in turn limits access to securing decent jobs and standard wages to secure living above the poverty limit. In this regard, the Argentine Supreme Court in the *Sanchez* case,⁷⁴ made an interlink between the minimum wage and the access to food, housing and healthcare, holding unconstitutional a bar on readjustment of social security payments in accordance with inflation rates and ordering a recalculation of such payments. Thus, a rights based approach to food security is essential because it prioritises the needs of vulnerable groups in society, thereby requiring immediacy in the redress of any violations of the right.⁷⁵ This is the case for millions of South Africans, including students in tertiary institutions.⁷⁶ Brand argues in this regard for a crisis response requiring direct and immediate interventions rather than long term responses.⁷⁷

In addition to this, a rights based approach to food security has the potential to empower citizens to hold state governments accountable to fulfilling a minimum core in guaranteeing the right to food. It also encourages participation on citizen's part and gives a platform for otherwise vulnerable and marginalised groups in society to legitimately seek solutions to their socioeconomic challenges.⁷⁸

Finally, a rights based approach ensures that state obligations are enshrined within corresponding instruments guaranteeing the right to food for all.⁷⁹ In this regard, Chile argues for linking proposed outcomes to policies to be developed to address food insecurity.

1.3.2 Student Food Insecurity in Tertiary Institutions

In the last few decades, a number of studies have been conducted, which has encouraged robust debates around student food insecurity in tertiary institutions.⁸⁰ Many reasons have been

⁷⁴ Sanchez, Maria del Carmen C ANSeS, of 17 May 2005.

⁷⁵ Brand D (2003) 4-5.

⁷⁶ A third of South Africans are currently at risk of hunger. See further, See Statistics SA 'The extent of food security in South Africa' (2019) Available at <http://www.statssa.gov.za/?p=12135> (Accessed 29 August 2020).

⁷⁷ Brand D (2003) 4.

⁷⁸ Chilton M, Rose D 'A rights based approach to food insecurity in the United States' (2009) 99 (7) *American Journal of Public Health* 1203.

⁷⁹ Chilton M, Rose D (2009) 1203.

⁸⁰ Hughes R, Willows N, Au V 'Nutritional quality and price of university food bank hampers' (2011) 67 *Canadian Journal of Dietetic Practice and Research* 104-107; Chapparo M, Zaghoul S, Hlock P et al (2009) 'Food insecurity prevalence among college students at University of Hawai'i at Manoa' 12 *Public Health Nutrition* 2097-2103; Patton-Lopez M et al 'Prevalence and correlates of food insecurity among

adduced on why this discourse is only just emerging, even in developed countries. One reason which pleads strong credence is the erstwhile assumption that the pursuit of higher education is an elitist pursuit and hence persons pursuing higher education have the barest minimum needs satisfied, including food, shelter and clothing.⁸¹ Of course this assertion is untrue as the extent to which persons experience food insecurity may vary across different stages of life. Studies indicate that food insecurity is most pronounced in the years spent attending a tertiary institution, for many reasons including new found independence, some students managing dual demands of studying and working and poverty.⁸²

In the United States, researchers from the University of Hawai'i at Manoa in 2009, found up to 21% of students were food insecure, with 6% experiencing food insecurity with hunger.⁸³ In 2011, a study was conducted at a midsize rural university in Oregon, which showed that up to 59% of students had experienced some form of food insecurity in the previous year.⁸⁴ Interestingly, the 2011 study at Oregon, proved a direct correlation between food security of university students and good academic performance.⁸⁵ A 2011 study conducted at the Griffith University, Queensland, Australia, found alarming levels of food insecurity of over 70% among university students, with up to 25% experiencing food insecurity with hunger.⁸⁶ In 2013, researchers at Deakin University in Australia carried out research to assess food insecurity amongst students. The results showed that up to 48% of students' experienced different degrees of food insecurity, with 30% reporting food insecurity with hunger.⁸⁷

Regionally, there are no documented statistics on food insecurity of students in African tertiary institutions outside of South Africa. It is important to note that this is not necessarily indicative of an absence of this issue on the continent- it is only indicative of a dearth of research in this

students attending a midsize rural university in Oregon' (2014) 46 (3) *Journal of Nutrition Education and Behaviour* 209-214.

⁸¹ Hughes R, Willows N, Au V 'Nutritional quality and price of university food bank hampers' (2011) 67 *Canadian Journal of Dietetic Practice and Research* 104-107.

⁸² Hughes R et al (2011).

⁸³ Chapparo M, Zaghoul S, Hlock P et al (2009) 'Food insecurity prevalence among college students at University of Hawai'I at Manoa' 12 *Public Health Nutrition* 2097-2103.

⁸⁴ Patton-Lopez M et al 'Prevalence and correlates of food insecurity among students attending a midsize rural university in Oregon' (2014) 46 (3) *Journal of Nutrition Education and Behaviour* 209-214.

⁸⁵ Measured as Grade Point Average of 3.1 and above.

⁸⁶ Hughes R et al (2011).

⁸⁷ Micevski D (2014) 261-262.

regard and once more highlights the shroud of silence and lack of attention to this vulnerable group.

Researchers in South Africa only turned their attention to this issue over the last decade. At University of KwaZulu Natal (UKZN), a study conducted in 2012 measured the prevalence of food insecurity amongst the local student community on financial aid, at 53.1%.⁸⁸ This study highlights the ineffectiveness of the structure of financial aid to students in curbing the scourge of poverty and deprivation among previously disadvantaged students. A mere seven years later, another study was published in 2019 from UKZN, measuring food insecurity rates among students using the Household Food Insecurity Access Scale (HFIAS). The study noted a significant correlation between students' source of funding and their predisposition to food insecurity.⁸⁹ The study showed that vulnerability to food insecurity was more prevalent with NSFAS funded students, where 48.1% had no food due to a lack of resources, 39.6% went to bed hungry and 28% of them stayed hungry the whole day and night due to a lack of food.⁹⁰ As previously noted, a study at the University of the Free State (UFS) showed that up to 65% of student respondents at UFS were food insecure, while 60% experienced 'food insecurity with hunger'.⁹¹ In the UFS study, food insecurity was most prevalent among black, coloured, undergraduates, first generation and male students, as well as students on bursaries or loans.

Despite the studies that are currently available in South Africa, there is yet to be legal or policy recognition that students in tertiary institutions are a group particularly vulnerable to food insecurity. In 2018, A University of Witwatersrand, highlighted the prevalence of food insecurity among specific groups of students.⁹² The study indicated that even though the levels of food insecurity were generally lower than those observed in other studies from other universities, there were clear pockets of hunger among some groups. Specifically, black male undergraduate students from township settlements and students on financial aid, were hardest hit. This study fills this gap by making a case for the erstwhile legal vulnerability of students

⁸⁸ Kassier S, Veldman F 'Food security status and academic performance of students on financial aid: the case of University of KwaZulu-Natal' (2013) 9 *Alternation Special Edition* 248-264.

⁸⁹ Sabi S, Kolanisi U, Siwela M & Ors 'Students' vulnerability and perceptions of food insecurity at the University of KwaZulu-Natal' (2019) 33(4) *South African Journal of Clinical Nutrition* 144 -151.

⁹⁰ Sabi S et al (2019).

⁹¹ Van de Berg L, Raubenheimer J 'Food Insecurity among Students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169.

⁹² Rudolph M and Ors 'Food insecurity and coping strategies amongst students at University of Witwatersrand Journal of Food Security'(2018) 6 (1) 20 -25.

in South African tertiary institutions and recommendations for policy interventions in the South African food security sphere to recognise this.

In the studies highlighted above, certain common threads were evident across board, both internationally and nationally. Students most impacted by food insecurity were students who lived away from home and students reliant on government support or funding. Also students who worked and studied were more predisposed to being affected by food insecurity.⁹³ Researchers at the Wisconsin Hope Lab have documented that a growing number of previously disadvantaged undergraduate students experienced food insecurity, even when they worked and received financial aid.⁹⁴ The implication of this is that both outside and within South Africa, the current funding models in tertiary education has been ineffective in addressing student food insecurity.⁹⁵ This motivates for a reconsideration of government approach and policies on student support to enhance accessibility, particularly to disadvantaged students. This research fills this gap by situating where the obligation lies and the normative content of the fulfilment of the right to food of students in tertiary institutions.

Furthermore, this links back to the trajectory of poverty- students experience food insecurity because of their poverty, stemming from their disadvantaged backgrounds, thus perpetuating the cycle of poverty.⁹⁶ Research has shown educational attainment to be an important factor in upward social mobility and breaking the cycle of poverty.⁹⁷ It follows that addressing the food insecurity of students in tertiary institutions becomes relevant beyond just addressing nutritional and caloric requirements, but also as a tool to combat poverty in line with the Sustainable Development Goals. This repositions the argument for addressing student food insecurity as merely a moral and legal based duty, to a duty entrenched in future developmental advancement of the nation.

As the body of knowledge on food insecurity in tertiary institutions continues to grow, it is evident that the available research contextualizes the problem mainly from a social science

⁹³ Patton-Lopez M et al (2014).

⁹⁴ Goldrick-Rab S, Broton K, Eisenberg D *Hungry to Learn: Addressing Food and Housing Insecurity among Undergraduates* (2015).

⁹⁵ Micevski D (2014) 262.

⁹⁶ Patton-Lopez M et al (2014).

⁹⁷ Pallas A 'Educational transitions, trajectories, and pathways' in Mortimer J, Shanahan M (eds) *Handbook of the Life Course. Handbooks of Sociology and Social Research*. (2003) 165-184.

approach. While this is perhaps helpful to tease out important questions such as the scale of the problem and which groups are most likely to experience the problem, it fails to provide lasting solutions to addressing the problem. This research takes a rights based approach to examining violations of the right to food within the context of tertiary institutions in South Africa, citing of accountability for these violations and thus creating a bedrock for solutions which are human rights based.

1.3.3 A Role for Non-State Actors

It is important to contextualise how non-state actors operating within the space of tertiary education impact on students' access to food. The term 'non state actors' has elicited debate in literature- Ssenyonjo, refers to the term as 'open ended', depending on the context in which it is used.⁹⁸ Josselin and Wallace categorize non-state actors in three ways as follows: (i) Organisations that are largely autonomous of central government funding and control, expressed in a plethora of forms including civil society, the market economy or the political economy; (ii) organisations operating within a network of more than one state, popularly known as transnational organisations, and; (iii) organisations whose actions, purposefully or semi-purposefully have political outcomes within more or one state.⁹⁹ Halliday in his examination of the historical roots of non-state actors, classifies them into five broad groups according to literature- 'NGOs, business groups, political organisations, religious entities and criminal organisations.'¹⁰⁰ He further argues that specialised entities such as UN agencies, the World Bank, International Monetary Fund, that are conceptually included in the definition of non-state actors should be excluded from the group.

Notwithstanding that the categorisation by Josselin and Wallace takes into consideration major categories of non-state actors, it belies the fact that non-state actors can be expressed in even simpler forms, outside of transnational organisations. Furthermore it remains unclear what level of government funding or control disqualifies an organisation from qualifying as a non-

⁹⁸ Ssenyonjo M 'The applicability of international human rights law to non-state actors: what relevance to economic, social and cultural rights' (2008) 12 (5) *International Journal of Human Rights* 725-760.

⁹⁹ Josselin D, Wallace W 'Non-State Actors in World Politics: A Framework', in Josselin D and Wallace W, *Non-State Actors in World Politics* (2001)1-20 at 3-4.

¹⁰⁰ Halliday F 'The romance of non-state actors' in Josselin D and Wallace W, *Non-State Actors in World Politics* (2001) 26.

state actor.¹⁰¹ It also restrictive to determine that entities who operate outside of a transnational context cannot be defined as non-state actors.

The definition of non-state actors as provided in the jurisprudence of the African Commission on Human and Peoples' Rights (ACHPR) is instructive for this study. The ACHPR adopts a more nuanced approach to defining non state actors, broadly stating that

The term 'non-state actors' has therefore been adopted by the international community to refer to individuals, organisations, institutions and other bodies acting outside the State and its organs. They are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.¹⁰²

It is important to make a distinction between non- state actors and private actors as this is key for contextualising their role in impacting human rights in general and more specifically the right to food of students in tertiary institutions.

Another point of intersection that seems to cut across both private actors and non-State actors lies in the fact that they can be liable for human rights violations, especially where they fail to uphold their obligation under national or international customary law.¹⁰³ Not all non-State actors are private actors especially where they are operating as quasi government and in positions of authority due to instances like armed conflict.¹⁰⁴ While this is appreciated, it is important to establish the meaning of private actors. This is engaged below.

1.3.4 *The Private Actors VS Non State Actors Debate*

To appreciate the difference between non-state actors and private actors, it is important to conduct a literature and jurisprudential review of both terms. Under the Inter-American system, the Court states that

The State has a legal duty to take reasonable steps to prevent human rights violations
... .

¹⁰¹ Ssenyonjo M (2008).

¹⁰² See Para 136 of Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/2002, 21st ACHPR AAR Annex II (2006-2007).

¹⁰³ Clapham A. 'Revisiting Human Rights in the Private Sphere: Using the European Convention on Human Rights to protect the Right of Access to the Civil Courts' in C. Scott (ed) *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 513-535.

¹⁰⁴ For a detailed engagement on non-State actors in armed conflict, see the draft General Comment of the African Committee on Rights and Welfare of the Child on Article 22 of the African Charter, available at www.acerwc.africa/general-comments (accessed 2 September 2020).

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obliged to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures....

The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.¹⁰⁵

This is an indication that private actors include individuals and entities that have a role to play in the protection of the rights of an individual within the territory of the state and they include corporations. This does not give the clarity with regard to non-state actors. The African Human Rights Court on Human and Peoples' Rights has upheld this in recent cases. It stated in a classical case that

The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.¹⁰⁶

A purposive interpretation of this provision indicates that in the African human rights system, a private actor includes a corporation; that by virtue of obligations that the government passes over to it grants it the duty, under internationally established principles, to avoid the violation of the rights of individuals. It would also appear that the obligation to uphold individual rights by a private actor rests in the principles of state responsibility that are passed on to the former.¹⁰⁷ This is corroborated by the draft principles of the International Law Commission

¹⁰⁵ *Velásquez Rodríguez v Honduras* 28 ILM 291 (1989), para 174, 175 and 182.

¹⁰⁶ Communication 155/1996 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria* para 58.

¹⁰⁷ Ratner S 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) *Yale Law Journal* 111 443-545 at 436.

(ILC) that state that the conduct of a person or entity which is not an organ of the State but empowered to exercise authority under national law is envisaged as an act of the State under international law, as long as the person or entity is acting in that capacity in the particular instance.¹⁰⁸

This position is further amplified by the fact that this organisation or entity presents various bodies which are empowered under national law to exercise governmental authority. The ILC offers various examples that stretch from

... public corporations, semi-public entities, public agencies of various kinds and even, in special cases, [to] private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations.¹⁰⁹

With regard to a private actor; there has to be some kind of recognition of the grant of governmental authority by the State to the former. The ILC Draft articles recognises this in a subjective manner in this context that

... what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.¹¹⁰

To this end, the obligations that the government passes on to the private actor, informs the extent to which any human rights violations by the private actor may be justiciable against in national courts. This is synonymous with the horizontal application of rights between a private person and an individual.¹¹¹

¹⁰⁸ A/56/10, Report of the ILC, adopted at its 53rd session, 2001, Commentary to the draft articles, Article 5 para. (1) of the Commentary 92.

¹⁰⁹ A/56/10, Report of the ILC, adopted at its 53rd session, 2001, Commentary to the draft articles, Article 5 para. (1) of the Commentary 92.

¹¹⁰ ILC Report (supra) 2001, Commentary to art. 5 at para 6 94.

¹¹¹ See Clapham *A Human Rights in the Private Sphere* (1993) and 'The Privatisation of Human Rights' *European Human Rights Law Review* launch issue 20-32.

This research takes a leaning toward the use of the term ‘non-state actors’ rather than private actors. As explained above, through the jurisprudence of the African Human Rights system adopts a more nuanced definition on who non-state actors are i.e. ‘...individuals, organisations, institutions and other bodies acting outside the State and its organs. ...’¹¹² This resonates more with who non-state actors are as envisaged, for the purpose of this thesis. The section that follows considers the impact of non-state actors on food (in) security.

1.3.5 Non-State Actors and Food Security

Non-State actors in the food security nexus include various players categorized in several groups.¹¹³ These include; farming and fish organisations, processors and retailers, consumer organisations, energy and transport organisations, insurance and banking, research organisations and finally, water and irrigations companies.¹¹⁴ These are further categorized into three groups that include the agricultural input industry, the food processors and traders and the food retailers.¹¹⁵ A look at the statistics reveals that there are a few farmers, followed by a large number of food processors and a larger number of retailers who play a key role in ensuring that the food is brought closer to the final consumer in the marketplace.¹¹⁶

With regard to production, South Africa presents dualism in its agricultural production whereby there exists a well- developed commercial agricultural sector informed by a small number of bulk producers. On the other hand are the subsistence or small scale agricultural sector with a relatively large number of producers.¹¹⁷ With regard to the small scale farmers, they remain suppliers of fresh produce markets, informal markets and supermarket chains.¹¹⁸ Some of the

¹¹² See Para 136 of Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/2002, 21st ACHPR AAR Annex II (2006-2007).

¹¹³ Schilpzand R & Ors ‘Governance beyond the state: non-state actors and food systems. Food security and global environmental change’ (2010) 272-300.

¹¹⁴ Gereffi G & Christian M ‘The impacts of Wal-Mart: The rise and consequences of the world's dominant retailer’ , (2009) *35 Annual Review of Sociology* 573-591.

¹¹⁵ Schilpzand R, Liverman D, Tecklin D, Gordon R, Pereira L, Saxl M, & Wiebe K ‘Governance beyond the state: non-state actors and food systems’ In Ingram J, Ericksen P and Liverman D (2010) *Food security and global environmental change*, 272-300.

¹¹⁶ Von B *The World Food Situation: New Driving Forces and Required Actions* (2007) International Food Policy Research Institute, available at <https://bit.ly/2Z0IJMI> (Accessed 3 September 2020).

¹¹⁷ Louw A, Chikazunga D, Jordaan D, & Biénabé E ‘Restructuring food markets in South Africa. Dynamics in context of the tomato sub sector’ (2006) *Report prepared for the Regoverning Markets project*.

¹¹⁸ SABC Kweek - Linking smallholder farmers to markets, available <https://bit.ly/2F0pJ9T> (accessed 3 September 2020).

supermarkets that are often supplied take up a 50-60 per cent market share in big chain supermarkets such as Woolworths, Pick and Pay, Shoprite-Checkers, South Africa.¹¹⁹

The point of departure is the extent to which they target the crucial segments of the general population like academic institutions where food security is an issue. Statistics show that over 80 percent of all processed food products in the SADC countries of Botswana, Namibia and Zambia are imported from South Africa.¹²⁰ The local South African-based farmer plays the key role of providing fruit and vegetables and to some extent, the processed food products to the final consumers in these countries.¹²¹

Further, questions on procurement present interesting statistics, especially by the supermarkets. These include the procurement of fresh fruit and vegetables by sourcing from the suppliers markets that allow in-house sourcing from a preferred source. This presents a mode of control of the 'preferred suppliers' by the supermarket through the provision of steady demand of the goods.¹²² It is reported that South Africa has over 4,219 stores and a 93.8 per cent market share of retail sales.¹²³ It is yet to be established the extent to which these supermarkets drive the agenda of food security in tertiary institutions vis a vis, their representation in institutions through branches at some of the campuses. It is argued that non-state actors also inform the rules that engage food safety, trade and accountability. They join issue with other factors such as climate change, high energy prices, globalization, and urbanization to inform the price of and the availability of food in the markets and by extension in the tertiary education sector as well.

¹¹⁹ SABC Kweek - Linking smallholder farmers to markets, Available at <https://bit.ly/2F0pJ9T> (accessed 3 September 2020).

¹²⁰ Emongor R & Kirsten J 'The impact of South African supermarkets on agricultural development in the SADC: a case study in Zambia, Namibia and Botswana' (2009) 48(1), *Agrekon*, 60- 84.

¹²¹ Emongor R & Kirsten 'The impact of South African supermarkets on agricultural development in the SADC: a case study in Zambia, Namibia and Botswana' J (2009) 60-84 *Agrekon*, 48(1), 14 available https://agritrop.cirad.fr/553287/1/document_553287.pdf (accessed 3 September 2020).

¹²² Louw A, Jordaan D, Ndanga L, & Kirsten J 'Alternative marketing options for small-scale farmers in the wake of changing agri-food supply chains in South Africa' (2008) 47(3) *Agrekon* 287-308.

¹²³ Louw A, Jordaan D, Ndanga L, & Kirsten J 'Alternative marketing options for small-scale farmers in the wake of changing agri-food supply chains in South Africa' (2008) 47(3) *Agrekon*,287-308.

1.3.6 The Realisation of the Right to Food for Marginalised Groups in South Africa

The right to food is realised if food security exists for ‘*all people*’ at all times.¹²⁴ Despite several government commitment in terms of policy action and apparent justiciability on the right to food in South Africa, food security remains elusive- especially for vulnerable groups. The reasons for this are multi-faceted. The apartheid history of South Africa has as its legacy, the majority black population below the poverty index several years after the dawn of democracy.¹²⁵ The last 26 years has seen the South African government making progresses towards correcting this past of socio economic neglect of a greater part of the population- this comes with its own set of challenges.

Harmonising the interests and needs of the vulnerable and marginalised groups in South Africa within the context of all socio economic needs is not always achievable. What takes precedence and what is postponed for later? Coomans and Yakpo explain that several social security programs targeted at ensuring an adequate standard of living, and indeed the realisation of the right to food for vulnerable groups in South Africa are fraught with policy as well as management issues and end up not delivering.¹²⁶

In South Africa, the absence of a coordinated policy and a legislative framework on the right to food, with a delineated responsible department further drives disharmony in addressing food insecurity. It is instructive that of all socio economic rights guaranteed under the South African constitution, only the right to food lacks a specific legislation which sets out the details of what this right entails.¹²⁷ Legislation on the right to food in South Africa is piecemeal and fraught with inconsistencies, with different national departments assuming responsibility for different vulnerable groups, such as the Department of Basic Education assuming responsibility for the NSNP and the Department of Social Development assuming responsibility for emergency

¹²⁴ Sibonile K, (2007) 321.

¹²⁵ Vusi G ‘Poverty, Inequality and Human Development in a Post-Apartheid South Africa’ Conference paper presented at ‘*Overcoming inequality and structural poverty in South Africa: Towards inclusive growth and development*’ Institute for Poverty, Land and Agrarian Studies. Available at <http://www.plaas.org.za/sites/default/files/publications-landpdf/summary%202010%20conf%20ep.pdf> (Accessed 26 March 2017).

¹²⁶ Coomans F, Yakpo K ‘A Framework Law on the Right to Food- An International and South African Perspective’ (2004) 1 *AHLRJ* 29-31.

¹²⁷ Nkrumah B ‘Opening Pandora’s box: A legal analysis of the right to food in South Africa (2019) *De Jure Law Journal* 47-64.

Social Relief of Distress Grant (SRDG). Notwithstanding the evidence that students in South African tertiary institutions are vulnerable to food insecurity, no specific department has been delineated to address the food security needs of students to this day.

Countries like India¹²⁸ have shown that where the government is reluctant or slow to implement socio economic policies, the judiciary can be very instrumental by means of judicial directives to responsible state officials and departments. However, the Judicial experience in implementation of food rights have been different in South Africa- judicial pro-activism has been slow to emerge. Until very recently, there was no specific right to food case. This is not unrelated to civil society apathy on the right to food in South Africa. Civil society has been known to play an important role in championing the realisation of other socio economic rights in South Africa, through their activism, on behalf of vulnerable and disenfranchised groups.¹²⁹ There is yet to be any recorded investigation South Africa either through the chapter nine institutions or government departments about food insecurity in public universities.

Against this backdrop, this research explores the notion that a successful redress of food insecurity must be holistically addressed through the prioritisation of the needs of vulnerable groups in society and that mainstreaming the rights of vulnerable groups within the food insecurity matrix is key to addressing food insecurity on a larger scale in South Africa. This thesis argues for the recognition of students in South African tertiary institutions as a vulnerable group and the prioritisation of their food security needs.

The arguments for this research are embedded in two theoretical frameworks. One is Foucault's theory of power and the other Martha Fineman's vulnerability theory.

1.4 Theoretical Underpinnings

The theoretical underpinnings/ framework of any research study serves the dual purpose of introducing and describing the theory which explains why the research questions are understudy.

¹²⁸ India is a similarly placed country with South Africa on the developmental index.

¹²⁹ See for instance the role played by the Legal Resources Centre in the *Grootboom* case, or the role of Treatment Action Campaign in the *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC) case, to ensure HIV positive mothers receive anti-retroviral drugs to stop mother to child transmission.

This thesis adopts and intermarries two theoretical frameworks. The first is on power in society as expounded by Michael Foucault and the second is Martha Fineman's vulnerability theory. Both theoretical frameworks speak to the core research problems/questions of this study and are elaborated upon in the second chapter of this study. Michael Foucault's theory on power reflects the deflection of access to resources away from vulnerable groups. It however stops short of identifying who is vulnerable. Fineman's vulnerability theory fills this gap by providing the context for determining vulnerability and obligations arising out of this vulnerability.

Foucault offered an alternative to the Marxist conception of power in society by his redefinition of power as being 'embedded' in humans rather than ascribed.¹³⁰ Foucault's conceptualisation of power and power relations in society resonates with this study's underpinnings on how power expressed in subtle forms can affect the outcomes of persons' access to resources. As had been examined above, the greatest predictors of food insecurity in South Africa generally and, by extension, tertiary institutions are race and class.¹³¹

Foucault's conceptualisation of power in society is not far divorced from Fineman's vulnerability theory. Like Foucault who theorizes that power is ever present, Fineman hinges the vulnerability theory on its constant and universal nature. Fineman conception of vulnerability puts the state firmly at the centre of obligation when dealing with the peculiarities of vulnerabilities which humans experience.

Both theoretical frameworks shed light on how vulnerability and power play out using the historical contexts of access to tertiary education in South Africa and how that trend in turn affects the lived realities of students on campus including their access to food, to this day.

1.5 Research Questions

¹³⁰ Horakova H (2011) 5.

¹³¹ See 2019 Statistics SA report on 'Towards measuring the extent of food insecurity in South Africa: an examination of hunger and food inadequacy', which profiles black headed households vulnerable to hunger in South Africa at 91.1% out of an aggregate of 1.7million vulnerable households. Available at <http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf> Page 18.

This research answers the question of where the obligation lies to realise the right to food for students in tertiary institutions. Specifically, the research responds to the following questions

1. Are students in tertiary institutions a vulnerable group? If yes, what obligations arise from this vulnerability in the realisation of their right to food?
2. What is the nature of the State's obligation to realise the right to food of students in South African tertiary institutions and in which organs of State does this obligation lie?
3. Do non-state actors have an obligations to ensure access to food for students in tertiary institutions?
4. Can a human rights-based approach effectively address the lack of access to food for students in tertiary institutions?

1.6 Aim of Research

The research seeks to explore themes surrounding the human right to food, vulnerability, food insecurity in tertiary institutions and the relationships between these themes. The right to food in the context of tertiary institutions is largely impacted by legal norms and frameworks surrounding the right to food on a national scale. The absence of legislation and policies on the right to food for all in South Africa,¹³² has a far reaching consequences for many identified vulnerable groups, including students in tertiary institutions.

This research explores the right to food in the context of South African legislation and policies, as well as the impact of legislation to guarantee the right to food for vulnerable groups in South Africa. Furthermore, the research seeks to explore coherency between realising food security in tertiary institutions and the requirement of public intervention from the various spheres of government. The research also explores how the private sector impacts the accessibility of marginalised groups to food.

1.7 Significance of the Study

¹³² Nkrumah B 'Opening Pandora's box: A legal analysis of the right to food in South Africa (2019) *De Jure Law Journal* 47-64

This thesis is significant first as a general contribution to the current body of knowledge on the right to food and food security. There is a gap in the research on the issue of food insecurity among students in South African institutions. The research that is available is mostly approached from a social sciences and public health or nutrition and dietetics perspective.¹³³ This research makes a novel contribution to the food security discourse by considering a human rights approach as an effective redress for food insecurity in South African tertiary institutions.

Furthermore, this thesis fills a gap in the recognition of who vulnerable groups are by making a case for the erstwhile legal vulnerability of students in South African tertiary institutions and recommendations for policy interventions in the South African food security sphere to recognise this.

1.8 Limitation of the Study

This thesis specifically examines food insecurity in tertiary institutions within South Africa. The contemplation of tertiary institutions in this study is limited to universities and does not include technical and other academic colleges. Furthermore, the thesis limits its examination of the thematic discourse through the lens of South Africa.

Considering the lack of a framework law on the right to food in South Africa, this thesis limits itself to the current policy framework which directly impacts on the right to food of students in tertiary institutions.

1.9 Research Methodology

The thesis comprises a desktop review of the literature on the right to food in general and more specifically the protection of the right to food for vulnerable groups. Desktop review as a

¹³³ Van de Berg L, Raubenheimer J 'Food Insecurity among Students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169.

research methodology has been described as a form of data gathering, wherein the researcher relies on already existing data to arrive at research findings.¹³⁴

The thesis uses relevant international and national legislation governing the right to food, rights and the protection thereof as its primary data sources.

The method of analysis applied includes the assessment and discussion of South African local law against international legal instruments providing for the rights to food and protection of the right to food. The review will include a review of books, articles as well as electronic materials obtained from various internet sites. The thesis also reviews the effect of policies in guaranteeing the right to food of students at tertiary institutions.

Although this is a socio legal research, the thesis did not employ field studies but rather utilised statistics from already conducted studies and thereby make deductions.

1.10 Chapter Overview

The thesis is divided into six chapters as described below.

Chapter 1: Introduction and Background to the Study

This chapter presents an overview of and a background to the thesis. Specifically discusses key concepts- such as the right to food and vulnerability in the realisation of human rights. It also touches on the interlink between these concepts.

Chapter 2: Vulnerability and Access to Food

This chapter discusses the theoretical framework for this thesis. The chapter discusses in depth what vulnerability in terms of human rights protection entails. It employs the analysis of international law and case law on the international scene to discuss the protection of the right to food for vulnerable groups in society. The chapter argues for the classification of students in tertiary institutions as a vulnerable group.

¹³⁴ Johnston M 'Secondary data analysis: a method of which the time has come' (2014) 3 *Qualitative and Quantitative Methods in Libraries* 619-626

Chapter 3: Stakeholders and Accountability in Ensuring Tertiary Students Access to Food

This chapter outlines and discusses current and relevant policy framework which directly impacts on the right to food of students in South African tertiary institutions. The chapter considers the obligations of the various spheres of government and organs of state to realise the right to food, whilst directly relating this to their obligation to students in tertiary institutions. The chapter also draws from the jurisprudence of the South African courts on other socio economic rights to situate the obligation to realise the right to food.

Chapter 4: Stakeholders and Accountability in Ensuring Tertiary Students Access to Food- A Role for Non- State Actors

This chapter evaluates the link between non-state actors and the right to food in the context of tertiary institutions. The chapter reiterates the indubitable link between non-state actors and the right to food, followed by a highlight of the role of non-state actors in addressing food insecurity at tertiary institutions. Then, an evaluation of the jurisprudence is done. This covers selected human rights monitoring bodies on the international scene, regional scene and decisions from South African courts.

Chapter 5: A Human Rights Approach as the Panacea to Food Insecurity in South African Tertiary Institutions

Following from preceding chapters, this chapter postulates that any solutions proffered to the problem of food insecurity in tertiary institutions, must flow from a human rights based approach. The chapter considers a plethora of other approaches, while making a case for a human rights based approach as the most suitable.

Chapter 6: Conclusion and Recommendations

The chapter drawing on observations from the preceding discussion, makes concrete recommendations to various actors, for addressing food insecurity among students in South African tertiary institutions and realising their right to food

1.11 Key Words

Food Security, Food Insecurity, Human Rights, Right to Food, Non-state Actor, Vulnerability



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CHAPTER 2

ANALYSING STUDENTS ACCESS TO FOOD THROUGH A POWER AND VULNERABILITY FRAMEWORK

2.1 Introduction

The previous chapter of this thesis introductorily discussed the foundational concepts for this study in brief, with a focus on the vulnerability of students in tertiary institutions to food insecurity. This chapter delves fully into the concept of vulnerability and power in terms of human rights protection and builds on the introductory discussions in the previous chapter.

This chapter sets out the theoretical framework for the study by examining how power in society distorts the allocation of resources, including food, along vulnerable contexts such as race, class and gender. The chapter further discusses in depth what vulnerability in terms of human rights protection entails. The chapter exemplifies how vulnerability and power play out using the historical contexts of access to tertiary education in South Africa and how that trend in turn affects the lived realities of students on campus including their access to food.

The term vulnerability has elicited a fair amount of discourse in the literature and has come to be ascribed different meanings in different contexts. It is widely attributed to mean being '[e]xposed to the possibility of being attacked or harmed, either physically or emotionally.'¹³⁵ Authors such as Bryan Turner, opines that harm remains a central defining feature as 'vulnerability defines our humanity as embodied subjects prone to suffering'.¹³⁶ Anna Grear, explains that we need not understand vulnerability as a uniform concept, as there are varied nuances to the term.¹³⁷ Notwithstanding the varied standpoint of authors on the term, one central point of convergence in recent literature is that many times vulnerability is misunderstood to mean a state of incapacity and inability. For instance, Marion and Donald argue that using the term 'vulnerable' for a specific group of persons runs the risk of othering such persons, exposing them to becoming subjects of pity without their own agency.¹³⁸ De Bruin, describes the use of the term 'vulnerable' as demeaning, paternalistic in its approach

¹³⁵ See Oxford Dictionary (2017).

¹³⁶ Turner B *Vulnerability and Human Rights* (2006) 1.

¹³⁷ Grear A *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (2010)132–133.

¹³⁸ See for instance Marion D and Donald P 'Health Policy, Vulnerability, and Vulnerable Populations.' In *Ethical Dimensions of Health Policy*, Eds Marion D, Clancy C and Churchill L (2002) 310–334.

and sexist.¹³⁹ This is not always the case, as many vulnerable groups and/or persons have been shown to be groups or persons, with the most ability to persevere under the worst of circumstances, albeit within conditions of extreme deprivation.

The section that follows discusses in detail the theoretical underpinnings of this study- power in society and vulnerability.

2.2 Theoretical Underpinnings

From the onset, it is necessary to identify and associate this study within a theoretical framework, as the explicit identification and inclusion of a theoretical framework is necessary for sound research.¹⁴⁰ The theoretical frameworks on Foucault's seminal work on power and Martha Fineman's vulnerability theory underpin the discussions and assumptions from which the issues for consideration in this study flows.

These theoretical frameworks are selected because they underpin the concerns highlighted in the research questions of this study. Foucault's theory on power in the archetypical post-modernist era reflects the deflection of access to resources away from vulnerable groups. It however stops short of proving who is vulnerable. Fineman's vulnerability theory provides the context for determining vulnerability and obligations arising from this vulnerability. The discussion that follows discusses the theories and their relevance to this study.

2.2.1 Power in Society

Power relationships are the foundational blocks on which society is built and have held the interest of scholars across a wide range of disciplines. To understand power relations in society is to understand the how and the whys of the poor and the rich. A nuanced definition the concept of power is yet to be agreed upon by social scientist- in fact, some argue that power by its nature can only be analysed after the fact, i.e. after it has been exerted.¹⁴¹ This dichotomy also

¹³⁹ DeBruin D (2001) 'Reflections on "Vulnerability."' *Bioethics Examiner* 5 (2) 1, 4.

¹⁴⁰ Grant C, Osanloo A 'Understanding, selecting and integrating a theoretical framework in dissertation research: creating the blueprint for your "house"' (2014) 4(2) *Administrative Issues Journal* 12-26.

¹⁴¹ Horakova H 'The predicament of the concept of power in Africa' in Horakova H, Nugent P (Eds) *Africa: Power and Powerlessness* (2011) 1.

plays out in the underlying theories of power. Nevertheless, power and its theory remains a necessary analytical tool for any study that analyses human political and/or social lived realities, such as this thesis.

Most social theorists tend to view power in terms of domination. In the Marxist contemplation of power, power determines which group(s) of persons have access to resources and which do not, as power itself is a resource for a select class of persons.¹⁴² This conception of power views it as being concentrated rather than diffused and vesting in specific persons or group of persons. Power in this regard is also largely described as being manifested through force, an example being state power expressed through the legitimate use of physical use of force and/or violence to prove dominance against subjects.¹⁴³ While the Marxist conception of power does define the ways in which power was expressed in the post-modernist era, it limits the contemplation of power in society. It fails to give expression to the manifestations of power in subtle but equally potent measures.¹⁴⁴ It thus is not ideally suited as a theoretical framework for this study.

Micheal Foucault offered an alternative to the Marxist conception of power in society by his redefinition of power as being ‘embedded’ in humans rather than ascribed.¹⁴⁵ In Foucault’s perception, power is pervasive- constantly present in social interactions at every level, as he succinctly states:

Power is everywhere; not because it embraces everything, but because it comes from everywhere. ... Power is not an institution, nor a structure, nor a possession. It is the name we give to a complex strategic situation in a particular society.¹⁴⁶

Foucault theorises that the embodiment of power in every relationship means that we are constantly subjecting power and being objects of it. This is perhaps most visible in social relationship where some are subjects of power and others are objects of it. This resonates with reported incidences of powerlessness and shame resulting from student hunger and the exposure to charitable offerings of food and/or food packs for hungry students.¹⁴⁷ It is evident

¹⁴² World Bank ‘The definitions of poverty’ Available at <https://siteresources.worldbank.org/INTPOVERTY/Resources/335642-1124115102975/1555199-1124115187705/ch2.pdf> (Accessed 6 April 2017).

¹⁴³ Nigam A ‘Marxism and power’ 1996 24 (4) *Social Scientist* 9.

¹⁴⁴ Thomas L (2002) Foucault, Governmentality, and Critique, *Rethinking Marxism*, 14:3, 49-64; Lynch R (2011) ‘Foucault’s theory of power’ in Taylor D (ed). *Michel Foucault: Key Concepts*, 13-26.

¹⁴⁵ Horakova H (2011) 5.

¹⁴⁶ Foucault M *The History of Sexuality, Volume 1: An Introduction* (1980) 93.

¹⁴⁷ El Zein A, Matthews A, House L and Shelnutt K ‘Why are hungry college students not seeking help? Predictors of and barriers to using an on-campus food pantry’ (2018) (10) *Nutrients* 1163 -1177.

that devoid of a human rights framework in which students' access to food is guaranteed, disenfranchised students remain objects

Further, Foucault perceives power as 'diffused' and not residing in persons, class of persons or specific institutions, but rather as cutting across all strata of society.¹⁴⁸ He departs from the Marxist focus on power being vested in the state and ventures to describe power as the diffusion of power across 'capillaries of the social body'.¹⁴⁹ This in Foucault's conceptualisation means that power by its very nature 'infuses actions, attitudes, discourses, knowledge, learning, and practices of people in everyday life.'¹⁵⁰ Foucault's recognition that other actors beyond the state are able to exert power enough to determine access to resources resonates strongly with this study's initial assumptions on the role of non-state actors in impacting students' access to food.

Foucault's critique of what he terms the "juridico-political" discourse is one of his main notions of power and a response to what he referred to as a misconception of power which has obscured the manners in which power is actually operated, thus making several of the actual workings of power tolerable.¹⁵¹ Foucault argues that this model of power is the basis of both the dogmatic Marxist conceptions of class domination and the liberal theories of sovereignty. Whereas the former sees the state as an apparatus of the bourgeoisie and locates power in the economy, the latter affirms that legitimate authority is constituted in law and is rooted in a theory of rights. A shared assumption of both conceptions is the idea that power is something that can be possessed (by the state, a class, an elite or the people, that it can be located in a centralized source such as the economy or the state, and that it is essentially repressive in its exercise).¹⁵² In rejecting this perspectives, Foucault displaced the focus on legitimization and law, replacing law and contract with war and conquest. He opined that power must be understood as relations of force where such relations encompasses "whatever in one's social interactions that pushes, urges or compels one to do something."¹⁵³

¹⁴⁸ Gaventa, John *Power after Lukes: a review of the literature* (2003) 2.

¹⁴⁹ Horakova H (2011) 5.

¹⁵⁰ Horakova H (2011) 6.

¹⁵¹ Lynch, R. A. (2011).

¹⁵² Thomas L (2002).

¹⁵³ Lynch, R. A. (2011:19).

Lastly, Foucault also conceptualises the positivity of power and power relations and departs from the erstwhile assumption that power implies negativity and suppression only. In his work on *Discipline and Punish*, he opines that

We must cease once and for all to describe the effects of power in negative terms: it ‘excludes’, it ‘represses’, it ‘censors’, it ‘abstracts’, it ‘masks’, it ‘conceals’. In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.¹⁵⁴

Foucault’s conception of power as positive is relevant specifically in the light of the empowerment of vulnerable groups over time. In general, Foucault’s conceptualisation of power and power relations in society resonates with this study’s underpinnings on how power expressed in subtle forms can affect the outcomes of persons’ access to resources. The greatest predictors of food insecurity in South Africa generally and, by extension, tertiary institutions are race and class.¹⁵⁵ This is a pointer to how structural inequality limits access to food in the short term and access to education and freedom from circuits of poverty in the long-run. Thus, as an embedded resource, white students, by virtue of their race and mostly financially secure socio-economic class, are more likely to have the power to address food insecurity as against black students. This argument is illustrated in the next section by conceptualising vulnerability

Furthermore, Foucault was of the notion that intervention programmes use and transmit specific types of knowledge which are reckoned to be prevailing “truths”. Truth represents one of Foucault’s technologies of power which comprises societal discourses that expound on certain “truths,” while devalorising others as untrue and consequently allows particular members of society to become experts of knowledge while others are excluded.¹⁵⁶ Indeed, this can be related to specific food security programmes and plans that are developed and implemented in South Africa and certain assertions of their success. Foucault also believed that the outcome of shifting power relations is either resistance or conformity through self-regulation (docility). Although he was of the opinion that power cannot be gotten without resistance, he also asserted that modern form of micro-power is immensely enhanced by human self-regulation, a term he also referred to as subjectification through which people present

¹⁵⁴ Foucault M *Discipline and Punish: The Birth of The Prison* (1977)194.

¹⁵⁵ See 2019 Statistics SA report on ‘Towards measuring the extent of food insecurity in South Africa: an examination of hunger and food inadequacy’, which profiles black headed households vulnerable to hunger in South Africa at 91.1% out of an aggregate of 1.7million vulnerable households. Available at <http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf> Page 18.

¹⁵⁶ Dayle J & McIntyre L ‘Children's feeding programs in Atlantic Canada: some Foucauldian theoretical concepts in action’. (2003) *Social science & medicine*, 57(2), 313-325.

themselves as “willful agents but also as conforming subjects.”¹⁵⁷ While the “Fees Must Fall” movement represents a form of resistance by students, the near absence of agitations specific to food insecurity on campuses is noteworthy and is somewhat highlighted in this thesis.

2.2.2 Vulnerability

Vulnerability as a term is conceptualised differently across disciplines. According to Alwang et al, each discipline has its own reasons for defining and measuring vulnerability.¹⁵⁸ Hence, individual disciplines have their scales and measures for classifying persons as ‘at risk’ or vulnerable.¹⁵⁹ For instance, environmental and climate scientist view vulnerability as the identification of aspects of the environmental system susceptible to harm and the extent of such harm.¹⁶⁰ Information technologists on the other hand, established a vulnerability framework to identify weak links within security systems.¹⁶¹ Medical bioethics view vulnerable populations as social groups with heightened susceptibility to adverse health outcomes.¹⁶² Despite the divergence, a recurring theme in the description of vulnerability is the possibility or presence of ‘harm’ as an element of vulnerability. Fineman’s vulnerability theory will serve as the theoretical framework upon which this thesis is based.

It is important to note at the outset that Foucault’s conceptualisation of power in society is not far divorced from Fineman’s vulnerability theory. Like Foucault who theorizes that power is ever present, Fineman hinges the vulnerability theory on its constant and universal nature. As

¹⁵⁷ Dayle J & McIntyre L (2003:321).

¹⁵⁸ Alwang J, Siegel P and Jorgenson S. ‘Vulnerability as Viewed from Different Disciplines.’ Presented at Sustaining Food Security and Managing Natural Resources in Southeast Asia: Challenges for the 21st Century. International Symposium. Chiang Mai, Thailand, 8–11 January 2002. Available at http://www.uni-hohenheim.de/symposium2002/pa_full/Full-Pap-S1-1_Siegel.pdf (Accessed 6 May 2019).

¹⁵⁹ Alwang J, Siegel P and Jorgenson S. ‘Vulnerability as Viewed from Different Disciplines.’ Presented at Sustaining Food Security and Managing Natural Resources in Southeast Asia: Challenges for the 21st Century. International Symposium. Chiang Mai, Thailand, 8–11 January 2002. Available at http://www.uni-hohenheim.de/symposium2002/pa_full/Full-Pap-S1-1_Siegel.pdf (Accessed 6 May 2019).

¹⁶⁰ Neil W ‘Vulnerability’ (2006) 16 (3) *Global Environmental Change* 268- 281; Turner B II et. Al ‘A framework for vulnerability analysis in sustainability science’ (2003) 100 (14) *Proceedings of the National Academy of Sciences*.

¹⁶¹ Xiuzhen Chen et. al ‘An OVAL-based active vulnerability assessment system for enterprise computer networks’ (2008) *Information Systems Front*.

¹⁶² Leight S ‘The application of a vulnerable population’s conceptual model to rural health’ (2003) 20 (6) *Public Health* 440– 48.

against the traditional meaning of vulnerability which pleads a case for disempowerment or victimhood of people, Fineman views vulnerability as an ever present state, to be understood as universal and constant- inherent in the human condition.¹⁶³ Vulnerability in this sense is borne out of the condition of humanity itself- from start to finish. The vulnerability of humans at birth is self-evident and applicable to all humans, and persists at different stages of the life cycle until the very end of a human's life. This vulnerability is brought on by a multiplicity of factors from external factors (such as adverse weather conditions) to internal factors (such as ill health and/or change in life circumstances). Mary Neal aptly summarizes it as follows:

[V]ulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) . . . Second, I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds.¹⁶⁴

In this sense, we all as humans experience vulnerability in two contexts- embodied and particularly.¹⁶⁵ Embodied in the sense that as Fineman has described, vulnerability is an embodiment or a lived reality of the very essence of human nature. It is however particular because we all experience vulnerabilities in our particular ways. In agreement with Neal's description above on being vulnerable to various kinds of hurt and harm, Peroni and Timmer, opined that harm comes in many intersecting varieties, including bodily, moral, psychological, economic and institutional.¹⁶⁶ All of these varieties of harm are pointers to the ways in which vulnerability can become particular- as experiences of harm differ from one human to the next.

Thus, an understanding of embodied vulnerability changes the erstwhile conception of equality at law. Equality and suggested solutions to discrimination have historically been viewed from the paradigm of the liberal subject at law. Fineman posits that the conceptualisation of equality in the liberal model, advances the assumption that all human beings are by their nature equal, free and born with inalienable rights, narrowly interpreted as 'sameness of treatment'.¹⁶⁷ This doctrine of equal protection has morphed into protection for standard categories of race, sex, nationality, religion etc, as enunciated in legislation and through the courts.

¹⁶³ Fineman M 'The vulnerable subject: anchoring equality in the human condition' (2008) 20 (1) *Yale Journal of Law and Feminism* 1.

¹⁶⁴ Mary N 'Not Gods but animals: Human dignity and vulnerable subjecthood' (2012) 33 *Liverpool Law Review* 177 186-187.

¹⁶⁵ Peroni L, Timmer A 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law' (2013)11(4) *International Journal of Constitutional Law* 1056.

¹⁶⁶ Peroni L, Timmer A (2013) 1058.

¹⁶⁷ Fineman M *The Illusion of Equality* (1991) 36.

Fineman asserts that whilst this doctrine of equality as sameness of treatment has served the purpose of addressing discrimination in some instances, it stops short of being an adequate tool to address persistent forms of discrimination and systemic inequities.¹⁶⁸ Formal equality in this sense, leaves undisturbed systems of privilege by a few to the detriment of others. By its failure to provide a framework to challenge the allocation of resources by the executive, it fails to address the disparities of economic and social discrimination in society. This is apparent in the post-apartheid South African tertiary education landscape.

It can be argued that opening the doors of post-secondary institutions to all after apartheid was a classic case of formal equality. What this did was grant sameness of treatment to all irrespective of race, with regard to their access to post-secondary education. However, more was and still is needed to correct centuries of deprivation of access to resources, if majority of students in the tertiary education sector are to be full embodied participants rather than mere recipients of post-secondary education.

In recent years, there has been a move towards seeing vulnerability not only in the context of disempowerment, but also as a positive force. This view ties in with Foucault's conceptualisation of power as not only a negative force, but also positive. Fineman, as a proponent of this move, argues that human vulnerability is generative of suffering, and this generative capacity 'presents opportunities for innovation and growth, creativity, and fulfilment. It makes us reach out to others, form relationships, and build institutions.'¹⁶⁹ Fineman contextualizes this further by noting the need to move from viewing human vulnerability in negative terms and seeing it for the potential it possesses. A successful move to this point requires a deeper understating of the need to move from ascribing vulnerability to specific contexts of people, which sustains the liberal argument, to understanding the universal scope of vulnerability.

The universal scope of vulnerability suggests the need for the reliance on institutions to address these vulnerabilities. This conception of vulnerability puts the state firmly at the centre of obligation when dealing with the peculiarities of vulnerabilities that humans experience. In this

¹⁶⁸ Fineman M (1991) 46, 174.

¹⁶⁹ Fineman M "'Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *The Elder Law Journal* 101.

light, Fineman proposes we understand vulnerability as a universal, inevitable, [and] enduring aspect of the human condition, and affirms that the proper role of the state is to be responsive to this.¹⁷⁰ This conception of vulnerability departs from formal equality models of ‘equal protection for all’ but rather delivers substantive equality as needed by persons in society. Rather than focus on the individual, it focuses on the State’s role in perpetuating vulnerability and institutional practices that produce the identities and inequalities in the first place.¹⁷¹ This turn to viewing vulnerability as universal rather than individualistic, centres and argues for a larger role for the State. In this vein, Cooper notes ‘. . . [S]ince we cannot escape our inevitable dependency, we might as well band together to fight for a strong state.’¹⁷²

It is thus important to bear in mind the contextual relationship between vulnerability in society and the State, and that one cannot be far divorced from the other. The State can through its policies and/or practices perpetuate or alleviate vulnerabilities. In the context of access to food for students in tertiary institutions within South Africa, the absence of specific policy to address the inequities of disadvantage giving rise to food insecurity, is an indirect perpetuation of vulnerability. This relationship is further explored later in this chapter when the trajectory of South African tertiary institutions is considered.

It is noteworthy that Fineman’s vulnerability theory has not gone without criticism. Kohn criticises the theory’s inability to work in the real world as a ‘prescriptive tool’.¹⁷³ In her assessment, Kohn argues that Fineman’s vulnerability theory has limited practical use in determining how to prioritise vulnerable subjects in the light of the state’s limited resources.¹⁷⁴ In response to this, firstly all theories have their limitations and the vulnerability theory is no exception to this. A theory should therefore not be wholly dismissed because of limitations which it might present. More importantly however is the fact that it is impractical to present a framework for determining scale of peoples’ vulnerabilities through a theory. This is best

¹⁷⁰ Fineman M ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2009) 20 *Yale Journal of Law and Feminism* 1, 9.

¹⁷¹ Fineman M ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2009) 20 *Yale Journal of Law and Feminism* 1, 16.

¹⁷² Cooper F ‘Always already suspect: revising vulnerability theory’ (2014) 93 (5) *North Carolina Law Review* 1339- 1379.

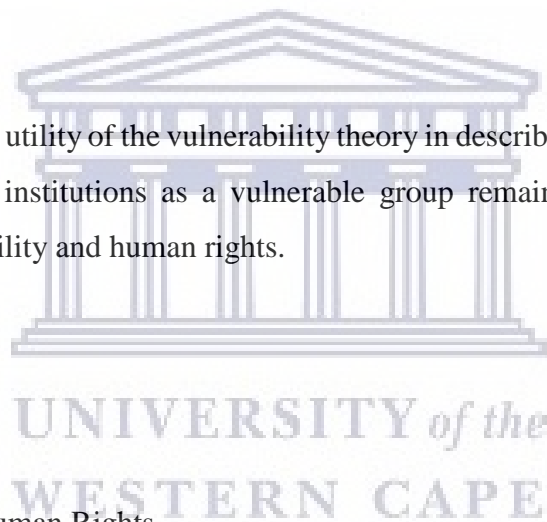
¹⁷³ Kohn N ‘Vulnerability theory and the role of government’ (2014) 26 (1) *Yale Journal of Law and Feminism*.

¹⁷⁴ Kohn N (2014).

addressed on a case by case basis and should ordinarily be decided by policymakers within the particular context.

Furthermore, Cloud in criticism of the vulnerability theory, noted that it undervalues the human desire for autonomy by centring the ‘responsive state’ envisioned by Fineman as the ultimate source of satisfaction for all basic human needs.¹⁷⁵ Kohn agrees with this standpoint by arguing that the application of the vulnerability theory to old-age policies has a leaning towards being paternalistic in nature.¹⁷⁶ There are two response to this, first as discussed above, the vulnerability theory categorically rejects the notion of the liberal subject in law. On this premise, the concept of ‘choice’ is diminished because people’s choices become less important in dictating the course of their lives. Second, particularly vulnerable people might in fact require these paternalistic policies to move them from positions of particular vulnerability to resilience.

Despite these critiques, the utility of the vulnerability theory in describing and locating students in South African tertiary institutions as a vulnerable group remains instructive. For now, attention turns to vulnerability and human rights.



2.3 Vulnerability and Human Rights

This section traces the inclusion of ‘vulnerability’ in the human rights discourse and discusses the development of vulnerability viz a viz human rights. The first issue for consideration in this regard is whether human rights is construed to protect vulnerable persons. Although rapidly expanding, the terrain of vulnerability and human rights is a largely contested terrain.¹⁷⁷ Scholars differ as to whether human rights can be interpreted to protect the most vulnerable in

¹⁷⁵ Cloud M ‘More than utopia’ in Albertson M and Fineman M (Eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Policy* (2015) 77-94.

¹⁷⁶ Kohn N (2014).

¹⁷⁷ Turner B *Vulnerability and Human Rights* (2006). 28

society.¹⁷⁸ There are two opposing arguments in this regard. Anna Grear in her work, presents both sides of the argument. The first strand of argument in agreement with Fineman notes that the concern of human rights is a concern for embodied vulnerability of humans as reflected in the Universal Declaration of Human Rights (UDHR).¹⁷⁹ The genealogy of human rights as a discourse is predicated upon the response to humans' embodied vulnerability in its earliest articulation in the eighteenth century. Added to this, the UDHR was a direct response to many of the horrors of human rights violations experienced during the Second World War. In this context, it is arguable that the discourse of human rights does in fact conceptualise vulnerability.¹⁸⁰

On the other hand, Anna Grear also notes that the conceptualisation of human rights envisions the liberal subject as the beneficiary and rightful owner of human rights, thereby excluding many groups of persons from laying claim to human rights. In this context, the liberal subject is envisaged to be self-sufficient, independent and autonomous. This subject of human rights is deemed 'invulnerable', hence the disjuncture. Groups which do not fall within the archetype of the liberal subject were therefore excluded, falling outside the conceptualisation of the UDHR.¹⁸¹ This is exemplified in the multiplicity of specific treaties that over the years have been developed in response to this problem.¹⁸² Grear reckons that the proliferation of these specific treaties are 'critiques of the closures of the abstract universal and the outcome of quasi-disembodiment'.¹⁸³

It is also noteworthy that over the years, the various human rights monitoring bodies, both internationally¹⁸⁴ and regionally, have in the exercise of their protective mandates through concluding observations and general comments, paid special attention to vulnerability and the

¹⁷⁸ Turner B *Vulnerability and Human Rights* (2006) 28; Chapman A & Carbonetti B 'Human rights protections for vulnerable and disadvantaged groups: the contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 *Human Rights Quarterly* 682.

¹⁷⁹ Grear A *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (2010) 132–133.

¹⁸⁰ Grear A (2010) 131.

¹⁸¹ Peroni L, Timmer A 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law' (2013) 11(4) *International Journal of Constitutional Law* 1056–1085.

¹⁸² For example the Convention on the Rights of Persons with Disabilities; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention on the Elimination of Racial Discrimination; and the Convention on the Rights of the Child.

¹⁸³ Grear A *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (2010) 132–133.

¹⁸⁴ It is important to note that the CESCR has continuously stressed that the ICESCR is a vehicle for the protection of vulnerable groups in society.

protection of human rights. For instance, General Comment 12 (GC 12) issued by the Committee on Economic, Social and Cultural Rights (CESCR), pays special attention to vulnerable groups in its elucidation of the content of the right to food. Several paragraphs of this General Comment, highlight the need for state intervention.¹⁸⁵ Specifically, Paragraph 13 on accessibility, makes a case for ‘socially vulnerable groups such as landless persons and other particularly impoverished segments of the population [needing] attention through special programmes’¹⁸⁶ and ensuring physical accessibility to physically vulnerable persons such as children, infants, aged, physically disabled and sick persons.¹⁸⁷ Paragraph 13 further makes mention of the particular vulnerability of indigenous people when it states ‘A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.’¹⁸⁸ It is also instructive that the CESCR in GC 12 expounds on the States core and non derogable obligation towards vulnerable groups, to be implemented as a matter of urgency.¹⁸⁹

Furthermore, treaty monitoring bodies have over the years and through their concluding observations, drawn attention to the plight of vulnerable groups and the duty of the state to specifically intervene.¹⁹⁰ When assessing periodic reports of states, the CESCR has consistently drawn attention to the plight of vulnerable communities and made concrete recommendations in this regard. For instance, in the 2012 Concluding Observation for Cameroon, the CESCR is specific that the realisation of ESCR requires state parties to the Covenant to pay special attention to vulnerable groups. The CESCR then goes ahead to specifically characterise women in Cameroon as vulnerable and expounds on the right to an adequate standard of living for women.¹⁹¹

¹⁸⁵ See for instance Paragraphs 13, 28, 35 and 38 of the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, available at: <https://www.refworld.org/docid/4538838c11.html><https://www.refworld.org/pdfid/4538838c11.pdf>.

¹⁸⁶ See Para 13 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, available at: <https://www.refworld.org/docid/4538838c11.html><https://www.refworld.org/pdfid/4538838c11.pdf>.

¹⁸⁷ Supra, Para 13.

¹⁸⁸ Supra, Para 13.

¹⁸⁹ Supra, Para 28.

¹⁹⁰ Nifosi- Sutton I *The Protection of Vulnerable Groups Under International Human Rights Law* (2017) 144.

¹⁹¹ UN Economic, Social and Cultural Rights (CESCR) Concluding observations of the Committee on Economic, Social and Cultural Rights - Cameroon E/C.12/CMR/CO/2-3 (23 June 2012) Available at <file:///C:/Users/Admin/Downloads/G1243750.pdf>.

Therefore, while it may be argued that the initial conceptualisation of human rights did not in fact contemplate protection for the vulnerable, the evolution of the discourse of human rights today places the vulnerable at the centre of human rights protection. Whether the vulnerability in this context is reminiscent of the general embodiment of human vulnerability or of specific group vulnerabilities would depend on the context. The courts over the years have further developed the concept of vulnerability and vulnerable groups.

Indeed the jurisprudence of the Courts in South Africa has reflected a recognition of vulnerability through its interpretation of the States' duties in the bill of rights. In *Hoffmann v South African Airways*, the Court noted 'Our Constitution protects the weak, the marginalised, the socially outcast, victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.'¹⁹² In this regard, Mubangizi, described the protection of human rights as one of the seminal functions of the courts in South Africa, carried out through their interpretation of the constitutional bill of rights and the exercise of their adjudicatory powers.¹⁹³

The inclusion of socio economic rights in the bill of rights of the South African constitution post-apartheid, was a clear indication of the vulnerabilities and inequalities which were a legacy of the apartheid system and which needed redress.¹⁹⁴ The section that follows examines the legacy of apartheid and exacerbated vulnerabilities in the South African tertiary education sector.

2.4 The Trajectory of Higher Education in South Africa- A Legacy of Power, Contestations and Vulnerability

To situate students in tertiary institutions as a vulnerable group, it is important to understand the trajectory of higher education in South Africa, specifically in the pre and post-apartheid eras. It is however necessary to highlight that university education commenced under colonial

¹⁹² 28 September 2000, Case CCT 17/00, 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC), para. 34.

¹⁹³ Mubangizi J 'Protecting Human rights amidst poverty and inequality: The South African post-apartheid experience on the right of access to housing' (2008) 2 African Journal of Legal Studies 130 – 146 at 141.

¹⁹⁴ Christiansen C 'Adjudicating non-justiciable rights: socio-economic rights and the South African Constitutional Court' *Columbia Human Rights Law Review* (2007) 38 328.

rule of the British. Colonial rule was exercised both directly and indirectly and touched on various spheres of political and socio economic South Africa, including education. Colonial rule took a paternalistic view of education, pushing and upholding white supremacist education, while eradicating and discountenancing indigenous forms of knowledge and knowledge production. This approach was replicated in South Africa.¹⁹⁵ Pietsch affirms that in South Africa, the colonial universities were introduced by ‘settler elites who saw them as both symbols and disseminators of European civilisation in the colonies.’¹⁹⁶ He further adds

Presuming the universality and superiority of ‘Western’ culture, these ‘settler’ universities established themselves as the local representatives of ‘universal’ knowledge, proudly proclaiming this position in the neo-gothic buildings they erected and the Latin mottos they adopted¹⁹⁷

2.4.1 Higher Education under Apartheid

The introduction of apartheid in 1948 only served to further the white supremacist agenda within the higher education sector. Higher education policy during the apartheid era was largely shaped by race and the politics of race.¹⁹⁸ Through the ruling party, the apartheid government made distinctions between the white and other areas of South Africa, by dividing the country into five entities and two main groupings –

- i. The Republic of Transkei (formed from part of the old Cape Province).
- ii. The Republic of Bophuthatswana (formed from part of the old Transvaal Province).
- iii. The Republic of Venda (also formed from part of the old Transvaal Province).
- iv. The Republic of Ciskei (formed from another part of the old Cape Province).
- v. The Republic of South Africa (RSA) (which consisted of the vast majority of the land holdings of the old South Africa).

The first four which later came to be addressed as TBVC, were majorly made up of the black, coloured and Indian population, while the RSA was strictly for whites. It is interesting that even though the then National party considered the TBVC as independent states, the rest of the

¹⁹⁵ Heleta S ‘Decolonisation of higher education: Dismantling epistemic violence and Eurocentrism in South Africa’ (2016) 1 (1) *Transformation in Higher Education*.

¹⁹⁶ Pietsch T ‘Empire and higher education internationalisation’ (2013) *University World News*, 20 July, Issue No: 282 viewed 16 April 2109, Available at <https://www.universityworldnews.com/post.php?story=20130718115637589>.

¹⁹⁷ Supra.

¹⁹⁸ Bunting I ‘The higher education landscape under apartheid’ in Cloete N et al *Transformation in Higher Education* (2006).

world shunned this artificial divisions, as a creature of apartheid. What is important to note is that this division would later have a long lasting impact on the trajectory of socioeconomic impact of the races, including an impact on education.¹⁹⁹

In 1984, a new constitution was introduced for what was then regarded as the RSA, which divided the national parliament into three houses- one for whites (House of Assembly), one for Indian (House of Delegates) and one for coloured voters (House of Representatives). African voters were not given any representation under the RSA constitution. In furtherance of the disenfranchisement of other race groups outside the whites, the 1984 constitution made a clear distinction between what was known to be ‘own affairs’ and ‘general affairs’. Own affairs were ‘matters specific to the ‘cultural and value frameworks’ of the coloured or Indian or white communities’²⁰⁰, while general affairs were matters which concerned all race groups. This distinction laid the bedrock for the differentiation in education between the white and other race groups.

Regarding the white, coloured and Indian population, the 1984 constitution prescribed education as an ‘own affair’, thus matters relating to education were within the ambit of the respective houses for each racial group. Education for Africans under the 1984 Constitution was prescribed as a matter for ‘general affairs’, vested in the then Department of Education and Training (DET).²⁰¹ Consequentially, institutions of higher learning had to be designated as exclusively for a specific race group. Constraints to discourage co-education of races were activated by the National Party, with stringent exceptions. Thus for instance, a coloured student seeking to be educated in a white only university could only do so where the university obtained a permit. Permits were only granted where it could be shown that other universities designated for the race group of the applicant, did not offer the courses which the applicant sought to study.²⁰²

¹⁹⁹ Moses E, Van der Berg S and Rich K ‘A Society Divided: How Unequal Education Quality Limits Social Mobility in South Africa’ (February 1, 2017). Synthesis report for the Programme to Support Pro-Poor Policy Development (PSPPD). Stellenbosch, February 2017. Available at SSRN: <https://ssrn.com/abstract=2973759>.

²⁰⁰ Bunting I (2006) 36.

²⁰¹ Bunting I (2006) 36-37.

²⁰² Bunting I (2006) 38.

This permitting system had far reaching consequences in disenfranchising other race groups outside whites, and created systems of inequities in their access to equal opportunities and access to education. The discussion on vulnerability as a theoretical framework for this study comes to bear in this discussion. As alluded earlier in this chapter, policies of the state either alleviate or exacerbate vulnerabilities. It is clear that the educational and other socio economic policies under the apartheid regime, while it alleviated vulnerabilities of white students, exacerbated vulnerabilities of black, coloured and Indian students. It is this legacy that continues to plague the landscape of tertiary education in South Africa to this day and why policies must take a human right centric approach to correcting this legacy. Furthermore, it can also be inferred that the system was reflective of Foucault's theory of power as an embedded resource to navigate system and have better outcomes. On this note, it can be implied that the embedded advantage of race and by implication better socioeconomic status under the apartheid regime, was a resource which advantaged white students (compared to their black, coloured or Indian counterparts), leading to overall better outcomes several generations later.

2.4.1.1 Historically White Universities (Historically Advantaged Universities)

The ideology of the National Party with regard to tertiary institutions viewed Universities as 'a creation of State' and by implication, they could also be dismantled by the State. This ideology found support in historically white universities, especially in the Afrikaans-medium historically white Universities.²⁰³ Many of them hardly used the permit systems to incorporate students from other race groups, especially black Africans, as reflected in their poor diversity rates of 90% and 89% white student population as at 1990 and 1993, respectively.²⁰⁴ These universities, run by executives and councils who wholly supported the policies of the apartheid regime, were viewed as serving the larger purpose of the apartheid regime and considered their continued financial survival as linked to being in good relations with the apartheid regime.²⁰⁵

The governance culture of these universities earned them the reputation of instrumentalist institutions, mainly set up for the purpose of furthering the apartheid agenda. Ian Bunting in defining instrumentalist institutions within the higher education context, noted that:

An instrumentalist higher education institution can be defined, for these purposes, as one which takes its core business to be the dissemination and generation of knowledge for a purpose

²⁰³ Bunting I (2006) 36.

²⁰⁴ Bunting I (2006) 36.

²⁰⁵ Bunting I (2006) 37.

defined or determined by a socio-political agenda. Knowledge is not regarded as something which is good in itself and hence worth pursuing for its own sake. It follows that knowledge which could be used for a specific social, economic or political purpose would be the primary form pursued in an instrumentalist institution.²⁰⁶

In this regard, Jansen sums up the academic and governance culture in these universities when he states

The first thing that hits an outsider ... is the powerful role of centralised authority within the institution. I was thoroughly shocked when I discovered how meetings are managed on the campus. The chairperson was not a facilitator who generated the best ideas on a problem ... from the collective minds of the attendees, before seeking an appropriate set of resolutions ... No: the chairperson, in most cases, already had the solutions and, it often appeared, had decided in advance what solution would be proposed (imposed?) and accepted. Now this has two dampening effects on institutional cultures and the individuals within them: it reduces the participants to powerless observers of a centralised process, and it reinforces the notion that intellectual authority vests in seniority rather than in the mix of personal talent in attendance ... The second thing that I observed was the relationship between staff, and especially between senior and junior academics. I observed, with some intrigue, the all-powerful role of senior academics (heads of department, deans, vice-principals, principal etc ... [There are many institutional] messages, layered on each other, that tell the junior person over and over again, that she is simply another body in the area, devoid of authority to act, inspire, lead, differ, contradict, change, initiate. She is simply a void whose intellectual and emotional life needs 'filling' by the promoter, the professor, the higher authority.²⁰⁷

[There is at this institution a] lack of critical discourse in the disciplines as well as in more public spheres with respect to pressing social and human problems. There is a pervasive and narrow problem-solving, applications-based pedagogy and research, but not much of a standing back and posing of critical questions in an attempt to understand, probe, disrupt official policy or standard practice.²⁰⁸

It is clear from the above that Bunting's and Jansen's descriptions of the institutional and governance cultures of historically white universities under apartheid are reminiscent of the earlier discussions in this chapter on Foucault's theories of power, specifically on power as a force for producing/reproducing. In the instant case, the power wielded by and at historically white universities produced a system of oppression and segregation that became so pervasive²⁰⁹ as to still be in effect many decades post-apartheid. It also reinforces Foucault's assertion that power permeates the social body, is contingent on persisting power relationships, and that power is either imperative for the good of all or is a tool of repression²¹⁰. It also clearly reflects the critique of the negative representations of power - what Foucault refers to as the "juridico-

²⁰⁶ Bunting I (2006) 40.

²⁰⁷ Jansen J 'Why Tukkies cannot develop intellectuals (and what to do about it)' (2001) *Innovation Lecture Series, 11 May 2001* Page 2.

²⁰⁸ Jansen J (2001) 4.

²⁰⁹ Re Foucault's theory on power as being pervasive.

²¹⁰ Dayle J & McIntyre L (2003).

discursive” understanding of power. Some of the principal characteristics of the misrepresentation are that power always takes the form of a law or rule involving a binary system of forbidden and permitted or illegal and legal, and that power is operational through a cycle of prohibition, a law of interdiction.²¹¹ It is however obvious that the manifestations of power in Jansen’s and Bunting’s descriptions are not written rules but subtle forms in which power is manifested.

The situation was only slightly better in English-medium previously white universities. Although on the surface their ideological stance seemed to differ from the Afrikaans medium historically white universities, they shared some similarities. One striking similarity was the authoritarian system of governance that was prevalent. Whilst there was a collegial system of governance in the general management of these institutions, lower cadres of junior staff and students were on the receiving end of the authoritarian governance models, with little to no room for assertion of any rights. Closer to the end of Apartheid, there was misplaced optimism on the part of the four historically white universities, as they were heavily criticised as never being true agents of social change and ‘islands of white social privilege’.²¹² In this regard, the former vice chancellor of the University of the Western Cape, Jake Gerwel noted:

In spite of our genuine commitment to free scholarly discourse and research every South African university has a dominant ideological orientation which describes the context of its operations. ... This is demonstrably true of both the subsets of historically white Afrikaans-language and English-language universities. The Afrikaans universities have always stood and still firmly stand within the operative context of Afrikaner nationalism. Networking in a complex way into its various correlative institutions ... Equally the English-language universities operate within the context of Anglophile liberalism, primarily linking and responding to its institutional expressions as in the English schools, cultural organisations and importantly big business. The one ideological formation under-represented or not at all represented in a similar way within the South African university community is that of the more radical Left²¹³

2.4.1.2 Historically Black Universities

²¹¹ Lynch R. (2011).

²¹² Mamdani M ‘Is African Studies to be Turned into a New Home for Bantu Education at UCT? (1998) Centre for African Studies, University of Cape Town.

²¹³ Gerwel J Inaugural address given by Professor Jakes Gerwel at his installation on 5 June 1987 as sixth Vice-Chancellor and Rector of the University of the Western Cape.

Historically black universities under apartheid were located both within the regions then regarded as the RSA (white homeland), consisting of two universities- one for coloureds and one for Indians,²¹⁴ and the TBVC (black homeland) with four historically black universities for Africans.²¹⁵

Although with students' populations which were mainly black up until the 1990s, the black universities within the RSA were also instrumentalist in nature. Instrumentalist in the sense that they were created for and at the pleasure of the then apartheid governments, to fulfil specific purposes, chief of which was to train black teachers for black schools and fulfil the need for lower cadre staff within the apartheid civil service. The apartheid agenda and authoritarian system of governance was furthered by ensuring that for the most part, leadership, including governing councils, and academic staff in these universities, were from white-Afrikaans medium universities, who de-emphasised production of new knowledge through research.²¹⁶ This intentional agenda on the part of the apartheid government, ensured that black universities were restricted to only reproducing materials previously taught in Afrikaans medium university.

Within the TBVC, there were four historically black universities- the University of Transkei, North West University, the University of Venda and the University of Fort Hare. Established within African homelands, their student enrolment were primarily black. Surprisingly, the governance structures of these universities were also very authoritarian. This can be attributed to the fact that the establishing governments viewed and treated the universities as 'an arm/department of government'.²¹⁷ The governments similar to the situation of black universities in the then RSA, saw the universities within the TBVC as a training ground for civil servants and teachers. In describing the University of Transkei, Habib notes that

... as a bantustan university, Unitra was not a financially autonomous institution. In fact, it was treated as any other department within the homeland civil service, and had its finances taken care of by whichever regime was in power in the Transkei. In a very real sense, Unitra was simply another line item in the budget of the Transkei's Department of Finance. A culture of

²¹⁴ The University of the Western Cape and the University of Durban-Westville respectively, controlled by houses in the Tricameral Parliament.

²¹⁵ Medunsa University, the University of the North, Vista University and the University of Zululand under the leadership of the Department of Education and Training.

²¹⁶ Bunting I (2006) 45.

²¹⁷ Bunting I (2006) 46.

financial accountability and modern systems of financial control were thus almost non-existent in the institution even as late as the 1990s.²¹⁸

While historically black universities remained instrumentalist and authoritarian in nature through the 80's, the situation changed from the 90s as they gradually resisted apartheid control to become strongholds of the struggle. The Universities of the Western Cape and the University of Durban-Westville rejected the apartheid ideologies of 'own affairs' on which they were founded, to admit students of other races. By 1993, Durban Westville had an Indian student population of only 53%, while University of the Western Cape had a coloured student population of only 55%. As turmoil engulfed the nation as a whole, black universities claimed autonomy from the apartheid government. In doing this, they disrupted the intellectual agenda, leading to the production of new knowledge in these universities. Authoritarian governance structures were also destabilised.²¹⁹

However, the prioritisation of political agendas in these universities, led to months of unrests and loss of months of learning stemming from class boycotts, staff strikes and closures of historically black universities for extended periods.²²⁰ Thus rendering institutions - and by extension students studying in these universities- particularly vulnerable to further subpar and inadequate access to quality education. The discussion turns to the land scape of tertiary education in South Africa, post-apartheid.

2.4.2 Higher Education Post-Apartheid

Many authors have reiterated that democracy after apartheid is yet to deliver on the hopes on which it was premised.²²¹ Whilst politically, apartheid is over, this has not necessarily translated into all socio economic endeavours, including education. Higher education in South Africa is still, 26 years after democracy, deeply racialized and fragmented, this in spite of the right policies in place. Claims to a mixed student population in most historically white universities as the basis of proof for transformation, fail to take into account, the structural causes of the continued perpetuation of racist ideologies.

²¹⁸ Habib A 'Structural Disadvantage, Leadership Ineptitude and Stakeholder Complicity: A study of the Institutional Crisis of the University of the Transkei' (2001) Commissioned paper. Available at www.chet.org.za/papers.asp 9.

²¹⁹ Bunting I (2006) 46.

²²⁰ Bunting I (2006) 47.

²²¹ Seekings J and Natras N *Class, Race and Inequality in South Africa* (2005) 46.

At the end of apartheid, policies which dismantled apartheid promoting ideologies were put in place, chief among them the removal of the permit /quota system required from non-whites to attend historically white universities. In a manner of speaking, this ‘flung open the doors of learning’ and addressed accessibility issues in higher education for blacks, coloured’s and Indians, to some extent. To some extent because while the obvious accessibility issues were taken care of by the more generic policies dismantling apartheid ideologies, the systemic issues were left unaffected. Some of the issues include- i) Curriculums which are still a reflection of the legacy of apartheid and colonialism²²²; ii) failure to increase number of black academics, especially at professorial levels²²³; iii) reliance on western conceptualisation about the continent as a whole, thus discountenancing ingenious knowledge production²²⁴ iv) authoritarian systems of governance still at play, with predominantly white governing councils; v) Lack of effective policies to address the harm of maldistribution occasioned by apartheid, which left many black students disenfranchised and without the right indices or condition for learning.

Of all the systemic issues highlighted above, the fifth resonates strongly with the crux of this study. It is important to note that the ripple effect of apartheid spread over decades, did a disservice to the non-white population in South Africa. Educational policies under apartheid as discussed in previous sections, gave white persons an unfair advantage through access to quality tertiary education. To this day, it continues to give this advantage by virtue of their stronger position²²⁵ in the labour market and by implication their earning power.²²⁶ It is trite that earning power is one of the strongest predictors of food insecurity. When this is juxtaposed with the general income levels and food security trend as explained in the 2019 report by Statistics South Africa, it clearly explains why food insecurity remains a mainly non-white problem in South Africa to this day.²²⁷

²²² Ramoupi N ‘African research and scholarship: 20 years of lost opportunities to transform higher education in South Africa’ (2014) 38(1) *Ufahamu: A Journal of African Studies* 271.

²²³ Jansen J ‘But our natives are different! Race, knowledge and power in the academy’ (1998) 24(2) *Social Dynamics* 109.

²²⁴ Mamdani M *Citizen And Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 71.

²²⁵ Re courses that were available to white students study in historically white universities and the perceived value of these disciplines in the job market viz a viz those in historically black universities.

²²⁶ Seekings J (2005) 35 -36.

²²⁷ Statistics SA report on ‘Towards measuring the extent of food insecurity in South Africa: an examination of hunger and food inadequacy’ (2019), Available at <http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf>.

Although the report by Statistic South Africa²²⁸ contextualised food insecurity within households, it is imperative to bear in mind that members within households are expressed in different roles within society. Some members of the everyday household are situated within the workforce, others are unemployed and others are engaged in the pursuit of education, including tertiary education. Although all from the same family structure and being exposed to a similar level of vulnerability based on socioeconomic standing within the larger society, some members of the same family may be even more vulnerable to food insecurity than others.²²⁹ It is on this premise that this study asserts that students within tertiary institutions are food insecure, because they come from households that are food insecure.

What this highlights is that similar to Foucault's postulations in his theory, power and how it is subjected can affect the outcomes of persons' access to resources. In this case, the disenfranchisement of certain racial groups under apartheid, affected their access to education and many decades later continues to impact their access to opportunities and resources. This has in effect given rise to exacerbated vulnerabilities across racial and socioeconomic classes. These vulnerabilities are expressed in various contexts, including vulnerabilities to accessing basic resources including food.²³⁰ These vulnerabilities do not suddenly end because students from these contexts find themselves within tertiary institutions. These vulnerabilities in the context of tertiary education can only be addressed by affirmative action from the state. It is thus imperative to examine what role the South African state plays and what its obligations are in addressing these vulnerabilities, specifically in the context of access to food for students in tertiary institutions.

²²⁸ Ibid 174.

²²⁹ Statistics SA report on 'Towards measuring the extent of food insecurity in South Africa: an examination of hunger and food inadequacy' (2019), Available at <http://www.statssa.gov.za/publications/03-00-14/03-00-142017.pdf>.

²³⁰ Van de Berg L, Raubenheimer J 'Food Insecurity among Students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169 ; Rudolph M et al 'Food insecurity and coping strategies among students at University of Witwatersrand' (2018) 6 (1) *Journal of Food Security* 20-25.

2.5 Conclusion

This chapter set out to discuss the theoretical underpinning of this study and how this relates to the vulnerability of students in tertiary institutions to food insecurity. The theoretical framework of power in society, using Michael Foucault's conceptualisation, explained succinctly how power could be perceived and used in varied forms (other than out rightly obvious forms), to pursue agendas and/or maintain privilege as seen under colonialist and apartheid eras. Finneman's vulnerability framework put the spotlight on the harm of maldistribution occasioned by deprivation and violations of rights and entitlements.

The chapter in tying together both theoretical frameworks, is an attempt to assess the trajectory of higher education landscape in South Africa during and after apartheid and what this portends in terms of race and class for students. Apartheid in South Africa has left in its wake a legacy of disenfranchisement and subjugation in many socio economic spheres, including the educational sector. Tertiary education under apartheid was highly fragmented by race and the politics of race. At the end of apartheid, decades of a racially segregated educational sector resulted in an almost all white empowered higher level cadre workforce with skills sets able to command higher earnings. On the flip side, the disenfranchisement suffered by persons of color, witnessed the proliferation of semi-skilled and unskilled persons of colour within the workforce, with attendant lower wages. Upon the dawn of democracy in South Africa, it was clear that there was a need to correct the imbalances of the past- the gates of learning were flung open to all, irrespective of racial classifications.

Over two decades after the official end to the apartheid system in South Africa, the picture is not much different. Whilst a lot more people of color are enrolled at what are today known as previously white (or previously advantaged) universities and the staff cadres are gradually becoming racially diversified, deep rooted systemic inequities and colonialist systems of governance continue to disenfranchise people of colour at these institutions. Majority of non-whites at tertiary institutions across South Africa today are first or second generation attendees in their families. It is necessary to put the context in which these students come from into perspective- they mainly come from contexts of poverty, occasioned by decades of lost income to their families as a result of the segregated apartheid educational systems discussed earlier on in this chapter. These disadvantaged backgrounds quickly set the stage for experiences of

material deprivation and by extension food insecurity, within tertiary institutions. The question arises as to whose responsibility it is to address the situation of food insecurity which many students find themselves in tertiary institutions. The next chapter respond to this.



CHAPTER 3

STAKEHOLDERS AND ACCOUNTABILITY IN ENSURING TERTIARY STUDENTS ACCESS TO FOOD

3.1 Introduction

The South African Constitution has time and again been lauded as one of the best constitutions entrenching constitutional democracy in recent history.²³¹ Not only does it make provision under the Bill of Rights²³² for the constitutional entrenchment of socio economic rights, but it also ensures that these rights are justiciable.²³³ The Constitution also provides that ‘reasonable legislative and other measures’ necessary, be adopted to achieve the fulfilment of these rights.²³⁴ De Vos in describing the Constitution notes that

... the 1996 Constitution is often said to serve as a bridge between a past that was characterised by the worst forms of political repression and inhumane treatment of masses of people, and a future that uncompromisingly commits the state to the values of human dignity, freedom and equality for all persons, irrespective of race or creed.²³⁵

In keeping with stipulations set out in the Constitution, legislation and/or jurisprudence of the courts have given effect to all socio economic rights which are constitutionally guaranteed, except one. Of all the socio economic rights which currently exist under the South African Constitution, the right to food remains the only socio economic right for which 26 years later, dedicated/specific legislation does not exist. While piecemeal provisions on the right to food, continue to be reflected in a host of other statutes, there is no specific legislation which coordinates the entrenchment and realisation of the right to food for all in South Africa. In the same vein, until June 2020, the courts in South Africa had not been presented with any specific right to food litigation, from which jurisprudence on the right to food could be developed.

²³¹ Fombad C ‘Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: lessons and perspectives from Southern Africa’ *The American Journal of Comparative Law* (2007) 11- 13.

²³² Chapter 2 of the South African Constitution.

²³³ *Per Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

²³⁴ See Section 27 (2) of the Constitution.

²³⁵ De Vos P, Freedman W, Brand D, Gevers C, Govender K, Lenaghan P, Douglas M, Ntlama N & Sibanda S *South African Constitutional Law in Context* (2014).

This in turn has led to a gap with regard to accountability- as there is currently no designated authority overseeing issues pertaining to the right to food in South Africa. The closest thing that exists is an ‘inter-departmental task team’, charged with overseeing food security at large in the nation, made up of the departments of Social Development, Basic Education, Health, Land Reform and Rural Development, Agriculture, Forestry and Fisheries, as well as Planning, Monitoring and Evaluation.²³⁶ The major critique of this task team has been the lack of policy cohesion between the departments and an inability to agree upon which food security related issues are most pressing and should take priority.²³⁷

Added to this, the state has been criticised for its emphasis on the ‘production’ aspects of food security and not taking into account that food security, especially in the South African context, is not a production issue but an ‘access’ problem.²³⁸ South Africa produces more than enough food to feed all its people, yet a 2019 Statistics South Africa (StatsSA) report indicated that almost a third of the population is at risk of hunger.²³⁹ The gap in accountability, occasioned by a lack of legislation and the absence of an overseeing authority, continues to exacerbate food insecurity in South Africa as a whole.

Within the context of tertiary institutions, the tensions on who is accountable becomes heightened, as the lack of alignment in policies and priorities between national departments persists. For a number of reasons, administrations of tertiary institutions are careful to assume direct responsibility for guaranteeing students right to food. Some of these reasons include funding constraints and overlapping duties of national departments.

This chapter commences with an introductory discussion on the nature of tertiary education in South Africa as a public good. The chapter then outlines and discusses the stakeholders in South African tertiary education. It focuses on the state as a key stakeholder in tertiary

²³⁶ ‘Parliament Committee briefed on food safety and food security’ Available at <https://www.parliament.gov.za/press-releases/committee-briefed-food-safety-and-food-security> (Accessed 29 August 2020).

²³⁷ Delport C ‘Food and Nutrition Policy in South Africa: The National Vision, Policy Space and Policy Alignment’ (2019) Unpublished Master’s Thesis, University of Stellenbosch, Available at [file:///C:/Users/Admin/Downloads/delport_food_2019%20\(1\).pdf](file:///C:/Users/Admin/Downloads/delport_food_2019%20(1).pdf) (Accessed 29 August 2020).

²³⁸ De Visser J ‘Food security, urban governance and multi-level government in African’ in Home R (Ed) *Land Issues for Urban Governance in Sub-Saharan Africa* 269.

²³⁹ See Statistics SA ‘The extent of food security in South Africa’ (2019) Available at <http://www.statssa.gov.za/?p=12135> (Accessed 29 August 2020).

education through an analysis of the South African legislative and policy framework on the right to food within tertiary institutions. It considers this against the background of the accountability in guaranteeing the right to food of students in South African tertiary institutions. The chapter considers the obligations at the various spheres of government such as national provincial and municipal, to realise the right to food with reference to the constitutional division of powers, whilst directly relating this to their obligation to students in tertiary institutions. The chapter also draws from the jurisprudence of the South African courts on other socio economic rights to situate the obligation to realise the right to food. Finally, the chapter considers what obligations and/or duties administrations in tertiary institutions have towards ensuring the fulfilment of the right to food for students on their campuses.

3.2 Is Tertiary Education a Public Good in South Africa?

In the context of food insecurity in tertiary institutions, it is necessary to ask- what services are in question and should these services be regarded as a public good. It is important to consider this issue given the peculiarity of South Africa's tertiary education landscape both during and post-apartheid.²⁴⁰ A determination that tertiary education in South Africa is a public good, further justifies the calls for ensuring that the conditions in which students learn are conducive and that no student should have to learn on an empty stomach. This section explores the question of tertiary education as a public good.

Economists describe a public good as the provision of goods or services to members of society, without profit, for which the consumption by one does not reduce the availability or exclude others from consuming.²⁴¹ By their nature, public goods generate a large amount of externalities otherwise known as social or public benefits.²⁴² The debates as to whether higher education is a public good is split along economic and political approaches.²⁴³ The economic approach considers it a private good, financed by some to the exclusion of others. Whilst the political approach, common to many Nordic societies, lays emphasis on higher education as a common benefit. It is equally available to all at the same standards and with future overall

²⁴⁰ Cf discussion in second chapter of this study re – '2.4 The trajectory of higher education in South Africa- a legacy of power, contestations and vulnerability'.

²⁴¹ Siglitz J 'Knowledge as a global public good' in Kaul I, Grunberg I, Stern M (Eds) *Global Public Goods: International Cooperation in the 21st Century* (1999) 382 – 383.

²⁴² Tilak J 'Higher education: a public good or a commodity for trade?' (2008) 38 *Prospects* 449–466.

²⁴³ Marginson S 'Higher education and public good' (2011) 65 (4) *Higher Education Quarterly* 415-416.

benefits to larger society. A clear example of this benefit are well remunerated graduate workers who in turn contribute to overall state funding through higher taxes. Another immediate benefit is the reduction of persons reliant on state social assistance as a result of higher employability figures of graduates.²⁴⁴

These public benefits have been well documented over the years. The Carnegie Commission on Higher Education,²⁴⁵ noted that ‘benefits from higher education flow to all, or nearly all, persons ... directly or indirectly’.²⁴⁶ Furthermore, a report of the Task Force on Higher Education and Society notes that ‘countries that are only weakly connected to the rapidly emerging global knowledge system will find themselves increasingly at a disadvantage.’²⁴⁷ The gap between industrial and developing countries in per capita incomes and standards of living will widen unless the corresponding gaps in knowledge and access to knowledge are successfully addressed.’ Further, the report notes that ‘compared with investment in the production of goods, investment in the production of new knowledge yields potentially higher economic returns...’²⁴⁸ It follows therefore that ‘societies with increasing numbers of the higher educated in their population are dynamic, competitive in global markets and successful in terms of higher levels of economic development.’²⁴⁹

The case should be made for the consideration of higher education as a public good in South Africa, especially in the context of balancing the inequities of the past and addressing high unemployment figures in post-apartheid South Africa.²⁵⁰ The continued perpetuation of

²⁴⁴ Wildschut A, Rogan M & Mncwango B ‘Transformation, stratification and higher education: exploring the absorption into employment of public financial aid beneficiaries across the South African higher education system.’ (2020)79 *Higher Education* 961–979.

²⁴⁵ The Carnegie Commission on Higher Education is a United States based education policy and research centre, founded in 1905 by Andrew Carnegie and chartered by an Act of US Congress.

²⁴⁶ Carnegie Commission on Higher Education *Higher education: Who pays? Who benefits? Who should pay?* (1973) Vii.

²⁴⁷ The Task Force on Higher Education and Society was convened by the World Bank and The United Nations Educational, Scientific and Cultural Organization (UNESCO) to explore the state of higher education in developing countries, over an 18 months’ time frame.

²⁴⁸ The World Bank ‘Higher Education in Developing Countries: Peril and Promise’ Report of the Task Force on Higher Education in Developing Countries (2000) Available at <http://www.tfhe.net/report/downloads/report/whole.pdf> (Accessed 29 August 2020).

²⁴⁹ The World Bank ‘Higher Education in Developing Countries: Peril and Promise’ Report of the Task Force on Higher Education in Developing Countries (2000) Available at <http://www.tfhe.net/report/downloads/report/whole.pdf> (Accessed 29 August 2020).

²⁵⁰ South Africa’s Quarter 2 2020 unemployment rate, stood at 23.3% according to Statistics SA. See further Statistics South Africa (2020) ‘Quarterly Labour Force Survey: Quarter 2, 2020’. Available at <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2020.pdf> (Accessed 10 October 2020).

inequality exposes South Africans to a milieu of vulnerabilities, including vulnerability to food insecurity and hunger. In 2019, South Africa was considered the most unequal country in the world, with a Gini Coefficient of 0.63- the highest in the world.²⁵¹ Major interventions have been suggested by economist and public policy makers to bridge the gap between the poor and the rich. One major intervention in bridging this gap is enhancing levels of education of the majority black populace, who are also the poorest of all races in the country. Post the 2015 #FeesMustFall protests, it would appear that the underlying ideology for the no fees declaration for higher education in December 2017,²⁵² is the acknowledgment for the need to ensure tertiary education in South Africa is a public good, to bridge inequality.²⁵³

Further to the discussion on tertiary education as a public good in South Africa, ensuring the right conditions prevalent for successful education at tertiary levels becomes imperative. One major factor in this regard, will be ensuring students are food secure enough to learn without the burdens of hunger or worry as to where the next meal will come from. It is imperative to identify which stakeholders contribute towards the right conditions for successful education in the tertiary education sector. The next section highlights this.

3.3 Stakeholders in Tertiary Education

The second chapter of this study traced the dark history of South African tertiary education up to 2020. It was clear from the second chapter that the apartheid government was the main stakeholder in tertiary education under the apartheid regime. It used tertiary institutions as a vehicle to propagate and further its agenda and dominance, while at the same time exacerbating the vulnerabilities of disadvantaged students. The landscape of tertiary education in the last 26 years has transformed rapidly, inviting more stakeholders and role players. An analysis of who

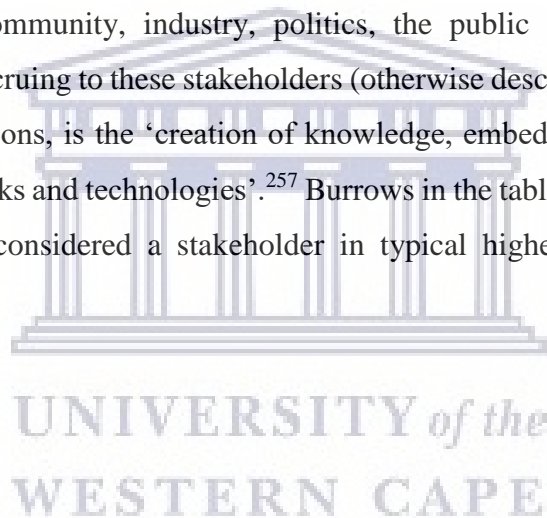
²⁵¹ Statistics South Africa ‘Inequality trends in South Africa: A multi-dimensional diagnostic of inequality’ (2019) Available at <http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf> (Accessed 10 October 2020) Page 5; Baker A ‘What South Africa can teach us as worldwide inequality grows’ May 2 2019 *The Times* Available at <https://time.com/longform/south-africa-unequal-country/> (Accessed 29 August 2020).

²⁵² Cf Discussion in the first chapter of this study (Section 1.2 Problem Statement) on the #FeesMustFall agitation.

²⁵³ See further News 24 ‘Zuma announces free higher education for poor and working class students’ Available at <https://www.news24.com/news24/southafrica/news/zuma-announces-free-higher-education-for-poor-and-working-class-students-20171216> (Accessed 2 May 2020).

these stakeholders are, will help to provide a more reasoned approach to ascertaining where accountability for food security of students in the tertiary education sector lies.

Stakeholders have been described as actors who are invested in the wellbeing of any organisation or sector and may gain or lose from the organisation or sector's activities.²⁵⁴ More often than not, stakeholders are not passive actors or mere beneficiaries of an organisation or sector's activities, but play roles as active participants and sometimes even place demands upon the organisation or sector. Freeman posits that stakeholders of universities (and by implication other tertiary institutions), are those who are most likely in a position to benefit from their social impact, with the list of stakeholders widening as the social impact and aims of universities widen.²⁵⁵ This is a broad definition of who might be categorised as a stakeholder in the context of tertiary institutions. According to Jongbloed et al they could include '...the international scientific community, industry, politics, the public sector, and the general public'.²⁵⁶ The benefits accruing to these stakeholders (otherwise described as resources) in the context of tertiary institutions, is the 'creation of knowledge, embedded in a wide variety of forms, from people, to books and technologies'.²⁵⁷ Burrows in the table below provides a broad range of who might be considered a stakeholder in typical higher education institutions (HEIs).²⁵⁸



²⁵⁴ Benneworth P, Jongbloed B 'Who matters to universities? A stakeholder perspective on humanities, arts and social sciences valorisation (2010) 59 (5) *Higher Education* 567.

²⁵⁵ Freeman R *Strategic Management: A Stakeholder Approach* (1984).

²⁵⁶ Jongbloed B, Enders J, & Salerno C 'Higher education and its communities: Interconnections, interdependencies and a research agenda' (2007) 56(3) *Higher Education* 303–324.

²⁵⁷ Benneworth P, Jongbloed B (2010) 569.

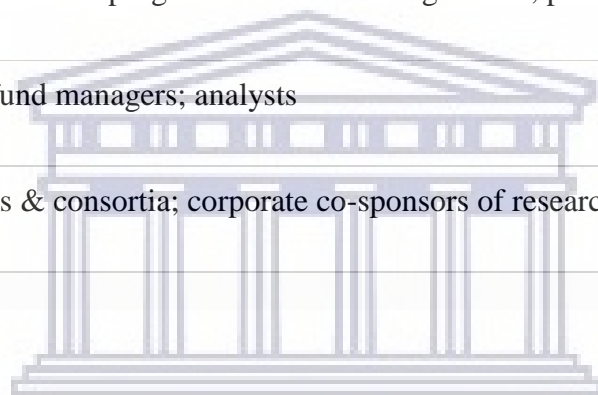
²⁵⁸ Burrows J 'Going beyond labels: A framework for profiling institutional stakeholders' (1999) 70(4) *Contemporary Education* 5–10.

Table 2- Stakeholder categories and constitutive groups in HEIs²⁵⁹

Stakeholder category	Constitutive groups, communities
Governing entities	National, provincial & local governments; Council of Higher Education (CHE); Executive council of institutions
Administration	Vice-chancellor; senior administrators
Employees	Faculty; administrative staff; support staff
Clienteles	Students; parents/spouses; tuition reimbursement providers; service partners; employers; field placement sites
Suppliers	Secondary education providers; alumni; other colleges and universities; food purveyors; insurance companies; utilities; contracted services
Competitors	Direct: private and public providers of post-secondary education Potential: distance providers; new ventures Substitutes: employer-sponsored training programmes
Donors	Individuals (includes trustees, friends, parents, alumni, employees, industry, research councils, foundations)
Communities	Neighbours; school systems; social services; chambers of commerce; special interest groups

²⁵⁹ Table 2 adapted from Burrows J 'Going beyond labels: A framework for profiling institutional stakeholders' (1999) 70(4) *Contemporary Education* 9.

Stakeholder category	Constitutive groups, communities
Government regulators	Department of Higher Education and Training (DHET); national, provincial & local financial aid agencies; South African Qualifications Authority (SAQA); research councils; national research support; tax authorities; social security; Patent Office
Non-governmental regulators	Institutional and programmatic accrediting bodies; professional associations
Financial intermediaries	Banks; fund managers; analysts
Joint venture partners	Alliances & consortia; corporate co-sponsors of research and educational services



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The stakeholders listed in Table 2 above, although not exhaustive, may be relevant in different contexts and at different times to HEIs. It is however important to note that in more recent scholarship, students have been identified as major stakeholders in the tertiary education sector, and not just mere participants of tertiary education.²⁶⁰ Notwithstanding the wide range of stakeholders at play in HEIs, the interest of some stakeholders, such as governing entities, are prioritised within the higher education sector.

A stakeholder analysis provides a clear picture of which external parties influence the decision making process of HEIs, based on characteristics that make them significant to the HEIs.²⁶¹ The analysis of stakeholders within the context of HEI's helps decipher what influence they hold over universities. Mitchell et al,²⁶² proposition three (3) elements that may help in analysing stakeholder's influence over the running of tertiary institutions. These are:

1. Stakeholders' power to influence – this depicts the balance of power relationship between the stakeholders and the institution. For instance, the 2015/16 #FeesMustFall crisis in South African tertiary institutions, centred students as stakeholders, with the power to influence the move towards a no-fee system of tertiary education in South Africa.
2. Legitimacy of the stakeholders' relationship – this points to expectations of what is socially expected as the relationship between the stakeholder and the institution. Sometimes this can be expanded to a more contractual relationship between the HEI and the stakeholder in question, creating more contractual expectations. For instance, many non-state actors through donor funded projects are stakeholders in the higher education sector today because they can be described as legitimately having a stake in the outcomes of the research produced by institutions through their monetary investments and/or donations.

²⁶⁰ Kettunen J 'Stakeholder relationship in higher education' (2015) 21(1) *Tertiary Education and Management* 60.

²⁶¹ Jongbloed B, Enders J & Salerno C (2007) 570.

²⁶² Mitchell R, Agle B & Wood D 'Toward a theory of stakeholder identification and salience: Defining the principle of who and what really counts' (1997) 22(4) *Academy of Management Review* 853–886.

3. Urgency of stakeholder's claim- this refers to the extent to which the stakeholders claim requires immediate action. For instance, the recent drive and investments in the higher education sector for Science, Technology, Engineering and Mathematics (STEM) graduates. Prioritising the support of STEM students (over their counterparts within the humanities) is borne out of the need for institutions to produce more STEM graduates to fast track technology related development in countries. In the last decade, many regulators within the higher education sector across the world have redirected the bulk of funding to students in STEM related areas of study, to ensure higher graduate output in these courses.²⁶³

The thrust of this research seeks to identify where accountability lies for the right to food of students in the tertiary education sector. The discussion on stakeholders identified and analysed the drivers of influence of stakeholders in the tertiary education sector. The stakeholders identified can be further categorised into two broad sets of stakeholders – state and non-state actors. This chapter will focus on stakeholders directly related to the functioning of the state in the South African tertiary education sector, i.e. state actors. This will encompass identified stakeholders such as governing entities, government regulators and administrations. The next chapter will examine other types of stakeholders, broadly recognised as non-state actors in the South African tertiary education sector. The section that follows outlines state actors who are stakeholders with the most influence in the South African tertiary education sector and their roles in guaranteeing the right to food of students.

3.4 Stakeholders in South African Tertiary Education and Their Role in Guaranteeing the Right to Food of Students

3.4.1 Government Regulators

This subsection will highlight the major stakeholder through which the government operates in and regulates the tertiary education sector. Specifically, the Department of Higher Education and Training (DHET) and the National Students Financial Aid Scheme (NSFAS) will be discussed.

²⁶³ Ahmed H 'Strategic future directions for developing STEM Education in Higher Education in Egypt as a driver of innovation economy' (2016) 7 (8) *Journal of Education and Practice* 127 -145.

1. The Department of Higher Education and Training (DHET)

South Africa adopted a system of multi-level government in the 1996 Constitution. Hence, governance is divided across three spheres- the national, the provincial and the local- each with its assigned powers. Murray and Simeon note that the Constitution in Section 401(1) requires that the various spheres are to be ‘distinctive, interdependent and interrelated.’²⁶⁴ De Vos explains that in federal and quasi-federal systems, division of powers between the spheres of government are either a divided model or an integrated model.²⁶⁵ A divided model maintains strict and exclusive divisions of duties and powers with no overlaps and/or shared duties. In an integrated model, while there are exclusive divisions of roles and powers, there are also concurrent or shared duties and powers between the different spheres of government. South Africa’s constitution adopts an integrated model of federalism.²⁶⁶

In this integrated model, the national government has powers to make and implement legislation on any matters, except for matters where provinces have exclusive preserve.²⁶⁷ These powers of the national government extends to matters over which it holds concurrent powers with provinces, as well as residual matters not listed in the constitution. By virtue of s 44(1)(a)(ii) of the Constitution, the national Parliament has residual powers to legislate on any matter. Where a matter is not dealt with in Schedules 4 and 5 of the Constitution, then the national sphere of government enjoys exclusive legislative and executive power over such matter.²⁶⁸ In this vein, outside of the specific contents of Schedules 4 and 5 of the Constitution, the national government has exclusive residual powers on all other matters. This forms the basis of the national government’s powers over higher education.²⁶⁹ Tertiary education falls under one of such matters which was not provided for in neither schedules 4 or 5 of the Constitution and on this basis, falls within the residual power competency of the national government.

²⁶⁴ Murray C and Simeon R ‘Multilevel Government in South Africa: An Interim Assessment’ (2001) (31) *Publius: The Journal of Federalism* 72.

²⁶⁵ De Vos et al (2014).

²⁶⁶ De Vos et al (2014).

²⁶⁷ De Visser J ‘Concurrent powers in South Africa’ in Steytler N (Ed) *Concurrent Powers in Federal Systems: Meaning, Making, Managing* (2017) 224.

²⁶⁸ This is however subject to the general principle that it may choose to assign such power to another sphere of government.

²⁶⁹ Borgström D, Naidoo U ‘Playing with Power: The Competing Competencies of Provincial and Local Government’ in *Constitutional Court Review Vol VI* (2016) 57-74, 61.

The national government, functioning primarily through the Department of Higher Education and Training (DHET), is a major stakeholder in tertiary education. The DHET derives its mandate constitutionally via Section 29 (1) (b) of the Constitution. The national government, functioning through the DHET is a major role player by virtue of its constitutional mandate, as well as a monitoring and governing body within the tertiary education sector. It gives effect to this role through ‘the development and maintenance of post school education for young people and adults’.²⁷⁰ The DHET, has sought to intervene in and transform the higher education sphere post-apartheid. In this vein, it has over the years set out policy to drive this transformation.

The dawn of the democratic era heralded the first transformative policy from the DHET, through its first White Paper entitled ‘Education and Training in Democratic South Africa: First Steps to Develop a New System (February 1995).’ This 1995 White Paper has over the years served as the reference point for other policy and legislation development. After broad consultations with the 1995 White Paper as a basis, the 1997 White Paper was released, to herald transformation in the higher education sector.

The 1997 White Paper suggested a ‘cooperative system of governance’ with regard to the input of stakeholders, with emphasis on pursuing social justice and transformation within the higher education system.²⁷¹ In this regard, the 1997 White Paper noted there was a need to

reconceptualise the relationship between higher education and the state, civil society, and stakeholders, and among institutions ... The principle of democratisation requires that governance of the system of higher education and of individual institutions should be democratic, representative and participatory and characterised by mutual respect, tolerance and the maintenance of a well-ordered and peaceful community life. Structures and procedures should ensure that those affected by decisions have a say in making them, either directly or through elected representatives. It requires that decision-making processes at the systemic, institutional and departmental levels are transparent, and that those taking and implementing decisions are accountable for the manner in which they perform their duties and use resources. (RSA, 1997a, sections 1:13, 1:19)

Although the 1997 policy pushed for a cooperative system, it was clear that there was a hierarchical order, with the policy clearly stating that the government should have a ‘proactive, guiding and constructive role’ in higher education.’ Many more policies and legislation were

²⁷⁰ See ‘Department of Higher Education and Training Manual in Accordance with the Promotion of Access to Information Act, Section 14 Manual, 2018 Edition’. Government Gazette No 42206, 31 January 2019 Page 2- 3 Available at https://www.gov.za/sites/default/files/gcis_document/201901/42206m.pdf (Accessed 30 May 2020).

²⁷¹ Hall M and Symes A *South African Higher Education in the First Decade of Democracy* (2005) 202.

to come after the 1997 White Paper in a bid to transform the higher education sector in South Africa.

Following a plethora of legislation and policies stemming from the 1995 White paper, Cabinet in 2013 approved yet another White Paper for Post School Education and Training.²⁷² At its core, the 2013 White Paper proposed strategies to improve the capacity of the post-school education and training system in accordance with South Africa's developmental goals and vision for the tertiary education sector.²⁷³ It lays down the policy directions to guide the Department of Higher Education and Training (DHET) and the allied institutions that contributes to the building of a developmental state.²⁷⁴ Some of the objectives include; a post-school system that is fair, equitable, non-racial, non-sexist and democratic; a single, coordinated post-school education and training system; and expanded access, improved quality and increased diversity of provision.²⁷⁵

The 2013 White Paper is laudable for its clearly defined focus and priorities of the DHET, as well as shaping its future strategies. The 2013 White Paper emphasised the need for improving access to and success in post school education for persons with disabilities. It also emphasised the need to create a nexus between post school education and the work place. This is contextually relevant in light of South Africa's high unemployment figures and the drive for producing scarce skilled graduates.²⁷⁶ Despite these hallmarks, the 2013 White Paper falls short of recognising the problem of and providing concrete policy interventions/solutions to food insecurity within the tertiary education sphere. The only reference to food security needs of students in the 2013 White Paper was in the context of student accommodation, where it noted in Paragraph 3.1.8

...Student residences should provide nutritious food to students at no extra cost above what they pay for accommodation. When students are given money separately for food, it tends to make healthy eating optional. Students are tempted to spend the money on other items or to use

²⁷² Department of Higher Education and Training (2013) 'White Paper for Post School Education and Training: Building an Expanded, Effective and Integrated School System' Available at <http://www.dhet.gov.za/SiteAssets/Latest%20News/White%20paper%20for%20post-school%20education%20and%20training.pdf>.

²⁷³ White Paper 2013, Executive Summary, xi.

²⁷⁴ White Paper 2013, Executive Summary, xi.

²⁷⁵ White Paper 2013, Executive Summary, xi.

²⁷⁶ South Africa has experienced high (albeit fluctuating) unemployment rates between 1999 -2020, ranging from 28% to 33.4% See further Statistics SA 'South Africa: Unemployment rate from 1999 to 2020' Available at <https://www.statista.com/statistics/370516/unemployment-rate-in-south-africa/> (Accessed 6 October 2020).

it to assist struggling family members. While the latter may be laudable, this has an inevitable negative impact on student health and academic performance.²⁷⁷

As noted in the first chapter of this study, the problem of food insecurity in tertiary institutions is an emerging area of focus and research, and thus may not have been within the contemplation of policymakers at the DHET at the time of drafting the 2013 White Paper. There are two immediate responses to this argument. The first being that the 2013 White Paper directly speaks to the disjuncture in policy making of the government and the lived realities of majority of South Africans. Policy should ordinarily be a reflection of and intervention in societal issues. The food insecurity status of South Africans in the years leading up to the 2013 White Paper, was a national focus issue, South Africa having been one of the countries to have been hardest hit by the global food price surge.²⁷⁸ Earlier research published in 2013 indicated that students who lived in university-owned residences were at higher risk of food insecurity and this affected the students' ability to concentrate in class.²⁷⁹ Similar findings show that underprivileged students on financial aid, were most likely to be food insecure and these students often under-performed academically.²⁸⁰

The second response is that students within tertiary institutions are regarded in a 'silos' approach, rather than as part of the political economy of the state, affecting and being affected by the factors that affect other groups of persons. Thus, student food insecurity is not seen as a higher education problem that needs to be addressed within the framework of higher education, but a social development problem. Consequently, if there was a recognition that students emanating from food insecure homes are themselves likely to be food insecure, perhaps there might have been a greater emphasis on food insecurity in the 2013 White Paper.

The framing of the abovementioned Paragraph 3.1.8 which addresses food security needs of students in the 2013 White Paper, is also an issue for concern. First, it fails to acknowledge that

²⁷⁷ See Para 3.1.8 Department of Higher Education and Training (2013) Supra.

²⁷⁸ Boyle B 'SA must grow food on all arable land, says Manuel' *The Times* Published 13 April 2008 Available at <https://web.archive.org/web/20090111091639/http://www.thetimes.co.za/PrintEdition/Article.aspx?id=747211> (Accessed 29 May 2020).

²⁷⁹ Gwacela M (2013) Exploring food insecurity and socio-economic factors affecting academic performance: a case study of first year students on probation and at-risk of academic exclusion (Doctoral dissertation).

²⁸⁰ Kassier S & Veldman F (2013) *Food security status and academic performance of students on financial aid: The case of University of KwaZulu-Natal*. *Alternation*, 9, 248-264, 248.

students in tertiary institutions are adults and their agency as fully formed adults ought to be respected and protected. Secondly, it fails to consider that students' choices on whether they eat healthy or not is largely influenced by availability – physical and economic- of healthy food options within the campus environment and its immediate surroundings.²⁸¹ It also fails to acknowledge that the food choices of students are influenced by a multiplicity of factors, ranging from the economic to the social. The insinuation that students are unable to make healthy choices if given cash to purchase food, rather than food directly, is the perpetuation of a bias.

In conclusion, the recognition of food insecurity of students only within the context of an accommodation crisis is problematic. With the shortfall in facilities within most public universities, most students live outside of campus accommodation²⁸² and their food security needs also require as much attention as those who live on campus provided accommodation. It is clear from the foregoing that the DHET needs to adopt a more nuanced approach to student food insecurity, which considers the issue beyond the framework of an accommodation crisis, but rather as a human rights violation.

2. The National Student Financial Aid Scheme

The National Student Financial Aid Scheme (NSFAS) is also an important stakeholder through which the government operates to fund students from disadvantaged backgrounds in the higher education sector. It is established in terms of the National Student Financial Aid Scheme (Act 56 of 199), with the specific objective to 'provide financial aid to eligible students at TVET colleges (Technical and Vocational Education and Training) and public universities; and, support access to, and success in, higher education and training for students from poor and working class families who would otherwise not be able to afford to study.'²⁸³ NSFAS' role as a facilitator of access to and success in education, is therefore critical in the discussion of food security of students.

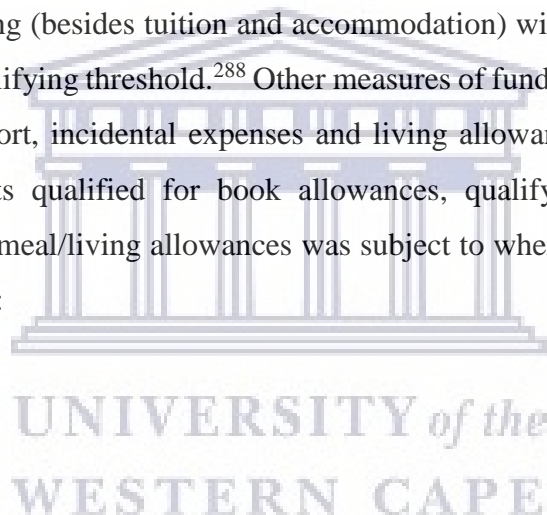
²⁸¹ Wegerif M, Adeniyi O 'Student hunger at South African universities needs more attention' *The Conversation* Published 18 September 2019 Available at <https://theconversation.com/student-hunger-at-south-african-universities-needs-more-attention-123378>.

²⁸² In a 2011 report of the Ministerial Committee for the Review of the Provision of Student Housing at SA Universities, 2011, indicated that only 20% of University students' nationwide were accommodated in on-campus accommodation. A target to move that number to 30% within 10 years (i.e. by 2020/2021) was set.

²⁸³ See further <http://nsfas.org.za/content/mission.html>.

The structuring of funding for students under NSFAS has been fiercely criticised for a while. Before 2018, there were reports on disparities in funding between institutions, with students in previously advantaged universities being at an advantage, especially with subsistence allowance amounts, compared to their counterparts from previously disadvantaged universities. The December 2017 declaration²⁸⁴ of free tertiary education for all by the then President Jacob Zuma, prompted an overhaul of the funding structure of NSFAS in 2018.²⁸⁵ NSFAS reorganised the funding of students on financial aid, to accommodate more funded students, by increasing the qualifying threshold to students from households with a combined gross income of less than R350, 000 per year.²⁸⁶

In 2019, the ‘Guidelines for Department of Higher Education and Training Bursary Scheme for Students at Public Universities’ was released by the DHET.²⁸⁷ It provided further details on what measure of funding (besides tuition and accommodation) will be provided to contact students who meet the qualifying threshold.²⁸⁸ Other measures of funding provided to students, include book, rent, transport, incidental expenses and living allowance or meal allowances. While all funded students qualified for book allowances, qualifying for other types of allowances, including the meal/living allowances was subject to where students lived. This is reflected in Table 3 below:



²⁸⁴ See further <http://www.presidency.gov.za/press-statements/president%E2%80%99s-response-heher-commission-inquiry-higher-education-and-training>.

²⁸⁵ The Presidency ‘The President’s response to Herher commission of inquiry into Higher Education and Training’ Available at <http://www.presidency.gov.za/press-statements/president%E2%80%99s-response-heher-commission-inquiry-higher-education-and-training> (Accessed 25 February 2019).

²⁸⁶ See further <https://www.htxt.co.za/2018/11/01/what-does-free-higher-education-actually-mean-in-south-africa/>.

²⁸⁷ Department of Higher Education and Training ‘Guidelines for Department of Higher Education and Training Bursary Scheme for Students at Public Universities’ Released 25 January 2019 Available at <file:///C:/Users/Admin/Desktop/CHAPTER%203%20PHD/Guidelines%20for%20the%20DHET%20Bursary%20Scheme%20for%20Students%20at%20Public%20Universities.pdf> (Accessed 3 August 2018).

²⁸⁸ Students with physical contact/access to their respective institutions as against distance learning students.

Table 3: Allowances for Contact University Students

(DHET Guidelines for Department of Higher Education and Training Bursary Scheme for Students at Public Universities' 2019)

Accommodation Type	Allowance type				
	Books	Living Allowance and Meals	Rent	Transport	Incidental Expenses
University managed Catering residence	X				X
University managed Self-catering Residence	X	X			
Private off campus Accommodation	X	X	X		
Living at Home	X			X	X

As reflected in Table 3, students living at home and at university managed catering residences are excluded from being paid living allowances (of R14,400 per year),²⁸⁹ which according to the guidelines caters to feeding and incidental expenses.²⁹⁰ It is suggested that the quantum of the allowance is insufficient. The amount of R14, 400 per year per funded student, equates to an average of R1200 per month per student. In March 2019, the National Agricultural Marketing Council put the average cost of a nominal food basket at R883.16 per person per month.²⁹¹ There is a consensus among scholars on the inadequacy of the NAMC's nominal

²⁸⁹ DHET approved amount for the 2019 academic year.

²⁹⁰ See Para 6.4.2 Department of Higher Education and Training (2019) Page 9.

²⁹¹ National Agricultural marketing Council 'Food basket price Monthly' Issue 40 (April 2019) Page 2 Available at <https://www.namc.co.za/wp-content/uploads/2019/04/NAMC-Food-Basket-Price-Monthly-Apr-2019.pdf>.

food basket to provide sufficient and nutritionally adequate food security.²⁹² This is further evidenced by the high rates of micronutrient deficiency at household levels in South Africa, especially for those reliant on state grants.²⁹³ The average cost of the nominal food basket is taken into consideration in the computation of state grants. Benchmarking this costs against the micro nutritional deficiency rates of persons on state grants, clearly demonstrates the insufficiency of grants to meet a healthy nutritional diet, leading to poor micro nutritional outcomes.

Research on food insecurity in South Africa is usually targeted at household levels, rather than at individuals such as students in at tertiary institutions.²⁹⁴ The use of the NAMC monthly benchmark to determine food cost for students in tertiary institutions may therefore not be an appropriate fit. Some students, incur added costs such as cost of transportation to procure food stuffs, cost of preparation with electricity or gas, which further drives up the total cost of food for students. In addition, food security is a wider concept that goes beyond ‘living expenses’ as contextualised by the 2019 regulations. Therefore, the allocated R1200 is not strictly for feeding but rather a ‘living allowance’. With other necessities taken into account including toiletries, cleaning products and/or transportation, it is easy to conclude that the earmarked sum for feeding and other necessities, is grossly insufficient.

The first group of students (i.e. students resident in university managed catering residences) excluded from accessing living allowances, is self-explanatory. Nonetheless, it may not necessarily speak to the realities of many institutions today. More than half of university residences are currently self-catering.²⁹⁵ In addition to this, the rationale behind excluding students living at home is questionable.²⁹⁶ A consideration of the DHET 2011 ‘Report on The

²⁹² See further- McLaren D, Moyo B and Jeffery J ‘The right to food in South Africa: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food’ (2015) Studies in Poverty and Inequality Institute, Working Paper 11; Jacobs P ‘The status of household food security targets in South Africa’ (2009) 48 (4) *Agrekon* 410 -433.

²⁹³ Modjadji P, Madiba S ‘The double burden of malnutrition in a rural health and demographic surveillance system site in South Africa: a study of primary schoolchildren and their mothers’ (2019) 19 *BMC Public Health* 1087.

²⁹⁴ See discussion on income based approach that emphasizes the household as the research setting other than the university.

²⁹⁵ Department of Higher Education and Training ‘Report on the ministerial committee for the review of the provision of student housing at South African universities’ (2011) Available at <https://www.cput.ac.za/images/students/Ministerial%20Committee%20Report%20on%20Student%20Housing.pdf>.

²⁹⁶ See Para 6.5.4 of Department of Higher Education and Training (2019)- Defined as students whose home address is within a 30km radius from where they study.

Ministerial Committee for the Review of the Provision of Student Housing at South African Universities' is instructive. Although it is considered only within the context of student accommodation, the DHET 2011 Report acknowledged the problem of student hunger and poverty when it noted:

...Given the stigma of poverty, the Committee is of the view that these stories are merely the tip of the iceberg that is student hunger. It is an indictment on all who live in this country that some of the greatest talents of the next generation, and many of its future leaders, are being suffered to live and learn under such appalling conditions. It is not only that the country's potential is being squandered; it is literally being starved. This state of affairs cannot be permitted to continue, and it should be the first and most urgent duty of every stakeholder in higher education to ensure that it does not.²⁹⁷

Having acknowledged the problem of student poverty and food insecurity as a consequence of this poverty, it is curious that the DHET in its 2019 Guidelines nevertheless exclude students living at home from accessing living allowances to address their food security needs. It is implicit, that by restricting these group of students to travel allowances,²⁹⁸ the DHET fails to acknowledge and respect the basic right to food of students. It also fails dismally in adopting a nuanced approach to addressing food insecurity of students in tertiary institutions. It fails to understand poverty as the root cause of student's food insecurity- that students are food insecure because they come from food insecure homes. Students do not become any less food insecure by the provision of only a travel allowance without a living allowance from which they can purchase food.²⁹⁹

Furthermore, it is argued that the policy does not consider the problem of food insecurity using a human rights based approach. It rather adopts a 'welfare based approach' to addressing student issues, thus failing to critically reflect on and address the problem of student food insecurity. The use of other benchmarks, such as the accommodation of the students- at home or at self-catering residences- without emphasising food insecurity as a human rights violation fails to critically engage with and address this problem.

²⁹⁷ Department of Higher Education and Training(2011) Pg 52-3.

²⁹⁸ See Para 6.5.4 of Department of Higher Education and Training (2019).

²⁹⁹ Cf Chapter One of this study and the discussion in Chapter One: '1.3.2 on Student Food Insecurity'.

3.4.2 *Governing Entities and Administrations*

Accountability is a critical aspect of public service delivery and a good indicator of the extent to which human rights are upheld. To this end, as recipients of public funding, universities are obligated to account for their achievements to government and the wider society.³⁰⁰ Structures of administration from the Council to Vice Chancellors, to higher cadre administrative personnel in tertiary institutions, ensure compliance with standards of accountability in enabling legislation. Coordinating bodies such as Universities South Africa (USAF),³⁰¹ ensure that these standards of accountability are upheld across institutions.

Universities South Africa (USAF) is the foremost representative organisation for all public universities in South Africa, promoting the inclusivity and transformation of universities in South Africa. Its core mandates are- ‘influencing and contributing to policy positions on higher education in South Africa; advocating for an adequately funded tertiary education sector; facilitating and coordinating effective dialogue between universities and other stakeholders; dissemination of research on key issues which have implications for universities and strengthening the creation of higher education governance systems based on cooperation and institutional autonomy’.³⁰²

As much as the USAF’s mandate seems geared towards transformation in the higher education sector, it is telling that an overarching /coordinating administrative body of universities in South Africa has for all its years of existence neither paid attention to, nor issued any statements, rejoinders or directives on the prevailing hunger among students in South African Universities. This calls for a re-examination of the true meaning of transformation as understood by USAF- if transformation cannot start from the more fundamental matters of ensuring students are fed and learn, then transforming the more complex issues in universities remain unachievable.

³⁰⁰ Benneworth P, Jongbloed B (2010).

³⁰¹ Formerly known as Higher Education South Africa (HESA.)

³⁰² See further <http://www.usaf.ac.za/public-universities-in-south-africa/>.

USAF's stance is mirrored in many institutions of higher learning across the country. Student hunger has been the 'skeleton' in institutions cupboards.³⁰³ The dearth of research and lack of attention to the problem of student food insecurity, left it an under researched area until about 2013 in South Africa. With more attention on student food insecurity through research and advocacy, the spotlight is on the role institutions play in guaranteeing the right to food of their students. It is important that this heightened awareness emphasises that institutions entrench a human rights based approach to guaranteeing students right to food. The use of a human rights based approach leads to the identification of the rights' holder and the duty bearers. This in turn creates a platform where the duty bearers have the obligation to show the logical steps that have been taken to improve the problems of food insecurity at universities.³⁰⁴

Logically, this raises questions of the extent of administrators' accountability for the food security needs of students in tertiary institutions. There is a general acceptance that promoting the well-being of students forms part of the core responsibilities of university administrators.³⁰⁵ It is curious that one of the fundamental issues of a person's well-being- food and nutrition security- continues to remain largely ignored by university administrations.³⁰⁶ In instances where it has been addressed, this has been done from a welfare centred perspective rather than a rights based approach.³⁰⁷

3.5 Accountability for Food and Nutrition Security in South African Tertiary Institutions

As alluded to earlier in this chapter,³⁰⁸ the Constitution delineates functions across the various spheres of government – national, provincial and municipal. The Constitution assigns each of these spheres certain powers and prerogatives and vests accountability for specific matters in the different spheres of government. It thus becomes essential to first examine the delineation

³⁰³ See further Hughes R and ors 'Student food insecurity: the skeleton in the university closet' (2011) 68(1) *Nutrition & Dietetics* 27-32.

³⁰⁴ Ukegbu P, Nwofia B, Ndudiri U, Uwakwe N, & Uwaegbute A 'Food insecurity and associated factors among University Students' (2019) 40(2) *Food and Nutrition Bulletin* 271-281.

³⁰⁵ Guild HE 'Wellbeing in higher education: A Guild HE report' Available at <https://www.guildhe.ac.uk/wp-content/uploads/2018/10/GuildHE-Wellbeing-in-Higher-Education-WEB.pdf> (Accessed 01 September 2020) 10-13.

³⁰⁶ Cf Chapter 1 Pages 13-15 on efforts of SA universities to deal with student hunger.

³⁰⁷ Coldwell D, Papageorgiou E, Callaghan C, & Fried A 'Academic citizenship and wellbeing: An exploratory cross-cultural study of South African and Swedish academic perceptions' (2016)30(1) *South African Journal of Higher Education* 80-105.

³⁰⁸ See discussion in 3.4.1 on Government Regulators.

of powers across national, provincial and municipal lines to be able to appropriately vest responsibility for food and nutrition security of students in tertiary institutions. The discussion that follows considers the delineation of powers across the various spheres of government and what impact this has on the right to food of students in tertiary institutions.

Functions at the national and provincial spheres include both matters of exclusive powers and concurrent powers. In this vein, the point of concurrence in legislative competences between the national and provincial spheres of government, lies in the functional areas that are shared by both the national and provincial legislatures listed in Schedule Four.³⁰⁹ This includes important matters such as health, housing, basic education etc. Provincial governments are also empowered to make laws on matters outlined in schedule 5 of the Constitution. Thus, the Constitution accords powers to the nine provincial legislatures of South Africa to legislate on the specific subject or 'functional areas' enumerated in both the fourth and fifth schedules.

The legislative competences not provided for in the foregoing schedules remain the preserve of the national legislature only.³¹⁰ Therefore, outside of the specific contents of Schedules 4 and 5, the national government has exclusive residual powers on all other matters. An example of these national legislative competences are matters of foreign affairs and higher education.³¹¹ De Vos argues that this implies that the powers of provinces are strictly limited to matters set out either in Schedule 4 or 5. On the other hand, the powers of the national sphere of government are not restricted and encompass matters outside of schedules 4 and 5.³¹²

Provinces and municipalities are pivotal in the delivery of services to citizens, whether in execution of broader national policy objectives or more specific objectives of the responsible sphere of government. To achieve this, provincial and local spheres of government require the finances to execute their duties and functions as delineated in the constitution. Provinces are funded almost entirely by the national government. Municipalities raise their revenue (property

³⁰⁹ Freedman D 'Constitutional law: Structures of government' in Joubert W (ed) (2012) 2nd ed 5(4) *Law of South Africa* para 57.

³¹⁰ The Constitution, section 44(1) (a) (ii).

³¹¹ *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [2000] ZACC 15.

³¹² De Vos et al (2014).

rates and fees for services) and receive some intergovernmental grants.³¹³ However, the national government holds most powers and, more importantly, the purse strings.³¹⁴ This is key because even where the national government does not have direct or exclusive control over certain matters, it may exert this control through the allocation (or non-allocation as the case may be) of finances to other spheres. In this regard, Steytler argues that even though the Constitution envisaged a system of intergovernmental coordination amongst all spheres, the national sphere in its relations with other spheres, dominates rather than coordinates.³¹⁵ The section that follows analyses the responsibilities at the different spheres of government for the right to food of students.

3.5.1 An Analysis of the Responsibility in the Different Spheres of Government for Food and Nutrition Security in Tertiary Institutions

The preceding discussion cites the overarching role of the national government in guaranteeing the right to food of students. However, this does not necessarily exculpate other spheres of government from a direct responsibility towards guaranteeing the right to food of students in tertiary institutions. This section further analyses the role of national government as well as the roles of provincial governments and municipalities in this regard.

Schedule 4 of the Constitution lists areas of concurrent jurisdiction between the national and provincial spheres of government as reflected in Figure 1 below. These are matters in which both the national and provincial governments are permitted to legislate and take executive action upon. In case of a conflict, section 146 of the Constitution provides generally for national laws prevailing over provincial laws in areas of concurrent jurisdiction.³¹⁶ Section 146 only comes to play- (1) when there is conflict and (2) where such conflict is brought to the Constitutional Court for adjudication. The Courts are yet to be approached by provincial governments to challenge national legislation on any of the areas of concurrent jurisdiction.³¹⁷

³¹³ Hendriks C ‘The effect of South Africa’s intergovernmental fiscal relations policies on accountability in provincial governments – An empirical case study’ (2017) 44(2) *Politikon* 305-326.

³¹⁴ De Visser J ‘Food security, urban governance and multi-level government in African’ in Home R (Ed) *Land Issues for Urban Governance in Sub-Saharan Africa* (2020) Springer, Switzerland.

³¹⁵ Steytler N ‘Co-operative and coercive models of intergovernmental relations: A South African case study’ in Courchene T and Allen J (Eds) *The Federal Idea: Essays in Honour of Ronald L. Watts* (2011) 413–28.

³¹⁷ De Visser J (2020).

³¹⁷ De Visser J (2020).



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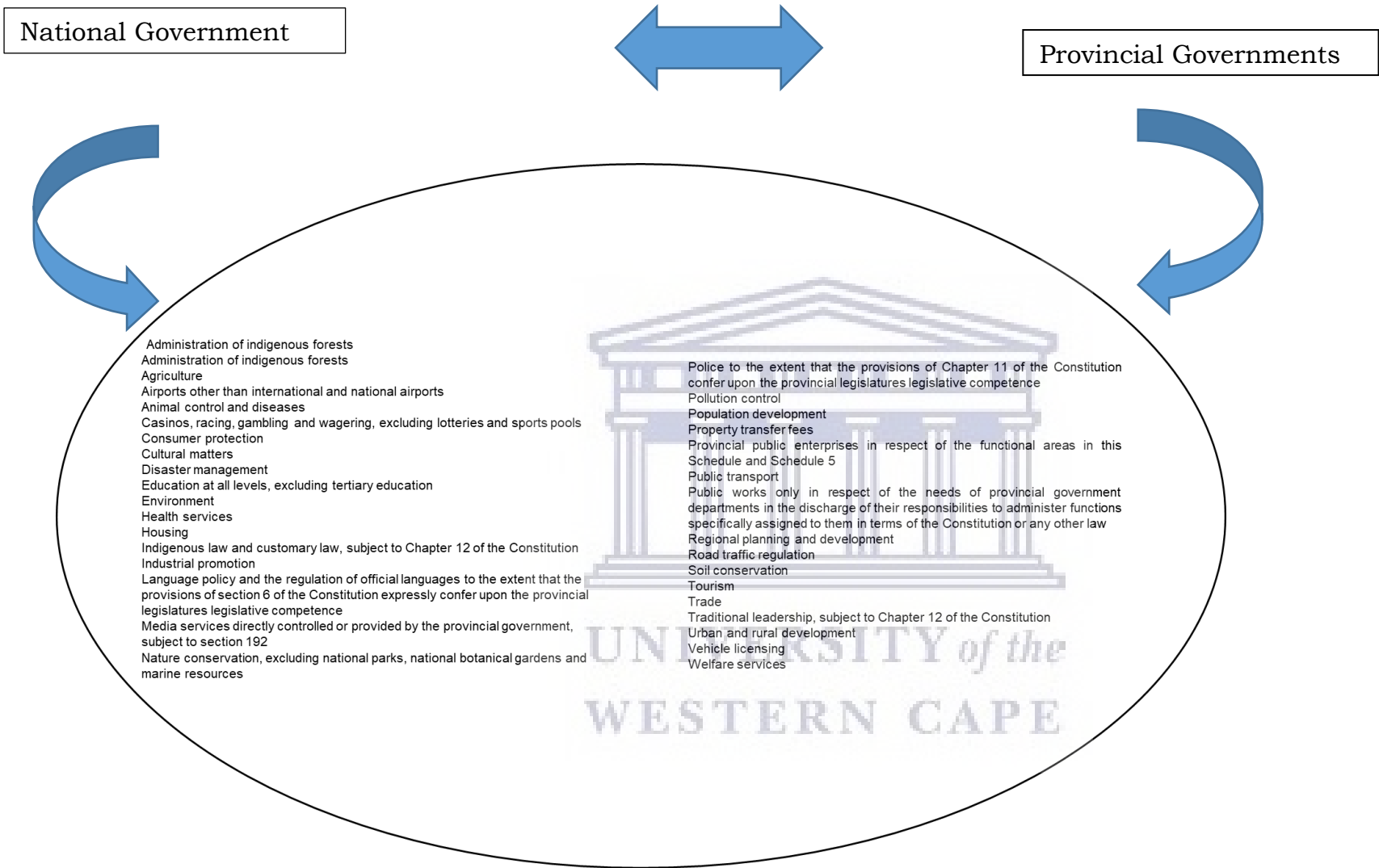


Figure 1: Schedule 4A – Concurrent national/provincial powers

It is clear that tertiary education does not fall within concurrent national and provincial powers or exclusive provincial powers.. In fact, it can be treated as one of the issues for which the national government has exclusive residual powers, discussed earlier on in this chapter.³¹⁸ The case of *Kutumela v Member of the Executive Committee (MEC) for Social Services, Culture, Arts and Sport in the North West Province*,³¹⁹ gives an insight into what may be interpreted as a role for the provincial government in addressing food insecurity. The administration of the Social Relief of Distress Grant (SRDG) falls within the competence of the provincial government on ‘welfare services’ as provided for in Schedule 4A of the Constitution. Mr Kutumela challenged the North West Province refusal to grant the SRDG to him, even though it was clearly a duty of the provincial government. Provinces had a duty to make the SRDG available to qualifying individuals and money had been allocated from the national government to the provincial government for this program. In his founding affidavit, Mr Kutumela noted:

presently without food, or ... living without food and (are) in desperate need of social assistance...³²⁰ We struggled to survive, and often went hungry. Our only income at the time was what my wife could earn doing part-time domestic and cleaning work in the area. She earned about R60 per week. It was not enough to feed us. We had to beg and borrow food...³²¹

The *Kutumela* case ended in a settlement order where the provincial government of the North West was directed to plan a program to ensure the effective implementation of the SRDG and put in place the necessary infrastructure for payment of the grant. Unlike higher education which doesn’t fall within the competence of provinces under Schedule 4, welfare services as contemplated in the *Kutumela* case does. A core rationale of the SRDG is to ensure that the right to food of vulnerable persons are fulfilled and that at the very minimum they are free from hunger.

Nonetheless, this may not necessarily apply *mutatis mutandis* to the case of student food insecurity. In the first instance, the SRDG applies only as an ‘emergency stop gap’ for immediate but temporary relief, whereby applicants are given food vouchers which they exchange for food at supermarkets. The SRDG is not a continuous form of social assistance- it is granted for an initial term of three months, with the possibility of an extension of another

³¹⁸ See discussion on residual powers in 3.4.1 on Government Regulators.

³¹⁹ Case 671/2003 (unreported) 23 October 2003 (B).

³²⁰ *Kutumela* supra pars 9.1 and 9.2 of founding affidavit.

³²¹ *Kutumela* supra para 21 of founding affidavit.

three months only.³²² In this light, provincial governments may only have a role to address student food insecurity on the basis of temporary relief where a student qualifies for such relief. It is clear that this in no way addresses the major concerns of student hunger on a nationwide basis.

Provinces have exclusive powers over matters enumerated in Schedule 5 (A) and (B) of the Constitution. The general rule is that the national legislature has no competence to enact legislation on functional areas enumerated in Schedule 5.³²³ An exception to this is provided for in section 44(2) of the Constitution. It provides for an exception to the provision of section 44(1) (a) (ii) in circumstances contemplated under section 44(2), such as where national legislation is 'necessary' to maintain national security; economic unity; essential national standards.³²⁴ This exception extends to where national legislation is necessary to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

Functional areas in Schedule 5 which may directly impact on food and nutrition security of students include abattoirs, provincial planning, provincial road and traffics etc.

The High Court in 2020 pronounced on the protection of the right to food of a vulnerable group during extraordinary circumstances which the State might be confronted with. The case of *Equal Education & Another Vs Minister of Basic Education & Others* is instructive in this regard.³²⁵ The claimants brought an order for an urgent declaratory injunction against the Minister of Basic Education and the MEC's of Education of eight provinces, declaring a breach of the constitutional right to food of learners in the basic education system under the National School Nutrition Programme (NSNP). The claimants also sought an order against the Minister and eight provincial MECs that they without delay ensure that the NSNP is implemented in such a manner that it provides a daily meal to all qualifying learners. No relief was sought against the tenth respondent – the MEC of the Western Cape. This is because the Western Cape had publicly committed to and directed the immediate resumption of the NSNP for all learners in its province.

³²² Section 23 (2) & (3), Regulations in Terms of the Social Assistance Act 13 of 2004 (22 February 2005) Regulation No 27316.

³²³ Constitution, section 44(2)(a)- (c).

³²⁴ Constitution, section 44(2)(a) - (c).

³²⁵ (22588/2020) [2020] ZAGPPHC 306.

In brief, the facts of the matter were that schools were shut after the declaration of a national lockdown by the South African government due to the 2020 corona virus pandemic. The NSNP under which up to Nine million identified vulnerable learners accessed at least one meal a day was also halted during the lock down. The claimants argued that the NSNP is designed to fulfil the unqualified rights of children to basic education and basic nutrition under section 28 of the Constitution.³²⁶ The rights to basic nutrition and basic education are fundamental rights which demand more than just a reasonable plan – these rights need a plan capable of making immediate implementation possible.

The Court handed down declaratory and supervisory orders, ordering the national and provincial Departments of Basic Education (DBE) to roll out the NSNP to all eligible children without delay, regardless of whether they have returned to school or not. In affirmatively granting the injunctions, the Court noted ‘...Continued breach by the Minister and MEC’s will leave millions of children hungry through the cold winter and as long as lockdown lasts. Hunger is not an issue of charity, but one of justice’.³²⁷

Although decided in the context of children’s right to food, the *Equal Education* case is instructive in demonstrating that even where the national government is the key player because it distributes the money, provinces do have agency and can make their own decisions particularly when it comes to implementation. The Court highlights this in its judgement when it critiques the roles of the eight other provinces in exacerbating the vulnerability of children reliant on the NSNP to hunger. The Court noted that ‘[t]here is administrative chaos and confusion in the provinces, requiring supervision of the Court.’³²⁸ The Court went further to list instances of the chaos in the way the provinces had administered the NSPN under the lockdown.³²⁹ This is further evidenced by the claimant’s exclusion of the MEC of the Western Cape in the reliefs sought, on the basis that it had committed to and in fact kick started the implementation of the NSPN in the provinces. This indicates that in terms of accountability,

³²⁶ Para 43 & 54 *Equal Education & Another V Minster of Basic Education & Ors* (22588/2020) [2020] ZAGPPHC 306.

³²⁷ Para 88.1 *Equal Education & Another V Minster of Basic Education & Ors* (22588/2020) [2020] ZAGPPHC 306.

³²⁸ Para 88.3 *Equal Education & Another V Minster of Basic Education & Ors* (22588/2020) [2020] ZAGPPHC 306.

³²⁹ Para 88.3.1 – 88.3.5 *Equal Education & Another V Minster of Basic Education & Ors* (22588/2020) [2020] ZAGPPHC 306.

provinces are not off the hook. While the role of national government remains key, it is counterproductive to place everything at the national government's door and indemnify other spheres of government- whether provincial or municipal.

The Constitutional Court has affirmed that under the Constitution, municipalities are not mere creatures of statutes, but a constitutional organ of state in the local sphere of government.³³⁰ De Vos noted that this is a radically different position from the status of municipalities' pre 1994, where they were at '[t]he bottom of a hierarchy of law-making powers.' They were not recognised or protected.³³¹ The Constitutional Court further noted in *City of Cape Town and Other v Robertson and Other*³³² that

[A] municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits. Now the conduct of a municipality is not always invalid only for the reason that no legislation authorises it. Its power may derive from the Constitution or from legislation of a competent authority or from its own laws.³³³

Section 156 of the Constitution delineates municipal powers. The section grants municipalities executive authority and right to administer- i) matters listed in schedule 4B and 5B; ii) any other matters assigned to it by national and provincial legislation. Schedules 4B and 5B of the Constitution specifically delineates exclusive municipal powers, subject to the provisions of Sections 155 (6A) and 7 of the Constitution. There are a number of cross cutting areas where municipal exclusive powers may have an impact on the right to food, specifically within a tertiary institution context.

De Visser argues that there may be some links between the executive and legislative decision making powers of municipalities and food security.³³⁴ Municipalities have a number of 'market' related competencies which impact on students' right to food, including- Licensing and control of undertakings that sell food to the public (5B); Markets (5B); Street trading (5B) and; Trading Regulations (4B). There are many ways in which the policies and practices of

³³⁰ Para 18, *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* (CCT7/02) [2002] ZACC 11; 2002 (11) BCLR 1220; 2003 (1) SA 678 (CC) (12 June 2002).

³³¹ De Vos et al (2014).

³³² (CCT 19/04) [2004] ZACC 21; 2005 (2) SA 323 (CC) (29 November 2004).

³³³ Para 60, *City of Cape Town and Other v Robertson and Other* (CCT 19/04) [2004] ZACC 21; 2005 (2) SA 323 (CC) (29 November 2004).

³³⁴ De Visser J 'Food security, urban governance and multi-level government in African' in Home R (Ed) *Land Issues for Urban Governance in Sub-Saharan Africa* (2020).

municipalities with regard to these services can be structured to alleviate the plight of hungry students. For instance, municipalities have a role to play in the regulation of the sale of food in 'open markets'. Their licensing regimes for instance can have a direct impact on student's access to nutritious food, where for instance such markets are situated in close proximity to campuses. This can have a ripple effect on driving down the overall cost at which students eventually purchase food. First, when markets are situated close to campuses, transportation costs to purchase food is cut out, thereby freeing up funds for students to purchase more food. Further, foods sold in open markets by smallholder farmers are on the average cheaper and fresher.³³⁵ This drives down costs at which students purchase food and ensures access to healthier food options. In this regard, municipalities become relevant in aiding student's physical and financial access to food.

Furthermore, municipalities are responsible for selling electricity (4B) and water (4B),³³⁶ both of which are essential for food security. Every municipality has a policy for free basic water and electricity for the indigent. This is an area in which municipalities may intervene on behalf of indigent students who need access to both water and electricity to prepare food. However, it is important to note that there are currently no municipal tariff policies which make specific provisions for free basic services for indigent students. This once again is as a result of the siloed approach of not viewing students in tertiary institutions as part of the political economy of the state, affecting and being affected by the conditions which affects other citizens within the state. The exclusion of students from municipalities policy for free basic water and electricity for the indigent, fails to take into cognisance the vulnerabilities of students as a group. The exclusion indicates that students are not regarded as being affected by the same conditions of poverty that affects the rest of the population.

In the discharge of their functions, municipalities conduct town planning -they design towns and cities around campuses.³³⁷ It is however questionable whether they take into consideration students' food security needs in these designs. This is particularly instructive, given the earlier

³³⁵ Friends of the Earth 'Eating from the Farm: the social, environmental and economic benefits of local food systems' (2016) Available at https://www.foeeurope.org/sites/default/files/agriculture/2015/eating_from_the_farm.pdf (Accessed 20 October 2020).

³³⁶ See also Section 84(1) of the Municipal Structures Act, Act 117 of 1998 which specifies powers and functions of municipalities with respect to water, electricity, waste water and sewerage disposal and municipal health services.

³³⁷ Under Schedule 4B, municipal planning is one of the exclusive functional competencies of municipalities.

discussion in the first chapter of this study on the campus environment and some campuses being recognised as food deserts. Students incur extra transportation costs because the current design of most towns where tertiary institutions are located do not take into consideration the realities of students' physical access to food. It also does not consider that a large population of students do not have their own means of transport and therefore have to pay for public transport.

Closely linked to this, municipalities are responsible for municipal public transport.³³⁸ As highlighted above, students are mostly reliant on public transport. High transport costs crowd out funds that can otherwise be spent on healthy food by students. There are currently no specific rebates/discounts afforded to students by municipalities on transportation. Rebates of this nature would be particularly relevant to NSFAS funded students who live at home and are not entitled to a meal or living allowance. It is within the competence of municipalities to regulate and plan municipal public transport, taking student populations' needs into account.

It is clear that while matters of tertiary education are within the domain of national government, there are areas of 'intervention' for provincial and municipal intervention in matters of food security, which affects all, including students in tertiary institutions. Guaranteeing food security for all, including students in tertiary institutions, remains the responsibility of national government, with roles to play for provincial and municipal governments. It is submitted that addressing the food security needs of students is a multi-layered problem with multiple actors. Each with their own responsibility for specific aspects of the problem and they must all do their bit.

Having highlighted the accountability of the government- specifically national, provincial and municipal government- in ensuring the food security of students in tertiary institutions, it becomes imperative to question what accountability in this instance will mean. Accountability standards at global levels have been shown to have an effect on accountability of state actors in a national/local context.³³⁹ Many of the treaties and/or soft laws, at the international scene,

³³⁸ Under Schedule 4B, municipal public transport is one of the exclusive functional competencies of municipalities.

³³⁹ Tsai L & Ors 'Effect of international standards on accountability behaviours' Research report prepared by MIT Governance Lab (2018) Available at <https://mk0mitgovlab6m5p3m06.kinstacdn.com/wp-content/uploads/2019/01/effect-of-international-standards-on-accountability-behaviors-brief.pdf> (Accessed 28 November 2020).

to which South Africa is party, informs what accountability for the food and nutrition security of students in tertiary institutions should look like.

3.6 Legal Framework for the States' Obligation to Guarantee the Right to Food of Students in Tertiary Institutions

Accountability manifests in particular contexts. International treaties and soft law, together with the constitutional framework of South Africa and policy guidelines, sets the stage for what legal accountability looks like in ensuring food and nutrition security for students in tertiary institutions.

General Comment 12 (on the right to adequate food) of the Committee on Economic Social and Cultural Rights, provides insight into what state's accountability in ensuring food and nutrition security for vulnerable groups entails. Paragraph sets out a minimum core standard to the fulfilment on the right to food when it notes that

‘...The principal obligation is to take steps to achieve *progressively* the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.’

As explained by Durojaye and Chilemba, this provision implies that the States' obligation to ensure freedom from hunger is an immediately realisable obligation.³⁴⁰ What currently obtains in the tertiary institution space in South Africa is at odds with the States' obligation to ensure freedom from hunger and a clear deviation from the its duty to fulfil the right to food of everyone.³⁴¹ Furthermore, Paragraph 15 of GC 12 provides for the State to step in where an individual or group is unable for reasons beyond their control to fulfil their right to food where it notes that -

‘[f]inally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly...’

³⁴⁰ Durojaye E and Chilemba E (2018) ‘Accountability and the right to food: a comparative study of India and South Africa’ *Food Security SA Working Paper Series 003* DST-NRF Centre of Excellence in Food Security, South Africa 11.

³⁴¹ Van de Berg L, Raubenheimer J ‘Food Insecurity among Students at the University of the Free State, South Africa’ (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169; Rudolph M et al ‘Food insecurity and coping strategies among students at University of Witwatersrand’ (2018) 6 (1) *Journal of Food Security* 20-25.

The second chapter of this study discussed in detail the multiplicity of factors which exacerbates the predisposition of students in tertiary institutions to food insecurity and thus will not be restated here. Suffice to state that it is clear, from chapter two, that many students firmly fall within the category of groups envisaged under this provision of GC 12 due to their inability to fulfil their own right to food.

Specifically, Paragraph 21 of GC 12 delineates the requirement for States to adopt a national strategy based on human rights policies and benchmarks, to ensure food and nutrition for all. This responsibility is further strengthened when the GC iterates the duty of States to ensure the right to food of particularly vulnerable groups are fulfilled, even when they face severe resource constraints.³⁴² This agrees with the theoretical framework of this study on vulnerability and centring the State. The State is responsible for addressing the vulnerability which vulnerable subjects (in this case, students) are confronted with.

Paragraphs 32 to 35 of General Comment 12 clearly sets out steps to ensure accountability of States to the people in ensuring the right to food of all. Specifically, the incorporation of the right to food in the domestic legal order is enunciated.³⁴³ South Africa as a nation achieves this, through the incorporation of the right to food in the Bill of Rights in the 1996 Constitution. However, South Africa falls short by not taking other concrete legislative measures enunciated by GC 12- specifically the establishment of a framework law on the right to food³⁴⁴ – to ensure accountability.

In addition, Paragraph 32 notes in part that

‘...All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National Ombudsmen and human rights commissions should address violations of the right to food.

GC 12 places the obligation on ombudsmen and human rights commissions to address violations of the rights to food. The South African Human Rights Commission (SAHRC) in 2017 released its report³⁴⁵ on the right to food in South Africa, where it listed the shortcomings

³⁴² See further Para 28 of General Comment 12.

³⁴³ See Para 33 General Comment 12.

³⁴⁴ See further Para 29 General Comment 12.

³⁴⁵ South African Human Rights Commission (2017) ‘The right to access to nutritious food in South Africa’ Available at

of the South African government in fulfilling the right to food of several vulnerable groups in the country. Although commendable as a step towards realising the right to food in South Africa, one major vulnerable group which the report neither investigated nor made reference to was students in tertiary institutions. Since then and despite the submission of a petition³⁴⁶ to the SAHRC, it is yet to investigate the continued violation of the right to food of students in South African tertiary institutions.

3.7 Conclusion

This chapter commenced with a brief reflection on the argument of tertiary education being a public good in South Africa and went on to explore the stakeholders of the tertiary education sector. The roles of the stakeholders in guaranteeing the right to food of students in tertiary institutions were examined. The state was identified as the key stakeholder with an obligation to guarantee the right to food of all in South Africa and more specifically of vulnerable groups. In the previous chapter, students in tertiary institutions have been identified as a group particularly vulnerable to food insecurity. This chapter went on to consider the various spheres (national, provincial and municipal) of government and their roles in fostering food security for students in the tertiary education sector. The legal framework of the State's role in guaranteeing students right to food was discussed against the background of General Comment 12 of the ICESCR.

Given the absence of a clear law or policy directive, it remained unclear which specific sphere of government bears responsibility for the right to food of students in tertiary institutions. Suffice to state that as a principal stakeholder the responsibility for fulfilling the right to food of students in tertiary institutions rests with the state, at the national sphere. This however, does not take away responsibilities of other spheres, in furtherance of the right to food of all. Within the framework of the competencies of both provincial and municipal governments, there are

<https://www.sahrc.org.za/home/21/files/Research%20Brief%20on%20The%20Right%20to%20Food%202016-2017.pdf>.

³⁴⁶ In brief, the petition of the DOI demanded that the SAHRC: i) Conducts an urgent nationwide inquiry into the state of food and nutrition security and the constitutional fulfilment of the right to food of students within tertiary institutions; ii) Reports timeously the findings of such inquiry to Parliament, making concrete recommendations on ways the different government institutions and departments, can address this issue, both in the short-term and long-term; and iii) Makes concrete legislative and policy recommendations to Parliament to ensure the fulfilment of the right to food of students within tertiary institutions. See further <https://dullahomarinate.org.za/news/the-dullah-omar-institute-petitions-chapter-9-institution-on-food-insecurity-in-tertiary-institutions>.

opportunities which directly or indirectly impact on students' access to food. These should be utilised in fulfilling this right. For instance, municipalities can promote students physical and economic access to food through its licensing regimes for markets, where for instance such markets are situated in close proximity to campuses. As it concerns the right to food of students in tertiary institutions, there is a clear and continuing abrogation on the part of the South African State. General Comment 12 of the ICESCR makes it unequivocally clear that other parties outside of the state also have responsibilities in the realisation of the right to adequate food for all- students inclusive.

The next chapter turns its attention to the role of non-state actors in the realisation of the right to food of students in tertiary institutions.



CHAPTER 4

ENSURING ACCESS TO FOOD FOR STUDENTS IN TERTIARY INSTITUTIONS- A ROLE FOR NON-STATE ACTORS

4.1 Introduction

The previous chapter outlined and discussed the South African legislative and policy framework on the right to food within tertiary education. The legal obligation of the state towards fulfilling the right to food of students in tertiary institutions was extensively discussed, with a conclusion that the state at a national level and acting through its various organs had a legal and constitutional obligation to ensuring food security for all, including students in tertiary institutions. A brief examination of who the stakeholders' within higher education was also carried out and non-state actors including business entities were identified as important stakeholders. The question that arose in the contemplation of state obligation in the previous chapter, was whether other non-state actors had an obligation or duty towards the fulfilment of the right to food for students in tertiary institutions.

The current chapter evaluates the link between non-state actors and the right to food in the context of tertiary institutions. The term non-state actors has been discussed earlier in the first chapter of this study, with a clear distinction between non state actors and private actors being made.³⁴⁷ Suffice to state that when broadly used, the term non state actors covers a variety of actors from local businesses including small and medium scale enterprises, to international organisations,³⁴⁸ transnational corporations,³⁴⁹ and non-governmental organisations (NGOs) etc.³⁵⁰ In the context of this research, non-state actors will refer mainly to local businesses for

³⁴⁷ See further the discussion in sections 1.3.4 and 1.3.5 of this study.

³⁴⁸ International organisations are creations of states or intergovernmental organisations, usually set up by specific treaties and for defined purposes as agreed between states.

³⁴⁹ Para 1 (a) of the UN Draft Code of Conduct on Transnational Corporations defines the term "transnational corporations" as '...an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.

³⁵⁰ See further See Para 136 of Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/2002, 21st ACHPR AAR Annex II (2006-2007).

profit that operate within or exert some form of influence, whether directly or secondary, within the tertiary education sector in South Africa.

Human rights discourse over the years has evolved from the classic paradigm of state obligation and answerability to individuals and has metamorphosed into holding accountable non-state actors who are in violation of human rights.³⁵¹ Transnational organisations may be held responsible for human rights violations that occurred as a result of their activities. This was evidenced in the *SERAC Case*,³⁵² where Shell (and the Nigerian government) was held liable for the violation of the right to food and right to life of the Ogoni people of Nigeria. This principle applies to other non-state actors including non-governmental organisations (NGOs), local businesses and international organisations.

This chapter argues that non-state actors should have a duty to ensure access to food for students at South African tertiary institutions and that where they hamper this access, should be held to account. In a bid to establish the extent of these obligations, three steps are taken. First, this chapter reiterates the indubitable link between non-state actors and the right to food, followed by a highlight of the role of non-state actors in addressing food insecurity at tertiary institutions. Then, an evaluation of the jurisprudence is done. This covers the norms and standards of selected human rights monitoring bodies on the international scene, regional scene and decisions from South African courts.

4.2 The Link between Business and Human Rights

Various developments on the international scene have gradually pushed for the recognition of human rights as an integral part of business and vice versa.³⁵³ First, there has been a fusion of business and society based on the concepts of business ethics, corporate social responsibility, corporate environmentalism and sustainable development.³⁵⁴ These concepts innately speak to

³⁵¹ Reinisch A 'The changing international legal framework for dealing with non-state actors' in Alston P (Ed) *Non-State Actors and Human Rights* (2005) 37.

³⁵² *Supra* (Chapter 2).

³⁵³ Human rights are becoming an increasingly prominent issue for business, premised in part on the activities of the United Nations (UN) Special Representative of the Secretary General (SRSG) on human rights and business. See Hamann R, Sinha P, Kapfudzaruwa F & Schild C 'Business and human rights in South Africa: An analysis of antecedents of human rights due diligence' (2009) 87(2) *Journal of Business Ethics* 453-473.

³⁵⁴ Bergman M, Bergman Z & Berger L 'An empirical exploration, typology, and definition of corporate sustainability' (2017) 9(5) *Sustainability* 753-766.

the recognition of humanity and dignity and the need to inculcate this in all decisions that are made across the value chain of any business.³⁵⁵ Secondly, conversations around business and human rights are not limited to the identification of human rights as a moral framework that informs the corporate world, but rather proof of a strong tradition that informs that conversations.³⁵⁶ Thirdly, the United Nations engaged various steps that point to a strong indispensable link between business and human rights.³⁵⁷ A brief discussion on the historical development of linking business to human rights follows.

4.2.1 Historical Account of Attempts to Regulate Business through a Human Rights Framework

A strong indispensable link between business and human rights is evident in the initial attempt to adopt the 1990 draft UN Code of Conduct of Transnational Corporations, a draft of 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights by the UN Sub-Commission on the Promotion and Protection of Human Rights. Other steps, apart from those mentioned previously, have been in debates on draft norms from business associations, CSOs which contributed to the establishment of the office of the United Nations (UN) Special Representative of the Secretary General (SRSG) on human rights and business.³⁵⁸

A turning point in the development of regulating business through a human rights framework was the appointment of the then UN Special Representative for Business and Human Rights, Prof John Ruggie. Ruggie conceptualised over a period of six years, the UN Guiding Principles

³⁵⁵ This can be viewed from the importance of the inherent dignity of a human as seen in various instruments. See the Preamble to the International Covenant on Civil and Political Rights (1966) 999 UNTS 171 and 1057 UNTS 407 available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; Preamble to the International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3 available at <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

³⁵⁶ Scholars have gone ahead to argue for this position while at the same time underscoring the human dignity of individuals as the cornerstone to this position. See McDougal, Lasswell and Reisman, 'The World Constitutive Process of Authoritative Decision' in McDougal M and Reisman W 'International Law Essays: a Supplement to International Law' in *Contemporary Perspective* (1981) 201. See also Bilchitz D (2015) The moral and Legal necessity for a business and human rights treaty available at <https://bit.ly/33GHiUu> (accessed 24 March 2020).

³⁵⁷ Hamann, Sinha, Kapfudzaruwa & Schild (2009) Business and human rights in South Africa: An analysis of antecedents of human rights due diligence. *Journal of Business Ethics*, 87(2)454.

³⁵⁸ Ruggie J 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (2007) Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Document A/HRC/4/35, 9 February 2007.

on Business and Human Rights, known as the Ruggie Principles.³⁵⁹ Ruggie's principles consist of a total of 31 directives, framed through its famous three pillars of protect, respect and remedy.³⁶⁰ In summary, it espoused 'the state duty to protect against human rights abuses, the corporate responsibility to respect human rights, and the need to help victims achieve remedy'.³⁶¹ While the first pillar places responsibility on the state to protect against human rights abuses from non-state actors, the second and third pillars, address the role of non-state actors.

The second pillar emphasises the duty of non-state actors in respecting human rights. This pillar is further elucidated upon in Principle 13, manifesting in two requirements- 1. Non-state actors should avoid causing and contributing to adverse human rights impact in the course of conducting their businesses and activities, and where such adverse human rights impacts occurs, address them. 2. Even where non-state actors do not directly contribute to these adverse impacts, where they arise by the reason of their business relationships, such adverse impacts ought to be prevented or mitigated as the case may be. Furthermore, there is an emphasis on the need for non-state actors to actively carry out due diligence to avoid, address and mitigate adverse impacts on human rights across the whole value chain of their businesses.³⁶² In the context of the right to food in South African tertiary institutions, it does appear that a case can in fact be made for the adverse effect of food retailers and the costs of purchasing food for students.

The third pillar of Ruggie's principles is access to a remedy where there has been a violation of rights based off the activities of non-state actors. On the one hand, the state has a responsibility on this regard to ensure the mechanisms to seek such remedies are in place. Non-state actors themselves are to be actively involved in the remedial processes in cooperation with other actors.³⁶³ Remedies can take a multiplicity of forms, ranging from apologies to

³⁵⁹ Sanders A 'The impact of the 'Ruggie framework' and the United Nations guiding principles on business and human rights on transnational human rights litigation in Jena M and Bravo K *The Business and Human Rights Landscape: Moving Forward, Looking Back* (2015).

³⁶⁰ Ruggie J Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: 'Protect, Respect and Remedy: a Framework for Business and Human Rights', A/HRC/8/5, 7 April 2008.

³⁶¹ Sanders A 'The impact of the 'Ruggie framework' and the United Nations guiding principles on business and human rights on transnational human rights litigation in Jena M and Bravo K *The Business and Human Rights Landscape: Moving Forward, Looking Back* (2015).

³⁶² Dharmawan N et al 'The guiding principles on business and human rights: National action plans towards corporation responsibility'(2018) 4(2) *Hasanuddin Law Review* 129 -130.

³⁶³ Dharmawan N et al (2018) 132.

restitution, rehabilitation, financial or non-financial sanctions, punitive sanctions, as well as prevention of harm through for instance an injunction or guarantee of non-repetition.

Beyond Ruggie Principles, it is important to bear in mind that business and human rights form a thematic issue that grazes across the whole human rights agenda due to commitments underscored in various human rights instruments like the UDHR,³⁶⁴ the ICESCR,³⁶⁵ the CRPD³⁶⁶ and the CEDAW.³⁶⁷ A cursory look at these instruments reveal that they are all applicable in the context of business and human rights. Furthermore, while the United Nations Guiding Principles are not binding per se, they do set out existing international law and best practice that guide the application of human rights to businesses. Most recently in these endeavours is the draft UN Treaty on Business and Human Rights, geared towards elaborating ‘an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.’³⁶⁸

The fact that actions of a business may hamper people’s enjoyment of their rights in a positive or negative manner may not necessarily be the crux of this discussion.³⁶⁹ What is crucial to note is what can be done to improve the enjoyment of rights with regard to a positive undertone; or what can be done to mitigate and effectively stop human rights violations in instances of a negative undertone. Literature from an international perspective indicates that businesses may drastically hamper the enjoyment of an individual’s rights where they do not take cognisance of the potential risks which the performance of their business may pose.³⁷⁰ Two pointers are deducible from the foregoing. First, that businesses play a key role depending on the approach they take, and secondly; a business needs to pay heed to the potential risk it poses to human rights across its value chain. It follows that businesses play a probable solution to ensuring the enjoyment of rights.

³⁶⁴ Article 14, Universal Declaration of Human Rights.

³⁶⁵ Article 11, International Covenant on Economic, Social and Cultural Rights.

³⁶⁶ Article 23, Convention on the Rights of the Child. Article 28 Convention on the Rights of Persons with Disabilities.

³⁶⁷ Article 14 Convention on the Elimination of All Forms of Discrimination against Women.

³⁶⁸ See further UN Human Rights Council, Resolution 26/9 (2014), para. 1.

³⁶⁹ UN Guiding Principles Reporting Framework.

³⁷⁰ How Can Businesses Impact Human Rights? Available at <https://www.ungpreporting.org/resources/how-businesses-impact-human-rights/> (accessed 245 March 2020).

One of such rights is the realisation of the right to food. While the right to food is not specially provided for as a standalone right in some international instruments, notably the ICESCR, it suffices to state that the instruments provide for this right within the context of an adequate standard of living.³⁷¹ In addition, human rights provide a framework that advances the global agenda of food and nutrition security through the framework of the right to human dignity.³⁷² An engagement of these businesses and whether they are state actors needs to be placed into perspective.

4.3 Role of Non-State Actors in Addressing Food Insecurity: A Tertiary Institution Perspective

More often than not, non-state actors are regarded in the context of their role as prescribed, or adjudicated upon in international law. For instance, international criminal law recognises that where non-state actors have control of a territory, they have obligations synonymous with a State. This has been seen in recent developments from the Committee on the Rights of the Child and the African Committee on the Rights and Welfare of the Child, where the Committees argue that non-state actors in situations of armed conflict have obligations toward the protection and promotion of the rights of affected children.³⁷³ Emerging literature indicates that rebel groups have obligations to promote and protect the rights of civilians in international humanitarian law, international human rights law and international criminal law.³⁷⁴

In the area of business and human rights, corporations are bound by international law toward the people that benefit, conduct business with or use their goods and services. Usually the rhetoric is geared towards transnational corporations or corporations working at an international or transnational perspective, however it is argued that this can be interpreted as applicable to local businesses as well, including small and medium scale enterprises.³⁷⁵

³⁷¹ Article 11 of the ICESCR.

³⁷² Donnelly J *Universal Human Rights in Theory and Practice* (2013) 20–21.

³⁷³ See draft General Comment of the African Committee on the Rights and Welfare of the Child on Article 22 on the ACRWC on children affected by armed conflict, available at acewrc.africa/general-comments (accessed 24 March 2020).

³⁷⁴ Clapham A, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement' (February 1, 2010). Available at SSRN: <https://ssrn.com/abstract=1569636> or <http://dx.doi.org/10.2139/ssrn.1569636> (Accessed 14 June 2020).

³⁷⁵ Bergman M, Bergman Z & Berger L (2017) 753-766; McDougal, Lasswell and Reisman (1981) 201, Bilchitz D (2015).

4.3.1 *Non-State Actors in a National Context?*

This study takes a turn by design to reflect on Non-State Actors in a National Context. For a start, it should be recalled that the preamble to the UDHR states that

[E]very individual and every organ of society shall strive by teaching and education to promote respect for these [human] rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among other peoples of territories under their jurisdiction.³⁷⁶

This obligation is universal and concerns both state and non-state - actors.³⁷⁷ In light of the distinct types of non-state actors, informed by their (criminal or non-criminal) actions or (national or international) territorial jurisdiction, other questions arise. First, the effectual physical extent of an organ as a condition precedent to its description as a non-state actor. Secondly, the interpretation of its actions in relation to the promotion and protection of human rights as a condition precedent to the obligations that flow from its engagement with individuals.

First, it is argued that the effectual physical extent of an organ is not a condition precedent to its description as a non-state actor. This is based on the position that non-state entities take on various forms like national and international NGOs, human rights defenders; terrorists; paramilitary groups in autonomous control of territories, multinational enterprises and individuals.³⁷⁸ As such, they may exist in national and international contexts. Secondly, the actions of non-state actors are a condition precedent to the extent to which they either protect or disregard the rights of individuals. To substantiate this, this study agrees with the position that non-state entities do have responsibilities, both in a positive and in a negative sense.³⁷⁹ The negative regard places an obligation on non-state actors to refrain from violating the rights of individuals. This position is generally accepted and recognised in both international and national law.

³⁷⁶ Preamble to the UDHR 1948.

³⁷⁷ The role of non-state entities, available at <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/the-role-of-non-state-entities> (accessed 24 March 2020).

³⁷⁸ The role of non-state entities, available at <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/the-role-of-non-state-entities> (accessed 24 March 2020).

³⁷⁹ d'Aspremont J (ed.) *Participants in the international legal system: multiple perspectives on non-state actors in international law* (2011) generally.

The positive side places a duty on non-state actors to contribute to the enjoyment of the rights of individuals.³⁸⁰ This however remains contentious and is not a settled position under international law. Indeed, many commentators dispute that non-state actors have a positive obligation to realise rights. However, this study aligns with the view that non-state actors can in fact breach their positive obligations to ensure the minimum requirements of any specific socio economic right, especially with regard to the activities of large corporate groups and global value chains.³⁸¹ To this effect, the positive obligations of non-state actors come to play in the discussion on their roles in ensuring access to food of students in tertiary institutions. This will be elaborated upon later on in this chapter. Suffice to state at this point that that use or misuse of their positive obligations in the context of food security in the tertiary education sector, can in fact distort student's access to food.

In the interim, while the effectual physical extent of a non-state actor is not a condition precedent to meeting this description, its actions in relation to the protection of human rights is a condition precedent to its obligations that flow from its engagement. This covers both instances of national and international law. As such, the existence of non-state actors at universities is a settled question that posits the need to establish the extent of these obligations.

4.3.2 *The extent of the obligations of non-state actors in a national context*

The extent of obligations of non-state actors in any sphere depends on the nature of the rights and how it fuses in both the public and private sphere of an individual. Proponents of the conservative position posit that constitutional rights apply in a public sphere but not in the private sphere.³⁸² A strict application of this position seems to indicate that private entities or non-state actors are not bound by human rights.³⁸³ This position follows the application of the

³⁸⁰ Ssenyonjo M (2017) 'The applicability of international human rights law to non-state actors: What relevance to economic, social and cultural rights?' In *Economic, Social and Cultural Rights*, 77-112.

³⁸¹ Cernic J *Corporate Accountability for Socio-Economic Rights* (2019) 7.

³⁸² Chirwa D The horizontal application of constitutional rights in a comparative perspective (2006) *Law, Democracy & Development* 10(2) 21-48.

³⁸³ Bittermann equates this to the perception that the legislature, the executive, the judiciary and all organs of the state are directly bound yet private actors are not directly addressed by constitutional rights. See Bittermann B *Providing for the effective domestic implementation of rights of nature: a critical discussion* (2017) (Unpublished Doctoral dissertation, University of Cape Town) 47. See also Gardbaum 'The Place of Constitutional Law in the Legal System' in Rosenfeld & Sajó *The Oxford Handbook of Comparative Constitutional Law* (2012) 177.

natural rights theory which bases its distinction on the existence of the public and the private spheres that subsequently inform the application of human rights.³⁸⁴ As a result, it is asserted that as long as these obligations affect an individual's enjoyment of human rights, the place of the private or public sphere ceases to exist. It is on this basis that it is argued that the extent of the obligations is informed by the nature of their application.³⁸⁵

The South African Constitution responds to this dilemma by providing for the horizontal application of the bill of rights. To this end, the relevant section provides that

A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.³⁸⁶

Critics of the horizontal application may argue that Constitutions regulates the public and not the private sphere.³⁸⁷ This position may be understood by natural law principles, which prohibit state interference with private activities.³⁸⁸ The danger with this approach is the violation of human rights by non-state actors due to the lack of accountability.³⁸⁹ The need for accountability, as a result, calls for the recognition of human rights obligations on the part of private parties.

To this end, section 9(4) of the Constitution of Suth Africa places an obligation on private individuals not to discriminate against others on the same comprehensive set of grounds that applies to the state.³⁹⁰ The extent of the obligation is bound by the nature of the right. In the instant case, the right in context is the right to food. This right as provided for, states that everyone has the right to have access to ... sufficient food and water;³⁹¹

³⁸⁴ Chirwa (2006) 21.

³⁸⁵ The question whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals would then refer to a vertical approach and the relations between non-state actors and person in their circles as the horizontal application. See Gardbaum S 'The " Horizontal Effect" of Constitutional Rights' (2003) 102 (3) *Michigan Law Review* 388

³⁸⁶ Section 8(2) of its Bill of Rights of the Constitution of the Republic of South Africa, 1996.

³⁸⁷ Chirwa D 'Obligations of Non-state Actors in Relation to Economic, Social, and Cultural Rights under the South African Constitution' (2002) 7 *Socio-Economic Rights Project*.

³⁸⁸ Chirwa (2002).

³⁸⁹ Chirwa (2002).

³⁹⁰ Section 9(4) states that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). Sub section 3 underscores the grounds to include.

³⁹¹ Section 27(1)(b).

It is submitted that the duty of non-state actors in the context of the right to food in South Africa, will be to ensure that they do not directly or indirectly hamper people's right to food. However, it has to be noted that the extent is determined by the progressive realisation of this right by the State, and not non-state actors, unless the position of the non-state actors is synonymous with the authority of the State.³⁹² Indeed recent argument in the literature is that in keeping with positive obligation on the part of non-state actors, progressive realisation also falls within the confines of some non-state actors, especially where their businesses take on traditional roles and/or services of the state.³⁹³ To this end, while the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights, non-state actors also have a duty in this regard.³⁹⁴ Within the context of right to food in tertiary education sector, this duty may be manifested by non-state actors taking definitive steps which recognise the vulnerability of students to food insecurity. For instance, practices which make food more economically accessible to students should be adopted by non-state actors with businesses within tertiary institutions, or who sell to students of tertiary institutions. Some examples of these practices as adopted by other jurisdictions include- selling food at discounted rates to students upon proof of identification,³⁹⁵ specific days at which students buy food at discounted prices at supermarkets.³⁹⁶

This national outlook is in tandem with the preamble of the draft UN Treaty on Business and Human Rights, where it notes

... Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur, as well as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationships;³⁹⁷

³⁹² Section 27(2).

³⁹³ Generally Cernic J (2019) 7, 41 -45.

³⁹⁴ Section 27(2) The discussion on progressive realisation is beyond the scope of this chapter. However the depths and content are well articulated in the CESCR General comment 3. nature of States parties obligations (Art. 2, paras 1, 10). Under Article 2 (1) of the ICESCR states that each State party is obliged to take the necessary steps "to the maximum of its available resources". As such, for the State party to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that it has engaged every effort to use all resources at its disposition to satisfy, as a matter of priority, those minimum obligations.

³⁹⁵ O'Donnell M 'Morrisons first big four supermarkets to offer 10% discount for uni students' *MSE News* Available at <https://www.moneysavingexpert.com/news/2016/09/morrisons-first-big-four-supermarket-to-offer-10-discount-for-uni-students/> (Accessed 09 September 2020).

³⁹⁶ Gray A 'The secret to grocery shopping on a college budget' Available at <https://spoonuniversity.com/how-to/shopping-on-student-budget> (Accessed 09 September 2020).

³⁹⁷ UN Human Rights Council, Resolution 26/9 (2014), Preamble.

In conclusion therefore, there is a role for non-state actors to play in addressing student access to food which extends beyond not hampering such access. This role should also extend to facilitating their access to food. The section that follows analyses international and regional norms and standards to the role of non-state actors.

4.4 Norms and Standards in Relation to Non-State Actors under International Law

International law exists to provide global legal order and uniformity in the laws against rights violations. This is done through treaties that state parties ratify and then register, in support of their aversion to certain rights violations. In addition to the discussion above, this section examines specifically the norms developed by treaty monitoring bodies in relation to business and human rights. This section places emphasis on the norms and standards emanating from selected human rights bodies. Their general comments, concluding observations and jurisprudence/decisions are examined in the light of non-state actors' obligations towards the protection of rights. Some of the norms and standards examined in this section include those emanating from the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of All Forms of Discrimination against Women; the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities. The jurisprudence emanating from these committees is largely based on the provision of the right to food under their founding human rights instruments.³⁹⁸

4.5 General Comments

General comments of the various human right treaty monitoring bodies, provide a robust interpretation of the contents of the rights in the respective treaties. Over the years, treaty monitoring bodies have increasingly moved towards using General Comments as an opportunity to adopt comments that contain significant normative guidance on various human rights.³⁹⁹ This section considers General Comments of treaty monitoring bodies on the roles which non-state actors play in the realisation of the right to food.

³⁹⁸ Article 14, Universal Declaration of Human Rights; Article 11, International Covenant on Economic, Social and Cultural Rights; Article 14 Convention on the Elimination of All Forms of Discrimination Against Women; Article 23, Convention on the Rights of the Child; Article 28 Convention on the Rights of Persons with Disabilities.

³⁹⁹ Keller H and Grover L 'General Comments of the Human Rights Committee and their Legitimacy' in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies* (2012)116-199, at 124.

4.5.1 *Committee on Economic, Social and Cultural Rights*

The Committee on Economic, Social and Cultural Rights (CESCR) is a body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights.⁴⁰⁰ The CESCR monitors the implementation of the articles in Part III of the Covenant, which include the right to an adequate standard of living under Article 11, wherein the right to food is situated.⁴⁰¹ In this regard, General Comments 12 and 24 of the CESCR are particularly instructive in informing the responsibilities of non-state actors on the right to food within the tertiary education sector.

The Committee's General Comment 12 discusses in-depth the realisation of the right to food (GC 12).⁴⁰² While GC 12 places obligations on State parties to respect, protect and fulfil the right to adequate food, other normative principles speak to ensuring the adequacy, availability and accessibility of food. States are also expected to engage the five principles of; the use of maximum available resources and progressive realisation of the right, use of the minimum core content or obligation, non-discrimination, participation and extraterritorial jurisdiction.⁴⁰³ The challenge is the application of GC 12 to non- state actors in the contextual engagement of the General Comment that is directed at States Parties.⁴⁰⁴ This is remedied by role of the General Comment that offers direction on the interpretation of article 11 of the ICESCR. A few principles stand out that speak to non-state actors.

⁴⁰⁰ It was established by the ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.

⁴⁰¹ The relevant Articles include work, under "just and favourable conditions", with the right to form and join trade unions (Articles 6, 7, and 8); social security, including social insurance (Article 9); family life, including paid parental leave and the protection of children (Article 10); an adequate standard of living, including adequate food, clothing and housing, and the "continuous improvement of living conditions" (Article 11); health, specifically "the highest attainable standard of physical and mental health" (Article 12); education, including free universal primary education, generally available secondary education, and equally accessible higher education. This should be directed to "the full development of the human personality and the sense of its dignity", and enable all persons to participate effectively in society (Articles 13 and 14); and participation in cultural life (Article 15).

⁴⁰² General Comment 12.

⁴⁰³ The principles are articulated in General Comment 12.

⁴⁰⁴ Further insights on the General Comment can be read in Seatzu F 'The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Food' (2011) 27 *Anuario Espanol de Derecho Internacional* 571-588.

First, adequacy of the right to food includes the satisfaction of dietary needs and freedom from adverse substances, as well as cultural acceptability.⁴⁰⁵ GC 12 provides that that the notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations.⁴⁰⁶ This is evident in concluding observations, where the CESCR recognises in some countries that a high percentage of households or individuals are food-insecure due to food price increases. It has recommended that States Parties strengthen their strategic interventions dealing with the alarming situation of increasing food insecurity.⁴⁰⁷

This inversely places an obligation on non-state actors to take steps that do not stifle the provision of access to food in general and within the context of this study, on universities.⁴⁰⁸ This extends to the provision of food that is merchantable and fit for the purpose.⁴⁰⁹ While it is true that adequacy is determined by the prevailing social, economic and other conditions, the non-state actor as a provider of access to food should not use these conditions to reap profits to the disadvantage of the buyer or the student. Thus, the vulnerability of the proposed buyer must be central to the policies, practices and pricing of the non-state actor, in a bid to promote rather than hamper the availability of food.

Secondly, the accessibility branch of the right to food entails physical and economic accessibility. Economic accessibility makes a demand on non-state actors to maintain reasonable prices to ensure that the attainment and satisfaction of the rights of an individual associated with the acquisition of food are not threatened or compromised.⁴¹⁰ The CESCR has on occasions expressed concern over serious food shortages and food price hikes that places persons in vulnerable situations, and recommended that States ensure necessary measures to guarantee the provision of food.⁴¹¹ Such measures ensure that non-state actors do not stifle the

⁴⁰⁵ These notions are discussed here. See Söllner S 'The "Breakthrough" of the right to food: The meaning of general comment no. 12 and the voluntary guidelines for the interpretation of the human right to food' (2007) 11(1) *Max Planck Yearbook of United Nations Law Online* 391-415.

⁴⁰⁶ General Comment 12, paragraph 8.

⁴⁰⁷ Concluding observation to Cambodia, para 28, 12 June 2009, E/C.12/KHM/CO/1, available at: <https://www.refworld.org/docid/4af181b20.html> (accessed 25 March 2020).

⁴⁰⁸ Any attempt to stifle the provision of access to food on grounds of improper enhancement of profit may be seen as a violation of the right to food contrary to section 9 of the South African Constitution.

⁴⁰⁹ It is expected that the food is not expired or dangerous to the students, and accepting the return of food that is spoilt or expired. This is the context of the Consumer Protection Act.

⁴¹⁰ General Comment 12, para 13.

⁴¹¹ Concluding Observations on the report of Nicaragua, para 23, 28 November 2008, E/C.12/NIC/CO/4, available at: <https://www.refworld.org/docid/494258622.html> (accessed 25 March 2020).

accessibility of food. In this vein, it would appear that food vendors at tertiary institutions have an obligation to refrain from unjustifiable price hikes of food, which makes food economically inaccessible to students.

This links back to the theory on power not only in the state but also as diffused across ‘capillaries of the social body’.^{412 413} It is clear that in the context of this study, non-state actors within the food supply value chain are able to subject power which students become objects of, thereby distorting their access to food. This further emphasizes the need to cite obligation for fulfilment of the right to food on non-state actors who have the power to affect students’ access to food.

It is also noteworthy that GC 12 while acknowledging the State parties as the parties to the Covenant, firmly reiterates the responsibilities of all members of society- including non-juristic persons in the fulfilment of the right to food. More specifically, it states the following about business:

...The private business sector - national and transnational - should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.⁴¹⁴

In furtherance of this, Paragraph 27 of GC 12 obligates State parties to ensure that the activities of the private sector are in conformity with the right to food.

In addition to GC 12, inference can be drawn from General Comment 14 (GC 14) on the right to health, where the Committee comments on the role of non-state actors in the realization of the right to health. Specifically, Paragraph 42 of GC 14 notes that

While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities.⁴¹⁵

Paragraph 42 and other provisions⁴¹⁶ within GC 14 provide context on the obligation of non-state actors in the realization of socioeconomic rights. Given the connection between the rights

⁴¹² Horakova H (2011) 5.

⁴¹³ See Chapter 2 of this study.

⁴¹⁴ General Comment 12, para 20.

⁴¹⁵ Para 42, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12).

⁴¹⁶ See further Paras 12(b), 26, 36, 55 and 56 of GC 14 on the Committee’s specific directions to non-state actors.

to health and food, it is easy to see how the Committee's comments in that regard also applies to the right to food.

General Comment 24 (GC24) of the CESCR provides guidance on how the activities of non-state actors may impact the enjoyment of socioeconomic rights, including the right to food. While GC 24 at the outset acknowledges that obligations to fulfil the rights set out in the ICESCR rests primarily with State parties, it acknowledges the growing role and influence of businesses in the fulfilment of human rights.⁴¹⁷ In discussing the scope of businesses to which the general comment applies, the Committee notes in paragraph 3 that '...business activities include all activities of business entities, whether they operate transnationally or their activities are purely domestic, whether they are fully privately owned or State-owned, and regardless of their size, sector, location, ownership and structure.'

GC 24 in discussing state parties' obligations to the fulfilment of the rights in the ICESCR and roles of non-state parties, draws a link between the activities of business and exacerbation of vulnerabilities of already vulnerable populations.⁴¹⁸ In the context of this study, this raises questions of how the activities of businesses within the tertiary education sector continues to perpetuate students' vulnerability to food insecurity. Does the proliferation of big chain supermarkets within the tertiary education sector exacerbate food insecurity among the student population?

The food environment in most institutions of higher learning is rapidly changing with the influx of big chain stores.⁴¹⁹ This is due to a combination of factors, but mainly because of the steep tendering process and conditionalities that most institutions have adopted over the years. As many small scale enterprises are unable to meet these requirements, competition is stifled in favour of major chain stores, eroding smaller scale businesses, including food vendors from the tertiary education landscape. The financial cost of purchasing food at major chain stores is significantly increased, compared to costs at smaller scale vendors, thereby driving up costs of students purchasing food and by implication exacerbating their food insecurity. The financial inaccessibility, as well as the lack of accessibility to nutritionally sufficient foods at these

⁴¹⁷ See further Para 1 and 2 of General Comment 24.

⁴¹⁸ See further Para 8 and 9 of General Comment 24.

⁴¹⁹ Pelletier J, Laska M 'Campus food and beverage purchases are associated with indicators of diet quality in campus students in college students living off campus' (2013) 28 (2) *American Journal of Health Promotion* 80 -87

supermarket chain outlets are contributory to the exacerbated vulnerability of students to food insecurity.⁴²⁰ This study takes the considered view that these factors can be directly linked to the activities of non-state actors operating within the food environment of tertiary education.

4.5.2 *Committee on the Rights of the Child*

The Committee on the Rights of the Child (CRC) is the body of 18 Independent experts who monitors the implementation of the Convention on the Rights of the Child (CRC) by its State parties.⁴²¹ It is established under Article 43 (1) of the CRC, to consider state reports on the implementation of the Convention, to make concluding observations and recommendations on the improvement in the realisation of the rights of the child.

It is recognised that a percentage of the student body in many South African tertiary institutions, especially within their first year, may still fall into the categorisation of children.⁴²² A 2016 Stats SA report indicated that of the national 14% level of post-secondary enrolment in South Africa, 18.3% of these were aged 17 and under.⁴²³ Therefore, the argument can be furthered that the provisions of the CRC may still apply in the tertiary institution context, in the case of students below the age of 18 years.⁴²⁴ This becomes relevant in light of the particular vulnerability of children and the duty on all to ensure that their rights are not violated.

It is important to note at the outset that within the framework of the rights of children, no distinctions are made between civil rights and socio economic rights. This stems from the holistic view/approach towards the actualisation of the child's wellbeing and that owing to their particular vulnerability, children are deserving of special protection.⁴²⁵ Further, the right to life framework of a child is broader and encompasses their right to food.

General Comment 15 of the CRC on the right to health of the child, provides detailed guidance on how the activities of non-state actors may impact the enjoyment of the right to health of

⁴²⁰ Meko N and Joordan E 'The food environment of students on a financial assistance programme at the University of the Free State, Bloemfontein' (2016) 29 (3) *South African Journal of Clinical Nutrition* 116-117.

⁴²¹ Article 43, 44 and 45 of the Convention of the Rights of the Child.

⁴²² A child is any person under the age of 18.

⁴²³ Statistics South Africa 'Education Series Volume III: Educational Enrolment and Achievement, 2016' 52.

⁴²⁴ The CRC in Article 1 defines a child as '...every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

⁴²⁵ Kuper J *International Law Concerning Child Civilians in Armed Conflict* (1997).

children. While this general comment relates specifically to the right to health, it does inform and provide guidance on how the activities of non-state actors may impact the enjoyment of other socioeconomic rights, including the right to food. Furthermore, the interdependence of rights is keenly expressed in the right to health and the right to food, the fulfilment of one not being possible without the other.

With regard to the more specific provisions of GC 15, Paragraph 6, specifically notes the need for recognition of a wide range of different duty bearers if the right to children's health is to be realized. The need for engagement with stakeholders' including non-state actors is further highlighted. In discussing the normative content of a child's right to the enjoyment of the highest attainable standard of health, the CRC makes it clear that all aspects of a child's life are to be considered in the light of available state resources, to be supplemented by other resources, including non-state actors.⁴²⁶ Further, the CRC in GC 15 iterates that children's right to health are a basket of both freedoms and entitlements. The entitlements are described as including '...access to a range of facilities, goods services and conditions, that provide equal opportunity for every child to enjoy the highest attainable standard of health'.⁴²⁷ In the contexts of tertiary education, it is clear that the access to food can rightly be classified as the entitlements described above. Thus, there is an obligation on both state and non-state actors to ensure the fulfillment of these rights. Non-state actors in South African tertiary education landscape continue to perpetuate financial non-access to food and thereby exacerbate inequality between students.

Finally, GC 15 of the CRC specifically discusses the role of non-state actors in the fulfillment of the child's right to the highest attainable standard of health. Some of the roles highlighted which also directly impact on non-state actors' role in ensuring access to food of students include the following:

- i. The obligation of due diligence with respect to human rights, including identifying, preventing and mitigating business impact on rights⁴²⁸;
- ii. Refraining from the advertisements of obesogenic foods⁴²⁹- this is particularly relevant in the context of most campus food environments.

⁴²⁶ Para 23, General comment 15 of the CRC.

⁴²⁷ Para 24, General Comment 15 of the CRC.

⁴²⁸ Para 80, General Comment 15 of the CRC.

⁴²⁹ Para 81, General Comment 15 of the CRC.

The Committee has further reiterated the impact which the activities of non-state actors can have on the rights of children through its discussions on children's rights and digital media.⁴³⁰ Specifically, it warns of the commercial exploitation of children by non-state actors, through targeted advertisements and the impact this might have on some of their rights. As large consumers of digital media, there are concerns on the growing rate of obesity in children and the role which targeted advertisement of junk food plays in this and how this affects children's rights to food and health. As highlighted above, this is contextually relevant to this research and shows how the right to food of minor students in tertiary institutions can be affected by the activities of non-state actors operating in the food sector.

The Committee also recommends to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child to consider communications from individuals and states on the violations of the Convention on the Rights of a Child.

It should be recalled that the relevant article provides that

'States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures... to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the **provision of adequate nutritious foods** and clean drinking-water, taking into consideration the dangers and risks of environmental pollution';⁴³¹

This provision seems to suggest that the State's mode of ensuring the provision of food, should direct the way non-state actors deal with children as rights' holders. It should be noted that the CRC deals with the rights of children. It is thus imperative to note that despite this limitation, it is worth evaluating the principles that it offers to see how they can be linked to the critique of the role of non-state actors in the tertiary institution environment.⁴³²

4.5.3 *Committee on the Rights of Persons with Disabilities*

⁴³⁰ Committee on the Rights of the Child ' Report of the 2014 day of general discussion on digital media and children's rights' Pp 15-16 Available at https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD_report.pdf (Accessed 18 August 2020).

⁴³¹ Article 24(2) (c) See also Articles 24(2)(d) and 27(3).

⁴³² See an extensive discussion of this approach when discussing the ACERWC under the African regional human rights system in section 4.5.2 below.

The Committee on the Rights of Persons with Disabilities (CRPD) is established under the Convention on the Rights of Persons with Disabilities.⁴³³ The Committee is a body of 18 independent experts who monitor the implementation of the CRPD.⁴³⁴ On the basis of the Optional Protocol to the CRPD,⁴³⁵ the CRPD is mandated to receive and examine individual complaints on the violation of the rights of Persons with Disabilities (PWDs), and undertake inquiries to obtain reliable evidence of grave and systematic violations.

An evaluation of its online database indicates that the Committee has not deliberated on any communication that deals with non-state actors in the context of the right to food at tertiary institutions.⁴³⁶ However, in its General comment No. 5 of 2017, it calls for equality across board to include PWDs and those without.⁴³⁷ A key paragraph states the importance of

the interdependence of an individual's personal development and the social aspect of being a part of the community: "Everyone has duties to the community in which alone the free and full development of his personality is possible." Article 19 [of the CRPD] has its roots in civil and political, as well as economic, social and cultural rights: the right to liberty of movement and freedom to choose one's residence (article 12 of the International Covenant on Civil and Political Rights) and the right to an adequate standard of living, including adequate clothing, food and housing (article 11 of the International Covenant on Economic, Social and Cultural Rights)...⁴³⁸

The link that the CRPD makes with the CESC on the right to an adequate standard of living that inculcates the right to food, shows that the principles underscored by one Committee may be applied by another as long as this application enhances the protection of the rights of an individual. This leads to the irresistible conclusion that there is a need for a joint application of the principles that can be obtained from the various committees, to speak to a holistic approach that constructs the role of non-state actors in the protection of the right to food of students, including students with disabilities. This position is enhanced in the call to state parties to avail 'support services, assistive devices and technologies [that] fully [respect] the human rights of persons with disabilities.'⁴³⁹ Furthermore, the CRPD calls for the use of accessibility to PWDs to enable them participate fully in matters that concern their lives.⁴⁴⁰ The foregoing discussion links back to the theory on vulnerability discussed earlier in this study. Students with

⁴³³ Article 34 of the Convention.

⁴³⁴ Article 34 of the Convention.

⁴³⁵ Adopted under the General Assembly Resolution A/RES/61/106.

⁴³⁶ Available at <https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx> (accessed 28 March 2020).

⁴³⁷ General comment No. 5 (2017) on living independently and being included in the community, document but also the availability of support services and assistive devices and technologies fully respecting the human rights of persons with disabilities.

⁴³⁸ Paragraph 9.

⁴³⁹ Paragraph 13. Similar sentiments on the importance of the right to food are raised in CRPD General comment No. 6 (2018) on equality and non-discrimination, document CRPD/C/GC/6, paras 44 and 68.

⁴⁴⁰ See General comment No. 2 (2014) on Article 9: Accessibility, para 1 and 2, document CRPD/C/GC/2.

disabilities are already vulnerable and could experience further vulnerability from other challenges including food insecurity.

4.6 Concluding Observations

State parties are expected to submit periodic reports to the respective human rights monitoring bodies or committees. These reports are a reflection of state parties' implementation of their treaty obligations. Upon a conclusion of the review of the state parties reports, as well as alternate reports in certain cases, the treaty monitoring bodies issue a set of 'concluding observations'. Concluding observations can be generally described as an assessment of the state's obligation under the treaty and recommendations for improvements of rights.⁴⁴¹ O'Flaherty argues that the issuance of concluding observations are treaty monitoring bodies' most important duty.⁴⁴² This is because the concluding observations provide an opportunity for the 'delivery of an authoritative overview of the state of human rights in a country and for the delivery of forms of advice which can stimulate systemic improvements.'⁴⁴³ This section examines relevant concluding observations from treaty monitoring bodies on the impact of non-state actors in the realisation of the right to food.

4.6.1 *Committee on Economic, Social and Cultural Rights*

The CESCR has issued concluding observations on the state of the realisation of socio economic rights, including the right to food, to states whose reports it has examined over the years. This study specifically highlights' the CESCRs concluding observation to South Africa on issues regarding the right to food in its initial report submitted to the Committee.

In response to South Africa's initial report submitted to the CESCR, the Committee made concrete recommendations which have both indirect and indirect effects on the right to food –

- i. 'Increase the child support grant at least up to the level of the food poverty line;
- ii. Ensure that all eligible children benefit from the grant;

⁴⁴¹ O'Flaherty M 'The concluding observations of United Nations human rights treaty bodies' (2006) 6(1) *Human Rights Law Review* 27.

⁴⁴² O'Flaherty M (2006) 32.

⁴⁴³ O'Flaherty M (2006) 38.

- iii. Expedite the adoption of the Social Assistance Amendment Bill of 2018 to increase the level of child support grants for orphaned and abandoned children living with relatives, for which it has already earmarked funds;
- iv. Adopt framework legislation protecting the right to adequate food and nutrition, and develop a national food and nutrition security strategy, taking into account the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security of 2004 and the Committee's general comment No. 12 (1999) on the right to adequate food.⁴⁴⁴

The fourth recommendation on the need to adopt a framework legislation on the right to food in South Africa, is a key factor in bridging the gap between students' vulnerabilities to food insecurity and situating obligations between state and non-state actors.

Furthermore, its concluding observation to South Africa, on the right to education, iterated the need for State parties to exercise a supervisory role over the roles non-state actors play in exacerbating vulnerabilities in the fulfilment of rights. It noted:

- (d) Improve the regulatory framework to define the roles and responsibilities of private sector actors, and monitor the education provided by such actors.⁴⁴⁵

Although within the context of the right to education, this is applicable to other socio economic rights and highlights the important roles that non-state actors can play either in exacerbating or ameliorating vulnerabilities in the fulfilment of socio economic rights.

4.6.2 *Committee on the Elimination of All Forms of Discrimination against Women*

The Committee on the Elimination of Discrimination against Women (CEDAW) is the body of independent experts mandated to monitor the implementation of the Convention on the Elimination of All Forms of Discrimination against Women.⁴⁴⁶ The CEDAW Committee has 23 experts and it considers the reports of States Parties. As such, it offers concluding observations to the Committee on State parties its concerns with regard to their engagement

⁴⁴⁴ See Concluding Observations on the Initial Report of South Africa E/C.12/ZAF/CO/1, Para 57.

⁴⁴⁵ See Concluding Observations on the Initial Report of South Africa E/C.12/ZAF/CO/1, Para 71 (d).

⁴⁴⁶ Article 17 of the CEDAW.

with the CEDAW Committee.⁴⁴⁷ Furthermore, the CEDAW Committee is mandated under the optional protocol to receive communications from individuals or groups of individuals alleging violations of rights, and to initiate inquiries into situations of grave or systematic violations of women's rights.⁴⁴⁸ The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), 1979, provides for the right to adequate nutrition.

The Convention provides for the right to food in the context of adequate nutrition for a woman during pregnancy and lactation. The relevant section reads: States Parties shall ensure to women, adequate nutrition during pregnancy and lactation.⁴⁴⁹

Applied to students, this provision provides for the right to food for students who may be pregnant in the course of their studies. This raises question of the extent to which non-state actors who offer access to food at tertiary institutions inculcate the dynamics of providing adequate food which also caters for female students who may be expectant.

A look at the CEDAW database on communications that have been considered,⁴⁵⁰ (indicates that there is currently no decision on the role of non-state parties with regard to the right to food. However, it has handed down recommendations that suggest that non-state actors can violate the right of women within a territorial or extraterritorial context.⁴⁵¹ Some of the General Recommendations of the CEDAW Committee in its Concluding Observations to State Parties reports, point to the responsibilities of non-state actors for human rights violations that are attributable to the former.⁴⁵² The CEDAW indicates that these obligations on both state and non-state parties encompass holistic state action in

⁴⁴⁷ Article 20.

⁴⁴⁸ This mandate is under Articles 1 and 2 of the optional protocol adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999 2131 UNTS 83.

⁴⁴⁹ CEDAW, Article 12 (2).

⁴⁵⁰ Decisions from the 1st to the 60th sessions of the CEDAW Committee entitled 'Optional Protocol to the Convention on the Elimination of Discrimination against Women – Jurisprudence', available at <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Jurisprudence.aspx> (accessed 29 March 2020). Communications like *MS v. Denmark* Communication No. 40/2012, Communication No. 31/2011 *VPP v. Bulgaria*, deal with health care but not the provision of the right to adequate nutrition for lactating mothers. [The evaluation is limited to sessions 51-60 of the CEDAW Committee].

⁴⁵¹ See Concluding observations of the CEDAW Committee to Switzerland, 2016 (CEDAW/C/CHE/CO/4-5); to Germany, 2017 (CEDAW/C/DEU/CO/7-8). See also Report of SR on Torture, 5 January 2016, A/HRC/31/57; CEDAW Committee, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para 8.18; Human Rights Committee, *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017); *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016), paras. 7.4.

⁴⁵² General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, para 25. It states that '...both international humanitarian law and human rights law have recognised the direct obligations of non-State actors...'

all areas of State action, including the legislative, executive and judicial branches, at the federal, national, sub-national, local and decentralised levels as well as privatised services. They require the formulation of legal norms, including at the constitutional level, the design of public policies, programmes, institutional frameworks and monitoring mechanisms, aimed at eliminating all forms of gender-based violence against women, whether committed by State or non-State actors.⁴⁵³

This position lends credibility to the continued role of non-state actors where they are in a position to determine the protection or the violation of the rights of an individual. Once again, this relates to the theoretical underpins of this study. Due cognisance must be had for the power which many non-state actors possess and wield in determining the fulfilment of otherwise of rights, in the exercise of their business activities. Where this power is exercise to exacerbate vulnerabilities, then such non-state actors become liable for an infringement of those rights.

4.7 Jurisprudence

The competence of the various treaty monitoring bodies to determine complaints is guided by the provisions of the treaties. Some are empowered to receive direct complaints from individuals, while others may not. What is important to note is that the pronouncement on matters from these bodies serves the dual purposes on human rights - 1. It clarifies and expounds on the interpretation of rights and 2. It is a tool for securing an individual's rights where there has been a breach in the fulfilment of the said right. This section sets put the jurisprudence of treaty monitoring bodies on the role of on-state actors in the realisation of rights, including the right to food.

4.7.1 *The Committee on Economic Social and Cultural Rights*

The coming into force of Option Protocol of the CESCR in 2013, recognised the competence of the Committee to receive complaints on rights violations from individuals or groups of individuals. Naturally, this opened the flood gates for a deluge of cases on the violations of economic, social and cultural rights from citizens of member states who had assented to the

⁴⁵³ Paragraph 26.

optional protocol.⁴⁵⁴ The recent case of *S.C v G.P*⁴⁵⁵ is instructive on the impact of and roles that non-state actors play in the guarantee of socio economic rights. The case involved a couple in Italy who sought the services of a private hospital with reproductive technology assistance in conceiving a child. After tests were carried out to determine the viability of the embryos, the hospital coerced the woman into implantation of one of the averagely-viable embryos, despite risk of a miscarriage. She subsequently miscarried. Furthermore, the couple's request to donate the remaining embryos to scientific research was turned down by the said hospital on the basis of the provisions of laws guiding assisted reproductive procedures in Italy at the time. The communication was subsequently brought against the hospital and the State (Italy). In its decision, the Committee noted that the forced transfer of the embryo into the woman's uterus was a violation of her right to health by the parties (i.e. private hospital).

Although bordering on the right to health and bodily integrity, the instant case highlights how in the exercise of its activities, a non-state actor may infringe on rights. This Committee's decision in the instant case is instructive for determining

4.8 Norms and Standards in Relation to Non-State Actors under the African Human Rights System

This section discusses the jurisprudence emanating from selected human rights bodies from the African Region.⁴⁵⁶ The discussion on the norms and standards in relation to non-state actors under the African human rights system, is carried out by a consideration of the jurisprudence of regional bodies which deal with human rights in Africa. These include the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.

⁴⁵⁴ Mckernan L 'International accountability for economic, social and cultural rights: recent developments in the complaints procedure of the Committee on Economic, Social and Cultural Rights' Available at <https://www.gi-escr.org/latest-news/2019/4/4/international-accountability-for-economic-social-and-cultural-rights-recent-developments-in-the-complaints-procedure-of-the-committee-on-economic-social-and-cultural-rights> (Accessed 10 September 2020).

⁴⁵⁵ E/C.12/65/D/22/2017.

⁴⁵⁶ African Charter on Human and People's Rights 9per the decision in Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60; Article 15 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

4.8.1 African Commission on Human and People's Rights

The African Commission on Human and Peoples Rights (African Commission) is one of the major institutional human rights structure of the African Union, established by the African Charter on Human and People's Rights.⁴⁵⁷ Its main mandate is to promote and protect human rights.⁴⁵⁸ The African Commission is mandated to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation.⁴⁵⁹ It also has the mandate to hear communications concerning the violations of any of the rights underscored in the ACHPR.

The right to adequate food is not directly recognised in the African Charter- a position that has led the African Commission to imply its existence under the rights to life,⁴⁶⁰ health,⁴⁶¹ and economic, social and cultural development.⁴⁶² To this end, one decision has been passed concerning the right to food. In *Social and Economic Rights Action Centre and another v Nigeria*.⁴⁶³ Briefly, this complaint was brought against the government of Nigeria, regarding the violations of the rights against the Ogoni people of Delta area of Nigeria. The facts were that the military government of Nigeria was directly involved in oil production through the national conglomerate, Nigerian National Petroleum Company (NNPC), the majority shareholder, in a consortium with Shell Petroleum Development Corporation (SPDC).⁴⁶⁴ The operations led to the environmental degradation of, and health problems to the Ogoni People.⁴⁶⁵

The complainants alleged that the oil consortium has exploited oil reserves in Ogoniland in disregard of the health or environmental rights of the local people. They sought a decision

⁴⁵⁷ The ACHPR Art 30.

⁴⁵⁸ Article 30.

⁴⁵⁹ Article 45 (1) b. See Nsongurua J 'The African Commission and fair trial norms' (2006) 6 *Africa Human Rights Law Journal* 229 at 305.

⁴⁶⁰ Article 5.

⁴⁶¹ Article 16.

⁴⁶² Article 22.

⁴⁶³ Communication 155/96 available at <https://www.achpr.org/sessions/decisions?id=134> (accessed 25 March 2020).

⁴⁶⁴ Paragraph 1.

⁴⁶⁵ Paragraph 1.

that the acts of the government through the oil companies violated their rights to life,⁴⁶⁶ health,⁴⁶⁷ and economic, social and cultural development.⁴⁶⁸

First, while the case dealt with the role of state actors, it hinted on the role of the government in ensuring that third parties do not stifle the right to food. The African Commission stated that

...the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.... The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government..., hence, is in violation of the right to food of the Ogonis.⁴⁶⁹

The significance of this case is that a state is not only to ensure the enjoyment of the right to food but must also protect citizens from deprivation of this right by a third party. Subsequent decisions have added to this principle in the context of non-state actors and stated that

The respect for rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the State to guarantee that private individuals do not violate these rights.⁴⁷⁰

This reiterates the position that the actions of the state towards third parties or non-state actors should envisage putting in place measures that ensure that they do not stifle an individual's enjoyment of rights.

Secondly, it recognised that the right to food was implicitly provided for in the context of other rights such as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22).⁴⁷¹ This led to the conclusion that the violation of these rights led to the-explicit violation of the right to food.

Thirdly, while the African Commission used four principles that underscore the obligation on the state in the recognition of the rights under the charter;⁴⁷² it should be noted, that the

⁴⁶⁶ Article 5.

⁴⁶⁷ Article 16.

⁴⁶⁸ Article 22.

⁴⁶⁹ Paragraph 65. This has been reiterated in *Dino Noca v Democratic Republic of the Congo* Communication 286 of 2004 04, para 156.

⁴⁷⁰ *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon* communication 272/03 para 88.

⁴⁷¹ SERAC, paragraph 64.

⁴⁷² These included the duty to respect (para 45), protect and promote (para 46), and to fulfil (para 47).

obligation to fulfil was open-ended, as far as the positive expectation from the State requires that it engages its stakeholders to realise rights.⁴⁷³ It could be argued, loosely, that the role of the state to ensure that stakeholders in the provision of the right to food did not stifle the enjoyment of this right.

In conclusion, three points are discernible from the African Commission on the obligations of non-state actors. First, the right to food though not explicitly provided for, is implied in other rights like the rights to life, health, and economic, social and cultural development. Secondly, the government has a role to ensure that non-state actors do not stifle the right to food. Thirdly, the obligation to fulfil places positive expectation on the State to ensure that stakeholders, including non-state actors, realise other than violate rights.

The Commission's Guiding Principles on the Implementation of the Socioeconomic Rights in the African Charter, further lends a voice to the right to food and the roles of various players in the realisation of the right. The principles create a minimum core obligation on the right to food, one of which is ensuring the freedom from hunger and alleviation from hunger of all.⁴⁷⁴ The Principles make the inextricable link between the right to food and other rights, including the right to education and health.⁴⁷⁵

While the Principles on the one hand, clarify state obligation in the realisation of the right to food, it clearly acknowledged the roles of other actors, including non-state actors when it provides for ensuring economic accessibility to food, noting that '...financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised.'⁴⁷⁶ Specifically with regard to non-state actors, Para 86 (w) provides that the state must take appropriate measures to ensure '...that activities of the private business sector [and civil society] are in conformity with the right to adequate food'. These paragraphs can be interpreted to mean that activities of non-state actors can potentially hinder the realisation of the right to food of people in various contexts. In the context of tertiary education, prices at which students purchase food can

⁴⁷³ Paragraph 46.

⁴⁷⁴ See further Para 86 (a) – (c) of the Principles and guidelines on the economic, social and cultural rights in the African Charter on Human and Peoples' Rights. Available at https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf (Accessed 19 August 2020).

⁴⁷⁵ Para 84 Principles and guidelines on the economic, social and cultural rights in the African Charter on Human and Peoples' Rights.

⁴⁷⁶ Para 86 (h) Principles and guidelines on the economic, social and cultural rights in the African Charter on Human and Peoples' Rights.

directly affect their access to food, where such prices do not promote economic accessibility of students to such food.

Furthermore, the African Commission through Resolution 420 on States' obligations to regulate private actors in the provision of health and education services, sheds more light on the role of non-state actors in the delivery of socio economic services.⁴⁷⁷ Although the resolution was specifically contextualised to the role of private actors in provision of healthcare and educational services, it provides guidance generally on their roles in the realisation of socio economic rights. Resolution 420 enjoins state parties to ensure that the involvement of non-state actors in the provision of socioeconomic rights is continually subjected to democratic scrutiny, as well as human rights principles.⁴⁷⁸ In addition, the Resolution reemphasises non-state actors' non-state actors responsibility towards respecting socio economic rights and their duty to refrain from infringe on these rights in the provision of services.⁴⁷⁹ This is in tandem with the Commissions' decision in the *SERAC case*. This would imply therefore that non-state actors do have a duty to ensure they do not hamper people's access to food, and especially vulnerable groups such as students, through actions along the entire food value chain.

Furthermore, the Commission through concluding observations to states, continues to reiterate the need to be cognisant of the role of third parties/ non-state actors in either fostering or disenfranchising people of their rights. As highlighted above,⁴⁸⁰ the CDESCR in its concluding observation to South Africa, note the need for the state to monitor the delivery of education services by non-state actors through better regulatory frameworks and other monitoring regimes.⁴⁸¹

In conclusion, the Commission recently in a statement issued on the COVID 19 pandemic in Africa, and ensuring the right to health of all in the region and particularly of the vulnerable, noted that

⁴⁷⁷ 420 Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services - ACHPR / Res. 420 (LXIV) 14 May 2019 Available at <https://www.achpr.org/sessions/resolutions?id=444> (Accessed 19 August 2020).

⁴⁷⁸ Para 1 (v) 420 Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services - ACHPR / Res. 420 (LXIV) 14 May 2019.

⁴⁷⁹ Para 2 420 Resolution on States' Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services - ACHPR / Res. 420 (LXIV) 14 May 2019.

⁴⁸⁰ Cf Footnote 355.

⁴⁸¹ Concluding Observations on the Initial Report of South Africa E/C.12/ZAF/CO/1, Para 71 (d).

‘Various sectors of society from individuals to political leaders, private sector and other social actors, community leaders, media, public opinion leaders and religious institutions bear special responsibilities of varying degrees for implementation of the prevention and containment measures... The private sector carries a responsibility proportional to its socio-economic power and influence to contribute to the measures for prevention and containment including through the contribution of resources...’⁴⁸²

4.8.2 *The African Court on Human and Peoples’ Rights*

The African Court on Human and Peoples’ Rights (African Court) was established pursuant to the Protocol to the African Charter on Human and Peoples’ Rights Establishing an African Court on Human and Peoples’ Rights, adopted in 1998.⁴⁸³ The protocol establishing the African Court only came into force in January 2004 after the minimum number of 15 ratifications was achieved. The Court became operational in November 2006.⁴⁸⁴ The African Court complements the protective mandate of the Commission in the realization of human rights in Africa.

The Court is composed of 11 judges elected by the African Union (AU) Assembly from a list of candidates nominated by member states of the AU. and interprets the application of the African Charter and every other human rights instrument by State parties. Cases can be submitted to the African Court by any of the following- i) The Commission; ii) by State Parties lodging a complaint to the Commission; iii) by state party against which a complaint has been lodged against at the Commission iv) by a state party whose citizen is a victim of human rights violation v) by any of the other African intergovernmental organisations.⁴⁸⁵ Furthermore the Court may receive cases from individuals and NGOs granted observer status by the Commission, pursuant to article 34(6) of the Protocol.⁴⁸⁶ Member states that have made a declaration under article 34(6) of the Protocol establishing the Court, assent to individuals or NGOs lodging direct complaints with the African Court. Decisions emanating from the African Court are binding on state parties to the Protocol.

⁴⁸² African Commission on Human and Peoples’ Rights ‘Press statement on human rights based effective response to the novel COVID-19 Virus in Africa’ Available at <https://www.achpr.org/pressrelease/detail?id=483> (Accessed 30 September 2020).

⁴⁸³ Organization of African Unity (OAU) *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, 10 June 1998, available at: <https://www.refworld.org/docid/3f4b19c14.html> [accessed 12 September 2020].

⁴⁸⁴ Murray M ‘The human rights jurisdiction of the African Court of Justice on Human and Peoples Rights’ in Jalloh C, Clarke K and Nmehielle V (Eds) *The African Court of Justice on Human and Peoples’ Rights in Context* (2019).

⁴⁸⁵ Article 5 (1) (a) – (e).

⁴⁸⁶ Article 5 (3).

A review of the jurisprudence of the African Court, indicates that its decisions weigh mainly on the role of the state in the fulfilment of human rights in the region. Nevertheless, the celebrated case of the *Ogeik People of Kenya in African Commission on Human and Peoples Rights v Republic of Kenya*⁴⁸⁷ is instructive. The case was referred to the African Court by the Commission. It concerned a 30 day eviction notice given to the Ogeik people of Kenya to exit their ancestral lands. The applicant in implying the influence of non-state actors on the eviction notice served on the Ogeik, noted in its submissions as follows

‘...the Applicant submits that the Respondent did not state whether the evictions were in the public interest as required by Article 14 of the Charter. The Applicant maintains that excisions and allocations made by the Respondent were illegal and done purely to pursue private interests and therefore, are in violation of the Charter.’⁴⁸⁸

In its response to the violation of the right to culture of the Ogeik, the Court succinctly noted the effect of economic activities from non-state actors when it stated

‘...Indigenous populations have often been affected by economic activities of other dominant groups and large scale developmental programmes. Due to their obvious vulnerability often stemming from their number or traditional way of life, indigenous populations even have, at times, been the subject and easy target of deliberate policies of exclusion, exploitation, forced assimilation, discrimination and other forms of persecution, whereas some have encountered extinction of their cultural distinctiveness and continuity as a distinct group.’⁴⁸⁹

The African Court eventually found the Kenyan government in violation of a the rights to freedom from discrimination, right to property, right to cultural life and right to development of the Ogeik people of Kenya, amongst others. While iterating the duties of states under the African charter, the case did in fact highlight the disruptiveness of the activities of non-state actors on the rights of vulnerable groups such as indigenous persons.

4.8.3 *African Committee of Experts on the Rights and Welfare of the Child*

The African Committee of Experts on the Rights and Welfare of the Child (African Committee) is established by the African Charter on the Rights and Welfare of the Child (ACRWC).⁴⁹⁰ Its mandate is to promote and protect the rights and welfare of the child.⁴⁹¹ Similar to the African

⁴⁸⁷ Application No. 006/2012.

⁴⁸⁸ Para 117 *Ogeik People of Kenya in African Commission on Human and Peoples Rights V Republic of Kenya* Application No. 006/2012.

⁴⁸⁹ Para 180 *Ogeik People of Kenya in African Commission on Human and Peoples Rights V Republic of Kenya* Application No. 006/2012.

⁴⁹⁰ African Charter on the Rights and Welfare of the Child, Article 32.

⁴⁹¹ Article 32.

Commission, the African Committee is also expected to consider communications from individuals, states and organisations concerning alleged violations on the rights and welfare of the child.⁴⁹² In essence, this is an indication that the mandate of the African Commission is similar to that of the African Children's Charter.⁴⁹³ In addition, the Commission has the mandate to formulate principles that inform the solutions to human rights problems in Africa. This is synonymous with the provision of the Children's Charter that states that the African Committee may 'formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa.'⁴⁹⁴

There is no decision from the African Committee on the position of non-state actors and the right to food. However, it should be recalled that under its Article 14(2), the ACRWC underscores the need for States Parties to take measures to ensure the provision of adequate nutrition to all children. It may be argued that while this provision may require that the State regulates the actions of State Parties in the provision of accessibility to food, a few students may be below the age of 18 years- specifically first year students at tertiary institutions, who are particularly vulnerable. This notwithstanding, any principles with regard to the role of non-state actors, and jurisprudence on the right to food may be instructive.

Nonetheless, the African Committee has on occasion through its jurisprudence weighed in on the role of non-state actors on other rights that affect children. In *Centre For Human Rights (University Of Pretoria) And La Rencontre Africaine Pour La Defense Des Droitsde L'homme (Senegal) v Government Of Senegal*,⁴⁹⁵ the African Committee found the Senegal government accountable for the of Quranic schools in Senegal (known as daaras), which had forced as many as 100,00 children (talibes) into street begging. The case highlighted the plight of many of the talibes, including exposure to severe malnutrition and hunger, living conditions akin to slavery and a general disregard for their rights to healthcare, education, and a clean and safe environment. The African Committee acknowledging the role of non-state actors (the daaras) in exacerbating the vulnerabilities of an already vulnerable group of children (the talibes), still held the Senegal government accountable for its failure to monitor effectively the daaras providing Quranic education.

492 Article 42(a)(i).

493 Article 45(1) (a).

494 ACERWC Article 42(a) (ii).

⁴⁹⁵ Decision No 003/Com/001/2012.

Through some studies, the ACERWC reiterates that hunger creates vulnerability, drawing on the fact that children in particular become vulnerable to dangerous activities, like the worst forms of child labour, recruitment by armed groups, and drop out from school.⁴⁹⁶ Furthermore, as discussed earlier in this chapter,⁴⁹⁷ the ACERWC warns of the inherent dangers of commercial exploitation of children by non-state actors, through targeted advertisements and the impact this might have on some of their rights, including the right to food and health.

While this may not be directly applicable to the majority of students (who are above 18 years) at tertiary institutions, it creates an opportunity for introspection into the intersectional vulnerabilities that students may be up against due to their lack of access to food at tertiary institutions. This is in tandem with the earlier discussions in previous chapters on the erstwhile effects of food insecurity on students' tertiary education.

In some of its General Comments, the African Committee reiterates the role of non-state actors in the promotion and protection of the rights of the child. These principles can be adapted to offer insights into the role of non-state actors at tertiary institutions. The African Committee mandates States to take steps to ensure that non-state actors do not stifle the enjoyment of rights, where they are in a position to reinforce the enjoyment of a given right.⁴⁹⁸ This lends credibility to the need for non-state actors to ensure the enjoyment of the right to food by everyone in their circles - including students at tertiary institutions.

4.9 Jurisprudence from South African Courts

It is not in doubt that throughout South Africa, non-state actors are engaged in the business of supplying basic services central to human survival.⁴⁹⁹ The normative position of South Africa

⁴⁹⁶ ACERWC Study, 44.

⁴⁹⁷ Committee on the Rights of the Child ' Report of the 2014 day of general discussion on digital media and children's rights' Pp 15-16 Available at https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2014/DGD_report.pdf (Accessed 18 August 2020).

⁴⁹⁸ The Draft General Comment on Article 22 on Children in Armed Conflict places an obligation on non-state actors that occupy territory and performs management and administrative duties, to ensure that the rights of children are not stifled. See General Comment on Article 22 on Children in Armed Conflict, paras 39, 81 available at https://www.acerwc.africa/wp-content/uploads/2020/01/Draft-General-Comment-on-Article-22_English.pdf (accessed 28 March 2020).

⁴⁹⁹ Welch AR 'Obligations of state and non-state actors regarding the human right to water under the South African Constitution' (2005) 5 *Sustainable Development Law and Policy* 58.

has been noted and need not be repeated here.⁵⁰⁰ It can be asserted that in the provision of the right of access to sufficient food, the Constitution recognizes the need to ‘improve the quality of life of all citizens. While the State retains the obligation to “respect, protect and fulfil” the right of everyone’s access to food, this is not the focus of this discussion. As earlier indicated, the constitutional requirement for the horizontal enforcement of the Bill of Rights creates an atmosphere for non- state actors to play a role in the provision of the enjoyment of the right to individuals. This section considers emerging jurisprudence on the right to food from the South African Court, to situate the role of non-state actors.

The case of *Soobramoney v. Minister of Health*,⁵⁰¹ offers some insight for introspection. It should be noted from the outset that it does not engage the right to food directly and it places emphasis on the obligations of the state. However, an evaluation of the principles therein might offer insights in the judicial trends in the enforcement of human rights in South Africa. In this case, the Constitutional Court was tasked to establish whether a hospital’s policy violated the right to health under sections 27(3) and 11 of the Constitution. It agreed with the position that the state has a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution. It however, added that the purpose of section 27(3) is to ensure that treatment is given in an emergency situation and is not frustrated by bureaucratic requirements and other formalities. The link that this case shares with the right to food was evident in the holding that the obligations imposed on the State under sections 26 and 27 (with regard to access to housing, health care, food, water, and social security) are dependent upon the availability of resources for such purposes.

In essence, the rights guaranteed are limited by the availability of those resources. As such, the state may reasonably determine how to allocate those limited resources. It is submitted that this decision to a large extent stifles the judiciary’s attempt to develop jurisprudence to impress upon the state, its role in the enjoyment of the rights under section 26 and 27. The effect of this case would indicate that the individual who would otherwise receive substantial treatment from non-state actors like private hospitals, would not do so because the state’s obligation was limited due to the availability of resources. This can be discerned from the statement that the

⁵⁰⁰ See opening remarks on South Africa in section 4.3.1 above.
⁵⁰¹ [1997] ZACC 17.

Court would 'be slow to interfere with rational decisions taken in good faith by the political organs and medical organs whose responsibility it is to deal with such matters'.⁵⁰²

In *Government of the Republic of South Africa v. Grootboom*,⁵⁰³ the Constitutional Court in what seems to be an about turn of its earlier take in *Soobramoney*, was of the view that private entities have a duty to respect socio-economic rights. The case concerned the right to housing; and the court rightly interpreted section 26 of the South African Constitution. It stated that the state and all other entities and persons, at the very least had a negative obligation to desist from preventing or impairing the right to access to adequate housing.⁵⁰⁴ It interpolated the fact that it is not only the State that is responsible for the provision of the houses, but that other agents within society, including individuals themselves, who should be enabled through legislative and other measures to provide housing.⁵⁰⁵ The points of convergence that this case points to in this study is evident in a number of pointers. First, the right to housing is interlinked to the right to food as a socio-economic right. Secondly, a negative obligation to desist from preventing or impairing these rights is key to their enjoyment by private individuals. To this end, these principles from the constitutional court may be utilised in informing the role that non-state actors play in the context of tertiary institutions

In another case of *Treatment Action Campaign v Minister of Health*,⁵⁰⁶ the applicant, a non-state actor, brought the application to the constitutional court, seeking an order that the government provides essential antiretroviral drugs throughout the country. The Constitutional Court ruled that the government had to devise and implement comprehensive and coordinated programmes for the progressive realisation of the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.⁵⁰⁷ In addition, the court called for the progressive realisation of this right within the available resources of the State.⁵⁰⁸ The approach of the Constitutional Court in this case did not engage the role of private players, who also had the ability to provide for the enjoyment of the right to health. In the context of this study. This presents a grey area with regard to the position of non-state actors who have the ability to engage the promotion and protection of the rights of an

⁵⁰² Paragraph 29.

⁵⁰³ [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

⁵⁰⁴ Grootboom 2000 BCLR (11) 1169 (CC) at para 34.

⁵⁰⁵ Paragraph 36.

⁵⁰⁶ 2002 (10) BCLR 1033 (CC).

⁵⁰⁷ Paragraph 135(2)(a).

⁵⁰⁸ Paragraph 135(2)(b).

individual. This case leaves a number of questions unanswered, such as where to strike a balance in the protection of a right, where it is the state on one hand and a non-state actor on the other; how the degree of obligations should be decided, where a non-state actor is in the position to offer better services than the state.

The case of *Mukudamm v Pioneer Foods Ltd and others*,⁵⁰⁹ although brought before the Constitutional Court on a procedural matter, clearly exemplified the role of non-state actors in either fulfilling or hampering the right to food. The applicant, a bread distributor, instituted a class action against the respondents who were bread manufacturers, after the determination by the Competition Commission against said respondents. The respondents had allegedly colluded to fix the price of bread to the detriment of consumers and especially the vulnerable, who were dependent on bread as a major source of food. The second and third respondents- Tiger Consumer Brands Limited and Premier Foods Limited- had both independently and prior to the class action entered into a settlement with the Competition Commission and were fined accordingly. Consequently, the applicant sought leave to bring a class action against the respondents which was denied at both the High Court and the Supreme Court of Appeal. The Constitutional Court in its judgement, unequivocally gave assent to the enforcement against non-state actors where they infringe on rights, when it noted that

In this case we are not concerned with an enforcement of a right in the Bill of Rights against the State. Although one of the claims mentioned by the applicant is for the vindication of the rights in section 22 on the Constitution, this claim is to be pursued against private companies...⁵¹⁰

The jurisprudence of the Constitutional Court offers insights into the protection of socio-economic rights. The decisions discussed above all border on socio-economic rights that relay similar guiding principles such as, the need for horizontal enforcement of the rights, and the positive and negative obligation on both state and non-state actors. Coupled with the position of international law on the role of non-state actors on the protection of the right of individuals, it is prudent that upcoming cases reiterate the need to balance the obligation on non-state actors, especially where they are in a position to ensure the protection of the right to food at South African tertiary institutions.

⁵⁰⁹ [2013] ZACC 23.

⁵¹⁰ Paragraph 41 [2013] ZACC 23.

The jurisprudence of the South African courts has evolved from *Soobramoney* where it was reluctant to definitely impugn what seemed to be state obligation upon on private actors, to *Mukudamm* where it unequivocally gave assent to the enforcement against non-state actors where they infringe on rights. This cannot be disconnected from the increasing international and regional discourse and developments on obligations of non-state actors. Suffice to state that currently, international, regional and now national norms, standards and jurisprudence, all point to the obligation which non state actors have with regard to socio economic rights. This obligation is both negative and positive. What this means is that on the one hand, non-state actors through their activities should in no way hamper the enjoyment of peoples' socio economic rights and they should also use their seeming advantage and/or power dynamics in the market economy to promote the fulfillment of these right.

Specifically, in the context of this study, these obligations will be manifested in a number of practical ways to non-state actors' vis-à-vis the right to food of students in tertiary institutions in South Africa. On the one hand, non-state actors must refrain from activities which hinders' students access to food. The most practical way this manifests are the hindrances based on economic access. Therefore, the price at which students purchase food should be economically accessible. Anti-competitive practices by big retailers operating within and around campuses, which inevitably drives out small and medium scale food vendors off campus (who are often times cheaper) is a clear example of the infringement of students' access to food and a violation of non-state actors obligation. On the flip side, the sale of food to students at exploitative rates rather than nominal rates (which many big retailers are able to absorb), would be a breach of non-state actors obligation to promote students' right to food in the tertiary education sector.

4.10 Conclusion

The current chapter has evaluated the link between non-state actors and the right to food in the context of tertiary institutions and established that this link has developed organically since the adoption of the UDHR. The argument that non-state actors have obligations to ensure access to food for students at South African Universities has highlighted various points. First, with regard to the role of non-state actors in addressing food insecurity at tertiary institutions, the actions of this entity can be in a national context as long as they aid the enjoyment or refrain from the violation of the rights of an individual. In the South African context, this role is

punctuated by the constitutional requirement for a horizontal interpretation of the Bill of Rights that makes non-state actors duty bearers.

With regard to the international human rights bodies, most of the jurisprudence rests in concluding observations and General Comments. From a normative position the right to an adequate standard of living, health, life and human dignity posit the indirect inclusion of the right to food. However, these human rights bodies point to general principles of socio-economic rights that can be used to inform the development of principles concerning the role of non-state actors in the protection of the right to food of students at tertiary institutions. These include the need for the state to require that the action of non-state actors informs the former's progressive realisation of the socio-economic right to food, and a negative obligation on non-state actors not to stifle the enjoyment of the right to food, thereby exerting their positions of power to thrive on the vulnerability of students to reap benefits. Another principle include the recognition of the role of non-state actors in the protection of the rights of individuals. These principles cut across the international to regional, and national scenes.

It should be noted that unlike the lack of decided communications on the right to food by international human rights institutions highlighted in this chapter, only the African Commission has a decision on the right to food and role of third parties- a crucial engagement in the development of the principles on the role of non-state actors in the provision of the right to food of an individual. Despite the lack of extensive case law or jurisprudence on the role of non-state actors on the provision of the right to food in general and more specifically the right to food of students at tertiary institutions, a last resort is to turn to the general principles of socio-economic rights and from there draw the inference which makes non-state actors duty bearers in the realisation of this right.

CHAPTER 5

AN EVALUATION OF VARIOUS APPROACHES TO VESTING ACCOUNTABILITY FOR THE RIGHT TO FOOD IN SOUTH AFRICAN TERTIARY INSTITUTIONS

5.1 Introduction

Previous chapters have discussed both state and non-state actors' obligations towards ensuring the right to food of students in tertiary institutions. While it was necessary to impute obligation for the realisation of the right to food of students in tertiary institutions, it becomes even more necessary to develop an approach through which these obligations should ideally be fulfilled.

Obligations raises questions on accountability and within the framework of accountability is the recognition of vulnerability. One of the theoretical underpinnings of this study has been the vulnerability theory expressed by Martha Fineman. This theory addresses the arguments against the use of the term 'vulnerability' in the human rights framework, as it describes vulnerability as an embedded resource of all humans. This chapter builds on the foundational discussion on vulnerability in earlier chapters of this study, through an in depth analysis of contemporary jurisprudence and literature on vulnerability.⁵¹¹

This chapter sets out to describe what legal accountability entails and then analyses vulnerability through a human rights framework. Against this bedrock, this chapter postulates that any solutions proffered to the problem of food insecurity in tertiary institutions, must flow from a human rights based approach. The chapter evaluates various approaches and relates the human rights based approach as a crucial component of vulnerability and accountability that are key principles to ensuring food security at tertiary institutions.

This chapter commences by first exploring what accountability means in terms of the framework of human rights. It then proceeds to discuss how accountability can be strengthened in the specific context of South Africa's constitutional democracy. The chapter goes on to

⁵¹¹ Cf the discussion on Vulnerability in Chapter 2 of this thesis.

explore vulnerability- linking the concept of accountability to the perpetuation or responsiveness to vulnerability of groups or persons. The chapter explores a milieu of approaches to resolving students' vulnerability to food insecurity- discussing the pros and cons of each approach. The chapter concludes with a discussion on an approach based in human rights as the best approach to addressing students' vulnerability to food in South African tertiary institutions.

5.2 The Concept of Accountability in Human Rights Law

The precursory research on who the stakeholders in tertiary education are, logically births the question of where accountability lies in ensuring the right to food of students in tertiary institutions. Before responding to this, it is necessary to first understand what accountability as a concept entails, specifically in human rights law.

5.2.1 Defining Accountability

Accountability as a term is lacking in a generally accepted definition, as it applies differently to different situations. Its semantic history- the notion of accounting- evokes narratives of bookkeeping and accounts. Used in its more generic form, accountability alludes to the notion of power and checks and balances. When seen within the context of power play and power relations, accountability becomes a double-edged sword of both answerability and enforcement.⁵¹² The narrative of answerability presumes a discursive inquest from an oversight authority. Tetlock describes accountability as follows:

Accountability is a critical rule and an enforcement mechanism- the social psychological link between individual decision makers on the one hand and social systems on the other. Expectations of accountability are an implicit or explicit constrain on virtually everything people do... Failures to act in ways for which one can construct acceptable accounts leads to varying degrees of censure, depending on the gravity of the offense and norms of society.⁵¹³

The above definition, is adaptable to the more traditional views of holding persons or organisations accountable, where the focus of accountability is on non-public entities. Public

⁵¹² Schelder A 'Conceptualizing Accountability' in Diamond L and Ors (Eds.) *The Self Restraining State: Power and Accountability in New Democracies* (1999) 14 – 17.

⁵¹³ Tetlock P 'The impact of accountability on judgment and choice: Toward a social contingency model' in M. P. Zanna (Ed.), *Advances in experimental social psychology*, Vol. 25. (1992) 337.

accountability focuses on the ‘public character of formal accountability. It focuses on systemic and structural forms of accountability for public service provision or governments’.⁵¹⁴ Clearly, public accountability is more geared towards the probing of provisions of government services. Accountability expresses in variable forms and ethical considerations- it may be formal or informal, left to discretion or be guided by stringent standardized routines.⁵¹⁵ Formal accountability may be expressed in terms of legalised forms. Examples are the authority which the legislative arm of government exercises over the executive, or the powers of specific government offices over others such as the office of the auditor general over departments. Informal forms of accountability are less legislated or organised- they many times are borne out of structures organising to demand accountability, and directs attention to accountability efforts of non-state actors.⁵¹⁶ Examples include the media (mass and social), as well as civil society organisations forming coalitions geared towards holding state and non-state actors accountable. It is important to note that recently, there has been a push for the more standardized forms of accountability, shrinking the space for discretionary forms of accountability.

While a multiplicity of definitions and applications exist on accountability, the crux of this research relates more to the notions of legal accountability. Agaba opines that there are three branches of legal accountability, viz- responsibility, answerability and enforcement.⁵¹⁷ Legal accountability requires transparency in the exercise of power and the right to receive information on the justification of acts taken by those exercising this power where required and/or requested.⁵¹⁸ Enforcement is core to the principle of legal accountability as the concept itself remains mere window dressing until there is emphasis on improper behaviour having consequences.⁵¹⁹ Nevertheless, it is important not to see accountability as merely an enforcement tool. Yamin encourages the move to viewing accountability in the light of shared

⁵¹⁴ Bovens M and Ors ‘Public accountability: proliferation and fragmentation’ in Bovens M, Goodin R and Schillemans T (Eds) *The Oxford Handbook Public Accountability* (2008) 4-5.

⁵¹⁵ Espeland W and Vannebo B ‘Accountability, quantification and law’ 2007 (3) *Annual Review of Law and social Sciences* 24.

⁵¹⁶ Grimes M ‘The contingencies of societal accountability: Examining the link between civil society and good government’ (2013) 48(4) *Studies in Comparative International Development* 380-402.

⁵¹⁷ Agaba D ‘Implementing legal accountability to reduce maternal mortality and morbidity in Uganda ’ (2018) 18 *African Human Rights Law Journal* 123-145.

⁵¹⁸ Schedler A et al (eds) *The Self Restraining State: Power and Accountability in New Democracies* (1999) 15 -17.

⁵¹⁹ Schendler A (1995)16.

roles and responsibilities between right holders and duty bearers, calling for review and remedy of shortcomings.⁵²⁰

Legal accountability oversight is expressed both on the domestic (national) and international legal accountability fronts. At the crux of both, is the ability of persons to seek redress to correct alleged violations.⁵²¹ To realise this, public authorities and institutions must put in place the necessary remedial or corrective measures, to address rights violations.⁵²² The *SERAC Case* brings to fore the principle of legal accountability of both state and non-state actors. In the case, the African Commission held both the Nigerian government and Shell (an IOC), responsible for the violation of several rights of the Ogoni people of Nigeria, due to the oil exploration activities in that region. Both the Nigerian government and Shell were found to be in violation of the rights to life, health and even food of the Ogoni people.

Further, in *Alyne v Brazil*,⁵²³ the CEDAW Committee noted that the Brazilian state failed to provide necessary judicial remedies to the respondent and thereby failed to protect her, when Brazil did not initiate proceedings against those who failed to provide adequate and timely medical treatment to the respondent. This case reiterates the accountability of the State in responding to the plight of the vulnerable. The section that follows contextualises accountability for food security of a vulnerable group in South Africa – students in tertiary institutions.

5.3 Legal Accountability for the Right to Food in South African Tertiary Institutions

The *SERAC and Alyne* cases make a compelling argument for accountability as a tool to ensuring the fulfilment of rights. The question that arises is to what extent state and non-state actors can be held to account. Accountability, for purposes of this research is derived from a human rights' perspective. To this end, the right to food and nutrition places an obligation on both the state and third parties to ensure food security in spaces where they are involved with the public, including universities. This foregoing position is also underscored pursuant to

⁵²⁰ Yamin A 'Towards transformative accountability: Applying a rights-based approach to fulfil maternal health obligations' (2010) 7 *International Journal of Human Rights* 97.

⁵²¹ Agaba D (2018) 130.

⁵²² Agaba D (2018) 130.

⁵²³ CEDAW Committee *Alyne da Silva Pimentel Teixeira v Brazil* C/49/D/17/2008, 10 August 2011 paras 7(8) & 8(2).

international obligations under various instruments like the UDHR,⁵²⁴ the ICESCR,⁵²⁵ the CRPD⁵²⁶ and the CEDAW.⁵²⁷

Accountability for the right to food within the South African context can be invoked through the Constitution of the Republic of South Africa (Constitution).⁵²⁸ The South African Constitution provides for the horizontal application of the bill of rights.⁵²⁹ It may be argued that the recognition of the right to food and the engagement of steps to ensure that the food security is not compromised is a form of accountability on the right to food.⁵³⁰ However, as discussed earlier, enforcement is the crux of accountability. The question therefore is what mechanisms are available within the South African context to enforce accountability for the right to food in South African tertiary institutions. The various structures on accountability as provided in the Constitution are discussed below.

5.3.1 Parliament

Constitutionally, the first point of call for accountability in the Republic is the Parliament. Parliament's core mandate as prescribed in the Constitution is passing legislation, oversight on government action, as well as facilitating public participation and international participation.⁵³¹ The Parliament functioning through both the National Assembly and the National Council of Provinces (NCOP), discharges its duty of holding the executive to account.⁵³²

The Constitution is replete with several provisions on how Parliament demands accountability from the executive through its oversight function. Annexure 1 of this research contains a full list of all constitutional provisions on Parliament's role in demanding accountability, suffice to note that some of these are worthy of note here. Specifically, Sections 55 and 56 provide for direct accountability mechanisms between Parliament and the executive. These sections

⁵²⁴ Article 14, Universal Declaration of Human Rights.

⁵²⁵ Article 11, International Covenant on Economic, Social and Cultural Rights.

⁵²⁶ Article 23, Convention on the Rights of the Child. Article 28 Convention on the Rights of Persons with Disabilities.

⁵²⁷ Article 14 Convention on the Elimination of All Forms of Discrimination against Women.

⁵²⁸ Constitution of the Republic of South Africa, 1996.

⁵²⁹ Chirwa D 'Obligations of Non-state Actors in Relation to Economic, Social, and Cultural Rights under the South African Constitution' (2002) 7 *Socio-Economic Rights Project* generally.

⁵³⁰ Chirwa (2002) generally.

⁵³¹ The Constitution of the Republic of South Africa, section 42 (3), 55 (1) & (2).

⁵³² The Constitution of the Republic of South Africa, section 42 (1).

empower Parliament in the exercise of its oversight duties to summon any person(s) or institutions to make representations before it.⁵³³ Accordingly section 55 (2) provides:

The National Assembly must provide for mechanisms – (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of - (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.

A consideration of all constitutional provisions on Parliaments powers to demand accountability indicates that Parliament has very broad powers of oversight over the functioning of state.⁵³⁴ Granted this broad powers to demand accountability, the onus lies on Parliament to invite a broad range of stakeholders to gain further insight into the problems of food insecurity in the tertiary education sector.⁵³⁵ Parliament's powers as derived from section 56 of the Constitution enables it to of its own accord, to invite any actors (both state and non-state) within the tertiary education sector to account on the continued violation of students right to food. Furthermore, Section 92 (2) and 93(2) of the constitution, reiterates the accountability of cabinet, including deputy ministers to Parliament. The onus therefore lies on Parliament in the exercise of its duties to take to task members of cabinet on the fulfilment of their constitutional duties- one of which is the right to food.

Given the complex nature of governance and the many socio economic problems in a developing nation such as South Africa, there is the possibility of some continued rights violations remaining unaddressed by structures of accountability if these matters are not highlighted before these structures. In this vein, by virtue of section 56 of the Constitution, a range of actors from student bodies to NGOS are able to submit petitions or make representations before Parliament on any issues of concern, including food insecurity in tertiary institutions.

Therefore, while Parliament has broad powers to demand accountability from the executive on the fulfilment of student's right to food, additional support is required if any momentum is to be gained in this regard. Civil society, researchers/research institutions, university managements and student structures, through petitions and representations before

⁵³³ Section 56, Constitution.

⁵³⁴ Refer to Annexure 1 for a full schedule of all constitutional provisions on Parliament's accountability framework.

⁵³⁵ The Constitution of the Republic of South Africa, section 56.

parliamentary committees, are key to moving forward the discourse on accountability for student food security, through parliament.

5.3.2 Chapter 9 Institutions

The Constitution provides for various institutions that play an oversight role in ensuring that the rights enshrined in the Bill of Rights (including the right to as food) may be enforced. Some of these institutions are provided for in chapter 9 of the Constitution, and are generally referred to as Chapter 9 institutions. They have the general mandate to support the development of democracy in the Republic and to perform their functions without fear, favour or prejudice.⁵³⁶ Chapter 9 institutions as delisted in the constitution are- the public protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General and the Electoral Commission.⁵³⁷ No organ of state is permitted to interfere with functioning of chapter 9 institutions and they only report to the National Assembly.⁵³⁸

The question to engage is how these institutions speak to the right to food.⁵³⁹ Of all the chapter 9 institutions listed above, the right to food falls firmly within the more specific mandate of the South African Human Rights Commission (SAHRC). The SAHRC is specifically tasked with the duty to monitor and assess the observance of human rights,⁵⁴⁰ as well as ‘to take steps to secure appropriate redress where human rights have been violated.’⁵⁴¹ It can therefore be inferred that the SAHRC has a mandate to add value to the food security at tertiary institutions through the element of accountability. This include conducting nationwide inquiries on the state of food and nutrition and the specifically on the enjoyment of the right to food in tertiary institutions.⁵⁴² It would follow that the findings would then be reported to the Parliament and presenting recommendations to improve the enjoyment of this right.⁵⁴³

⁵³⁶ The Constitution of the Republic of South Africa, section 181 (2).

⁵³⁷ The Constitution of the Republic of South Africa, section 181 (1).

⁵³⁸ The Constitution of the Republic of South Africa, section 181 (4) & (5).

⁵³⁹ The Constitution of the Republic of South Africa, section 181.

⁵⁴⁰ The Constitution of the Republic of South Africa, section 184 (1) (c).

⁵⁴¹ The Constitution of the Republic of South Africa, section 184 (2) (b).

⁵⁴² This formed part of the petition by the Dullah Omar Institute (DOI) in its petition to the South African Human Rights Commission concerning the need to take some steps toward engaging the enjoyment of the right to food at tertiary institutes, available at <https://bit.ly/3gY3PRE> (accessed 4 September 2020).

⁵⁴³ See DOI petition to the South African Human Rights Commission on the enjoyment of the right to food at tertiary institutes, available at <https://bit.ly/3gY3PRE> (accessed 4 September 2020).

It appears that the Commission for Gender Equality (CGE) may also be a useful Chapter 9 institution for demanding accountability with regards to the more specific effect of food insecurity on female students at tertiary institutions. Vulnerability to food insecurity in South Africa is gendered- more women suffer the effects of hunger and food insecurity within the general population.⁵⁴⁴ Emerging research within the tertiary education sector however points to male students as being more vulnerable to food insecurity.⁵⁴⁵ Some researchers have highlighted sex work among females as a possible coping mechanism for food insecurity.⁵⁴⁶ If this trend applies *mutatis mutandis* in the tertiary education sector among female students, it explains their reduced vulnerability to food insecurity per the emerging data. However, this raises a range of other human rights concerns within a gendered framework, which calls for the intervention of the CGE.

It can therefore be inferred that the CGE also has a mandate to add value to the food security at tertiary institutions through the element of accountability, specifically with regard to female students. This include monitoring, investigating, researching and advising on the state of food and nutrition and the specifically on the enjoyment of the right to food and other attendant/cross cutting rights of female students in tertiary institutions.⁵⁴⁷ It would follow that the findings would then be reported to the Parliament and presenting recommendations to improve the enjoyment of this right.⁵⁴⁸

5.3.3 The Judiciary

The Constitution vests judicial authority in the courts, to the exclusion of all other arms of government.⁵⁴⁹ The judiciary is an independent arm of government and is subject only to the Constitution and the law.⁵⁵⁰ No form(s) of interference is permitted with the functioning of the

⁵⁴⁴ The World Bank (2018) 'Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints and opportunities' 25.

⁵⁴⁵ Van de Berg L, Raubenheimer J 'Food Insecurity among Students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169.

⁵⁴⁶ Khan M et al 'Poverty of opportunity forcing women into prostitution – a qualitative study in Pakistan' (2010) 31 (4) *Healthcare for Women International* 365 -383.

⁵⁴⁷ The Constitution of the Republic of South Africa, section 187 (2).

⁵⁴⁸ The Constitution of the Republic of South Africa, section 187 (2).

⁵⁴⁹ The Constitution of the Republic of South Africa, section 165 (1).

⁵⁵⁰ The Constitution of the Republic of South Africa, section 165 (2).

courts within the judicial system.⁵⁵¹ Therefore, even the executive arm of state, is not permitted to directly or indirectly influence the functioning of the judiciary. Furthermore, orders of courts remain binding on all persons and organs of government to which it applies.⁵⁵² Section 166 of the Constitution, delineates courts within the judicial system as follows:

- i. Constitutional Court;
- ii. Supreme Court of Appeal;
- iii. High Courts (including High Courts of Appeal);
- iv. Magistrate Courts; and
- v. Any other court established or recognised in terms of an Act of Parliament.

Other courts currently in the judicial system include: Income Tax Courts, the Labour Court and the Labour Appeal Court, the Land Claims Court, the Competition Appeal Court, the Electoral Court, Divorce Courts, Small Claims Courts, Military Courts and Equality Courts.⁵⁵³

Decisions emanating from the Constitutional Courts, Supreme Court and High Courts are authoritative sources of the law. These courts give interpretative effect to constitutional provisions.⁵⁵⁴ Given that the courts promote litigants access to justice through its adjudicative functions, it follows that the judiciary is an important source of legal accountability within the framework of tertiary institution students' right to food. The right to food is a constitutionally guaranteed right for all, thus the onus lies on the courts to demand accountability for the fulfilment of this right from the state when such a matters are within its competency for adjudication.

Legal accountability through the courts on the right to food in South Africa is still emerging. A few cases have been brought before the courts, many of which did not specifically have a right to food framework but which nevertheless, had elements of the right to food, which the courts pronounced upon.⁵⁵⁵ What is important to note is that the Courts, where it has arisen, have not shied away from holding both state and non-state actors to account for the realisation

⁵⁵¹ The Constitution of the Republic of South Africa, section 165 (2).

⁵⁵² The Constitution of the Republic of South Africa, section 165 (5).

⁵⁵³ It is important to note that these courts are an offshoot of the provisions of Section 166 (e) of the Constitution.

⁵⁵⁴ The Constitution of the Republic of South Africa, sections 167, 168 & 169.

⁵⁵⁵ These have been extensively covered in gthe previous chapter.

of the right to food. In *Mukudamm v Pioneer Foods Ltd and others*,⁵⁵⁶ although the case came before the Constitution Court on a strictly procedural matter, the Constitutional Court in its judgement, unequivocally gave assent to the enforcement against non-state actors where they infringe on people's right to access food.

It is further argued that the oversight role of other judicial institutions like the Competition Commission have been instructive in ensuring the manufacturers do not engage in cartels to fix food prices.⁵⁵⁷ It is submitted that while the case dealt with enforcing healthy competition, this was instructive in ensuring that the approaches to supplying bread in South Africa continued uninterrupted such that the supply informs food security.

A more recent decision of the High Court, gave effect to the state's obligation in the realisation of the right to food, although specifically within the context of children. In the case of *Equal Education and Others v Minister of Basic Education and Others*,⁵⁵⁸ it was alleged that due to the COVID-19 pandemic lock down strategy implement by the state on 28 March 2020, the Department of Basic Education had put a stop to the National School Nutrition Programme (NSNP). The NSNP was instituted in 1994 and currently, over 9 million children in South Africa received at least one nutritious meal daily, providing over 45 million meals per week. An NGO, Equal Education went to court on an urgent basis to ask for a declaratory order forcing the Department of Basic Education to reinstate the NSNP, despite the lockdown, thereby feeding all eligible children irrespective of whether they had returned to school or not.

The ensuing declaratory order requiring that the Department of Basic Education to feed all eligible children irrelevant of whether they have returned to school or not was very instructive in ensuring the enjoyment of the right to food, nutrition and food security. The good practices in this case can be engaged hereto to improve the enjoyment of the right to food for other vulnerable groups, including students in tertiary institutions.

This study takes a turn by design to reflect on the concept of vulnerability in human rights law.

⁵⁵⁶ [2013] ZACC 23.

⁵⁵⁷ *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9.

⁵⁵⁸ (22588/2020) [2020] ZAGPPHC 306 (17 July 2020).

5.4 Judicial Understanding of Vulnerability

As reflected above, the concept of accountability, is many times linked with protection of the interests of vulnerable groups. This section discusses the jurisprudence of vulnerability in human rights law, using this to draw the link between accountability for the right to food in tertiary education sector, through an approach based in human rights. The jurisprudence of various regional human rights bodies is used to mainly draw on the concept of what vulnerability is.

5.4.1 Jurisprudential Contextualisation of Vulnerability and Human Rights

It is important at the outset to reiterate that vulnerability as a concept is without express legal basis in international human rights law. However, the courts over years- and more specifically international human rights bodies- have drawn on the concept of vulnerability in their jurisprudence,⁵⁵⁹ especially when confronted with human vulnerability in the adjudication of rights violations. This section analyses how these bodies have interpreted vulnerability within a human rights framework.

The European Court on Human Rights (ECtHR) through its jurisprudence has emphasized a group approach to vulnerability as opposed to an individualistic approach. It has used the concept of vulnerability in relation to ethnic minorities,⁵⁶⁰ asylum seekers⁵⁶¹ and the mentally ill.⁵⁶² However, the case of *Chapman v The United Kingdom*⁵⁶³, was the ECtHR's first foray into a vulnerability analysis in its jurisprudence. The 2001 case involved the eviction of a Roma woman from her land where she stationed her caravan without the necessary planning permits. Her argument on discrimination⁵⁶⁴ and violation of the right to respect for her minority lifestyle⁵⁶⁵ was rejected by the court. Her argument was that living and travelling in a Caravan was central to her cultural tradition and thus the permit requirements prevented her from pursuing this lifestyle. In rejecting this argument, the court held that:

⁵⁵⁹ Beduschi A 'Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts' (2018) 36 (1) *Boston University International Law Journal* at 55-85.

⁵⁶⁰ *DH v the Czech Republic*, 2007-IV Eur. Ct. H.R. 241, 182 (2007).

⁵⁶¹ *MSS v Belgium and Greece*, 2011-1 Eur. Ct. H.R. 255, 251 (2011).

⁵⁶² *Taddei v France*, App. No. 36435/07, 63 (2010).

⁵⁶³ 2001-I; 33 Eur. H.R. Rep. 18, 96 (2001).

⁵⁶⁴ Article 14 EHCR.

⁵⁶⁵ Article 8 EHCR.

As intimated in *Buckley*, the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases.

Although Ms Chapman lost the case, the case put in place important identifiers of vulnerability which the Court would later expand on in future cases. This was concisely described by Peronni and Timmer as

...belonging to a group (in this case, the Roma minority) whose vulnerability is partly constructed by broader societal, political, and institutional circumstances (in this case, power differentials and a planning framework unresponsive to the needs arising from a way of life different from that of the majority).⁵⁶⁶

Post Chapman Case, the court has expanded the scope of vulnerable groups beyond the Roma people to include persons with mental disabilities, asylum seekers and persons living with HIV. Although no clearly defined parameters were outlined in the court concluding that the aforementioned groups were in fact ‘vulnerable persons’, the court in each case drew on European and international law, to arrive at the determination of vulnerability. Peronni and Timmer from the examination of the case law, arrived at three (3) rationales the court used in its jurisprudence to make a determination of vulnerability. They are- relational, particular and harm-based. These three rationales are discussed below.

A. Relational:

In this regard, the Court views the vulnerability in which the individual finds himself as arising from his or her social context. The vulnerability is located not solely with the individual, but in the wider social circumstances, such as the Roma people in the *Chapman case*. Perroni and Timmer opine that

The Court’s notion of vulnerable groups is thus relational because it views the vulnerability of certain groups as shaped by social, historical, and institutional forces. In other words, the Court links the individual applicant’s vulnerability to the social or institutional environment, which originates or sustains the vulnerability of the group she is (made) part of.⁵⁶⁷

It is instructive to note that this element resonates with Finemann’s argument on the role of societal institutions (or the State) in originating and perpetuating vulnerabilities.

From the foregoing, it is clear that the relational element of vulnerability rings true within the context of tertiary institutions in South Africa. It becomes evident that structural inequities

⁵⁶⁶ Peroni L, Timmer A (2013) 1063.

⁵⁶⁷ Peroni L, Timmer A (2013) 1064.

present within students' population and within the varied types of tertiary institutions are complicit in originating as well as perpetuating students' vulnerabilities to food insecurity. Research carried out so far,⁵⁶⁸ shows that students vulnerable to food insecurity were most likely to be black, in historically black/disadvantaged universities, first year and often time first generation tertiary education attendees in their families.

B. Particular

With regard to the element of particularity, the courts' vulnerable subject stands in contrast to Finneman's 'universal vulnerable subject' earlier explored in Chapter Two of this study. Rather, the vulnerable subject as treated by the courts is particular. At first glance, this might seem to create some sort of disjuncture with recent academic scholarship on vulnerability.⁵⁶⁹ However, a cursory look reveals that it does not. Vulnerability as explained through Finemann's vulnerability theory is both universal and particular. Universal in the sense that all humans are vulnerable, but also particular, because the tools at each individuals wherewithal, at each point of vulnerability differs, thus leading to some being more vulnerable and others less vulnerable to specific circumstances. For instance as discussed earlier on in this chapter, female students coping mechanisms as indicated in the research, makes them less vulnerable to food insecurity in tertiary institutions as against their male counterparts.

Furthermore, Perroni and Timmer suggest that the court's use of 'particularly vulnerable group' rather than just 'vulnerable groups' is indicative of the court's awareness that people belonging to this group are simply more vulnerable than others.⁵⁷⁰ For instance, the jurisprudence of many courts have described women living with HIV/AIDS as particularly vulnerable, compared to the general population of people with HIV. This is due to a number of factors, including- a woman's physiological make up which makes her more susceptible to the illness; intimate partner violence and being unable to negotiate safe and/or consensual sex in relationships; discrimination in access to sexual and reproductive healthcare which many women still face; economic inequality of women; polygamy; cultural and traditional practices which disadvantage women such as female genital mutilation.⁵⁷¹ This implies that the court's

⁵⁶⁸ Van den Berg & Raubenheimer (2015) 160-169.

⁵⁶⁹ Re Finemann M (2008).

⁵⁷⁰ Peroni L, Timmer A (2013) 1076.

⁵⁷¹ See generally *A, C & Others v. Union of India & Others*, High Court of Judicature at Bombay [Mumbai], Writ Petition No. 1322 of 1999, at para. 19.

vulnerable subject 'is a group member whose vulnerability is shaped by specific group-based experiences'.⁵⁷²

Again, this element resonates with tertiary students' vulnerability to food insecurity in South Africa. Although food insecurity continues to be a problem which many South Africans are vulnerable to, students in tertiary institutions, for a multiplicity of factors highlighted in the first chapter of this study, continue to be particularly vulnerable to food insecurity.

C. Harm- Based

This is perhaps the most relatable of the criteria used in determining vulnerable groups by the court. Relatable because many authors have affirmed that harm is a key element of vulnerability. Perroni and Timmer have classified the courts determination of harm into two broad groups- harm of misrecognition and harm of maldistribution.⁵⁷³

Nancy Fraser succinctly describes the court's view on harm occasioned by misrecognition when she describes it as follows:

institutionalized patterns of cultural value . . . constitute some actors as inferior, excluded, wholly other, or simply invisible—in other words, as less than full partners in social interaction. . . .⁵⁷⁴

Prejudice and stigmatisation were the hallmark of harm occasioned in most group vulnerability cases examined by the ECtHR. In *D.H. and Others V. The Czech Republic*⁵⁷⁵, the court in finding that Roma children had been discriminated upon based on prejudice, noted that '[A]s a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority'.⁵⁷⁶ The court in its decision, in the *D.H. Case* and other cases, made several references to Council of Europe documents which were indicative of prejudices against the people of Roma, to inform its understanding of the Roma's vulnerability.⁵⁷⁷ In *Horváth And Kiss V. Hungary*⁵⁷⁸ the systemic placing of Roma children in special needs schools following a systematic misdiagnosis of mental disability, was recognized

⁵⁷² Peroni L, Timmer A (2013) 1064.

⁵⁷³ Peroni L, Timmer A (2013) 1065.

⁵⁷⁴ Nancy Fraser 'Rethinking Recognition' (2000) 3 *New Left Review* 107 at 113.

⁵⁷⁵ App. No. 57325/00, 47 Eur. H.R. Rep. 3 (2007).

⁵⁷⁶ Supra App. No. 57325/00, 47 Eur. H.R. Rep. 3 (2007).

⁵⁷⁷ See also *Sampanis and Others V. Greece* App. No. 32526/05, June 5, 2008 and *Oršuš and Others V. Croatia (Gc)* App. No. 15766/03, 52 Eur. H.R. Rep. 7 (2010), where the facts in the cases also revealed several hostilities by non Roma parents towards wards/children of Roma descent within schools.

⁵⁷⁸ App. No. 11146/11, 29 January 2013.

by the court as a prejudice occasioning group vulnerability. The court in reaching its decision acknowledged ‘biases in placement procedures’ and noted that the misdiagnosis was as a result of the socio economic status of the children.

In *Kiyutin. v Russia*⁵⁷⁹, a HIV positive man married to a Russian citizen with whom he had a daughter, was refused a residence permit on the basis of his HIV status. The court found that the applicant was discriminated against. This decision resonated with the courts jurisprudence on exclusion of groups historically subject to prejudice. In reaching this decision, the court referred to its previous decision,⁵⁸⁰ explaining the extent of discrimination persons living with HIV had to survive since the 1980s and stating that “people living with HIV are a vulnerable group with a history of prejudice and stigmatization.” The court noted that the rationale for denying HIV positive persons residence permits on the grounds that they were likely to engage in unsafe behaviours was unfounded, irrational and prejudicial.

In *Yordanova v Bulgaria*,⁵⁸¹ the applicant sued the Bulgarian state over the planned mass eviction of Roma inhabitants from a settlement which they has occupied for decades. The Romas had apparently been in occupation of said settlement with no objection from the state, until repeated complaints from neighbours over their occupancy of said settlement, based on alleged ‘Roma families’ behaviour’. The court ruled against the planned eviction which would have rendered the applicants homeless, on the grounds of the State’s failure to recognise the applicants’ situation as an outcast community and a socially disadvantaged group.⁵⁸² This case differed from the others as the courts’ focus of vulnerability was the poverty rather than discrimination and prejudice, even though it was clear this also played a role in the proposed eviction.⁵⁸³ The case however made the link between the harm of maldistribution and vulnerability. The second chapter of this study clearly made the link between the history of deprivation and disenfranchisement under the apartheid system and how that continues to affect specific students access to resources in general and food specifically. Suffice to state that the harm of maldistribution continues to be expressed in systemic disenfranchisement to this day.

⁵⁷⁹ App. No. 2700/10, 53 Eur. H.R. Rep. 26 (2011).

⁵⁸⁰ See *ALAJOS KISS CASE*.

⁵⁸¹ App. No. 25446/06, Apr. 24, 2012.

⁵⁸² *Yordanova v. Bulgaria*, Para 129.

⁵⁸³ Peroni L, Timmer A (2013) 1068.

The African regional jurisprudential system, through the complaint mechanism of the African Commission on Human and Peoples' Rights (ACHPR), has from the onset taken to the particular protection of vulnerable groups in Africa. This approach is not far divorced from the historical context of colonialism which Africa largely emerges from and the need for redress and balancing the injustices of the past.⁵⁸⁴ Thus, groups identified or known to be particularly vulnerable have from the outset been granted protection in the defence of their human rights. In this regard, one of the former commissioners of the ACHPR, Commissioner Umozurike, noted that

It seems pretty obvious that one of the peculiarities of the African Charter is its emphasis not just on individuals but on peoples, and this starts right from the very title and runs throughout there is no way that people here simply means all the people of the country — it is people that have an identifiable interest, and this may be carpenters, may be tribes, may be fishermen or whatever.⁵⁸⁵

Thus, like its counterpart the ECtHR, the dispute resolution mechanism of the ACHPR also lays an emphasis on group vulnerability of peoples (or groupings) in Africa. The celebrated *SERAC CASE* was an instance where the African Commission pronounced on protection for group vulnerability. The communication was brought before the Commission by the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights against the Nigerian Government (acting through the Nigerian National Petroleum Company) and Shell Petroleum Development Company (SPDC). The communication related to the oil exploration activities of SPDC within the Ogoni land in the oil rich Niger Delta area of Nigeria. These exploration activities had led to serious environmental degradation, causing the population who were mainly farmers and artisanal fishermen to lose out on their livelihood. The communication alleged that the Nigerian Government had condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies. At the heart of the SERAC case was social disadvantage and material deprivation of a group of people (the Ogoni People) over a period of time, as seen in previous cases considered under the ECtHR. In affirming the vulnerability of the Ogoni people, the ACHPR in holding the Nigerian government accountable for the violations noted that

⁵⁸⁴ Dersso S 'The jurisprudence of the African Commission in Human and Peoples' Rights with respect to peoples' rights' (2006) 2 AHRLJ 333 -357.

⁵⁸⁵ African Commission, Examination of State Reports (Libya-Rwanda-Tunisia) General Discussions (9th session March 1991) available at <http://library.africa-union.org/african-commission-human-and-peoples-rights-examination-state-reports-9th-session-march-1991-libya-4> (Accessed 02 May 2019).

...The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society. Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties⁵⁸⁶

It was clear that in the instant case, the African Commission prioritised the protection of the vulnerable Ogoni people from both state and non-state actors activities and influences.

The African Court on Human and Peoples' Rights (African Court) as a complementary mechanism for complaints in the fulfilment of the African Commission's protective mandate, has also made far reaching pronouncements on the protection of vulnerable groups in a number of decided cases. In a 2018 decided case,⁵⁸⁷ which sought to challenge the impact of a newly adopted Malian legislation on women's rights on a broad spectrum of issues ranging from minimum age of marriage for girls, to consent to marriage, to inheritance rights of women, the African Court in declaring the said legislation in violation of women's right, noted that '...by adopting the Family Code and maintaining therein discriminatory practices which undermine the rights of women and children, the Respondent State has violated its international commitments.'⁵⁸⁸

The outcomes for students in institutions of high learning who are vulnerable to food insecurity, clearly depicts the harm-based element. Emerging research continues to point to food insecurity as one of the major causes of South Africa's high attrition rates in tertiary institutions.⁵⁸⁹ Students' vulnerability to food insecurity occasions harm both on the short and long terms. The inability to complete their studies, low performance academically, mental health problems are some of the short term or more immediate indications of harm.⁵⁹⁰ On the longer term, the harm is reflected in the extension of intergenerational poverty and perpetuation of inequality, due to a lack of educational capital and/or resource.

⁵⁸⁶ See Paras 56- 57 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001) Available at <http://hrlibrary.umn.edu/africa/comcases/155-96.html> (Accessed 02 May 2019).

⁵⁸⁷ *APDF & IHRDA v Republic of Mali* Available at <http://www.african-court.org/en/index.php/55-finalised-cases-details/942-app-no-046-2016-apdf-ihnda-v-republic-of-mali-details> (Accessed 02 May 2019).

⁵⁸⁸ Ibid Para 124.

⁵⁸⁹ Sabi S et al (2019) 150.

⁵⁹⁰ Sabi S et al (2019) 150.

In conclusion, social disadvantage and material deprivation are increasingly becoming basis for the Court to make a finding of group vulnerability in its bid to address the harm of maldistribution. On this basis, this section has demonstrated the need for accountability to improve the enjoyment of the right to food for other vulnerable groups, including students in tertiary institutions. However, that this accountability is only adequately vested within a human rights framework/approach. The next section delves into an exploration of various possible approaches to addressing accountability for student's vulnerability to food insecurity within the context of tertiary institutions.

5.5 An Evaluation of Various Approaches to Vesting Accountability for the Right to Food in Tertiary Institutions

Various approaches to addressing food insecurity informs the engagement on aspects of food security broadly. This section sets out to evaluate various approaches and relates the human rights based approach as a crucial component of vulnerability and accountability that are key principles to ensuring food security at tertiary institutions. Some of these approaches have evolved over time from a broader societal response to food insecurity. There is a need to evaluate the various approaches and the value they add to the enjoyment of the right to food in the context of students at public tertiary institutions.

This study unpacks the value that is attached to the use of a human rights based approach. Before this is done, it is important to evaluate other approaches before pinpointing the most distinguishable approach. To this end, this section unpacks the various approaches to food security- a total of six approaches are engaged. These include the food availability; Income-based; Basic needs and the Entitlement approach. In addition, the chapter also discusses sustainable livelihoods and the human rights' approach.

5.5.1 *The food availability approach*

The food availability approach, is dubbed as the oldest and most influential in the world's history.⁵⁹¹ It was referred to as the Malthusian approach to food following the perspectives of

⁵⁹¹ Burchi F & De Muro P 'From food availability to nutritional capabilities: Advancing food security analysis' (2016) 60 *Food Policy* 10-19 at 10.

the Venetian thinker Giovanni Botero (1588) and the popularisation by Thomas Malthus around 1789.⁵⁹² Malthus asserted that the increase in human population is directly proportional to the availability of food, whereby the increase is usually identified in regions of plenty.⁵⁹³ As such where the population outgrew its primary resources like food, problems such as food insecurity cropped up.⁵⁹⁴ This approach emphasised the (dis)equilibrium between population and food whereby the maintenance of the equilibrium required that the rate of the availability of food had to be higher than the growth of population.

This approach was upheld in the definition of food security at the World Food Conference as the availability at all times of adequate world food supplies of basic foodstuffs to sustain a steady expansion of food consumption and to offset fluctuations in production and prices.⁵⁹⁵ The import of this definition in the context of this approach is twofold. First, the demand from the population has to be informed by a low fertility rate.⁵⁹⁶ Secondly, on the supply side, the population has to boost its agricultural production to ensure the continued availability, access and the utilisation of food.⁵⁹⁷ In the context of food security at tertiary institutions, there is a disconnect between the linkage of the demand for food and the supply on one hand and the affected student at university.

There has not been a sudden and rapid increase in the population as propounded by this approach due to advances in technology, as well as a rising standard of living among the people. As a result, this approach does not offer insightful answers by the food availability approach.⁵⁹⁸ In addition, the perspective that the production of food would be out-paced by the growth in the population and the diminishing returns in agriculture is wrong. This is because countries have rapidly adopted advanced technology to ensure the continued production of food.⁵⁹⁹ This instead presents questions in the context of student suffering from food insecurity- if there is

⁵⁹² Burchi F & De Muro P 'A human development and capability approach to food security: Conceptual framework and informational basis' (2012) *Background paper*, 8 at 1.

⁵⁹³ Florek S 'Food Culture: What's Wrong with Malthus' (2014) available at <https://bit.ly/3jIU0tH> (accessed 29 July 2020).

⁵⁹⁴ Dyson T 'World food trends: a neo-malthusian prospect?' (2001) 145(4) *Proceedings of the American Philosophical Society* 438-455 at 440.

⁵⁹⁵ Appendix: Declaration of the World Food Summit: Five Years Later available at <https://bit.ly/2CWBn4R> (accessed 29 July 2020).

⁵⁹⁶ Burchi F & De Muro P (2016) 3.

⁵⁹⁷ Burchi F & De Muro P (2016) 3.

⁵⁹⁸ Seth T (2020) 'Malthusian Theory of Population: Explained with its Criticism' available at <https://bit.ly/3f6uCdB> (accessed 29 July 2020).

⁵⁹⁹ Seth T (2020) 'Malthusian Theory of Population: Explained with its Criticism' available at <https://bit.ly/3f6uCdB> (accessed 29 July 2020).

continued and adequate production, why do students still encounter problems of access to food security at tertiary institutions?

This approach does not address the core concerns of this study for a number of reasons. First, the food availability approach envisages food security as a crucial cornerstone, informed by food production and stocks in a closed economy and food trade in an open economy.⁶⁰⁰ Secondly, this approach overly simplifies what informs population growth like poverty, lack of education and unemployment. Poverty make persons vulnerable- a position that is presented in students who suffer from food insecurity.⁶⁰¹ In addition, the approach does not contextualise other major aspects which drives food insecurity such as societal inequalities, management of the land tenure systems and other related aspects.⁶⁰²

This approach thus fails to take into consideration several important aspects of food security which are unrelated to an availability context, thereby falling short of a rights based approach. This includes non-nutritive based elements of food security such as the acceptability of food, as well as dignity of persons to feed themselves and non-discrimination in access to food. These are all important elements based in a human rights framework, which guarantees the right to food for every one and within the context of this study, students in tertiary institutions.

5.5.2 *Income-based approach to food security*

Another approach to food security is the income based approach that states that food security is a problem of food availability and is affected by a macroeconomic approach.⁶⁰³ The approach argues that the economy is informed by various interdependent factors, consequently it is wrong to relate the problems to food security as an exclusive preserve of the agricultural/food sector. The overriding argument of the income-based approach is that the income of an individual plays a crucial role, as the lack thereof affects one's ability to buy goods that

⁶⁰⁰ Le Mouël C, Lattre-Gasquet D & Mora O 'Land use and food security in 2050: a narrow road' (2018) 400.

⁶⁰¹ Florek (2014) .

⁶⁰² Florek (2014) .

⁶⁰³ Burchi F & De Muro P 'A human development and capability approach to food security: Conceptual framework and informational basis' (2012) *Background paper 1*.

guarantees the standard of living of a person. Therefore, food insecurity is the effect of the lack of sufficient income to purchase food.⁶⁰⁴

However, there are various assumptions that inform the income based approach. It assumes that income informs the capacity to have food security.⁶⁰⁵ While this means that food security depends on the ability of the caregivers to support students, most research is done at household levels as units of analysis. As such the interpretation assumes a certain line of distribution informed by the biological needs of its members. In addition, expenditure surveys underestimate money spent on food, where the value of the food produced at home is often not recorded.⁶⁰⁶

The largest assumption that ousts the relevance of the student in this approach is the assumption that the student has a form of income. In qualifying the vulnerability of students to food insecurity in the second chapter of this study, it was emphasised that many students neither have an income or alternative sources of funds which they can rely on to purchase food for a variety of reasons. An overwhelming majority of students fall within the category of those not entitled to access state grants, many students in full time academic pursuit are unemployed, and others do not qualify for financial aid because their total family income are on the one hand too rich to qualify, yet too poor to self-sustain. In this regard, it is argued that the basic-income approach on its own does not suitably address the food security needs of tertiary education students in South Africa.

The income-based approach fails to take into account the context of vulnerable populations without access to an income- such as students. This differs from a human rights based approach that centres vulnerability and creates an accountability framework to address this vulnerability. In this regard, the human rights based approach is a preferred approach to addressing the food security needs of vulnerable groups such as students in tertiary institutions.

⁶⁰⁴ Sibrian R 'Deriving Food Security Information From National Household Budget Surveys' available at www.fao.org/3/a-i0430e.pdf (accessed 29 July 2020).

⁶⁰⁵ Reutlinger S & Selosky M *Malnutrition and Poverty, Magnitude and Policy Options* (1976) generally.

⁶⁰⁶ Frankenberger T 'Indicators and Data Collection Methods for assessing Household Food Security' (1992) in Maxwell S and Frankenberger TR (eds.) *Household Food Security: Concepts, Indicators, Measurements. A Technical Review*, 96.

5.5.3 Basic-needs approach to food security

The approach is a product of engagements in the late 1970s by the International Labour Organization (ILO) through the inculcation of non-economic aspects of development.⁶⁰⁷ This approach defined the basic needs of a person to include food, clothing, housing, education, and public transportation.⁶⁰⁸ It is proposed that to deal with these problems, there is a need to tackle the structural issues in society such as poverty, unemployment, and under-employment.⁶⁰⁹

Scholars have further advised that development should be seen as a process that seeks to ensure the satisfaction of basic needs through the continued provision of both material and nonmaterial aspects.⁶¹⁰ In the context of development, it is expected that States collaborate with development agencies to deal with identified structural issues to lead to the provision of food, shelter and clothing.⁶¹¹

This approach proposes different modes of assessing food security. First, there is the food frequency assessment, which questions the number of meals an individual has had in a day.⁶¹² This is instructive in the context of students at tertiary institutions and the daily decisions which some of them make which affects their access to food.⁶¹³ In this regard, answers that indicate low figures, provides an indication of the level of food security in such institutions. However, the number of meals may not necessarily be the only yardstick, as this assessment requires that insights on the frequency of the consumption of different items is also carried out. This calls for greater detail that may not speak to the more structural issues of power, vulnerability and the lack of access to resources which distorts food security of students at tertiary institution. It is argued that the focus on the frequency other than the quantity consumed makes it hard to

⁶⁰⁷ Emmerrij L (2010) The Basic Needs Development Strategy, 1 available at <https://bit.ly/31465AS> (Accessed 30 July 2020).

⁶⁰⁸ Emmerrij L (2010) The Basic Needs Development Strategy, 1 available at <https://bit.ly/31465AS> (Accessed 30 July 2020).

⁶⁰⁹ Emmerrij L (2010) The Basic Needs Development Strategy, 1 available at <https://bit.ly/31465AS> (Accessed 30 July 2020).

⁶¹⁰ Stewart F *Basic Needs in Developing Countries* (1985) generally.

⁶¹¹ Burchi F & De (2016) 3.

⁶¹² Burchi F & De (2016) 3.

⁶¹³ This would be particularly evident in the case of NSFAS funded students outside of residences who are not entitled to transport allowances and recounted reports of having to choose between paying for a meal or for transportation to school.

deal with the erstwhile simple answers that one requires when evaluating the student's lack of food security at tertiary institutions.⁶¹⁴

The shortfall with this approach is the ambitious stance it takes in seeking to propel provision beyond necessary means to what may be described as an utopia of more desirable means that may go beyond the required basic minimum. Of course there is nothing wrong with this in principle, but there is a need to question the engagement of the provisioning of basic needs approach for desirable outcomes. This is evident in the approach's emphasis on whether people eat enough food. This may be misleading in the context of public tertiary institutions where the conversation borders principally on the lack of food for those in need.

This approach also proposes that one should observe the nature of food consumption within a household.⁶¹⁵ It is expected that this observation takes place during meals so as to have information on the food that is being consumed. However, the concept of household observation does not translate to the tertiary education environment, where often there is no centralised system of provision of meals emanating from a caregiver as in a household. It is on this premise that the existence of research that points to food insecurity at household levels, is an indeterminate predictor of food (in)security within tertiary institutions. The levels of food insecurity at tertiary institutions within South Africa, have been shown to be above the average levels in society generally.⁶¹⁶ Recent research shows that in 2012, over 25% of South African households were found to be food insecure.⁶¹⁷ This rate when measured against an approximately 68% rate of food insecurity among students in a South African tertiary institution, shows that the situation is more dire within the tertiary education sector.⁶¹⁸ As a result, any subsequent attempts to establish the required amount of calories or their aggregation is done against a wrong premise- households do not typically exist in the tertiary education environment. It is on this premise that the basic needs approach, despite its usefulness, falls short of offering a diligent option to engage in dealing with food insecurity at universities.

⁶¹⁴ Burchi F & De (2016) 3.

⁶¹⁵ Burchi F & De (2016) 3.

⁶¹⁶ See Van den Berg L and Raubenheimer J 'Food insecurity among students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169.

⁶¹⁷ Statistics SA (2012) 4-5.

⁶¹⁸ Van den Berg L and Raubenheimer J (2015).

Similar to the food availability approach, the basic needs approach fails to take into consideration several important aspects of food security which are unrelated to the non-nutritive based elements of food security such as the acceptability of food, as well as dignity of persons to feed themselves and non-discrimination in access to food. These are important elements entrenched in a human rights framework, which guarantees the right to food for every one and within the context of this study, students in tertiary institutions.

5.5.4 Entitlement approach

The entitlement approach is a shift from the food availability approach underscored by the Malthusian approach, to the need for granted access to food. This approach, according to Amartya Sen proposes that a person is entitled to commodity bundles that includes food.⁶¹⁹ It follows from this position that the presence of starvation and famine are due to a failure to have sufficient food.⁶²⁰ It should be noted at this point that an entitlement refers to personal endowments or resources that are legally owned by an individual, which are the resources a person legally owns such as house, livestock, land, and nontangible goods. They may also relate to a set of commodities the person can have access to through trade and production.⁶²¹ It is however, argued that the singular use of endowments as the yardstick for entitlements is misleading where the former is applied subjectively.

Consequently, a reduction in endowments may still lead to possible starvation.⁶²² This may be due to other reasons like a drop in the prices of the commodity being produced, due to reasons that affect the availability to food. In addition, this approach seems to blend well in instances of a famine analysis. It should be recalled that the contextual understanding of a famine may indicate its absence, yet people still lack access to food. For instance, research from South Africa shows that it is food secure on a national level with the ability to produce, import, retain and sustain sufficient food for its population. However, people at household and individual

⁶¹⁹ Sen A 'Ingredients of Famine Analysis: Availability and Entitlements' (1981) 96 *The Quarterly Journal of Economics* at 433-464.

⁶²⁰ Sen A 'Ingredients of Famine Analysis: Availability and Entitlements' (1981) 96 *The Quarterly Journal of Economics* at 433-464.

⁶²¹ Devereux S 'Sen's entitlement approach: critiques and counter-critiques (2001) 23(3) *Oxford Development Studies* 245-263.

⁶²² Osmani S 'The Entitlement Approach to Famine: An Assessment' *World Institute for Development Economics Research*, 1993 available at <https://bit.ly/33gYLVg> (assessed 30 July 2020).

levels still go to without meals.⁶²³ This position is reiterated by the scholarly perspective that states that where

people go hungry on a regular basis all the time, or seasonally, the explanations of that have to be sought in the way the entitlement system in operation fails to give the persons involved adequate means of securing enough food⁶²⁴

This is an indication that hunger is interpreted as an entitlement failure that would require one to understand the reasons that lead to this failure. It is argued further that the emphasis on the existence of hunger and famine as failures of entitlement, disregards the role of the supply of food and the relevance of other structural socio-economic conditions in society. In addition, this leads to the need to recognise that starvation may be interpreted subjectively, as the lack of enough food to eat or the lack of access to food to eat.

To this end, the approach presents various shortcomings. It seems to imply the existence of an income as the most important form of access to food, yet this is not the position in the rural areas of developing countries.⁶²⁵ It is argued further that the emphasis on income represents a limited economic status of an individual/household other than the existence of assets.⁶²⁶ However, it is worth noting that the entitlement approach predicts possible deprivations of food in future and points to an examination of other multidimensional issues of food security such as hunger and undernutrition.

However, without prejudice to the foregoing, the approach does not apply to the contextual nature of majority of students at tertiary institutions. It is proposed that the vulnerability particularity debate discussed earlier on in this chapter, unpacks the peculiar aspect of the student who is neither in a household nor in ownership of tools of production that would mitigate the effects of food insecurity on him. Within the tertiary education context, most students are neither involved in the day to day production of food, or have an income to use as a basis to gauge their ability to sustain their entitlement. In addition, the entitlement approach places emphasis on the economic aspects of famine without proper consideration of non-market institutions that determine these entitlements like social conditions, and other emergencies that play a role in exacerbating famine.⁶²⁷

⁶²³ Van den Berg & Raubenheimer (2015) 160.

⁶²⁴ Dreze J & Sen A *Hunger and Public Action* (1989) 24.

⁶²⁵ Devereux S (2001) 246.

⁶²⁶ Burchi & De (2016) 13.

⁶²⁷ Devereux S (2001) 246.

In the context of students, the existence of famine or its lack thereof is not a precursor for food security in tertiary institutions. As earlier indicated, there may be no famine and individuals such as students will still be food insecure. This, in spite of the ability of the state in question to produce food, export food and retain an equivalent amount of food that is sufficient for its population.

5.5.5 *The charitable food system approach*

This approach is anchored against the background of benevolence. Its formal structural existence is credited to developed economies who sought to close the gaps arising from the shrinking space of state welfare to vulnerable populations.⁶²⁸ This approach being benevolent in nature, is anchored mainly by non-profit organisations, religious organisations and other private actors. The utility of the approach is twofold- on the one hand, it gets food to those in need of it, and on the other hand it redirects and recycles what might potentially have been wasted food back into the food system for human consumption.⁶²⁹ It is currently estimated that about ten million tonnes of food, making up a third of all food produced, in South Africa is wasted.⁶³⁰

Food banks are a major highlight of the charitable food systems approach, whereby they centrally collect food from donor actors and distribute to the food insecure. This system over the years has also taken root in developing countries, including South Africa, with organisations such as Food Forward SA at the forefront of the approach.⁶³¹

While the approach has been lauded, it does come with certain peculiarities which do not make it an ideal or sustainable approach to the problem of student food insecurity in the tertiary education sector. For one, stigma continues to be attached to food poverty even to this day.⁶³² Many vulnerable groups which rely on food aid are stigmatised within their communities. This

⁶²⁸ Yan M, Sutherland R 'A place-based alternative approach to food security' (2018) 54 (4) *Community Development Journal* 644.

⁶²⁹ Yan M, Sutherland R (2018) 645.

⁶³⁰ WWF-SA *Food Loss and Waste: Facts and Futures. Taking a Step Towards a more Sustainable Food Future* (2017) Available at http://awsassets.wwf.org.za/downloads/WWF_Food_Loss_and_Waste_WEB.pdf (Accessed 06 August 2020) 7.

⁶³¹ See further <https://foodforwardsa.org/our-work/>.

⁶³² Minaker L, Elliott S & Clarke 'A Low income, high risk: the overlapping stigmas of food allergy and poverty' (2015) 25 (5) *Critical Public Health*, 599-614.

stigmatisation replays within the context of tertiary institutions, thereby standing as a deterrent to many students from actually accessing the food.⁶³³ A study at the University of KwaZulu-Natal, revealed that up to 30% of food insecure students indicated social stigma was attached to food insecurity on the campus environment and thus preferred anonymity about their food insecurity status. Furthermore, unique dietary preferences and/or needs are hardly catered for under this model.⁶³⁴ Given that acceptability is one of the key pillars of food security, it becomes difficult to categorise this approach as one which guarantees food security. The recipients of these donations are not at liberty or have the agency to determine what they eat.⁶³⁵ Within the context of tertiary institutions, this in itself perpetuates an added layer of vulnerability.

The unpredictability of food availability for distribution under this approach also remains a major source of concern as a guarantee of food security. The sustainability of the model is dependent on the generosity of donors. With the missing element of an obligation to donate such food, donors are at will to divert such donations to more commercially viable options such as for animal feed. In the event of this happening, this exacerbates the recipients' vulnerability to food insecurity, given their dependence on the donations that had previously been created and fostered. Within the context of tertiary institutions, this makes for a very unreliable approach to addressing student food insecurity.

5.5.6 Sustainable livelihoods approach

Another approach that is worth evaluating is the Sustainable Livelihoods approach that inculcates food security, development and poverty. Initially, the approach emphasised livelihood, rural development and poverty.⁶³⁶ It subsequently expanded to include other aspects like both tangible and intangible assets classified into five categories.⁶³⁷ These include natural, physical, human, financial and social capital. It should be recalled that this evaluation does not seek to elucidate the viability of the approach but rather evaluate whether it speaks to the position of the student who is food-insecure. The sustainable livelihoods approach takes on a

⁶³³ Sabi S et al (2019) 144-151.

⁶³⁴ Yan M, Sutherland R (2018) 645.

⁶³⁵ Yan M, Sutherland R (2018) 647.

⁶³⁶ Chambers R *Rural Development: Putting the Last First* (1983) generally.

⁶³⁷ Chambers R 'Sustainable livelihoods, environment and development: putting poor rural people first' Discussion Paper, (2005) 240.

long-term perspective; and is also informed by the political, economic, physical, social and cultural context of the society. This calls to play various issues like agricultural activities, rural areas and how they contribute to food (in) security etc. The shortfall with this approach lies in the continued emphasis on an analysis of the household assets and their relationship with vulnerabilities and resilience.⁶³⁸

This approach advocates for the use of coping mechanisms to mitigate the reduction in the access to food or its declining availability.⁶³⁹ It is interesting to note that the coping mechanisms call for people to engage in activities that could enable their continued realisation of certain goals. Unfortunately, the reference to the need for capabilities calls for an evaluation of a household on the basis of the assets it has as a source of mitigation of challenges of food insecurity. This makes the approach seek to deal with issues of poverty other than food security. As such, this makes it an abstract notion to engage when considering the context of the student in a tertiary institution, who is not in a household, yet has to have sufficient food during the tenure of his studies at the university. In addition, the sustainable livelihoods theory, just like the basic needs and the entitlement approach, focuses on the need to “gain a living”,⁶⁴⁰ through the accessing the necessities of life. The approach like the others, is not attuned to the plight of the student who may not be earning an income and not in the perfect position of a household that is used as a unit of analysis. This calls for the need to consider an approach that speaks to the personal plight of the student in need of food.

5.5.7 *The human rights based approach*

Chilton and Rose have defined a human rights based approach to food security as

‘...a system of ideas based on the Universal Declaration of Human Rights, adopted by the United Nations in 1948, and its associated treaties and legal covenants.’⁶⁴¹

UNICEF’s conceptualisation is at par with Chilton and Rose when it states that a human rights based approach is

‘a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting

⁶³⁸ Holt J & Mark L ‘The Household Economy Approach’ *A resource manual for practitioners. Save the children* 17 (2000) available at <https://bit.ly/3hUAicq> (accessed 20 July 2020).

⁶³⁹ Burchi & De (2016) 17.

⁶⁴⁰ Burchi & De (2016) 17.

⁶⁴¹ Chilton M, Rose D ‘A rights based approach to food insecurity in the United States’ (2009) 99 (7) *American Journal of Public Health* 1203.

human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.⁶⁴²

Furthermore, the United Nations Principles and Guidelines for a Human Rights Approach to Food Security Interventions of 2006 (UN Principles and Guidelines on Poverty Interventions) states that poverty is the denial of a person's rights to a range of basic capabilities, such as the capability to be adequately nourished and to live in good health.⁶⁴³ The United Nations Principles and Guidelines for a Human Rights Approach to Food Security Interventions of 2006 (UN Principles and Guidelines on Poverty Interventions) state that poverty is the denial of a person's rights to a range of basic capabilities, such as the capability to be adequately nourished and to live in good health.⁶⁴⁴ To this end, paragraphs 18 and 19 of the UN Principles and Guidelines on Poverty Interventions provide that empowerment occurs most fundamentally by introducing the concept of rights itself. Once this concept is introduced into the context of policy making, the rationale of poverty alleviation no longer derives merely from the fact that people living in poverty have needs, but also from the fact that they have rights that give rise to legal obligations on the part of others.

The above definitions are an indication that the platform that should inform the rationale and reasoning for any appropriate approach is the human right(s) in question. It should be noted that a human rights based approach inculcates development to a certain degree. First, it is informed by the intrinsic rationale that it should be used to do the right thing morally or legally.⁶⁴⁵ Secondly, it is also informed by the instrumental rationale, that recognises that a human rights-based approach leads to better and more sustainable human development outcomes.⁶⁴⁶ As such, the need to engage a human rights based approach involves a balancing of the moral or legal aspects of a matter and the development aspects as well.

⁶⁴² UNICEF (2020) Human Rights' Based approach to programming, available at <https://uni.cf/39HKADB> (accessed 20 July 2020).

⁶⁴³ UN Principles and Guidelines on Poverty Interventions para 7 <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (accessed 28 March 2020).

⁶⁴⁴ UN Principles and Guidelines on Poverty Interventions para 7 <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (accessed 28 March 2020).

⁶⁴⁵ UNICEF 'Human Rights Based approach to programming' (2020) available at <https://uni.cf/39HKADB> (accessed 20 July 2020).

⁶⁴⁶ UNICEF 'Human Rights Based approach to programming' (2020) available at <https://uni.cf/39HKADB> (accessed 20 July 2020).

Human rights are generally described as the relationships between claim holders and duty bearers.⁶⁴⁷ The narrative that follows to this ends adds that the duty bearer has to respect, protect, facilitate, and fulfil the rights of the claim holders. The fluidity of both the claimant and duty bearers oscillates from the international to the domestic community, to local governments, non-state actors like businesses, NGOs, societies, household, families and finally individuals.⁶⁴⁸ The response by a government to matters of human rights is envisaged in a democratic system of government, where its respect for the right is reflected through the various modes of accountability to people within its territory.⁶⁴⁹ The notion of legal accountability has been expounded upon earlier in this chapter. Suffice to state that, the existence of democratic institutions that promote the rule of law and citizen participation are great indicators of the strength of both political and civil rights.⁶⁵⁰

It should be noted further that a human right relates to a cognisable state of being; creating a standard of wellbeing that develops into a claim upon infringement.⁶⁵¹ The basis of laying a claim lies in the status of being a human.⁶⁵² It is for this reason that the Constitution of the Republic of South Africa recognises the need to redress the imbalances brought about by South Africa's brutal history and seeks to use democracy and human rights to address societal problems and challenges. As such, where the right is not realised by the duty bearer, it turns into a claim, that can be pursued to realise the right.⁶⁵³ The question is how food insecurity may be identified as a claim that can be pursued using a human rights based approach. Before this question is answered, this study tackles the fundamentals of a right perspective.

Namakula agrees with Reeves and stated that the four principles that enumerate a right include (i) a protected interest; (ii) a duty or obligation(s); (iii) a duty-bearer; and (iv) a beneficiary or

⁶⁴⁷ FAO 'The right to adequate food: Fact sheet no 34' available at <https://bit.ly/2XbZvay> (accessed 30 July 2020).

⁶⁴⁸ Haddad L & Oshaug A 'How does the human rights perspective help to shape the food and nutrition policy research agenda?' (1998) 23(5) *Food Policy* 329-345.

⁶⁴⁹ Haddad & Oshaug 'How does the human rights perspective help to shape the food and nutrition policy research agenda?' (1998) 23(5) *Food Policy* 340.

⁶⁵⁰ Haddad L & Oshaug A 'How does the human rights perspective help to shape the food and nutrition policy research agenda?' (1998) 23(5) *Food Policy* at 340.

⁶⁵¹ Namakula C 'The Structure of a Human Right in Law: Setting the Criterion for a Right Legally So-Called' (2017) 32 *The Journal Jurisprudence* 137.

⁶⁵² Namakula (2017) 137.

⁶⁵³ Anthony R 'Standard Threats: How to Violate Basic Human Rights' (2015) 41 *Social Theory and Practice* 408.

an interest bearer.⁶⁵⁴ It is argued that the existence of a beneficiary or an interest bearer creates a standard of wellbeing or conduct that has to be addressed as the mode of realising the right.⁶⁵⁵

First, the protected interest derives from the demand for the respect and protection of the inherent dignity of a human being.⁶⁵⁶ Without taking the detour of defining what inherent dignity is, it can be simply described as the respect accorded to an individual without discrimination, without inequality by virtue of his or her humanness.⁶⁵⁷ In addition, a right ought to have valuable ideals that establish guarantees that are valuable and indispensable to human dignity. This consequently informs the justiciability of the right due to its ideals and how it informs the inherent dignity of an individual. Thus, the lack of food that leads to hunger undermines the inherent dignity of an individual and the protection from hunger is underscored by the right to food and nutrition in both national and international law. In instance where criminal cases are involved, the fact that the Constitution provides for the right to a fair trial guarantees that the person will be presumed innocent, will be informed of the charges against him or her in a language that he or she understands, and will be accorded facilities to prepare his or her defence.⁶⁵⁸ To this end, the right adopts a functional character of protecting the perpetrator or the duty bearer from harm until a tribunal has decided on the merits of the claim by the claimant.⁶⁵⁹

Secondly, the existence of an obligation reiterates the principle that a human right encompasses rational attention to the corresponding duties, whereby the former informs the justiciability in tribunals that are established to provide adjudication.⁶⁶⁰ Where this duty is not addressed by the duty bearer, the claim holder may then claim an infringement and seek redress through legal action.⁶⁶¹ These obligations falls broadly into four categories-respect, promotion, protection, and fulfilment of the specific interest.⁶⁶² It is therefore not enough that an individual may speak of his or her right and assume the existence of an obligation. The obligation has to

⁶⁵⁴ Namakula (2017) 137, Anthony (2015) 408.

⁶⁵⁵ Namakula (2017) 137, Anthony (2015) 408.

⁶⁵⁶ Ritu S 'Human Rights Ideology' (2014) 1 (5) *International Journal of Multidisciplinary Approach and Studies* 318.

⁶⁵⁷ Valentini L 'Dignity and human rights: A reconceptualisation' (2017) 37(4) *Oxford Journal of Legal Studies* 862-885.

⁶⁵⁸ International Covenant on Civil and Political Rights, Article 14.

⁶⁵⁹ Anthony (2015) 403.

⁶⁶⁰ Sen A 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs* 315, 322.

⁶⁶¹ Namakula (2017) 138.

⁶⁶² Namakula (2017) 138.

be informed by an identifiable commitment to a legal or moral system that speak to the inherent dignity of an individual and falls within the bound of possible identification.⁶⁶³

Thirdly, duty that is identified has to accrue to an ascertainable and 'functional' entity that is bound by the right. For instance, the African Human Rights System states that the enjoyment of rights and freedom implies the performance of duties on the part of everyone.⁶⁶⁴ These duties arise at various levels right from the individual at grassroots, to the international entity at the higher apex.⁶⁶⁵ In some circles, it is arguable that an individual may also be a duty bearer to themselves. However, the question of the individual's freewill to violate his rights is hard to enforce as he takes it upon himself to violate his own dignity.⁶⁶⁶

Fourthly, this protected interest that creates a duty bearer that is ascertainable and functional also requires an interest bearer that is an ascertainable person that takes on the right as his or her property.⁶⁶⁷ As such the bearer 'must engage in an active process of taking ownership of the right, sustaining it or even developing it'.⁶⁶⁸ This requires dissemination and mass sensitisation to ensure that the interest bearer knows about the existence of his or her right.

This raises the question on how the above applies to food security. First, the link between the respect for the right to food and the strength of democratic institutions introduces questions of human rights, democracy, and economic performance at the cross-national, national, and project levels. To this end, it may be argued that the lack of access to food by students at higher institutions of learning affects the enjoyment of the right to education, the right to the highest attainable standard of health, the right to equality and freedom from non- discrimination. As such the state would have an obligation to ensure that it respects these rights and in so doing it takes on steps that ensure that students' food security is fulfilled, through the engagement of a rights approach.

⁶⁶³ Donnelly J 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 391.

⁶⁶⁴ African Charter on Human and Peoples Rights (ACHPR), Preamble, adopted on 27 June 1981, entered into force on 21 October 1986.

⁶⁶⁵ Article 27.

⁶⁶⁶ Namakula (2017) 138.

⁶⁶⁷ Taylor C 'Conditions on an Unforced Consensus on Human Rights' (Paper presented at the Bangkok Workshop, March 1996) 1.

⁶⁶⁸ Namakula (2017) 140.

In addition, both the state and various non-state actors may need to examine the reasons that lead to food insecurity at tertiary institutions and how their actions or inactions continues to perpetuate students vulnerability to food insecurity. This approach on the basis of human rights violations goes beyond the scope of the aforelisted approaches and seeks to engage a position that justifies the means of resolving the human rights violations that arises from food insecurity.⁶⁶⁹

To this end, the human rights approach requires that the executive, judiciary and the legislature take on the use of transformative constitutionalism to ensure redressing the imbalances brought about by history, by engaging a human rights approach. The continued emphasis on the participation by various stakeholders, from the executive, the judiciary and the legislature posits a unified development of normative and legislative frameworks that protect students at tertiary institutions from the problems of food insecurity. Through evaluating the contemporary approaches, and deliberating on the enactment of adequate laws, the handing down of landmark decisions and the use of progressive policies that speak to the continued improvement of students affected by food insecurity, a rights based approach is unravelled.

This would as a matter of principle, speak to the continued respect, protection, facilitation and the fulfilment of the right to food through the engagement of policy and research. The right to food in tertiary institutions and how the state can ensure progressive realisation and enjoyment of this right, is achievable through the use of a human rights based approach. It is not in doubt that this approach places students at the centre of the various initiatives that would be important in improving their position of vulnerability.

5.6 Adoption of a Human Rights Based Approach to Address Student Hunger: Best Practice Example

The examples of other jurisdictions approaches to solving student food insecurity is instructive in adopting a rights based approach. While these approaches have not typically been labelled a ‘rights-based’ approach, they embody elements of human rights, which serve as best practices to be adopted in South Africa. Swipe Out Hunger in the United States of America (USA) is

⁶⁶⁹ Haddad L & Oshaug A How does the human rights perspective help to shape the food and nutrition policy research agenda? (1998) 23(5) *Food Policy* at 340.

one such sterling example which provides best practice. Swipe Out Hunger (SOH) is an organisation started over 10 years ago to address the high rates of food insecurity in the USA, it adopted a multi-pronged approach, with human rights outlook. It does this by driving for donations from students with extra meal swipes or dining dollars to donate them into a pool, which is spread to students in need, without the need for open identification of ‘needy students’.

SOH bases its programs on a specific theory of change, which resonates with the underlying motivation for this study. Its theory of change is that when sustainable, student-centric and innovative food security programs are adopted nationwide, - i) the higher education sector will become more equitable; ii) basic needs movement within the higher education space will gain greater traction; iii) there will be higher retention and graduation rates of students, including better inclusivity of all students, and; iv) students will experience improved health, nutrition and academic wellbeing, with less stigma, isolation.⁶⁷⁰

Adopting this theory of change, SOH’s underlying philosophy to addressing student hunger over the years has been- i) student power- i.e. centring vulnerable students not just as recipients but active right bearers in reclaiming the right to food; ii) Innovation- bringing on board technological and resource input from non-state actors to resolve student food insecurity; iii) sustainability- ensuring that its methods catered to students and student outcomes not only on the short/immediate term but also on a long term basis; and iv) destigmatisation – addressing narratives of hunger and poverty through re-education of the structural causes of these inequities.⁶⁷¹

Through its results, it does appear that the theory of change translated into the underlying philosophy has brought about meaningful change/impact to student hunger in the tertiary education sector. In its ten years of existence and through its multi-pronged approach, SOH has authored and sponsored legislation on state and federal levels to support student food security.⁶⁷² Some of these include-

⁶⁷⁰ See further Swipe Out Hunger ‘Our Theory of Change’ Available at <https://www.swipehunger.org/whycollegehunger/> (Accessed 09 September 2020).

⁶⁷¹ See further Swipe Out Hunger ‘2020 Impact Report: Feeding our Future’ Available at <https://2020impact.swipehunger.org/> (Accessed 09 September 2020).

⁶⁷² See further Swipe Out Hunger ‘Policy Wins’ Available at <https://www.swipehunger.org/ourwork/#policy> (Accessed 09 September 2020).

- **SB 85 Hunger Free Campus Bill California** – a bill authored by SOH in 2017 and has been passed into law, which provides financial support to all California public colleges (California State University, University of California, and community colleges), provides for initiatives addressing college student hunger, and which in many cases included starting a Swipe Out Hunger program.
- **A4702 Hunger Free Campus Bill New Jersey (*Replication of SB 85*)** – a Bill sponsored by the SOH in 2019, which has also been passed into law. The Bill provides for financial support to all public colleges in New Jersey for initiatives addressing college student hunger, which in many cases includes starting a Swipe Out Hunger program.
- **Food For Thought Act, introduced by Rep. Adam Schiff (D-Ca) – Federal** – a bill sponsored by the SOH in 2019, still in process, which seeks the authorization of \$6 million a year for a pilot investment to create grants that would help provide free meals to the nation’s community college students.
- **HB 1175 Hunger Free Campus Grant Program Maryland (*Replication of SB85*)** – a bill sponsored by the SOH in 2020 which seeks financial support to all public colleges in Maryland for initiatives addressing college student hunger, which in many cases includes starting a Swipe Out Hunger program.

Outside of its legislative and policy strides, the SOH has made significant impact in addressing student food insecurity in the tertiary education sector in the USA in a number of ways. It offers advocacy training for student leaders, thereby helping students themselves become advocates for their rights to an adequate standard of living. Trainings are organised for students on becoming leaders through its advocacy pathway program.⁶⁷³ Further, it currently has a total of 102 partner tertiary institutions in the USA which implements its programs. It has also brought on board several non-state actors in the drive to end student food insecurity.⁶⁷⁴

⁶⁷³ See further Swipe Out Hunger ‘Policy Wins’ Available at <https://www.swipehunger.org/ourwork/#policy> (Accessed 09 September 2020).

⁶⁷⁴ See further Swipe Out Hunger ‘Our Work Available at <https://www.swipehunger.org/ourwork/#swipedrive> (Accessed 09 September 2020).

Many times the readily available excuse for many developing countries reluctance to adopt programs that address the needs of the vulnerable, is resource constraints. While some may argue that countries like South Africa can do better, it does not belie the fact that resource constraints in the light of the many socio-economic needs is a real problem. What SOHs program has shown is that the different actors are better off working together, rather than apart to end student hunger. SOH's example pinpoints the crucial role of the state in creating the right legal and policy framework to address student hunger. The role for non-state actors to bring on board innovative technological and resource input is also critical. The SOH example is a model based within a human rights framework which is still able to be adopted within the context of a developing country like South Africa.

Other best practices continue to be developed across countries to stamp out student food insecurity. What this shows is that beyond the recognition of the problem, there is a recognition that responses must be achieved through a human rights framework. A human rights based response is one which recognises the vulnerability of students, centres students as right bearers, ensures that the dignity of students is maintained through its responses, seeks to ensure state accountability for the issue through legal and policy framework, extends responsibility to non-state actors and ensures that the solutions proffered are sustained and sustainable.

5.7 Conclusion

An evaluation of the various approaches indicates that the human rights based approach offers the best remedy to dealing with the problem of food insecurity in institutions of higher learning. This is informed by the principles that underscore a human right, i.e. a protected interest, with an ascertainable and functional duty holder and claim bearer as underpinned by both international and domestic legal instruments.

Furthermore, the use of a human rights approach engages the vulnerability of the individual in the context of relational, particularity and harm that could be occasioned to the individual. The holistic engagement of these aspects by implication leads to accountability on the part of individuals, entities, the State and non-state actors in dealing with the food insecurity of students at institutions of higher learning.

A best practice model has been examined which speaks to the very core of a human rights based approach- one which is suitable for the current situation in South Africa. The chapter

that follows makes concrete recommendations for South Africa on the basis of a human rights based approach.



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CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 General Conclusions

This thesis set out to explore the human right violation of a lack of access to food of students in the South African tertiary education sector and an appropriate response to this violation. The study was guided by four main research questions. First, the research probed whether students in South African tertiary institutions were a vulnerable group to food insecurity and by implication, deserving of special protective measures to address their vulnerability. The second research question probed the nature of the State's obligation to realise the right to food of students in South African tertiary institutions and in which organs of State this obligation lay. The third research question was whether non-state actors had obligations to ensure access to food for students in tertiary. The final research question focused on whether a human rights-based approach effectively addresses the lack of access to food for students in South African tertiary institutions.

The first research question was responded to in the second chapter of this thesis, which on the one hand developed a theoretical grounding of power and vulnerability for this research, while explaining the historical linkages of students' vulnerability to food insecurity. The second research question was responded to in the third chapter of this thesis which extensively reviewed state obligation and more specifically which organs of government were primarily responsible. The third research question was responded to in the fourth chapter which made a case for and discussed the extent of the obligation of non-state actors to addressing the problems of access to food in the tertiary education sector. The fifth chapter of this thesis responded to the final research question by considering a milieu of approaches towards solving food insecurity, arriving at the conclusion that an approach within a human rights framework was a best suited approach.

Each of the chapters highlighted above, had their own conclusions which will not be reiterated at this point. Suffice to state however, that there are some major conclusions from this study which are necessary to highlight.

First off, it is important to note that the vulnerability of students in South African tertiary institutions is both historical and intersectional. As had been reiterated earlier on in this study, students are food insecure because they come from homes that are food insecure. The theoretical framework on vulnerability theory developed by Martha Fineman, was used to demonstrate how vulnerability is perpetuated cyclically. An intersection of race, class, gender, historical inequalities, a worsening national economy and now the COVID-19 pandemic, all correlate to exacerbate students vulnerability to food insecurity. In addition, the perpetuation of vulnerability is not far divorced from the imbalances in power dynamics. This study used Michael Foucault's theory on power to describe how power disparities in the tertiary education sector historically created these vulnerabilities within the landscape of what is tertiary education in South Africa today. A response therefore to the ever increasing hunger endemic within South African tertiary institutions, must begin from a recognition of the factors that make student vulnerable to food insecurity in the first place. Inequality is bad for any nation's economy as well as society as a whole. Student hunger reinforces these inequalities. Whereas access to public high level education should be an equaliser, but not if poor black students continue to experience hunger.

It is also important to highlight that a major roadblock within the framework of situating state accountability on the right to food and specifically within a tertiary education context, is an absence of legislation. The right to food remains the only constitutionally guaranteed socio-economic right in South Africa which has no dedicate/specific legislation. This lacuna has a domino effect of creating a vacuum in responsibilities at state level. This is highlighted in practice, where no specific government department assumes responsibility for students' lack of access to food. Over the last three years, the Dullah Omar institute at the University of the Western Cape has under the auspices of the 'Access to Food for Students Project', engaged with multiple departments on this issue, culminating in petition to the SAHRC.⁶⁷⁵ Coordinating this project, provided first hand practical experiences of the lack of coordination and reluctance to own accountability within government structures. It also leaves room for other structures such as university administrations and other non-state actors, to through their actions and inactions perpetuate students' vulnerability to food insecurity.

⁶⁷⁵ See further 'The Dullah Omar Institute Petitions Chapter 9 Institution on Food Insecurity in Tertiary Institutions' Available at <https://dullahomarinstitute.org.za/news/the-dullah-omar-institute-petitions-chapter-9-institution-on-food-insecurity-in-tertiary-institutions> (Accessed 25 August 2020).

Lastly, South Africa has over the years built a corporatised food system.⁶⁷⁶ There is a lot to be said both for and against the corporatisation of South Africa's food system that however has not been the focus of this research. What is key to note is that while it may not be feasible to totally eliminate corporate power in South Africa's food system, it is long overdue that room is made for a more just food system which demands greater accountability framework of both state and non-state actors in the food system.

Whether from state or non-state actors, it is clear that the current accountability framework on the right to food in South Africa does not sufficiently cover the needs of vulnerable groups such as students in tertiary institutions. The next section suggests concrete recommendations which are an off shoot of this study.

6.2 Recommendations

These recommendations are a bridge between the current framework on student's right to food in South African tertiary institutions and what is proposed as a human rights based framework as set out in the previous chapter. This forms a framework from which the state and other actors in the tertiary education sector can take accountability for addressing the food security needs of a hitherto ignored vulnerable group.

6.2.1 Recommendations to Government

There is a need for a proper quantification of the scale of the food insecurity problem within the tertiary education sector. As explained in the first chapter, the current studies that do exist paint the picture on a 'campus restrictive' basis. From the limited data that was available as at the time of this study, an emerging picture of hunger levels, greater than the national average levels among students in tertiary institutions was clear.⁶⁷⁷ Although this in itself is worrisome, the insufficient data is cause for even greater concern, given the possibility of the situation being direr than is currently envisaged. There is insufficient data on a national scale which

⁶⁷⁶ Greenberg S 'Corporate power in the agro-food system and South Africa's consumer food environment' (2016) Working Paper 32 PLAAS UWC and Centre of Excellence on Food Security.

⁶⁷⁷ Some universities reported a food insecurity ration of up to 65% among students, national average currently stands at 23%.

clearly highlights the most vulnerable institutions as well as most vulnerable students. Who are those students in specific institutions that need immediate attention for freedom from hunger? Without this data, the state continues to run afoul of its international, regional and constitutional duty on the right to food and more specifically, the minimum core requirement of everyone's freedom from hunger.

An absence of the extensive research which captures the data, also misses the opportunity to understand students' 'coping strategies' and how these strategies may or may not be detrimental to the furtherance of many of their other human rights. For instance, studies have shown that food security in South Africa is gendered- with women more likely to go hungry.⁶⁷⁸ However, emerging data shows that male students in tertiary institutions are more likely to be food insecure compared to their female counterparts.⁶⁷⁹ This calls into question, what coping strategies' women in tertiary institutions use to limit their vulnerabilities to food insecurity. It is trite that younger women adopt transactional sex as a coping strategy for poverty and to meet basic needs.⁶⁸⁰ If this is mirrored with the context of tertiary institutions, it implies that female student's vulnerabilities are exacerbated. Another added layer of vulnerability is their continued vulnerability to food insecurity. To address this vulnerability, they are exposed to a possibility of intersected vulnerabilities from gender based violence to HIV/AIDS and other sexually transmitted diseases. In this vein, the continued violation of the right to food for certain classes of students can lead to the violation of many other rights including the right to health and the right to dignity of person. It is therefore recommended that an in-depth study be conducted to investigate the reach of food insecurity amongst students in South African tertiary institutions, as well as, the coping mechanisms being adopted by students – especially female students- to address their food insecurity.

The realisation of the depth of food insecurity in the tertiary education sector, logically births the second recommendation of this study- the need to explicitly recognise students in South African tertiary institutions as a vulnerable group. Over the years, the South African government has through legislative and policy measures, explicitly recognised vast categories

⁶⁷⁸ The World Bank 'Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints and opportunities' (2018) 25.

⁶⁷⁹ Van de Berg L, Raubenheimer J 'Food Insecurity among Students at the University of the Free State, South Africa' (2015) 28(4) *South African Journal of Clinical Nutrition* 160-169.

⁶⁸⁰ Khan M et al 'Poverty of opportunity forcing women into prostitution – a qualitative study in Pakistan' (2010) 31 (4) *Healthcare for Women International* 365 -383.

of people as vulnerable groups and in response ensure that their basic needs, including their right to food are catered for with the States budgetary framework. Examples of these groups range from children, to the aged, to persons with disabilities. Despite compelling evidence both from an international and national perspective, the vulnerability of students in South African tertiary institutions, to deprivation and food insecurity, continues to be largely unaddressed. It does appear that there is some sort of acknowledgement about the issue, given that many institutions have established some sort of programs to address it.

What is clear is that these programmes both in structure and in effect, have remained ineffective in addressing student food insecurity with the institutions. The first step towards a true address of the food insecurity dilemma in the tertiary education sector, begins from the legal acknowledgement that students are vulnerable. This positions students as a group needing extra measures- from legislative and policy measures to budgetary allocations- on the long and short term to address their vulnerability. From a human rights based approach, the recognition of students as a vulnerable group obligates the state to adopt appropriate measures to address hunger among students in tertiary institutions.

With a clearer understanding of the extent of food insecurity in the tertiary education sector and that students are a vulnerable group, it is also important that concrete measures, both in the short and long term, be implemented in response to this vulnerability. These measures are a range from legislative to others. With regard to legislative measures, South Africa urgently requires a right to food framework law. As discussed earlier, the absence of legislation on the core issue of the right to food, leaves gaps in the accountability framework of the state. This recommendation is in tandem with CESCR's recommendation to South Africa on its initial state report in 2018.⁶⁸¹ The Committee in expressing its concern at the high level of food insecurity nationally, recommended that amongst other measures, South Africa should

‘ (d) Adopt framework legislation protecting the right to adequate food and nutrition, and develop a national food and nutrition security strategy, taking into account the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security of 2004 and the Committee's general comment No. 12 (1999) on the right to adequate food.’

⁶⁸¹ UN Committee on Economic, Social and Cultural Rights ‘ Concluding observation on the initial report of South Africa’ 29 November 2018 E/C.12/ZAF/CO/1 Available at [file:///C:/Users/Admin/Downloads/G1835152%20\(3\).pdf](file:///C:/Users/Admin/Downloads/G1835152%20(3).pdf) (Accessed 27 August 2020).

Under its international commitments, South Africa has a duty to ensure that the right to food is given effect through legislative and other measures. Specifically, General Comment 12, enjoin states to adopt a '*framework law* as a major instrument in the implementation of the national strategy concerning the right to food.'⁶⁸² The benefits of a framework law includes the legislative recognition of special duties towards vulnerable groups and persons.

In addition to the enactment of a framework law on the right to food, South Africa also requires specific policy intervention within the higher education sector which targets food insecurity among student in the sector. Specifically, the approach to policy must be two-pronged. First, the sector requires policy which addresses on the short-term the most vulnerable students. This policy must be aimed at ensuring no student(s) in all tertiary institutions within South Africa sleep on an empty stomach. The short-term policy also needs to create both inter sector and inter institutional lines of duties/obligations and accountability. Who does what across the sector and within institutions must be clearly delineated. Long term policy needs to be crafted which creates a framework vested in human rights, that addresses the food security needs of all students within the framework of the tertiary institution sector. It is recommended that within the Department of Higher Education, a dedicated desk with access to staff and resource complement is created to drive the legislative and policy process of ensuring the access to food for all. Budgetary allocations for long term solutions also need to be taken into account in the creation of the proposed desk.

Government working through its existing structures of the DHET and NSFAS, need to re- envision its responses to the reality of food insecurity in South African tertiary institutions, beyond the provision of financial aid. This study had earlier asserted that both within and outside of South Africa, research indicates that some of the students most vulnerable to food insecurity are those on financial aid. What this posits is that the provision of financial aid only is not a sufficient response to food insecurity in tertiary institutions, especially because many students on financial aid feel obligated to share with other family members the said aid. For instance, the re-establishment of universities kitchens using a portion of NFSAS money paid as a food allowance to students might be a way to ensuring students are fed on while on campus.

Best practices from other regions, should be adopted to ensure that food gets to the intended recipients- students. One such best practice is that used by Swipe Out Hunger (SOH) in the

⁶⁸² Paragraph 29, General Comment 12 of the ICESCR.

United States. The model of SOH creates a card only payment system for all students without any differentiation between self-funded and state/financial aid funded students. These cards are used to purchase food at various vendors all over tertiary institutions in the USA. Cash transfers and/or donations are made into cards for state/financial aid funded students, thereby removing stigma and enabling them purchase food like every other student on campus.

Closely related to this and in furtherance of its protective mandate on the right to food, it is recommended that the state, through a specific department or agency drives the process of non-state actors taking up a greater roles in the realisation of students' right to food. It is perhaps more useful to tackle the issues of food waste in the food value chain from a broader national perspective. The model adopted and used by France can serve as a lesson for South Africa.⁶⁸³ First, broad spectrum consultation processes should be held with corporates in the food value chain, to make a case for redirecting and repurposing waste. Some of the food waste can be redirected in to the tertiary education sector to address the food insecurity in the sector. The repurposing of food waste should also be incentivised by the state- to kick-start the industry's move towards less waste. Finally, punitive legislative measures should be drafted in law and implemented to ensure that food does not continue to go to waste, when the country sits with a massive food insecurity problem at household and individual levels.

Lastly, the accountability mechanisms with government structures need to be more alive to holding the State accountable for the food security of students in the tertiary education sector. Parliament, Chapter Nine Institutions and even the judiciary need to turn up the ante on demanding concrete plans from the State in addressing food insecurity within tertiary institutions.

Specifically with regard to the judiciary, one of the roles of the courts is to clarify and interpret the law- to give meaning and effect to legislation and through exercise of its duties, create an accountability mechanism. In a constitutional democracy as South Africa's, this role is crucial to the development and implementation of human rights. India has led the way in judicial activism on the right to food with its famous right to food case,⁶⁸⁴ which carried on for several

⁶⁸³ Hinckley S 'How France became a global leader in curbing food waste' Available at <https://www.csmonitor.com/Environment/2018/0103/How-France-became-a-global-leader-in-curbing-food-waste> (Accessed 31 August 2020).

⁶⁸⁴ *People's Union for Civil Liberties vs Union of India & Others* Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001 (Supreme Court of India).

years and birthed a series of injunctive reliefs, including the supervisory role of the courts over the executive.⁶⁸⁵ Until July 2020, South African courts had shied away from judicial activism with regard to the right to food. South African courts have over the years missed several opportunities to elucidate on the right to food in a number of cases.

The COVID -19 pandemic however seems to have changed this tide. In a recently decided case, the High Court found the state in violation of children's right to food, for its refusal to continue with the national school nutrition programme over the lockdown, thereby exacerbating the vulnerability of many South African children who rely on the meals for their daily nutritional intake.⁶⁸⁶ This case is a step in the right direction of where South Africa's judiciary should be heading as it concerns elucidating on the right to food in South Africa. It is recommended that this case, forms the background and/or basis for litigating the continued violation of the right to food of students in South African tertiary institutions.

6.2.2 Recommendations to University Administrations

Administrations of tertiary institutions need to take ownership of the problem of food insecurity within their institutions. The administrations in tertiary institutions need a shift in attitudes towards student food insecurity, from the current passive role, to one of leading a just transition in the food system, beginning with their immediate environment- the campuses.⁶⁸⁷ From using their influence to their buying power, tertiary institutions are strategically placed to drive a change in the food system in South Africa as a whole, using institutions as the hub of this change.

Tertiary institutions should sanitise the food environment within their institutions. Research points to students' reliance on cheap, obesogenic food items rather than healthy food. Measures to discourage sale of mainly obesogenic foods need to be implemented on campuses. Furthermore, vendor selection processes must place emphasis on the cost of food and type(s)

⁶⁸⁵ Durojaye E & Chilemba E 'Accountability and the right to food: a comparative study of India and South Africa' (2018) *Food Security SA Working Paper Series 003* DST-NRF Centre of Excellence in Food Security.

⁶⁸⁶ *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306 (17 July 2020).

⁶⁸⁷ Wegerif M, Adeniyi O 'Student hunger at South African universities needs more attention' *The Conversation* Published 18 September 2019 Available at <https://theconversation.com/student-hunger-at-south-african-universities-needs-more-attention-123378> (Accessed 20 September 2020).

of food to be sold by vendors on campuses. Tertiary institutions need to create opportunities for the entrants of small-scale food vendors on campuses, to create a more competitive food environment, with more varieties for students.

Suffice to state that the food system as a whole in its current form in South Africa needs reenvisioning. Within the context of tertiary institutions, there are many universities that own land, have agricultural production disciplines and other relevant disciplines along the entire food value chains. There are many universities in other jurisdictions (such as the University of California, Santa Cruz) that have shown how to put these resources to use- with strong farm production that the community buys from using alternative marketing. Students, academics/research and teaching comes together in this model.

The research that tertiary institutions generates on a wide range of food security concerns, could also be channelled from being mere academic research outputs to actual pilot study sites in tertiary institutions. Added to this, tertiary institutions should streamline zero-weighted courses into the learning experiences of students. The goal for educating students at the tertiary level should extend beyond learning to development of well-rounded adults upon graduation. Some suggestions on these courses include courses on balanced nutrition, healthy life styles and diets, courses on effective financial management and planning- especially for students on financial aid, courses on gardening and growing own food through many modern agro ecology methods.

6.2.3 Recommendations to Non-State Actors

The realisation of the right to food of all students within the tertiary institutions in South Africa is not a duty for the state only. Non-state actors, working within the framework of accountability as provided by the State, could very well be key in the realisation of students' access to food. As earlier discussed in this chapter, South Africa has a mainly corporatized food system. The drawback of this is the skewed power dynamics which the corporatized food system holds, which drives for profitability irrespective of whether human rights are infringed or not. The transition towards a just food system must be preconditioned upon the fact that corporations cannot continue to place profits above people and that the state must regulate corporate power to ensure it does not impinge on human rights.

The current levels of food insecurity among the South African populace are unacceptable- within the tertiary education system the levels are even more precarious. Despite this, South Africa's food value chain continues to waste up to a third of all food produced.⁶⁸⁸ South Africa currently loses over ten million tonnes of food annually across the food production value chain- from farm to fork.⁶⁸⁹ The fact that the majority of this waste- up to 90 % - ends up in landfills, creating a range of ecological and climatic issues, further lends credence towards the need for a rethinking of how the private sector purposes and repurposes food.⁶⁹⁰ Non-state actors currently benefit largely from the tertiary education sector. From purchase of raw food items to cooked food, there are potentially 20million customers for the food sector within universities alone, excluding other forms of tertiary institutions. Whether on or outside campus environments, students are a major component of the market of the non-state actors in the food value chain.

With this realisation, there should be an obligation on non-state actors to ease the burden of students' access to food. There are many ways in which this can be carried forward in practical terms, adopting best practices from other regions outside of South Africa. Examples of these initiatives include discount days for students to purchase food, capping the prices at which students purchase food on campus etc.

Beyond the purchase of food, excess food within the food value chain can be repurposed and redirected to feeding students in tertiary institutions. Food Forward South Africa, already applies this program, where it liaises with the private sector to redirect what would have been wasted food, to over 50,000 children in early learning centres.⁶⁹¹ It is possible to roll out this same model across all tertiary institutions in South Africa- with the applicable health and safety measures in place. This model could potentially serve three purposes.

⁶⁸⁸ WWF 'The truth about our food waste problem' Available at <https://www.wwf.org.za/?21962/The-truth-about-our-food-waste-problem#:~:text=Why%20food%20waste%20is%20a,chain%20%E2%80%93%20from%20farm%20to%20fork>. (Accessed 31 August 2020).

⁶⁸⁹ WWF 'The truth about our food waste problem' Available at <https://www.wwf.org.za/?21962/The-truth-about-our-food-waste-problem#:~:text=Why%20food%20waste%20is%20a,chain%20%E2%80%93%20from%20farm%20to%20fork>. (Accessed 31 August 2020).

⁶⁹⁰ Ishangulyyev R, Kim S & Lee S 'Understanding Food Loss and Waste-Why Are We Losing and Wasting Food?' (2019) 8(8) *Foods (Basel, Switzerland)* 297.

⁶⁹¹ See further Food Forward SA 'Our work' Available at <https://foodforwardsa.org/our-work/> (Accessed 31 August 2020).

First, it could incentivise corporations in the food value chain towards the fulfilment of corporate social responsibilities, for which they may gain the added advantage of tax breaks.⁶⁹² Secondly, it could reduce food waste within the food value chain and the tandem environmental and climatic concerns that comes with this through greenhouse gas (GHG) emissions of waste. Lastly, it could help to cut the State's cost for financing and budgetary allocations towards reducing food insecurity in tertiary institutions.

6.2.4 Recommendations to Students

The role of students cannot be over emphasised in the process of reclaiming the right to food in South African tertiary institutions. The 2015 #FeesMustFall protests are testament to the fact that when students unite to demand action on the part of the state, the likelihood of success on their demands is high. A human rights-based approach considers students not just as mere recipients of the right to food, but also as right bearers. As the main vulnerable subjects, this research recommends that students through their student representative councils (SRCs) and other organised student body structures nationally, spear head the move towards the eradication of food insecurity in South African tertiary institutions. A multitude of options remain open as mobilising strategies, from the softer approach to a more hard line stance involving greater pressure and more specific demands. The most important immediate objective, should be amplifying the voices of students across the nation on narratives of hunger and the denial of their right to food.

Furthermore, it is important to begin to think of students in a broader context of how it affects the long term developmental goals of South Africa. High level skills are essential for the development of any economy. Student hunger means more students dropping out of school before completing their studies and others performing below the level they otherwise could. All of this means a less skilled society and by implication a weaker economy in the long term. There is a need to move the debates around student hunger away from a welfare perspective of helping "the poor", to one of students and others organising to reshape the food system in exciting ways. It is about addressing one of the most challenging issue the South African

⁶⁹² Badenhorst G 'Deduction of VAT on corporate social responsibility expenses' (2018) 33 *Tax Professional* 18-19.

society faces and students can lead on this as they have lead in so many other important struggles and changes in society.

Partnering with CSOs and NGOS on this cause might be a helpful mobilisation strategy, with the realisation that students must take ownership and remain centred in this process. Partnering with CSOs, bring on board the advantage of resources including expertise and financial resources, in a range of processes from negotiations to possible litigation. Negotiations and discussions with university administrations, as well as with national departments are building blocks for the mobilisation process. Organised protests, the submission of petitions to chapter 9 institutions such as the South African Human Rights Commission, as well as exploring litigation on the issue, all remain within the framework of human rights based mobilisation strategies which students can explore.



7 ANNEXURE 1

Constitutional Provisions on Parliament's Oversight Role⁶⁹³

Section 41(2)	An Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations and must provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
Section 42(3) & (4) (3)	The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action. (4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting provinces.
Section 55(2)	The National Assembly must provide for mechanisms – (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of - (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.
Section 56	The National Assembly or any of its committees may - (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.

⁶⁹³ Culled from Parliament 'Oversight and accountability model: Asserting Parliament's oversight role in enhancing democracy'. Available at (Accessed 02 September 2020).

Section 66(2)	The National Council of Provinces may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.
Section 67	Not more than 10 part-time representatives designated by organised local government representing the different categories of municipalities may participate in the proceedings of the National Council of Provinces when necessary, but may not vote. Section 69 The National Council of Provinces or any of its committees may – (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.
Section 70(1)	The National Council of Provinces may – (a) determine and control its internal arrangements, proceedings and procedures; and (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
Section 89 (1)	The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of – (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office. (2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office.
Section 92 (2)	(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. (3) Members of the Cabinet must ... provide Parliament with full and regular reports concerning matters under their control.
Section 93(2)	Deputy Ministers ... are accountable to Parliament for the exercise of their powers and the performance of their functions.

Section 100(2)	If the national executive intervenes in a province by assuming responsibility for the relevant obligation which that province cannot or does not fulfil, the national executive must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began. The intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention. The Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.
Section 102 (1)	If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet. (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.
Section 114(2)	A provincial legislature must provide for mechanisms – (a) to ensure that all provincial executive organs of state in the province are accountable to it; and (b) to maintain oversight of - (i) the exercise of provincial executive authority in the province, including the implementation of legislation; and (ii) any provincial organ of state.
Section 125(4)	Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.
Section 133 (2) & (3)	(2) Members of the Executive Council of a province are accountable collectively and individually to the provincial legislature for the exercise of their powers and the performance of their functions. (3) Members of the Executive Council of a province must provide the provincial legislature with full and regular reports concerning matters under their control.
Section 139(2)	If a provincial executive intervenes in a municipality which cannot or does not fulfil an executive obligation by assuming responsibility for the relevant obligation in that municipality, the provincial executive must

	<p>submit a written notice of the intervention to the Cabinet member responsible for local government affairs and the relevant provincial legislature and the National Council of Provinces within 14 days after the intervention began. The intervention must end if the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention, or if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention. The Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.</p>
Section 139(3)	<p>When the relevant provincial executive intervenes in a municipality which cannot or does not fulfil an executive obligation by dissolving the Municipal Council, the provincial executive must immediately submit a written notice of the dissolution to the Cabinet member responsible for local government affairs and the relevant provincial legislature and the National Council of Provinces. The dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days</p>
Section 139(6)	<p>If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to – (a) the Cabinet member responsible for local government affairs; and (b) the relevant provincial legislature and the National Council of Provinces within seven days after the intervention began.</p>
Section 155(6)	<p>Each provincial government must establish municipalities in its province in a manner consistent with the applicable national legislation and, by legislative or other measures, must - (a) provide for the monitoring and support of local government in the province; and (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.</p>
Section 155(7)	<p>The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the</p>

	effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority.
Section 194(1)	The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on – (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the Assembly of a resolution calling for that person's removal from office.
Section 199(8)	To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.
Section 201(3) & (4)	(3) When the defence force is employed in co-operation with the police service; in defence of the Republic or in fulfilment of an international obligation, the President must inform Parliament promptly and in appropriate detail. (4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the required information to the appropriate oversight committee.
Section 203 (1)	The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of - (a) the reasons for the declaration; (b) any place where the defence force is being employed; and (c) the number of people involved. (2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration. (3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.
Section 206(9)	A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions. Section 210 National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for - (a) the co-

	<p>ordination of all intelligence services; and (b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members</p>
<p>Section 216(3) & (4)</p>	<p>(3) A decision to stop the transfer of funds due to a province may be enforced immediately, but will lapse retrospectively unless Parliament approves it. (4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time.</p>
<p>Section 231(2), (3) & (4)</p>	<p>(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.</p>

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