

# Between availability and entitlement: The Constitution, *Grootboom* and the right to food

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## 1 INTRODUCTION

South Africa has enough food for its people. Our country generally shows a healthy exportable surplus in its production of basic foodstuffs.<sup>1</sup> In cases where drought or other factors have caused a shortfall in supply, we have always been able to import sufficient food timeously.<sup>2</sup> We have never featured on the UN Food and Agriculture Organisation's (FAO's) Global Information and Early Warning System as a country in, or even approaching, a food crisis. Food production in South Africa is also diversified, ensuring the availability of a wide range of foodstuffs.<sup>3</sup>

Nevertheless, a large number of people in South Africa do not get enough or the right kind of food to eat. The National Department of Health (DoH) has estimated that 14 million South Africans (approximately 37% of our population) experience food insecurity.<sup>4</sup> This fact is borne out by different forms of technical data. On the consumption side, figures show that the daily nutritional intake of many South Africans falls below basic requirements. A 1999 survey found that one in two children aged between one and nine years ingest less than half the recommended daily amounts of energy, vitamins A and C, iron, zinc and calcium.<sup>5</sup> A more recent study indicates that 42.6% of households in South Africa experience "food poverty", and are unable to afford even a basic subsistence diet.<sup>6</sup>

These figures are reflected in anthropometric indicators of the effects of malnutrition: 16% of South African babies are born underweight,<sup>7</sup> 21.6%

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1 Department of Agriculture and Land Affairs (DLA): Food Security Working Group 1997: 9; Hanekom 1998: 11; Ramabenyane 1999: 65.

2 DLA *ibid.*

3 Hanekom 1998: 2.

4 Mgijima 1999: 60. Food security has been defined as: "access for all, at all times, to adequate food which is nutritionally adequate, safe, and in the best interest of the consumer, and where the food supply and access is sustainable" (Eide 1999: 8).

5 Department of Health (DoH) 1999.

6 Caelers *et al* 2001: 1.

7 Thipanyane 1999: 76.

of children under nine years of age are stunted,<sup>8</sup> 10% are underweight<sup>9</sup> and 3.7% experience wasting.<sup>10</sup> In addition, South Africans show a high prevalence of micro-nutrient deficiencies: of children between the ages of six and 71 months, 33.3% are vitamin A deficient, 21.4% are anaemic and 10% are iron deficient.<sup>11</sup>

Apart from scientific indicators, people's daily experience tells us that South Africans do not get enough to eat. 45% of the population in rural areas and 26% in metropolitan areas reported in 1998 that they go hungry at least once a month, 17% of people living in rural areas reported going hungry at least once a week and 6% of those living in urban and semi-urban areas go hungry every day.<sup>12</sup>

Finally, to place these figures in their socio-political context, hunger and malnutrition are also stratified along racial, class and gender lines:

- A higher percentage of black adult men are underweight than adult men in any other racial group;<sup>13</sup>
- 30% of black children under the age of five are stunted, while the rate is 5% among white children;<sup>14</sup>
- 38% of rural black South Africans report going hungry at least once a month as opposed to almost no rural white South Africans;<sup>15</sup>
- stunting among young children is most prevalent in three of South Africa's poorest and most rural provinces:<sup>16</sup> the Northern Province (Limpopo) (34.2%), the Eastern Cape (28.8%) and the Free State (28.7%);<sup>17</sup> and
- 25% of adult women suffer from nutritional defects such as iron deficiencies.<sup>18</sup>

These statistics are telling in many respects, but for present purposes they show two things. First, there is an obvious disconnect between South Africa's ability to produce and procure more than enough food for its people (something which it consistently succeeds in doing) and its ability

8 Shung-King M *et al* 2000 "Child health" *South African Health Review* <[www.hst.org.za/sahr/2000/chapter19.htm](http://www.hst.org.za/sahr/2000/chapter19.htm)> accessed 11/05/2001. 14. See also DSD 2002: 16. Stunting indicates a height-for-age ratio under two standard deviations from the norm.

9 Shung-King *ibid*. Underweight indicates a weight-for-age ratio of under two standard deviations from the norm.

10 DoH 1999. Wasting indicates a weight for height ratio of under two standard deviations from the norm. It is seen as an indicator of severe current under-nutrition.

11 *Ibid*.

12 CASE 1998. See also DSD 2002: 29 (indicating that in 1999, 21.9% of households nationally reported going hungry).

13 DoH 1998 *South African Department of Health survey - Adult health* [www.196.36.153.56/doh/programmes/nutrition.html](http://www.196.36.153.56/doh/programmes/nutrition.html) > accessed date unknown.

14 South African Human Rights Commission (SAHRC) 1999: 25.

15 Thipanyane 1999: 77.

16 The Eastern Cape has been shown to be the poorest province in the country, with a poverty rate of 70.7%, while Gauteng is the richest (17.3%). The Free State was second poorest (63.4%) and the Northern Province fifth (59.1%). See Thipanyane 1999: 77.

17 Mgiijima 1999: 60.

18 Thipanyane 1999: 77.

actually to stave off malnutrition, under-nutrition and hunger (something which it manifestly fails to do). This disconnect bears out, in the South African context, a general point that Amartya Sen made long ago: such hunger, malnutrition and food insecurity as these statistics indicate almost never result from an insufficient national food supply (what Sen calls the *availability* of food), but almost always from insufficient access to an existing sufficient food supply (depending on questions of what Sen calls *entitlement*).<sup>19</sup> This observation also applies to South Africa. The figures cited clearly show that the crucial question in addressing issues of food insecurity and its results in South Africa is not so much how to maintain an adequate national supply of food, as it is how to place an existing adequate supply of food at the disposal of those who need it – how to generate effective access to food.

This fact places the problem of food security in South Africa squarely (also) in the legal domain. A country's national food supply (food availability) is mostly determined by natural and macro-economic factors, things that the law can do little to control and shape. Actual access to food, on the other hand, is determined largely by entitlement – by social and political factors. It depends on the ability “to establish command over food, using the entitlement relations operating in . . . society depending on its legal, economic, political and social characteristics . . .”.<sup>20</sup> The law can do a great deal to control and shape these things. It can lay parameters and determine priorities for social and economic policy formulation and it can shape and control the different legal and non-legal power relations that determine access to food. In this sense the law “stands between food availability and food entitlement”<sup>21</sup> – it can mediate between availability and entitlement.

The second point emanating from the statistics above forms the focus of this paper. The figures I cite indicate that a large percentage of South Africa's people do not only experience an inadequate nutritional status (although a large number, of course, also do) – the nutritional status of many people is desperate, or in crisis, in the sense that they suffer the “daily terrorism of hunger”.<sup>22</sup> Both the food intake data and the anthropometric indicators presented above show that many South Africans do not even meet *basic essential* levels of access to food, let alone enjoy a fully adequate nutritional status.

A categorisation of nutritional need between ‘simple’ inadequacy, on one hand, and desperation – or crisis – on the other, echoed at the international

19 Sen 1981: 1. I dare, once again, to repeat his famous quote here: “Starvation is the characteristic of some people not having enough food to eat. It is not the characteristic of there not being enough food to eat”. See also Drèze & Sen 1998; Eide 1995: 94–95; and Ravindran & Blyberg 2000: 222.

20 Sen 1981: 165.

21 Sen 1981: 166: “The focus on entitlement has the effect of emphasising legal rights. Other relevant factors, for example market forces, can be seen as operating through a system of legal relations (ownership rights, contractual obligations, legal exchanges, etc). The law stands between food availability and food entitlement.”

22 Phrase used by Constitutional Court Justice Tolakele Madala in a recent address at the Centre for Human Rights, University of Pretoria (unpublished).

level by distinctions between *undernourishment* and full-blown *nutritional deprivation*<sup>23</sup> and, in a legal sense, between a “core content”<sup>24</sup> and a “minimum core content”<sup>25</sup> of the right to food, is admittedly somewhat crude<sup>26</sup> and also politically and ethically very problematic.<sup>27</sup> Despite this, its application in South Africa does make the basic policy argument of this paper possible. The desperate state of many South Africans’ nutritional status amounts to a crisis situation that requires a crisis response: direct and immediate intervention rather than the indirect, longer-term policies that are intended to address less acute nutritional inadequacy over the longer-term. That is: the food crisis facing many South Africans seems to indicate a need for a policy focus on the direct transfer of food to desperate people to improve their food entitlement immediately, in addition to a focus on longer-term capacity building initiatives that will gradually improve food entitlement.

This broad policy point is the starting point for my paper.<sup>28</sup> In the rest of it I first try to state this point and one other in legal terms, looking at them through the lens of the Constitutional Court’s decisions in *Grootboom*<sup>29</sup> and

23 *Nutritional deprivation* indicates a condition of not receiving enough nutritional input to avoid stunting, wasting, underweight and other serious health risks; *undernourishment* indicates a condition of not receiving enough nutritional input to live a normal, active working life, without facing serious and long term health risk. Drèze & Sen 1998: 35.

24 “The availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other rights.” General Comment No. 12 (Twentieth session, 1999), *The right to adequate food (art 11 of the Covenant)* UN doc. E/2000/22, par 8.

25 “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*” (emphasis added). General Comment No. 12, *supra* note 24, par 14.

26 Crude both because it is difficult to draw context sensitive basic standards against which to measure data, and because, once such standards have been set, it is difficult to test whether they are being met, because of problems of measurement. The extent of realisation of the right to food can be measured in two ways: through analysing input or output data. Both these approaches have their problems. The daily calorific and other nutrient intake of a person as measured against predetermined nutritional requirements is not an entirely accurate measurement of actual nutritional capability because, among other things, the actual nutritional requirements of a person are determined individually by his or her height, weight and basal metabolism. Also, the ability of a person to be nourished by food actually ingested is determined by certain non-food factors such as existing disease and even climate. Measuring a person’s status in relation to realising his or her right to food through anthropometric indicators is flawed for the same reason: stunting, underweight and wasting is also partly caused by non-food factors, not the least social factors. See, in general, Drèze & Sen 1998: 35-45.

27 Nutritional activists resist the distinction on a political basis because of the possibility that it may be interpreted as trivialising the very real and very urgent needs of those who are not nutritionally deprived, but ‘only’ undernourished. The conceptual and ethical difficulties of distinguishing and then prioritising categories of need have also often been pointed out. See, in general, Van Marle 2002.

28 I should state at the outset that my suggestion is not that these should be exclusive policy focuses, developed at the expense of appropriate policies to ensure the maintenance of an adequate national food supply and policies aimed at the longer term and indirect enhancement of access to food. As will become clear later, my argument is simply that the absence of any comprehensive direct food transfer component in the nutritional policies of the state presents an unconstitutional gap in policy.

29 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*).

in the *TAC* case.<sup>30</sup> I then provide, in section 3 below, a brief account of current policy initiatives related to realising the right to food. Finally, section 4 assesses this policy situation from my previously established legal perspective and make a number of practical suggestions on that basis.

## 2 THE RIGHT TO HAVE ACCESS TO ADEQUATE FOOD

What I will simply call the right to food in this paper is entrenched in three different provisions with three different formulations in the South African Constitution. The principal provision is section 27(1)(b), which entrenches everyone's right to have access to sufficient food.<sup>31</sup> The right to food also occurs in section 28(1)(c), where it is called the right of children to basic nutrition, and in section 35(2)(e), where it is called the right of detained persons simply to nutrition.<sup>32</sup> My focus here will be on the section 27(1)(b) right of everyone to have access to sufficient food.

I will not describe the content and nature of the right to food comprehensively. The right to food is widely recognised and protected in international law,<sup>33</sup> and an extensive literature about its normative make up is

30 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

31 The scope of this right is both broader and narrower than that of the other two food-related rights in the Constitution. It is a right of everyone, and thus applies widely, but it is qualified by s 27(2), which determines that the state must take reasonable legislative and other measures, within available resources, to achieve its progressive realisation.

32 These last two instances of the right to food are again both narrower and broader in scope than the s 27(1)(b) right. They apply only to a narrow group of people (children and detained persons respectively), but they are not qualified in the same way as s 27(1)(b) and in principle provide to children and detained persons a priority right to basic nutrition and to nutrition respectively (subject of course to s 36, the general limitation provision of the Constitution). The interpretation that ss 28(1)(c) and 35(2)(e) give rise to priority entitlements was the prevalent interpretation of these provisions until the decision in *Grootboom* was handed down (see Brand & Heyns 1999: 9; Brand & Bekink 1999: 187–188; De Vos 1997: 87–88; Liebenberg & Pillay 2000: 31). In *Grootboom* Yacoob J for the Court held that this is true only in a very limited sense. Only where children are not cared for by their parents or extended family (having, for instance, been removed from their families) does the state incur a constitutional duty to provide directly in their needs (*Grootboom*, *supra* note 29, par 77). Otherwise the duty to provide for the needs of children lies on their parents and families, and the state's duty is limited to providing the legal, administrative and institutional framework to enforce the duty on the parents and to "fulfill[ing] its obligations to provide families with access to land in terms of s 25, access to adequate housing in terms of s 26 as well as access to health care, food, water and social security in terms of s 27". (*Grootboom*, *supra* note 29, par 78). These duties, so Yacoob J points out, "require the state to provide access on a programmatic and coordinated basis, subject to available resources". (*Grootboom*, *supra* note 29, par 78). This restrictive position was somewhat mitigated in *TAC*, where the Constitutional Court softened its stance on the scope of the state's obligation to provide in the needs of children, and stated that the state is "obliged to ensure that children are accorded the protection contemplated by s 28 that arises when the implementation of the right to parental or family care is lacking". The Court went on to make it clear that this obligation would apply also where children are still with their parents or families, but parental or family care was lacking because the parents or families were themselves dependent on the state (*TAC*, *supra* note 30, par 79).

33 The principal international instruments in which the right to food is recognised are the Universal Declaration of Human Rights, 1948 (article 25) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 (article 11). For a comprehensive

[continued on next page]

available elsewhere.<sup>34</sup> I will limit my conceptual discussion to the principles enunciated in *Grootboom* and the *TAC* case about the normative content of socio-economic rights, drawing out the application of these principles to the right to food.<sup>35</sup> At this point, and at the risk of repeating what is covered elsewhere in this volume, it is probably wise to explain briefly what I see those principles to be.

While both judgments are susceptible to different readings, representing for some an unexpectedly limited approach to the adjudication of socio-economic rights<sup>36</sup> and for others a robust engagement with the issues, I will limit my analysis to an application only of that which *Grootboom* and the *TAC* case have clearly given us – I follow a sceptical rather than optimistic reading of the cases for purposes of this paper.

In both cases the Constitutional Court (hereafter the Court) emphasised that the positive obligations imposed on the state by sections 26(1) and 27(1) are in their totality described in sections 26(2) and 27(2) respectively.<sup>37</sup> This means that the only positive duty placed on the state by sections 26(1) and 27(1) is a duty to develop and implement policies to realise socio-economic rights that are reasonable in light of the available resources, taking into account that socio-economic rights have to be realised only progressively. The Court has quite extensively described what is required for a policy to be reasonable: it must be rational, inclusive of all significantly at risk groups in society, coherent, coordinated, flexible enough to respond to both short- and longer-term needs, and effectively implemented.<sup>38</sup>

Of these requirements, two are particularly relevant to a discussion of the right to food in South Africa. The first is the requirement of reasonable inclusion, which holds that a policy, to be reasonable, should “respond to

list of international treaties, declarations, resolutions and other materials recognising the right to food, see Bekker 2000 (generally) and Tomasevski 1982 (generally).

34 Such discussions and descriptions can be found in Tomasevski 1982; Eide 1999: 8–12; Eide 1995 (generally); Künneman 2002, General Comment No. 12, *supra* note 24; and FAO 1998.

35 That the holdings in *Grootboom* on the right to housing and in the *TAC* case on the right to health care can be applied in principle here to the right to food is an issue that need not be canvassed here again. All three provisions entrenching different instances of the right to food in the Constitution are in all material respects exactly similar to the three instances of protection of the right to housing found in the Constitution.

36 See for instance Roux 2002 (arguing persuasively that the Court has failed to engage in substantive priority-setting in *Grootboom* and so has created no more than a duty of “reasonable inclusion”); and Bilchitz 2002 (criticising the Court’s failure to adopt in any form the minimum core concept in *Grootboom* and the *TAC* case and its general failure to attribute any direct positive obligations to the state).

37 This is most evident in the *TAC* case, where the Court emphatically rejected the argument raised by one of the *amici* in that case that s 27(1) imposed a positive duty to provide in the basic needs of individuals on the state, apart from the duties described in s 27(2) (*TAC*, *supra* note 30, pars 29 and 30). The position, however, has a long pedigree, forming the basis of the Court’s decision in *Grootboom* (*supra* note 29, pars 34 and 38) and even in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (hereafter *Soobramoney*), par 11.

38 *Grootboom*, *supra* note 29, pars. 39–44.

the needs of those most desperate”<sup>39</sup> and take into account the “amelioration of the circumstances of those in crisis”,<sup>40</sup> linked to the requirement of flexibility, which holds that a policy must “make appropriate provision for attention to housing crises and to short-, medium- and long-term needs”.<sup>41</sup> This requirement, in slightly different guises, was proffered by the Court in both *Grootboom* and the *TAC* case as the basis for its decision that the policies in question in those cases were unreasonable. The second is the requirement that, to pass constitutional muster, a policy framework must be coherent<sup>42</sup> and coordinated, that is, it must “clearly allocate responsibilities and tasks to the different spheres of government”.<sup>43</sup>

## 2.1 Inclusivity and flexibility

The first factor identified above (the linked requirements of inclusivity and flexibility) takes account of the fact that people face differing degrees of deprivation and consequently exhibit differing degrees of need, and in response to this fact mandates that policies must make provision for all different levels of deprivation and need and must cater for immediate, crisis situations in addition to containing longer-term, more permanent interventions. In practical terms this element of reasonableness required the state’s housing policy in *Grootboom* to take account also of the needs of those people who lived in a state of housing crisis. In the *TAC* case it was used to invalidate the state’s policy position because it excluded from its benefits those indigent HIV positive mothers and their children who did not have access to one of the pilot sites at which Nevirapine was provided.<sup>44</sup>

The Court in *Grootboom* was clear about who the “most desperate” and “those in crisis” were. One possibility could have been to identify only a narrow group: those who, because of some intervening disaster, have temporarily sunk below a certain basic level of enjoyment of a right.<sup>45</sup> The Court explicitly rejected this limited description, when it referred simply to “people who are living in intolerable conditions *and*. . . people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition”.<sup>46</sup> This seems to indicate that

39 *Ibid* par 44.

40 *Ibid* par 64 (my emphasis).

41 *Ibid* par 43.

42 *Ibid* par 41.

43 *Ibid* pars 39 and 40.

44 In this sense the judgment in the *TAC* case seems to be simply rationality-based: there was no rational basis for the state not to extend its provision of Nevirapine outside the pilot sites if it had decided that the drug was safe and effective enough to be provided at the pilot sites, and particularly since the Court had found that such extension would have negligible allocational consequences and that the infrastructure for the counselling and monitoring required for the provision of the drug was substantially in place outside the pilot sites. However, the Court styled its finding of unreasonableness as based on the inflexibility of the policy.

45 See *Minister of Public Works v Kayalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC) at par 38, where the finding in *Grootboom* is applied to ascertain the constitutional duty of government toward exactly such a group of people, whose dwellings had been destroyed by flooding.

46 *Grootboom*, *supra* note 29, par 52 (my emphasis).

anyone who, for whatever reason – be it simply the grinding poverty that is so prevalent in South Africa, or natural or other disasters – has sunk below a certain basic level of enjoyment of a right, is regarded as desperate, in crisis and living in intolerable conditions, whether such a person's position is of a temporary nature, or whether it is more permanent.<sup>47</sup>

The Court was less clear about what “making provision for” people in desperate need would entail. An optimistic reading would hold that such people are constitutionally entitled to immediate,<sup>48</sup> prioritised<sup>49</sup> and direct, even if only basic, government assistance – that the state *physically has to provide* for their most basic needs as a matter of priority.<sup>50</sup>

A less optimistic reading would point out that *Grootboom* stopped far short of establishing a duty for the state of direct and immediate provision of basic resources. This limited reading of the two decisions is supported by two things. First, on a conceptual level, in showing its aversion to the idea of the minimum core content, the Court has in both *Grootboom* and the *TAC* case rejected the notion that a duty of direct and immediate provision applies to situations of very severe deprivation.<sup>51</sup> Second, and more practically, in neither *Grootboom* nor the *TAC* case do the orders handed down require any actual prioritisation of effort and expenditure according to differing degrees of need, either temporally or as regards allocational choices.<sup>52</sup> A limited – and to my mind realistic – reading of both *Grootboom* and the *TAC* case would hold that the twin duties of inclusivity and flexibility established in the two cases in actual fact require no more than that, on paper, a policy *may not leave out of account*, and must make *at least some* provision for those who, for whatever reason, whether temporarily or permanently, find themselves in dire straights regarding access to housing, food, water and health care services. This is the reading of the two cases that I will adopt for purposes of this paper.

Despite their limited scope, the duties of inclusivity and flexibility still hold significant possibilities for challenges to the state's nutritional policies as they stand. In *Grootboom*, in the context of the right to have access to adequate housing, the Court found that those who are truly homeless, in the sense of having no durable shelter against the elements, are “desperate” enough that they should also be taken account of. This resulted in an order with the implication that national, provincial and local housing policy be revised to include measures for the direct provision of temporary shelter to those in housing crisis.

47 This same idea seems to have applied in the *TAC* case also. See the characterisation by the Court of those mothers and their children who were excluded from the pilot sites (*TAC*, *supra* note 30, par 79).

48 *Grootboom*, *supra* note 29, par 64.

49 Albeit temporary. *Ibid* par 36.

50 For a view that comes close to such an optimistic reading see, in general, Sunstein 2001.

51 See, in general, Bilchitz 2002.

52 Regarding *Grootboom* see here, in general, Roux 2002. This characterisation also holds in the *TAC* case: although the Court there did issue a directory order to make Nevirapine available, its order was made possible by the fact the basic policy decision to provide Nevirapine had already been made and in addition by the fact that its order would have no budgetary implications. In this sense the decision was a simple rationality exercise. See note 44 *supra*.



I would submit that those South Africans who I referred to in the Introduction above as experiencing nutritional deprivation, as opposed to undernourishment, would qualify for purposes of the holding in *Grootboom* as “desperate”, “in crisis” and “living in intolerable conditions”. Children who waste away because of lack of food, who do not grow to their full physical and mental potential because of under- and malnourishment, and people who have no or too little food to eat every day of their lives, exhibit the same urgent, immediate need with regard to the right to food as the *Grootboom* community exhibited with regard to the right to have access to adequate housing. This is true whichever method of measurement is used and even if the most limited and basic of base-lines is selected.

*Grootboom* and the *TAC* case say that government is obliged to take account of the needs of such people. The basic policy imperative for the direct transfer of food to those in crisis can now be framed in legal terms. I would suggest that extensive measures providing for the direct transfer of food, be it through extended tax zero-rating on basic foodstuffs, food price controls of another kind, food stamps, extended monetary social assistance, or the actual provision of food, are constitutionally required in the light of *Grootboom*, in addition, of course, to longer-term income and food production generation and other capacity building strategies. By implication, a policy framework that makes no or only negligible provision for these kinds of measures would be unreasonable because it is exclusive and inflexible. As such it would be unconstitutional.

## 2.2 Coordination and coherence

The second factor determining the reasonableness of a policy identified above is the requirement that a policy intended to implement a right, such as the right to have access to adequate housing and the right to have access to sufficient food, must be coherent (make sense as a whole) and coordinated.

The message seems to be, in the first place, that a single dedicated policy framework has to be formulated (and of course implemented) for each of the rights. The Court indicated that this might require framework legislation at national level, depending on circumstances.<sup>53</sup> Such a coherent policy framework must clearly coordinate the fulfilling of different functions, indicating which sphere of government is responsible for which particular elements of the policy.

Although the Court’s judgment in *Grootboom* only directly addressed the question of coordination between different *spheres of government* (national, provincial and local), the principle can surely be extended to encompass coordination between different institutions and departments *within one sphere of government*. In this extended sense the principle of coordination and coherence is particularly relevant to policies aimed at realising the right to food.

<sup>53</sup> *Grootboom*, *supra* note 29, par 40.

Possibly more so than any other socio-economic right, the right to food is dependent for its realisation on realising a range of other rights. This is true in an indirect sense: Simply to acquire food, one needs, for example, access to land, to education and resultant employment and income generation and, in some instances, to social security or assistance. Food, in a certain sense, is not merely plucked from trees. It has to be produced or acquired through exchange and the ability to produce food or to acquire it through exchange depends on realising these other rights. It is also true, more importantly, in a direct sense. Research has shown that a person's ability to be nourished by food physically acquired and ingested "depends crucially on . . . characteristics of a person that are influenced by such non-food factors as medical attention, health services, basic education, sanitary arrangements, provision of clean water [and] eradication of infectious epidemics . . .".<sup>54</sup> So, to use basic examples, a person suffering from a simple disease such as diarrhoea, caused by contaminated water, is unable to ingest the nutrients and calories of food eaten. In this way the right to food is compromised by deficiencies in realising the right to water. A person who suffers from malaria requires, among other things, additional quantities of iron – failures in health because of disease create extra requirements for realising the right to food. A person who is insufficiently educated is unable to obtain the full benefit of food acquired because of a lack of knowledge about how to store or prepare it optimally. A final example that is perhaps at this stage more poignant for South Africans is the following: the right to food of a new-born child of an HIV positive mother is directly implicated by its mother's health, as the current policy of the National Department of Health is to discourage breast-feeding in such a situation, *without at the same time providing substitute feeding*. Realising the child's right to food in this case is determined to a large extent by a failure in realising its mother's right to health (which prevents breast feeding), as well as the socio-politically informed health policy decision not to provide substitute feeding.

Because the right to food is in this special sense interdependent with other human rights, policies aimed at its realisation require especially careful and extensive interdepartmental and inter-sectoral coordination and careful attention to ensure its coherence. Again, after *Grootboom*, this is so not only because it makes good policy sense, but because it is constitutionally required.

These two constitutionally indicated factors – the focus on direct transfer of food to create food entitlement for those in desperate need and the focus on coordination and coherence – form the background for the policy review that follows.

### 3 POLICY FRAMEWORK FOR THE REALISATION OF THE RIGHT TO FOOD

For it to be possible to properly assess the current policy framework for realising the right to food in the light of the two constitutional imperatives

54 Drèze & Sen 1998: 13, 35-45 and 177.

identified above, it is first necessary to determine the outlines of that framework. This policy review is necessarily brief and traces only two themes throughout: the extent to which nutrition-related policy is coordinated and coherent, and the extent to and manner in which it takes account of desperate need.

In addition, to take account of recent policy developments in the field, the review falls into two broad parts. I first consider the general policy framework that represents government's stock response to problems of food insecurity over the past number of years. I then separately consider a recent emergency policy response to the crisis in food security precipitated by an unprecedented rise in food prices.

### 3.1 General policy framework

#### 3.1.1 Structures and institutions

It does not seem an overstatement to say that there is currently no single coherent, overarching policy framework dealing with realising the right to food in South Africa.

Unlike the situation with most of the other socio-economic rights, the right to food has no specific government department at national, provincial or local level dedicated primarily and in the first instance to its realisation, as the Department of Health is dedicated to realising the right to have access to health care services, and the Department of Social Development is dedicated to realising the right to have access to social security and assistance. This in itself is not necessarily a problem. In fact, because the right to food is so specially dependent on realising other rights for its own realisation, it probably makes good sense that different departments are responsible for different aspects of food security. The real problem lies in the lack coordination between the departments involved. This is both an institutional and a policy development problem.

On an institutional level, no effective overarching body exists to coordinate the efforts of different departments. Three different government departments at national level have indicated in policy pronouncements that they regard realising the right to food as at least one of their responsibilities: the DoH, the Department of Land Affairs and Agriculture (DLA), and the Department of Social Development (DSD). In addition, the Departments of Water Affairs and Forestry, Trade and Industry, and Finance, are inevitably involved with matters pertaining to realising the right to food.

Within the DoH food-related policy initiatives are driven by the Directorate for Nutrition.<sup>55</sup> Neither the DLA nor the DSD have a specific division dedicated primarily to realising the right to food. Within the DSD, the responsibility lies with the National Poverty Relief Office.<sup>56</sup> The activities

55 DoH 2002 "Integrated Nutrition Programme: A foundation for life" <[www.196.36.153.56/doh/programmes/nutrition.html](http://www.196.36.153.56/doh/programmes/nutrition.html)> accessed date unknown.

56 DSD 2001 "Building a caring society together: The road to social development. Report of the Department of Social Development (from June 1999–March 2001)" <[www.welfare.gov.za/Documents/Doc%202001/Annual%20Report/road.htm](http://www.welfare.gov.za/Documents/Doc%202001/Annual%20Report/road.htm)> accessed 11/05/2001: 9.

of the different departments related to the right to food are coordinated through an interdepartmental committee convened by the DLA.<sup>57</sup> This committee seems to have been largely inactive, at least in coordinating the efforts of different departments.

On a policy development level, although there are references to enhancing and protecting nutritional capabilities in various pieces of legislation,<sup>58</sup> and although there are various policy documents within particular government departments dealing with aspects of the right to food in isolation,<sup>59</sup> no framework or other comprehensive piece of legislation, nor any overarching policy document dedicated to realising the right to food currently exist. Instead (or possibly as a result), food related policy has developed in a rather piecemeal fashion, with different aspects – and sometimes the same aspects – addressed by different departments. Each of the three main departments mentioned above have developed their own policy initiatives to deal with those issues related to the right to food which they regard as their responsibility, without there being any general policy framework identifying priorities. In the DoH this is the integrated nutrition programme (INP), initiated in 1995,<sup>60</sup> in the DSD, aspects of the poverty relief programme,<sup>61</sup> and in the DLA, the food policy adopted in May 1998.<sup>62</sup>

An exciting current development aimed at addressing the problems with coordination and coherence in policy is the drive within the DLA to enact framework legislation dealing with the right to food. The project, although still in its infancy, is intended to result in draft legislation to be tabled at the beginning of 2003. By all indications<sup>63</sup> the framework legislation will follow guidelines set by the FAO, which envisage that it would provide a framework for coordination of different spheres and different sectors of government and would contain specific and monitorable targets and timeframes for realising the right to food.

### 3.1.2 Nature of policy initiatives

Apart from the problems with coherence and coordination that emerge from an overview of the institutional structures involved in implementing the right to food, an overview of the substance of the different policies that operate within this institutional framework (such as it is) shows a particular and quite marked focus on longer-term capacity building initiatives rather than on immediate food transfers. This focus, as I will argue below, is constitutionally problematic.

57 SAHRC 2000: 83.

58 See, in general, the Land Reform (Labour Tenants) Act, No 3 of 1996 and the Extension of Security of Tenure Act, No 62 of 1997.

59 See in particular DoH 2002, *supra* note 55; DLA 1997, *supra* note 1, and DSD 2001 "Business plan 2001/2003: Poverty Relief Programme" <[www.welfare.gov.za](http://www.welfare.gov.za)>

60 DoH 2002, *supra* note 55

61 DSD 2001, *supra* note 59, 3, 5–7.

62 SAHRC 2000: 83.

63 A preliminary draft Bill has in fact already been completed, but won't be discussed here as it is still embargoed. In broad terms the Bill seems, at this stage, to be strong on creating coordinating structures at national levels, but weak on setting national standards and monitorable targets.

- Department of Health

Food-related policies and programmes run by the DoH are described in its INP, initiated in 1995.<sup>64</sup> This programme is intended to “improve the nutritional status of all South Africans by offering various services and interventions directed at solving malnutrition”.<sup>65</sup> The programme consists of:

- a variety of monitoring and information gathering projects;
- projects aimed at nutritional supplementation, limited food transfer and support for capacity building; and
- nutritional education projects.

It is focussed on vulnerable groups, identified by the DoH as children and women.

To accurately inform its continuing policy development the DoH has committed itself to instituting, as the basis for the INP, a nutrition information system. As part of this development it has conducted or commissioned a number of important national surveys on specific and general areas of concern. These are the National Food Consumption Survey (1999), the South African Vitamin A Consultative Group Survey (1995), the Iodine Deficiency Disorder Survey (1998) and the introduction of the Road to Health card to monitor growth of children.

The DoH has instituted a range of nutritional supplementation projects and limited and focussed food transfer projects, and has supported capacity building projects with the aim of effecting micro-nutrient malnutrition control and disease-specific nutrition support and contributing to household food security. Part of this drive has been the introduction and management of the primary school feeding scheme, following then-President Nelson Mandela’s declaration in May 1994 that a “nutritional feeding programme will be implemented in every primary school where a need has been identified”.<sup>66</sup> The project aims to provide a nutritious mid-morning snack to all at-risk primary school children, which will constitute at least a third of their recommended daily intake of energy. Despite various (at times serious) problems related to implementation, this project has managed to reach more than 15 000 primary schools and almost five million children on a regular basis.<sup>67</sup>

The DoH succeeded in 1995 in legislating the mandatory iodation of food grade salt to combat the high prevalence of iodine deficiency among children. The 1998 iodine deficiency disorder survey shows that iodine deficiency among children has been reduced to 10% prevalence.

In April 2000 the DoH introduced a vitamin A supplementation project,<sup>68</sup> intended to address the high prevalence of marginal vitamin A deficiency in children, which, apart from a general link to morbidity, has been particularly linked to an increased risk of mother-to-child transmission

64 DoH 2002, *supra* note 55.

65 *Ibid* 1.

66 State of the Nation Address, 1994.

67 DoH 2002, *supra* note 55, 4.

68 Shung-King 2000, *supra* note 8, 9.

of HIV.<sup>69</sup> It is implemented through, among other things, food fortification and direct dietary supplementation through primary health care facilities. Wide implementation of the project has not yet taken place, as logistical problems in particular have held it back.<sup>70</sup>

The DoH has piloted a project for managing severe malnutrition among children through primary health care facilities. In its pilot phase this project succeeded, in the limited areas in which it was implemented, in reducing the infant mortality rate due to severe malnutrition from 28% to 14%.<sup>71</sup>

The DoH has refrained from itself becoming involved in running income generation and other capacity building projects aimed at enhancing access to food. It rather supports such programmes financially. It has done so since the 1997/1998 financial year. In that year R15 million was allocated to this function and 72 community-based projects were supported. In 1998/1999 R28 million was allocated.<sup>72</sup>

Finally the DoH has engaged in a range of nutritional education, promotion and advocacy projects. These include the development and implementation of a primary school nutritional education package, the development of nutritional guidelines for people living with HIV/AIDS, the development and distribution of a vitamin A brochure in eight of the official languages and the development and implementation of breastfeeding guidelines for health workers.<sup>73</sup>

To summarise: the DoH's response to problems of food insecurity in South Africa consists of a number of information gathering and education programmes, financial assistance for capacity building programmes, a food transfer project targeted specifically at children and a range of specific nutritional supplementation programmes. As such the DoH's policy response seems to be a balanced programme with a wide variety of different interventions, both of the longer-term capacity building nature and of the direct intervention kind. However, the initiatives which involve the direct transfer of food or nutrition (the different nutritional supplementation programmes and the primary school feeding scheme) are quite sharply focused on particular groups seen as especially dependent (children, and to a lesser extent women) and are aimed at very specific needs only (mostly only at addressing micro-nutrient deficiencies).

- Department of Agriculture and Land Affairs (DLA)

The DLA has consistently regarded the enhancement of both national and individual food security as a policy focus.<sup>74</sup> It established the Food Security Working Group (FSWG) in October 1994. The FSWG produced an influential policy discussion document, *Food security policy for South Africa*, in 1997. On the basis of its recommendations, the DLA adopted its food

69 *Ibid.*

70 *Ibid.*

71 DoH 2002, *supra* note 55, 3.

72 Mgiijima 1999: 63.

73 Mgiijima 1999: 62; Shung-King 2000: 9-10; DoH 2002, *supra* note 55, 4.

74 Department of Agriculture 1995 "The White Paper on Agriculture" <[www.gov.za/whitepaper/1995/agriculture.htm](http://www.gov.za/whitepaper/1995/agriculture.htm)> 1.

policy in May 1998.<sup>75</sup> This policy, aimed at enhancing national food security by focussing on food availability, accessibility and utilisation, combines a drive to maintain and stimulate national food supply creation with a number of projects aimed at stimulating food production for own consumption and income generation through the development of small-scale commercial agriculture to enhance access to food. The second of these drives is most important for purposes of this paper.

The DLA's approach to enhancing access to food is premised on the idea that dependence on the state should be reduced and self-sufficiency of households and individuals should be promoted. This approach is encapsulated in the following statement of the FSWG: "Poverty reduction and its eventual elimination is . . . a key food security challenge".<sup>76</sup> The DLA's efforts to enhance food accessibility therefore focus on various capacity building strategies through agriculture. There are two main thrusts to these efforts. In the first place, the DLA recognises that food security can be improved by increasing production. The effect of increasing food production on household food security is both direct and indirect. Increased food production for own consumption directly increases household access to food. Increased general production potentially drives down food prices, thus enabling easier access to food through exchange.<sup>77</sup> The DLA's food policy therefore focuses on increasing and diversifying food production through a variety of projects that improve access to productive resources such as land, capital and implements, and education and agricultural extension projects that improve existing small-scale production activities.<sup>78</sup>

Second, the DLA recognises that production will always be insufficient to address household access to food adequately and that access to food through exchange also has to be stimulated. The DLA therefore also attempts to improve household food access through exchange by stimulating income from agriculture. This is done in a variety of ways. On the macro level the DLA stimulates agricultural growth, not only in food-related areas but also in the production of cash crops so as to increase employment opportunities. This includes a deliberate focus on more labour-intensive crops. On the micro level small-scale household production of cash crops is also stimulated through agricultural extension services and education projects.<sup>79</sup>

Although it discourages dependency and promotes self-sufficiency, the DLA recognises that in some cases food entitlement can only be created through transfers, direct or indirect, of food. It sees a limited role for itself in this regard (the primary role being that of the DSD) and limits itself to the provision of grants to vulnerable groups, as part of its land care programme, to stimulate self-reliance through better production.<sup>80</sup>

75 SAHRC 2000: 83.

76 DLA, *supra* note 1, 18.

77 Mgijima 1999: 66.

78 Mgijima 1999: 67.

79 Hanekom 1998: 11–12.

80 Mgijima 1999: 67.

To summarise: the DLA's involvement in combating food insecurity consists of a marked focus on food production and procurement drives, with a lesser focus on enhancing access to food, which primarily manifests itself in a variety of capacity building and skills transfer programmes aimed at stimulating food production for own use and more general agricultural production for generation of income. There is almost no component of direct transfer of food in the DLA's food related policies, apart from possibly the very limited system of land care programme grants.

- Department of Social Development (DSD)

The DSD indicates its commitment to realising the right to food in the *White Paper on Social Welfare*<sup>81</sup> where it undertakes to develop "appropriate nutritional objectives and activities" targeted at those in nutritional distress.<sup>82</sup> Within the DSD, food related policies are part of the more general poverty relief programme.<sup>83</sup> In this programme the DSD clearly identifies food insecurity as one of the major indicators of the programme's target evil, namely poverty. It also emphasises the self-sustaining link between food insecurity and low income levels and the inability to generate an income.<sup>84</sup> On this basis the DSD identifies as one of the objectives of the poverty relief programme the "development of household food security".<sup>85</sup>

This the DSD intends to achieve through what it describes as direct and indirect efforts. The Department's primary programme aimed at enhancing food security entails establishing and maintaining "rural food production clusters" to stimulate food production for own consumption – in the eyes of the DSD, a direct intervention. The DSD aims to establish 144 of these clusters (each of which reaches 100 households) over a three-year period, presumably starting in 2001.<sup>86</sup>

The poverty relief programme also includes a variety of income generating initiatives, which will indirectly contribute to enhancing food security by enabling food entitlement through exchange.<sup>87</sup>

Although it recognises that its more traditional role of cash transfers through social security and assistance plays an important part in creating entitlements to food and enhancing food insecurity,<sup>88</sup> the DSD is unequivocal in its judgement that its strategies for enhancing food security should move away from dependence on cash grants and focus on sustainable capacity building and self-sufficiency.<sup>89</sup>

81 Department of Welfare 1997 "White Paper for Social Welfare" <[www.gov.za/whitepaper/1997/soswel97.htm](http://www.gov.za/whitepaper/1997/soswel97.htm)>

82 Vries 1999: 71.

83 DSD 2001, *supra* note 59, 3, 5–7.

84 *Ibid* 3.

85 *Ibid* 5.

86 *Ibid* 7.

87 *Ibid* 8–10.

88 Vries 1999: 71–72.

89 DSD 2001, *supra* note 59, 2.



One of the critical shifts in welfare policy is the reduction of dependence on state assistance. Firstly, maintaining and expanding the current levels of state assistance . . . is not sustainable. Secondly, while it provides recipients with regular cash payments, it does not address the circumstances that render recipients vulnerable and poor.<sup>90</sup>

Although this stance has recently been somewhat softened, particularly in reaction to the recommendations of the Commission of Enquiry into a Comprehensive System of Social Security for South Africa<sup>91</sup> (the Taylor Commission), which moots the expansion of existing social assistance grants as well as the possible introduction of an across-the-board basic income grant, the current structure of social assistance in South Africa is still woefully inadequate in a number of respects. Although the existing social grants have often been shown to make a major contribution to poverty alleviation, not only for those they are specifically aimed at, but also for others,<sup>92</sup> the levels of the different grants are dangerously low and it is well documented that the uptake rate of most is very bad. More importantly the current general structure of social assistance grants indicates an ideological aversion to the notion of dependence on the state.

All of the major social assistance grants in South Africa provide for the needs of certain select groups of people only, who have particular reasons apart from simple poverty for their predicament. At the risk of stating the obvious, the old age pension applies only to the aged, the disability grant applies only to a very narrowly defined category of disabled people, the child support grant applies only to children under the age of seven years, the foster care grant falls only to families caring for foster children and only parents of disabled children are entitled to the care dependency grant. This special needs-based system of social assistance sends out, in the first place, an ideological message – it demonises dependence, mandating state provision for basic needs only in those cases where people face deprivation for ‘natural’ reasons (their age or disability) out of their own control. The impression is thus created that those who are poor and who cannot attribute their poverty to either their age or to a disability, are somehow to blame for their position and are as such undeserving of state assistance.<sup>93</sup> More to the point for purposes of this paper: the special needs-based social assistance system leaves out of the loop a very large number of South Africa’s poor: poor people who are able bodied, older than seven and have not yet reached pensionable age, *however desperate their situation might be*, have no long-term access to state assistance.<sup>94</sup> Their only recourse is the social relief of distress grant, a temporary grant for a maximum three months for people who face particular distress because of some sudden occurrence. In addition to being temporary (and so conditioned by the idea that abject poverty is a passing aberration,

90 Vries 1999: 72.

91 DSD 2002.

92 See notes 107 and 108 below for references in this regard.

93 See, in general, Ross 1991, Williams 1998 and Simon 1985 for similar analyses of the social assistance schemes in the United States.

94 DSD 2002: 30–31.

rather than a permanent reality), this grant is almost never used in practice and is as such an almost negligible response to the problem.<sup>95</sup>

To summarise: the DSD's response to food insecurity in South Africa consists primarily of long-term capacity building projects aimed at either generating food production for own consumption or at income generation.

The DSD recognises that cash social assistance grants are an important tool to generate food entitlement, but the current social assistance system is special needs-based and as such is a mechanism for access to food for only a very specific sector of South Africa's poor. Even for those it targets, the social assistance system is inadequate because of low levels of grants and their low uptake rates.

### 3.2 Current crisis response

During the first nine months of 2002, prices of basic foodstuffs such as maize and potatoes rose dramatically due to a combination of economic factors.<sup>96</sup> This led to a national outcry as the price increases manifestly placed basic foodstuffs out of reach of a large portion of the population.

In response in October 2002 government announced a package of measures designed to alleviate the crisis. First, a number of increases in social assistance grants were announced: the child support grant would be increased from R130 to R140 per month, the old age pension from R620 to R640 per month, the foster care grant from R450 to R460 per month and the care dependency grant from R620 to R640 per month.<sup>97</sup> In addition government reached several agreements with producers and marketers of basic foodstuffs to provide food at special low prices for the poor.<sup>98</sup> Finally, at the end of October, government announced in its medium-term budget policy statement that it would set aside R400 million over the next three years for emergency food relief.

95 I have no figures to substantiate this statement – my evidence is mostly colloquial. However, the extent to which the social relief for distress grant has fallen into disuse is illustrated by the following instance of policy choice. In October 2001 a destitute woman, disabled single mother to two children, approached the Durban High Court with an application for an order directing government to provide her with food vouchers, which she was entitled to in terms of the social relief for distress grant. Her application was granted and government was ordered to provide her the food vouchers for three months, entitling her to a sum of R160 per month to buy food (see in general Ricard 2001). It is at least interesting to note the DSD's choice to oppose her application to receive that to which she was clearly legally entitled.

96 Food prices rose by an average 18.2% over the first eight months of the year. Staple grain prices rose by a stunning 44%. See Boyle 2002.

97 Further increases in social security and social assistance grants were announced at the end of October in the Medium-Term Budget Policy Statement. Not enough detail was available for these to be commented on in this paper, but the increases then announced generally seem to be aimed only at keeping up with inflation and do not seem to represent increases in real terms.

98 Premier Foods, Metro, farming group Agri Corporation and other donors agreed to provide 1 400 tonnes of maize every month for three months at a recommended price of R25.99 per 12.5kg bag, compared to the normal rate of R43. See Boyle B 2002 "Govt steps in to feed poor" *News24.com* October 10 <[www.news24.com/contentDisplay/level4Article/0,1113,2-1134\\_1269972,00.html](http://www.news24.com/contentDisplay/level4Article/0,1113,2-1134_1269972,00.html)> accessed 10/22/2002.

These emergency measures were widely welcomed. At the same time their limitations were pointed out. Apart from certain practical flaws<sup>99</sup> there are two general problems with the response that are significant for this paper. First, the package of measures is generally again a special needs-based package: apart from the temporary price relief, the increases in social assistance grants are inevitably aimed at only certain groups of particularly vulnerable people. As such, they suffer from the same general practical and ideological problems referred to above. Second, and more importantly, the very fact that the package of measures is styled by government itself as a response to a *food crisis* is problematic. It indicates a denial by the state that a food crisis existed prior to the recent price hikes and that a duty rested on the state to take account of that crisis even then. This is particularly clear if one considers the R400 million fund set aside to deal with food crises *as they arise* over the next three years. Government seems to be under the impression that it only needs to respond directly and urgently if a situation occurs that is out of the ordinary. This is not sufficient in a case such as ours, where the ordinary food situation is a crisis.

#### 4 CONCLUSIONS AND RECOMMENDATIONS

The necessarily skeletal and brief overview of the policy framework for realising the right to food provided in the previous section yields two important points for purposes of this paper.

##### 4.1 Direct versus indirect assistance

Read together the different policy initiatives of the different departments express a marked and quite specific preference as to focus. The review of these and other policy documents shows that the combined focus of the three different departments is indeed on the enhancement of food entitlement, rather than food availability, through a variety of different means, as I suggested it should be in the first section above. In fact, both the DLA and the NDL clearly state as much.<sup>100</sup> A review of the policy documents further shows that, apart from creating and managing monitoring and information gathering systems, two kinds of programmes predominate: various capacity building programmes intended to strengthen people's abilities to generate food for themselves (these seem to be the norm), and various limited instances of direct transfer of food (these are the limited exceptions).

If taken together, the various policy initiatives in different government departments seem to be based on a preference for longer-term interventions in food accessibility through capacity building and income generation, rather than through direct food transfers. This is a conscious policy preference of the DLA and the DSD and seems to be a latent theme in the

99 Cosatu, for instance, has pointed out that the increases in social assistance grants were not increases in real terms, as they only just kept up with general inflation and did not nearly keep up with food price inflation. See Reuters 2002.

100 Ramabenyane 1999: 65.

policies of the DoH. Although the DoH provides certain direct food transfers in the form of nutritional supplementation and most notably the primary school feeding scheme, these policies are limited in their scope (they are aimed at addressing not food insecurity in general but only certain micro-nutrient deficiencies) and apply in the main only to certain groups identified as vulnerable (children and women). The same can be said about the direct access to food generated by social security cash grants; apart from the fact that the system administered by the DSD is inadequate as far as level of grants and uptake of grants is concerned, it is only a special needs-based one and provides no coverage to a very significant proportion of South Africa's poor. The same can be said of the current crisis response to the rise in prices of basic foodstuffs – it is primarily special needs-based and is by its very design a response to what is seen as a sudden emergency, an aberration caused by unusual circumstances in world markets, rather than a sustained approach to what is in fact that strange thing, an *endemic crisis* of food security in South Africa. In general government seems to see its role as that of a facilitator, with only a residual role to provide very limited instances of direct assistance in very narrowly defined circumstances.<sup>101</sup> This general approach fails to take account of the crisis proportions of South Africa's food problems. I have shown above that many people in South Africa who are not covered by the existing methods of direct transfer of food regularly fall below basic survival levels of access to food. Longer-term capacity building projects, despite their virtues of sustainability, do not address the urgency of these people's needs. Their most basic food requirements have to be met first, before they can be helped through longer-term interventions. Short-term emergency interventions also are insufficient – the crisis facing this group of people is not of a passing nature. Some more permanent solution has to be found.

This leads to the first point of possible criticism in the light of *Grootboom* and the *TAC* case. As argued in section 2 above, the principle enunciated in *Grootboom* – that government is constitutionally required to make provision for the amelioration of the conditions of those living in intolerable conditions and to design programmes and policies that are flexible enough to respond to immediate, short-term and longer-term needs – seen in the light of the high prevalence of people living in food crisis in South Africa, indicates that government is constitutionally required to address the needs of the hungry and nutritionally deprived

101 In more general terms this prevailing attitude is reflected in the national cabinet's response thus far to recommendations of the Taylor Commission (see DSD 2002), that the social assistance net has to be dramatically expanded, possibly also through the introduction of a basic income grant. Although a final and comprehensive response has been shelved until January 2003, Joel Netshitenze, in an official response to the proposal for an income grant, has criticised the idea, saying that it would amount to a "handout" and would encourage a culture of entitlement. Netshitenze further indicated that the cabinet would prefer other alternatives to combat poverty, including a public works programme, because it believes that "able-bodied" South Africans should enjoy "the opportunity, the dignity and rewards of work" (as quoted in Habib & Skinner 2002). A remark such as this is so rich in problematic ideological content that it probably merits a comprehensive analysis of its own.

through direct intervention in the form of food transfers. The absence of any such comprehensive minimum food transfer component, specifically for those not covered at all by the currently inadequate measures of direct transfer in the different food policies, seems to represent a gap in the policy framework that falls foul of *Grootboom*.

The Court in *Grootboom*, having found that the state's housing policy was unconstitutional because it failed to make provision for those most desperate, of course declined to indicate to the state how precisely it should remedy the unconstitutionality of its policies. It specifically indicated that there would be a wide range of different possible policy choices through which this could be achieved, and that it wouldn't prescribe which of those choices were preferable, as long as the gap was filled.<sup>102</sup> Direct intervention of the kind envisaged in *Grootboom* can, in the context of the right to food, also be achieved in a variety of ways: either through the direct provision of food to desperate people, through price subsidisation or tax zero-rating of basic foodstuffs to facilitate food acquisition through exchange, or through different kinds of social assistance grants such as food stamps or vouchers or cash grants which again enables direct access to food through exchange. I will, to depart from the Court's position in *Grootboom*, yield to the temptation to say which of those possibilities I find most suitable. A variety of factors indicate to me that a choice, although not necessarily an exclusive one, for social assistance grants, and preferably cash grants, seems most appropriate in South Africa under current conditions. These factors are the following:

- The provision of social security grants as a method of directly generating food entitlement is recognised to be logistically a much more manageable task than, for instance, the direct provision of food to those in crisis. This is true even in the case of actual famine, where emergency response efforts have often failed due to the logistical difficulties of distributing large quantities of food to affected people.<sup>103</sup> It is even truer in a non-famine situation such as in South Africa, where much larger numbers of people have to be reached for a much longer period of time, than would be the case in responses to temporary and intermittent crises.<sup>104</sup>
- Social security grants, whether in the form of food vouchers or direct cash transfers, are more sensitive to individual choice and consequently to issues of dignity and freedom than other forms of direct transfer of food. This factor is especially important in a culturally diverse country such as South Africa. Social security grants introduce an element of flexibility and enable individuals to exercise their personal choice as to which food to acquire, depending on cultural and other

<sup>102</sup> *Grootboom*, *supra* note 29, par 41.

<sup>103</sup> Drèze & Sen 1998: 95–96.

<sup>104</sup> An illustration of this point is found in the history of the primary school feeding scheme run by the Department of Health, which consists of the direct provision of nutritious snacks to children at primary schools. In a number of cases this ambitious scheme, although ultimately successful has almost floundered on logistical and administrative difficulties.

more personal factors.<sup>105</sup> If social security grants take the form of some kind of across-the-board basic income grant, it avoids the further ideological baggage of demonising dependence occasioned by a special needs programme, such as we have currently.

- Social security grants, in the form of cash grants, contribute not only to food security, but also to a range of other important factors that impact on a person's standard of living, such as the ability to acquire adequate housing, education and health care. Apart from directly contributing to needs other than nutritional needs, the cash in hand generated by social security cash grants improves nutritional status indirectly by ensuring that the factors on which it depends are also strengthened.<sup>106</sup>
- Social security grants have been shown to be directly linked to food security, as it is to other indicators of basic welfare, in a number of recent studies conducted in South Africa.<sup>107</sup> As such in South Africa it is manifestly an effective channel through which to direct resources effectively at the target evil of nutritional deprivation.<sup>108</sup>

In the light of these factors, it is suggested that an extension of social security grants, be it through the better utilisation and expansion of existing programmes such as old age pensions or the child support grant, or be it through the introduction of an across-the-board basic income grant, would be, to use *Grootboom's* terms, a "reasonable" policy option to pursue in the quest for realising South Africans' right to food.<sup>109</sup> My own preference would be for an across-the-board basic income grant, most importantly because such a system would avoid the ideological baggage of a special needs-based programme referred to above and would, more practically, extend assistance to that large group of people who are currently not assisted in any way.

## 4.2 Coordination and coherence

A further area of concern evident from the policy review above is the lack of coherence in policy formulation and the continuing lack of coordination between the different government departments involved in realising the right to food. In 1999 the Chairperson of the South African Human Rights Commission had this to say about this problem:

In the course of our monitoring of economic and social rights as required by the Constitution, one of the gaps we have discovered is that there is no Ministry that considers itself to be responsible for the . . . issue of food in a holistic

105 DSD 2002: 61.

106 *Ibid* 55-56.

107 See, for instance, a study conducted into severe malnutrition problems among small children in the Mt. Frere district in the Eastern Cape by the University of the Western Cape (Public Health Programme), the Health Systems Trust and the London School of Hygiene and Tropical Medicine, the preliminary results of which are found in University of the Western Cape (Public Health Programme) *et al* 2001. See also Liebenberg 2001: 245.

108 On the important role that social assistance cash transfers play currently in South Africa to combat poverty directly see DSD 2002: 24-25, 59.

109 See, in general, the remarks of the Taylor Commission justifying the introduction of such an across the board basic income grant (DSD 2002: 60-62).

manner. In fact, we found that there are different Ministries that tell us that they only take responsibility for bits of it. One participant says we must go to Trade and Industry in terms of marketing and production. Others say they deal with farmers and land whereas some say they deal with something else.<sup>110</sup>

The same situation seems to apply today: although the different departments are clear that they do have a constitutional responsibility to implement the right to food, there seems to be very little coordination between their functions. The apparent lack of coordination between different departments involved with implementing the right to food in policy development and implementation in this regard is reflected, in the first place, by a large measure of overlap between the policies of different departments. For example, as the policy review shows, all three of the main departmental players see the development of capacity to produce food for own consumption as one of their responsibilities, if not their most important policy focus in realising the right to food. All three departments consequently run or finance programmes of this nature, with differing degrees of comprehensiveness.

Apart from the problem of overlap and consequent wasted resources, the lack of effective coordination has also allowed certain important things to slip through the cracks. Again, as the review of specific policies above shows, apart from certain notable but limited exceptions, none of the three main departments involved in realising the right to food have any focus on the direct provision of food by whatever means. This failure in policy creates, as I argue, a possibly unconstitutional gap in the framework.

The current efforts of the DLA to enact framework legislation on the right to food might adequately address this problem. The draft bill that currently exists certainly seems to provide for adequate coordinating structures and institutions on national level and the drafting process for the legislation should be followed with interest, to ensure that other issues, such as the creation of national standards and targets, are also addressed in this way.

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<sup>110</sup> Pityana 1999: 2.

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