1 Introduction

In its landmark decisions in Soobramoney, Grootboom, Treatment Action Campaign, and Khosa, the Constitutional Court adopted a model of reasonableness review for assessing whether the state has complied with the positive duties imposed by the socio-economic rights in FC sections 26 and 27. In doing so, it has rejected the argument urged by the amici curiae in Grootboom and TAC that FC sections 26 and 27 impose a minimum core obligation on the state to ensure that everyone has access to essential basic levels of the
relevant rights. The furthest the Court was prepared to go was to hold that, where the evidence in a particular case revealed that it was appropriate, regard could be had to the content of a minimum core obligation in evaluating the reasonableness of the state's measures. Thus a litigant could not rely directly on the non-fulfilment of a minimum core obligation imposed by the rights in FC sections 26 and 27 to secure immediate relief. She could, at most, rely on such an obligation to support her arguments that the measures adopted by the state were unreasonable in the circumstances. A finding of unreasonableness could, in general, not be used to elicit benefits for an individual or a class of individuals.

The Court's objections to direct reliance on a concept of minimum core obligations were basically threefold: the difficulty of defining the content of minimum core obligations; a concern that any definition would not reflect the diversity of needs of differently placed groups; and an incompatibility with the institutional roles and competencies of the courts.

In this essay, I evaluate the model of reasonableness review for positive socio-economic rights claims and compare it to an approach based on the concept of minimum core obligations. The focus will be on cases in which people claim access to the services and resources referred to in FC sections 26 and 27.

Any such evaluation must take into account the critical role of socio-economic rights in advancing the transformative commitments and values of the Constitution. Klare describes transformative constitutionalism as 'a long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory,

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5 This concept is endorsed by the UN Committee on Economic, Social and Cultural Rights (UNCESCR) which supervises states parties' obligations under the International Covenant on Economic, Social and Cultural Rights (1966). See, for example, 'General Comment 3: The nature of states parties' obligations (art 2(1) of the Covenant)' UN doc E/1991/23 (1990) para 10; 'General Comment 14: The right to the highest attainable standard of health (art 12 of the Covenant)' UN doc E/C.12/2000/4 (2000) para 43; 'General Comment 15: The right to water (arts 11 & 12 of the Covenant)' UN doc E/C.12/2002/11 (2002) para 37. See Grootboom (n 2 above) para 33; Treatment Action Campaign (n 2 above) para 34.

6 See Grootboom (n 2 above) paras 27-33; Treatment Action Campaign (n 3 above) paras 26-39.
and egalitarian direction.’ The preamble of the Final Constitution affirms that it was adopted so as to establish, amongst other goals, a society based on social justice and an improvement in the quality of life of all. When interpreting socio-economic rights, the courts are obliged to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom.’ The realisation of socio-economic rights is integral to this vision of a transformed society.

2 What does ‘reasonableness review’ mean in the context of socio-economic rights claims?

In reviewing positive socio-economic rights claims, the central question that the Court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question. The Court’s approach is designed to allow government a margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights:

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

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9 Grootboom (n 2 above) para 41.

10 As above. O’Regan J describes the purpose of the reasonableness standard as follows in Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 2 SA 359 (CC), 2005 4 BCLR 301 (CC) para 87:

   In adopting this standard the Court requires the bearer of constitutional obligations to perform them in a manner which is reasonable. This standard strikes an appropriate balance between the need to ensure that
However, in practically all the socio-economic rights cases decided by the Constitutional Court, the effect of its decisions has been to require government to alter its preferred policy choices and to allocate additional resource to particular programmes. This statement can therefore be understood to signal a two-fold awareness: (1) that the courts' role will be to decide, in the context of concrete cases, the appropriate margin of discretion to allow the state to make policy and budgetary choices; and (2) the courts will still scrutinise these choices for their compliance with the purposes and values protected by the socio-economic rights in the Constitution. The implication is that there is no brightline boundary between law and policy, and that substantive evaluative choices will have to be made regarding when and how the courts should intervene in policy choices which impact on people's socio-economic welfare. The challenge facing the Court in this context is the formulation of transparent criteria to guide the making of these evaluative choices. The jurisprudence shows that the Court has gone a substantial distance in articulating its approach to evaluating the reasonableness of the state's acts or omissions in the context of socio-economic rights claims.

Thus the Court has indicated that it will assess the reasonableness of the state's conduct in the light of the social, economic and historical context, and consideration will be given to the capacity of constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances.

Reasonableness review has synergies with the description of 'obligations of conduct' imposed by economic, social and cultural rights according to The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. Thus an obligation of conduct 'requires action reasonably calculated to realize the enjoyment of a particular right.' 'The Maastricht guidelines on violations of economic, social and cultural rights' (1998) 20 Human Rights Quarterly 691 para 7. The Maastricht Guidelines were adopted by a group of eminent international law experts to elaborate on the obligations imposed by the International Covenant on Economic Social and Cultural Rights.

The Court acknowledges that its decisions have budgetary implications, but understands it as a by-product of the enforcement of constitutional rights as opposed to any direct attempt to 'rearrange budgets'. See Treatment Action Campaign (n 3 above) para 38. For an insightful analysis of the Court's approach to decisions with implications for resource allocation, see: T Roux 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' 10 (4) Democratization (2003) 92-111.


As Karl Klare suggests, one of the values of substantive legal reasoning which openly engages with the evaluative choices involved in interpretive work, is that it improves the transparency of the legal process thereby contributing to 'deepening democratic culture.' Klare (n 8 above) 171.
institutions responsible for implementing the programme.\textsuperscript{15} While Soobramoney raised the spectre of the Court adopting a thin standard of rationality scrutiny for socio-economic rights claims, the Court in \textit{Grootboom} and TAC proceeded to develop a more substantive set of criteria for assessing the reasonableness of the state’s acts or omissions.\textsuperscript{16} Thus the Court held that a reasonable government programme must have the following features:\textsuperscript{17}

- It must be comprehensive, coherent and coordinated;\textsuperscript{18}
- Appropriate financial and human resources must be made available for the programme;\textsuperscript{19}
- It must be balanced and flexible\textsuperscript{20} and make appropriate provision for short, medium and long-term needs;\textsuperscript{21}
- It must be reasonably conceived and implemented;\textsuperscript{22} and
- It must be transparent, and its contents must be made known effectively to the public.\textsuperscript{23}

The element of the reasonableness test that comes closest to a threshold requirement is that a reasonable government programme must cater for those in urgent need:

To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.\textsuperscript{24}

This requirement of the reasonableness test is justified in terms of the value of human dignity. Thus in \textit{Grootboom} the Court held:

\textsuperscript{15} \textit{Grootboom} (n 2 above) para 43.
\textsuperscript{16} See \textit{Bel Porto School Governing Body & Others v Premier, Western Cape & Another} 2002 3 SA 265 (CC), 2002 9 BCLR 891 (CC) para 46; \textit{Khosa} (n 4 above) para 67.
\textsuperscript{17} The Court noted in \textit{Khosa} that the factors identified in the assessment of reasonableness were not a closed list and that ‘all relevant factors have to be taken into account’. The Court went on to observe that ‘[w]hat is relevant may vary from case to case depending on the particular facts and circumstances.’ \textit{Khosa} (n 4 above) para 44.
\textsuperscript{18} \textit{Grootboom} (n 2 above) paras 39 and 40.
\textsuperscript{19} \textit{Grootboom} (n 2 above) para 39.
\textsuperscript{20} \textit{Treatment Action Campaign} (n 3 above) paras 68, 78, 95.
\textsuperscript{21} \textit{Grootboom} (n 2 above) para 43.
\textsuperscript{22} \textit{Grootboom} (n 2 above) para 40-43.
\textsuperscript{23} \textit{Treatment Action Campaign} (n 3 above) para 123.
\textsuperscript{24} \textit{Grootboom} (n 2 above) para 44. See A van der Walt ‘A South African reading of Frank Michelman’s theory of social justice’ in H Botha, A van der Walt & J van der Walt (eds) \textit{Rights and democracy in a transformative constitution} (2004) 163 207.
It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. ... Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.25

The assessment of the reasonableness of government programmes is influenced by two further factors derived from sections 26(2) and 27(2). The first is the concept of ‘progressive realisation’ which was interpreted as follows in Grootboom:

The term ‘progressive realisation’ shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.26

In this context, the Court also specifically endorsed the views of the UN Committee on Economic, Social and Cultural Rights that any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.27

The second factor (which is linked to the first one) is the availability of resources. In this regard, the Court held that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.28

26 Grootboom (n 2 above) para 45.
27 As above, citing UNCESCR General Comment 3 (n 5 above) para 9. The concept of ‘retrogressive measures’ has not yet received further elaboration from the Constitutional Court. The major interpretative difficulty is whether retrogression should be assessed in relation to particular individuals or groups, or in respect of the entire population.
28 Grootboom (n 2 above) para 46.
This last consequence flows from the Court’s understanding that the positive duties imposed by the socio-economic rights provisions are limited by the second subsections of both FC sections 26 and 27.29

The model of reasonableness review is confined to the positive duties imposed by socio-economic rights. In respect of the negative duties, the Court has adopted a different model of review. Thus where legislation or conduct deprives people of the existing access which they enjoy to the relevant rights, this deprivation constitutes a breach of the first subsection of FC sections 26 and 27. This breach is only justifiable in terms of the stringent requirements of the general limitations clause (FC section 36). Thus the limitation must be in terms of a law of general application and is tested against the purpose and proportionality requirements inherent in section 36. Negative violations are thus subject to a much more stringent form of scrutiny than positive violations of socio-economic rights. The principled sustainability of the distinction between negative rights and positive rights is somewhat dubious. And it can likewise lead to a number of practical difficulties in characterising various kinds of claims.30 However, as the focus of the essay is on cases involving positive claims by people to the various services and resources referred to in sections 26 and 27, this issue will not be pursued further.

3 An alternative model of review based on ‘minimum core’ obligations

The Court’s jurisprudence, particularly its rejection of minimum core obligations, has attracted quite a bit of criticism.31 Several authors have questioned whether the Court’s jurisprudence sufficiently defines the content of the relevant socio-economic rights, and protects those who are experiencing a severe deprivation of minimum

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29 Soobramoney (n 1 above) paras 11 and 28; Grootboom (n 2 above) para 38; Treatment Action Campaign (n 3 above) para 39.

30 For a critique of the negative and positive duties distinction in the context of socio-economic rights, see M Craven ‘Assessment of the progress on adjudication of economic, social and cultural rights’ in J Squires, M Langford & B Thiele (eds) The road to a remedy: Current issues in the litigation of economic, social and cultural rights (2005) 27 34-36.

essential levels of basic socio-economic goods and services.\footnote{See, eg, M Pieterse ‘Coming to terms with judicial enforcement of socio-economic rights’ (2004) 20 South African Journal on Human Rights 383 410–411.} Other authors have pointed out that the failure to provide for people’s urgent socio-economic need imperils their health, lives and future socio-economic well-being, and represents a failure to respect their inherent human dignity.\footnote{For an argument that human dignity requires taking account of the relative urgency of the needs of different individuals and groups and a corresponding urgent response, see Liebenberg (n 25 above) 15-18 and 22-23.}

The major theoretical rival to the reasonableness model of review adopted by the courts is a model which incorporates the notion of minimum core obligations. David Bilchitz, a leading proponent of this view, argues that the minimum core obligation protects people’s urgent threshold interests in survival ‘as the inability to survive wipes out all possibility for realising the sources of value in the life of a being.’\footnote{Bilchitz Poverty and fundamental rights (n 31 above) 187.} On this conception, the minimum core places an obligation on the state to ensure that individuals ‘are not exposed to the general conditions that threaten their survival’.\footnote{Bilchitz Poverty and fundamental rights (n 31 above) 188.} Individuals also have a more maximal interest ‘in the general conditions that are necessary for the fulfilment of a wide range of purposes’.\footnote{As above.} This more maximal interest would require a standard of socio-economic provisioning which allows them to flourish and achieve their goals. However, the meeting of minimum core obligations should enjoy prioritised consideration in social policy making and in the judicial enforcement of these rights due to the urgency of the interests they protect. In other words, without the meeting of minimum essential needs to survival, the obligation to progressively achieve the full realisation of the rights to a satisfactory standard of adequacy becomes meaningless. The implications for adjudication are that a court must require particularly weighty reasons by way of justification from the state for a failure to fulfil core obligations.\footnote{See Bilchitz’s endorsement of the notion of ‘weighted priority’ as opposed to ‘lexical priority’ in relation to assessing compliance with minimum core obligations: Bilchitz Poverty and fundamental rights (n 31 above) 208-213.}

A number of academic commentators have contested the view that a model of review incorporating the notion of minimum core obligations is better suited to the judicial review of positive socio-economic rights claims.\footnote{Sachs (n 25 above); M Wesson ‘Grootboom and beyond: Reassessing the socio-economic rights jurisprudence of the South African Constitutional Court’ (2004) 20 South African Journal on Human Rights 284; B Porter ‘The crisis of ESC Rights and strategies for addressing it’ in Squires, Langford & Thiele (n 30 above) 43 48–55; MS Kende ‘The South African Constitutional Court’s embrace of socio-economic rights: A comparative perspective’ (2003) 6 Chapman Law Review 137.} In many respects, these interventions
represent elaborations of the concerns articulated by the Court in relation to the minimum core concept.39

The first set of objections relates broadly to the impact of the minimum core concept on democratic institutional functioning and culture in South Africa. The concept of minimum core obligations ostensibly compels the courts to transgress the boundaries of their institutional legitimacy and competence, thus undermining the separation of powers doctrine. The process of defining and enforcing minimum core obligations results in the courts usurping government’s policy-making functions. One response to this line of argument is that the notion of bounded ‘separate spheres’ does not accord with the relational, dialogic character of the relationship between the different spheres of government under the South African Constitution.40

Of greater concern to a vision of transformative constitutionalism that promotes institutional and social dialogue in the process of realising socio-economic rights is the argument that the endorsement of minimum core obligations by the judiciary will undermine deliberative democracy. Thus Carol Steinberg argues that the minimum core represents an ‘intrusive rule-based’ approach which is likely to stifle institutional conversation and collaboration between the three branches of government.41 In contrast, she argues,

the abstract and open-ended nature of the reasonableness inquiry should be understood as a ‘democracy-promoting’ form of minimalism in which the court settles the case before it on narrow grounds, avoiding the laying down of clear rules and final resolutions that will inhibit the effective functioning of the other branches of government.42

The kind of case-by-case evolution of standards on socio-economic rights promoted by reasonableness review is more likely to promote ‘the kind of argumentative give-and-take, evolution, learning and compromise’ which will produce wiser and more sustainable decisions on socio-economic rights.43 Her analysis is based on the understanding that there is a legitimate diversity of views regarding the nature and role of socio-economic rights, how different socio-economic needs

39 See n 7 above and accompanying text.
42 Steinberg (n 41 above) 276.
43 Steinberg (n 41 above) 272.
should be prioritised and ranked, and the measures through which these rights should be realised. Given their limited institutional competence, judges may get it wrong in defining the minimum content of the rights.

While an institutional dialogue between the branches of government is to be encouraged, the institutional advantages of the legislature as an institution should not be overstated. However sound the theoretical justifications for preferring legislative measures for giving effect to socio-economic rights, it is premised on a certain understanding of the ideal role and functioning of legislatures which does not reflect the current realities both in South Africa and other jurisdictions. Most modern legislatures are subject to the constraints of time and resource pressures, are at a relative disadvantage to the executive in relation to technical expertise and resources, and are, finally subject to capture by powerful business and interest groups in society. This results in imperfect legislation which may disregard or neglect the rights of particular groups, most frequently those who are politically, economically and socially marginalised. In addition, many of the decisions made in relation to socio-economic rights are policy and administrative decisions which do not enjoy the same democratic legitimacy as legislative decisions. In making policy decisions relating to the implementation of socio-economic rights, the purposes and values which these rights seek to protect and to promote may be overlooked or discounted.

44 Steinberg (n 41 above) 275. For a similar argument in favour of the kind of weak-form judicial review of socio-economic rights represented by the Court’s reasonableness model, see R Dixon ‘Creating dialogue about socio-economic rights: Strong-form versus weak-form judicial review revisited’ (2007) 5 International Journal of Constitutional Law 391-402. Dixon highlights the various theoretical groundings which have been provided for the minimum core concept in constitutional scholarship, and the different practical consequences which these approaches have for the interpretation of socio-economic rights claims (400-401). On ‘weak form’ judicial review, see generally: M Tushnet ‘New forms of judicial review and the persistence of rights- and democracy-based worries’ (2003) 38 Wake Forest Law Review 813.

45 Steinberg (n 41 above) 268.

46 For an excellent discussion of the institutional advantages and disadvantages of the courts and legislatures in relation to socio-economic rights, see Pieterse (n 32 above) 389-399.

47 For a discussion of the ‘blind spots’ and ‘burdens of inertia’ in legislative processes, see Dixon (n 44 above) 402-406.

48 See, eg, the High Court’s analysis of the administrative nature of the decisions of the City of Johannesburg in relation to the introduction of pre-payment meters and the limitation of the free basic water supply to the residents of the Phiri Township to 25 litres per person per day (or 6 kilolitres per household per month) in Mazibuko & Others v The City of Johannesburg & Others [2008] ZAGPHC 128 (30 April 2008) paras 63, 70, 104, 163 - 164, 181.
A related concern from the perspective of establishing a culture of participatory democracy in South Africa is that if the courts were to provide complete normative definition of the minimum core of socio-economic rights it would foreclose legitimate dialogue within the broader civil society about the conceptual and value-based underpinnings of socio-economic rights and the best modes of realising them in the variety of contexts in which they arise.50 The minimum core concept seeks to establish a normative essence for socio-economic rights which is beyond contestation and debate.51 This may tend to promote closure in broader deliberative and discursive processes relating to the implementation of socio-economic rights.

The second critique of the minimum core concept concerns its linkage to the standard of survival needs. Contrary to what is claimed, the survival standard does not guarantee clarity and certainty in defining priority claims in the context of socio-economic rights adjudication.52 Given the fact that threats to life can be relatively short-term, medium-term or long-term, the survival-standard does not provide clear guidance as to which socio-economic interventions should be adopted or enjoy prioritised consideration in policy-making and adjudication. Health education measures concerning the dangers of smoking and the need for safe sex may not seem to be an urgent priority, but may nevertheless have a significant impact in terms of saving lives in the longer term. It is not, as some proponents of the minimum core would seem to claim, easy to disentangle short, medium and long-term needs.

A third critique of grounding the minimum core concept in biological survival is that the standard is unduly reductionist in the context of a transformative constitution which seeks to promote the achievement of social justice. Depending on the context, it results in either over- or under-inclusivity in the specification of core obligations. On the one hand, people can survive on very little which

49 Danie Brand has argued that there is an overemphasis in the Court’s socio-economic rights jurisprudence on the institutional relations between the different branches of government, and insufficient attention to promoting broader discursive engagement in defining and implementing socio-economic rights. See D Brand ‘The “politics of need interpretation” and the adjudication of socio-economic rights claims in South Africa’ in AJ van der Walt (ed) Theories of social and economic justice (2005) 17.

50 Dixon (n 44 above) 416-417. Dixon points out that while it may be possible ‘as an abstract and theoretical matter’ to formulate the morally and constitutionally correct grounding for these core obligations, it is also likely and reasonable that South Africans, with a variety of different life experiences and perspectives, will differ on these questions.’


52 See Bilchitz’s critique of the lack of clear standards and benchmarks provided by reasonableness review: Poverty and fundamental rights (n 31 above) 161-162.
can support a kind of minimalism in socio-economic provisioning that is inappropriate in contexts where the state has the resources to provide more than the bare necessities for survival. For example, Amartya Sen points out that people ‘have been known to survive with incredibly little nutrition’ and that so-called “minimum nutrition requirements” have an inherent arbitrariness that goes well beyond variations between groups and regions.53

On the other hand, in the context of health care rights, a survival-based standard supports the provision of expensive, tertiary health care interventions. Such interventions will, under conditions of scarcity, occur at the expense of less expensive preventative and primary health care interventions.54

Young argues that ‘the emphasis on minimalism behind the core becomes suggestive, when attached to life, of a more scientific, needs-based assessment of the commodities necessary for biological survival.’55 This approach does not reflect the socially and communally determined processes and values through which social needs are identified and validated.56 As Justice O’Regan observes in *S v Makwanyane*:

> It is not life as mere organic matter that the Constitution cherishes but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. ... The right to life is more than existence, it is a right to be treated as a human being with dignity.57

In finding that the City of Johannesburg’s decision to limit the residents of Phiri Township’s free basic water supply to 25 litres of water per person per day (or 6 kilolitres per household per month) infringed FC section 27, Tsoka J held that this supply was inadequate to secure the right to health and the right to lead a dignified life.58 The court held that it was uncontested that the City of Johannesburg had the resources to provide a free basic water supply of 50 litres per

53 A Sen *Poverty and Famines* (1981) 12 as discussed by Young (n 51 above) 131.
54 The ethical and practical problems associated with the survival-based standard for determining minimum core obligations in the context of health rights, impels Bilchitz to develop the notion of ‘the pragmatic minimum threshold’ in relation to health rights. The pragmatic minimum core represents a conglomeration of the principled survival-based standard together with a range of other theoretical and practical considerations such as the resources and capacity available in a particular society. Bilchitz *Poverty and fundamental rights* (n 31 above) 220-225.
55 Young (n 51 above) 131.
56 Nancy Fraser describes the way in which social needs are politically and discursively determined. N Fraser *Unruly practices: Power, discourse and gender in contemporary social theory* (1989) 144-160, 163-183. For discussions of Fraser’s theoretical perspectives on the struggle over needs in contemporary capitalist societies, see Brand (n 49 above) 17; Liebenberg (n 8 above) 5.
57 *Makwanyane* (n 8 above) paras 326-327.
58 *Mazibuko* (n 48 above) paras 124 and 179.
person per day which the World Health Organisation and an international expert recommended as being required for a healthy and dignified lifestyle.\textsuperscript{59} This judgment suggests that the application of a heightened review standard should not only be confined to one core value or interest such as biological survival. Moreover, in respect of other socio-economic rights, such as the right to education, the focus on mere biological survival simply does not accord with the broader purposes and interests which such a right protects. In striving to establish clear, fixed and judicially manageable standards for the adjudication of socio-economic rights claims, the minimum core approach is in danger of encouraging minimalism in social provisioning when the context may in fact render such minimalism unnecessary and inappropriate.\textsuperscript{60}

A fourth difficulty with the minimum core concept is related to the Constitutional Court’s observations concerning the difficulty of defining minimum core obligations given the diversity of needs and circumstances in which different groups find themselves.\textsuperscript{61} The underlying concern is that the minimum core approach is unduly rigid, and its application may operate to exclude or marginalise the needs of various groups that do not fit the background norms informing the definition of core obligations. Bilchitz responds to this concern by arguing that the minimum core should aim to define a general standard informed by people’s urgent survival needs. This standard, for example, still allows for a measure of latitude and flexibility regarding what precisely is needed to meet people’s needs in different contexts.\textsuperscript{62} However, he argues that the minimum core does require ‘a rigid stance in one respect: it requires us to recognise that it is simply unacceptable for human beings to have to live without sufficient resources to be free from threats to their survival.’\textsuperscript{63} He thus argues for a form of heightened scrutiny to be applied to claims

\textsuperscript{59} Mazibuko (n 48 above) paras 179 – 181.
\textsuperscript{60} See the similar concern expressed by Porter (n 38 above) 55.
\textsuperscript{61} Grootboom (n 2 above) paras 32–33.
\textsuperscript{62} Bilchitz Poverty and fundamental rights (n 31 above) 198. See also his response (200-202) to Danie Brand’s argument that the minimum core may be suitable for the international enforcement of socio-economic rights, but is not useful for the domestic context where we must be ‘far more specific, concrete, context-sensitive and flexible in our thinking about basic standards, core entitlements and minimum obligations.’ D Brand ‘The minimum content of the right to food in context: A response to Rolf Künnemann’ in D Brand & S Russell (eds) Exploring the core content of socio-economic rights: South African and international perspectives (2002) 99 101.
\textsuperscript{63} Bilchitz Poverty and fundamental rights (n 31 above) 208.
which implicate minimum core obligations. This two-tier approach requires distinguishing between core needs (those that implicate survival) and non-core needs (those that relate to fulfilling a range of purposes and flourishing as a human being) in relation to both socio-economic policy-making and in adjudicating cases.

However, the difficulty, as I have previously suggested, is that social needs are in fact interconnected and that no clear-cut distinction exists between core and non-core needs. Nancy Fraser describes needs these claims as ‘nested’ in that they are ‘connected to one another in ramified chains of “in order to” relations’. It is generally possible to reach consensus on what Fraser terms, ‘thin needs’ such as the need of people in non-tropical climates for shelter in order to survive. However, as soon as one inquires into the detail of what precisely is required in order to provide shelter which can be sustained and fulfil its purposes, one encounters a diversity of views. In relation to housing, for example, the issue of the location of housing close to employment and livelihood opportunities is generally not defined as part of the minimum core obligations of the state. However, the location of housing is usually a crucial factor in people’s abilities to pursue sustainable livelihood strategies which secure the socio-economic well-being of themselves and their dependants.

64 Bilchitz Poverty and fundamental rights (n 31 above) 210-213 characterises this heightened scrutiny as a form of ‘weighted priority’. It refers ‘to a reason which has great importance to us and which can only be overridden by considerations that are of equivalent weight’ (211). Bilchitz identifies four such weighty reasons which can justify overriding core obligations: (1) scarcity of resources; (2) situations where the minimal interests of some individuals can only be met by dedicating a disproportionately vast amount of resources to them; (3) the need to preserve some space for individuals to pursue interests beyond the minimal interest in survival, such as ‘opportunities to realise their goals and achieve positive experiences’; and (4) situations when the realisation of the minimum core of a particular right would prevent the realisation of the minimum core of other rights and liberties (212).

65 Fraser ‘Unruly Practices’ (n 56 above) 163.

66 For example, Bilchitz argues that the general standard that constitutes the minimum core obligation of the state in relation to housing would be that everyone should have ‘access to accommodation that involves, at least, protection from the elements in sanitary conditions with access to basic services, such as toilets and running water.’ Bilchitz Poverty and fundamental rights (n 31 above) 198.

67 See City of Johannesburg v Rand Properties (Pty) Ltd & Others 2007 6 SA 417 (SCA). The Supreme Court of Appeal ordered the City of Johannesburg to provide temporary accommodation to occupiers who face eviction in terms of the National Building Regulations and Building Standards Act 103 of 1977. The Court ordered that this ‘temporary accommodation is to consist of at least the following elements: a place where they may live secure against eviction; a structure that is waterproof and secure against the elements; and with access to basic sanitation, water and refuse services.’ In order to implement the foregoing, the City was ordered to determine the location of the alternative accommodation ‘after consultation’ if requested by any occupier (para 78, Orders (c), 2.1 and 2.3). This represents an implicit acknowledgment of the significance of the location of
Taking location into account in fulfilling core obligations will usually require the state to purchase more expensive land closer to employment opportunities thus increasing substantially the resource implications of providing basic shelter. However, this detracts from the clarity of definition and relatively low-cost implications which is an argument in favour of the minimum core as a manageable judicial standard for the enforcement of basic subsistence needs. On the other hand, excluding location from the ambit of core obligations in the sphere of housing will have the effect of deepening the marginalisation of those for whom proximity to employment opportunities is crucial to the sustainability of their livelihood strategies and long term development.68

While Bilchitz’s approach does permit a diversity of specification by defining the minimum core as a general standard, the problem lies precisely in this attempt to ground core/priority obligations in a single metric. This approach does not reflect the fact that people may have other important needs which do not meet the threshold of survival, but which warrant prior consideration in a constitutional order founded on the values of human dignity, equality and freedom.69 For example, the provision of child care facilities may not be crucial to survival, but, given the gendered burden of care70 and the conditions of socio-economic deprivation in which many women live, the provision of such facilities is crucial to their ability to participate in

67 accommodation to the fundamental interests of occupiers. In its judgment on appeal, the Constitutional Court focused on the obligation of ‘meaningful engagement’ between the parties in relation to the consequences of a threatened eviction. See Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v The City of Johannesburg and Others 2008 3 SA 208 (CC) paras 9–36. The UN Committee on Economic, Social and Cultural Rights defines the ‘location’ of housing to be one of the elements which must be taken into account in assessing the ‘adequacy’ of housing in terms of article 11 of the International Covenant on Economic, Social and Cultural Rights. Thus adequate housing ‘must be in a location which allows access to employment opportunities, health care services, schools, child-care centres and other social facilities. ... Similarly housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.’ ‘General Comment 4: The right to adequate housing (art.11(1) of the Covenant)’ UN doc E/1992/23 (1991) para 8(f).

68 The Indian Supreme Court held in Olga Tellis v Bombay Municipal Corp (1985) 3 SCC 545 that the right to a livelihood was implicated in the eviction of pavement dwellers in the city.

69 See, eg, Rosalind Dixon’s argument that it is equally plausible to base a notion of minimum core obligations on the rights and values of human dignity and equality Dixon (n 44 above) 399-401. For an argument that a heightened review standard should be applied to basic need claims informed by a dignity-based standard, see Liebenberg (n 25 above).70

70 See President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC), 1997 6 BCLR 708 (CC) para 37.
development programmes, employment and society more generally.\(^{71}\) By excluding such facilities from the ambit of ‘heightened priority’ obligations, the gendered character of social provisioning is rendered invisible. The exclusion of such gender-specific priorities simultaneously reinforces the marginalisation of both women’s needs and, more generally, the needs of those men and women who undertake the burden of reproductive work in our society. Similarly the provision of various forms of specially adapted housing and social services to people with disabilities may not be necessary for their survival, but is nonetheless crucial for their ability to participate as equals in society.\(^{72}\) The case for judicial intervention becomes even more compelling if the context reveals that the state (or a private institution) has sufficient resources to provide such facilities.

Finally, it has been argued that a two-tiered approach\(^{73}\) which requires prioritisation of core needs is also likely to be counterproductive in a developmental state. Murray Wesson argues that it will encourage the diversion of state resources to temporary, emergency-type measures from long-term, and often more efficient, investments.\(^{74}\) Because the state is faced with ‘a spectrum of needs’,\(^{75}\) Wesson contends that a more nuanced approach is advisable: Such an approach does not prioritise one set of needs to the absolute exclusion of others, and allows for a balance between short-term and long-term aims.\(^{76}\) That said, such balancing risks downplaying the undisputed importance of ensuring that immediate socio-economic needs are met in favour of economic initiatives which promise an improvement in overall well-being in the medium- to longer term. As the Court noted in *Grootboom*, a general statistical improvement in access to socio-economic rights may reflect an insufficient commitment to the Final Constitution’s demand that everyone is treated with care and concern.\(^{77}\) Moreover, empirical

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\(^{71}\) See B Goldblatt ‘Citizenship and the right to child care’ in A Gouws (ed) *Un(thinking citizenship: Feminist debates in contemporary South Africa* (2005) 117. Goldblatt argues that childcare rights can be derived from the right of everyone to social security (sec 27(1)(c)), the right of children to social services (sec 28(1)(c)), and the right to fair labour practices (sec 23(1)).


\(^{73}\) Bilchitz *Poverty and fundamental rights* (n 31 above) 202 argues that the ‘two-tier structure’ that he proposes ‘has the benefit of offering a clear, structured way in which to approach the application of socio-economic rights to particular situations.’

\(^{74}\) Wesson (n 38 above) 304.

\(^{75}\) Wesson (n 38 above) 303.

\(^{76}\) Wesson (n 38 above) 304. See also the similar argument by Dixon (n 44 above) 411.

\(^{77}\) *Grootboom* (n 2 above) para 44.
evidence suggests that the direct provision of social assistance to individuals promotes social and economic development.\(^{78}\)

4 Re-evaluating reasonableness review

On the other hand, ‘reasonableness review’ has been criticised for amounting to little more than an administrative law model that does not engage in a sufficiently substantive analysis of the content of socio-economic rights and the obligations they impose.\(^{79}\) The vagueness and openness of the reasonableness inquiry allows courts to avoid giving clear normative content to socio-economic rights.\(^{80}\) Minimum core arguments are, most often, a direct outgrowth of this critique of reasonableness review.\(^{81}\)

For other scholars, this ‘openness’ represents the major advantage of reasonableness review. For such openness or flexibility enables courts to attain a skilful balance between ‘displacing democratic judgments about how to set priorities’ and abdicating any meaningful role in the judicial enforcement of socio-economic rights.\(^{82}\) Reasonableness review allows the courts to set general norms while simultaneously placing the burden of justification on government to explain its priority-setting.\(^{83}\)

In many respects, reasonableness review provides the courts with a flexible and context-sensitive basis for evaluating socio-economic rights claims. It allows government the space to design and formulate appropriate policies to meet its socio-economic rights obligations. At the same time, it subjects government’s choices to the requirements


\(^{79}\) D Brand ‘The proceduralisation of South African socio-economic rights jurisprudence, or “what are socio-economic rights for?”’ in Botha, van der Walt & van der Walt (n 24 above) 33.


\(^{81}\) Bilchitz ‘Towards a reasonable approach’ (n 31 above) 9-10.


\(^{83}\) As above.
of reasonableness, inclusiveness and particularly the threshold requirement that all programmes must provide short-term measures of relief for those whose circumstances are urgent and intolerable.\textsuperscript{84} Reasonableness review enables courts to adjust the stringency of its review standard informed by factors such as the position of the claimant group in society, the nature of the resource or service claimed,\textsuperscript{85} and the impact of the denial of access to the service or resource in question on the claimant group.\textsuperscript{86} The Court’s jurisprudence suggests that the government’s justifications will be subject to more stringent scrutiny when a disadvantaged sector of society is deprived of access to essential services and resources. In this regard, the Court has acknowledged the poor as a vulnerable group in society, whose needs require special attention.\textsuperscript{87}

Thus the reasonableness inquiry takes into account a number of considerations relevant to the claimant group, the nature of the service or resource in question as well as the historical, economic and social context\textsuperscript{88} in which the claim arises. In this sense, ‘reasonableness review’ avoids closure and creates the on-going possibility of challenging various forms of socio-economic deprivations in the different contexts in which they arise. Such review could facilitate the participation and the dialogical interaction between the state and civil society in the defining of and realisation of socio-economic rights. The Treatment Action Campaign (TAC) has been able to use reasonableness review to win a major victory in the provision of appropriate medical treatment to reduce the risk of the transmission of HIV from mother to child.\textsuperscript{89} The TAC and other civil society organisations have been able to use this victory and the criteria for a reasonable programme established in \textit{Grootboom} as part

\textsuperscript{84} Steinberg (n 41 above) 277 argues that ‘the intense scrutiny’ of government conduct combined with the heavy weighting of the values of human dignity and equality in the proportionality assessment, gives the reasonableness inquiry in socio-economic rights cases a discrete character.

\textsuperscript{85} In \textit{Soobramoney} (n 1 above), a more tertiary and expensive form of medical treatment was claimed and the Court applied a deferential standard of review based on rationality. In contrast, in \textit{Grootboom} (n 2 above), \textit{Treatment Action Campaign} (n 3 above) and \textit{Khosa} (n 4 above) the review standard was stricter and involved a more searching scrutiny of government’s justifications for denying the applicants access to a basic level of service provision.

\textsuperscript{86} In \textit{Grootboom}, \textit{Treatment Action Campaign} and \textit{Khosa}, the Court emphasised the severe impact on the claimants of the deprivation in question. See, for example, the historical context and current socio-economic circumstances of the claimants sketched by the Court in its judgments at \textit{Grootboom} (n 2 above) paras 2-11; \textit{Treatment Action Campaign} (n 3 above) 78-79; \textit{Khosa} (n 4 above) paras 71, 76-77, 80-81.

\textsuperscript{87} \textit{Grootboom} (n 2 above) para 36; \textit{Treatment Action Campaign} (n 3 above) para 79.

\textsuperscript{88} \textit{Grootboom} (n 2 above) paras 43-44 and 92.

of broad-based strategy for achieving a general anti-retroviral roll-out programme.90

However, a significant disadvantage of reasonableness review is that it does not incorporate the traditional two stage approach to constitutional analysis.91 Put differently, it does not begin with an initial principled focus on the content and scope of the right and situation of the claimants, and thereafter a consideration of possible justifications for the infringement.92 As a result, the Court engages only very superficially with the content and underlying purposes and values of the relevant rights.

5 Towards substantive reasonableness

The Court is clearly committed to the model of reasonableness review. However, it has not excluded a role for the notion of minimum core obligations as a factor in its evaluation of the reasonableness of government measures.93

This part considers how reasonableness review can be strengthened so as to ensure that courts engage adequately with the content of the rights and their underlying values. Such an approach would preserve the openness and context-sensitivity of reasonableness review that facilitates greater participation and deliberation in interpreting the normative commitments underlying socio-economic rights. At the same time, such an approach can assist in ensuring that a heightened standard of review is applied in cases involving basic needs without encountering the disadvantages associated with the survival-based standard of minimum core obligations.94

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92 See also Pieterse (n 32 above) 406–407.

93 See n 6 above and accompanying text. In Mazibuko (n 48 above) Tsoka J interprets the Constitutional Court judgments in Grootboom (n 2 above) and Treatment Action Campaign (n 3 above) not as an outright rejection of the minimum core concept as part of our law (para 131).

94 See the discussion in part 4 above.
In *Grootboom*, the Court held that the comprehensive, co-ordinated programme which the state is obliged to adopt to give effect to socio-economic rights ‘must be capable of facilitating the realisation of the right.’ However, until some understanding is developed (even if it is provisional) of the content of the right, the assessment of whether the measures adopted by the state are reasonably capable of facilitating its realisation takes place in a normative vacuum. Reasonableness review should thus be developed in a way which incorporates a principled and substantive interpretation of the content of socio-economic rights. Such an interpretation should seek to elucidate the purposes and interests which these rights protect and should promote ‘the values that underlie an open and democratic society based on human dignity, equality and freedom’ as required by FC section 39(1)(a).

As I observed above, the Court has not spent much interpretive energy in developing the substantive content of the various socio-economic rights in FC sections 26 and 27. *Grootboom* offered a promising start. The Court held that ‘access to adequate housing’ implies a recognition ‘that housing entails more than bricks and mortar’:

> It requires available land, appropriate services such as the provision of water and the removal of sewerage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met; there must be land, there must be services, there must be a dwelling.

However, in arriving at this definition the Court proffers little engagement with the very purposes that the right to housing is meant to protect. The Court’s main engagement with the constitutional values, particularly human dignity, is in the context of justifying the element of the reasonableness test which requires that short-term measures of relief must be provided for those in desperate need. These values do not play any significant role in developing the substantive content of the rights protected in FC sections 26 and 27.

In *Treatment Action Campaign*, the Court provides even less insight into the scope and content of the right of access to health care services. The Court’s primary aim is to demonstrate that government’s inflexible stance regarding the confining of Nevirapine to the nine research sites could not be justified in the light of the policy, capacity and resource arguments raised by the state itself. The Court does not explain why the provision of essential drugs and

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95 *Grootboom* (n 2 above) para 41
96 *Grootboom* (n 2 above) para 35.
97 *Grootboom* (n 2 above) para 44.
98 *Treatment Action Campaign* (n 3 above).
attendant services to reduce the risk of HIV-transmission should form an integral part of health care services in the South African context.\(^9\)

For example, access by women to Nevirapine in the public health sector to reduce the risk of mother-to-child transmission of HIV could be regarded as an integral component of the right to reproductive health care. Such treatment advances the constitutional values of human dignity and equality — particularly in the context of the gendered burden of child care. In the South African context, the burden of caring for an HIV-positive baby will fall disproportionately on poor, black women.

Similarly in *Khosa*, while the Court emphasises the significance of the values of human dignity and equality in evaluating the reasonableness of the exclusion of permanent residents from the impugned social assistance legislation, it does not engage with the content or scope of the social security and assistance rights in FC section 27(1)(c).\(^{10}\) Until some understanding is developed (even if it is provisional) of the content of the right, it is impossible to assess whether the measures adopted by the state are reasonably capable of facilitating its realisation.\(^{101}\)

Neither does the Court engage in any detail with how the rights have been interpreted in relevant international human rights law or in other jurisdictions as required in section 39(1)(b) and (c) of the Constitution. There is an increasing volume of international and comparative jurisprudence that the courts can consider in developing the interpretation of socio-economic rights. For example, the European Committee on Social Rights, which supervises the obligations of state parties to the European Social Charter,\(^{102}\) has

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\(^{9}\) It is noteworthy in this regard that the UN Committee on Economic, Social and Cultural Rights regards the provision of ‘essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs’ as part of the core obligations imposed by the right to the highest attainable standard of health in article 12 of the ICESCR. General Comment 14 (n 5 above) para 43(d). As the Court noted in *Treatment Action Campaign* (n 3 above), Nevirapine was recommended ‘without qualification’ for the purpose of the reduction of mother-to-child transmission of HIV (para 60). The Committee also regards the taking of measures ‘to prevent, treat and control epidemic and endemic diseases’ to be an obligation of ‘comparable priority’ (para 44(c)). On the right to health in international law, see generally BCA Toebes *The right to health as a human rights in international law* (1999).

\(^{10}\) The Court deals briefly with the ambit of the right of access to social security in terms of section 27(1)(c) in *Khosa* (n 4 above) at paras 46-47.

\(^{101}\) As noted by the Court in *Grootboom* (n 2 above) para 41, the programme which the state is obliged to adopt to give effect to socio-economic rights ‘must be capable of facilitating the realisation of the right.’ On this point, see K McLean ‘Housing’ in Woolman et al (n 92 above) Chapter 55. No reference to McLean at note 92.

developed a sophisticated understanding of the housing rights in the Charter. Thus in the complaint of *European Roma Rights Centre v Greece*, the Committee held:

The right to housing permits the exercise of many other rights — both civil and political as well as economic, social and cultural. It is also of central importance to the family. The Committee recalls its previous case law to the effect that in order to satisfy Article 16 states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity). The Committee has stated that adequate housing refers not only to a dwelling which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence. Furthermore the obligation to promote and provide housing extends to security from unlawful eviction.\(^\text{103}\)

The purpose of considering international and comparative law sources is not so that they can be slavishly followed, but rather because they broaden the range of options available to courts in developing the interpretation of socio-economic rights. They also ensure that the Court is aware of applicable international law standards, and the practices of other open and democratic societies. As Kent Roach observes:\(^\text{104}\)

> A globalized world is one where people, including judges, engage in multiple and ongoing conversations that cross borders. It is hopefully a world characterized by a sense of openness, modesty and willingness to learn from others.

Ultimately, the South African courts remain under a duty to consider which interpretations best advance the values and transformative commitments of the Constitution in the current political, economic and social context of South Africa. However, a reflective consideration of the interpretation of socio-economic rights in other international and comparative jurisdictions should generate new options and possibilities in considering our own jurisprudence. This openness to on-going self-examination and renewal is essential if socio-economic rights are to fulfil their transformative potential under the Constitution.

Reasonableness review should thus include a more principled and systematic interpretation of the content of the various socio-

\(^{103}\) *European Roma Rights Center v Greece* Complaint No. 15/2003 para 24. See also *European Roma Rights Centre v Italy* Complaint No. 27/2004; *European Roma Rights Centre v Bulgaria* Complaint No. 31/2005.

economic rights, the values at stake in particular cases and the impact of the denial of access to these rights on the complainant group. A consideration of impact would require close attention to the historical, social, economic and political context in which groups experience a denial of access to socio-economic rights. The courts should first engage with the content of the rights and the context and implications of the alleged violation, and avoid moving too quickly to a consideration of the state’s justificatory arguments. This approach will help guard against reasonableness degenerating into an unprincipled and unduly deferential standard of review.

A further dimension of reasonableness review which requires development is the standard of justification which should be applied in various types of socio-economic rights cases. One of the advantages of the minimum core approach is that it imposes a high burden of justification in contexts where people are deprived of the basic necessities of life. This helps promote social and economic policies which are orientated toward ensuring that people’s basic needs are met. When people’s basic needs go unmet, they live in conditions which are inconsistent with human dignity and freedom, and are unable to participate as equals in society. Thus in Grootboom, the Court observed:

The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, equality and freedom.

This advantage of the minimum core approach can be incorporated within the framework of reasonableness review by placing a heavy burden of justification on the state in circumstances where a person or group lacks access to a basic socio-economic service or resource.

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105 The Constitution prescribes that one of the basic values and principles governing public administration in South Africa is that ‘[p]eople’s needs must be responded to, and the public must be encouraged to participate in policy-making.’ (FC sec 195(1)(e)).

106 Grootboom (n 2 above) para 44. See also Khosa (n 4 above) para 52. In Khosa, Mokgoro J further noted that ‘decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.’ Khosa (n 4 above) para 74 (footnotes omitted).
corresponding to the rights in FC sections 26 and 27.107 The Court itself has acknowledged that there ‘may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.’108

In determining what constitutes a basic social need or the necessities of life, the courts need not be guided by a single overarching standard such as biological survival. Instead, it is of critical importance that they engage in a context-sensitive assessment of the impact of the deprivation on the particular group. In assessing the severity of the impact, the courts should consider the implications of the lack of access to the resource or service in question for other intersecting rights and values such as the rights to life, freedom and security of the person, equality and human dignity.109 Courts should also be alert to the ways in which the denial of access to the particular right creates or reinforces patterns of inequality and marginalisation in our society.110 A failure to ensure such basic social provisioning should only be justifiable when resources are demonstrably inadequate,111 or other compelling justifications exist. The latter may include, for example, competing urgent priorities which are justifiable in an open and democratic society based on human dignity, equality and freedom.112

107 In Rail Commuters (n 11 above) para 88 the Constitutional Court held that the assessment of reasonableness should include, amongst others factors, ‘the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer.’ This was in the context of the duty of public companies in charge of rail transport to take reasonable measures to ensure the safety and security of commuters. These positive obligations were derived from reading the South African Transport Services Act 9 of 1989 in the light of the Constitution, particularly sections 10 (human dignity), 11 (right to life) and 12 (the right to freedom and security of the person). This illustrates how these rights, traditionally regarded as falling within the civil and political rights camp, also impose positive duties on the state and that the courts are prepared to adopt a similar standard of reasonableness for assessing their compliance with these duties.

108 Grootboom (n 2 above) para 33; Treatment Action Campaign (n 3 above) para 34. In Khosa (n 4 above) Mokgoro J was at pains to emphasise the implications of socio-economic deprivation for other rights and values in the Bill of Rights. See, eg, paras 40–45 and 49.

109 On the interrelationship between socio-economic rights, and the right and value of equality, see Liebenberg & Goldblatt (n 72 above).

110 The UNCESCR has held that: ‘In order for a state party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’ General Comment 3 (n 5 above) para 10.

111 See, for example, David Bilchitz’s suggestions regarding possible grounds of justification for the non-fulfilment of minimum core obligations. Bilchitz Poverty and fundamental rights (n 31 above) 212-213.
The seriousness of the impact of the deprivation in question may warrant a strict proportionality requirement approximating the section 36 test. Proportionality should, in the context of positive socio-economic rights claims, also require the state to consider lesser forms of provisioning where it is not possible to meet everyone’s basic needs within current resource constraints. 113 A strict standard of scrutiny was illustrated in the Khosa judgment where the fact that a vulnerable group of complainants (non-nationals) was denied access to a social grant with the effect that they were forced into relations of dependence on their community triggered ‘a hard look’ review of the state’s policy and budgetary justifications. 114

It is currently unclear whether the Court will confine its scrutiny to the resources allocated in the budget to particular programmes or Departments or whether it will be prepared to examine the resources available to the state as a whole. Both a textual and purposive reading of sections 26(2) and 27(2) suggests that a broad concept of the state’s ‘available resources’ should be adopted. Allowing the state to rely simply on its own budgetary allocations would defeat the purpose of socio-economic rights by allowing the state to determine the extent of its own obligations. Thus courts should examine the resources available in the national budget as a whole as opposed to focusing exclusively on existing allocations. 115 To enable the courts to conduct this assessment, it is imperative that the state be required to place the necessary budgetary and policy information before the court in support of its justificatory arguments.

This approach to the review of positive socio-economic rights claims is not premised on a dichotomous two-tier distinction between core and non-core interests. Compliance with socio-economic rights obligations is assessed in terms of the single evaluative criterion of reasonableness. However, reasonableness review must incorporate substantive factors such as the interpretation of the relevant socio-

113 On the need to ensure that reasonableness review imposes a strong burden of justification on the state and incorporates a proportionality analysis in cases where litigants seek access to basic needs, see Liebenberg (n 25 above) 21-29; and (n 8 above) 31-33. The UNCESCR has emphasised that, even in times of severe resource constraints, states are obliged to put in place ‘relatively low-cost programmes’ to protect vulnerable members of society. General Comment 3 (n 5 above) para 12.

114 Khosa (n 4 above) paras 53-67.

115 For an argument that litigants have generally been too timid in urging judicial review of government’s resource allocation priorities, see K Lehmann ‘In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core’ (2006) 22 American University International Law Review 163. For arguments in favour of a broad interpretation of the state’s ‘available resources’ to incorporate the national budget as a whole, see D Moellendorf ‘Reasoning about resources: Soobramoney and the future of socio-economic rights claims’ (1998) 14 South African Journal on Human Rights 327; Bilchitz Poverty and Fundamental Rights (n 31 above) 227-230.
economic right, and a detailed, contextual assessment of the impact of the denial of the right on the complainant group. This interpretation and assessment should entail a consideration of both relevant international and comparative law, as well as the implications of the denial of access to basic socio-economic needs for the enjoyment of other intersecting rights and constitutional values. In cases where individuals or groups lack access to a resource or service which has a severe impact on them, a higher standard of justification should be imposed upon the state. Where the service in question is of a more tertiary nature, and the evidence suggests that ordering its provision will prejudice other basic service and redistributive programmes, a greater margin of discretion can be afforded to the state in its priority setting. However, such relaxation does not absolve the courts from their duty to undertake a serious assessment of whether available resources do not in fact warrant the provision of the more extensive socio-economic resource or service. It should be borne in mind that the purpose of the rights in FC sections 26 and 27 is to ensure the full realisation of the relevant rights. Although the state is afforded a reasonable measure of latitude to achieve this ‘progressively’, it cannot defer its obligation to ensure the full realisation of the rights when the requisite resources exist.

6 Conclusion

The approach developed above is intended to facilitate a relational and dialogic approach to the interpretation of socio-economic rights whilst preserving the features of the minimum core approach that requires heightened scrutiny of acts and omissions which result in a denial of basic needs. As such, it resonates with an approach to rights-based transformation in South Africa which values participatory democracy and public deliberation. Chief Justice Pius Langa reminds us of the tradition of critical scholarship in South Africa which emphasises the ‘permanent ideal’ of transformation embraced by our Constitution:

On that view, transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of

116 See Soobramoney (n 1 above).
being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.118

The approach I have advocated has the further advantage of narrowing the distinction between the way in which the courts review the positive and negative duties imposed by socio-economic rights. This distinction is based on the false premise that the current patterns of those who have and of those who lack access to resources and services are perpetuated by the state through existing rules of public or private law.

Law and legal processes alone cannot bridge the chasm between the realities of poverty and inequality that pervade our society and the constitutional ideal of a new society founded on human dignity, equality and freedom. However, when cases concerning socio-economic rights do come before the courts, it is important that the jurisprudence applied to these claims facilitates the transformation of unjust social and economic relations entrenched by current laws. A more robust model of reasonableness review which engages seriously with the purposes and values underlying socio-economic rights — and the devastating impact of poverty on any individual’s life chances — will help these rights fulfill their transformative potential.

118 Langa (n 8 above) 354.