

THE NEED FOR A CAPABILITIES-BASED STANDARD OF REVIEW FOR THE ADJUDICATION OF STATE RESOURCE ALLOCATION DECISIONS

Shanelle van der Berg

Doctoral candidate, Member of the Socio-economic Rights and Administrative Justice Research Group, Stellenbosch University*

1 Introduction

Poverty and inequality negate the capabilities of millions of people to live meaningful lives.¹ Recent statistics show that approximately 23 million South Africans are poor.² For many, the transformative ethos of the Constitution thus exists only on paper. Karl Klare’s description of transformative constitutionalism is by now familiar:

“By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”³

Courts fulfil a significant function in a concerted effort to effect societal transformation by interpreting and enforcing constitutional rights. Of course, courts can by no means achieve this project in isolation. It is primarily the task of government to implement laws and policies aimed at far-reaching transformation. However, transformation must occur through on-going participatory processes that enable the public and civil society organisations to contribute to the formulation of

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¹ A Sen *Development as Freedom* (1999) 74.

² Stats SA *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2011* (2014) 12.

³ KE Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 150 (original emphasis).

government's transformative agenda.⁴ Courts constitute one amongst many platforms where deliberation and participation can occur. Furthermore, courts can ensure that laws, policies and administrative action are constitutionally compliant. By engaging in substantive reasoning and requiring government to justify its actions, courts can support the transition from a culture of authority to a culture of justification, in terms of which all exercises of public power must be justified.⁵

The fulfilment of socio-economic rights constitutes a critical prerequisite for the transformation of South African society and the unlocking of the potential of each of its citizens.⁶ Socio-economic justice is thus central to a project of transformative constitutionalism. The realisation of socio-economic rights including, *inter alia*, the rights to education;⁷ access to adequate housing;⁸ health care, sufficient food and water, and to social security,⁹ is necessary to address the structural socio-economic disadvantage caused by apartheid era laws and policies. In addition, it is essential to realise socio-economic rights in order to facilitate the enjoyment of all other constitutional rights.¹⁰ Without the basic socio-economic means to live an autonomous and dignified life, meaningful participation in social, economic and political life is not possible.

Resource allocation lies at the heart of the realisation of socio-economic rights. However, resources are finite. The judicial enforcement of socio-economic rights will accordingly often demand the evaluation of government expenditure decisions. Such expenditure decisions require an inherently prioritising approach.¹¹ Courts should therefore be capable of assessing government priorities in the light of the socio-economic rights enshrined in the Constitution. An appropriate review paradigm and evaluative criteria can aid courts in doing so, and thereby fortify the ability of adjudication to contribute to the realisation of socio-economic rights by guiding

⁴ P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 354.

⁵ E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32; M Pieterse "What do we Mean when we Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155 156, 161, 165.

⁶ Preamble of the Constitution of the Republic of South Africa, 1996 ("Constitution").

⁷ S 29.

⁸ S 26.

⁹ S 27.

¹⁰ Including "first generation" civil and political rights.

¹¹ G van Bueren "Alleviating Poverty through the Constitutional Court" (1999) 15 *SAJHR* 52 61; C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206.

government policy and facilitating democratic dialogue.¹² This paper posits that the capabilities approach, as developed by Amartya Sen and Martha Nussbaum, constitutes a suitable review paradigm for the adjudication of State resource allocation decisions impacting on socio-economic rights.

In this paper the need for developing a capabilities-based standard of review for the adjudication of resource allocation decisions that impact on socio-economic rights is elucidated. Furthermore, this paper tentatively investigates whether the model of reasonableness review adopted by the Constitutional Court for the adjudication of qualified socio-economic rights is susceptible to incorporating such a standard of review, whereby the importance of the capabilities at stake triggers a robust proportionality enquiry.

2 Why capabilities?

2.1 Capabilities, socio-economic rights and transformative constitutionalism

Amartya Sen conceptualises capabilities as the substantive freedom to choose the lives we have reason to value.¹³ Sen furthermore incorporates the concept of “functionings” into his approach; conceived as “the various things a person may value doing or being”.¹⁴ “Functionings” represent a supple concept, which can include basic states of being (such as being adequately nourished) as well as more complex states of being (such as being able to participate effectively in community life). This conceptualisation of functionings complements the constitutional concept of progressive realisation in the context of the primary socio-economic rights provisions in the Constitution.¹⁵ Resource allocation decisions could thereby be assessed with increasing levels of scrutiny in order to determine whether government has progressively enabled more complex levels of functioning.

¹² M Pieterse “Health Care Rights, Resources and Rationing” (2007) 127 *SALJ* 514 514.

¹³ A Sen *Development as Freedom* (1999) 74.

¹⁴ 75.

¹⁵ Ss 26(2) and 27(2) of the Constitution state that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the rights of access to adequate housing, health care, sufficient food and water and social security.

Capabilities constitute the substantive freedom to choose “alternative functioning combinations”.¹⁶ A person for whom more functioning combinations are possible therefore possesses a greater “capability set” than a person who cannot achieve a functioning of being well-nourished, let alone a functioning combination of good health and education. Functionings thus represent actual achievements or what a person can actually do, whereas capability sets represent the substantive freedom to choose different functioning combinations.¹⁷ Capabilities therefore constitute the real *opportunities* that people have to realise various lifestyles, rather than the choices they actually make.

The capabilities approach as developed by Sen and Martha Nussbaum thus resonates strongly with the socio-economic rights enshrined in the Constitution, and with a project of transformative constitutionalism, generally. Just as the freedom to choose meaningful lives cannot exist without the essential capabilities that render meaningful choices possible, the freedom to fully participate in social, political and economic life can only be exercised when at least basic material needs are met. The socio-economic rights enshrined in the Constitution can thus be conceptualised as being informed by the underlying capabilities they represent – capabilities worthy of legal and political recognition, protection and enforcement.

2.2 Poverty as a deprivation of basic capabilities

Sen views poverty as a “deprivation of basic capabilities”.¹⁸ Where elementary capabilities such as those related to health care and education are lacking, mortality, undernourishment and widespread illiteracy may result.¹⁹ It follows that where material socio-economic needs are left unfulfilled, more complex functionings²⁰ such as social and political participation cannot be realised. This approach (as opposed to one that focuses on low levels of income) recognises the intrinsic significance of

¹⁶ A Sen *Development as Freedom* (1999) 75.

¹⁷ 75.

¹⁸ 20; for a discussion of why poverty should be viewed as capability deprivation rather than in terms of low income, see further 87-110.

¹⁹ A Sen *Development as Freedom* (1999) 20.

²⁰ A Sen *Development as Freedom* (1999) 75 describes the concept of “functionings” as “the various things a person may value doing or being”. “Functioning outcomes” are the alternative functionings and combinations of functionings that people achieve given their capability sets.

socio-economic deprivations while simultaneously acknowledging influences other than income on poverty.²¹ Although connections can exist between income levels and capabilities,²² Sen argues that income should be viewed as merely *instrumental* to the attainment of greater capability sets and functionings. A focus on the deprivation of capabilities and the removal of “unfreedoms”²³ in the struggle against poverty takes account of the personal characteristics and circumstances that can impede the *conversion* of income into capabilities.²⁴ Moreover, it recognises that true freedom encompasses significantly more than merely high levels of income²⁵ while real poverty can be more intense than income data indicates.²⁶

2.3 Capabilities and State resource allocation

Room is thereby left for recognition of the relationships between structural and systemic disadvantage and socio-economic deprivation.²⁷ Where government may seek to justify a particular allocation of resources to economic growth that will aid heightened income levels in the long term, such justification cannot be accepted at face value. Instead, resource allocation should be reviewed in light of other factors that result in capability deprivation. This view of poverty also accords with the philosophy underlying the inclusion of justiciable socio-economic rights in the Constitution. As Froneman notes, true freedom remains unattainable where the material means to enjoy such freedom are absent.²⁸ Courts should therefore take care to always place the vital interests that socio-economic rights represent – and the gravity of a deprivation of basic capabilities – at the forefront of any evaluation of State resource allocation decisions. This conceptualisation could justify a State resource allocation decision aimed at the immediate alleviation of a deprivation of

²¹ 87-88.

²² In that income can influence what people can choose, be or do (A Sen *Development as Freedom* (1999) 72) and capability enhancement through, for example, the provision of education and health care can increase the income levels of the recipient (19, 90).

²³ A Sen *Development as Freedom* (1999) 3, 15-17.

²⁴ A Sen *The Idea of Justice* (2009) 254-257.

²⁵ A Sen *Development as Freedom* (1999) 14.

²⁶ A Sen *The Idea of Justice* (2009) 256.

²⁷ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 25-29.

²⁸ J Froneman “Enforcing Socio-Economic Rights Under a Transformative Constitution: The Role of the Courts” (2007) 8 *ESR Review* 20 21.

basic capabilities over a competing resource allocation decision aimed at promoting more complex functionings on a longer term basis.²⁹

Nevertheless, resource allocation cannot solely be directed at realising basic capabilities and elementary functionings. As discussed below, Sen relies on the prioritisation and valuation of capabilities through public, reasoned discussion. Nussbaum, on the other hand, has identified a list of central capabilities that she regards as deserving of priority.³⁰ She argues that a life of human dignity requires as a minimum the provision of “ample” threshold levels for all the capabilities included in her list.³¹ While Sen’s approach leaves room for prioritisation without raising the same problems related to the “minimum core” as Nussbaum’s list does,³² Nussbaum’s classification merits mention here since it gives rise to similar issues of over-concentrated resource allocation. If all or most resources are allocated for the realisation of the thresholds that Nussbaum identifies, such resources may be correspondingly rendered unavailable for the development of capabilities beyond these minimum thresholds. Bilchitz, who likewise devises a two-fold threshold for

²⁹ As the Constitutional Court stated in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44:

“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 the most urgent and whose ability to enjoy all rights therefore is 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.”

³⁰ MC Nussbaum *Creating Capabilities* (2011) 33-34.

³¹ 32.

³² The minimum core entails that a State is obliged to provide certain minimum threshold socio-economic goods required to meet essential needs and is elucidated in UN Committee on Economic, Social and Cultural Rights *General Comment No 3: The nature of State parties’ obligations (art 2(1) of the Covenant)* UN Doc E/C 14/12/90 para 10. It is submitted that a minimum core approach is more in line with the capabilities approach than a utilitarian approach in that it allows for the provision of minimal goods necessary to achieve that which one values being or doing. The Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33 and *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 34 did not exclude the role of the minimum core approach in aiding in a determination of reasonableness. For a discussion of the problems related to the minimum core, especially those relating to the indeterminacy of the core and the potential of curtailing broader social dialogue regarding the content of socio-economic rights, see *inter alia* S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 163-173 and KG Young “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” (2008) 33 *Yale J Int’l L* 113.

fundamental rights, astutely warns against diverting all resources to the fulfilment of basic needs:

“Where the realization of such [minimal] interests entails that most of society’s resources are devoted to this purpose, the realization of such needs can lose its point for everyone. It is necessary for there to be resources available to retain a space beyond the basic in order for individuals to have the opportunity to realize their ends.”³³

As will be elaborated upon below, Sen’s approach to valuation can be developed so as to cater for resource allocation that adequately addresses the promotion of capabilities and functionings beyond the minimum.

2.4 Weighting capabilities through a participatory process of public reasoning

Sen recognises that substantial debate can exist as to the importance and prioritisation of diverse capabilities. Capability sets can compete with each other, with functioning outcomes³⁴ and with other considerations such as the implementation of fair procedures, for prominence – and for resource allocation. However, Sen does not perceive the possible diversity of valuation as a serious theoretical challenge. Instead, he relies on evaluative reasoning to overcome – at least partially – heterogeneity in valuation.³⁵

³³ D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 210. See also D Bilchitz “Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*” (2010) 127 SALJ 591 601-604 where Bilchitz discusses the difficulty of striking a balance between short-term relief from poverty and long-term fulfilment of adequate access to socio-economic goods and over-all development. Bilchitz proposes that short-term, interim services may be necessary to enable recipients to enjoy the benefits of long-term programmes. However, he points out that development will not be possible without tolerating a certain level of inequality of resources until the ultimate goal of progressive realisation (equal, adequate access to socio-economic goods) is reached:

“It is crucial to understand that the Constitution sets a long-term goal of ‘equality of sufficiency’: it mandates that this be achieved through a process of progressive realisation which requires some level of inequality in the short-term.” (D Bilchitz “Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*” (2010) 127 SALJ 591 603).

³⁴ I.e. the alternative functionings and combinations of functionings that people achieve given their capability sets.

³⁵ A Sen *Development as Freedom* (1999) 77.

Sen postulates that once a focal space for valuation is specified, judgments regarding prioritisation can result immediately. He elaborates thus:

“When some functionings are selected as significant, such a focal space is specified, and the relation of dominance itself leads to a ‘partial ordering’ over the alternative states of affairs.”³⁶

For purposes of the adjudication of State resource allocation decisions in socio-economic rights cases, the focal space has already been specified by the Constitution.³⁷ The socio-economic rights³⁸ and the right to just administrative action³⁹ enshrined in the Bill of Rights can provide the normative paradigm in which the further prioritisation and valuation of specific State resource allocation decisions can take place. This “partial ordering” may justify the prioritisation of spending on socio-economic programmes over expenditure on luxury items or even areas such as national defence, where expenditure is disproportionate to the defence needs of the country. However, where more difficult questions of competing resource allocation decisions arise, there will be a need to refine the “partial ordering” by assigning weights to different allocations, or to factors that influence the evaluation of such allocations. For example, further refining of the ordering may be required in complex disputes where competing interests (for example short term *versus* long term spending on socio-economic rights or expenditure on education *versus* health) vie for resource allocation.

Sen proposes that weights can be selected through a process of reasoned evaluation. For purposes of social evaluation, of which it is submitted adjudication should be regarded a part of, Sen argues that a “reasoned ‘consensus’ on weights, or at least on a range of weights”⁴⁰ must be arrived at. Importantly, this can only be achieved where public discussion and democratic understanding and acceptance are allowed to take place.⁴¹ In order to make a sound assessment, valuation of diverse capabilities is necessary, and these judgments and valuations are carried out through a participatory process of reasoning. Importantly, to make evaluative judgments

³⁶ 78.

³⁷ A resort to Nussbaum’s list of central capabilities (CM Nussbaum *Creating Capabilities* (2011) 33-34) is therefore unnecessary.

³⁸ Particularly for purposes of this paper, ss 26, 27 and also 29 of the Constitution.

³⁹ S 33 of the Constitution.

⁴⁰ A Sen *Development as Freedom* (1999) 78.

⁴¹ 78-79.

susceptible to subsequent public scrutiny, decision-makers must engage in explicit and substantive reasoning. Evaluative judgments must accordingly be explicit about the priorities chosen – important choices about the prioritisation of capabilities should not be buried in implicit reasoning.⁴²

For complex resource allocation decisions to be effectively adjudicated, the permissible range of weights must thus be narrowed:

“The partial ordering will get systematically extended as the range is made more and more narrow. Somewhere in the process of narrowing the range – possibly well before the weights are unique – the partial ordering will become complete.”⁴³

Courts can therefore systematically assign weights to different factors, such as the content and normative purposes of socio-economic rights and the right to just administrative action contrasted with the justification proffered by the State for a particular resource allocation decision. Where the purpose of the right is particularly important, and the deprivation resulting from an inadequate allocation of resources is grave, the range should be substantially narrowed and the intensity of the scrutiny applied to the State’s justificatory arguments should be sharpened. Furthermore, where the State’s justification seems disproportionate or insufficient *vis-à-vis* the normative content of the rights and gravity of any violation thereof, the partial ordering should become complete. This will be the case where, for example, a social group lacks access to adequate levels of water necessary to lead dignified lives. Where the crucial normative value of dignity is seriously imperilled, and the factual context of the litigants’ lived reality illustrates the urgency with which the infringement should be treated, the State will have to proffer very strong justifications for not allocating additional resources so as to make adequate levels of water available. The range of weights will thus be narrowed to accord dominant weight to the litigants’ dignity and basic capability deprivation, whereas much less weight will be afforded to justificatory arguments by the State.

⁴² 75.

⁴³ 78.

3 The need for development of a capabilities-based standard of review

3.1 An insufficient focus on the content of rights

A capabilities approach to the adjudication of State resource allocation decisions requires that a two-step process be followed, according to which the normative content of the socio-economic rights at stake influences the subsequent weighting process. Where the interpretative and justificatory stages of this process are collapsed, an inappropriate intensity of review may be applied and disproportionate weight may be assigned to the State's justificatory arguments based on resource constraints. If the right in question lacks content, no measure exists whereby the reasonableness of the relevant resource allocation decision can be assessed. The reasonableness of the resource allocation decision can thus be determined by establishing whether the allocation is proportionate to the capability needs underlying the right. If the resource allocation is not capable of doing so, it is unreasonable and the socio-economic right at issue is infringed.

Furthermore, by failing to engage in normative interpretation a court eschews the explicitness and substantive reasoning demanded by a transformative application of the capabilities approach in a culture of justification. The Constitutional Court's approach to the adjudication of socio-economic rights claims has largely been characterised by an overwhelming focus on the reasonableness of the State's actions. This has led to a failure to adequately develop flexible interpretations of the normative content and purposes of the rights at stake. As pointed out by Liebenberg:

“The reasonableness model of review offers no clear distinction between determining the scope of the right, whether it has been breached, and justifications for possible infringements. This allows the courts to elide an initial principled engagement with the purpose and underlying values of the relevant rights and the impact of the deprivations on the claimant groups. The focus of the inquiry... is on the justifiability of the State's policy choices without a sustained analysis of the substantive values and purposes which the relevant rights protect under South Africa's transformative constitution.”⁴⁴

⁴⁴ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 175-176, see further 173-179.

The “substantive purposes” that socio-economic rights seek to protect are the capabilities necessary to achieve the functioning outcome of living an autonomous and dignified life in a position of substantive equality with others. In this sense, the fundamental values of freedom, dignity and equality can identify which more basic capabilities must be realised for the functioning outcome to be achieved. The social, historical and factual context of the case at hand will further identify what capabilities form part of the content of the relevant socio-economic right. For example, the purpose of the right of access to adequate housing can be said to be the achievement of the functioning outcome described above. However, in order to live an autonomous, dignified life in a position of substantive equality with others, many more basic capabilities must first be realised. Depending on the position of the claimant group in the historical and social context of South Africa, considered along with the factual context or “lived reality” of the case at hand, these capabilities may include the capabilities to enjoy adequate shelter, access to infrastructure and access to basic services. These capabilities are in turn necessary to realise more complex capabilities such as being able to enjoy a sufficient state of nourishment or an adequate state of health. Insufficient attention has therefore been devoted to the recognition and expansion of the vital capabilities that socio-economic rights represent and should foster.

3 1 1 *Soobramoney*

*Soobramoney v Minister of Health (KwaZulu-Natal)*⁴⁵ (“*Soobramoney*”) serves as an exemplar of the pitfalls that can occur when a court fails to engage with the normative substance of the right at stake. This case centred on the allocation of scarce medical resources. The appellant was denied dialysis treatment for chronic renal failure owing to the scarcity of resources in the provincial Health Department and, by extension, the public hospital to which he turned.⁴⁶ Although the thin

⁴⁵ 1998 1 SA 765 (CC).

⁴⁶ Due to the scarcity of resources experienced by the public hospital, only patients with curable, acute renal failure gain automatic access to dialysis treatment. Patients with irreversible, chronic failure must meet certain criteria to access dialysis treatment. In particular, such patients must be eligible for a kidney transplant. Owing to the appellant’s heart disease, he was ineligible for a transplant and thus likewise ineligible for dialysis treatment in the public sector. He had sought treatment from the private sector but eventually

standard of rationality review adopted by the Constitutional Court can be ascribed to a number of factors, the Court's failure to engage in explicit reasoning or to elaborate on the normative purposes of the socio-economic right of access to health care⁴⁷ indubitably contributed thereto. By first grappling with the content of the right of access to adequate health care, a more intense level of scrutiny might have been appropriately applied to the State's resource allocation decisions. An application of a more robust intensity of review might have yielded the same outcome, yet the importance of the capabilities at stake would have necessitated closer scrutiny of the resource allocation decisions at issue. Such an approach would have been more in harmony with adjudication under a transformative constitution that recognises and seeks to advance basic capabilities through their incorporation as socio-economic rights.

Furthermore, the Court failed to embrace a commitment to explicit, substantive reasoning as is required in a culture of justification⁴⁸ when it wholly subsumed the content of the right of access to health care services as set out in section 27(1) of the Constitution into its assessment of the State's obligations set out in section 27(2). Section 27(1) was thereby consigned a "definitional function only",⁴⁹ in that it merely served to categorise those claims which are in fact protected and which therefore trigger the imposition of the State obligations set out in the second subsection. Instead of clearly articulating what it considered as worthy of protection under section 27 (for example, curative or preventative treatment) and then distinguishing the appellant's claim from the capabilities encompassed by the right of access to health care, the Court resorted to implicit reasoning that obfuscates the normative content of the right at issue. Indeed, "the only substantive references to the ends that government is required to pursue [in terms of section 27(1)] are oblique and

depleted his finances. *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) paras 3-5.

⁴⁷ S 27(1)(a) of the Constitution.

⁴⁸ E Mureinik "A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32; M Pieterse "What do we Mean when we Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155 156, 161, 165.

⁴⁹ C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 239.

indirect”⁵⁰ – thus highlighting the deficiency of the Court’s approach when assessed in terms of the requirements of a capabilities-based model of review.

3 1 2 *Grootboom and TAC*

In *Government of the Republic of South Africa v Grootboom*⁵¹ (“*Grootboom*”) the Constitutional Court fared somewhat better in recognising that the right of access to adequate housing⁵² “entails more than bricks and mortar”.⁵³ However, after enumerating a brief list of what the right additionally encompasses,⁵⁴ the Court did little further by way of engaging with the normative purposes and substance of the right with reference to the capabilities that it signifies.⁵⁵ Where the Court did invoke the fundamental values of freedom, dignity and equality that underlie and inform socio-economic rights and the vital capabilities that these rights represent, it did so during its assessment of the reasonableness of State measures.⁵⁶ In contrast to the Court’s approach, normative considerations should, as a first step, extend the partial ordering of values set by the right at stake. Normative considerations should thus be used to identify which capabilities are implicated, and determine what weights should be assigned to these capabilities. Once the importance and weights of the relevant capabilities are determined, proportionate weights can then be ascribed to resource

⁵⁰ D Brand “The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or ‘What are Socio-Economic Rights For?’” in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 45.

⁵¹ 2001 1 SA 46 (CC).

⁵² S 26 of the Constitution.

⁵³ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35.

⁵⁴ Para 35:

“It requires available land, appropriate services such as the provision of water and the removal of sewage 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. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26.”

⁵⁵ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 177; D Brand “The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or ‘What are Socio-Economic Rights For?’” in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 45-46.

⁵⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 177.

availability or constraints and other competing factors at the second stage of the rights analysis. Significantly, the Court did demand a means-end analysis in that the measures adopted by the State “must be capable of facilitating the realisation of the right”.⁵⁷ However, in order to determine whether the means can achieve the constitutionally mandated ends, those ends must be substantively interpreted.⁵⁸ The Court failed to do so. Instead it again focused almost exclusively on the obligations imposed upon the State in the second subsection of the right.⁵⁹

Similarly, in *Minister of Health v Treatment Action Campaign (No 2)*⁶⁰ (“TAC”), the Constitutional Court did not *explicitly* engage with the normative content of the right of access to health care services. Although there is implicit recognition that the administration of Nevirapine to mothers and their children forms part of this right, the normative justification for this conclusion was left unexplored. The ability of such treatment to achieve the overarching functioning outcome of living an autonomous, dignified life in a position of substantive quality with others was therefore left unexamined.⁶¹ Consequently, the weighting exercise inherent in a capabilities approach to the adjudication of State resource allocation decisions was once again forced to take place in the absence of normative guidelines.

3 1 3 Mazibuko

The Constitutional Court came close to a complete abdication of its interpretative duties in *Mazibuko v City of Johannesburg*⁶² (“Mazibuko”). *In casu*, the Constitutional Court reverted to a standard of rationality review in holding that the provision of 25 litres of water per person per day to poor residents of Phiri, Johannesburg (the

⁵⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.

⁵⁸ D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 143.

⁵⁹ D Brand “The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or ‘What are Socio-Economic Rights For?’” in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 33 45-46; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 177.

⁶⁰ 2002 5 SA 721 (CC).

⁶¹ D Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 *SAJHR* 1 8-10; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 178.

⁶² 2010 4 SA 1 (CC).

“applicants”) was reasonable and did not breach section 27(1)(b)⁶³ of the Constitution.

Whereas the Supreme Court of Appeal had previously held that the right of access to “sufficient” water⁶⁴ could not constitute “anything less than a right of access to that quantity of water that is required for *dignified* human existence”,⁶⁵ the Constitutional Court declined to examine the substantive implications of the value of dignity for the normative content of the right. Instead, the Court rejected the applicant’s argument that the right should be quantified in order to effectively assess the reasonableness of the State’s measures to progressively realise the right within available resources. The Court *a priori* assumed that the provision of “sufficient” water, on the applicants’ account, was not “immediately” possible.⁶⁶ Yet the Court failed to acknowledge that, at the time of judgment, fifteen years during which the right should have been “progressively” realised had elapsed. The Court also eschewed a substantive conceptualisation of progressive realisation as requiring the State to progressively improve the quality of access to socio-economic rights.⁶⁷ According to the Court’s approach, progressive realisation only requires flexibility in the sense that the State should continually review its policies and adapt them in the light of changing circumstances.⁶⁸ Moreover, without a substantive conceptualisation of what the right ultimately requires, it becomes difficult, if not impossible, to truly assess the

⁶³ S 27(1)(b) states that “[e]veryone has the right to have access to... sufficient food and water”.

⁶⁴ S 27(1) of the Constitution.

⁶⁵ *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA) para 17 (emphasis added).

⁶⁶ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 56-59. In misconstruing the applicants’ argument as one for the “minimum core” approach, the Court accepted, without much evidence, the impossibility of even achieving a minimum standard as it previously did in *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC). For criticism of the vague, unsubstantiated statements previously made by the Court in this regard, see D Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 *SAJHR* 1 16-17.

⁶⁷ A capabilities approach supports a substantive conceptualisation of progressive realisation. Capability realisation can lead to the achievement of a spectrum of functioning outcomes. This can range from basic functioning outcomes such being adequately nourished, to more complex functioning outcomes such as being able to participate fully in social, economic and political life.

⁶⁸ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 40, 67.

reasonableness of the State's progress.⁶⁹ The Court misconstrued the applicants' argument as one for the "minimum core" approach, whereby the minimum content of the right is what the State works *from* to progressively realise the right in its entirety. The applicants in fact argued for the quantification of the right in the sense of what the State should be working *towards*. In the latter sense, the reasonableness of the State's conduct could then be evaluated against such constitutional goalpost as opposed to being assessed in a normative void. By failing to earnestly consider this distinction, the Court in effect failed to evaluate the State's evidence with a view towards establishing whether it was in fact reasonably possible to provide "sufficient water" necessary for the leading of dignified lives.⁷⁰

Context – both normative and factual – is a key consideration within a capabilities approach to adjudication.⁷¹ Without taking heed of the normative purpose of the right at issue in the context of the lived reality of those who allege a right-infringement, the capabilities at stake cannot be identified. Where substantive content cannot be ascribed to the relevant right with reference to the capabilities it represents in a given case, an appropriate intensity of scrutiny cannot be determined. The Court was therefore *prima facie* correct when it stated that "[t]he concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable".⁷² Incongruously, by failing to recognise that the normative values of freedom, dignity and equality necessitated a certain quantity of water,⁷³ the Court failed to take seriously the lived reality of the applicants who lacked such quantity of water.⁷⁴ The applicants were therefore deprived of the basic capabilities necessary to choose to lead an autonomous, dignified life in a position of substantive equality with others. "Context"

⁶⁹ The Court adopted an inverse approach to content when it stated:

"By adopting [reasonable measures], the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness." *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 66.

⁷⁰ S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 469 and see for further criticism 466-480.

⁷¹ A Sen *The Idea of Justice* (2009) 377.

⁷² *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 60.

⁷³ The normative context.

⁷⁴ The factual context. See in this regard Applicants' Heads of Argument paras 323-331 in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC).

as it pertains to implicated capabilities and the circumstances of the applicants therefore played little role in the Court’s assessment of the State’s conduct.⁷⁵

Moreover, the Court’s suggestion that “[f]ixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context” cannot be supported. The capabilities approach leaves room for flexibility in defining the content of rights and for the adjudication of State resource allocation decisions.⁷⁶ The content of rights may change in correspondence to changing contexts. Thus, in a certain factual context the normative values of freedom and dignity may identify the capability to realise an adequate state of health as forming part of the content of the right of access to sufficient water. “Sufficient water” would therefore constitute the quantity of water necessary to realise the capability of enjoying an adequate state of health. In a different social and historical context, the value of equality may indicate that the capability to enjoy a greater quantity of water constitutes the content of the same right. Where this capability is not realised, disparities in access to water may exacerbate entrenched class-based patterns of disadvantage. The more complex capability of enjoying the freedom to live life in a position of substantive equality with others will thus be negated. “Sufficient water” in this case would constitute the quantity of water necessary to bring the relevant group’s access to water roughly in line with the access enjoyed by groups who do not suffer from structural patterns of race- or class-based disadvantage. One right can accordingly represent varying capabilities depending on the normative and social, historical and factual context at hand. The Court in *Mazibuko* thus eschewed at least two central tenets of the capabilities approach in that it failed to *explicitly* grapple with the normative and factual *content* of the right at issue. As was the case in *Soobramoney*, these factors contributed to the Court’s application of a thin, highly deferential standard of rationality review. This standard is incommensurate with the importance of basic capability fulfilment for the achievement of the functioning outcome of living a free, dignified life as a substantively equal member of society.

⁷⁵ For further criticism of the Court’s general approach that fails to place sufficient focus on the interests, needs and lived reality of litigants, see D Bilchitz “Placing Basic Needs at the Centre of Socio-Economic Rights Jurisprudence” (2003) 4 *ESR Review* 2. See also S Wilson & J Dugard “Taking Poverty Seriously: The South African Constitutional Court and Socio-economic Rights” (2011) 22 *Stell LR* 664 673-678.

⁷⁶ See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 471.

3 1 4 Blue Moonlight

Even in those judgments where State resource allocation decisions were subjected to a sufficiently robust standard of review given the capabilities at issue, the Court could still do more to *explicitly* grapple with the content of the rights at stake. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*⁷⁷ (“Blue Moonlight”) the Constitutional Court was called upon to decide whether local government (the “City”) was constitutionally obliged to provide temporary, emergency housing to occupiers who were evicted from their homes by private landlords and who would be rendered homeless as a result of such eviction. The Court’s willingness to closely interrogate the State’s insufficient resource allocation could be explained by its *implicit* recognition of the effects of homelessness on the capabilities necessary to live a life characterised by freedom, dignity and equality. However, the Court did not justify its selected standard of scrutiny by way of explicit elaboration of the capabilities that must be realised in order for the overarching functioning outcome to be achieved. Besides some general observations regarding the impact of homelessness on dignity⁷⁸ and a factual survey of the occupiers’ circumstances,⁷⁹ the Court only gave fleeting recognition to the intersection of the normative and factual context of the case at hand.⁸⁰

⁷⁷ 2012 2 SA 104 (CC).

⁷⁸ Para 2.

⁷⁹ Paras 6-7.

⁸⁰ N 88 (emphasis added):

“[In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC)] ... this Court noted that when determining whether an exclusion is reasonable regard must be had to: the purpose of the right in question; the impact of the exclusion on those excluded; the relevance of the ground of exclusion to the purpose of the right in question; and the potential impact the exclusion has on other intersecting rights. From the foregoing, it is evident that the Occupiers are disproportionately impacted by the exclusion. *The effect that this exclusion has on their rights to life and dignity is significant.*”

See also C McConnachie & C McConnachie “Concretising the Right to a Basic Education” (2012) 129 SALJ 554 579 who comment on the relegation of such a vital step of adjudication to a “mere footnote”.

3.2 A rigid distinction between positive and negative duties

The negative nature of the duty imposed on the State may lead a court to apply a more robust standard of scrutiny to the State's actions, regardless of the resource implications that its order may ultimately entail.⁸¹ Ironically, one of the reasons why courts regard themselves as more institutionally competent to adjudicate negative rights and duties is that negative rights are traditionally regarded as entailing less far-reaching resource implications.⁸² As observed by Young, "negative obligations are easier for a court to deal with"⁸³ and the prioritising dimensions of socio-economic rights can purportedly be avoided. However, as Liebenberg persuasively argues, all human rights obligations demand significant positive action and concomitant resource allocation by the State.⁸⁴ As the author points out, the crucial difference in the scope of resource allocation for the realisation of socio-economic rights and traditionally recognised civil and political rights is that the State has already invested vast resources in the infrastructure necessary to realise the latter category of rights.⁸⁵

"The fact that socio-economic rights require a greater commitment to institutional reforms and are thus more resource intensive in many contexts than civil and political rights is due to historical and political choices rather than any intrinsic feature of the rights themselves."⁸⁶

It is consequently unsound to allow a false dichotomy between positive and negative duties to influence the level of scrutiny adopted for the adjudication of State resource allocation decisions. Instead of resorting to typologies that focus on the nature of rights or the duties they give rise to,⁸⁷ it should be borne in mind that "the ideological lens through which a right is viewed determines which kind of duties are

⁸¹ S 36 of the Constitution.

⁸² S Liebenberg "Grootboom and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SAPL* 37 48.

⁸³ KG Young *Constituting Economic and Social Rights* (2012) 177.

⁸⁴ S Liebenberg "Grootboom and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SAPL* 37 49.

⁸⁵ 51.

⁸⁶ 51-52.

⁸⁷ As originally devised by H Shue *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (1980).

in focus”.⁸⁸ Where resource allocation decisions fall to be adjudicated, the vital capabilities at issue should dictate what level of scrutiny is appropriate. Capabilities thus constitute the “ideological lens” through which the State’s obligations should subsequently be assessed.

Identical capabilities may be implicated in a case which can be framed in terms of the positive duties of the State under section 26(2), or its negative duties under section 26(1) or 26(3).⁸⁹ For example, where occupiers are evicted from a privately owned building and no provision for temporary accommodation is made, the capabilities imperilled will include those related to enjoying shelter from the elements, access to infrastructure, proximity to places of work, and access to services such as water, electricity and sanitation. The deprivation of these elementary capabilities may negate the capability to live itself, in other words it could result in absolute capability deprivation. By framing a claim in terms of section 26(1) or 26(3), the duty of the State in this type of situation could be characterised as “negative”. This may lead to the application of the stringent section 36 limitations analysis to determine whether the State has failed in discharging its negative obligation by failing to prevent interference with existing access to the socio-economic right.⁹⁰ This claim could also be framed so as to require the state to adopt “positive” reasonable measures to make provision in its housing policy for temporary accommodation. In the latter case, a limitations analysis will not follow and the State’s omission may be judged against a much lighter level of scrutiny. Dafel states in this regard:

⁸⁸ S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 67.

⁸⁹ S 26 states:

“Housing

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

⁹⁰ The “existing access test” was developed in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34. M Dafel “The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect” (2013) 29 *SAJHR* 591 600 states in this regard:

“[T]he *existing access test* entails that a claimant must institute his socio-economic rights claim as a negative obligation if he already has access to the socio-economic resources and there is a measure or the threat of a measure that seeks to erode the current enjoyment of the resource.” (Original emphasis).

“A claimant that can characterise his case as one where the state has breached the negative obligation will in all likelihood have a stronger case for the vindication of his socio-economic right than a claimant that only invokes the state’s positive obligations to act.”

The fact that a stronger claim may exist where a case is characterised as the breach of a negative obligation – even though the *same capabilities* are implicated regardless of how the claim is framed – proves the falseness of the dichotomy between positive and negative obligations. Moreover, it shows that a continued adherence to this dichotomy can have serious detrimental consequences for critical socio-economic capabilities.

A unified capabilities-based standard of review that can be applied to State resource allocation decisions holds the potential to benefit litigants and prospective litigants, the State, and jurisprudence as a whole. By interpreting the content of rights with reference to the capabilities they aim to foster in a given normative and social, historical and factual context, litigants and those similarly placed can expect courts to focus on their needs. Without focusing on socio-economic capability realisation, the overarching functioning outcome of having the freedom to choose a life lived with dignity in a position of substantive equality with others will never be possible. The formulation of a unified capabilities-based standard of review can also clarify the constitutional obligations of the State, thereby allowing the State to formulate and implement its socio-economic programmes accordingly. Finally, a coherent body of jurisprudence allows for meaningful public scrutiny of the evaluative judgments made by courts. Public scrutiny can in turn lead to the contestation of initial judgments, and the formation of new evaluative judgments in the light of evolving reality.

4 Conceptualising a capabilities-based standard of review

It emerges from the above discussion that there is a need for the development of a capabilities-based standard of review for the adjudication of State resource allocation decisions. However, in devising such standard, it must be acknowledged that the prioritisation of resource allocation for the attainment of a broad spectrum of

capabilities is by no means a simple task. “Difficult decisions”⁹¹ must be made in appropriating the national budget, in dividing revenue among provinces and in allocating limited resources for the administration and implementation of particular policies. Sen acknowledges that a capabilities perspective is “inescapably pluralist” and that the prioritisation of capabilities, functionings and concomitant resource allocation can give rise to lasting debate.⁹² However, as discussed above, Sen postulates that a weighting exercise can successfully occur through a process of “reasoned evaluation”.⁹³

4 1 Reasonableness review and weighting

The assignment of varying weights serves the dual purpose of prescribing the level of intensity of scrutiny applied by the courts as well as indicating whether the resource allocation decision itself bears up to whatever level of scrutiny is appropriate. Moreover, the variability of weights resonates with the open-ended standard of reasonableness review adopted by the Constitutional Court in adjudicating socio-economic rights⁹⁴ and administrative justice⁹⁵ claims.

The model of reasonableness review can be applied in socio-economic rights⁹⁶ and administrative justice⁹⁷ cases. Given that administrative law often serves as a critical conduit for the realisation of socio-economic rights, it is preferable that

⁹¹ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) para 29.

⁹² *A Sen Development as Freedom* (1999) 76-77.

⁹³ 78. Where consensus needs to be reached on the weights assigned to capabilities and other factors, Sen argues that agreement should be reached through a process of public reasoning (79).

⁹⁴ See in particular *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC); *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC); *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

⁹⁵ See in particular *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amicus Curiae)* 2006 2 SA 311 (CC) and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC).

⁹⁶ Ss 26 and 27 require the State “must take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realisation of [the rights enshrined in s 26(1) and 27(1)]” (emphasis added).

⁹⁷ S 33(1) of the Constitution requires administrative action that is “lawful, *reasonable* and procedurally fair” (emphasis added).

reasonableness review develops coherently across both these spheres of law. Quinot and Liebenberg advocate an approach to reasonableness review that utilises the benefits of this standard of review across the fields of socio-economic rights and administrative justice cases while simultaneously developing the substantive content of socio-economic rights.⁹⁸ According to the authors, the normative and factual context of any given case should serve to “narrow the band” of options available to the State or administrator in acting “reasonably”.⁹⁹ Where administrative action impacts on a socio-economic right, the normative content and purposes of the relevant right should thus narrow the range of options available to the administrator – or, in capabilities parlance, narrow the range of permissible weights.¹⁰⁰ Since the “narrowing of the band, and in particular the extent of the narrowing... depends on the substantive implications of the relevant right”¹⁰¹ it follows that “understanding what the substantive implications of the relevant right are under the circumstances, is a first step to assess the reasonableness of the administrator’s substantive choice”.¹⁰² The same reasoning applies to cases where administrative action is not at issue,¹⁰³ in that “[r]easonableness must be assessed in the light of the normative goals that the relevant socio-economic rights seek to advance”.¹⁰⁴

The substantive interpretation of the content and normative goals of the socio-economic right at stake is therefore a crucial first step in the process of valuation. Similarly, the gravity of the impact of the State’s actions or omissions must result in the application of a “stronger” standard of reasonableness review or a narrowing of the range of permissible weights.¹⁰⁵ Referring to the distinction drawn by John Rawls between rationality and reasonableness,¹⁰⁶ Sen acknowledges the variability of levels of scrutiny:

⁹⁸ G Quinot & S Liebenberg “Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa” (2011) 22 *Stell LR* 639 641.

⁹⁹ 647.

¹⁰⁰ 649.

¹⁰¹ 650.

¹⁰² 650.

¹⁰³ For example, where a legislative act is at issue in setting the budget or an executive act is at issue in implementing a socio-economic policy.

¹⁰⁴ 655.

¹⁰⁵ 652.

¹⁰⁶ J Rawls *Justice as Fairness: A Restatement* (2001) 5-8.

“The demands of scrutiny would have to be sharpened and tightened when we move from the idea of rationality to that of reasonableness, if we broadly follow John Rawls in interpreting that distinction.”¹⁰⁷

Resource allocation decisions cannot be accurately weighted and adjudicated if weights have not already been assigned to the purposes and impact of the rights concerned. This initial assignment of weights to the substantive content and implications of the socio-economic rights at issue should serve to establish the level of scrutiny applied to State resource allocation decisions. Where the fundamental values of freedom, dignity and equality are seriously implicated, and the factual context of the litigants shows that even basic capabilities are being threatened or deprived, a strict level of scrutiny should be adopted. Thereafter, it should be determined whether the resource allocation decision in question passes muster when subjected to the selected level of scrutiny. The first weighting step will be particularly important where different socio-economic rights compete for resource allocation or where short term and long term socio-economic needs vie for resource allocation. Thus, for example, where one of the socio-economic needs at issue represents a “fertile capability” that can generate improvements in other socio-economic areas, government can be expected to spend scarce resources on its realisation.¹⁰⁸ For example, education constitutes a fertile capability in that it can foster dignity and enhance one’s ability to participate in the economic, political and social spheres. Education thereby promotes agency for the realisation of further basic capabilities and more complex capability sets.¹⁰⁹ The fertile nature of education as a capability is recognised internationally¹¹⁰ as well as by its formulation as an “unqualified” right in the Constitution.¹¹¹

Resource availability or constraints are thus *concomitant* factors to which weights should be assigned, but cannot be allowed to subsume the assessment of other weight-worthy considerations. Rather, such decisions should be evaluated as part of a second, “justificatory” step once the content of the right has been allowed to refine the partial ranking already established by the inclusion of socio-economic rights in

¹⁰⁷ A Sen *The Idea of Justice* (2009) 196.

¹⁰⁸ MC Nussbaum *Creating Capabilities* (2011) 99.

¹⁰⁹ 98.

¹¹⁰ Art 13(1) of the International Covenant on Economic, Social and Cultural Rights (1966).

¹¹¹ S 29 of the Constitution does not contain the qualifications relating to “available resources” and “progressive realisation” that appear in ss 26 and 27.

the Constitution. To conclude otherwise would be to eschew the valuation process and neglect to prioritise capabilities justly. Where resources are allocated inefficiently or unreasonably,¹¹² these factors should likewise increase the weights assigned to the capabilities represented by socio-economic rights in order to extend the “partial ordering” necessary to effectively adjudicate the State resource allocation decision concerned.

4.2 Proportionality as weighting

Proportionality analysis holds the potential to be developed specifically for the balancing of competing rights, competing capabilities within the same right, or rights *versus* other resource-intensive interests in the context of limited resources:

“Proportionality is a doctrinal tool for the resolution of conflicts between a right and a competing right or interest, at the core of which is the balancing stage which requires the right to be balanced against the competing right or interest.”¹¹³

Proportionality as a standard of review most accurately reflects the weighting exercise required by a capabilities approach to adjudication. Furthermore, a fully developed reasonableness review standard can give expression to *elements* of a *transformative* application of the capabilities approach to adjudication, such as the recognition of the fundamental values that inform capabilities; the acceptance of judicial responsibility to enhance capabilities; participation; and explicit, substantive reasoning. Although not all these elements are apparent from the jurisprudence expounded below, those factors commensurate with a capabilities approach to the adjudication of State resource allocation decisions can be identified and fruitfully developed in future judgments. These diverse review standards can most easily be incorporated into adjudication by applying a flexible model of proportionality review to weight and prioritise competing factors.¹¹⁴

¹¹² G Quinot & S Liebenberg “Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa” (2011) 22 *Stell LR* 639 651-652.

¹¹³ K Möller “Proportionality: Challenging the Critics” (2012) 10 *I Con* 709 710.

¹¹⁴ The mechanics of developing proportionality review specifically for the review of State resource allocation decisions impacting on socio-economic rights is discussed fully in S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions*

Reasonableness review as espoused by the Constitutional Court (albeit not always consistently applied) enables a two-step adjudicatory process to occur. The substantive, normative content of a socio-economic right and its underlying capabilities is thereby able to dictate a priority setting process. Once a partial ordering is achieved, further weight can be assigned to capabilities and other competing factors such as the alleged existence of resource constraints.

4.2.1 Proportionality in administrative law: *Bato Star*

The right to just administrative action in the Constitution¹¹⁵ requires reasonable administrative action. Since socio-economic rights are often realised through the medium of administrative action, it is therefore desirable to develop the model of reasonableness review coherently across the spheres of socio-economic rights and administrative law. Formulations of a reasonableness test in administrative law jurisprudence that is capable of incorporating a capabilities-based standard of review are therefore instructive.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*¹¹⁶ (“*Bato Star*”) the Constitutional Court was called upon to review the allocation of natural resources on the grounds of, *inter alia*, reasonableness. Specifically, a challenge was brought based on the allegedly insufficient allocation of fishing quotas to new entrants in a particular sector of the fishing industry. In reviewing the reasonableness of the allocative decision, O’Regan J located judicial review for reasonableness in section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000,¹¹⁷ as informed by section 33 of the Constitution. Significantly, O’Regan J refused to construe the provision as espousing a highly restrictive, *Wednesbury*

Impacting on Socio-economic Rights (2015 forthcoming) LLD dissertation Stellenbosch University and falls beyond the scope of this paper.

¹¹⁵ S 33 of the Constitution.

¹¹⁶ 2004 4 SA 490 (CC).

¹¹⁷ S 6(2)(h) of PAJA states:

“6(2) A court or tribunal has the power to judicially review an administrative action if –
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.”

formulation of reasonableness.¹¹⁸ Instead, she held that the test was a “simple” one according to which a decision that a reasonable decision-maker could not reach, was susceptible to review.¹¹⁹

Noting that the test for reasonableness is a *contextual* one, O’Regan J went on to list factors that could assist in determining whether a decision was reasonable or not. Relevant factors include “the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected”.¹²⁰ Although purportedly considerations to help determine the actual reasonableness of a decision, these factors can in fact be more appositely applied to determine to what *level* of scrutiny such decision must be subjected.

The last two enumerated factors, namely “the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected”, signal a proportionality analysis that can allow the normative content of the capability at stake to determine the level of scrutiny to which a State resource allocation is subsequently subjected. The importance of the “interest” or capability at play should therefore narrow the range of weights that could potentially be assigned to competing capabilities and other factors, including the cogency of justificatory arguments raised by the State for making a particular resource allocation decision. The separate judgment of Ngcobo J, although assessing the decision on grounds of lawfulness, illustrates how the foundational constitutional values of freedom, dignity and equality should animate scrutiny of legislation or policy. It follows that where a particular State

¹¹⁸ From the well-known English decision of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (CA) 233-234:

“[I]f a decision on a competent matter is so *unreasonable that no reasonable authority could ever have come to it, then the courts can interfere* ... but that would require *overwhelming proof*... [A decision] must be proved to be unreasonable in the sense, not that it is what the court considers unreasonable, but that it is what the court considers is a decision that no reasonable body could have come to, which is a different thing altogether. The court may very well have different views from those of a local authority on matters of high public policy of this kind ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another... provided [that the administrative authority] *act ... within the four corners of their jurisdiction, the court ... cannot interfere.*”

¹¹⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 44.

¹²⁰ Para 45.

resource allocation decision is adjudicated, the values that inform both the capabilities approach and socio-economic and administrative justice rights must be allowed influence the standard of scrutiny applied.

Whereas the last two listed factors may invoke a proportionality analysis, the first two factors may require that due weight be accorded to the decision under review. O'Regan J stated that where a complex decision required an equilibrium to be struck between competing interests or required particular expertise, judicial respect was appropriate. However, these observations did not detract from need to ensure that the government conduct or policy was capable of reasonably resulting in the relevant goal, for example the realisation of a socio-economic capability:

“This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. *A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.*”¹²¹

When conducting a weighting exercise, expertise can therefore be acknowledged but cogent justificatory argument and evidence should always be required from the State. Where polycentricity or the institutional competence of the reviewing court is of real concern in adjudicating a particular State resource allocation, this should be openly acknowledged. However, for the capabilities at stake to remain the focus of the weighting exercise, such concerns should to the greatest extent possible be mitigated, for example through the creation of innovative remedies.¹²²

4 2 2 Allowing the normative context to trigger robust review: Khosa

The foundational constitutional values of freedom, dignity and equality will almost always be implicated where socio-economic rights are concerned.¹²³ These values

¹²¹ Para 48 (emphasis added).

¹²² The question of how to adopt a capabilities approach to remedies is discussed fully in S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-economic Rights* (2015 forthcoming) LLD dissertation Stellenbosch University and falls beyond the scope of this paper.

¹²³ See, for example, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83 and *Khosa v Minister of Social Development; Mahlaule v Minister of Social*

can help identify the important capabilities at stake and trigger a more robust approach to the adjudication of resource allocation or a defence of resource constraints raised by the State. The normative context or values at play should therefore inform a capabilities-based standard of review. Where these values are implicated by a deficient State resource allocation decision, a robust manifestation of reasonableness review – or a proportionality enquiry – will be appropriate.

In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*¹²⁴ (“*Khosa*”) the right to equality¹²⁵ and the right of access to social security¹²⁶ directly intersected. *In casu*, the Court applied a robust proportionality analysis in determining whether financial considerations of limiting social security grants to citizens outweighed the impact of such policy on permanent residents, including the impact on their life and dignity.¹²⁷ Notably, the Court placed the burden of adducing evidence – including evidence related to resource allocation or resource constraints – on the State. The correct placement of the *onus* is especially important where court orders are likely to have budgetary implications.¹²⁸ Having noted that equality is implicit in socio-economic rights in that the latter are conferred upon “everyone”, the Court stated that even in cases where the State can justify not

Development 2004 6 SA 505 (CC) para 40. See also *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21:

“Each time an applicant approaches the courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably implicated. The appellants’ reliance on section 10 as a self-standing right therefore does not add anything to this matter...”

¹²⁴ 2004 6 SA 505 (CC).

¹²⁵ S 9 of the Constitution.

¹²⁶ S 27(1)(c) of the Constitution.

¹²⁷ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 82; S Liebenberg & B Goldblatt “The Interrelationship between Equality and Socio-economic Rights under South Africa’s Transformative Constitution” (2007) 23 *SAJHR* 335 359-360; M Wesson “Equality and Social Rights: An Exploration in Light of the South African Constitution” (2007) *PL* 748 757; C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 88.

¹²⁸ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 19. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 98.

allocating resources to “everyone”, the limiting or allocative criteria must be “consistent with the Bill of Rights as a whole”.¹²⁹

Although it was acknowledged that in the context of limited resources it was necessary to differentiate between classes of persons when making allocative decisions, such classifications – in other words, allocative criteria – had to be reasonable under section 27(2).¹³⁰ The Court therefore clearly linked the requirement of “reasonableness” – as opposed to the lower standard of rationality – to the determination and subsequent evaluation of resource allocation. In addition, the Court held that a “rational connection” must exist between the differentiating law and a legitimate government purpose.¹³¹ While the direct link between reasonableness and the adjudication of resource allocation decisions is appropriate in a culture of justification, the Court’s rationality language obfuscates matters somewhat. It should be interpreted as a minimum threshold for resource allocation (more apposite to the threshold test for equality before the law in terms of section 9(1) of the Constitution than a reasonableness analysis in terms of section 27(2)). Once met, other factors could nevertheless lead to a determination of unreasonableness. The Court clarified its position later on in the judgment when it stated that, even on the assumption that a rational connection did exist in this case, “[s]ection 27(2) of the Constitution sets the standard of reasonableness which is a higher standard than rationality”.¹³²

The Court turned to an analysis of the State’s defence of its exclusionary allocation, which was based on the “impermissibly high financial burden” that allocation would place on the State. It was argued that social grant expenditure had increased significantly and would continue to do so, that provision had to be made for other socio-economic programmes and that the requested relief would result in provincial budgetary shortfalls.¹³³ The Court embarked on a close examination of the State’s submissions,¹³⁴ and concluded that the vague evidence presented was

¹²⁹ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 44.

¹³⁰ Para 53.

¹³¹ Para 53.

¹³² Para 67.

¹³³ Para 60.

¹³⁴ See also S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 159, 193 and S Fredman “Providing Equality: Substantive Equality and the Positive Duty to Provide” (2005) 21 *SAJHR* 163 181.

indicative of speculation on the part of the State.¹³⁵ The Court concluded that “the cost of including permanent residents in the system will be only a small proportion of the total cost”.¹³⁶

In its equality analysis, the Court made the following significant statement which should be regarded as equally relevant to the adjudication of resource allocation decision in socio-economic rights adjudication:

“[D]ecisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.”¹³⁷

Finally, the Court concluded that the financial considerations raised by the State were outweighed by the impact that its current policy had on the life and dignity of permanent residents of South Africa.¹³⁸ The values of freedom, dignity and equality can therefore inform the weighting exercise whereby a particular resource allocation decision is subjected to robust scrutiny as a second step following normative interpretation. Resource allocation should always be judged against the normative values enshrined in the Bill of Rights, as the State evinces its commitment to the transformative ideals set out in the Constitution through its allocative and budgetary choices.

4 2 3 Robust review of negative duties

Proportionality as robust review has not always been applied in a principled manner by the Constitutional Court. In *Grootboom*, the Constitutional Court recognised that section 26 of the Constitution encompasses a negative obligation

¹³⁵ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 62. The State provided a wide range for the possible increase in expenditure that would result from widening the scope of its provision of social security to permanent residents.

¹³⁶ Para 62. The Court calculated that the cost of increasing the benefits to permanent residents would only constitute 2% of the present costs.

¹³⁷ Para 74 (footnotes omitted).

¹³⁸ Para 82. In his dissenting judgment, Ngcobo J regarded the State as justified in its concern that widened provision would impact detrimentally on other socio-economic rights. (Para 127). Moreover, he insisted that unless evidence to the contrary was presented, “courts should be slow to reject reasonable estimates made by policymakers”. (Para 128). Finally, it is noteworthy that he did not consider the fact that the increase in expenditure would not be substantial as a relevant factor. (Para 129).

“placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing”.¹³⁹ In *TAC*, it was stated that section 27 contains a similar negative duty.¹⁴⁰ Whereas the positive obligations incumbent upon the State in terms of sections 26(2) and 27(2) are defined and limited by considerations of reasonableness, progressive realisation and available resources, these qualifications do not pertain to negative obligations.

The widened scope of these negative obligations, as well as a traditional aversion to the enforcement of positive duties, have triggered a notably different mode of review in cases where negative obligations to refrain from impairing access to socio-economic rights are at issue. Instead of the State’s obligations being circumscribed by resource constraints as is the case where positive duties are concerned, a presumptive infringement of a negative right triggers the application of the stringent proportionality analysis required by the section 36 general limitations clause.¹⁴¹

Although the State’s latitude to rely on resource constraints is reduced where negative obligations are adjudicated, judgments in such cases have nevertheless resulted in orders with manifest implications for State resource allocation. For example, in *Jaftha v Schoeman; Van Rooyen v Stoltz*¹⁴² (“*Jaftha*”), the Constitutional Court closely examined certain provisions of the Magistrates’ Courts Act 32 of 1944 that allowed for the sale in execution of people’s homes in order to satisfy even trifling debts. The Court established that this procedure *prima facie* infringed the applicants’ negative right not to be deprived of their existing access to adequate housing.¹⁴³ The Court went on to subject the Act to stringent review under the

¹³⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34.

¹⁴⁰ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 46.

¹⁴¹ S Liebenberg “*Grootboom* and the Seduction of the Negative/Positive Duties Dichotomy” (2011) 26 *SAPL* 37 41. S 36(1) of the Constitution states:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

¹⁴² 2005 2 SA 140 (CC).

¹⁴³ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34.

general limitations clause, which includes a proportionality enquiry.¹⁴⁴ The Court held that the violation of the negative obligation could not be justified under section 36 of the Constitution, and proceeded to issue a remedy of judicial oversight of future sales in execution under the Act.¹⁴⁵ This remedy clearly necessitates additional (time-, human- and ultimately budgetary) resources;¹⁴⁶ yet this result was seemingly not considered in the light of the negative duty at stake.

Where robust reasonableness review amounting to a standard of proportionality review results from the implication of a negative duty, it is unjustified. Instead, the right and underlying capability at issue should determine the intensity with which a proportionality analysis is applied and to which resource-based defences are subjected.

5 Conclusion

This paper has demonstrated that a real need for a capabilities-based standard of review exists where complex, polycentric State resource allocation decisions fall to be adjudicated. An amorphous standard of reasonableness review as hitherto applied in socio-economic rights and administrative justice jurisprudence poses the risk of deteriorating into a thin standard of rationality review despite the implication of important capabilities. Where a court's assessment of the reasonableness of State measures is allowed to subsume the interpretation of the normative content of the rights at stake, the danger arises that capability enhancing resource allocation decisions will not be assured. Instead, a narrow conception of "available resources" can drain socio-economic rights of their remedial potential and thereby eschew a capabilities approach to resource allocation and subsequent adjudication. A capabilities approach to the adjudication of State resource allocation decisions thus requires a two-stage adjudicative process, according to which the normative content of the right at issue is allowed to determine to what level of scrutiny State resource allocation decisions are subjected during the second, justificatory stage of the analysis.

¹⁴⁴ Paras 35-49.

¹⁴⁵ Paras 54-55.

¹⁴⁶ S Liebenberg "*Grootboom* and the Seduction of the Negative/Positive Duties Dichotomy" (2011) 26 *SAPL* 37 51.

However, where diverse rights compete for prominence and resource allocation, or where long-term and short-term capability realisation vies for resources, the weighting exercise required for the ranking of capabilities calls for sophisticated development. Proportionality as standard of review most closely resembles the weighting exercise inherent to the prioritisation of oft-competing capabilities. Significant development towards the recognition of proportionality as an appropriate standard of review where important capabilities are at stake has been made in the field of administrative law. Where capabilities related to socio-economic rights and the right to just administrative action overlap, proportionality review can therefore be fruitfully applied to ensure just State resource allocation decisions. In socio-economic rights jurisprudence, proportionality review has been met with approval by the Constitutional Court where the fundamental value of equality has simultaneously been threatened by a State resource allocation decision. Given that the fundamental values of freedom, dignity and equality will all usually be implicated to some degree where socio-economic rights and the right to just administrative action are concerned, a uniform proportionality standard of review stands to be developed in order to ensure capability realisation.

Where reasonable and proportionate resource allocation decisions are required, courts can help ensure that the State directs its resources at socio-economic capability realisation at a systemic level. Where resources are allocated to realise capability needs, it becomes possible for the socio-economically disadvantaged members of our society to unlock their potential and choose meaningful lives. In this way, a society characterised by freedom, dignity and equality for all becomes a realistic prospect.