

# The implication of socio-economic rights jurisprudence for government planning and budgeting: The case of children's socio-economic rights

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## 1 INTRODUCTION

Given the entrenchment of socio-economic rights in South Africa's constitution, jurisprudential development and discussions on government's obligations with regard to the realisation of socio-economic rights should provide important guidance to the development of social policy. In particular the budget process, as a key instrument of government planning and implementation, should involve the active application of evolving interpretations of government's socio-economic rights obligations.

In an attempt to support this process, this article suggests a basic framework to be used in assessing those government programmes which are designed to promote the realisation of children's socio-economic rights. The objective is to introduce a basic methodology for rights-based government planning, budgeting and oversight.<sup>1</sup>

In developing a rights-based approach to Executive planning and budgeting processes, it is instructive first to restate the mandate and the limitations of the courts with regard to the realisation of socio-economic rights. The Constitutional Court has interpreted the courts' mandate as follows:

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- 1 Detailed analysis of the budget process will not be undertaken in this article save to mention that Cabinet provides overall leadership to the budget process by setting policy priorities about a year before the national budget is announced. Thereafter, a fiscal framework is established and projected revenue is divided first 'vertically' amongst national, provincial and local spheres and then 'horizontally' amongst the various government departments that take part in a 'bidding process' through which they make submissions regarding their proposed multi-year expenditure plans to the Medium Term Expenditure Committee, co-ordinated by the National Treasury. Parliamentary representatives are ultimately in a position to oversee budgeting and planning process, although – as explained below – their inability to make budgetary amendments can be regarded as a limitation of this oversight capacity.

Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.<sup>2</sup>

With regard to limitations, legal writers have noted that the courts are ill-equipped to deal with 'polycentric' issues which 'affect an unknown but potentially vast number of interested parties and that have many complex and unpredictable social and economic repercussions, which inevitably vary for every subtle difference in the decision'.<sup>3</sup> Socio-economic rights cases, which tend to entail the review by the courts of government prioritisation, planning and resource allocation, with implications for welfare, income and asset distribution and macro-economic conditions, are typical instances of complex, polycentric decisions.

The executive organs of government are technically in a stronger position than the courts to develop and implement programmes aimed at realising various social and economic rights, due in the main to their institutional position and experience, and their access to specialised expertise. Despite this technocratic superiority, actions of executive organs may be found wanting if such actions do not sufficiently take into account socio-economic rights obligations or if they are based upon invalid interpretations of such obligations.

The challenge laid out in this article is that executive organs should consider the standards being developed in socio-economic rights jurisprudence when they conduct their planning and budgeting processes. It is the duty of executive organs to ensure that their planning and budgeting processes take into account jurisprudential developments. Failure to ensure that jurisprudential developments guide policy and budgetary processes could have the effect that South Africa's 'constitutional scheme itself [is] put at risk'.<sup>4</sup>

Although not dealt with in much detail in this article, it is worth noting that legislative bodies oversee and at times legislate for the outcomes of budgetary and planning processes. It is submitted that the standards developed in socio-economic rights jurisprudence should guide the conduct of legislative organs in their oversight and legislative roles.<sup>5</sup>

2 *Minister of Health and Others v Treatment Action Campaign and Others (TAC)* 2002 (5) SA 721 (CC).

3 Roux T 'Legitimising Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92.

4 In *Khosa and Others v Minister of Social Development and Others* 2004 CCT12/03 ('*Khosa*') at 19 the court held that it is the 'government's duty' to ensure that it places evidence before the court with regard to socio-economic rights matters which may have 'significant budgetary and administrative implications'. It is submitted that a comparable duty would require that government organs apply standards laid down by the courts in developing and financing programmes relevant to the realisation of socio-economic rights.

5 In this regard the application of the oversight and legislative power of the National Assembly and National Council of Provinces in terms of s 44(2) and s 55(2) of the Constitution should be informed by jurisprudential developments concerning social and economic rights.

In this regard, an issue which requires particular attention is the failure by Parliament to fulfil the constitutional requirement under section 77(2) to enact a procedure which would enable the legislature to amend money bills tabled by the Executive.<sup>6</sup> Parliament is currently empowered to either accept or reject, but not amend, money bills. This limits the role of parliamentary oversight and weakens the institution's ability to apply jurisprudential standards to budgets for socio-economic rights-related programmes. The drastic implications for effective governance of the rejection of a tabled budget means that legislators cannot credibly be expected to reject a tabled budget and, in the absence of amendment powers, are left with no effective option other than to accept money bills as tabled by executive organs.

This article proceeds with an analysis, first, of the substantive issues associated with the application of a 'reasonableness' standard to programmes related to the realisation of children's socio-economic rights and, secondly, of the procedural question of how such a rights-based approach can be integrated into government planning and budgeting processes.

## 2 EVALUATING PROGRAMMES AIMED AT REALISING CHILDREN'S RIGHTS

The Bill of Rights has been interpreted as offering protection to children on two distinct levels. The first level is that rights under sections 26 and 27 require that government put in place reasonable programmes, subject to available resources, to ensure that everyone, including children, should have access to housing (section 26) and health care, food, water and social security (sections 27).<sup>7</sup> At a second level the Bill of Rights under section 29(1)(a) entrenches the right to basic education and, under section 28(1)(c), children's rights to basic nutrition, shelter, basic health care services and social services without any specific qualification with regard to progressive realisation subject to available resources. According to Liebenberg:

Current jurisprudence has not resolved whether children have direct entitlements to the socio-economic services in section 28(1)(c). *Grootboom* and *TAC* can be read to suggest that the State is under a direct duty to provide these rights in circumstances where family care is lacking either in a physical or economic sense.<sup>8</sup>

This article will deal first with programmes aimed at progressively realising children's socio-economic rights in terms of sections 26 and 27 and, in the next section, will raise some possible approaches to programmes regarding children's basic socio-economic rights under sections 28 and 29.

6 S 77(1) of the Constitution defines a money bill as follows: 'A Bill that appropriates money or imposes taxes, levies or duties is a money Bill'.

7 *Government of the Republic of South Africa & Others v Grootboom & Others* ('*Grootboom*') 2001 (1) SA 46 (CC) at par 78.

8 Liebenberg S 'The Interpretation of Socio-Economic Rights' in Chaskalson *et al Constitutional Law of South Africa* 2ed (2004) at 33-51.

Key developments in socio-economic rights jurisprudence have taken place in cases where claims have been made for positive relief against the state based on the enforcement of socio-economic rights. In *Soobramoney v Minister of Health, KwaZulu-Natal* ('Soobramoney')<sup>9</sup> and the TAC case claims were made regarding access to health care, in *Grootboom and Port Elizabeth Municipality v Various Occupiers* ('Port Elizabeth Municipality')<sup>10</sup> claims were made with regard to housing and protection from unfair eviction respectively, and in the *Khosa* case claims were made by permanent residents for access to social security.

Through these cases, and with some evolution of the thinking along the way,<sup>11</sup> the Constitutional Court has begun to develop a standard to ascertain whether government is to be considered to have adopted reasonable measures to advance the realisation of socio-economic rights. To be regarded as reasonable, government programmes should have the following characteristics:

- The programme must be comprehensive and co-ordinated with a clear delineation of responsibility amongst the various spheres of government, with national government having overarching responsibility;
- The programme must be capable of facilitating the realisation of the right;
- The programme must be reasonable both in conception and implementation;
- The programme must be balanced and flexible and make appropriate provision for crises and for short, medium and long-term needs;
- The programme cannot exclude a significant segment of society;
- The programme must include a component which responds to the urgent needs of those in the most desperate situations and the state must plan, budget for and monitor measures to address immediate needs and the management of crises.<sup>12</sup>

Government has a constitutional obligation to put in place reasonable programmes to advance rights to education, fair labour practices, access to land, access to housing, health care, food, water and social security, the rights of children and environmental rights. Rather than focusing on the application of a reasonableness review in respect of all socio-economic rights in question, this article focuses on how such a review is to be applied to programmes aimed at advancing children's socio-economic rights.

With regard to the assessment of programmes aimed at progressively realising children's socio-economic rights, it is submitted that the enquiry should proceed as follows:

9 1998 (1) SA 938 (CC).

10 2004 CCT 53/03.

11 According to Danie Brand in *The proceduralisation of South Africa Socio-Economic Rights Jurisprudence* (2004) at 41, the factors referred to by the court in *Grootboom* for assessing the reasonableness of a government programme require government to show 'a much stronger link between the policy at issue and its constitutionally mandated goal than in *Soobramoney*'.

12 Liebenberg (fn 8 above) at 33–34.

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- Is there a programme, or are there programmes, reflected in the budget designed to advance the rights in question?
- If not, government would be in breach of its constitutional obligation to progressively realise socio-economic rights and could be successfully challenged to develop such a programme.
- If the answer is yes, is the programme, or are the programmes, 'reasonable'? In terms of the criteria outlined above and discussed more fully below, programmes must be reasonable both in their conception and implementation (including clarification of the content and meaning of the rights in question).
- If not – that is, if a programme can be shown not to be reasonable for any reason – then government would be in breach of its constitutional obligation to progressively realise socio-economic rights and could be successfully challenged to reform the programme and budget accordingly.
- If the answer is yes – that is, if a programme can be shown to be reasonable – then government would be regarded as fulfilling its constitutional obligation to the progressive realisation of socio-economic rights.
- Even if this is the case, and a particular programme were to be considered reasonable, it is submitted that scope remains for continuing advocacy for policy reform and refinement. It should be understood, though, that such advocacy would take place in the political, policy and budgetary realms and not in the realm of any breach of government's constitutional obligations.

An indicative, although not comprehensive, linking of current government programmes to the realisation of section 26 and section 27 socio-economic rights may be tabulated as follows:

Constitutional right	Related government programme/s
Everyone's right of access to adequate housing (section 26)	Department of Housing's means-tested National Housing subsidy programme
Everyone's right of access to health care (section 27)	Department of Health's programme of free health care for pregnant women, children under the age of 6 and people with disabilities; Department of Health's means-tested programme of primary, secondary and tertiary health care
Everyone's right of access to food (section 27)	Department of Health's primary nutrition programme for the distribution of food in schools; Department of Agriculture's food security and rural development programme which finances projects for achieving household food security

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Everyone's right of access to water (section 27)	Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme supplying potable water to communities; Department of Provincial and Local Government and various local authorities' Consolidated Municipal Infrastructure programme for the provision of municipal services
Everyone's right of access to social security (section 27)	Department of Social Development's various social grants including the child support grant, foster care grant, care dependency grant (for children with severe disabilities) and state old age pension

In judging whether government programmes devised to advance children's socio-economic rights are reasonable, it is important to remember the Constitutional Court's view that for the advancement of each right there are 'a wide range of possible measures' that could be adopted by the state, each of which could have the quality of 'reasonableness'.<sup>13</sup>

## 2.1 Programmes must be reasonable both in conception and in implementation

In dealing with the criterion that government programmes should be 'reasonable' both in their conception and in their implementation, it is clear that there is a requirement on government to go beyond a hollow statement of good intentions. As discussed above, the content of the right should be considered and should inform both the conception and the implementation of programmes to achieve the realisation of the right.

An example of a children's rights-related programme which may be considered to be flawed in conception would be where children are denied access to socio-economic rights as a result of administrative procedures which require the participation of an adult primary care-giver. Such a requirement could have the effect of disallowing child-headed households, the incidence of which is reportedly on the rise as a result of the prevalence of HIV-AIDS in South Africa, from accessing the child support grant or from being registered at a school. An administrative requirement which excludes a significant section of the children who are meant to be targeted by the child support grant, or prevent them from registering at school, would be regarded as 'unreasonable' in conception.

<sup>13</sup> In deciding whether or not a particular programme is 'reasonable' the Constitutional Court has emphasised that it would not enquire 'whether other more desirable or favourable measures could be adopted, or whether public money could have been better spent . . . 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': *Grootboom* at par 41.

An example of a programme which may be regarded as being 'reasonable' in conception, but not in implementation, would be a programme which is aimed at extending children's socio-economic rights, but does not budget for all the constitutive elements of the administrative capacity which would be required to ensure the implementation of the programme. For example, if government were to budget for an expansion of social assistance transfers to children, but failed to include budget allocations for necessary expansions of administrative capacity and increased public awareness programmes to encourage an adequate take-up rate, this would most likely result in a situation where the implementation of a rights-related programme would be vulnerable to a constitutional challenge.

Similarly, the implementation of a phased roll-out of the child support grant would be considered 'unreasonable' if it operated in such a way that many children become too old for the eligibility window at some point in the year, but when the eligibility age is increased the following year, they become eligible again and need to re-apply. According to the Children's Institute, which has proposed a more 'reasonable' system of roll-out whereby a child continues receiving the grant until he or she reaches the upper age limit, over 200 000 children were required to re-apply for grants in the first year of the extension of the Child Support Grant.<sup>14</sup>

## 2.2 Programmes must be balanced and flexible

Programmes should be able to cater for a variety of different circumstances. They should not be so rigid as to make it impossible to have regard to particular needs and circumstances. In *Grootboom*, the housing policy was inflexible in the sense that it was 'one size fits all' – everyone joins the same queue for the same housing provision, despite the fact that some are in desperate circumstances. 'Balance' means that programmes must not focus on only one group but must have regard to the needs of all and give proper preference where preference is necessary.

Additional aspects of the requirement that programmes be balanced and flexible would include requirements that:

- Programmes recognise that conditions change over time and that government policies which have the objective of realising socio-economic rights are flexible enough to adjust to such changing conditions.<sup>15</sup>
- Programmes are alive to the question of inter-generational balance, in that it would not be reasonable for programmes aimed at addressing the needs of the current generation of children to be implemented in such a way as to place a crippling debt burden on future generations.

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14 Leatt A and Rosa S *Social security implementation – granting assistance to the poor* (2004).

15 A pertinent example would be a requirement that, in planning for welfare transfer payments, consideration should be given to adjusting the nominal value of benefits for the expected effects of inflation in order to secure the real value of benefits in the longer term.

### 2.3 Programmes must make appropriate provision for crises and for short, medium and long-term needs

A key criterion for assessing the reasonableness of programmes devised to advance children's socio-economic rights is that such programmes should *systematically* deal with the provision of services at various levels, addressing not only long-term plans but also immediate problems faced by children. In the *Grootboom* judgment the Constitutional Court was of the view that government housing plans which were only addressing the long-term housing backlog, and not systematically addressing the immediate needs of people in desperate need as well, could not be held to meet the requirement of 'reasonableness'.

This criterion suggests that government programmes devised to realise children's socio-economic rights are required to operate on various short, medium and long-term levels, presumably with varying degrees of attenuation of the right, with a higher degree of attenuation being regarded as acceptable for the shorter-term responses. A potential problem which could arise in this regard would be if government departments were to interpret the requirement of catering for crises and short-term needs to mean simply that their budgets should make contingency provision for disasters. An unintended consequence of such an interpretation could see resources, instead of being used for the realisation of children's rights, being diverted into emergency relief funds without any clear underlying programmes. The net effect of such a development would be the sterilisation of a proportion of resources originally allocated to programmes devised to realise children's socio-economic rights.

### 2.4 Programmes may not exclude a significant segment of society

Even though they should be read together, the criterion that programmes should not exclude a significant segment of society is listed distinctly from that which requires that the interests of those most in need should not be ignored. In the arena of children's socio-economic rights, it is likely that government programmes which purport to be targeted at children in need will be required effectively to reach all such children in need, or at least not systematically exclude any particular segment of the target group.

A current example of where this criterion may not be met is in the field of education where a reported shortcoming of the Department of Education's Norms and Standards for School Funding, aimed at advancing children's right to basic education, is that redress funding targets the poorest schools while other poor schools, that are not ranked amongst the poorest, do not benefit from the allocation of additional state funding.<sup>16</sup> An argument can be made that such a system of school funding, which has the effect of excluding a significant segment of society in need, may

16 See Wildeman RA 'School Funding Norms 2001: Are More Learners Benefiting?' IDASA Budget Information Service <http://www.idasa.org>.



be vulnerable to a challenge on the grounds of unreasonableness. On the other hand, if it can be shown that a school governing body has failed to implement, or has incorrectly implemented, an otherwise reasonable policy, such as the Schools Act's fee exemption framework available for poor families, then this would call into question the conduct of the school governing body but not the reasonableness of the framework itself.

In the *Khosa* case it was found that legislation which purported to include citizens and exclude permanent residents, including children of permanent residents, from access to state old age pensions, child support grants and care dependency grants, was unreasonable. The court held that if the differentiation between citizens and permanent residents was to pass constitutional muster it 'must not be arbitrary or irrational nor must it manifest a naked preference'.<sup>17</sup> It further held that:

it may be reasonable to exclude ... workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country. The position of permanent residents is, however, quite different to that of temporary or illegal residents. They reside legally in the country and may have done so for a considerable length of time.<sup>18</sup>

## 2.5 Programmes must not ignore those most urgently in need

In *Grootboom*, the Constitutional Court clearly indicated that all government programmes aimed at realising socio-economic rights, and in this instance children's socio-economic rights, must specifically target the poor or those most urgently in need. The court held:

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 therefore in most peril, must not be ignored by the measures aimed at achieving realisation of the right.<sup>19</sup>

With regard to children, this entails particular challenges for a range of government programmes, including those aimed at providing such basics as nutrition, health care, shelter and education. There is a requirement that these programmes must be accessible to the poorest and most vulnerable children. For example, it could probably be shown that nutritional or health care programmes which make use of the school system to access children in need are not accessible to the poorest and most vulnerable children, including street children and child farm labourers. Also children whose parents have failed to register them for schooling timeously and are being excluded due to age requirements should be regarded as urgently in need of programmatic assistance by the education authorities.

Rights under section 26 and section 27 of the constitution are subject to the limitation that the state is to take reasonable measures to achieve the progressive realisation of the right 'within its available resources'. Although this would appear to provide a ready justification for the state as to

17 *Khosa* at 53.

18 *Khosa* at 59.

19 *Grootboom* at 44.

why particular socio-economic rights have not been realised, in no case to date has it been found that the realisation of any socio-economic rights has been reasonably limited due to lack of resources.

Certain jurisprudential *dicta* on resource availability are likely to have an impact on the process of budgeting for the progressive realisation of socio-economic rights. In the High Court judgment in the *TAC* case it was held that government's duty to draw up a coherent national plan to roll out Nevirapine existed independently of the availability of resources. Only once such a plan existed 'will it be possible to obtain the further resources that are required for a nation-wide programme, whether in the form of a reorganisation of priorities or by means of further budgetary allocations'.<sup>20</sup>

Only when there is a contestation of fact regarding the availability of state resources will jurisprudence be developed. Liebenberg has suggested that 'the courts should not simply accept unsubstantiated allegations regarding resource shortage', yet holds that 'the courts are unlikely to be receptive to a direct challenge to Government's macro-economic and budgetary decision making processes . . . however orders . . . enforcing socio-economic rights may have indirect budgetary implications'.<sup>21</sup>

### 3 SHOULD BASIC CHILDREN'S RIGHTS BE TREATED WITH HIGHER PRIORITY?

Children's rights under section 28 and section 29 are not internally constructed so as to be subject to 'available resources' or 'progressive realisation', as are section 26 and section 27 socio-economic rights. An indicative, although not comprehensive, linking of current government programmes to the realisation of section 28 and section 29 socio-economic rights may be tabulated as follows:

Children's right to basic nutrition (section 28)	Department of Health's primary nutrition programme for the distribution of food in schools
Children's right to basic health care services (section 28)	Department of Health's programme of free health care for pregnant women and children under the age of 6; Department of Health's means-tested programme of primary health care
Children's right to social services (section 28)	Department of Social Development's various social grants including the child-support grant, the foster-care grant, and the care-dependency grant (for children with severe disabilities)

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20 *Treatment Action Campaign & Others v Minister of Health & Others* 2002 (4) BCLR 356 (T).

21 Liebenberg (fn 8 above) at 47.

Children's right to basic education (section 29)

Department of National Education's National Norms and Standards Programme and provisions allowing waiver of school fees and uniforms for the indigent, as well as programmes to assist with students' transport requirements

Although the correct interpretation of section 28 and section 29 rights has not been resolved, it is submitted that government programmes seeking to achieve the implementation of these rights should have to comply with a 'higher standard' which would include additional elements in the test for reasonableness; for example:

- programmes should be implemented as rapidly as possible, and
- programmes should be so devised as to reach all children in need, *inter alia* entailing the explicit identification of children to be targeted, either due to their removal from the family environment or inadequate family support.

It would be expected that the programmes related to section 28 and section 29 rights should explicitly include the 'higher' objective of reaching *all* children in need as a matter of *urgency*. This would probably rule out limited forms of delivery mechanisms which exclude potential recipients, such as pilot projects, as well as lengthy roll-out plans.

Whereas the progressive realisation of socio-economic rights under section 26 and section 27 explicitly allows for government to rely on resource constraints as a justification for the lengthier delivery time of rights-related programmes, no such explicit justification is attached to basic children's rights under section 28 and section 29. As a result, it is submitted, programmes devised to advance section 28 and section 29 rights should be characterised by *accelerated* and *comprehensive* service delivery to all children in need. A reasonable time period, which should be regarded as concomitant with the state's obligation to prioritise these rights, will be measured in terms of the period required for the urgent marshalling of real administrative capacity rather than any delay being justified in terms of a constraint of financial resource.

#### 4 PROMOTING A RIGHTS-BASED PLANNING AND BUDGETING PROCESS

Procedurally, government budgeting has come to be regarded as an instrument through which a range of social and economic objectives may be achieved. In order to promote a more integrated and purposive approach to rights-based governance it is most important that the government planning and budget processes be challenged to take into account, systematically and transparently, government's socio-economic rights obligations. For example, budgetary authorities should require in the *MTEF Treasury Guidelines for Preparing Budget Proposals*<sup>22</sup> that departments

22 The Medium Term Expenditure Framework (MTEF) Guidelines are published by the National Treasury to assist government departments to develop their proposals for

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involved in socio-economic rights-related programmes clearly outline how programmes for which they are seeking funds are in line with the reasonableness criteria developed in constitutional jurisprudence.

Significant benefits, including the following, could be achieved through such an approach:

- Firstly, the reasonableness test provides a framework within which government departments can assess whether the programmes which they are developing or implementing are sufficient to meet constitutional requirements.
- Secondly, through applying such criteria early on in the governance process, the realisation of social and economic rights becomes in part a proactive activity rather than merely a reactive activity in which government departments are required to comply with court decisions.
- Thirdly, in the context of scarce resources the alignment of government programmes with reasonableness criteria provides an important basis for deciding which government programmes are to be allocated resources, with the expectation that programmes which are in line with 'reasonableness' criteria are likely to achieve improved social outcomes.
- Fourthly, budgetary planning which correctly integrates socio-economic obligations into departmental planning will assist in the avoidance of the 'budgetary shocks' which occur when there is court intervention. For example, in the *Khosa* case the likely budgetary impact of the order to include permanent residents as beneficiaries of certain social grants amounted to an estimated R243 million to R672 million per year, although the court regarded this as a 'small portion of the total cost' of social grants (at the time valued at R26,2 billion per year).<sup>23</sup>
- Fifthly, there are a number of tools used by planners and economists in the budgeting process which would assist in enriching the theory and application of the 'reasonableness' framework. These include incidence analyses of government programmes to see how effectively intended beneficiaries are targeted or, conversely, where such groups are unreasonably excluded.

## 5 CONCLUSION

This article proposes a basic methodology for scrutinising – and ultimately contesting – planning and budgeting processes in a human rights-oriented manner. The logic of this methodology is, firstly, to analyse South Africa's evolving jurisprudence on socio-economic rights in order to understand the extent of government's obligations with regard to each of these rights. Secondly, it is to identify which government programmes purport to advance each of these particular rights and, thirdly, to test whether the

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multi-year expenditure planning. These proposals are then deliberated upon by government's Medium Term Expenditure Committee.

<sup>23</sup> *Khosa* at 62.

programmes identified do reasonably advance the right in such a manner as to pass constitutional muster. It is in tackling this third aspect that a range of detailed questions must be asked as to whether the programmes outlined in government budgets are indeed of the standard required in terms of government's constitutional obligations.

An important jurisprudential discussion, not dealt with in this article, has turned on how to give substantive 'teeth' to the process of reviewing socio-economic rights-related programmes for reasonableness.<sup>24</sup> It is submitted that in addition to integrating standards rooted in socio-economic rights jurisprudence into the government's planning and budgeting processes, this would be further facilitated through broader public discussion and mobilisation around Charters of Rights, as contemplated in section 234 of the Constitution, aimed at deepening the culture of democracy through establishing social consensus on the meaning and content of socio-economic rights and related obligations which such rights place on state organs.<sup>25</sup> An added benefit of widened discussions on such initiatives as a Children's Charter, an Education Charter, a Workers' Charter or a Health Charter would be to democratise the process of defining the meaning and content of rights entrenched in the constitution beyond the litigation process. Such a process would also have the effect of providing an important interpretative guide to the courts with regard to the enforcement of socio-economic rights.

## Bibliography

- Bilchitz D 'Giving Socio-Economic Rights teeth: The minimum core and its importance' (2002) 119 *SALJ* 484
- Bilchitz D 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' 2003 (19) *SAJHR*
- Brand D 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence or "What are Socio-Economic Rights for?"' in Botha H *et al* (eds) *Rights and Democracy in a Transformative Constitution* (2004)
- Fuller L 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* (2) 353
- Liebenberg S *The Interpretation of Socio-Economic Rights* in Chaskalson *et al* *Constitutional Law of South Africa* (2004)
- Leatt A and Rosa S *Social Security implementation - granting assistance to the poor* (2004)
- Roux T 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92

24 See Bilchitz D 'Giving Socio-Economic Rights Teeth: The minimum core and its importance' (2002) 119 *SALJ* 484.

25 'In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution': s 234 of the Constitution.