

**WHAT ARE SA'S SOCIO-ECONOMIC RIGHTS
OBLIGATIONS IN THE CONTEXT OF THE COVID
PANDEMIC?**

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THREE PRIMARY SOURCES OF ESCRS LEGAL OBLIGATIONS

- Bill of Rights in the 1996 Constitution
- African human rights system, including the African Charter on Human and Peoples' Rights
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Other treaties at international and regional levels dealing with specific groups and non-discrimination

KEY PRINCIPLES

- **Minimum core obligations:** essential basic levels of rights must be prioritized – social protection floors / Short-term provision for those whose needs are urgent (SA constitutional jurisprudence)
- **Progressive realisation:** reasonable, measurable and participatory progress towards full realisation of the relevant rights
 - ~ CESCR: An obligation to “to move as expeditiously and effectively towards that goal”
- **Retrogressive measures:** should be avoid, and if unavoidable must be justified by the State according to certain criteria –
 - ~ Necessary; temporary; proportional; avoidance of direct or indirect unfair discrimination – disadvantaged should not bear the burden; review and participation by those affected; protection of minimum core obligations

KEY PRINCIPLES

- **“Maximum available resources”** (ICESCR); “Within available resources” (SA context): Defence for State, but also imposes positive duty to mobilise resources for ESCRs realisation
- **Non-discrimination and substantive equality:** systemic inequalities require not only that the state refrain from discrimination, but also that it take positive measures to redress and overcome such inequalities
- **Duty of state to protect** against private sector violations and in the context of the SA Constitution, private parties bound by negative duty not to deprive people of access and even positive duties in some case (*Daniels v Scribante*)
- **International assistance and co-operation:** heightened importance in context of Covid – universal vaccine and treatment access; debt relief
- **Cross-cutting human rights principles:** human dignity, participation, accountability, access to remedy; interdependence with civil and political rights

CESCR CONCLUDING OBSERVATIONS ON SA SELECTED RECOMMENDATIONS

- Mobilisation of maximum available resources (“MAR”): tax policy and collection; re-examine growth model – “more inclusive development pathway”
- Austerity measures:
 - Increase levels of funding to social security, health and education;
 - Task DPME with ensuring that public policies are directed towards realization of Covenant rights
 - Ensure that the Standing Committee on Public Accounts within the national parliament (and its equivalents within provincial parliaments) takes such rights into consideration in assessing the budgetary choices of the national and provincial governments
- Employment: High unemployment rate; informal economy; casualization and externalization; minimum wage

CESCR CONCLUDING OBSERVATIONS ON SA SELECTED RECOMMENDATIONS

■ Social security:

- a) Design and regularly update a composite index on cost of living;
- b) Raise the levels of non-contributory social assistance benefits to a level that ensures an adequate standard of living for recipients and their families
- c) Ensure that those between the ages of 18 and 59 with little or no income have access to social assistance
- d) Establish a social protection floor in line with the rights-based definition provided in the ILO Social Protection Floors Recommendation, 2012 (no. 202)
- e) Expand the coverage of the Unemployment Insurance Fund benefits to all workers, regardless of their status;
- f) Consider the possibility of introducing a universal basic income grant
- g) Rectify the situation brought about by the outsourcing of the social grants payment system and ensure that all the payments are made in a timely manner during the transition period.

CESCR CONCLUDING OBSERVATIONS ON SA SELECTED RECOMMENDATIONS

- Increase the child support grant to the level of the food poverty line
- Adopt framework legislation protecting the right to adequate food and nutrition and develop a national food and nutrition security strategy
- Expedite the adoption of the NHI and address the large disparities between public and private health care systems
- Education – school infrastructure; reduce school dropout rate; guarantee high quality early education for all children, particularly those from disadvantaged families
- Adopt relevant measures to ensure accessibility and affordability of the Internet, particularly in schools and rural areas and for most disadvantaged groups.

CESCR CONCLUDING OBSERVATIONS ON SA FOLLOW-UP ISSUES

- 1) Preparation of a composite index on the cost of living (benchmark for social benefits to ensure right to adequate standard of living) and access to social assistance for adults between 18 and 59 years of age
 - 2) Adopt Social Assistance Amendment Bill of 2018 to increase level of CSG for orphaned and abandoned children living with relatives
 - 3) Ensure that all migrant, refugee and asylum-seeking children have access to education regardless of their immigration status
- Follow-up Report due 29 November 2020
 - Provision for parallel reports – CSOs + NHRIs
 - To be assessed by CESCR in terms of criteria of “sufficient progress”; “insufficient progress”; “lack of sufficient information to make an assessment”; “No response”

STATUS OF CONCLUDING OBSERVATIONS AND ENFORCEMENT

- Recommendations and at such not formally legally binding – but authoritative assessment by expert international body with legal mandate to assess compliance with ICESCR
- Serious, good faith consideration
- Can acquire “teeth” through for example being used in litigation when endorsed by Courts e.g. *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24; 2021 (1) BCLR 1 (CC) e.g. CESCR recommendation – extension of COIDA to domestic workers (para 35(a))
- CESCR and CRC doctrine of “retrogressive measures” cited in support of NG High Court finding that failure to ensure that all children received access to school meals even if their grade had not returned to school violated children’s constitutional rights to basic nutrition and to education: *Equal Education v Minister of Basic Education*, Case No 22588/2020
- Advocacy and mobilisation

SPECIFIC IMPLICATIONS OF ESC RIGHTS DURING COVID PANDEMIC

Covid has tipped SA over from an already dire poverty and inequality situation into a crisis of unemployment, hunger, insecurity, violence and ever-deepening spirals of racial, gender and wealth inequalities

- 3 million job losses between February and April concentrated amongst already disadvantaged groups in labour market – women (2/3 of those who lost their jobs being women); black persons; youth and less-educated groups in lower-income households; and informal sector workers (NIDS-CRAM)
- Unemployment in 3rd quarter of 2020 on expanded definition: 43% (narrow def = 30, 8%)
- “With no extra support an estimated 9,8 million people will face hunger. With the current grant package this falls to an estimated 4, 1 million – the grant package rescues almost 6 million people from hunger” (NIDS-CRAM Hunger in South Africa during 2020: Results from Wave 2 of NIDS-CRAM (30 September 2020), 4)

SPECIFIC IMPLICATIONS OF ESC RIGHTS DURING COVID PANDEMIC

- Disparate impact of dual track health care and social determinants of health on black persons and women – increased burden of disease
- Increased very high school drop-out rate against affecting mostly learners in poorer communities

SPECIFIC IMPLICATIONS OF ESC RIGHTS DURING COVID PANDEMIC

PRIORITIES:

1) **Maintain and increase social protection**

- See CESCR Statement on Covid-19 pandemic and economic, social and cultural rights, 17 April 2020 with focus on marginalised and disadvantaged (paras 15 – 16)
- Fate of Covid-19 Grant of R350 for the unemployed?

2) **Vaccine access and distribution**

- See CESCR Statement on States on Universal and Equitable Access to Vaccines for Covid-19, adopted 27 November 2020
- Transparent and participatory strategy for acquisition, prioritization and distribution
- International assistance and solidarity – combating “vaccine nationalism”; IP rights should not be – TRIPs flexibilities; SA/India – waiver application to WTO

SPECIFIC IMPLICATIONS OF ESC RIGHTS DURING COVID PANDEMIC

3) Ensure adequate budgetary provision for socio-economic rights – short, medium and long term

- Looming threat of “fiscal consolidation measures” (austerity policies) – contracting GDP, rising debt levels, declines in tax revenues.
- 24 June 2020 Supplementary Budget: cutting and reprioritising budgets affecting basic education; higher education & training; human settlements; agriculture, land reform and rural development
- MTBPS – 28 October: Programme of fiscal consolidation – reduce non-interest expenditure on main budget by R300bn over next three years
- Counter-strategies e.g. advocacy relying on doctrine of “non-retrogression”
- Conditions attached to public and private debt that SA undertakes

RE-COMMITMENT TO SOCIAL EXPENDITURE AND DEVELOPING INSTITUTIONAL CAPACITY BUILDING TO DELIVER ESCR

“The Committee calls upon all States parties to ensure that the extraordinary mobilization of resources to address the COVID-19 pandemic provides the impetus for *long-term resource mobilization* towards the full and equal enjoyment of the economic, social and cultural rights enshrined in the Covenant. In so doing, they will lay the foundation for achieving the ideal enshrined in the Universal Declaration of Human Rights of achieving a world of free human beings enjoying “freedom from fear and want”. Mechanisms to facilitate *national and international cooperation and solidarity, and substantial investments in the institutions and programmes* necessary for the realization of economic, social and cultural rights, will ensure that the world is better prepared for future pandemics and disasters.”

CESCR Statement on the Covid-19 pandemic and Economic, Social and Cultural Rights,
17 April 2020, para 25.