



SOCIO- ECONOMIC RIGHTS AND AUSTERITY

A SECTION27 report compiled by

Mila Harding, Mbali Baduza and Julia Chaskalson

August 2020

+SECTION27
catalysts for social justice

10 YEARS OF IMPACT



People queue outside a SASSA (South African Social Security Agency) paypoint in Philippi, Cape Town after the South African government declared a 21 day COVID-19 lockdown.

Photo: Roger Sedres/Alamy Live News

CONTENTS

| | |
|-----------------|----------|
| FOREWORD | 2 |
|-----------------|----------|

| | |
|---------------------|----------|
| INTRODUCTION | 3 |
|---------------------|----------|

PART 1

| | |
|---|----------|
| THE IMPACT OF AN AUSTERITY BUDGET ON SOCIAL SPENDING | 5 |
|---|----------|

| | |
|--|----------|
| Reframing the narrative on public spending: public expenditure is a public investment | 6 |
| <i>Zukiswa Kota (Head of monitoring and advocacy at the Public Service Accountability Monitor)</i> | |

| | |
|---|----------|
| Austerity without consolidation – a case study of the Gauteng Department of Health | 8 |
| <i>Professor Michael Sachs (Wits, Southern Centre for Inequality Studies)</i> | |

PART 2

| | |
|---|-----------|
| COMPARATIVE PERSPECTIVES ON STRATEGIC LITIGATION FOR SOCIO-ECONOMIC RIGHTS | 11 |
|---|-----------|

| | |
|--|-----------|
| Resourcing rights: state obligations in times of austerity | 12 |
| <i>Allison Corkery (Director of the Rights Claiming and Accountability Programme at CESR, the Centre for Economic and Social Rights)</i> | |

| | |
|---|-----------|
| A comparative perspective on using litigation to challenge fiscal austerity measures | 14 |
| <i>Aoife Nolan (Professor of International Human Rights Law, Faculty of Social Sciences at Nottingham University)</i> | |

| | |
|--|-----------|
| Litigating against austerity in the United Kingdom | 16 |
| <i>Sandra Fredman (Professor of Law at the University of Oxford)</i> | |

PART 3

| | |
|---|-----------|
| RETHINKING SOCIO-ECONOMIC RIGHTS LITIGATION IN A TIME OF AUSTERITY | 17 |
|---|-----------|

| | |
|---|-----------|
| The impact of strategic litigation in South Africa | 18 |
| <i>Jason Brickhill</i> | |

| | |
|---|-----------|
| Litigation against mass evictions in the Johannesburg inner city: lessons learned, and where to next | 20 |
| <i>Nomzamo Zondo (Executive Director for SERI, the Socio-Economic Rights Institute of South Africa)</i> | |

| | |
|-------------------|-----------|
| CONCLUSION | 22 |
|-------------------|-----------|

| | |
|--|-----------|
| POTENTIAL THREATS AND OPPORTUNITIES AS A RESULT OF COVID-19 | 25 |
|--|-----------|

| | |
|--|-----------|
| ‘To experience a crisis is to inhabit a world that is temporarily up for grabs’ | 26 |
|--|-----------|

| | |
|---|-----------|
| South Africa during the pandemic | 27 |
|---|-----------|

| | |
|---|-----------|
| The austerity seminar in the context of COVID-19 | 32 |
|---|-----------|

| | |
|--------------------------------------|-----------|
| Proposing policy alternatives | 34 |
|--------------------------------------|-----------|

| | |
|-------------------|-----------|
| Conclusion | 36 |
|-------------------|-----------|

+ SECTION 27
catalysts for social justice

10 YEARS OF IMPACT

FOREWORD

Faranaaz Veriava and Sasha Stevenson

As 2020 began, South Africa was grappling with decreasing budgets for social services, widespread corruption and mismanagement of funds, and deep and growing inequality. By March, the country was locked down in response to the COVID-19 pandemic. In the months that followed, the impacts of historical fiscal consolidation, austerity and wastage became even clearer, with already strained social services buckling under the pressure of new demands, and emergency interventions inadequate to meet our soaring need.

It is in this context that we consider how best to use legal advocacy and litigation to ensure the realisation of socio-economic rights in 2020 and beyond.

Regarding the amount of money committed and spent for the realisation of socio-economic rights, reductions come in many forms. Declared austerity, fiscal consolidation, re-prioritisation, economic policy shifts, corruption and misuse of funds all take money and services away from those who rely on social support, and violate their socio-economic rights. The impact of these violations is disastrous. The poor and vulnerable are disproportionately harmed. Inequality increases. Power consolidates. And the economy weakens further.

The question is: as public interest lawyers and activists, what can we do about it? The answer is that we must refine and adapt our methods for a new context with new challenges. Litigation as a last resort is a mainstay of public interest lawyering in South Africa, and the principle is as applicable as ever in relation to budgeting and spending shifts.

Before litigating, we must delve more deeply into the making of legislation and economic policy, including assessing whether tax policy is becoming regressive,

and whether (and how) progressive policies are being implemented. We must track allocations and spending for socio-economic rights realisation, monitoring shifts in priorities. We must pay attention to the process of instituting austerity measures, to ensure that impact assessments are done. We must follow and address the capacity and functioning of critical institutions, including institutions such as the South African Revenue Service and the National Prosecuting Authority, and tackle issues that may seem 'political'.

Once litigation is required, our traditional approach can also be adapted, targeting different processes and structures and using different legal frameworks and provisions. While we do not expect the courts to step into the role of the executive and legislature, the courts can continue to be used to catalyse socio-economic rights realisation through legal challenges to cuts or inadequate allocations; to inaction, in terms of the State's duty to act progressively in fulfilling socio-economic rights; to fruitless expenditure and corruption; and in combatting the incapacity of critical institutions that have not always been at the core of socio-economic rights litigation.

Socio-economic rights realisation sits at the core of South Africa's constitutional democracy. The cost of failing to realise these rights can be counted in lives lost and citizens relegated to poverty and inequality. As civil society organisations committed to achieving social justice, unless we explore new and innovative ways to face the challenges of austerity, the enormous implementation gap between socio-economic rights in the Constitution and in practice will only widen.



Seminar participants (L-R): Umunyana Rugege, Michael Sachs, Faranaaz Veriava, Nomzamo Zondo, Allison Corkery, Zukiswa Kota, Jason Brickhill and Sasha Stevenson.

INTRODUCTION

On 2 March 2020, SECTION27 hosted a seminar on ‘Socio-economic rights litigation in the time of Austerity and State Capture’. The seminar was held to discuss the increasing austerity and incidence of state capture in South Africa, as well as the consequent threat of socio-economic rights retrogression.

Those who contributed at the seminar included leading economists, budget analysts, legal academics and practitioners, whether physically present at the seminar or attending through video conferencing from abroad.

The purpose of the seminar was to develop a better understanding of how public interest organisations should move forward in advocating for socio-economic rights – to, in the words of Faranaaz Veriava, “rethink some of our traditional legal repertoire to achieve socio-economic justice”. A closer look at the way austerity works and presents itself was central. Coming into the seminar, some significant questions included how to challenge the neo-liberal narrative that austerity is both beneficial and necessary; how to use litigation to challenge austerity budgets; and what other avenues of anti-austerity legal advocacy could be explored.

This report collects summaries of the presentations given at the seminar, in the hope that it may be used as a resource in future socio-economic rights litigation and anti-austerity legal advocacy.

The seminar was divided into three parts.

- Part one was an overview of the meaning of austerity,

how it manifests itself in the South African context, and what effects it has on socio-economic rights.

- Part two gave insight into experiences of litigation against austerity measures in other jurisdictions, and how these may be useful for those engaging in public interest litigation in South Africa.
- Finally, part three looked at the current state of socio-economic rights litigation in South Africa, and how to move forward with the promotion of socio-economic rights.

Since the seminar in early March 2020, the COVID-19 pandemic has thrown the global order into turmoil. In response, President Cyril Ramaphosa announced a national state of disaster, and that South Africa would undergo a nationwide lockdown from 23 March 2020 in an effort to ‘flatten the curve’ of the rapid spread of the virus, and prepare our already ailing healthcare system for the probable influx of cases. The lockdown closed sectors of the economy deemed non-essential; and even though some lockdown regulations have since been lifted, the already fragile economy has been weakened. Furthermore, the need for a well-resourced and supported public health system has also been brought into the spotlight.

This report concludes by discussing what the COVID-19 pandemic may mean for austerity and socio-economic rights in South Africa. Although profoundly devastating, the COVID-19 disaster has provided an opportunity to create sustained change and development towards a more just and equal society. We must use it.

PATIENTS' WAITING AREA

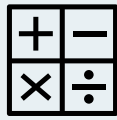
Long queues at Chris Hani Baragwanath hospital in Soweto.

Photo: © Oupa Nkosi



Delapidated buildings at Sahlumbe High School in KwaZulu-Natal.

Photo: © Oupa Nkosi



PART 1

THE IMPACT OF AN AUSTERITY BUDGET ON SOCIAL SPENDING



L-R: Zukiswa Kota, Michael Sachs and Umunyana Rugege.

PART 1: THE IMPACT OF AN AUSTERITY BUDGET ON SOCIAL SPENDING

Reframing the narrative on public spending: public expenditure is a public investment

Zukiswa Kota (Head of monitoring and advocacy at the Public Service Accountability Monitor)

Zukiswa Kota spoke to the effects of austerity on health, basic education and local government. Central to the discussion was linking budget analysis, litigation and progressive advocacy work to the human impact of austerity measures. Austerity, Kota demonstrated, jeopardises attempts to shrink socio-economic inequality in South Africa, and infringes on human rights. Kota argued that budgets and fiscal commitments can be read as law, and that budget cuts can therefore be framed as a violation of constitutional rights. Furthermore, Kota contended, austerity measures are discriminatory, as the burdens of budgetary cuts are disproportionately shouldered by poor households and black women.



Kota showed the effects of austerity measures on the day-to-day workings of hospitals, schools and local government. She illustrated the effects of expenditure ceilings on local and provincial hospitals. In showing a real per-capita decline in healthcare spending,

Kota argued that this underfunding has particular impact on staffing. In 2018, for example, there were an estimated 38,000 vacant posts for critical staff in the health sector. In addition, community health workers are underpaid, and remain a vulnerable category of the healthcare profession.

Given this sobering reality, the ambitions of the proposed National Health Insurance seem far-fetched, as the successful implementation of universal healthcare in South Africa will require 'double the spend' to realise quality healthcare that will shrink the fatal inequalities in our health system.

With respect to basic education, Kota drew from a 2005 study showing that hundreds of Eastern Cape schools had unsafe buildings and sanitation, and lacked electricity and water. Arguing that 15 years later there has been no radical improvement in the condition of infrastructure in many Eastern Cape schools, Kota illustrated how current cuts to critical conditional grants (such as the Education Infrastructure Grant and the Schools Infrastructure Backlog Grant) exacerbate the existing infrastructure crisis in schools.

Finally, turning to local government, or what Kota termed the "hub of service delivery" – a sector under-researched and under-supported by civil society – Kota demonstrated how the problems of under-capacity, underfunding through shrinking equitable share and

large debt levels often cripple municipalities. She showed that although they are tasked with eliminating poverty, reducing inequality and furthering the goals of the Constitution, local governments are critically under-supported. Their capacity is directly and disproportionately affected by budget cuts at national and provincial level. Though local governments can generate their own revenue, most of their funding comes through transfers from national government, which have decreased over the past few years. This jeopardises the delivery of bulk services projects (such as water, roads and electricity), and results in heightened local debt levels. In the provinces of Limpopo and the Eastern Cape, for example, inequality has only deepened – largely due to the decline of municipal infrastructure grants.

However, austerity is only one side of the coin. Having a capable state – at all levels of government – is vital to ensuring that services are delivered and rights are upheld. We live in a context where there is widespread irregular expenditure at municipal and provincial level, and a concerning number of municipalities are under external administration. Nonetheless, there are opportunities for civil society to develop advocacy and litigation campaigns regarding the capacity of the state, influenced by budget availability, to uphold constitutional rights and values.

Civil society itself is affected by austerity, but must continue to challenge budget cuts that impact on socio-economic rights. A renewed and pointed focus must be placed on marginalised groups, for whom the disproportionate effects of budget cuts in health, education and local government are most tangible.



Professor Michael Sachs.

PART 1: THE IMPACT OF AN AUSTERITY BUDGET ON SOCIAL SPENDING

Austerity without consolidation – a case study of the Gauteng Department of Health

Professor Michael Sachs (Wits, Southern Centre for Inequality Studies)

Elsewhere in the world, austerity typically entails a shrinking of the size of the State to contain deficits through fiscal consolidation. But according to Professor Michael Sachs, the austerity experience in South Africa is that there seems to be no foreseeable consolidation plan to contain mushrooming deficits. Rather than simply curtailing the total size of the spending envelope, Sachs argues, it is the allocation choices that drive austerity in South Africa.

Sachs demonstrates this theory using the case study of the Gauteng Department of Health (GDoH). His research shows that the total resource envelope available to the GDoH in terms of real spending per capita has doubled since 2005 – contrary to how the popular discourses explain austerity.

Several factors account for this increase in spending.

First, employment has been expanded, and wage trends show an annual increase well above Consumer Price Index (CPI) for several classes of public servants, notably nurses. However, the salaries of managers in the public sector have not increased at the same rate, and the effect of private-sector managers being paid more generously has caused an outflow of managerial staff from the public health system into the private sector. Sachs shows that wage increases crowd out spending for goods and services, resulting in declining quality of care and services within the provincial health system as a whole. Furthermore, his research shows that Gauteng has debts for goods and services amounting to R6 billion.

Sachs points out that medico-legal payouts are accounting for an increasing share of the Province's spending, shifting allocations away from goods and services. In this regard Sachs believes that civil society should draw attention to unscrupulous lawyers taking advantage of the system, as well as advocating for the regulation of medico-legal claims. Another contributing factor to the change in spending structure is the policy decision adopted by the Gauteng Department of Health to shift away from hospi-centric care to district and primary levels of care. Regarding this point, Sachs illustrated that the change in conditional grant structures to prioritise HIV/AIDS services at district level have resulted in central or provincial hospitals manifesting the accrued liabilities – and debts – of the Department.

What this analysis shows is that funding has not decreased; rather, it is being allocated differently – and not always efficiently – and not with the objective of containing a growing deficit in the sector. It is these allocative choices that define our experience of austerity.

According to Sachs, the budget deficit is a pressing issue that must be addressed. Over time, the interest payments on debt absorb a greater and greater share of national revenue. Indeed, out of every R100 collected in revenue, R15 is now spent on debt transfers. These repayments do nothing to serve vulnerable groups; instead, they benefit elites. Debt repayments drain the revenue pool and crowd out resources available for socio-economic rights. Bailouts for failing state-owned enterprises exacerbate this situation further. What is more, several fiscal policies adopted by the State for elite expenditure – including the financing structures for tertiary education, e-tolls,

Eskom and Sanral – shift the burden of funding from user charges to the general tax base.

All of these factors, along with the leniency shown towards corruption, irregular expenditure and waste, as well as the erosion of important budget institutions such as the South African Revenue Services (SARS), weaken the financial elements of the Constitution. This requires targeted advocacy from civil society.

Researchers debate the 'appropriate' levels of debt for developing countries; but what is concerning, Sachs argues, is South Africa's debt trajectory – in other words, the rate at which our debt is expanding. This accelerating gradient results in increased chances year on year of a major debt crisis, with a higher probability of a sudden, rapid and sustained fiscal retrogression akin to the experiences of Argentina or Greece. A debt crisis of such proportions would seriously jeopardise socio-economic rights, and is thus a central concern for human rights advocates. Indeed, South Africa seems to be leaning towards more regressive fiscal structures and tax instruments – which burden the poor, and illustrate a deep crisis in public finance. Austerity, according to Sachs, is just a symptom of this crisis. There is an opportunity for advocacy efforts aimed at addressing the structural challenges of South African public finances, as opposed to focusing solely on debating ideologically weighty terms such as 'austerity'. Advocacy aimed at shaping legislation and regulation can work alongside litigation methods to tackle this crisis in public finance.

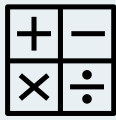
Another potential avenue for advocacy lies in holding the State accountable for promises made to unify public goods. Sachs shows how public goods such as education and health are segregated in South Africa, where the affluent in society lock in resources for the provision of elite services. Holding the State accountable for the provision of public services can only achieve so much, as public systems will necessarily be second class. This is because when a dual system of public services (i.e. both public and private) is permitted, the elites direct the majority of capital to the private sector. Take the plans for National Health Insurance, for example – advocacy could be directed at expanding public financing for public healthcare, which, according to Sachs, would go beyond increasing funding for an ineffective system, and would hold the State accountable for desegregating national health services as a whole.

Regarding the strategies that should be adopted, according to Sachs, litigation can only do so much. Regulation, legislation and further research are all necessary in order to challenge the prevailing conditions regarding public finance in the country. Allowing the status quo to persist, however, poses the very real threat of a major economic collapse; which would violate socio-economic rights profoundly, and in lasting ways.

Booyens informal
settlement in
Johannesburg.

Photo: © James Oatway





PART 2

COMPARATIVE PERSPECTIVES ON STRATEGIC LITIGATION FOR SOCIO- ECONOMIC RIGHTS



Allison Corkery.

PART 2: COMPARATIVE PERSPECTIVES ON STRATEGIC LITIGATION FOR SOCIO-ECONOMIC RIGHTS

Resourcing rights: state obligations in times of austerity

Allison Corkery (Director of the Rights Claiming and Accountability Programme at CESR, the Centre for Economic and Social Rights)

Allison Corkery spoke about the potential benefit of litigators focusing on the obligation under international law for states to resource rights. The main actors featured in Corkery's presentation were CESR and the Committee on Economic, Social and Cultural Rights ('the Committee').

Corkery described the potential benefit of using the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as data-driven advocacy, to realise the redistributive potential of rights and to fight against rights retrogression.

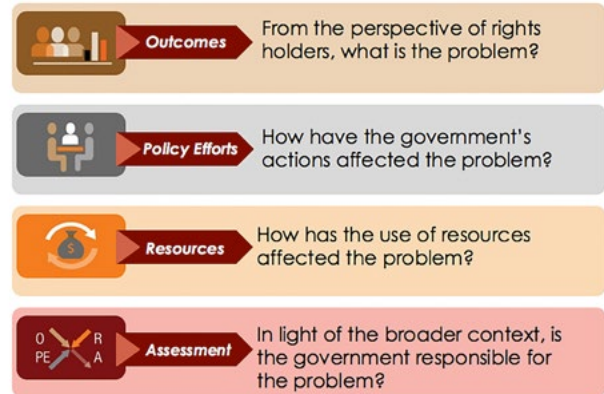
States that are party to the ICESCR undertake to take steps to progressively realise the rights recognised in the ICESCR, to the maximum of their available resources. The rights in the ICESCR include the right to social security; the right to form a trade union; the right to be paid a decent living; the right to education; and the right to “adequate food, clothing and housing” – as well as other socio-economic rights.

However, the ICESCR is neutral on what economic system is best for rights fulfilment, and gives states wide discretion in this regard; it embodies what Corkery refers to as “economic agnosticism”. Although available guidelines are limited, there are some concerning the actual resourcing of rights: the Limburg Principles state that rights should be given due priority, and resources should be allocated in a way that is both effective and equitable. The Committee has stated in its General Comments that resource allocations must ensure minimum core obligations and combat discrimination. Further, any measures that are “deliberately retrogressive” for rights realisation must be justified “by reference to the totality of the rights provided for in the ICESCR, and in the context of the full use of the maximum available resources”.

Corkery then spoke about the response to rights retrogression due to austerity, in the context of a state that is party to the ICESCR. Major normative developments began to occur due to widespread civil society concern over the impacts of fiscal adjustment. This led to the elaboration of the criteria needed to justify retrogression, and heightened expectations for and scrutiny of resourcing decisions – specifically in the context of the obligation of states to use “maximum available resources”. To illustrate this, Corkery presented the case against austerity in Spain in 2012. A report from Spain was given to the Committee that did not mention the recent financial crisis or poverty in Spain. In response, CESR then presented an alternative report to the Committee, in collaboration with other civil society organisations. CESR argued that the adoption of certain austerity measures by the Spanish government, without prior assessment of their human rights impacts or consideration of alternatives, was a violation of the State’s duties under the ICESCR.

Subsequently, the Committee made strong recommendations, and published an open letter to all parties to the ICESCR regarding what the criteria would be for judging the lawfulness of retrogressive measures. According to the Committee, along with other criteria, any policies that lead to the retrogression of rights must

OPERA: A FOUR-STEP FRAMEWORK



be temporary, necessary, proportionate, and must protect the minimum core of rights. But what is regarded as ‘available’ resources is determined largely by a state itself. There is a duty for states to ensure ‘adequate’ or ‘sufficient’ revenue through ‘fair’, ‘progressive’ or ‘socially equitable’ fiscal policy. In the South African context, the Committee has expressed concern that austerity will “further worsen inequalities in rights enjoyment”, and has recommended that the government pursue alternative measures. Addressing corruption and fruitless expenditure, tackling tax evasion and tax avoidance, and re-examining South Africa’s growth model are all options in this regard.

Corkery highlighted the importance of targeting decision makers and assessing the impact of austerity measures prior to their adoption. In both legal strategy and advocacy, data plays a vital role. Human rights bodies are improving in this regard, and the OPERA framework is a useful tool. However, there are still challenges that human rights bodies face, both empirically and normatively. The normative standards used to evaluate state policies are still vague (for example, the exact meaning of ‘impact’ and ‘maximum available resources’ is unclear). There is also uncertainty surrounding the extraterritorial obligations imposed on states by the ICESCR; further, it is unclear what the roles are for globalised private actors within the territory of states that are party to the ICESCR.

Corkery’s presentation highlighted the importance of interpretation and clarification of the ICESCR. There is certainly potential for using the ICESCR as a tool to determine a state’s obligations, and to evaluate their behaviour. Corkery also demonstrated the power of using data in legal strategy and advocacy. It is clear that civil society organisations must use available data to their advantage, and advocate for economic models and policy alternatives that will promote rights realisation.



Aoife Nolan.

PART 2: COMPARATIVE PERSPECTIVES ON STRATEGIC LITIGATION FOR SOCIO-ECONOMIC RIGHTS

A comparative perspective on using litigation to challenge fiscal austerity measures

Aoife Nolan (Professor of International Human Rights Law, Faculty of Social Sciences at Nottingham University)

Aoife Nolan described some examples of the European experience of challenging austerity measures through litigation. She made it clear that anti-austerity advocacy must not focus primarily on litigation; although litigation may be useful as one tool in fighting against austerity measures, it cannot be the primary tool. However, the examples provided by Nolan are useful in terms of conceptualising how to use litigation to challenge austerity in South Africa.

In Europe, fiscal austerity measures have largely been challenged using constitutional law. There are a range of constitutional provisions and principles that can be used to challenge fiscal austerity measures. The most common principles and provisions relied on to challenge austerity measures in Europe include equality and non-discrimination; specific economic and social rights; the right to a fair trial; property rights; the principle of protection of legitimate expectations; the principle of proportionality; and the principle of the social state.

The first case example described by Nolan took place in Hungary in 1995. The Constitutional Court found that measures required by the International Monetary Fund (IMF) directed at cutting social benefits were “unconstitutionally disproportionate”.¹ Firstly, this was because the measures failed to protect vulnerable groups. Secondly, where social expectations or benefits are dramatically altered, this cannot happen overnight, and there must be sufficient reason for the alteration. Finally, the criterion of the right to the protection of property was used to evaluate the constitutionality of the reduction or termination of benefits (with regard to social security benefits, where the insurance element has a role to play).

In Germany, the Constitutional Court considered reforms to social protection in the context of a demographic crisis that would ultimately have resulted in an economic crisis. It held that any such reforms must be consistent with the right to the guarantee of a subsistence minimum, in line with the right to human dignity under Article 1.1 of the German Basic Law, in conjunction with the principle of the social welfare state found in Article 20.1 of the Basic Law. The right to a subsistence minimum concerns access to the material necessary for physical existence and participation in social, cultural and political life. In this way, the right to the guarantee of a subsistence minimum is similar

to the “minimum core” concept in the ICESCR. In the Hartz IV decision, the Constitutional Court stated that its role was not to treat rights as providing quantifiable minimums; rather, the Court’s role was to ascertain whether justice was done to the right, by examining the basis and the method of assessment of benefits. Courts would thus consider whether lawmakers had chosen a suitable method of calculation for assessing the subsistence minimum, whether they had ascertained and considered all the necessary facts, and whether they had kept within the boundary of what was justifiable in terms of the legislature’s own calculation.

Finally, Nolan examined the Portuguese experience of challenging austerity in courts. In 2013 the Portuguese Constitutional Court struck down a number of fiscal austerity measures. This was on the basis of a constitutionally impermissible differentiation of treatment between the public and private sectors, in the context of the right to a salary and the right to social security. The Court made it clear that it is not altogether constitutionally impermissible to reduce social spending; it applied a proportionality analysis, to find a range of specific austerity measures unconstitutional. In fact, proportionality tests have been a key feature in judging austerity measures across many jurisdictions; and often this is based on procedure rather than on the substance of rights.

Nolan notes that in Europe, as in South Africa, courts are reluctant to engage in budgetary analysis. However, the European experience with austerity litigation does not translate neatly to South Africa, which has far stronger protections of economic and social rights in its Constitution. Generally, in Europe, courts have focused on the fairness of the procedure and the quality of the decision making. South Africa potentially has the framework to move beyond this, and focus on substance. However, despite this potential it is still important to recognise that judges are not key decision makers, and that litigation is reactive. It is also unclear whether the courts have served or can serve as a counter-hegemonic force in relation to fiscal austerity. Therefore, anti-austerity advocacy must be proactive – engaging with the legislature, and taking part in policy formulation to stop austerity measures from being implemented in the first place.

1. Constitutional Court, Decision 43/1995.

Litigating against austerity in the United Kingdom

Sandra Fredman (Professor of Law at the University of Oxford)

The Welfare State has long been part of British society; examples include the National Health Service and public education. However, stated Sandra Fredman, after 2010 there was no easy legal path for challenging austerity measures. This is partly because on top of the typical challenges faced when litigating against measures resulting in socio-economic rights retrogression, the United Kingdom (UK) does not have a written constitution. This means that there are no entrenched socio-economic rights in the UK – not even the right to equality.

Therefore, austerity has been challenged using the Equality Act 2010, and the ‘public sector equality duty’. According to section 149 of the Equality Act, in fulfilling their duties, public authorities must have “due regard” for eliminating unlawful discrimination, advancing equality of opportunity and fostering good relations. Instead of arguing that socio-economic rights existed in the UK, litigators utilised the public sector equality duty – arguing that a variety of fiscal austerity measures violated that duty. Litigators had to map poverty onto particular characteristics (for example race, gender or disability) when arguing that the measures being challenged violated the public sector equality duty. Because of this tactic, on occasion the courts found the arguments of litigators to be artificial, and ruled that in reality they were attempting to enforce socio-economic rights.

Litigators argued that the public sector equality duty was a duty to take reasonable steps to achieve equality. However, the courts rejected this argument, holding that public sector equality duty extended only to having ‘due regard’ for eliminating unlawful discrimination, advancing equality of opportunity and fostering good relations. ‘Due consideration’ means ‘to seriously consider’ and ‘to take into account’, but there was no duty

on public authorities to produce results, or even to take active steps. The courts did state that due consideration includes consultation; but Fredman argues that this element has largely been under-estimated and under-explored by litigators.

The South African context is very different to that of the United Kingdom. Human rights discourse is very much alive in South Africa. Unlike in the United Kingdom, there is a proactive duty on the State to take reasonable steps to fulfil socio-economic rights on a progressive basis. Additionally, in South Africa public authorities must have more than just ‘due regard’ for the impact of austerity on vulnerable groups. Furthermore, this duty is set out in the Constitution, which is South Africa’s highest law. According to Fredman, there is also potential for using Section 7 of the Constitution, where Section 7(2) states that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”. In addition, further use can be made of Section 9 of the Constitution, where the immediate right to equality is entrenched, which can challenge any austerity measures that undermine that right. There is also potential for using the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 to challenge austerity measures with disproportionate effects on vulnerable groups.

Thus although anti-austerity litigation in South Africa may not face the same challenges faced by litigation in the United Kingdom, Fredman argues that the use of the equality paradigm may be a useful tactic in strategic litigation in South Africa.



PART 3

RETHINKING SOCIO- ECONOMIC RIGHTS LITIGATION IN A TIME OF AUSTERITY



Jason Brickhill.

PART 3: RETHINKING SOCIO-ECONOMIC RIGHTS LITIGATION IN A TIME OF AUSTERITY

The impact of strategic litigation in South Africa

Jason Brickhill

Strategic litigation has frequently been used against unconstitutional conduct or stagnation by the government in rights fulfilment. Jason Brickhill spoke about the impact of strategic litigation in South Africa, and possible future approaches to challenging the retrogression of socio-economic rights, as well as the tactical and doctrinal issues that may be faced.

Brickhill reminded us that 'austerity' means more than cuts to spending, and that its effects are not limited to budget cuts.

In a chapter in *Economic and Social Rights* by Katherine Young, Jeff King looked at the impact of austerity globally, and found that it is not a new phenomenon. There are a number of persistent trends identified by King. These are the collapse of trade union density and collective bargaining coverage, a decline in support for social democratic parties, threats to revenue and progressive tax policies, and the persistence of the distinction between the 'deserving' and 'undeserving' poor.

More recent threats include demographic changes, climate change, and financial and economic crises. There are a number of possible consequences to these phenomena. These include stealth retrenchment, intrastate conflict, increased competition for resources within the social budget, and increased reliance on desert arguments – what do people deserve, and who deserves it?

These global trends can be seen in South Africa. There are far more players at the table, with a splintering in the trade union sector. Free-marketers in South Africa continue to push to do away with labour regulations. There is pervasive rhetoric either criminalising or pathologising the poor. Neoliberal trends are emerging in courts – in the Masawi case,² the High Court ruled that it was permissible to charge for emergency housing. In Chapelgate,³ the High Court of its own accord introduced a requirement that one must be legally in the country before acquiring alternative accommodation. There have also been cost orders levied against public interest organisations; these have generally been overturned by the Constitutional Court, but are becoming worryingly frequent. Finally, SARS has become less effective, and there is thus a reduction in revenue for social spending.

Brickhill identified three possible approaches to challenging austerity and rights retrogressions in South Africa. Firstly, there is the violations approach, which Brickhill compared to a fly swatter. This approach is reactive – when the government brings up resource constraints as a defence in socio-economic rights litigation, the approach is to swat that defence away, mainly using paragraph 74 of *Blue Moonlight*.⁴

Second is the outcomes-focused approach, for which Brickhill uses the metaphor of a mosquito-infested swamp. In this approach, the methodology used to enforce socio-economic rights is a combination of prophylaxis and treatment. Organisations track allocations and spending, and respond to cuts or inadequate allocations with litigation. This approach is more systematic, but is still largely reactive, and generally targets unanswerable questions.

The third approach focuses on the State's obligations

more broadly and systematically – Brickhill used the metaphor of a beehive. Organisations participate actively in budget processes, and build a strategic framework using research, mobilisation and advocacy. In terms of revenue generation, more attention is paid to SARS, as well as to the criminal justice sector in terms of its potential for enforcing tax compliance and combatting corruption, which have largely been ignored by the public interest sector, or thought of as too 'political' to get involved in. Brickhill pointed out that there is also the possibility of proactive litigation – challenging government's inaction in terms of its duty to act progressively in fulfilling socio-economic rights. Public interest organisations should also involve themselves in tender litigation, and increase their focus on fruitless expenditure and corruption.

In terms of doctrinal issues in litigating socio-economic rights, after footnote 46 of *Mazibuko*⁵ it seemed that it would not be possible to utilise the 'minimum core' argument. However, since *Mazibuko* South Africa has now fully ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), possibly reopening the door to the minimum core argument. This depends on how the argument is framed; the ratification of the ICESCR must mean something legally, and its doctrines must be used in interpreting the Bill of Rights (according to Glenister).⁶ Arguably, the Constitutional Court has already been implicitly using the concept of the minimum core in cases concerning education provisioning. However, courts become uneasy when presented with conflicting expert evidence, and are unlikely to set a minimum core of their own accord. Therefore, Brickhill argued, the government – with public participation – should determine the minimum core, which could then be judicially enforced.

The public interest sector is stretched, having drastic funding cuts and the exit of major donors. Therefore, collaboration across the sector is vitally important for challenging austerity. A broader approach must be used by the public interest sector – perhaps using the third approach to advocacy identified by Brickhill: going beyond litigation, being proactive, and exploring new areas of advocacy.

2. 2017 (4) SA 632 (GJ).

3. 2017 (2) SA 328 (ECG).

4. 2012 (2) SA 104 (CC).

5. 2010 (4) SA 1 (CC).

6. 2011 (3) SA 347 (CC).



Nomzamo Zondo.

PART 3: RETHINKING SOCIO-ECONOMIC RIGHTS LITIGATION IN A TIME OF AUSTERITY

Litigation against mass evictions in the Johannesburg inner city: lessons learned, and where to next

Nomzamo Zondo (Executive Director for SERI, the Socio-Economic Rights Institute of South Africa)

Nomzamo Zondo spoke about the impact and limitations of strategic litigation in South Africa, focusing on enforcing the right to adequate housing in Johannesburg's inner city by using litigation to defend people as much as possible from mass evictions and homelessness. Zondo gave pertinent insights into the lessons learned from litigating against the government for socio-economic rights in these cases.



Zondo stated that in 2014, engagement between SERI and the State regarding the State's housing plans effectively came to a halt. The State handed power to their lawyers, and stopped communicating directly with SERI. SERI had taken the position that the government's housing programme required the provision of alternative accommodation for people subjected to mass evictions from buildings in the inner city, especially where such evictions would leave people homeless. Because of the litigation, government was forced to give proper explanations and justifications for its policy positions.

Government had to explain what was planned and budgeted for, what was not planned or budgeted for, and why. This was a powerful result; the State had to do more than just declare that something had not been budgeted for, or state simply that it did not have the resources. After the explanations and data were given, SERI could use the State's data and explanations to package their arguments within the State's own framework.

However, while all this was happening, Johannesburg's inner-city buildings were collapsing. Living conditions for occupants of these buildings were deteriorating rapidly, and government was not responding to the deterioration – they had to be chased to respond in every case.

Where litigation had already occurred, contempt orders were required, because of government's non-compliance with the court orders requiring the provision of accommodation. The lesson learned, said Zondo, was that – even if one is able to litigate the State into a corner – if there is no political will, then nothing

will get done. Judgments and court orders are not always enough.

It's time, Zondo said, to look at the actual monetary costs of unconstitutional action (or inaction) by the State. The argument that money is not a central consideration regarding socio-economic rights fulfilment has not been working for the public interest sector. An effective strategy for public interest organisations to follow would be to move away from a rights-only framework and to use the costs arguments of the State against them. For example, the State not providing people with access to electricity not only affects their basic rights; it also costs the State money, because of the subsequent proliferation of illegal connections.

A further idea for the public interest sector would be to make unexpected alliances. As an example, said Zondo, the courts have a more tolerant attitude towards a 'Friend of the Court' or *amicus curiae*, so it may be tactically beneficial to collaborate and partner with agents in the private sphere when arguing against government policy.

Without political will, strategic litigation alone cannot force the State to take action to fulfil rights. It may be beneficial for the public interest sector to move away from relying solely on a rights framework in both advocacy and litigation. Using the State's data and packaging arguments in the State's own framework has proved to be effective. Involving the private sphere in socio-economic rights litigation as *amici curiae* may also prove to be effective in future, and is something for the public interest sector to consider.

CONCLUSION

Fiscal austerity measures are disastrous for the realisation of socio-economic rights. As illustrated by Zukiswa Kota, austerity has effects beyond ‘fiscal consolidation’. It actively harms people. It is also discriminatory in nature, disproportionately harming the most vulnerable in society. Further, as pointed out during the discussion phase of the seminar, the mainstream narrative that investment in socio-economic rights is a fiscal burden is inaccurate. There is a direct link between rights fulfilment and economic growth.

It is clear that austerity is more than budget cuts, and that it is often implemented in unexpected ways. In tracking austerity, public interest organisations need to be more nuanced in their understanding of how austerity works and how it can present. As pointed out by Michael Sachs, organisations need to look beyond budget cuts and into how money is being allocated and reprioritised; whether tax policy is becoming more regressive; and at the capacity and functioning of critical institutions. Using monitoring and impact assessments to determine the effects of policies, or whether policies are being implemented, is vital in ensuring the state is working towards socio-economic rights fulfilment. In this regard, the OPERA framework introduced by CESR may prove useful.

Litigation has long been used as a tool in socio-economic rights advocacy. Jason Brickhill pointed to the history of this, and laid out the predominant legal strategy used to prevent socio-economic rights retrogressions. This has mainly been using Blue Moonlight against the government’s threadbare excuses of resource limitations (without providing any evidence or analysis). However, Brickhill pointed out that socio-economic rights litigation has been limited by the Constitutional Court’s rejection of the concept of the minimum core.

This may change with South Africa’s ratification of the ICESCR, which reintroduces the possibility of making use of the concept of minimum core obligations in

socio-economic rights litigation. This could be used to challenge budget cuts or inadequate allocations. As illustrated by Allison Corkery, the ICESCR has proven useful in anti-austerity litigation in a number of European countries. There is also potential in using an equality framework in order to challenge austerity measures. Austerity is discriminatory; and as stated by Sandra Fredman, the right to equality is immediately realisable in South Africa, and it could be argued that austerity unfairly discriminates against vulnerable communities. Rights discourse is stronger in South Africa than in many other jurisdictions, and this can be used to our advantage.

As the public interest law sector has long recognised, litigation on its own is not enough to realise socio-economic rights or to stop austerity in South Africa. A more holistic and pro-active strategy is required. This was a viewpoint shared by most of the speakers at the seminar.

Before resorting to litigation, public interest organisations must:

- Engage in the making of legislation and economic policy.
- Track allocations and spending for socio-economic rights realisation.
- Ensure there are impact assessments of austerity measures prior to their adoption.

As stated by Aoife Nolan, the key decision-makers on economic policy are not and cannot be judges. Further, there is no real evidence that anti-austerity litigation has any meaningful effect in disrupting the dominant neo-liberal narrative. By nature, litigation is also reactive, and the courts are reluctant to engage in economic analysis. Further, as pointed out by Nomzamo Zondo, court orders can be meaningless where there is no political will.



Therefore, the approach used by public interest organisations must be proactive, and must intensify advocacy in non-litigious spaces in order to stop austerity measures from being introduced in the first place. In this regard, data and monitoring are vital. We must also change the narrative around socio-economic rights as a fiscal burden, and the moralisation of poverty. As stated by Zondo, a rights-only approach has become ineffective, and we need to show how socio-economic rights investment leads to economic growth. Further, public interest organisations cannot be afraid to involve themselves in what may seem ‘too political’. More attention must be paid to institutions such as SARS and the NPA, in order to ensure that government revenue is in fact being collected and that efforts are being made to end corruption.

This is the time for public interest organisations to intensify advocacy for socio-economic rights and against austerity measures in South Africa. Socio-economic rights retrogressions caused by austerity are a huge threat, and will be compounded by the looming climate crisis. The brutality and rights impact of neo-liberal policies must be laid bare to the public. Now, more than ever, we need to emphasise that a different, better world is possible. Doing this requires engaging the public at grassroots level, creating and supporting policy alternatives and involving ourselves

in policymaking. In order for such advocacy to be effective, collaboration and solidarity across the public interest sector is vital.

Although litigation may be useful in bringing attention to austerity and rights retrogressions, and may be able to stop some policies from being implemented, it is important to be both proactive and reactive where we need to be. This is necessary to prevent socio-economic rights retrogression and avoid economic and social collapse in South Africa.

Where litigation becomes necessary, we need to move beyond traditional challenges – such as contesting budgetary-constraints arguments by the State – to requiring a decent level of provisioning of socio-economic rights, through more pro-active engagement with the equality paradigm provided in the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.



The City of Cape Town moved hundreds of homeless people to a site in Strandfontein because of the Covid-19 pandemic.

Photo: Ashraf Hendricks/GroundUp



Volunteers unload food parcels for distribution.

Photo: © Tshepiso Mabula

POTENTIAL THREATS AND OPPORTUNITIES AS A RESULT OF COVID-19

The global pandemic that reached South Africa shortly after the austerity seminar held by SECTION27 has perhaps demonstrated the brutality of economic inequality in post-apartheid South Africa more than anything has before.

Although the South African economy was far from healthy before the pandemic, the impacts of COVID-19 may be causing the greatest economic contraction in South Africa's history.⁷ In his address on 21 April 2020, President Cyril Ramaphosa stated that the economy after the pandemic will not be the same as it was before this unprecedented event. This new economy will be "...founded on fairness, empowerment, justice and equality".⁸

However, there is always a risk that politicians are 'talking left while walking right', using rhetoric to mask the furtherance of right-wing policies,⁹ which may very well re-emerge after the crisis. It is up to civil society activists to fight for the economy that Ramaphosa is promising. In doing that, it is necessary to reject any austerity measures that may be proposed in future, and to use this pandemic as a moment to reflect on how we can create a more just society based on our constitutional values and rights.

This will be a multifaceted process – identifying how gross inequality and poverty in South Africa is caused and maintained, promoting reforms, and monitoring and compiling data, as well as supporting and engaging with grassroots activism.

7. Ravi Naidoo 'Five initiatives that are crucial to any New Deal are already pencilled into the COVID-19 economic package. They need to be taken further.' (29 April 2020) accessed from <https://www.dailymaverick.co.za/opinionista/2020-04-29-the-pandemics-economic-devastation-has-created-a-rare-opportunity-for-a-new-deal-in-south-africa/> on 1 May 2020.
8. Statement by President Cyril Ramaphosa on further economic and social measures in response to the COVID-19 epidemic <http://www.dirco.gov.za/docs/speeches/2020/cram0421.pdf> (21 April 2020).
9. Patrick Bond 'Bretton Woods institution narratives about inequality and economic vulnerability on the eve of South African austerity' (2015) 45 International Journal of Health Services 415 at 430.



POTENTIAL THREATS AND OPPORTUNITIES AS A RESULT OF COVID-19

'To experience a crisis is to inhabit a world that is temporarily up for grabs'¹⁰

It is understandable to feel a deep pessimism in the midst of the COVID-19 pandemic. What the world is going through is undeniably traumatic. Many lives have been lost, and what has happened is frightening and painful for many. The fragility of the world order has been laid bare. The pandemic has ripped "open the fabric of normality", as Peter C Baker has aptly put it,¹¹ revealing the worldwide fragility of national healthcare and social security systems.

There is now an opportunity to intensify advocacy for government money to be spent progressively, reducing inequality, realising socio-economic rights, and ending self-imposed fiscal austerity measures.

10. William Davies 'The last global crisis didn't change the world. But this one could' (24 March 2020) accessed from <https://www.theguardian.com/commentisfree/2020/mar/24/coronavirus-crisis-change-world-financial-global-capitalism> on 21 April 2020.

11. Peter C Baker 'We can't go back to normal': how will coronavirus change the world?' (31 March 2020) accessed from <https://www.theguardian.com/world/2020/mar/31/how-will-the-world-emerge-from-the-coronavirus-crisis> on 21 April 2020.



POTENTIAL THREATS AND OPPORTUNITIES AS A RESULT OF COVID-19

South Africa during the pandemic

After about a month of national lockdown President Cyril Ramaphosa announced a stimulus package of R500 billion, amounting to 10% of GDP (which is also the percentage the economy is predicted to contract).¹²

The initial economic relief put in place by the government to ease the effects of the lockdown was woefully inadequate. Starvation became a primary concern, and people were forced to resort to looting convenience stores and food delivery trucks.¹³ There has been some successful advocacy for topping up social grants by a range of organisations, including SECTION27, providing some relief to vulnerable households.¹⁴ According to President Ramaphosa, the relief package announced on 21 April would increase the child support grant (CSG) by R300 per child in May as a once-off payment, and by R500 thereafter for the next five months.¹⁵ A special COVID-19 social relief grant of R350 was created for those who are unemployed and not receiving any other grants. All other grant

beneficiaries would receive an extra R250 per month for the next six months.¹⁶

But the announcements made by President Ramaphosa were subsequently revised in substantial ways. Notably, the National Treasury clarified that the CSG would be allocated per caregiver, as opposed to per individual child. This greatly reduces the effectiveness of the top-up in combating hunger in vulnerable households. Although allocating the R500 increase in the CSG per caregiver rather than per child was estimated to save the government R13 billion, the effects of the limitation are likely to have devastating effects – leaving an additional two million children below the food poverty line.¹⁷

Hunger has been exacerbated by the exclusion of CSG recipients from the COVID-19 grant, and the complete inadequacy in the provision of emergency food relief packages.¹⁸ Further, the rising cost of food and rapidly falling incomes have left families in abject destitution.¹⁹

12. Gilad Isaacs 'Covid-19: Unpacking President Ramaphosa's rescue package' (22 April 2020) accessed from <https://www.groundup.org.za/article/unpacking-president-ramaphosas-rescue-package/> on 23 April 2020.
13. Odwa Mkentane 'Looting of trucks, shops spreads to small towns in Western Cape' (23 April 2020) accessed from <https://www.iol.co.za/capetimes/news/looting-of-trucks-shops-spreads-to-small-towns-in-western-cape-47069822> on 23 April 2020.
14. Jeremy Seekings 'Covid-19: Ramaphosa's plan is good, but the budget is insufficient' (23 April 2020) accessed from <https://www.dailymaverick.co.za/article/2020-04-23-covid-19-ramaphosas-plan-is-good-but-the-budget-is-insufficient/> on 23 April 2020.
15. Ibid.
16. Estelle Ellis 'Some relief for 13 million people as Ramaphosa announces increase in child support grant' (21 April 2020) accessed from <https://www.dailymaverick.co.za/article/2020-04-21-some-relief-for-13-million-people-as-ramaphosa-announces-increase-in-child-support-grant/> on 23 April 2020.
17. Budget Justice Coalition 'Government's COVID-19 economic response inadequate and punitive' accessed from <https://budgetjusticesa.org/media/finding-money-to-fight-covid-19-transparency-and-participation-are-the-bottom-lines-1/> on 1 July 2020.
18. Ibid.
19. Ibid.

In addition, these concerns coincided with the halting of the National School Nutrition Programme (NSNP), a national project that provides over 9 million learners with meals at school every day.²⁰

The NSNP caters for schools in quintiles 1 to 3, meeting vulnerable learners' daily nutritional needs and contributing to improved educational outcomes. The NSNP has been widely lauded as one of the government's most effective 'pro-poor'²¹ policies, for its impressive reach. In the context of lockdown, where many families have suffered loss of income and learners are not receiving food at school, we have received chilling testimony that even with the CSG top-up, families have been struggling to put food on the table for all children in the household, in the absence of school meals.²² Furthermore, recipients of the CSG were not eligible for the Department of Social Development's food parcel and social relief of distress programmes. We received evidence that even with the modest increase to the CSG, children's nutritional needs were not being met. As a response to the reported increases in child hunger – now verified by the first wave of findings of the nationally representative 'National Income Dynamics Survey – COVID-19 Rapid Mobile survey'²³ – SECTION27, Equal Education and the Equal Education Law Centre took the government to court, demanding the resumption of the NSNP.²⁴

On 2 July 2020, before Judge Potterill in the North

Gauteng High Court, we argued that the rights to basic nutrition and basic education are interdependent, and that the government's failure to resume the NSNP for all eligible learners – including those not yet back at school – where plans had been proposed to do so previously were violating children's rights to adequate nutrition and basic education.²⁵ The Department of Basic Education (DBE) opposed our urgent application; its defence was to deny that it had ever "refused" to provide the NSNP, and it further claimed that it was indeed implementing the programme. However, the reality on the ground told a different and troubling story. Faced with the compelling and irrefutable evidence provided by the applicants, on 17 July 2020 the court found in our favour – rejecting the DBE's "semantic defence", which the Court deemed to be "bad in law and contrived".²⁶

Judge Potterill handed down a supervisory interdict, where without delay, the DBE and provincial education departments (MECs) were required to deliver school meals to all qualifying beneficiaries without delay, and to furnish the Court with plans for the resumption of the programme within 10 days, and with regular updates every 15 days thereafter.

The Court further handed down a declaratory order, reiterating the statutory and constitutional duties of the DBE and MECs to fulfil learners' rights to basic nutrition and basic education.²⁷ In the words of Judge Potterill: "Hunger is not an issue of charity, but one of justice... Children are categorically vulnerable, poor hungry children are exceptionally vulnerable. The degree of the violation of the constitutional rights is thus egregious."²⁸

20. Department: Planning, Monitoring and Evaluation & Department: Basic Education 'Report on the implementation evaluation of the National School Nutrition Programme' accessed from <https://www.education.gov.za/Portals/0/Documents/Publications/NSNP%20Documents/2.%20NSNP%20Summary%20Report.pdf?ver=2018-11-09-083251-100> on 13 July 2020.
21. Department of Basic Education 'Strategic Plan 2020-2024' (2020) at 7 accessed from https://www.google.com/url?q=http://pmg-assets.s3-website-eu-west-1.amazonaws.com/DBE_Strategic_Plan_2020_-2024.pdf&sa=D&ust=1594640978132000&usg=AFQjCNHLzwDC6IYUIQY-0L8uUUYz8d-3HA on 13 July 2020.
22. See: Jeremy Seekings 'Feeding poor people: The national government has failed' available at: <https://www.groundup.org.za/article/feeding-poor-people-national-government-has-failed/>, and Jeremy Seekings 'Report on Social Grants and Feeding Schemes under the Covid-19 Lockdown in South Africa' Annexure NM6 to the Founding Affidavit for Equal Education v Minister of Basic Education.
23. <https://cramsurvey.org/wp-content/uploads/2020/07/Van-der-Berg-Coronavirus-Lockdown-and-Children-1.pdf>
24. Zukiswa Pikoli 'Courts asked to compel government to feed learners' accessed from <https://www.dailymaverick.co.za/article/2020-06-12-courts-asked-to-force-government-to-feed-learners/#gsc.tab=0> on 10 July 2020.
25. See: Applicants' Heads of Argument paras 83-144 available from <http://section27.org.za/wp-content/uploads/2020/06/Applicants-Heads-of-Argument.pdf>.
26. Faranaaz Veriava and Sasha Stevenson 'School feeding court case: The justice of eating and the obscenity of hunger' accessed from <https://www.dailymaverick.co.za/article/2020-07-19-school-feeding-court-case-the-justice-of-eating-and-the-obscenity-of-hunger/#gsc.tab=0> on 19 July 2020.
27. SECTION27 'Joint statement: Education rights organisations and school communities to now monitor government's compliance with the school meals courts judgment' accessed from <http://section27.org.za/2020/07/joint-media-statement-education-rights-organisations-and-school-communities-to-now-monitor-governments-compliance-with-the-school-meals-court-judgment/> on 20 July 2020.
28. Equal Education and Others v Minister of Basic Education ZAGPPHC 306 (17 July 2020) paras 88.1 - 88.2. Available from: <http://section27.org.za/wp-content/uploads/2020/07/Judgment-Equal-Education-and-others-v-Minister-of-Basic-Education-and-others-22588-2020-2.pdf>

While funding has not been cut from the NSNP in the supplementary budget (although the NSNP has not received additional funds either, with R50 million of its existing budget redirected towards funding new hygiene measures), government's failure to reinstate or expand an existing programme with recognised reach and scope – in the broader context of underfunding of social relief measures – represents a commitment to austerity.

Over and above this litigation, our analysis shows that it is becoming increasingly clear that austerity is informing South Africa's response to COVID-19. Analysts have pointed out that the R500 billion relief package announced by President Ramaphosa in April is a mirage.²⁹ The analysis of the supplementary budget tabled by Minister of Finance Tito Mboweni in June 2020 shows that very little additional net funding is being made available to the COVID-19 response. R130 billion of the relief package is coming from already planned budget expenditure.³⁰ Social spending has been hard hit in the newest supplementary budget, with potentially disproportionate increased additional funding flowing to the South African National Defence Force and South African Police Services³¹.

Indeed, even during what is a public health crisis, expenditure on health has been meagre. In February 2020, cuts to health conditional grants amounted to R1.9 billion in the medium term, with the hardest hit being central and provincial hospital services budgets, as well as those of emergency medical services. These trends continue with Mboweni's supplementary budget. Projected to need at least R21.5 billion to face the COVID-19 challenge, the health sector has actually only received R2.9 billion in net additional funding, with the rest of the Department of Health's response funded through the reprioritisation and reallocation of existing budgets. Provinces are expected

to revise February's baselines, which had not taken the crisis into account.³² Significant cuts have been made to the HIV/AIDS, TB and Malaria conditional grant, as well as to funding for National Health Insurance.³³ One of the cuts is to the HIV (Life Skills) conditional grant (used to train teachers to deliver comprehensive sexuality education). R20 million of the grant has been cut, and R40 million has been shifted to pay for COVID-19 material.

Despite continued plans to reopen schools in a phased manner for all learners in an effort to save the academic year, which requires the sector to deal with the need for adequate water access and dignified toilets in schools, the basic education sector has received no additional relief funding from the National Treasury. In part this is because basic education is not considered a "COVID-19 frontline department".³⁴ Instead, the basic education sector has been one of the largest net 'losers' in the supplementary budget, with a net cut of R2.1 billion. Notably, even in areas where there are demonstrable backlogs and rights violations, as is the case with school infrastructure, spending has been reduced – the education infrastructure grant and school infrastructure backlog grant, for example, have been slashed by R1.7 billion, with funding ordinarily committed to eradicating pit toilets, upgrading unsafe school buildings and improving school infrastructure now being used to fund COVID-19 essentials for schools.³⁵

29. Budget Justice Coalition 'Government fails to live up to COVID-19 socio-economic relief promises' (9 July 2020) accessed from <https://budgetjusticesa.org/media/government-fails-to-live-up-to-covid-19-socio-economic-relief-promises/> on 13 July 2020.

30. Isaacs op cit note 12.

31. Op cit note 28.

32. Budget Justice Coalition 'Detailed analysis of the Supplementary Budget proposals on spending, debt and raising more revenue' (24 July 2020) accessed from: <https://budgetjusticesa.org/media/detailed-analysis-of-the-supplementary-budget-proposals-on-spending-debt-and-raising-more-revenue/> on 27 July 2020.

33. National Treasury 'Supplementary Budget Review' (2020) accessed from <http://www.treasury.gov.za/documents/national%20budget/2020S/review/FullSBR.pdf> on 27 July 2020.

34. Chaskalson, Selebalo and McLaren, 2020. 'Education spending is falling. The COVID-19 budget has slashed it further.' https://www.groundup.org.za/article/education-spending-falling-covid-19-budget-has-slashed-it-further/?fbclid=IwAR2_hi-VdoRw3tHgDhhUHVKYWWLRbe2MfMbNxvhyNLq-qF8_a1I7E9nMaU

35. SECTION27 'Joint statement on supplementary budget: Activists lament the lack of additional funding to Basic Education sector' (25 June 2020) accessed from <http://section27.org.za/2020/07/activists-lament-the-lack-of-additional-funding-to-basic-education-sector/> on 14 July 2020.



A commuter rushes
for a morning taxi at
the Baragwanath Taxi
Rank in May 2020.

Photo: © Oupa Nkosi

In a joint statement with Equal Education, the Equal Education Law Centre and the Public Service Accountability Monitor, we noted:

“...cuts to infrastructure funding jeopardises long-term infrastructure projects already in the pipeline: plans to build new schools and replace unsafe ones, scheduled repair and maintenance projects, or plans to deliver permanent water and sanitation infrastructure, will now be forced to grind to a halt.

The near total suspension of the education infrastructure programme for the 2020/21 financial year is an extreme and regressive measure. It sets the achievement of Minimum Norms and Standards for School Infrastructure, including the eradication of plain pit toilets, back by yet another year. This will mean that learners and teachers continue to go to schools that are dangerous, unhygienic and unfit for learning.”³⁶

This supplementary budget represents the continuation of a worrying trend of cutting spend per learner on basic education infrastructure. The achievement of legally binding norms and standards for school infrastructure is thus further jeopardised, and learners’ rights to basic education and equality are threatened.

While some reprioritisation of existing budgets will

naturally be necessary to some extent, the movements of funds and justifications for doing so must be carefully evaluated, and the budget for social spending must not be cut dramatically.

In terms of relief for business and households, the government is allocating R200 billion in loan guarantees and R70 billion in tax deferments or deductions.³⁷ Ramaphosa has stated that funds for increased spending will come from “local sources such as the UIF, global partners and international financial institutions”.³⁸ There are thus no proposed tax increases, despite there certainly being an argument for a ‘solidarity tax’ to be imposed on the wealthy for the duration of the crisis.³⁹ Few forms of new revenue have been proposed, and thus the reduced relief package consists mostly of reprioritisations from existing budgets.⁴⁰

Economist Gilad Isaacs argues that the relief package was not enough, and that once it is broken down, it can be shown that it does not necessarily cost the fiscus anything at all.⁴¹ More could and should be spent in order to support the economy in the medium term.⁴²

Even with the relief package, GDP is still expected to decline between 6 and 10 percentage points in 2020.⁴³ Millions of jobs will be lost, and State revenue is likely to decline radically.⁴⁴ The increase in the child support grant was clarified to be payable per carer and not per child, lessening the impact the increase could have had. Further, a grant of R350 for those with no other income source is certainly not enough for individuals to survive on.⁴⁵ It is clear that the grant increases are not enough to alleviate policy and hardship; but these issues existed before the pandemic. We have been presented with an opportunity to rethink and reshape how our society functions, and who gets to benefit from it.

36. Ibid.

37. Ibid.

38. Ibid.

39. Ibid, the proposal from the IEJ could raise an estimated R48 billion.

40. Op cit note 31.

41. Ibid.

42. Ibid.

43. Ibid.

44. Duma Gqubule ‘SA’s Covid-19 stimulus package falls far short’ (19 May 2020) accessed from <https://www.newframe.com/sas-covid-19-stimulus-package-falls-far-short/> on 24 May 2020.

45. Op cit note 17.

The austerity seminar in the context of COVID-19

In a country with constitutionally entrenched socio-economic rights such as South Africa, the government has the duty to realise rights such as the right to sufficient food and water,⁴⁶ children's rights to basic nutrition,⁴⁷ the right to basic education,⁴⁸ and the rights to equality, dignity and life.⁴⁹

Where it deliberately is not doing so, the government must justify the non-fulfilment or retrogression of these rights through Section 36 of the Constitution, using a proportionality analysis and proving to courts that such limitation of a right (or retrogression) is proportionate to the purpose of the limitation (and is "...justifiable in an open and democratic society based on human dignity, equality and freedom"). Importantly, the courts must consider whether there were less restrictive measures to achieve the purpose of the limitation.

Further, after having signed the ICESCR, South Africa finally ratified it fully in 2015. Before this was even done, the Constitutional Court (in obiter) approved of the comments of the Committee on Economic, Cultural and Social Rights in General Comment 3 on the meaning of 'progressive realisation'.⁵⁰ General Comment 3 states that the duty to "progressively realise" includes a duty to do so as "expeditiously and effectively" as possible.⁵¹ If a state were to implement any measure that purposefully regresses the fulfilment of socio-economic rights, such a state would need to justify such a measure "...by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".⁵² There is thus a presumption against the regression of the rights in the Covenant, and the onus is on the government to show why such measures are justifiable.

The Committee, in a statement on 'Public debt, austerity

measures and the International Covenant on Economic, Social and Cultural Rights', gave some guidance as to how to judge whether regressive measures are justifiable.⁵³ For example, where the implementation of regressive measures is unavoidable, they must be shown to be necessary and proportionate; they must not stay in place any longer than necessary; they should not result in discrimination, and should ensure marginalised and disadvantaged groups are not disproportionately affected; and they should not affect the "minimum core content of the right".⁵⁴ In terms of regression of the right to social security (Article 9 and 10 of the Covenant), states must ensure there was reasonable justification for the regressive measures, that they have "comprehensively examined" alternatives, that the measures are not directly or indirectly discriminatory, and that the measures will not have a sustained or unreasonable impact on the realisation of the right. Further, there must be "genuine participation" of impacted groups when the state examines the possible impacts of the regressive measures or their alternatives, and there must be an "independent review" of the measures on a national level.⁵⁵

The ICESCR states that a government must use the "maximum of its available resources" to progressively realise the rights in the ICESCR. This is stronger than the way progressive realisation is framed in the Constitution, wherein it states that the government must use "available resources".⁵⁶ Interpretation of 'available resources' or

46. Section 27(1)(b) of the Constitution.

47. Section 28(1)(c) of the Constitution.

48. Section 29 (1)(a) of the Constitution.

49. The right to water, housing and food are rights the government must progressively realise using available resources. The right to life, equality, children's right to nutrition and the right to basic education are immediately realisable.

50. Sandra Liebenberg Socio-economic rights: Adjudication under a transformative Constitution (2010) at 189.

51. Committee on Economic, Social and Cultural Rights 'The nature of States parties obligations' (1990) General Comment 3.

52. Ibid para 9.

53. Committee on Economic, Social and Cultural Rights 'Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights' 2016 general comment para 4.

54. Ibid.

55. Ibid.

56. See section 25(5), 26(2) and 27(2) of the Constitution.

‘maximum available resources’ can be confusing, because to a large extent the state itself determines what resources are available (e.g. how much the state will borrow or tax people). However, it is clear, as stated by Brickhill in his presentation, that equitable tax policies, cracking down on tax evasion and avoidance, and tackling corruption in both the public and private sphere are some measures that would further ‘maximise’ resources available for socio-economic rights realisation.

The Committee released a statement regarding states’ responses to the pandemic, and stated that if states do not act within a human rights framework when responding to the pandemic, they are at risk of violating their obligations under the ICESCR.⁵⁷ It stated that states must recognise that the direct and indirect effects of the virus will not be equal, and vulnerable communities are more likely to suffer.⁵⁸ The statement stressed the importance of adequate investment in “...public health systems, comprehensive social protection programmes, decent work, housing, food, water and sanitation systems, and institutions to advance gender equality”.⁵⁹ Further, it called on state parties to use the moment of extreme resource mobilisation to address the virus as an impetus to mobilise resources for socio-economic rights in the long run.⁶⁰

An important development in the context of the austerity seminar is the release of Philip Alston’s report on global poverty, in his capacity as UN Special Rapporteur on Extreme Poverty and Human Rights.⁶¹ The report put forward several observations on the narrative surrounding extreme poverty in recent decades, and offered recommendations on how to move forward. Firstly, the report shows that the pre-pandemic narrative describing extreme poverty as close to eradication was misleading and inaccurate.⁶² This is because of misplaced reliance on the World Bank’s international poverty line (IPL). The report describes the IPL as extremely unambitious, and notes that it is intended to reflect a low standard of living

– lower than what would be necessary for a dignified life. Secondly, the report highlights that those who will suffer the most due to the pandemic are those living in poverty, and that this is not the fault of COVID-19. The report states that the impact of the pandemic on the poor would have been far less severe if social safety nets were in place, but that due to years of pressure to enact austerity measures, social safety systems are “...closer towards nineteenth-century models rather than late-twentieth-century aspirations”.⁶³ Thirdly, the report states that implementing the traditional economic policies aimed at economic growth as a way to reduce poverty is not supported by evidence. Privatisation, regressive tax policies, deregulation, labour reforms and social service cuts have not reduced poverty, and have had devastating effects on the poor.⁶⁴ According to the report, “fiscal consolidation” programmes have increased inequality, and have been linked to an array of social ills.⁶⁵

The post-pandemic world is not immune to austerity. As in Europe after the 2008 financial crisis, big spending may be followed by strict austerity. In this context, it is important to carefully monitor any proposals, what is and is not being done, and the discourse floating around. Minister Mboweni has already proposed heightened austerity measures for the period 2021 to 2022.⁶⁶

Socio-economic rights realisation needs to be central to policy formulation and implementation. Litigation after the fact is possible, but stopping austerity measures from being implemented in the first place is the most desirable plan of action. This can be done by proposing policy alternatives, centralising human rights discourse, and reminding the government of its obligations under constitutional and international law against the retrogression of socio-economic rights. Generally, litigation must be used as a last resort after other avenues have been exhausted, as was the situation in the NSNP case.⁶⁷

57. Committee on Economic, Social and Cultural Rights ‘Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights’ 17 April 2020 para 2.

58. Ibid para 5.

59. Ibid para 24.

60. Ibid.

61. Report of the Special Rapporteur on extreme poverty and human rights ‘The parlous state of poverty eradication’ (2 July 2020) <https://chrgj.org/wp-content/uploads/2020/07/Alston-Poverty-Report-FINAL.pdf>.

62. See paras 3 & 12.

63. Para 36

64. Para 62

65. Para 63.

66. Op cit note 31.

67. ‘South Africa is getting a new universal income grant: report’ (14 July 2020) accessed from <https://businesstech.co.za/news/finance/415935/south-africa-is-getting-a-new-universal-income-grant-report/> on 27 July 2020.

Proposing policy alternatives

Vishwas Satgar, of the Co-operative and Policy Alternative Centre, has stated that the pandemic has now given us space to break from dominant economic thinking, giving room to thinking about heterodox, bold and innovative ways to address economic inequality and the climate crisis in South Africa.⁶⁸

The pandemic has also given us space to think about how the government can fulfil its constitutional and international obligations to realise socio-economic rights. Numerous policies from a number of social justice organisations have been advocated for to mitigate the pain of lockdown, ranging from increasing the child support grant⁶⁹ and implementing a basic income grant (which South Africa is now seriously considering),⁷⁰ to extending the NSNP to include weekends and the integration of South Africa's private and public health systems.^{71 72} If ever there was a time to be bold, that time is now.

Before the pandemic even reached South Africa, as the participants in our seminar explicated, the public healthcare system was underfunded, under-staffed and over-burdened.⁷³ Healthcare provision in South Africa is grossly unequal because of its dual nature – the split between private and public healthcare provision. More money is spent annually on private healthcare than public

healthcare, despite the fact that the public healthcare system serves far more people than the private healthcare system.⁷⁴ Despite poor health outcomes in South Africa, over the past few years the government has reduced spending on health “...in real terms, overall and per unemployed person.”⁷⁵ Public interest organisations in South Africa have demanded principled contracting between the private and public health sector, that prioritises the saving of lives rather than generating profit.⁷⁶ It is clear that the current state of the public healthcare system is not fit-for-purpose, and dramatic interventions are urgently needed.⁷⁷

The pandemic provides a renewed moment to advocate for the forgiveness of unethical and unsustainable debt, so that the money being used to finance that debt can be transferred to the funding of socio-economic rights and (as a result of funding such rights) economic development. Several senior figures in Africa have already argued for a two-year moratorium on \$115 billion of sovereign African

68. Vishwas Satgar 'COVID-19 and the case for a citizens' basic income grant in South Africa' (15 April 2020) accessed from <https://www.dailymaverick.co.za/opinionista/2020-04-15-covid-19-and-the-case-for-a-citizens-basic-income-grant-in-south-africa/> on 20 April 2020.
69. Mark Heywood 'Influential coalition urges President Ramaphosa to increase child support grants' (5 April 2020) accessed from <https://www.dailymaverick.co.za/article/2020-04-05-influential-coalition-urges-president-ramaphosa-to-increase-child-support-grants/> on 23 April 2020.
70. Seekings op cit note 53.
71. Spaul et al. 2020. NIDS-CRAM Wave 1 Synthesis Report: Overview and Findings. <https://cramsurvey.org/wp-content/uploads/2020/07/Spaul-et-al.-NIDS-CRAM-Wave-1-Synthesis-Report-Overview-and-Findings-1.pdf>
72. Lydia Cairncross, Louis Reynolds, Russell Rensburg and Leslie London 'It is urgent to integrate SA's private and public healthcare systems now' accessed from https://www.dailymaverick.co.za/article/2020-04-22-it-is-urgent-to-integrate-sas-private-and-public-healthcare-systems-now/?utm_content=buffer2dee2&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer on 10 May 2020.
73. Nimi Hoffmann 'Spain did it, so why can't South Africa nationalise healthcare to save lives?' (12 April 2020) accessed from <https://mg.co.za/article/2020-04-12-spain-did-it-so-why-cant-south-africa-nationalise-healthcare-to-save-lives/> on 20 April 2020.
74. Institute for Economic Justice and SECTION27 'Fact Sheet: Funding the right to health' (2019) accessed from <http://section27.org.za/wp-content/uploads/2019/05/2019-IEJ-S27-Health-Fact-Sheet.pdf> on 7 July 2020.
75. Ibid.
76. SECTION27 et al. 'Civil society organisations call for principled contracting with private sector in the COVID-19 health response, as well as more coordination and transparency' accessed from <http://section27.org.za/2020/05/media-statement-civil-society-organisations-call-for-principled-contracting-with-private-sector-in-the-covid-19-health-response-as-well-as-more-coordination-and-transparency/> on 18 June 2020.
77. Ibid. See: <http://section27.org.za/2020/05/media-statement-civil-society-organisations-call-for-principled-contracting-with-private-sector-in-the-covid-19-health-response-as-well-as-more-coordination-and-transparency/> and <http://section27.org.za/2020/03/civil-society-challenges-the-private-sector-to-step-up-support-for-the-covid-19-response/>

debt owned by the private sector, in order to fund the fight against the pandemic.⁷⁸ Economist Jayati Ghosh also advocates for significant debt restructuring and relief (such as the lowering of interest rates, and possibly debt forgiveness) for middle- and low-income countries, as a response to the deleterious economic effects the pandemic has had (including dramatically increasing the possibility of sovereign debt crises).⁷⁹ When Moody's downgraded its outlook for South Africa late last year, it issued a warning about the growing debt-to-GDP ratio.⁸⁰ This ratio will almost certainly increase due to the pandemic. Debt relief could be a way to alleviate this – perhaps not in the way Moody's expected or advocated for, but in the way South Africa and other middle- and low-income countries need.

However, even if debt forgiveness or renegotiation is seen as too radical, the State may be able to take on more debt to fund the response to the pandemic with medium and longer term socio-economic development goals in mind. Concern has been raised about borrowing from international financial institutions, and in particular the IMF. This is because the IMF has a chequered history regarding developing nations, often requiring them to implement Structural Adjustment Programmes (austerity) as a condition to borrowing money.⁸¹ Fortunately, the loans the government has obtained from the IMF and other financial institutions do not have Structural Adjustment Programmes attached, have low interest rates, and come with transparency requirements.⁸²

In building a post-COVID-19 economy, we must ensure that it is 'green'. Numerous activists in South Africa

and abroad have called for a Global Green New Deal in the wake of the economic devastation brought about by the pandemic.⁸³ We have been presented with an opportunity to transform our society into one that is environmentally sustainable.⁸⁴ In order to do so, we need to decarbonise on an international scale. This must be done in an equitable manner, with cognisance taken of the ecological and colonial debt owed by wealthy countries.⁸⁵ If done equitably, a Global Green New Deal could mitigate some of the effects of climate change while transforming the world into one that is more just. In South Africa, it appears as if the pandemic has provided the government with an opportunity to sneak through environmentally harmful and unjust regulations.⁸⁶ Public interest organisations are pushing against such reforms, calling for an end to environmentally destructive policies and for a just transition to a green economy.⁸⁷ The Institute for Economic Justice, 350Africa and the Climate Justice Coalition have released a transformative report in this regard.⁸⁸

As pointed out by Dennis Davis, "...the pandemic has highlighted the crucial role of the state".⁸⁹ The pandemic has shed light on the inadequacy of the welfare system in South Africa, and has provided an opportunity to argue for the increase of grants – not just during the pandemic, but permanently.⁹⁰ This is already being done in Spain, where the government is attempting to implement a type of basic income grant not just as a relief measure for the duration of the pandemic, but as a permanent fixture of the Spanish welfare system.⁹¹

78. David Pilling 'Senior Africans propose 'standstill' on eurobond debt payments' (7 April 2020) accessed from <https://www.ft.com/content/89c6d60f-5fe9-4b72-b327-4a6eb267a9c9> on 25 April 2020.
79. Jayati Ghosh 'COVID-19: A chance for IMF redemption' accessed from <http://jamaica-gleaner.com/article/business/20200412/jayati-ghosh-covid-19-chance-imf-redemption> on 12 April 2020.
80. Mark Heywood 'Stop dancing to Moody's tune' (31 March 2020) accessed from <https://www.dailymaverick.co.za/article/2020-03-31-stop-dancing-to-moodys-tune/#gsc.tab=0> on 1 May 2020.
81. See Macleans A. Geo-Jaja and Garth Mangum 'Structural adjustment as an inadvertent enemy of human development in Africa' (2001) 32 *Journal of Black Studies* 30.
82. Riana de Lange 'Tito Mboweni's rescue plan tops R800bn' (26 April 2020) accessed from <https://city-press.news24.com/Business/tito-mboweni-rescue-plan-tops-r800bn-20200426> on 30 April 2020.
83. Alex Lenferna 'The solution to the coronavirus recession is a Global Green New Deal' accessed from <https://jacobinmag.com/2020/04/coronavirus-global-green-new-deal-south-postcolonial> on 29 June 2020.
84. Ibid.
85. Ibid.
86. See: Alex Lanferna and Jennifer Wells 'To recover from COVID-19, South Africa needs Green New Deal' accessed from <https://dailymaverick.co.za/article/2020-04-24-to-recover-from-covid-19-sa-needs-green-new-deal/#gsc.tab=0> on 20 June 2020.
87. Ibid.
88. See: Institute for Economic Justice, 350Africa and Climate Justice Coalition 'No going back to normal: imagining a just recovery in South Africa' accessed from <https://7lo0w1yurlr3bozjw1hac3st-wpengine.netdna-ssl.com/files/2020/07/Just-Recovery-Report-ForWeb-1.pdf> on 27 July 2020.
89. Dennis Davis 'Finding the money to fight COVID-19' (9 April 2020) accessed from <https://www.businesslive.co.za/fm/opinion/on-my-mind/2020-04-09-dennis-davis-finding-the-money-to-fight-covid-19/> on 24 May 2020.
90. Christopher Webb and Natasha Valley 'South Africa has raised social grants: why this shouldn't be a stop-gap measure' accessed from <https://theconversation.com/south-africa-has-raised-social-grants-why-this-shouldnt-be-a-stop-gap-measure-138023> on 7 May 2020.
91. Thomas Colsan 'Spain is about to bring in a basic income scheme which the government thinks will 'stay forever'' (18 May 2020) accessed from <https://www.businessinsider.com/spain-to-approve-basic-income-scheme-response-coronavirus-outbreak-2020-5?IR=T> on 20 May 2020.

Conclusion

It is not completely unreasonable to look at President Ramaphosa's call for a more equitable economy with scepticism; especially when in his 21 April 2020 address, the President promised "structural changes to support business".

While this is not in itself negative, where such structural changes are supporting ethical, non-corrupt businesses, it is important to remember that the South African corporate class is arguably one of the most corrupt in the world;⁹² effective measures must simultaneously be put in place to end corruption. Because of the pandemic and bleak economic outlook in South Africa, now is precisely the time that economic policy is being formulated.

This economic policy must be formulated with the progression of socio-economic rights in mind. Public interest organisations must continue to advocate for just and equitable economic policy, based on constitutional principles and the ICESCR. The necessity for social spending has been made clear by the pandemic; but this is not the only time that increased social spending is necessary.

Because the unimaginable has happened, there is now room to explore policies that seemed unthinkable and impossible to many people in South Africa in the past (such as a universal basic income). The immediate focus of public interest organisations must be the alleviation of hardship and containment of the virus, but we must also lay the foundation for systemic change in order to bring about a country that better emanates constitutional values and fulfils constitutional rights when the pandemic is over. As stated by Allison Corkery, we can and must build a better future out of the wreckage wrought by the pandemic.⁹³ In order to do this, it is essential for human rights obligations to take centre stage, and for us to reject any call for blind faith in free markets⁹⁴ and the need to reduce social spending to the detriment of socio-economic rights realisation.

92. Op cit note 9 at 423-424.

93. Allison Corkery 'COVID-19: Turning a human rights lens on crisis response' accessed from <https://afsee.atlanticfellows.org/blog/allison-corkery-covid19-human-rights> on 16 June 2020.

94. Ibid.

ACKNOWLEDGEMENTS:

SECTION27 would like to thank
Daniel McLaren for his comments
on and edits to this report.

PUBLISHED BY:

SECTION27
First Floor, South Point Corner Building
87 De Korte Street, Braamfontein
Johannesburg, 2017
www.section27.org.za
13 August 2020

Design: the earth is round, Cape Town
Photos: Roger Sedres, Oupa Nkosi, Ashraf Hendricks,
Tshepiso Mabula, James Oatway.



+SECTION27
catalysts for social justice