SPII
STUDIES IN POVERTY AND INEQUALITY INSTITUTE
Building up knowledge to break down Poverty

POLICY BRIEF 2016/01

Daniel McLaren

February 2016

"Within its available resources"

Socio-Economic Rights and the National Budget

Background

In times of economic crisis, as well as in times of GDP growth, the budgetary choices made by the state affect human rights more than any other decision-making process. Cut public debt? Reduce the deficit? Invest in education, health care, infrastructure?

Since the Universal Declaration on Human Rights of 1948, human rights and constitutional law have begun to provide frameworks for engaging with these important questions. The goal of human rights budget analysis, as explained in this Policy Brief, is to guide governments towards making budget choices which ensure that the protection and fulfilment of human rights is supported by the budget, especially in times of resource constraints. This is particularly true of socio-economic rights, which in South Africa take up a large share of the budget.

The Constitution of the Republic of South Africa provides that the state must fulfil socio-economic rights "within its available resources". This obligation is **often misunderstood** to mean simply that the state should not overspend or over-commit itself on socio-economic rights related programmes. Moreover, the phrase is often used as **an excuse** for a failure to provide adequate services or for not providing services at all. Yet the Constitutional Court, the United Nations Committee on Economic, Social and Cultural Rights and other authorities have set clear guidelines that provide a much more expansive meaning to this phrase. Indeed, the phrase "within its available resources" draws its inspiration from a similar, conceptually identical (though more positive sounding) phrase in the International Covenant on Economic, Social and Cultural Rights, which requires government to progressively realise socio-economic rights "to the maximum of its available resources".

Although the two phrases have a different thrust, they express the same reality: the fulfilment of socio-economic rights is dependent upon the resources that a given country has available to it. Therefore, governments must strike a balance in their budgets between maximising the resources at their disposal for the implementation of programmes designed to fulfil SERs, on the one hand, and ensuring the sustainability of those resources over time, on the other. **The state does not have access to unlimited resources, but it must maximise the resources it does have available to it to spend on ensuring and fulfilling socio-economic rights.**

This Policy Brief, and those that will follow in this series, unpacks the states budgetary obligations to fulfil socio-economic rights and provides analysis of whether the state is meeting those obligations – in terms of how it is **generating**, **allocating** and **spending** its available resources. This we undertake for a simple reason: **if we are to fulfil the promise of the Constitution and ensure socio-economic justice for all in South Africa, we need to start putting human rights back at the centre of the budget.**

Socio-economic rights and the national budget: what are the government's obligations?

The inclusion of social and economic rights in South Africa's first democratic constitution envisioned the reconstruction and

FOUNDATION FOR HUMAN RIGHTS
south african human rights commission
FORDFOUNDATION

transformation of a divided and unequal society. These socio-economic rights (SERs) to **education, social security, health care, housing, food, water and sanitation, a healthy environment, land** and, crucially, **redress for past racial discrimination,1** read together with the rights to **life, dignity and substantive equality**,[2] establish a framework to *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.*[3]

Yet, despite the promises and guarantees of the Constitution, unacceptable and unsustainable levels of poverty and inequality, compounded by widespread unemployment and a lack of access to quality, basic services for many poor communities, continue to violate people's rights, ensuring persistent economic, social and political unrest.

Few people would disagree that the realisation of SERs is key for overcoming South Africa's persistent struggle with poverty and inequality. Nor would economists disagree that better education, health care services, access to housing and social security (to name but a few) would go hand in hand with a stronger, more dynamic and prosperous work force and economy.

The budget – and the political and economic choices that go into its development – is the primary vehicle through which government's plans to fulfil socio-economic rights and correct past racial discrimination are financed. Without provision for funds in the budget, no programme, no matter how well designed, will be able to have a significant impact on socio-economic poverty and inequality. Yet while most South African's are aware that the Constitution plays an important role in holding public power accountable and determining the overall direction of state policies and plans, **few are aware of the extent to which the budget and the use of public funds more generally are also subject to the requirements of the Constitution and international human rights treaties that South Africa has ratified.** But what are these requirements? And have we, as a country, fulfilled them?

The states overarching obligation to fulfil socio-economic rights is found in sections 26(2) and 27(2) of the Constitution:

*The state must take reasonable legislative and other measures, **within its available resources,** to achieve the progressive realisation of each of these rights.*[4]

In relation to the budget, and the use of the country's resources, the phrase "within its available resources" was adopted by the drafters of the Constitution. This phrase appears three times in the Bill of Rights, in section 25(5) in relation to land, section 26(2) in relation to housing, and section 27(2) in relation to health care services, food, water, and social security. But what does this phrase mean? What is the nature of this obligation and what does it entitle rights-holders to?

1 The Constitution of the Republic of South Africa, 1996, sections 25-29.

2 Ibid, sections 9-11.

3 Ibid, preamble.

4 Ibid, sections 26(2) and 27(2).

"Within its available resources" and "maximum of its available resources"

The phrase "within its available resources" takes its cue from a similar phrase in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted my United Nations Member States in 1966 and which South Africa ratified in 2015. The ICESCR is an international treaty ratified by 164 nations that gives force to economic and social rights with very similar provisions to the South African Constitution. The ICESCR was in fact a major source of inspiration for the drafters of the SA Constitution and has been cited on numerous occasions by the Constitutional Court in the socio-economic rights cases it has dealt with.[5] South Africa's recent ratification of the ICESCR means that government must "domesticate" its provisions into local law and henceforth ensure that legislation (including budgets) comply with the articles of the Covenant. **By April 2017, the state must report to the United Nations Committee on Economic, Social and Cultural Rights on the plans it has made and the steps it has taken to implement the Covenant.** It is therefore crucial that government and social partners understand what the provisions of the ICESCR are and how they relate to the provisions of the Constitution. This is particularly true in the case of how the state should finance access to and budget for the progressive realisation of socio-economic rights.

"Maximum available resources" not different to "within available resources"

Article 2 of the ICESCR sets out the overarching obligation on states to fulfil socio-economic rights:

International Covenant on Economic, Social and Cultural Rights, Article 2:

***1.** Each State Party to the present Covenant undertakes to **take steps**, individually and through international assistance and cooperation, especially economic and technical, to the **maximum of its available resources**, with a view to **achieving progressively** the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

Careful readers will note that the formulation of this article is very similar to the formulation of the state's obligation to fulfil socio-economic rights provided by the South African Constitution. The Committee on Economic, Social and Cultural Rights (CESCR) is a body set up by the United Nations to oversee implementation of the ICESCR and to provide guidance to states on their obligations under the Covenant. This is the body to which South Africa will report on its implementation of the ICESCR by April 2017. The CESCR has issued 'General Comments' on various

5 Most notably, see Government of the Republic of South Africa and Others v Grootboom and Others (2000).

aspects and articles of the Covenant and General Comment 3 focuses on **Article 2** (above). This Comment provides significant guidance on the question of how the state should raise, allocate and spend resources to fulfil socio-economic rights.

Available resources and "progressive realisation"

The recognition that the availability of resources is never infinite should be understood in relation to the Covenant and the Constitution's similar recognition that socio-economic rights cannot be fulfilled for all people immediately, or even within a short space of time. It is for this reason that states are required to achieve socio-economic rights progressively – or over time. **The use of state resources for SERs is therefore to support and ensure that they are realised progressively.** The CESCR provides an explanation of the meaning of progressive realisation in General Comment 3 that was endorsed by the Constitutional Court in *Grootboom*:

"[Progressive realisation] … is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[6]

Progressive realisation therefore has two related components: **the state must, first, ensure that enjoyment of socio-economic rights is continuously expanded over time, including in terms of access to those rights and the quality of that access**. Second, **the state must not take backward steps or retrogressive measures that have the intent or effect of reducing or limiting access to socio-economic rights.** This has important budgetary impacts. For a start, government must have policies and plans in place that set out how resources will be used to achieve the most effective and timely fulfilment of SERs. Second, progressive realisation implies that the resources available to the state for allocation to socio-economic rights related programmes should be continuously increased wherever possible. It would also suggest that any reductions in budgets for SERs would have to be managed in such a way as to avoid any negative impacts on access to SERs.

The generation of revenue

Although poor performance or under-delivery on government services is often attributed to a lack of sufficient resources, there is a growing consensus that resource generation for human rights fulfilment needs to look beyond the budget itself and evaluate fiscal and economic policies according to human rights principles.[7] This requires an assessment of the reasonableness and progressive nature of fiscal and tax policies and the broader macro-economic context within which budget decisions are made. The obligation to use the maximum available resources to fulfil SERs means that government must do everything possible to mobilise resources that can be directed to socio-economic programmes. Where socio-economic rights remain unfilled (because large numbers of people lack access to housing, quality health care or education, for example) the state is required to do all it can to raise more revenue to fund access to these rights. This includes, among others:

- Ensuring a progressive system of taxation is in place (where wealthier residents and companies pay a higher share of their income and expenditure in tax);
- Continuously broadening the tax base to ensure stable, increasing revenues;
- Making the tax system efficient and easy-to-use to ensure that all tax due is collected;
- Closing tax 'loop-holes' and minimizing and penalizing unlawful tax evasion and avoidance (such as 'profit shifting').

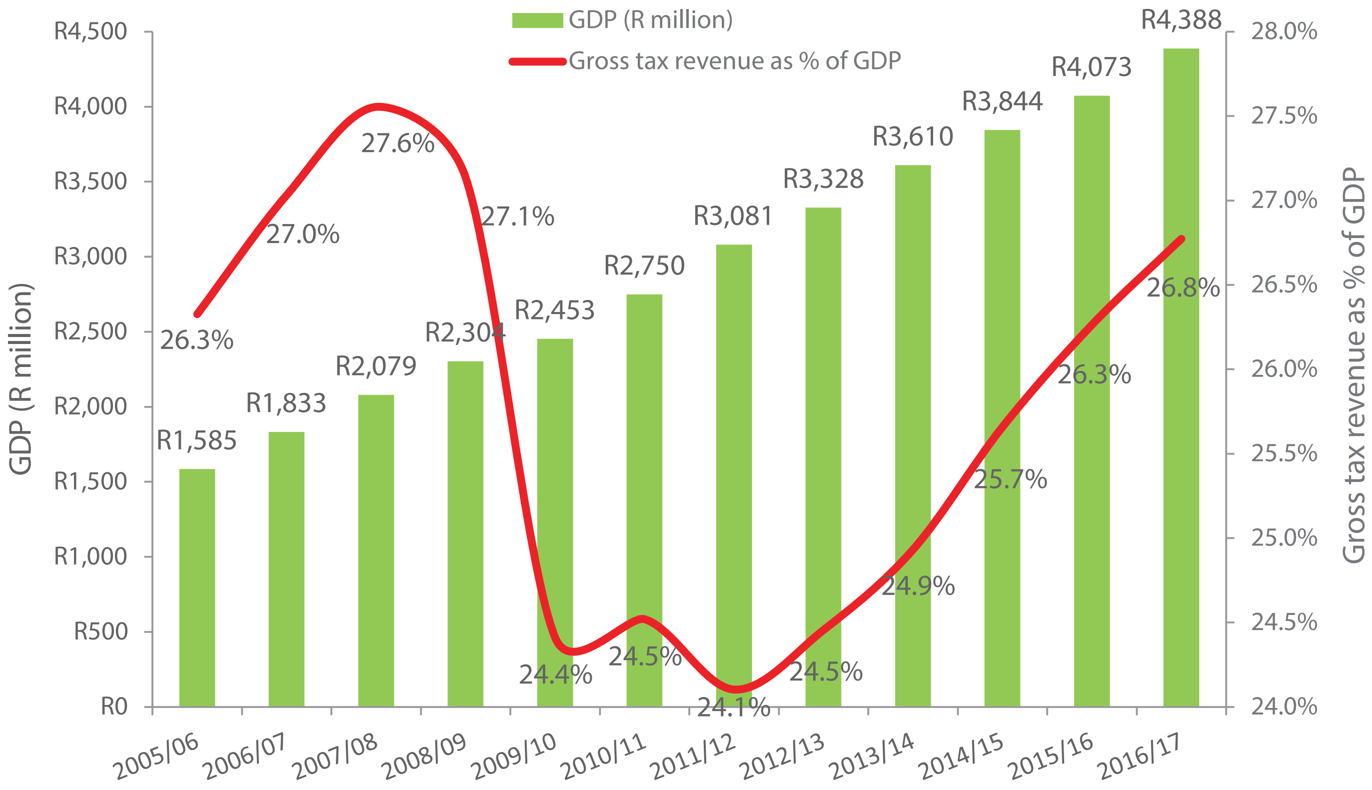
The obligation of "maximum available resources" is neutral on the question of whether lower or higher taxes will generate the highest returns in terms of GDP and government revenue growth. However, where GDP is growing and more revenue is being generated, this must translate into a proportionate increase in expenditure on SERs: people must see a direct benefit from an "expanding pie". Whatever path government decides to take – to reduce or increase taxes – **it must show that greater enjoyment of socio-economic rights and access to quality socio-economic services and programmes has been achieved.** If this is not the case, it must make efforts to understand why and be flexible enough to consider alterations in economic policy that would have more impact on SERs.

The same is true of government debt. Taking on debt in the short-medium term to invest in SERs may lead to stronger economic growth and investment in the workforce in the long-term, which will in turn allow the government to collect higher tax revenues which allow it to pay off the debt. However, if debt is incurred and GDP or revenue growth do not pick-up, paying the debt off over many years may reduce the amount of resources available for SERs. Again, the main question is whether the state has attempted to maximise resources for SERs, taking into consideration all possible options. The main thing for thing state to show is that is has considered these options, justified its choice of policy, reviewed that policy in terms of its socio-economic impact, and altered it if access to SERs has declined or not sufficiently increased.

6 Committee on Economic, Social and Cultural Rights General Comment No. 3: The Nature of States Parties' Obligations (1990) E/1991/23 at para 9.

7 Radhika Balakrishnan and Diane Elson 'Auditing economic policy in the light of obligations on economic and social rights' Essex Human Rights Review (2008) Vol. 5.

Gross tax revenue in South Africa as a percentage of GDP, 2005/06 – 2016/17



Funding socio-economic rights in times of economic recession or crisis

In good times and in bad, government is under an obligation to put forward a budget that advances human rights. **Progressive realisation means that no backward steps can be taken that diminish people's current enjoyment of their rights, even in resource scare situations.** During times of economic recession or crisis, the state should do all it can to avoid cutting the budgets for SER related areas (in nominal and real terms) unless it can demonstrate that this **will not affect current enjoyment of SERs** or result in cuts to goods and services that people rely upon. This may be through **compensatory measures** or **efficiencies** that counter the potential negative effects of cuts. When funds are tight, government should first look for cost savings and non-essential areas of the budget that could be re-directed towards SERs.

If such possibilities have been exhausted, and government decides that funds must be redirected or cut from SER-related programmes, and such cuts will reduce the provision of goods or services that are necessary for the enjoyment of SERs, the CESCR has said that:

- Any cuts should be temporary and adhere to the principles of equality and non-discrimination (discussed below). At a minimum, this means that vulnerable members of society must be protected as far as possible from the cuts.
- As many people may be dependent on SER programmes for the essentials of life, agreed minimum standards must be maintained for all SERs.
- The government has the burden of proving that it has made its decision only after the most careful consideration of all alternatives.
- It has arrived at its decision keeping in mind its obligations with regard to all of the rights in the ICESCR (and in South Africa, the Constitution).
- It has used the maximum of available resources to avoid making the cuts.[8]

Moreover, any cuts must be planned for and monitoring systems put in place to assess whether negative impacts are experienced, including at a disaggregated level. Crucially, once the disaster or crisis is over, the government must reverse the cuts that were made.

Separately from the above, emergency and contingency funds should always be reserved within budgets to deal with unexpected natural or other disasters. However, even where

8 Ann Blyberg and Helena Hofbauer Article 2 & Government Budgets (2014) Available at: www.internationalbudget.org/publications/escrarticle2.

emergency funds have been reserved, dealing effectively with natural disasters (such as a drought) may require government to redirect funds towards programmes to relieve immediate suffering.

Substantive equality and non-discrimination

Human dignity, equality and freedom are founding values of the Constitution. The achievement of substantive, rather than merely formal, equality is also provided for in Section 9 of the Constitution. This means that it is insufficient for the government to pass laws that on paper promise equality for all people. The state must rather take positive measures and actions that ensure the achievement of equality (including in terms of the equal enjoyment of socio-economic rights) in fact as well as in word.

Constitution of South Africa, Section 9, Equality

(1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

(3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

Likewise, the ICESCR promotes equality through the language of non-discrimination:

International Covenant on Economic, Social and Cultural Rights, Article 2.2

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, Religion, political or other opinion, national or social origin, property, birth or other status.

The CESCR has confirmed that the ICESCR too requires affirmative measures which ensure the "effective enjoyment" of socio-economic rights by all people. In General Comment 20 the Committee writes that: "Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination."[9]

The Constitutional obligation on the state to achieve substantive equality and the international human rights law obligation to achieve the effective enjoyment of all rights by all people has a number of implications for how the state generates and allocates resources through the budget. In terms of the generation of revenue, we have seen above that this must be done on a progressive basis that redistributes wealth and opportunity through, among others, a system of taxation where wealthier individuals and companies pay a higher share of their income and expenditure in tax than people with little or no income.

But raising funds for the state coffers in a progressive manner is not sufficient to promote equality. The government's budget must also be spent in a way that promotes greater equality. Allocating adequate amounts to socio-economic rights related programmes is a key vehicle to achieve this if those programmes are focused on improving access to quality public services for the majority of people and to promote the welfare of poorer groups and individuals. For example, cash transfers to individuals with no income provided through social security programmes are an efficient form of redistribution when the revenue generated by the state to spend on such programmes is collected on a progressive basis.

Measuring the extent to which the budget promotes substantive equality is a complex exercise that often produces contested results. For example, the World Bank has claimed that the tax system in South Africa is progressive and that this coupled with progressive social spending by the state means that South Africa's GINI coefficient (the standard international measure of inequality) is substantially reduced thereby.[10] Others have challenged this finding, however, noting that the Bank does not include in its study a range of revenue and expenditure policies (such as tax incentives for companies) that if accounted for would reverse many of the GINI coefficient gains made by the policies that were included in the study.[11]

A separate analysis by the Organization for Economic Co-operation and Development (OECD) of 17 OECD countries covering the period 1974-2005[12] found a positive correlation between high top 1 per cent income share (a widely used indicator of income inequality) and fiscal deficit.[13] This feeds into other studies that show that higher inequality leads to tax base erosion and is correlated with greater difficulties in sustaining or reducing government debt and higher probability of default.[14] These studies would suggest that promoting equality and maximising available resources requires redistribution through

9 Committee on Economic, Social and Cultural Rights General Comment No. 20: Non-discrimination in economic, social and cultural rights (2009) E/C.12/GC/20 at para 38.

10 World Bank South Africa economic update: fiscal policy and redistribution in an unequal society South Africa Economic Update Issue no. 6. Washington, DC: World Bank Group. Available at: www.worldbank.org.

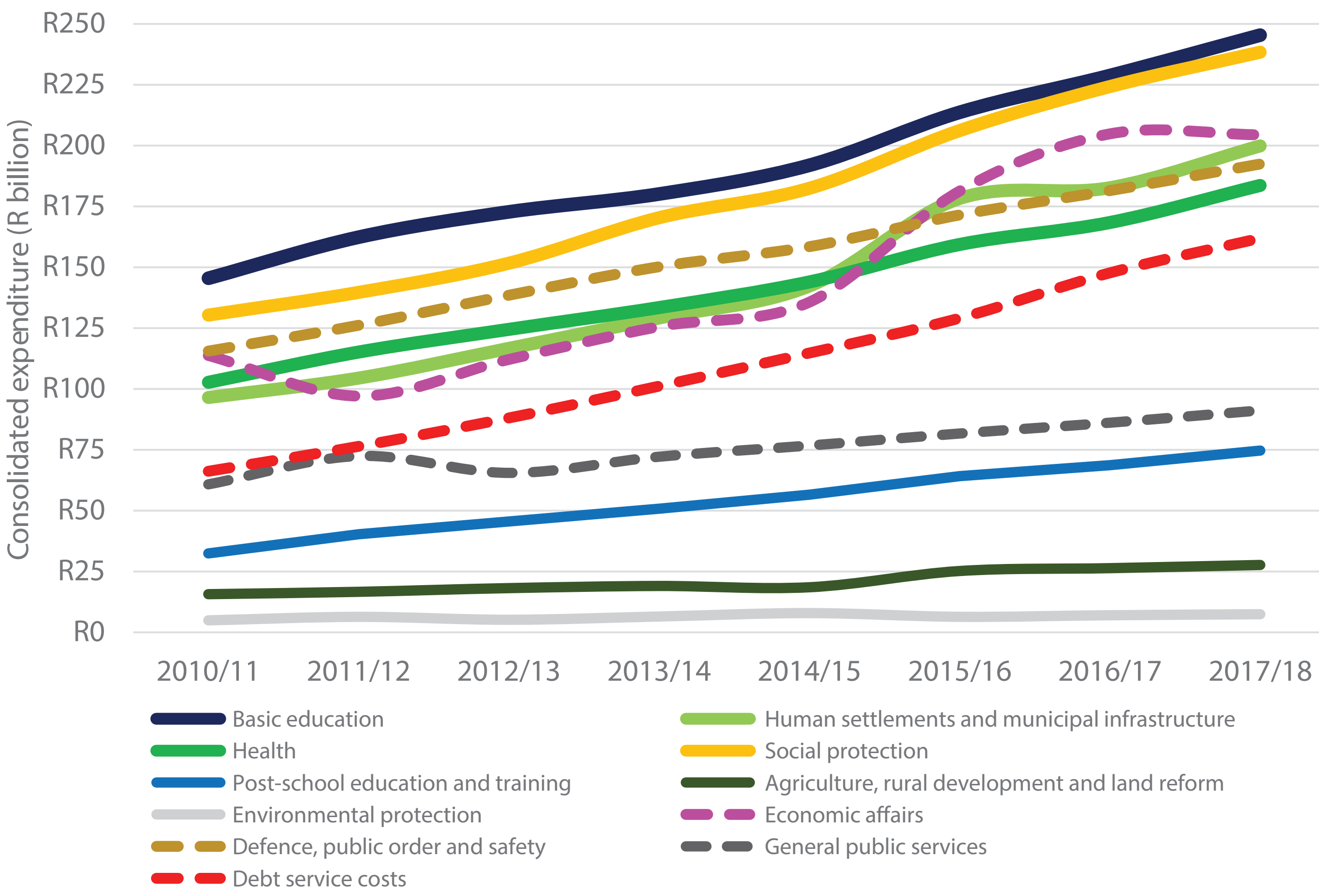
11 Patrick Bond Do government spending and taxation really reduce inequality, or do we need more thorough measurements? A response to the World Bank researchers (February 2016) Econ3x3. Available at: www.econ3x3.org.

12 Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights Human Rights Council Thirty-first session 12 January 2016 A/HRC/31/60.

13 S Milasi 'Top income shares and budget deficits" Centre for Economic and International Studies Research Paper Series (August 2013) vol. 10 issue 11 No. 249.

14 See A. Berg and J. Sachs 'The debt crisis structural explanations of country performance' (1988).Journal of Development Economics vol. 29 No. 3.

Consolidated government expenditure on socio-economic rights related areas and other main expenditures, 2010/11 – 2017/18



the government budget. The CESCR has accepted this and stated that "Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination".[15]

Measuring equality in the budget requires **accurate data** on who benefits directly and indirectly from state funds that is disaggregated to, at least, gender, race, income decile, age, disability and geographical area. The state must provide such information wherever possible to prove that its allocation policies are equitable. Achieving substantive equality in access to and enjoyment of socio-economic rights thus requires a balancing act between not unfairly discriminating against any person or group while actively promoting persons unfairly burdened by past discriminatory laws and policies.

Key questions to ask when assessing the non-discriminatory nature of the budget include: Are resources being utilised to prioritise the needs of the most vulnerable and disadvantaged, to reduce disparities in line with the constitutional goal of substantive equality? Is the spread of resources across departments, spheres of government, geographic localities equitable and justified?

15 CESCR General Comment No. 20 at para 1.

Adequacy, priority, efficiency, and effectiveness of resource generation and allocation to socio-economic rights

Adequacy

Gaps that hinder translation of policies and programmes into efficient and equitable delivery of quality goods and services often result from under-resourcing of these policies. Adequate resources must therefore be made available to fund the objectives of SER-related programmes. This requires a needs assessment using accurate, up-to-date, representative and disaggregated data. To fulfil the obligation of progressive realisation, the state should set targets that have a meaningful impact on the assessed need for a good or service. These targets must ensure that access to the good or service is continuously broadened and improved in terms of quality over time. Targets must take into account the obligation of substantive equality that requires vulnerable persons and historically disadvantaged groups to be given priority in government programmes.

Adequate funds must also be reserved for emergencies and the management of crises. Programme costing based on the identified need and the availability of resources is also required. Thus, if government wants to adopt a significant new programme, it must cost how much it will likely cost and determine whether adequate new funds can be raised. If funds must be diverted from other projects or programmes, they should only come from SER related areas if such programmes can be shown to be underperforming or in need of review. If any new expenditure is likely to result in less funds being available for SER related areas in future, this must be fully justified and fully compensating measures must be adopted. Finally, **government must collect data on programme implementation that shows how much of the demand for goods or services is being met and how adequately.** All of the information generated and used in these processes must be accessible to the general public so that people can monitor and contribute to them.

The main way of analysing whether allocations to SER-related areas are adequate is to compare the coverage of government programmes with the actual demand for SER-related goods or services. Access to information produced by the state and its statistical agencies is essential for this. **Key questions to ask** when assessing the adequacy of allocations to SERs include: Are resource allocations transferred to implementing departments sufficient given the objectives of the programme, likely demand and the costs of intervention. Are they increasing in real terms over time? Are there any regressive spending patterns? Are funds available to cover emergency situations?

Priority

Due priority must be given to socio-economic rights within the budget. This can be assessed in terms of the share of the total budget allocation to socio-economic rights, as well as the percentage of GDP going towards socio-economic rights related areas compared to other expenditure areas.

Efficiency

Actors allocated resources for socio-economic programmes and initiatives must endeavour to spend the maximum budget available to them. On the one hand, actors must not spend more than has been allocated to them. On the other, under-expenditure is a violation of the obligation to use all available resources because it limits the amounts being spent on SER programmes. Any under-expenditure above 2% of the programme budget must be rectified as soon as possible. Quarterly reporting to oversight bodies on expenditure is a useful way of monitoring this. Where there are problems such as a lack of capacity to spend funds these must be identified and rectified.

Funds allocated to SERs that are wasted or otherwise miss-spent also constitute a violation of the obligation to use maximum available resources. **Government must take steps to ensure that it pays a reasonable price for procurement of goods and services and that procurement processes generally are transparent and rigorous, and conducted with oversight** (including, but not limited to, independent audits). Corruption in the use of public funds is a clear violation of the obligation to use funds efficiently and must be countered by effective anti-corruption measures and penalties.

The obligation of progressive realisation requires government to balance short and long-term needs in its expenditure plans. Too much focus on one or the other may lead to inefficiencies in how funds are budgeted. For example, a focus on short-term needs may lead to a reliance on temporary infrastructure (such as for housing or educational facilities) that in the long-run are more expensive to build and maintain than well-planned permanent infrastructure.

Key questions to ask when assessing the efficiency of allocations and expenditure on SERs include: Is the overall expenditure of the programme efficient given the costs of the intervention? Are institutions capable to spend the funds allocated to them efficiently? Are funds being accounted for and spent on their intended purpose? Are there any under or over-expenditure patterns? Can their cause and impact be identified?

Effectiveness

Resources must be used in such a way that they will have **maximum impact** on the enjoyment of socio-economic rights. Expenditures on SER-related areas must have the effect of increasing access to SERs and the quality of SER-related services. Appropriate monitoring systems must be in place to establish the effectiveness of such expenditures using accurate and timely data. Data must be disaggregated to ensure that the effect of budgetary decisions on different population groups (and thus on transformation, inequality and poverty) is continuously assessed. As always, information must be transparent and proactively made available to the public

Finally, it must be noted that an assessment of resource availability and expenditure cannot be separated from an analysis of institutional arrangements, human resources and local capacity which are necessary for the efficient and effective spending of budgets.

Key questions to ask when assessing the effectiveness of expenditures on SERs include: Is the money being spent on the right things and having the desired results and impacts? Is it bringing about tangible improvements in enjoyment of the socio-economic rights? Are targets being met? Is sufficient data available to assess this and it adequate monitoring taking place?

Way forward

Government budgets remain inaccessible for most people, especially at the local or facility level and where public funds have been outsourced to private companies. It therefore remains a challenge for civil society organisations to mobilise people and engage with the budget, despite its importance for the realisation of all human rights. Throughout 2016, SPII will be applying the international human rights law and Constitutional principles and obligations set out in this Policy Brief to the South African budget and public finance landscape more broadly. From taxation and the generation of revenue, to inflation and interest rates, the division of revenue and the actual allocations and expenditures by the state on socio-economic rights since 2005/06. The Policy Briefs that follow will attempt to make the budget more accessible and will be posted to our website and used to trigger more rigorous debate on the extent to which the maximum available resources are being used to ensure the realisation of socio-economic rights for all in South Africa.

SPII
STUDIES IN POVERTY AND INEQUALITY INSTITUTE

Building up knowledge to break down Poverty

Studies in Poverty and Inequality Institute (SPII)

31 Quinn Street, Newtown
Johannesburg
South Africa
2000

Phone: + 27 11 833 0161
Fax: + 27 11 832 3085
www.spii.org.za

FOUNDATION FOR HUMAN RIGHTS

south african human rights commission

FORDFOUNDATION