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STUDIES IN POVERTY AND
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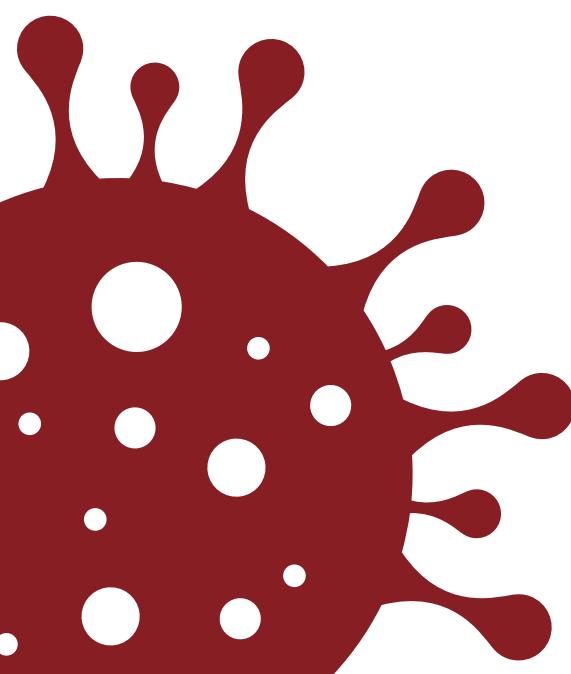
PROJECT BRIEF

ICESCR & COVID-19

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How the Pandemic Impacts South Africa's responses and obligations to the UN Committee on Economic Social and Cultural Rights.

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WHAT IS THE ICESCR?

The **International Covenant on Economic, Social and Cultural Rights (ICESCR)** is a crucial multinational treaty that was adopted by the UN General Assembly in 1976. It ensures the **socio-economic** and **cultural rights** of all people and requires **signatory states (State Parties)** to actively protect and provide for those rights .

ICESCR IS MADE UP OF 31 ARTICLES SPLIT INTO 5 PARTS:

Part 1: Establishment of the right to self determination.

Part 2: Explanation of the concept of progressive realisation as well as refinement of the limitations that may be permitted in relation to said rights.

Part 3: The rights covered by ICESCR, namely the right to work, the right to social security, the right to family life, the right to an adequate standard of living, the right to health, the right to education, and the right to take part in cultural life.

Part 4: Explanation of the reporting, monitoring and recommendation processes.

Part 5: Explanation of the processes of ratification, amendments to ICESCR and the timeframes in which they come into effect.

The body that oversees ICESCR is the Committee on Economic, Social and Cultural Rights (CESCR). Made up of 18 experts from around the world², CESCR receives and assesses reports from States Parties who have ratified ICESCR. State Parties submit reports to CESCR, vis-à-vis the UN Secretary General, on their progress in delivering on socio-economic and cultural rights. Along with States Parties' reports, CESCR welcomes reports and inputs from Civil Society organisations (CSOs) to give as clear a view of the state of said rights in their country.

SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA AND THE CONSTITUTION

South Africa can proudly claim one of the most progressive constitutions in the world. The comparatively recent drafting of South Africa's Constitution in 1996 meant that widely adopted international rights treaties, like ICESCR, had an obvious influence on its drafting³. Because of this most of the rights protected by ICESCR are covered by the Bill of Rights in chapter 2 of the Constitution⁴. The two rights that are not explicitly included are the right to an adequate standard of living and the right to work.

The current overarching development policy constructed by the South African government is the National Development Plan (NDP)⁵. The key aims of this policy are the reduction of

the country's high levels of poverty and the levelling out of inequality by the year 2030⁶. Through the NDP, government seeks to coordinate the many relevant government departments with the goal of attaining 14 medium-term outcomes that will materially aid in the elimination of poverty and inequality. These outcomes include goals that align with the meeting of key socio-economic rights, including quality basic education, safety and security for all, decent employment, human settlements that meet their residents socio-economic needs, local governments that are reliable and effective, a public service that delivers on development goals, and an effective social security system⁷.

¹ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

² Including Professor Sandra Liebenberg of Stellenbosch University's Law Faculty and Co-Director of the Socio-Economic Rights and Administrative Justice Research Project, who became the first South African nominated to CESCR in 2016

³ 2017 States Report to CESCR

⁴ <https://www.gov.za/documents/constitution/chapter-2-bill-rights#7>

⁵ States Report to CESCR

⁶ <https://www.gov.za/issues/national-development-plan-2030>

⁷ States Report to CESCR, page 11

In addition to these outcomes, the state has subscribed to the UN 2030 Sustainable Development Goals (SDGs) which they describe as providing a "shared blueprint for peace and prosperity for people and the planet, now and into the future". These goals include the elimination of poverty, hunger and inequality; access to quality education, clean water, sanitation, affordable and clean energy, decent work and more⁸.

In addition, as set out above, government is obligated to see the socio economic rights enshrined in both ICESCR and the Constitution fulfilled.

Both the Constitution and the ICESCR that informed its drafting refer to the progressive realisation of socio-economic rights. The concept of progressive realisation acknowledges that states are obliged to use the maximum available resources it has to meet, as expeditiously as possible, universal enjoyment of all socio-economic rights.

SOUTH AFRICA'S FIRST STATE PARTY REPORT TO CESCR - 2017

South Africa is one of 171 countries to have ratified or acceded to ICESCR⁹. Initially signed by President Nelson Mandela in 1994, South Africa became a ratified State Party on 12 January 2015¹⁰ and subsequently submitted their initial State Party Report in April 2017, which was published in June 2017¹¹.



⁸ <https://sdgs.un.org/goals>

⁹ <https://indicators.ohchr.org/>

¹⁰ <http://www.un.org.za/committee-on-economic-social-and-cultural-rights-concluding-observations-on-the-initial-report-of-south-africa/>

¹¹ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx² States Report to CESCR

¹² 2017 States Report to CESCR

THE KEY POINTS IN THE REPORT TO CESCR ARE AS FOLLOWS:

RIGHT TO WORK

While the constitution does not designate the right to work, it does designate the right to choose a trade¹³. The report acknowledges that while unemployment is very high, they have instituted policies and programs to reduce it by 1 million jobs, especially for youth, women and people with disabilities.

RIGHT TO JUST AND FAVOURABLE WORK CONDITIONS

The report discusses the impending introduction of the R20 per hour minimum wage, which was introduced after the report was submitted¹⁴. It also discusses the policies that mandate safe and equitable work conditions through regulations around safety, sexual harassment, exploitation of children and unemployment insurance.

RIGHT TO JOIN A TRADE UNION

The report acknowledges the Constitution's recognition of this right and the subsequent right to collective bargaining and protest.

RIGHT TO SOCIAL SECURITY

While the report acknowledges that the Constitution reflects this right, it highlights the limitation of available resources in the progressive realisation of this right. The report goes on to enumerate the social assistance measures that it has enacted, and explains the agencies and legislature that govern them.

PROTECTION AND ASSISTANCE FOR THE FAMILY

This section addresses how the Constitution views marriage and its recognition in the religious and sexual orientation spheres, as well as discussing the protections provided to children, the elderly, refugees and asylum seekers, and victims of trafficking.

RIGHT TO AN ADEQUATE STANDARD OF LIVING

The report acknowledges that the Constitution does not have explicit wording regarding this right as it is understood that the fulfilment of the other socio-economic rights would result in its automatic fulfilment. This section subsequently addresses the delivery on services like the provision of housing and infrastructure, access to food, water and sanitation and a clean, healthy environment.

RIGHT TO HEALTH

The report addresses reforms to the healthcare system that would allow for the better distribution of resources between private and public medical institutions, make medications more accessible, better address the needs of those with mental and cognitive disabilities, and ensure adequate health warnings are placed on drugs and food. The report discusses the proposed universal healthcare plan, touches on a number of health indicators for development such as life expectancy, infant mortality rate, access to medications for pandemic diseases like TB and HIV/AIDS and explains measures taken to ensure that the elderly and people with disabilities have access to healthcare.

¹³ Ibid

¹⁴ https://www.gov.za/sites/default/files/gcis_document/201912/minimumwagebillb9-2019.pdf

RIGHT TO EDUCATION

The report discloses the measures taken to ensure near universal access to primary and secondary education and to progressively realise universal access to higher education. It also addresses the various policies adopted to reduce drop out rates, such as school feeding plans, fee-free schools, school transport schemes and substance awareness and prevention programmes. The report acknowledges the problems faced, such as resource inequality between schools and the debate around free higher education in the face of the #feesmustfall movement.

CULTURAL RIGHTS

The report acknowledges the State's obligation to protect the cultural rights of individuals and groups and touches on the policies to install commemorative structures, to encourage engagement in sports and the arts, and to protect libraries.

2018 RATIFICATION CAMPAIGN OF ICESCR CIVIL SOCIETY SHADOW REPORT

In response to the States Report, CSOs are invited to make submissions to CESCR so they can get a more nuanced and holistic understanding of the enjoyment of the rights in ICESCR.

One such collective of CSOs is South Africa's Ratification Campaign of ICESCR ('the Campaign'). Members of the Campaign include: Black Sash; the Dullah Omar Institute for Constitutional Law, Governance and Human Rights (DOI); the People's Health Movement South Africa (PHM-SA); the Socio-Economic Rights Institute of South Africa (SERI); the Studies in Poverty and Inequality Institute (SPII); the Institute for Poverty, Land and Agrarian Studies (PLAAS); and individual experts from the Wits School of Law Jackie Dugard and Lilian Chenwi¹⁵.

Read the report here: <http://spii.org.za/wp-content/uploads/2019/07/Joint-Submission-to-the-United-Nations-Committee-on-Economic-Social-and-Cultural-Rights-64th-Session.pdf>

The Shadow report developed by the Campaign touches predominantly on points which the Campaign felt reflected either omissions or a lack of understanding of people's lived realities and the effect of policy decisions on them. The concerns raised in this report include:

1. The exclusion of the **Optional Protocol** from South Africa's ratification of ICESCR and lack of a given timeline for its ratification. Their recommendation in this regard is the **immediate completion** of the **ratification process**.
2. The **lack of explicit protections** for some of the rights covered by ICESCR in the Constitution, which the Campaign recommends remedying by **fully domesticating ICESCR**.
3. The potential for the use of the **progressive realisation terminology** as a means of excusing avoidable delays in securing and delivering on rights, especially in a country like South Africa where **inequality** renders so many people **voiceless**.
4. That certain policy choices, such as the **increasing of VAT from 14% to 15%** so as to increase revenue, are not intrinsically pro-poor and are likely to cause **more distress** than **relief** to the most **vulnerable members of society**.
5. That the **irregularities** in the social grant system are **unacceptable** and further **jeopardise** the **dignity, security and stability** of the country's most **vulnerable** people.

¹⁵ Joint Submission to the United Nations CESCR 64th session

6. That there are still no **cohesive, interdepartmental plans** to insure **universal food security**, to ensure the **equitable distribution of land** for sustainable food production, and to **protect the public from corporate flouting** of food and food labelling regulations.
7. That, while initial great progress has been made in the delivery of housing, many other obstacles exist like the **stagnation of programmes**, frequent and damning reports of **corruption, inadequacy of houses and infrastructure**, and the prevalence of **forced evictions**.
8. That the **lack of access to water and sanitation** is too closely tied to class and location, namely that it is the **poor and rural population** that are the most under serviced.
9. That access to **adequate healthcare** is so **deeply unequal** and based entirely on **class** and that remedies to this situation, including the introduction of the **NHI**, need to focus on **redistributing resources** as a matter of **urgency**.

RECOMMENDATIONS TO THE STATE FROM CESCR

CESCR opened its observations with an acknowledgment of the unique socio-political, economic and cultural nuances that are particular to post-apartheid South Africa and the great progress made since the establishment of democracy.

Their subsequent recommendations included:

- Encouraging the State Party to fully ratify and ensure all the rights in ICESCR -
- Drawing attention to the use of the progressive realisation terminology as a means of delaying "immediately realisable" rights -
- Increasing support for the defenders of human rights, including increasing funding for the South African Human Rights Commission and more vigorously supporting the right to protest by trade unions -
- Standardising data processes so as to better understand the socio-economic and cultural rights landscape of South Africa -
- Encouraging a shift in policy approaches toward a strong focus on reducing inequality and unemployment, eliminating austerity measures, and formalising work and workers in the informal sector -
- Creating better systems and policies for the protection of asylum seekers, sex workers and children -
- Ensuring equal access to quality healthcare, schooling and housing, especially for the poor and disabled -

CESCR RECOMMENDATIONS AS THEY PERTAIN TO SPII AND PARTNER WORK

SPII and their partners have been continuously involved in work around the realisation of socio-economic rights in line with the recommendations of CESCR.

SPII's Socio-economic rights monitoring tool functions as a resource for understanding progress made in food security, housing, education, social security, healthcare, sustainability, and water and sanitation. Through this monitoring tool they analyse the existing policies, determine the adequacy of the budgets allocated and evaluate the progress made in providing and protecting said rights¹⁶.

Through a partnership between the Southern African Social Policy Research Institute (SASPRI), the Labour Research Service (LRS) and SPII, the decent standard of living was developed as a means of gauging the level of income required to fulfil this right.

It also shines a light on whether the policies instituted by the state, such as the various social grants and the minimum wage increase, are as effectual as the State believes¹⁷.

Additionally, SPII is a keen advocate for a universal Basic Income Grant (BIG) as an inclusive policy to ensure all people have access to social security¹⁸. SPII has also hosted the SADC BIG campaign for many years. Their work in this regard revolves around policy research intended to show how necessary and possible this approach is in ensuring dignity, food stability, alleviating poverty, reducing inequality and generally improving quality of life¹⁹.

EXPERT OPINIONS ON WHAT IS EXPECTED OF THE STATE DURING COVID

With the advent of COVID-19, everyone from individuals, to businesses, to countries have had to reconsider their plans and projections for 2020 and beyond. It is expected that such a complex global problem would affect States Parties ability to protect and promote socio-economic rights. For the completion of this report, SPII facilitated interviews with Tim Fish-Hodgson of SERI and Fernando Ribeiro Delgado of the Strategic Litigation Working Group with the intention of discovering how they, in their professional capacity, see the pandemic impacting ICESCR.

One of their key insights was that there are no standard mechanisms to enforce ICESCR so, from a legal standpoint, they are suggestions. As Fish-Hodgson points out, their value becomes evident when they are used by the public to hold their governments accountable. The impetus therefore is on CSOs to galvanise interest and, where necessary, outrage around delivery on the rights enshrined in both the Constitution and in ICESCR. In light of the pandemic this is crucial because, as with most crises, it disproportionately affects marginalized communities.

In light of the pandemic, when concerns of preventing loss of life are paramount, responses by governments can either limit or expand socio-economic and cultural rights. In the South African context, for example, many people have been deprived of the right to work by the expedient of the lockdown and social distancing. But as both the experts interviewed pointed out the introduction of the emergency COVID-19 grant, though woefully insufficient, resembles in its essentials the basic income grant that would form part of the right to social security. Delgado also addressed the working conditions of essential workers whose right to work was maintained out of necessity, saying that government and employers then had an obligation to take adequate steps in ensuring that their right to safe working conditions was not undermined.

Another concern raised by Delgado was the role of information in fighting the spread of COVID-19 and what that means for people's privacy. People have raised concerns around Big Data and the information collected in contact tracing, and how that could be used to infringe people's right to privacy. The information collected is critical to preventing the spread of the virus, but considering the haste with which these systems had to be set up, it is virtually impossible for there to have been adequate public consultation and civil society participation in establishing them.

¹⁶ <https://spi.org.za/research-and-advocacy/the-socio-economic-rights-monitoring-tool/>

¹⁷ <https://spi.org.za/research-and-advocacy/decent-standard-of-living/>

¹⁸ <https://spi.org.za/BIG>

¹⁹ <https://spi.org.za/big/>

Ultimately, both experts concluded that government's responsibility under COVID-19 is to ensure they maintain a rights based focus in their handling of the pandemic. ICESCR, though not legally binding, gives a framework for understanding and protecting socio-economic and cultural rights and in times like this, governments' choices should emulate ICESCR wherever possible.



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