

The relevance of the International Covenant on Economic, Social and Cultural Rights for older persons in South Africa

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The Universal Declaration of Human Rights of 1948 (UDHR) recognises that '[a]ll human beings are born free and equal in dignity and rights' (article 1). This equality in dignity and rights applies irrespective of age. The UDHR further states that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law' (article 7).

Despite this recognition of equality in dignity and rights for all, international human rights law does not explicitly recognise the rights of older persons. The exception is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, which lists 'age' as one of the prohibited grounds of discrimination (article 1(1)). This lack of explicit recognition has resulted in a call for the United Nations (UN) to create a new convention on the rights of older persons (INPEA et al, 2010).

Various international human rights law treaties do, however, provide for rights that apply to all, including older persons. This paper focuses on the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 in relation to the socio-economic rights of older persons because it is the main treaty at the UN level that focuses solely on economic, social and cultural rights.

The ICESCR guarantees a range of socio-economic rights such as social security, work, education and an adequate standard of living including food, clothing and housing, as well as cultural rights. South Africa signed the ICESCR more than 16 years ago, but has yet to ratify it. By signing the ICESCR, South Africa has undertaken to 'refrain from acts that would defeat the object and purpose' of the treaty in the period between signature and ratification (see article 18 of the Vienna Convention on the Law of Treaties of 1969).

An Optional Protocol to the ICESCR, adopted in 2008, provides a platform for people to bring complaints to the UN Committee on Economic, Social and Cultural Rights (CESCR) when they have not been able to access a remedy at the national level. The CESCR oversees the implementation of the ICESCR. South Africa has yet to sign or ratify this Protocol.

This paper highlights key provisions and aspects of the Covenant and its subsequent interpretation that are relevant in advancing the socio-economic rights of older persons at the national level. Though South Africa has not

yet ratified it, the ICESCR serves as persuasive authority and can be used as a guide in interpreting the rights in the Constitution. This has been emphasised by the South African Constitutional Court (*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 26) and in the Constitution itself (sections 39(1) and 233).

Recognition of older persons in the ICESCR

Like other international human rights treaties, the ICESCR does not explicitly refer to the rights of older persons. However, article 9 of the Covenant, dealing with the right of everyone to social security, including social insurance, implicitly recognises the right to old age benefit.

Notwithstanding the lack of explicit recognition, the CESCR has made a number of important statements on the socio-economic rights of older persons, including clarifying the socio-economic rights obligations of states in relation to such persons. These statements are contained in various general comments (GC) of the Committee that interpret the rights in the ICESCR and elaborate on the obligations imposed on states when they ratify the Covenant. The Committee has dedicated one of these general comments solely to the socio-economic rights of older persons (GC 6 on the economic, social and cultural rights of older persons, UN doc. E/1996/22).

The following paragraphs outline the obligations of states in relation to the rights of older persons to adequate housing, health care, adequate food and social security as contained in the various general comments of the CESCR. Since these general comments go further than constitutional provisions in defining the scope of these rights and the duties on states, they could be very useful in advancing the socio-economic rights of older persons in South Africa. South African courts have, in fact, sought guidance from some of the CESCR's general comments when dealing with cases relating to, for example, housing and access to water.

Rights and state obligations in relation to older persons

The ICESCR lays down the duties of states parties in relation to the rights that are contained in it. These obligations are reinforced by various international standards on ageing or older persons such as the UN Principles for Older Persons, adopted in 1991 (UN doc. A/RES/46/91). These Principles aim to ensure that priority is given to the situation of older persons.

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Importantly, states parties are required to 'pay particular attention to promoting and protecting the economic, social and cultural rights of older persons' (GC 6, para 12). In addition, they should regularly monitor the enjoyment of rights by older persons and adopt measures to ensure that these rights are realised without discrimination (GC 6, para 18). The Committee has drawn attention to the fact that 'age' is a prohibited ground of discrimination in various contexts, and that states parties have to address discrimination against unemployed older persons in relation to finding work and accessing professional training, and against older persons living in poverty with unequal access to old age pensions (GC 20 on non-discrimination in economic, social and cultural rights, UN doc. E/C.12/GC/20, para 29).

Related to non-discrimination is the provision on equal rights of women and men, which requires that states parties pay particular attention to older women, who are often in a critical situation because they spend most of their lives caring for their families (see GC 6, paras 20 and 21).

The following four subsections of this paper consider the obligations of states parties in relation to four specific rights. Before that, however, I briefly highlight some obligations of states parties in relation to other rights in the ICESCR, as elaborated on by the CESCR with reference to older persons.

In relation to 'the right to work', the Committee finds it desirable for older workers to be employed in circumstances in which their experience and know-how can be beneficial, and for states to ensure that retirement preparation programmes are in place and effectively implemented (GC 6, paras 23 and 24; see also GC 18 on the right to work, UN doc. E/C.12/GC.18, para 16).

The Committee further emphasises that enjoyment of 'the right to education' is not limited by age or gender, and thus extends to older persons (GC 13 on the right to education, UN doc. E/C.12/1999/10). States parties are therefore required to ensure that older persons have access to suitable education programmes and training and remain integrated into society (GC 6, paras 37 and 39). The Committee also recognises older persons as one of the groups that face difficulties with physical 'access to water', thus necessitating steps by states parties to provide them with safe and sufficient water (GC 15 on the right to water, UN doc. E/C.12/2002/11, para 16).

Other rights dealt with by the Committee in GC 6, particularly the rights to adequate housing, health care, food and social security, are considered in more detail below.

The right to adequate housing

The CESCR recognises older persons as one of the most vulnerable groups that suffer disproportionately from the practice of forced evictions (GC 7 on the right to adequate housing in the context of forced evictions, UN doc. E/1998/22, annex IV, para 10). This is in line with various international documents and standards on housing that recognise older persons as falling among vulnerable and disadvantaged groups.

States should therefore take special measures to ensure that the housing rights of older persons are protected. Housing for older persons, as explained by the Committee, should not be seen as mere shelter, as the psychological and social significance of housing needs to be taken into account too. Accordingly, states parties have a duty to ensure that the national policies they adopt assist older persons to continue to live in their own homes for as long as possible. This can be done through, for instance, the development and improvement of homes and by adapting them to the ability of older persons to gain access to and use them (GC 6, para 33).

The right to health care

The ICESCR refers to the 'right to the highest attainable standard of health', which takes into account both the individual's biological and sociological condition and state resources (see GC 14 on the right to the highest attainable standard of health, UN doc. E/C.12/2000/4, para 9).

This right goes beyond the right to be healthy or to timely and appropriate health care. The CESCR has explained that the right also extends to

the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels (GC 14, para 11).

The Committee has also identified essential elements of the right, which include availability, accessibility (encompassing non-discrimination and physical and economic accessibility), acceptability and quality. In relation to physical accessibility, states are required to ensure that health facilities, goods and services are within safe physical reach for all sections of the population, especially older persons (GC 14, para 12). The Committee further emphasises the need for states parties to adopt an integrated approach that combines elements of preventive, curative and rehabilitative health treatment (GC 14, para 25).

The right to adequate food

The CESCR has emphasised that the right to adequate food should not be interpreted in a narrow or restrictive sense that limits it to a minimum package of proteins, calories and other specific nutrients. Physical and economic access to adequate food at all times, or to means

for its procurement, is vital for one to enjoy the right to adequate food (GCt 12 on the right to adequate food, UN doc. E/C.12/1999/5, para 6).

In terms of physical access, the obligation of states in relation to older persons includes ensuring that adequate food is accessible to them (GC 12, paras 7 and 13). This would ensure food security for older persons.

The right to social security

The realisation of the right to social security is crucial to ensuring that people live a dignified life. Social security benefits include contributory and non-contributory schemes, as well as other forms of benefit. The UN Independent Expert on the question of human rights and extreme poverty has identified, in the context of social protection for older persons, a number of factors that are necessary for a social pension scheme to comply with human rights law.

These include recognising the right to social security, including the right to non-contributory pensions, and ensuring the following:

- equitable access to social security and paying special attention to vulnerable and disadvantaged groups;
- physical and cultural accessibility;
- transparency and access to information;
- accountability;
- wide and informed participation;
- adequacy of benefits;
- access to health care; and
- gender equality (Sepúlveda, 2010: paras 51–97).

Old age provision is recognised as one of the principal branches of social security, and older persons are one of the groups that traditionally face difficulties in enjoying their right to social security. Accordingly, states parties are required to provide special facilities for older persons and ensure that they are covered by contributory and non-contributory schemes. States are under a duty to provide non-contributory old age benefits and other assistance to older persons that have not completed a qualifying period of contribution by the time they reach the age prescribed in national legislation and do not have a social security benefit or assistance, with no other source of income (GC 6, para 30; and GC 19 on the right to social security, UN doc. E/C.12/GC/19, para 15). Upon the death of an older person who was a breadwinner, states must make provision for benefits to the survivors and orphans (GC 6, para 29; and GC 19, para 21).

Assessing compliance

With reference to national mechanisms for the enforcement of rights, the ICESCR provides additional enforcement mechanisms. Currently, the CESCR assesses states parties' compliance with their obligations through the state reporting procedure. States parties are required to submit regular reports on the measures taken and the progress made in achieving observance of the rights in the ICESCR (article 16).

In reviewing state reports, the CESCR has devoted

some effort to assessing whether states parties are paying particular attention to older persons. In concluding observations, the CESCR has recommended that states parties take specific measures to ensure that older persons enjoy their socio-economic rights. For example, the CESCR expressed concern over the level of social security available to older persons in the United Kingdom and Northern Ireland, which it found to be insufficient to enable them enjoy their rights. It then recommended that the existing social security system be reviewed so as to address the inadequacies (see CESCR, Report on the Tenth and Eleventh Sessions, UN doc. E/1995/22, paras 294 and 303). In relation to the right to health care, the CESCR has gone as far as looking at whether specialised services are available for older persons. In relation to Luxembourg, for example, the CESCR expressed concern over the lack of specialised geriatric doctors and facilities for older persons (see CESCR, Report on the Sixteenth and Seventeenth Sessions, UN doc. E/1998/22, para 397).

The CESCR further expressed concerns over issues such as the extent of poverty among older persons and underdeveloped home care in the case of Serbia and Montenegro. It then required the state party to take measures to reduce poverty among older persons, prioritise and allocate resources for home care for older persons, as opposed to institutional care, and also to strengthen non-profit organisations that provide home care and other services (see UN doc. E/2006/22, paras 288 and 315). And in developing home care and other personal and social services for older persons, states parties have to take into account the combined health and social care needs of older persons. This was recommended by the CESCR when assessing the state report of Italy.

The CESCR's concluding observations thus provide more guidance to states on the extent of their socio-economic rights obligations towards older persons. It should be noted that once the Optional Protocol to the ICESCR of 2008 comes into force, the CESCR will also be able to use the complaints and inquiry procedures to enforce the rights and obligations in the ICESCR.

Conclusion

Because South Africa's population is ageing rapidly, and the majority of the older population in the country face income poverty, the government needs to ensure the implementation of existing policies aimed at protecting older persons and also to assess the effectiveness of these measures regularly.

The ICESCR, with its particular attention to older persons, could serve as a useful framework within which to evaluate the socio-economic rights of older persons, guaranteed in the Constitution. The CESCR, as seen above, has elaborated on the rights in the Covenant in the context of older persons and provided more clarity with regard to the relevant obligations of states. The ICESCR could thus strengthen the existing national policies on older persons. The government has, in fact, acknowledged the importance of international human rights treaties in strengthening do-

mestic mechanisms promoting rights (Parliamentary Monitoring Group, 2005). Furthermore, the ICESCR is relevant because it provides that where a state party does not have the resources to realise the rights contained in it, the state can request international cooperation and assistance in meeting its obligations. Ratification of the ICESCR would thus be beneficial to the realisation of the socio-economic rights of older persons as well as others in society.

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The general comments of the CESCR can be accessed at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

Excerpts from the concluding observations of the CESCR as well as other treaty bodies in relation to older persons can be accessed at <http://www.bayefsky.com/bytheme.php/id/930>.