

The potential of the International Covenant on Economic, Social and Cultural Rights as a tool for poverty reduction in South Africa

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Introduction

Together the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR; hereafter 'the Covenant') represent the fundamental human rights commitments of the international community. They were adopted to give concrete legal force and effect to the human rights commitments in the United Nations Charter (1945) as well as the Universal Declaration of Human Rights (1948). The Covenant – ratified by 161 states – is based on the values of recognising the inherent dignity, potential and equality each person.

It seeks to give effect to these values in the context of people's basic material needs. There is a close synergy with the foundational values of the South African Constitution of human dignity, equality and freedom and the inclusion of economic, social and cultural rights as justiciable rights in the Bill of Rights. As former President Nelson Mandela said in supporting the inclusion of socio-economic rights in the Constitution:

A simple vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, which by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.

Ratification of the Covenant has been long delayed when one considers that it was signed over 20 years ago, on the occasion of the historic first visit of former President Nelson Mandela to the United Nations General Assembly. Its sister Covenant on Civil and Political Rights was signed at the same time, but ratified in 1998. In 2002 South Africa acceded to its two optional protocols, providing respectively for an individual communications procedure and the abolition of the death penalty. The delay in ratifying the ICESCR is out of sync with South Africa's own commitment to the interdependence of all human rights reflected by its

integration of civil, political, economic, social, cultural and environmental rights in its holistic, internally renowned Bill of Rights. However, the accession process to the Covenant – as announced by Cabinet in its decision of 10 October 2012 – is now proceeding.

The question I focus on here is how this vitally important international human rights treaty can help in meeting South Africa's major goals of reducing poverty and inequality. I highlight three areas – expanding the scope of socio-economic rights; developing rights-based indicators for poverty reduction; and enhancing accountability for socio-economic rights violations.

Expanding the scope of socio-economic rights

There are many similarities between the rights protected in the Covenant and the socio-economic rights entrenched in the South African Bill of Rights. But there are also important differences. The right of everyone to have access to adequate housing, for example, is protected in section 26 of the Constitution, and the rights to have access to health care services, sufficient food and water, and social security (including social assistance) in section 27. In the Covenant, the right to health is protected separately (art 16), while article 11 incorporates the rights to adequate food, clothing and housing under the umbrella right of everyone to an 'adequate standard of living for himself and his family'. (The Covenant's male-orientated terminology reflects the era when it was drafted, but the UN Committee on Economic, Social and Cultural Rights [hereafter 'the CESCR'], which is the body responsible for supervising State's Parties obligations under the Covenant – has sought to rectify this in subsequent interpretations.)

The Covenant entrenches a right to 'the widest possible protection and assistance' to the family, while South Africa has derived protection for families indirectly through the right to human dignity in section 10 of the Constitution (*Dawood v Minister of Home Affairs*) and the rights of children in section 28.

These differences in formulation are not necessarily significant as there is no obligation on states to constitutionalise the rights in the precise form in which they are formulated in the Covenant. However, once we have ratified the Covenant, an international obligation will exist to give effect to these rights through legislation, policies, programmes and the creation of domestic remedies for their violation (CESCR, General Comment No. 9 [1998]). For example, the right to an adequate standard of living protected in article 11 of the Covenant can help ensure that

The Covenant recognises the right to work, but the South African Constitution does not

efforts to realise socio-economic rights in South Africa cumulatively guarantee an adequate standard of living to all. South Africa will have to undertake a national process of dialogue and policy formulation to ensure the realisation of this significant Covenant right.

A key right that is recognised in the Covenant but not in the Constitution is the right *to work*. Section 23 of the Constitution protects rights *in work*, such as the right of everyone to fair labour practices and the associational and collective bargaining rights of workers and employers. However, there is no equivalent constitutional guarantee corresponding with the rights in articles 6 (and to a large extent articles 7) of the Covenant. Article 6 enshrines the right to work and places obligations on States Parties to take positive measures to ensure that everyone has the opportunity to gain her living by work which she freely chooses or accepts, and to achieve steady economic, social and cultural development and full and productive employment.

The CESCR has adopted detailed guidelines on the scope and implications of this right in General Comment No. 18 (2005). This General Comment points out how the right to work is both essential to the realisation of other human rights and helps secure the dignity of individuals as valued contributors to society and their communities. It also clarifies that the work as specified in article 6 must be 'decent work', defined as work that respects the fundamental rights of the human person as well as the rights of workers in terms of their conditions of work safety and remuneration.

Decent work also provides an income that allows workers to support themselves and their families, and respects the physical and mental integrity of the worker in the exercise of his/her employment. Work is a broader concept than work done in the context of an employment relationship for a salary and wage and is closely linked to the variety of means through which people pursue a livelihood (see Jan Theron, 2014).

The right to work is one of the most neglected socio-economic rights. By acceding to the Covenant, South Africa is afforded the opportunity to view employment and livelihood creation through a rights-based perspective and to draw on the resources and experience available through the Covenant and its supervisory body, the CESCR, to develop this central right in the struggle against poverty and inequality.

Developing rights-based indicators for poverty reduction

The main operational clause of the Covenant is article 2, which defines the nature of the state's duties in relation to all the protected rights. It reads as follows:

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

Although not identical, this article bears a close resemblance to the clause defining the nature of the state's duties under sections 26(2) and 27(2) of the South African Constitution.

In fact, the Covenant was a major source of justification and inspiration in both the inclusion and formulation of the socio-economic rights provisions in the South African Bill of Rights. What is the significance of these obligations for drafting the social policies and programmes that are necessary to reduce poverty?

In elaborating on the nature of states' obligations in General Comment No. 3 (1990), the CESCR noted that the concept of 'progressive realisation' allows a certain margin of flexibility in the timeframes for achieving the full realisation of the relevant rights, given potential resource and other constraints. However, it goes on to emphasise that progressive realisation simultaneously imposes concrete obligations on the state 'to move as expeditiously and effectively as possible' towards the goal of full realisation of the rights. In addition, any measures that reduce the enjoyment of the right (so-called 'retrogressive measures') must be justified in the light of the totality of the rights in the Covenant and in the context of the full use of the maximum available resources (CESCR General Comment No. 3, para 9).

In addition, the CESCR views the progressive realisation of the rights to commence from a floor or baseline of providing for minimum essential elements of each of the rights as a matter of priority – the so-called 'minimum core obligation' (General Comment No. 3, para 10). Although the South African Constitutional Court has not accepted an independent right on each individual to go to court to claim a specific minimum level of enjoyment of the rights, it has held in the famous *Grootboom* case that in order to pass constitutional muster a reasonable programme must incorporate short-term measures of relief for those in desperate need or living in intolerable circumstances. It has also left open the door for the recognition of minimum core obligations in the assessment of the reasonableness of the government's acts or omissions where evidence is placed before the court to determine the content of the relevant minimum core obligation, for example, in the context of housing, health care services, social security.

However, the fact that the Court – largely for reasons related to its perceptions of its own institutional limits and capacity – has not endorsed an independent minimum core obligation for the purposes of litigating socio-economic rights, does not imply mean that this obligation should not be reflected in the budgets, policies, plans and legislation of the state. On the contrary, once the Covenant is ratified it forms part of the international obligations of South Africa to define such a minimum core in relation to each right and to ensure that it is realised in practice. This is one of the aspects on which the state will be asked to account in the state reporting procedure.

It is therefore encouraging that the National Development Plan (NDP) makes 'a firm commitment' to achieving a minimum standard of living. It consciously does not seek to define such a standards in advance, but calls for participation and debate from all social partners (National Planning Commission, 2013:28). This work should be accelerated through research and broad public debate on defining such minimum standards of achievement in relation to each of the Covenant rights. These should then enjoy priority attention for implementation.

The General Comments of the CESCR also usefully elaborate on a number of process and substantive indicators for achieving progressively the full realisation of the rights in the Covenant – beyond the safety net of the minimum core. For example, the substantive indicators developed by the CESCR in assessing the 'adequacy' of the right to housing include: legal security of tenure; the availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. Similar substantive indicators are developed in relation to a number of other Covenant rights, including water, social security, education and health care services. Overarching substantive indicators in relation to these rights include the availability of services, physical and economic accessibility, and acceptability (culturally sensitive).

The CESCR has also developed a detailed General Comment on what it means to guarantee gender equality in the enjoyment of economic, social and cultural rights (General Comment No 16 [2005]), and non-discrimination in the enjoyment of these rights (General Comment No. 20 [2009]). These General Comments elaborate on the steps that should be taken to ensure the equal enjoyment of socio-economic rights. As such, they are invaluable in providing guidance on integrating an equality perspective in the interpretation and implementation of socio-economic rights. This is necessary to deepen our understanding of poverty in South Africa not only as a deprivation of resources and social services, but also a product of unequal relationships of power and privilege in all spheres. To combat poverty on a sustainable basis will require breaking deeply entrenched patterns of systemic discrimination on grounds of race, gender, class, disability and others (General Comment No. 20, para 12).

Process indicators include the adoption of transparent strategies and plans of action for the realisation of the rights, incorporating indicators and benchmarks by

which progress can be monitored, the periodic review of such plans and strategies, and the generation of disaggregated statistics which reflect the extent to which marginalised and vulnerable groups enjoy meaningful access to the rights. There are a number of synergies between these process indicators and the jurisprudence of the Constitutional Court on the obligation of the state to adopt reasonable programmes to give effect to socio-economic rights and to engage meaningfully with the beneficiaries of rights (see, for example, the jurisprudence listed in the references below). It also resonates with central concepts in the NDP of expanding human capabilities and nurturing active citizenship.

Many of these indicators are already being used by NGOs, research institutes and the Human Rights Commission to monitor progress in realising socio-economic rights (see reports listed in references). However, what is lacking is a more meaningful integration of these indicators within budgetary, policy and legislative processes (e.g. the exercise of parliamentary portfolio committee oversight functions) impacting on the realisation of these rights. These indicators are specifically rights-based indicators and, although there are some overlaps, they are not equivalent to general economic or developmental indicators. They reflect what it means to understand housing, social security, health care and so forth specifically as human rights, which South Africa undertakes to the international community to do upon ratifying the Covenant.

Through its participation in the state reporting procedure, South Africa will be able to benefit from the considerable experience of the UN Committee on Economic, Social and Cultural Rights in monitoring the fulfilment of States Parties' obligations under the Covenant. It will also afford structured opportunities to engage in dialogue with local and international NGOs (involved in the shadow reporting procedure), other States Parties and technical experts, and to benchmark its performance in relation to other States Parties with a similar developmental profile. Ratification of the Covenant will enable South Africa to access a wealth of experience, expertise and UN agency technical assistance (see ICESCR articles 22 and 23, General Comment No. 2 [1990] on international technical assistance measures). This will support and provide fresh impetus to our poverty reduction strategies by linking them more closely to global efforts to achieve the full realisation of socio-economic rights. It will also provide fresh insights into the interpretation and implementation of the socio-economic rights entrenched in our own Constitution.

Enhancing rights-based accountability

The Optional Protocol

The final theme concerns the ratification of the Optional Protocol to the Covenant, creating a communications procedure for the enforcement of the rights in the Covenant. The entry into force of the Optional Protocol on 5 May 2013 was a landmark event in the international protection of human rights, and in redressing the historic imbalance in the

protection of economic, social and cultural rights. It allows individuals or groups of individuals under the jurisdiction of a State Party who claim to be victims of a violation by that state of any of the economic, social and cultural rights set forth in the Covenant to submit a complaint to the CESCR.

The Optional Protocol makes available an international remedy for those who claim that their economic, social and cultural rights have been violated. Most cases will be resolved and dealt with in the domestic legal system of a State Party, as a pre-condition for accessing the communications procedure is the exhaustion of available domestic remedies. By ratifying the Optional Protocol a state submits itself to a form of quasi-judicial international legal accountability for fulfilling its obligations under the Covenant. This is a form of accountability with real teeth and thus enhances the status and importance of economic, social and cultural rights. They are more likely to be taken seriously both by organs of state and by beneficiaries if meaningful avenues of redress exist both within the national legal system and through dedicated and experienced international forums.

Further, a communications mechanism helps generate clarity over time on the normative content of the relevant rights and the state's obligations in various concrete contexts which form the subject of communications. This normative clarity is invaluable to guide states on the necessary measures to respect, protect, promote and fulfil the rights, and to guide rights beneficiaries in monitoring and advocacy.

The Optional Protocol means that socio-economic rights are no longer second-class rights compared with civil and political rights. They enjoy equal status and protection at the international level. The question is whether South Africa will join the growing number of states that are endorsing this historic development in the international protection of human rights by ratifying the Optional

Protocol. This is the highest sign of our commitment to the interdependence of all human rights and honours former President Mandela's insight that to fulfil our human potential both freedom and bread are necessary.

Conclusion

By joining over 160 States Parties to the ICESCR, South Africa is finally aligning its constitutional commitment to these rights with its international human rights obligations. In so doing, South Africa will become a full partner in a global dialogue on advancing the realisation of economic, social and cultural rights. In an age of globalisation, austerity measures resulting in the rollback of many critical social programmes, growing inequality between the rich and poor, and continued poverty, the need for renewed strategies to advance the realisation of these rights worldwide is more relevant than ever.

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