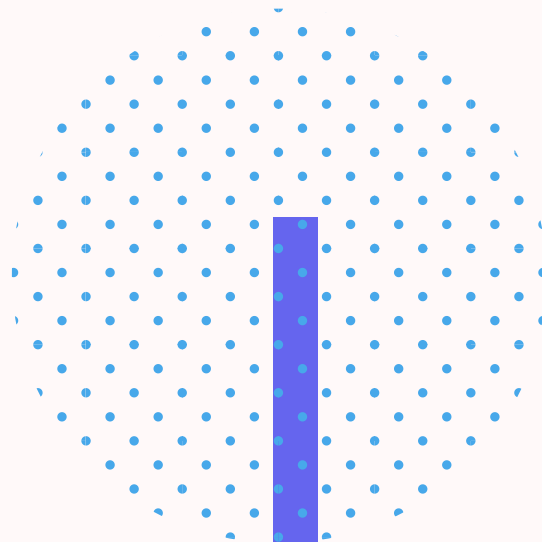


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INTRODUCTION TO ICESCR OPTIONAL PROTOCOL
[OP-ICESCR]



Mallika Ramachandran

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2020

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ABOUT THE DOCUMENT

BE THE CLASSROOM SERIES has previously worked and posted on the meaning and nature of economic, social and cultural rights [ESC rights].

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- (3) Introduction to ESC Rights under the Indian Constitution

The present document on Introduction to the ICESCR- Optional Protocol [OP-ICESCR] is an addition to the on-going work on the Human Rights Framework on ESC Rights. It covers basic information on the objectives of the OP and the key provisions dealing with the redressal mechanisms and processes.

Much emphasis is given to highlighting the expansion of the normative framework through the works of the Committee under the ICESCR. The document highlights a few of the important standards developed, interpreted and applied by the Committee in its dealing with member states.

The document also mentions a few areas that need further study and analysis in order to understand the impact of the OP-ICESCR mechanisms within domestic jurisdictions, particularly of the member states.

The document is meant only for academic purposes.

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IMPORTANCE OF OPTIONAL PROTOCOLS

Human rights treaties are often attached and complemented with Optional Protocols. The Optional protocol instruments are adopted after careful deliberation between different stakeholders including member states to human rights treaties.

The Optional Protocols once adopted may;

1. Address a specific aspect/substantive topic.

[for example, ICCPR Second Optional Protocol on Death Penalty under which states parties agree to abolish the death penalty; the first optional protocol to the Convention on the Rights of the Child protecting children against armed conflict seeks to increase the protection of children in armed conflicts].

2. Provide mechanisms and procedures for enforcement of treaty provisions.

[e.g. conduct of enquiries]

3. Provide a legal basis & access to a complaints mechanism by individuals & groups.

[e.g. Third optional protocol under the Convention on the Rights of the Child, 2011]

OPTIONAL PROTOCOL TO ICESCR: BACKGROUND

The adoption in 2008 and the coming into force on 5 May 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR or OP) was a historic development in advancing accountability under international human rights law for violations of economic, social, and cultural rights.

[Sandra Liebenberg, HRQ- 2020]

ADOPTION:

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights [OP-ICESCR] was adopted in 2008 by the General Assembly. Entered into force in 2013.

PROVISIONS:

Contains 21 articles; as on 5 June 2020, the protocol has 24 parties.

ICCPR & ICESCR:

The Optional Protocol brought the ICESCR at par with the ICCPR in terms of introduction of like enforcement mechanisms including an individual complaints procedure; and it is thus seen as having 'rectified a three-decades-old asymmetry in international human rights law' [Tara J. Melish, 2009].

The ICESCR simply envisaged the mechanism of periodic reports by member states to monitor implementation; no further remedies (such as inter-state communications provided for in the ICCPR) were envisaged.

ADDRESSING VIOLATIONS:

The OP-ICESCR was adopted to ensure that remedies are provided in cases of violations of economic, social and cultural rights. It adds an adjudicatory and inquiry procedure for CESC to enforce and implement the ICESCR.

OP-ICESCR: HISTORY

As far back as 1968, the International Conference on Human Rights had urged governments to develop legal procedures to prevent violations of economic, social and cultural rights, while demands for an optional protocol began to be made from the 1970s.

§ The first formal discussion on the same took place only in 1990;

§ The CESCR argued in support of such strong measures as this would not only increase the stature and seriousness of the rights but enable it to speak on instances of abuse; this led to a draft protocol presented to the UN Commission on Human Rights in 1994 and a revised draft in 1996;

§ An Open-ended Working Group to consider options regarding the elaboration of an optional protocol was established in 2002 after two reports by an independent expert in 2002 and 2003.

§ The group held five ten-day sessions between 2004 and 2008 ; and in its last meeting agreed to transmit the draft OP-ICESCR to the Human Rights Council.

§ In June 2008, the Council approved the draft text, and on 10 December 2008, it was opened for signature by the UN General Assembly.

[See Catarina de Albuquerque and Malcolm J. Langford, 2016; Tara J. Melish, 2009].

OP-ICESCR: OBJECTIVES

1.

The preamble to the OP-ICESCR reaffirms the aim of the UDHR and the two International Covenants (ICCPR and ICESCR) that 'the ideal of human beings free from fear and want can be achieved only if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights', as well as the 'universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms'.

2. The OP-ICESCR seeks, through the mechanisms provided therein, to achieve the purposes of the covenant and implementation of its provisions.

3. The passage and entry into force the Optional protocol to ICESCR establishes three key procedures: an individual/group communications procedure, an extensive and far reaching inquiry procedure, and a unique inter-state communications procedure...

[Desierto & Gillespie]

4. Individuals & groups can litigate before the CESCR through the Complaints/Communications Procedure against the State which has become a member party to the OP.

"Cases that involve a group of individuals or otherwise have the potential for broader structural and systemic impact and jurisprudential development may be preferable to cases that have a more limited scope".

[OP-ICESCR Guidance Manual, pg. 19]

The OP-ICESCR represents a milestone in efforts to redress the imbalance in justiciability mechanisms for economic, social, and cultural rights at the international level.

[Sandra Liebenberg, HRQ- 2020].

KEY PROVISIONS

1. Individual Communications (complaints by individuals on violation of ESC rights in the Covenant) [Articles 1-9]
2. Interim Measures (pending consideration of individual communications) [Article 5]
3. Inter-state Communications (non-fulfilment of obligations under the Covenant by a state party) [Article 10]
4. Inquiry (into 'grave and systematic violations' of ICESCR rights) [Articles 11-12]
5. International Assistance and Cooperation and Trust Fund [Article 14]
6. 'Opt-in' provisions for Inter-state Communications and Inquiry:

It may be noted that while states when becoming party to the protocol recognize the competence of the Committee to receive individual communications on violation of the covenant against themselves, with regard to the other two mechanisms provided, namely, inter-state communications and inquiry, a state party must give separate consent with regard to each of the mechanisms for those provisions to be applicable to them.

INDIVIDUAL COMMUNICATIONS: WHO CAN APPLY?

• Under Article 2;

• a. Individuals who claim to be victims of violations of the Covenant;

• b. Groups of individuals who claim to be victims of violations of the Covenant;

• c. Third parties acting on behalf of those individuals or groups of individuals with their consent;

• d. Third parties acting on behalf of those individuals or groups of individuals, even without their consent, if an adequate justification can be provided for doing so. [OP-ICESCR Manual, p. 23].

Communications are admissible where:

All available domestic remedies have been exhausted

Human rights jurisprudence has established that in order to fall within the scope of the exhaustion rule, a domestic remedy must meet three criteria:

•• It must be available in practice;
•• It must be adequate (or sufficient) to provide relief for the harm suffered and;

•• It must be effective in the particular circumstances of the case. “ In the absence of effective domestic remedies, the exhaustion requirement in Article 3(1) does not apply.

• e.g. rejection for non-exhaustion of domestic remedies:

A.M.B. v. Ecuador, Communication 3/2014, 8 August 2016, E/C.12/58/D/3/2014:

...here the Complainant had failed to exhaust the available remedy perceiving the same as inefficient based only on a general statement by the president of the council of the judiciary on delays in proceedings.

INDIVIDUAL COMMUNICATIONS: ADMISSIBILITY

Communications would be inadmissible where [Article 3]:

1. The communication is submitted one year after exhaustion of domestic remedies unless it can be shown that it was not possible to submit within the given time (such a requirement is not generally seen in other international instruments but is present in some regional systems).

2. Facts in the complaint occurred prior to entry into force of the protocol

[e.g. E.C.P. et al. v. Spain, Communication 13/2016, 20 July 2016, E./C.12/58/D/13/2016; Imelda Merino Sierra and Juan Luis Merino Sierra v. Spain, Communication 4/2014, 24 November 2016, E/C.12/59/D/4/2014]

3. The matter has been examined by the Committee or under any other international investigation or settlement procedure.

4. It is incompatible with the provisions of the ICESCR.

5. It is ill-founded, not sufficiently substantiated, or based on mass media reports alone.

6. Is abuse of a right to submit a communication or is anonymous or not in writing.

[e.g. claims not substantiated-- Baltasar Salvador Martínez Fernández v. Spain, Communication 19/2016, E/C.12/64/D/19/2016]

INDIVIDUAL COMMUNICATIONS: PROCESS

The Communication,

if admissible is brought to the notice of the concerned party which shall file explanations or statements together with remedy adopted within six months [Article 6].



The Committee may make available its good offices to the parties so as to reach a friendly settlement, which if reached closes the matter [Article 7].



Examination of the communication based on relevant documents is carried out in closed meetings, also taking into account documentation from other UN bodies and specified authorities [Article 8].



Views of the Committee if any are transmitted to the party with its recommendations to which the state party is to respond in writing within six months, while the Committee may also call for the state to submit further information about measures taken in response to the recommendations in the periodic reports submitted by states parties [Article 9: follow-up].

WHAT CONSTITUTES A VIOLATION?

Considerations before the CESCR:

1. Which acts/omissions constitute a violation of ICESCR Rights.
2. Where a communication does not reveal a 'clear disadvantage' to the author, if necessary, the Committee may decline consideration unless it raises an issue of general importance [Article 4]
3. Which rights under the ICESCR are enforceable under the OP-ICESCR .

Article 2 takes a comprehensive approach and covers all economic, social, and cultural rights under the Covenant.

4. In the consideration of complaints, the reasonableness of the steps taken by the concerned state party is looked into [Article 8(4)]

(this standard reflects South African jurisprudence, e.g. Republic of South Africa and Others v. Irene Grootboom and Others, (2000) 11 BC:R 1169 (CC))

On what constitutes a violation under the ICESCR; one needs to also look at -

Limburg Principles on the Implementation of the ICESCR;

The Maastricht Guidelines on Violations of ESC rights;

The Montreal Principles of Economic, Social and Cultural Rights, and

The Maastricht Principles on Extra-Territorial Obligations of States and ESC Rights [OP-ICESCR Guidance Manual]

INTERIM MEASURES

Interim measures can be taken by the CESCR under the following heads;

1. EXCEPTIONAL CIRCUMSTANCES:

After receipt of a communication, and before a determination on merits, the Committee may transmit a request to a state party for urgent consideration to take interim measures in exceptional circumstances.

2. DAMAGE TO VICTIMS:

The objective is to avoid possible irreparable damage to victims.

Usually such provisions are found in the procedural rules of the monitoring body and not in the treaty provision itself which leads to challenges or non-compliance; recent instruments including the OP-ICESCR thus include such a measure as part of the treaty provision.

In *Maribel Vivana López Albán v. Spain*,
Communication no. 37/2018, E/C.12/66/D/37/2018,

a violation of Article 5 was found as the author (complainant) was evicted and provided inadequate alternative accommodation despite a request to the state party to suspend eviction pending the complaint, and no adequate explanation was provided by the state for its failure to comply.

INTERIM MEASURES

[Cont...]

In *S.S.R. v. Spain*, Communication no. 51/2018, E/C.12/66/D/51/2018,, the Committee noted:

•It [CESCR] may decide to request that interim measures be taken by the state party when it appears that irreparable harm may be likely to the author/victim if not suspended or withdrawn pending consideration of a communication.

•‘Exceptional circumstances’ refers to ‘the serious impact that an act or omission by the state party may have on a protected right or on the future effectiveness of any decision by the Committee on a communication submitted for its consideration’. This is in line with the practice of other international bodies.

•Irreparable damage ‘refers to the threat or risk of a rights violation that is of such a nature as to be irreparable or not adequately compensable or to forestall the possibility of restoring the rights that have been violated’.

INTERIM MEASURES

[cont...]

•In *S.S.R. v. Spain*, Communication no. 51/2018, E/C.12/66/D/51/2018,, the Committee noted:

•The risk or threat must be real and there must be no available effective domestic remedy that could prevent such damage.

•The Committee cannot request interim measures unless it finds the matter to be prima facie admissible.

•The likelihood of damage occurring need not be proved beyond a reasonable doubt; author must provide the Committee with enough information on facts and violations to establish a prima facie case and existence of risk of irreparable damage.

•Where initially real risk is not found by the Committee if such risk arises, the complainant may reapply for interim measures.

•Eviction would be considered to pose a risk of irreparable damage where the complainant has no access to adequate alternative housing; the situation of the family concerned is also taken into account.

By accepting the obligations under OP-ICESCR, the state party must undertake in good faith to cooperate with the Committee; if it fails to adopt interim measures, it fails to fulfil its obligations with respect to good faith.

INTER-STATE COMMUNICATIONS [ARTICLE 10]

An inter-state communication may be filed by a state party where it considers that another state party is not fulfilling its obligations under the Covenant;

the same must be in writing; also both the party filing the communication and against whom the same is made must have given their consent recognizing the committee's competence to receive inter-state communications against them.

After an opportunity to file responses in writing, if the matter is not resolved satisfactorily within six months, the Committee can make available its good offices with a view to friendly settlement; and where not so resolved the Committee is to provide in its report, the facts, oral arguments, and written submissions and also give its views thereon.

As Article 10 does not specify where the contravention takes places and against whom, it has broad extra-territorial application [Malcolm Langford, Cheryl Lorens and Natasha Telson, 2016].

Even though little used, it has been noted that the presence of such provisions provide 'powerful tools' for international diplomacy, and its utility is also indicated by its increased use in various systems including regional systems. [Claire Mahon, 2008]

Inter-state communication procedures while provided for in many international human rights instruments (e.g. ICCPR) are known to be underutilized or not resorted to at all, one key reason being 'political calculus'; they have however, been utilized in the European Court of Human Rights, International Labour Organisation, and International Court of Justice, as well as in the Inter-American and African systems, usually where the complainant state had a direct interest. [Malcolm Langford, Cheryl Lorens and Natasha Telson, 2016].

INQUIRY: ARTICLE 11 & 12

Where a state party has given consent recognizing the competence of the Committee as regards the inquiry provisions, the Committee may where it receives reliable information indicating 'grave and systematic violations' of the rights in the ICESCR invite the concerned party to cooperate and submit its observations on the concerned matter.

Taking into account the same, the Committee may designate one of its members to conduct an inquiry and report urgently to the Committee; this includes, where warranted, a visit to the state with its consent; and is to be conducted confidentially.

The Committee, after the same, is to transmit its findings to the concerned party which in turn must submit its observations with six months. A summary of proceedings may be included in the Committee's annual report.


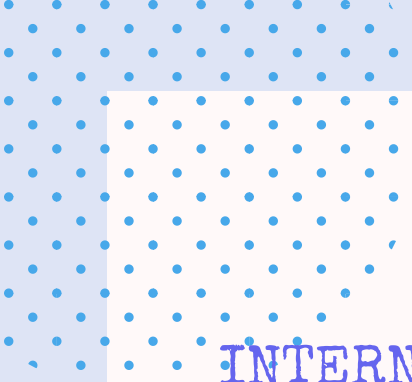
Follow-up is envisaged by calling for information regarding the same to be included in the periodic reports filed by states parties; as well as can be requested at the end of the six-month period after transmission of findings [Article 12]

The Committee's authority to establish an inquiry does not depend on the state's consent or cooperation, though cooperation would enhance its efficacy .

Reliability of information indicates that the same must be well-founded; it is different from credibility (or extent to which it can be believed) though credibility is a factor that can play into reliability.

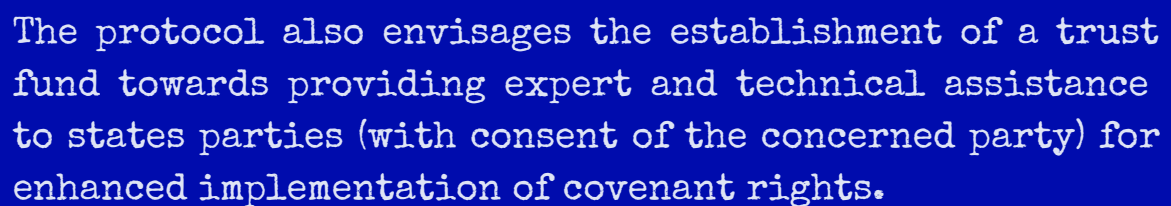
'Grave indicates' serious or severe but not gross, which is a higher threshold; while systematic implies that the state has failed to bring an end to persistent violations

[Donna J. Sullivan, 2016]



INTERNATIONAL ASSISTANCE AND COOPERATION; TRUST FUND [ARTICLE 14]

Based on communications and inquiries, where required, and with the consent of the state, the Committee may forward to UN Agencies, funds, programmes and other competent bodies, communications and inquiries which indicate the need for technical advice or assistance.



The protocol also envisages the establishment of a trust fund towards providing expert and technical assistance to states parties (with consent of the concerned party) for enhanced implementation of covenant rights.

REMEDIES

Remedies for violations of human rights could include:

- restitution,
- compensation,
- public apology,
- guarantees of non-repetition,
- satisfaction

[Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law..., 2005]

The text of the OP-ICESCR does not explicitly set out any specific remedial recommendations that may be made by the Committee on finding a violation. However, its decisions in communications indicate some such remedies:

1. Guarantees of non-repetition by the state;

2. Direction/recommendation to the state to adopt adequate legislative, administrative measures

[e.g. legislative and administrative measures to guarantee right of women to take free decisions regarding medical intervention affecting their bodies—S.C. and G.P. v. Italy, communication 22/2017, E/C.12/65/D/22/2017;

to ensure that notification by public posting is limited to situations where all means of serving notice personally have been exhausted—I.D.G. v. Spain, Communication 2/2014, E/C.12/55/D/2/2014]

•3. Recommendations as to access to justice/domestic remedies being ensured for victims/affected persons .

•[e.g. persons at risk of destitution or violation of covenant rights be ensured that they can challenge the decision before a judicial or other impartial authority and that effective remedies are available—Rosario Gómez-Limón Pardo v. Spain, Communication 52/2018, E/C.12/67/D/52/2018]

4. Remedy also depends on nature of violations and the position of the victim [e.g. age of victim, gravity of the violation]

CESCR JURISPRUDENCE: STANDARDS & GUIDANCE

The successful enforcement of ESC rights is often viewed in light of the works of the CESCR as seen in its General Comments, Views under the communications mechanism, and concluding observations.

The Committee over the years adopted practical standards on assessing the responsibility of states under ICESCR.

The following can be seen as few of the important interpretations of the CESCR made in order to strengthen the OP-ICESCR mechanisms. Each of the following points require further study and analysis.

1.

DELIBERATE RETROGRESSIVE MEASURES

The concept addresses instances where the state is responsible for backwards steps in human rights protection. [Ben T.C. Warwick, 2019].

States not to indulge in retrogressive measures. The same need to be justified by the State accordance with the ICESCR. [CESCR]

“If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are 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 State party’s maximum available resources”

[CESCR General Comment No. 13 on Right to Education].

CESCR JURISPRUDENCE: STANDARDS & GUIDANCE [CONT...]

2.

ACCEPTABILITY & QUALITY- dimensions of human rights [The AAAQ Framework]

Policies and rights to be implemented in a manner acceptable to the context of the society or the culture. The Acceptability and Quality dimension is part of the AAAQ framework adopted under other human rights treaties as well.

In light of the right to water, the CESCR in General Comment No. 15 stated that water services must be culturally appropriate and sensitive to gender, life cycle and privacy requirements. The acceptability criteria is both subjective and culturally dependent.

Regarding quality, the CESCR stated; water must be safe and free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health.

[Danish Institute for Human Rights- The AAAQ Framework and the Right to Water, 2014].

CESCR JURISPRUDENCE: STANDARDS & GUIDANCE [Cont...]

3.

REASONABLENESS STANDARD-

Standard applied while considering communications under OP-ICESCR- Article 8 of OP-ICESCR.

The most striking and unique feature of the OPICESCR is the incorporation of an express provision [8 (4)] prescribing the assessment standard to be applied by the CESCR to the examination of communications under OP. [Sandra Liebenberg, 2020].

CESCR says; -- Substantive elements of a reasonable policy include the 4 A's - Acceptability, availability, accessibility, adaptability.

-- Steps are reasonable if deliberate, concrete & targeted. The time in which steps were undertaken by states is also important.

-- All reasonable strategies must be informed by an equality framework,

-- Reasonable standard mandates that states address issues of systemic discrimination and the barriers faced by individuals

-- Reasonable steps should include administrative remedies that are accessible, affordable, timely and effective. Including substantive and procedural guarantees.

[Bruce Porter]

CESCR JURISPRUDENCE: STANDARDS & GUIDANCE [Cont...]

4.

Third Party Interventions

In light of the communications submitted before the CESCR; when examining individual communications under the Optional Protocol the CESCR may accept relevant information and documentation submitted by third-parties when necessary for the proper determination of the case. Third-parties may also submit information and documentation on a particular communication at the request of the Committee, or the Committee through its Working Group or a Rapporteur.

[Guidance on Third Party Interventions, Adopted by CESCR, 2016].

“Article 8 vests the CESCR with discretion to consult relevant documentation emanating from UN bodies, specialised agencies, regional human rights systems...the Committee has admitted third party submissions from coalitions of NGO’s [ESCR-Net] and thematic special procedures of the Human Rights Council [Spl Rapporteur on the Right to Housing]”. [Sandra Liebenberg, 2020].

The openness to external materials is adding to the jurisprudence of the Committee while making the process under the OP-ICESCR mechanisms participatory and duly representative of interests of different stakeholders.

CESCR JURISPRUDENCE: STANDARDS & GUIDANCE [Cont...]

5.

Extraterritorial application of ICESCR Obligations-

The CESCR has discussed and expanded the international reach of the ICESCR.

Including in following cases;

- State to regulate & monitor activities of TNC's based in its jurisdiction and affecting rights in another country.
- Situations of occupation of foreign territory by member states.
- States bound by ICESCR obligations while acting as members of international organizations.
- Under Obligations of Actor other than States the CESCR includes commitments and responsibilities of UN specialised agencies/international organizations towards ESCR.

[Fons Coomans, 2011]

CESCR JURISPRUDENCE: STANDARDS & GUIDANCE [Cont...]

6.

The scope of rights under ICESCR- UN-ENUMERATED RIGHTS:

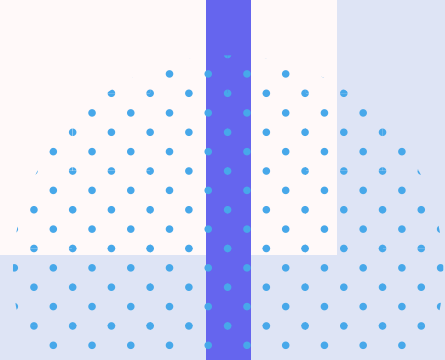
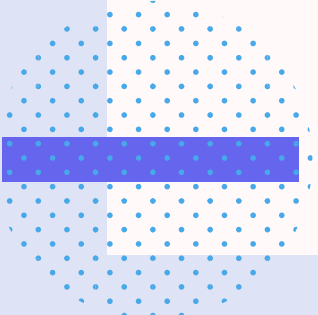
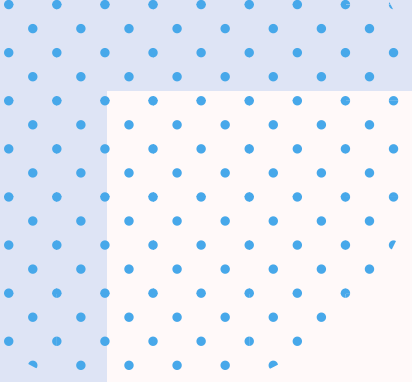
The CESCR has expanded the field of ESC rights in order to serve the objective of the ICESCR. E.g. Right to family planning information, access to contraceptives are viewed as human rights interests under the ICESCR.

•“The Committee on Economic, Social and Cultural Rights (CESCR) has interpreted human rights enumerated in human rights instruments to protect unenumerated rights, thus creating for such rights a domain. For instance, the right to water is not one specifically included in the provisions of the ICESCR. However, General Comment 15 issued by the CESCR on the Right to Water refers to the word ‘including’ used in article 11 of the ICESCR”. [Mallika Ramachandran, 2020].

POINTS FOR FURTHER STUDY

1. View the evolution & expansion of ESC rights in light of the mechanisms under the OP-ICESCR.
2. Study the direct and indirect impact of the CESCR jurisprudence on courts having domestic & regional jurisdictions.
3. Study the influence of CESCR Jurisprudence on the works of other human rights treaty bodies.
4. Study the impact of CESCR Recommendations on other UN mechanisms including Universal Periodic Review, Special Rapporteurs.
5. Ascertain the emphasis given to data and quantitative details of rights under the ICESCR- OP mechanisms.
6. Study the significance of the OPERA Framework for ICESCR , designed to combine the quantitative & qualitative data on ESCR.
7. Study the procedural and other factors that limit the access to the OP-ICESCR mechanism by victims of ESC rights violations.
8. Compare statistics on cases under the OP-ICESCR and under other Optional Protocols of human rights treaties.
9. Study the emerging CESCR jurisprudence in light of COVID-19.

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