

# **Swiss NGO-Coalition:**

## **Propositions for the "List of Issues" in consideration of the second and third periodic report of Switzerland to the CESCR**

***The Swiss NGOs recommend the Committee on Economic, Social and Cultural Rights to take into consideration the following fourteen topics – "list of issues":***

### **A Fundamental Deficits in Implementation**

1. Social Rights are Secondary within the Swiss Legal System (Art. 2, 1)
2. Lack of Distributing Information on the CESCR and Insufficient Observance of the Recommendation of the Committee (Art. 16)
3. Federal Structure as a Barrier of Implementation of the CESCR
4. Absence of a National Human Rights Institution

### **B Implementation of the Provisions under CESCR**

5. Prohibition of Discrimination (Art. 2, 2)
6. Equal Rights of Men and Women (Art. 3)
7. Right to Work and Fair Conditions of Employment (Art. 6 and 7)
8. Trade Union Rights, Right to Strike (Art. 8)
9. Social Security (Art. 9)
10. Right to Family, Children and Young People (Art. 10)
11. Fair Standards of Living (Art. 11)
12. Right to Health (Art. 12)
13. Right to Education (Art. 13)
14. Right to Culture (Art. 15)

*Berne, 2 November 2009*

*Swiss NGO-coalition*

**The Swiss NGO coalition is formed by the following organisations, which does not mean that these organisations necessarily agree with every single demand in the paper.**

Amnesty International, Swiss Section	www.amnesty.ch http://vierte-welt.ch
ATD Fourth World	www.caritas.ch
Caritas Switzerland	www.codap.org
Youth resource center on Human Rights – CODAP	www.fian.org/world-wide/fian-switzerland
Fighting Hunger with Human Rights – FIAN	www.frauenrat.ch
Womens network for foreign policy	www.gms-minderheiten.ch
Society of Minorities in Switzerland – GMS	www.heks.ch
Swiss Interchurch Aid – HEKS	www.humanrights.ch
Humanrights.ch / MERS	www.netzwerk-kinderrechte.ch
Child Rights Network Switzerland	www.postbeijing.ch
NGO Coordination post Beijing Switzerland	www.sans-papiers.ch
Platform for undocumented Migrants	www.pro-juventute.ch
Pro Juventute	www.sah.ch
Swiss Labour Assistance – SLA	www.fluechtlingshilfe.ch
Swiss Refugee Council – SRC	www.friedensrat.ch
Swiss Peace Council – SFR	www.sgb.ch
Swiss federation of trade unions – SGB	www.vpod-ssp.ch
Swiss union of public services – vpod/ssp	www.tdh.ch
Terre des hommes – child relief	

This paper is edited by Humanrights.ch / MERS, Hallerstrasse 23, CH-3012 Bern, Phone. +41 31 302 01 61,  
E-mail: info@humanrights.ch, www. humanrights.ch; responsible: Ruedi Tobler; translation: Katri Hoch

## **A Fundamental Deficits in Implementation**

### **1. Social Rights are Secondary within the Swiss Legal System**

**(Art. 2, 1)**

**(Recommendations 10, 25, 27)**

The completely revised Federal Constitution of 1999 codified non-binding social goals instead of enforceable rights. The Federal Court of Switzerland excludes the justiciability of the provisions of the CESCR in its jurisdiction. The Federal Council of Switzerland explicitly rejected the possibility of joining the Additional Protocol to the CESCR. According to it, «the CESCR is not directly applicable in Switzerland and it is considered to have only a programmatic nature in the Federal Council and the Federal Court of Switzerland» (response to the motion 09.3279 Ratification of the Additional Protocol to the CESCR on 20.5.09 by Evi Allemann<sup>1</sup>). Until the adoption of its second periodical report to the CESCR, the Federal Council did not give any substantial reasoning why a whole decade had passed between its first and second report. The Federal Council and the Parliament have mulled over the ratification of the European Social Charter for years now, but it was rejected in 2004.

### **2. Lack of Distributing Information on the CESCR and**

**insufficient Observance of the Recommendation of the Committee**

**(Art. 16)**

**(Recommendation 37)**

In October 2009 during the state report procedure concerning the CPPR, the Swiss delegation promised to translate the recommendations of every UN Committee related to state report proceedings into German and Italian languages. This is a little positive step forward. However, neither the state reports nor the recommendations of the Committee are published in the Federal Gazette. The reports and recommendations are available in the websites of the SECO (State Secretariat for Economic Affairs) and the Directorate for Public International Law (EDA). This was acknowledged in the report (f. 609) but is not entirely true.<sup>2</sup> Furthermore, these websites are not easy to find. In what extent and by which means the Federal Council informs the Federal Assembly, cantonal administrations and parliaments as well as the administration and justice authorities on the different levels (federal, cantonal, district, commune) about their human rights duties is not publicly known.

### **3. Federal Structure as a Barrier for the Implementation of the CESCR**

**(Recommendations 9, 26)**

The cantons and communes share the responsibility of implementing central social rights, above all in education, health care services and social and cultural matters. The Federal Council does not have an adequate mechanism to control the uniform implementation of these rights under the CESCR all over the country, even though noting that it is its responsibility under the covenant. In practice there exist huge differences in the implementation of the convention rights between the cantons, to some extent also between the communes.

### **4. Absence of a National Human Rights Institution**

The discussions about the establishment of a national human rights institution (NHRI) according to the Paris Principles have already existed for almost a decade. In July 2009 the Federal Council came to the conclusion that the creation of a NHRI would be „premature“. It simply intends to contract selected university institutes to provide certain services in the field of human rights for a next five years.

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<sup>1</sup> The comprehensive scope of the Additional Protocol to the CESCR was described in this response as an «extreme requirement».

<sup>2</sup> On the website of SECO the both State reports (1996 and 2008) are available, but not the recommendations:  
[www.seco.admin.ch/00385/00452/02028/index.html?lang=de](http://www.seco.admin.ch/00385/00452/02028/index.html?lang=de)

On the web site of EDA the recommendations of 1998 are available, but only the Swiss Report of 1996: In addition, it is mentioned that the Additional Protocol is still in process, this means that the page is not being updated:

[www.eda.admin.ch/eda/de/home/tipics/human/humri/humrep/pact1.html](http://www.eda.admin.ch/eda/de/home/tipics/human/humri/humrep/pact1.html)

Furthermore, the Federal Department of Justice and Police (EJPD) has a website with the title «UN Civil Covenant and Social Covenant», where you can find only the reports and recommendations (English and French) to CCPR. The information concerning the CESCR is missing. It can be concluded, that only civil rights counts for the Ministry of Justice: [www.ejpd.admin.ch/ehpde/home/themen/staat\\_und\\_buerger/ref\\_menschenrechte\\_2/ref\\_uno-sozialpakt.html](http://www.ejpd.admin.ch/ehpde/home/themen/staat_und_buerger/ref_menschenrechte_2/ref_uno-sozialpakt.html)

There are no cross-references available between these websites. (27. October 2009)

## **B Implementation of the Provision of the CESCR**

### **5. Rule of Non-Discrimination**

**(Art. 2, 2)**

#### **(Recommendation 16)**

Discrimination was banned under the new Federal Constitution of 1999. However, until today the state has not adopted a comprehensive anti-discrimination law allowing an effective legal remedy against discrimination. The current legal protection against discrimination is inconsistent, complicated and incomplete. Different rules apply depending on the area (work, services, etc.), sphere (public, private) and grounds for discrimination (gender, race, ethnicity and religion and disability etc.). In respect to those implicit provisions of civil law, which were considered under figure 51 in the state report of Switzerland, there is hardly any jurisprudence.

### **6. Equality between Men and Women**

**(Art. 3)**

#### **(Recommendations 17, 32)**

Hardly any improvements have been achieved in relation to equal treatment of men and women over the past years, especially in areas of employment (salary difference, discrimination and precarious conditions of employment, lack of social security). Accordingly, more and more women face poverty (see point 7).

A comprehensive strategy for gender mainstreaming – including gender budgeting – is failing.

### **7. Right to Work and Fair Conditions of Employment**

**(Art. 6 and 7)**

#### **(Recommendations 11, 12, 13, 14, 18, 29, 30, 31)**

Part-time employment instead of full-time, low wages, work on call, precarious and non-protected working conditions instead of regulated employment as well as growing unemployment and long-term unemployment are clear signs that work is getting more and more precarious, which is connected with the cutbacks in protection of employment. This is partly responsible for the fact that several hundred thousand of people are living in working-poor situations.

Official and hidden unemployment has become a continuing problem. This has been taken only a little into account by Switzerland and it is facilitating only a few projects for second and third labour markets. The State report does not mention the cutbacks in social services. In addition, there are still disadvantages within the labour market based on sex, age, health condition, degree of disability, origin and residence permit.

Despite of the legal prohibition, the discrimination in wages continues to be a problem – about half of the cases on wage differences cannot be explained by a different educational level, career tracks or age of service, and therefore it constitutes discrimination. In low salary employment the women are overrepresented. A claim by trade unions for a "controlling of salaries" was achieved in some public companies and federal offices, but generally it faces opposition both from private companies and from the public sector.

The Aliens Act, which entered into force in 2008, is discriminatory in relation to the issuance of working permits on account of a nationality. Persons, who come from outside of the EU or EFTA states or are not highly qualified, are discriminated. Persons stemming from non-EU or -EFTA States and being less educated more often have difficulties to find an employment, or generally an employment corresponding to their qualifications.

Apprentices and trainees generally have worse health conditions than pupils of the same age. At the same time they are more often confronted with occupational accidents than their older colleagues. The age of the protection of minors was reduced from 20 to 18 years. Also, many possibilities to employ young people on nights and Sunday have been created.

In many cantons the employees at an hourly rate do not have the right for paid vacations. The Appellate Court of Geneva decided a case with reference to the CESCR, in which it ascertained the right of employees at an hourly rate to a fair compensation of vacation. This decision is legally effective only in the canton of Geneva.

*For the prohibition to work for undocumented migrants, see point 9 about Social Security.*

### **8. Trade Union Rights, Right to Strike**

**(Art. 8)**

#### **(Recommendation 28)**

Because of a complaint submitted by the Swiss Federation of Trade Unions, the ILO Committee on Freedom of Association decided that Switzerland breached the ILO Convention Nr. 98. According to the decision, the Swiss legislation does not allow an adequate protection against unfair dismissals for active members of a trade union.

Switzerland refuses to change its legislation accordingly. An unfair dismissal because of trade union activity cannot be withdrawn.

Although embodied in the Federal Constitution (Art. 28), the right to strike is being more often restricted through courts decisions: Most often the right to strike is affirmed as legitimate but held disproportional.

Over the last years, there have often been cases about employers, who deny the presence of trade unions in their companies as well as any kind of negotiations, although the right to collective negotiations has been recognised under the Constitution (Art. 28).

## **9. Social Security**

**(Art. 9)**

### **(Recommendation 23)**

The extremely restrictive Swiss Asylum Act and the objective of the Swiss Aliens Act to keep out third-State citizens from Switzerland push more and more people into insecurity or into a situation of almost complete lawlessness. This can drive people into the hands of smugglers and human traffickers as well as into exploitation by prostitution, in domestic work or in agriculture.

The situation of people without a regular residence permit to Switzerland (undocumented migrants) has changed dramatically in the past years. A stricter Asylum Act and Aliens Act have created a new category of “irregular persons”, who are banned from working as well as excluded from social benefit programmes. Persons with a legally binding negative asylum decision have been banned from working, also in cases where the enforcement of removal has been suspended (Art. 43 para. 2 Asylum Act). At the same time, those persons are excluded from social benefits and are given an emergency aid so that they will not starve or freeze to death (Art. 80-82a Asylum Act). They are given a daily cash allowance, which equals to the price of a package of cigarettes. With this amount of money they are expected to cover all their needs. In some cantons like in Basle-city, they have been given a shelter only for the nights, and during the days they have no other chance than to spend their time on the streets – also in winter. The medical aid is heavily restricted. Some cantons are terminating or do not contract health insurances for rejected asylum seekers – despite of an obligation to contract insurance. They pay the medical costs only in case of biggest emergencies for somatic illnesses. Any sort of private help to those affected by this regulation is criminalised (Art. 116 Aliens Act). In addition, their right to move can be limited and they can be even isolated (Art. 74 Aliens Act). A breach of such security measures can be penalised with an imprisonment up to three years. In practice this means that a person can be detained because of a deportation process up to two years. In addition to that a person can be detained up to three years because of missing identity documents a deportation is not possible.

Those illegal people who are nowhere numerically comprised, are in addition to those 90'000 undocumented migrants covered in the state report of the Switzerland under figure 65 (estimated by the Federal Office for Migration) who live in Switzerland under precarious conditions. As a result of a protest action by undocumented migrants during 2000-2002, the Minister of Justice developed criteria, according to which around 2'000 undocumented were legalised. Her successor restricted this procedure so that only some most blatant cases fill the criteria. The state report does not mention the reason for closing the 2005 formed working-group for undocumented migrants under the Federal Commission on Migration. Already after two years of work the Commission had to end its task as useless, because the Federal Office for Migration and most of the cantonal offices for migration declined to follow the decisions of the working group. Today the situation is worse than before 2000.

The Platform for undocumented Migrants (relief organisations, NGOs, trade unions, Churches, parliamentarians) invited the federal and cantonal officers to numerous round tables in order to tackle the problems of undocumented migrants like for example health, school enrolment, education as well as right to marriage. When the public health and education authorities showed readiness to commit themselves to the concerns of undocumented migrants, the migration authorities were strict and excluded the platform systematically from the development of their ordinances.

## **10 Right to Family; Protection of Children and Youth**

**(Art. 10)**

### **(Recommendations 15, 19, 20, 31, 34)**

Although the aim of the new Aliens Act is to strengthen integration, it in fact limits the right to family reunification considerably. Affected by this are not only aliens but also Swiss citizens.

The new Aliens Act aims to fight against the (so-called) fictitious marriages, which had led to situations, where the perception of right to marriage for alien couples has been hindered or, to some extent, even made

impossible. The rule, according to which a fictitious marriage can be nullified by civil law, was related with the clause, which allows the paternity to be automatically cancelled. This means that the children will lose all the rights based on the paternity. From the beginning of 2010 onwards the undocumented migrants are not anymore able to marry in Switzerland because of a new regulation. This is even so, when a marrying couple has already lived together for a long time and has mutual children.

The Swiss legislation allows alien minors to be detained, without a criminal offence. This kind of administrative detention can take as long as twelve months and it is not unusual in practice, however it varies from canton to canton. Detention of minors, in general, lasts longer than detention of adults.

There are no statistics available in Switzerland about children in foster care. Without harmonised quantitative and qualitative data about foster care practices, it is dubious to plan improvements in the policies supporting child development and family life. Particularly it concerns the most marginalised families who are often helpless when dealing with social services about foster care issues.

## **11. Fair Standards of Living**

(Art. 11)

### **(Recommendation 12)**

The number of people living in poverty, despite of the economic power of Switzerland, is high and is still growing. This affects mostly children and young people, single mothers, large families, aliens and people in precarious conditions of employment. Differences in wages and property are considerably high and are increasing.

On behalf of the government, a strategy for fight against poverty is being planned. In a draft, there are missing clear measurable goals as well as an implementation plan and the rights of those in concern. What is also missing is a consideration of the situation of those persons who live and work in Switzerland without documents as well as of those persons who have to rely on the emergency aid according to Asylum Act and Aliens Act.

Concrete measures to improve the discriminative situation of travellers (yenish, roma and sinti) are missing. Like before, they are suffering because of the lack of sites and places where they can live according to their traditions.

Strategies, instruments and legal regulations are missing in order to examine the economic policy decisions which concern Switzerland and third countries (agricultural, trade agreements, patent right, permission for agro fuel, export assurances) in how far the right to food and a fair contribution of aliments is being respected, protected and promoted. Prohibitions for the importation of agro fuel, which are directly concurring with aliments, are missing. There is also a lack of regulations in order to obligate Swiss enterprises to respect the right to water and food in all their businesses.

*The problems of the living conditions of undocumented migrants, see Point 9 (social security)*

## **12 Right to Health**

(Art. 12)

### **(Recommendations 21, 22, 24, 35, 36)**

In opposition to the 1998 recommendations of the Committee (figure 36) to lower the costs of health services especially for families and to bring them in accordance with the rights under Art. 11 para 1 of the CESCR, Switzerland has not shown any significant progress in fighting against the increasing costs in the health sector and the costs for health insurances are rising (in 2010 the increase of premiums for health insurances is estimated to be up to 20 %). This affects mostly the middle class families, who cannot benefit from a price-reduction. Also the undocumented migrants are affected by the same problem, above all when they are living in a region where there are no specific advice centres for them and thus they are not able to obtain price-reductions of premiums or some other additional benefits.

*See more about the restrictions in the public health system for undocumented migrants under point 9 (social security)*

## **13. Right to Education**

(Art. 13)

### **(Recommendations 11, 17, 26, 33)**

The provisions concerning the educational system in the Federal Constitution have been fundamentally overworked and adopted in a referendum in 2006. Although claimed by the recommendation 11 and 26 of the Committee and the civil society, the right to education according to Art. 13 of CESCR was not a foundation for

this revision of the Federal Constitution. There were no steps taken in order to introduce free education in secondary and higher education (Art. 13 para 2 b and c).

The regulation of the system of scholarships considerably varies from canton to canton. The Swiss Conference of Cantonal Ministers of Education (EDK) decided in 2009 an intercantonal agreement on unification of scholarships in upper secondary and tertiary school level. Every canton can decide on its own whether to accede to it or not based on its sovereignty. Several categories of aliens are excluded from scholarships, above all those with precarious residence permits, but also persons, who reside in Switzerland because of studies. Accordingly, it breaches the rule of non-discrimination under the Art. 2 para. 2 of the CESCR.

The children and young undocumented persons live their lives in a particularly vulnerable situation. They are discriminated when it comes to their right to education, both in preschool and after compulsory schooling as well as in their special educational needs. Very often they suffer from the precarious situation for many years, living with the fear of being recognized by the authorities and being returned to their home countries. Poverty, social isolation and a life without prospects after compulsory schooling undermine the right of every child to a life in dignity.

The chances for success in school are for the children from "classic" immigration countries (Southern Europe) as well for children living in disadvantageous milieus restricted. Because of the very selective school system many of those children will be too soon directed to a lower education level without taking into consideration of their school performance and therefore the possibility to a higher education is obstructed for them.

Switzerland has not yet acceded to the UN Convention on the Rights of Persons with Disabilities and the intercantonal agreement on special educational needs adopted by the EDK on 2007 does not equate the standards of the Convention. In relation to the integration of children with special educational needs there exist massive differences between the cantons: The canton Ticino does not offer special classes. In other cantons the rates for segregation of children into special classes varies considerably. In totally, it varies for all the pupils between 1 % (Valais) and 8 % (Basle-Land).

Systematic measures for people to complete their uncompleted basic education are missing (Art. 13 para 2 f).

Human rights education is not systematically included into curriculum (Art. 13 para 1).

## **14. Right to Culture**

**(Art. 15)**

### ***(Recommendation 11)***

Although by ratifying the Council of Europe Framework Convention for the Protection of National Minorities (SR 0.441.1) the yenish people was recognised as a minority group, and there are also institutionalised measures in order to advance their culture and traditions, but it is less than what comes to other minority groups in Switzerland (for example rhaeto-romanic) in terms of financing the cultural institutions, advancement for language, newspapers, radio and television broadcasting. The rights of the yenish people, sinti and roma are not explicitly codified in the Federal Constitution as well as in most of the cantonal constitutions. The Federal Council confirmed in its response to an interpellation (07.3624) on December 2007 that it is not willing to accede to the ILO Convention Nr. 169 on Indigenous and Tribal People. The problem with regard to the living and transit sites where they can live according to their tradition stays unsolved.