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### Conclusion and recommendations

#### 5.1 Conclusion

This study has provided a preview of the ICESCR<sup>226</sup> and its provisions and the approach of the South African Courts in enforcing the justiciable SERs in the South African Constitution.<sup>227</sup> The study has also highlighted the likely benefits that South Africa might reap from ratifying the ICESCR and its Optional Protocol, having regard to the provisions of the ICESCR and the interpretation of the Constitutional Court.<sup>228</sup> As seen earlier, despite the South African Bill of Rights provision for SERs, it is still lacking in some major areas like the right to education and the right to work. Nevertheless, the South African Bill of Rights should at least be commended for making SERS justiciable while western countries are still debating about the latter's justiciability. With the breakthrough of the OP-ICESCR, a major step has been made at the international level in favour of justiciability of SERs. In view of the fact that South African courts already adjudicate on SERs, it is recommended for South Africa to ratify both the ICESCR and the OP-ICESCR, as this will enhance the protection of SERs in its domestic application.

It is true that the ratification of the ICESCR will not result in an 'overnight' change in the provision of SERs. However, international law has an important role to play in the South African jurisdiction be it for the purpose of interpreting laws or legislating or for advancing the enforcement of rights in general. Cases such as *Grootboom* and *Joe Slovo* show how international law in the form of general comments from the Committee on ESCR have impacted on the interpretation of SERs provisions.

However, in *Grootboom*, *TAC* and *Mazibuko* cases, the Constitutional Court rejected the minimum core approach, which has left some poor litigants without direct relief. The reasonableness approach that the Court has adopted, though more substantive than the 'rationality' test in *Soobramoney*, poses some difficulties for poor litigants without legal representation as they will not

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<sup>226</sup> See chapter 2 of this dissertation.

<sup>227</sup> See chapter 3 of this dissertation.

<sup>228</sup> See chapter 4 of this dissertation.

be able to put together all the resources required to prove their case. Hence, by ratifying the ICESCR, South Africa will be bound to also give effect to the minimum core concept, in addition to its obligation to do so under the African Charter. Academics have nevertheless expressed concerns as to the impact of the African regional system of human rights in the South African jurisdiction. They have argued that the impact of the latter compared to the UN system has been 'quite minimal'.<sup>229</sup> Considering the impact that the UN system has in the domestic jurisdiction, it is of paramount importance for South Africa to ratify the ICESCR and the OP-ICESCR for there to be a real hope coupled with international pressure to improve the interpretation and the enforcement of SERs in the country. In light of the setbacks identified in this dissertation and the recommendations below, the ratification of the ICESCR and the OP-ICESCR will definitely provide a boost in the domestic protection of SERs in South Africa.

## 5.2 Recommendations

This section provides a number of suggestions that can be taken into account in order to ensure the ratification and effective implementation of the ICESCR as well as the effective enforcement of the SERs guaranteed in the South African Constitution. The recommendations are directed at state actors such as the judiciary, executive and legislature, non-state actors such as NGOs and the media, the SAHRC and the African Commission.

### 5.2.1 State actors

The contribution of state actors in the South African constitutional democracy within the context of this study would be to provide a more effective domestic implementation of SERs. The ICESCR calls upon all member states to promote and give effect to it.<sup>230</sup>

The ratification of the ICESCR should not be an end in itself; hence courts have a role to play in ensuring that the provisions of the ICESCR are domesticated and used in interpreting constitutionally guaranteed rights. As seen from the cases discussed in the study where international law has been referred to, the Constitutional Court has picked and chosen which principles of the ICESCR to give effect to, especially as South Africa has not ratified the treaty. For

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<sup>229</sup> Kapindu (n 138 above) 50.

<sup>230</sup> Art 2(1) of the ICESCR.

instance, as stated above, the Constitutional Court rejected the minimum core approach in favour of the reasonableness one, thus, focusing more on the procedural part rather than providing content to the SERs. It is further submitted that even if South Africa has not ratified the ICESCR, the Constitutional Court could have been a major player in domesticating the contents of its provisions through its judgments and make it the law of the land through common law.

Further, despite the fact that the Constitutional Court in the case of *Grootboom*,<sup>231</sup> for instance, decided in favour of the applicants, there are still two reasons why the jurisprudence is not in its effect pro poor. Firstly, due to the rejection of the minimum core concept, the judgment did not provide 'direct, substantive relief' to the applicants, thereby providing little prospects to the poor to knock at the doors of courts in case they seek relief.<sup>232</sup> Secondly, the reasonableness review adopted by the court requires applicants to have the complex understanding of policies and budgetary issues, hence acting as a disincentive for the poor to bring cases to courts.<sup>233</sup>

Therefore, it is recommended that the ICESCR be ratified so that the Constitutional Court will have no excuse to depart from the minimum core obligations which would lessen the onus of proof on the victims. Moreover, the Constitutional Court is recommended to embark on remedies such as structural interdicts which will give a supervisory role to the Court and ensure that the remedies it prescribes are duly executed by the executive branch.

Also, the appropriate ministry which will undertake to implement the ICESCR upon ratification has got a very important role. Since all human rights are interrelated and are matters of primary concern in any democratic society, the respective ministry should ensure that all government departments collaborate in meeting the obligations under the ICESCR, especially reporting obligations. It should also act as a peer pressure mechanism for other departments to act promptly. Moreover, it is common knowledge that many poor South Africans are not aware of their rights as well as the various mechanisms available for enforcing them. The role of government authorities and officials in this regard is important in ensuring that there are appropriate human rights education programmes.

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<sup>231</sup> See chapter 3 of this dissertation.

<sup>232</sup> J Dugard & T Roux 'The Record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in R Gargarella et al (eds) *Courts and Social Transformation in New Democracies An institutional voice for the poor* (2006) 113.

<sup>233</sup> Dugard & Roux (n 232 above) 113.

Further, the legislature is the only body which can, through incorporation in national laws, effectively implement the ICESCR. Parliament, within its mandate, has the duty to make the government conform to the Constitution. Therefore, it is the primary function of parliament to use the parliamentary processes to allow the domestication of the provisions of the ICESCR. Hence, parliament can be instrumental in encouraging the government to ratify the ICESCR. In other words, members of parliament including the opposition can pressurise the executive, through parliamentary debates, to ratify the ICESCR.

### **5.2.2 Non-state actors**

With respect to the role of non-state actors such as NGOs, training and education are of prime importance. Education and training workshops should be organised more frequently so as to sensitise people about their SERs and the means available for them to seek redress in case of violation or threats of violation; and also how NGOs can assist them in this regard. In addition, the target groups of those workshops should not exclude the municipal officers, journalists and academics, for them to properly and efficiently address different SERs issues. NGOs can also support and improve state protection of SERs through getting involved in, for instance, the appointments of officials who will be occupying posts in constitutional bodies.

The media is a powerful instrument as well, which can frame public opinion if proper use is made of it. The media can also be used in disseminating information on SERs in a most comprehensive way to the different categories of people in society, and in reporting violations made and the means sought to redress same, thereby nurturing the support of the public in respecting and making others respect human rights standards.

### **5.2.3 The role of the SAHRC**

Monitoring the realisation of SERs is important and constitutional institutions such as the SAHRC have a role to play in this regard. As mentioned previously in this study, the SAHRC is mandated by the Constitution to monitor the implementation of these rights. However, the government needs to ensure that the SAHRC is well resourced to be able to effectively carry out this task. Government departments must also be responsive to the SAHRC's call for information, on the extent of implementation of rights so as to facilitate assessment of the progress being made and identification of challenges. Ratification of the ICESCR and its Optional Protocol will be important in ensuring that

the SAHRC's role is complemented by the Committee on ESCR through the state reporting and complaints procedure.

#### **5.2.4 The role of the African Commission**

Lastly, the African Commission can also play a role in promoting the ratification process of the ICESCR by South Africa. Since South Africa is a party to the African Charter and submits periodic reports to the African Commission and also makes statements during the sessions of the Commission, the latter can exert pressure on South Africa for it to ratify the ICESCR.



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