

The Ratification of the International Covenant on Economic, Social and Cultural Rights in South Africa.

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List of abbreviations and acronyms

African Charter	African Charter on Human and Peoples' Rights
African Children's Charter	African Charter on the Rights and Welfare of the Child
African Commission	African Commission on Human and Peoples' Rights
ANC	African National Congress
African Women's Protocol	Protocol to the African Charter on Human and Peoples'
BCLR	Butterworths Constitutional Law Review
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPRs	Civil and Political Rights
ESCR	Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OP-ICESCR	The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
RDP	Reconstruction and development programme
SAHRC	South African Human Rights Commission
SERs	Socio-Economic Rights
UN	United Nations
UN Committee on ESCR	United Nations Committee on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights

Introduction

South Africa is a country that was characterized by apartheid until 1994. This is one of the contributing factors towards the fact that socio-economic rights did not receive much recognition then. The first three Constitutions¹ contained no bills of rights, so that, at that time there was no scope for human rights. Socio-economic rights may not have been implemented then, but the 'minority' (black people who were segregated because of racism during the apartheid regime) was aware of them and how they were being deprived of them. For this reason the African National Congress (ANC) freedom charter² which was adopted in 1955 featured an array of socio-economic rights. These rights only catered for certain people at that particular time; however these rights have since come a long way.

Post 1994 the Constitution was adopted, which included provisions that would in a way correct or undo the wrongs that were in the past.³ To mark the end of an era, South Africa signed on to a number of international treaties in its attempt to illustrate that peace had been brokered throughout the country, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR/ the covenant).⁴ However the ICESCR, unlike the ICCPR has since then not yet been ratified. In this dissertation I focus on this failure, having signed the ICESCR, to take the next step and ratify it. My point of departure is that, although all states including South Africa are under no obligation to either sign or ratify any international treaty, it is highly unusual for South Africa, that generally supports the underlying premises of the ICESCR and even assisted in drafting the recently adopted Optional Protocol to it,⁵ not to have ratified the ICESCR so long after having signed it.

Although not included to any notable extent in the 1993 Constitution (the so-called interim Constitution),⁶ a range of socio-economic rights were considered during the multi-party

¹The first being adopted in 1910 by the South African Union, the second in 1961 and the third in 1983.

²The Freedom Charter of 1955 which was drafted by the Congress of the People (COP) in 1953, a gathering convened by a range of Liberation movements.

³ See Preamble to the Constitution of the republic of South Africa, 1996, which talks about correcting the injustices of our past.

⁴Former president Nelson Mandela signed the covenant in 1990

⁵The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the United Nations in 2008 and entered into force on 5 May 2013.

⁶Constitution of the Republic of South Africa, Act 200 of 1993.

negotiations and where then included as justiciable rights in the 1996 Constitution ('the Constitution').⁷ Despite their inclusion in the Constitution being preceded by objections relating to separation of powers and institutional competence concerns, which the Constitutional Court in its judgment certifying the Constitution found invalid,⁸ these rights have since their entrenchment in the Constitution played a pivotal role in South Africa.⁹ This has been illustrated by the way in which people have gone further by exercising these rights openly from the number of cases that have been brought before the Constitutional Court with regards to rights, such as, education, housing, water and social assistance.¹⁰ These rights have also in some way since apartheid contributed to creating some form of equality to the previously disadvantaged. An example can be seen from the housing program (Reconstruction Development Programme hereafter 'RDP') and the social grants for the aged and for the children.¹¹ Partly on this basis, the South African Constitution has been hailed as one of the best Constitutions in the world, for its inclusion of a Bill of Rights that contains socio-economic as well as civil and political rights that are also featured in most international human rights instruments.

Against this background it seems particularly strange that South Africa has signed but not yet ratified the ICESCR.

Although the country has since the early 90s come a long way in distributing resources evenly, the country is still hampered by the majority of people, especially those in previously disadvantaged areas, still not having adequate access to clean water, health services, education or housing. This is exacerbated when one takes account the unemployment rate,¹² which has not improved much

⁷ Constitution of the Republic of South Africa, 1996.

⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) (First Certification judgment).

⁹ Mubangizi J, C. 'The protection and enforcement of socio-economic rights in Africa: Lessons from the South African experience' (2007) 15 African Yearbook of International Law 88 and also taking into account the *First Certification Judgment*.

¹⁰ Cases brought forward include but not limited to; *Grootboom case*, *Khoza case*, *PE Municipality case*, *Soobramoney case* and *Mazibuko case* which shall be discussed in a later part of this paper.

¹¹ The grants are administered by a separate national government agency (SASSA), in 2003, approximately seven million South Africans, out of a total population of 45 million, received one of these grants. Total spending in 2004/05 amounted to R41 billion (approximately US\$7 billion), which represented 10.2% of total government spending, and 3.1% of GDP. www.odi.org/resources/docs/1688.pdf (accessed November 2014)

¹² In 2007 South Africa's HDI rose to 0.683 and has continued to grow in 2010. The HDI is an index that combines measurements of life expectancy, educational attainment and gross domestic product (GDP) and also to determine the development of a country. The HDI may not solely concentrate on socio-economic rights however it does illustrate that there are certain improvements in the aspects which are socio-economically associated. www.defenceweb.co.za/index (accessed March 2011).

taking into consideration the country's population.¹³ The poor percentages depicted by these statistics show the need for the ratification of the ICESCR. The cabinet's recent decision towards the ratification¹⁴ of the ICESCR will assist the Constitutional Court and the Government to consider the effectiveness of their approaches in terms of it being reasonable enough and whether the available resources are used to their full extent in order to provide these services to the people.

Another problem which arises is that the only form of recourse that victims of socio-economic rights violations have currently are the domestic courts and the channels for recourse provided in the African regional human rights system.¹⁵ Should the ICESCR, including its Optional Protocol indeed be ratified then the victims will also have international recourse, which will assist a great deal.

Against the background I attempt in this dissertation to answer the following questions

- Taking account of the current state of socio-economic development in the country, is the domestic implementation of socio-economic rights in South Africa sufficient, so that it need not also ratify the ICESCR and its OP-ICESCR?
- Why has South Africa delayed in ratifying the ICESCR?

The methodology employed was mainly desktop research, relying also on books, journals, reports and statistics as well as case law and legislation on SERs in South Africa. General comments of the UN Committee on ESCR were used.

¹³ www.statssa.gov.za *Quarterly labour force survey: quarter 2, April to June 2012* (accessed January 2013) the unemployment rate has decreased in this quarter by 0.4 percent which now leaves it at 36.2%.

¹⁴ Cabinet has made a request to parliament to accede to the ICESCR. www.gcis.gov.za Statement on Cabinet meeting of 10 October 2012 (accessed March 2013).

¹⁵ African Commission on Human and People's rights which was established by the African Charter and came into force with it in 1986. The Commission is tasked with promoting and protecting human rights and collective rights throughout the continent.

2

Introduction to the International Covenant on Economic, Social and Cultural rights and the possibility of its implementation in South Africa.

2.1 Introduction

Economic, social and cultural rights such as the rights to education, work, health and shelter were included in the Universal Declaration of Human Rights (UDHR).¹⁶ To give effect to these rights, the ICESCR was adopted. For one to understand the ICESCR one has to study the background to it and get an understanding that the norms of the Covenant must be recognised in an appropriate manner within the domestic legal order and also contain means of redress and remedies which can be available to an individual or a group of people.¹⁷

2.2 The background to the International Covenant on Economic, Social, and cultural rights

The ICESCR came about after the United Nations Commission on Human Rights (UNCHR) began to draft conventions on human rights which would be legally binding on the states ratifying them, by way of resolution. The Commission was not reaching an agreement as to whether there should be one or two conventions. This question was placed before the General Assembly, which in a 1950 resolution called upon the Commission to adopt a single convention.¹⁸ However the following year the Western States were able to reverse this decision with the permission of the Commission, and therefore, the rights in the UDHR were divided into two separate international covenants; one being on civil and political rights (ICCPR) and the other being on economic, social and cultural rights (ICESCR).¹⁹ Economic, social and cultural rights have since become part and parcel of international human rights, not only at universal level but also at regional level. The International Bill of Rights

¹⁶ This provision can be found in Article 25 of the Universal Declaration of Human Rights which was adopted by the General Assembly resolution 217 A (III) of 10 December 1948.

¹⁷ U.N. Committee on ESCR General Comment No 9, The domestic application of the Covenant, UN Doc E/C.12/1998/24 (1998)

¹⁸ United Nations General Assembly resolution 421 (V) of 4 December 1950.

¹⁹ United Nations General Assembly resolution 543 (VI) of 5 February 1952.

states that all rights are universal, indivisible, interdependent and interrelated;²⁰ the International Bill of Rights is an informal name given to one General Assembly and two international treaties established by the United Nations. It consists of the UDHR (1948), the ICCPR (1966) with its two optional protocols and the ICESCR (1966). However the contrary assertion that economic, social and cultural rights constitute a “second generation” of human rights, the first generation being civil and political rights (hereafter CPRs), has led to many problems when implementing economic, social and cultural rights. There still seems to be the idea that civil rights only incur passive obligations of abstention from the state, also giving the impression that civil rights were loftier than social and economic rights²¹ and those economic, social and cultural rights (hereafter ESCs) require active measures by the state.²² The ICESCR is a treaty that puts forward to the parties, as one of its requirements, to commit themselves to work towards the granting of economic, social and cultural rights to people.

Continuing with this discussion one should also bear in mind that the inclusion and protection of social and economic rights in a bill of rights is one of the main issues in dispute in a number of countries.²³

2.2.1 The rationale behind the separation of civil and political rights and economic, social and cultural rights.

There have been numerous debates concerning the drafting of the Civil and Political rights (CPRs) and ESCs into a single document embracing these rights on an equal footing. One of the arguments was that ESCs require legal obligations of a different nature and a different system of supervision, whereas CPRs were regarded as imposing mainly negative duties which meant it required the implementation of an individual without state intervention.²⁴ The argument carried on as to how ESCs would impose positive duties of performance on the state, requiring a high level of resources, e.g. the full realisation of the right to adequate housing. Another argument that was brought to the table concerned the justiciability of these rights (ESCs); was that ESCs could not be subject to

²⁰This principle was as first emphasised in the Universal Declaration of Human Rights in 1948

²¹Engh I. **Developing capacity to realise socio-economic rights: the right to food in the context of HIV/AIDS in South Africa and Uganda.** Intersentia, 2008

²²Eide A et al. **Economic, social and cultural rights: a universal challenge.** Martinus Nijhoff Publishers. 1995

²³The Namibian courts' are precluded from enforcing the principles stipulated in Article 95, the equivalent of the SER's in the SA Constitution and other international human rights instruments, as a result there have not been any reported cases in Namibia involving socio-economic rights except for a few cases involving land expropriation. Uganda's position is similar to that of Namibia see Mubangizi J C. **'The Constitutional protection of socio-economic rights in selected African countries: A comparative evaluation'** (2006) 2 (1) *African Journal of Legal Studies*.

²⁴Currie I and de Waal J. **Bill of Rights handbook.** 5th Edition. Juta & Co, 2005

litigation as it would dim the principle of separation of powers. It was for these reasons, in addition to others, that two documents were then drafted separating the two covenants.²⁵

The inclusion of socio-economic rights in the UDHR was not an issue; however the issue at hand was the formulation and the enforcement of socio-economic rights. In general socio-economic rights were depicted as positive rights as opposed to civil and political rights which were considered as negative rights and therefore 'easier' to implement because they are believed to have less impact on finance and bringing the judiciary into the executive or the judiciary and thereby bringing the principle of separation of powers into disrepute. However this statement has been thrown into debate many times as there are civil rights which also require positive action from the state, e.g. the right to picket, which would require police protection and state resources to monitor the people.²⁶

2.2.2 The domestic implementation of the ICESCR

Section 231 (3) of the interim Constitution states that where Parliament agrees to the ratification of an international agreement, such agreement shall form part of domestic law "provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution." However the application of the ICESCR domestically requires it to function along the principles of international law in order for its successful application. In this respect it states that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."²⁷ The covenant also aims to make certain that everyone has access to effective remedies by the competent national tribunals for acts violating the fundamental rights granted to them by the constitution or by law.²⁸

The South African Constitution provides for the consultation and inclusion of international law when interpreting statutes.²⁹ With regards to the domestic implementation of the ICESCR, the Constitution already has made similar provisions for most of the socio-economic rights catered for in the ICESCR taking into consideration Article 2 of the covenant.³⁰ What the Constitution can seek to achieve is the direct incorporation of the ICESCR into our law (South African). One of the advantages of direct incorporation is that it will promote consistency between domestic law and South Africa's international obligations. It will also assist with the development of jurisprudence in the area of

²⁵ For a historical overview into the separate covenants see Eide A. **Economic, social and cultural rights as human rights: a textbook**. M Nijhoff Publishers. 1995

²⁶ See note 7 Bill of Rights Handbook.

²⁷ U.N. Committee on ESCR General Comment No 9, The domestic application of the Covenant, UN Doc E/C.12/1998/24 (1998) Para 3, citing article 27 of the Vienna Convention on the Law of Treaties 1969.

²⁸ Ibid.

²⁹ Section 39 (1) of the Constitution of 1996.

³⁰ International Covenant on Economic, Social and Cultural rights, 1966.

economic, social and cultural rights as an integral part of the new legal traditions that are being constructed under a constitutional democracy.³¹

2.2.3 The nature of obligations under the ICESCR

Upon ratification of the covenant, a State Party is under an obligation to begin immediately to take steps towards full realisation of the rights contained in the covenant. Such steps should be deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. Article 2 of the covenant is the core article which regulates the scope of the state's obligations. Article 2 (1) states 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 resource, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' The covenant provides discretion for developing countries to determine to what extent they will guarantee the economic rights to non-nationals.³² However States must in all that discretion guarantee that the rights in the covenant will be exercised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Art 2(2)). Article 3 further adds that men and women are to enjoy the rights set forth in the covenant equally.³³

In order to ensure that States will fulfil their obligations towards the realization of social, economic and cultural rights, a form of mechanism by way of supervised reports was put in a place. The United Nations Economic and Social Council (ECOSOC) have the primary responsibility for supervising the compliance by State Parties with their obligations according to the Covenant (Part IV). They developed a mechanism whereby a State will send a report regarding its position on the implementation of the ICESCR. This is done through a system of periodic reporting by states on the 'measures they have adopted and the progress made in achieving the observance of the rights' recognized in the covenant (Art 16(1)). The reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the Covenant (Art 17(2)), and on that the council may transmit to the Commission on Human Rights for study and general recommendation or, as

³¹Liebenberg S. 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *SAJHR* 359.

³²Article 2(3).

³³Regard should be given to the Declaration and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17.³⁴

2.3 The effect of the ICESCR before it was signed in South Africa

There have been numerous debates since the early 90's concerning the inclusion of a justiciable Bill of Rights in the new Constitution. The arguments that were brought forward were similar if not the exact same to those statements which were argued with regards to the ICESCR and ICCPR. The ANC adopted the Freedom Charter³⁵ which canvassed for the direct entrenchment of social and economic rights and to address the injustices of the past,³⁶ therefore the ICESCR came into play.

However the ICESCR could not have been implemented in South Africa before 1994 as South Africa was still under the apartheid regime. During that time socio-economic rights were not even considered, and if they had been, they would have only been applied to a select race. The implementation of the ICESCR requires progressive realisation and availability of state resources and this would have proven a near impossible task for a country in such turmoil where the resources were only reserved for one race.

The vigorous debates which waged in the international sphere before the adoption of the ICESCR in 1966 were now encountered with regards to including social rights in the South African Constitution. The idea here was to have social rights included within the Constitution as sort of directive principles to give guide when encountering social rights issues and also showing that socio-economic rights are not the only rights which require positive obligations from the state but also civil and political rights. When this argument came before the Constitutional Court, the Court dismissed arguments against the justiciability of social rights based on the institutional competence of courts to pronounce on matters involving positive state action or budgetary and policy implications. It also stated that: 'it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by civil and political rights'.³⁷

³⁴Liebenberg S. 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *SAJHR* 359.

³⁵ Adopted at the Congress of the People on 26 June 1955.

³⁶ Van Wyk D et al. **Rights and Constitutionalism: The new South African legal order**. Juta 1994

³⁷ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) (1996).

2.3.1 The implications of the ICESCR for South Africa after it was signed

The drafting of the final constitution (hereafter the Constitution) brought about a huge transformation during the transition from an ungovernable state to a state which would be submerged into a democratic state. During the drafting of the Constitution much debate centred on the inclusion of economic, social and cultural rights and this suggestion was welcomed with nervous optimism by human rights lawyers. This was seen as a daring experiment in the enforcement of human rights especially in a country infamous for its atrocious human rights violations during its apartheid regime.³⁸ Civil and political rights were also not enforced in South Africa until two years prior to the 1996 Constitution, through the transitional Constitution which came into force on April 1994.

Article 18 of the Vienna Convention states that upon signature a country incurs international obligations to refrain from 'acts which would defeat the object and purpose of the treaty',³⁹ the Convention further states that the period between signature and ratification is also intended as a period in which the state reviews all domestic law and policy to ensure that it will be in compliance with the obligations imposed by the treaty at the moment of ratification.

In a State such as South Africa it is much easier to implement the ICESCR because most of the provisions that are in the Covenant are already in the Constitution illustrating the notion of direct enforcement, taking into consideration Article 2 which is closely emulated by Section 26 of the Constitution which states that:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.⁴⁰

Including also Section 27 which states similarly:

³⁸Pieterse, M. 'Possibilities and pitfalls in the domestic enforcement of social rights: contemplating the South African experience, (2004) 26 Human Rights Quarterly 885.

³⁹Vienna Convention on the Law of Treaties, 1969, Art 18.

⁴⁰§26. South African Constitution 1996.

- (1) Everyone has the right to have access to --- health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
- (3) No one may be refused emergency medical treatment.⁴¹

2.4 Conclusion

The ICESCR together with the ICCPR and other conventions on human rights were drafted by the UNCHR, so that they may be legally binding on the states ratifying them. Socio- economic rights were drafted taking into consideration the social aspects of life to give recognition to rights such as education, shelter, food, children’s rights, women’s rights, etc.

In its entirety the SERs require commitment from the legislature as well as participation from that particular state whether the SER’s are directly incorporated or done otherwise. Taking into consideration that the South African Constitution features a vast number of SERs, it will thus be necessary to require South Africa to continue with the ratification of the ICESCR and its optional protocol. The pros and cons of such will be discussed in chapter 3.

⁴¹ Ibid S27.

3

The implementation of socio-economic rights in South Africa

3.1 Introduction

Historically SERs were a near impossible task in terms of implementation in South Africa taking into consideration that it is a country previously embroiled in domestic turmoil. In this chapter I dwell on the introduction and the position of SERs in the South African Constitution. I also compare the Constitution and the ICESCR and to further discuss if these similarities and differences I identify equate to the non-ratification of the ICESCR.

I further discuss the influence that the ICESCR brings to South African courts jurisprudence in order to illustrate to one that the need for ratification of the ICESCR is present and also to further strengthen the use of international law in the interpretation of our laws as it has been seen that “the effective implementation of socio-economic rights not only requires the recognition of these rights as justiciable or enforceable rights and the development and implementation of policies to give effect to them at the national level. It also necessitates the ratification and implementation of international treaties.”⁴²

3.2 The South African Constitution and socio-economic rights

During the multi-party negotiations for the drafting of the Constitution there were numerous debates about the inclusion of socio-economic rights into the Constitution. These arguments mimicked the arguments which were brought forward in the drafting of the International Bill of Rights. The arguments presented at international level had somehow trickled into the national debates, therefore causing the same hurdles for socio-economic rights to be included into the Constitution. Factors which were of main concern were the justiciability of SERs and the financial constraints that they would bring, causing a blurring of the lines of separation of powers were courts to decide cases dealing with the positive duties imposed by these rights. For example in *Soobramoney*⁴³ the KwaZulu-Natal health department was inundated with budgetary, personnel and infrastructure constraints and decided to make dialysis treatment available only to those patients who were candidates for a kidney transplant. The money and personnel resources as a result would be dedicated to other pressing needs. The applicant challenged the decision of being denied

⁴²Chenwi L. ‘Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol’ (2010) 11 (1) ESR Review.

⁴³*Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

treatment, and the failure to allocate resources to him. The Constitutional Court decided against Mr Soobramoney as had the court decided for the applicant (and others in his position) in entitlement to dialysis treatment, the decision would not have only affected the individual but also the complex web of allocating resources therefore causing there to be an infringement within the tiers of government.⁴⁴

The above arguments were already considered in the *First certification* judgement⁴⁵ keeping in mind the discussion held about the nature of socio-economic rights and the impediments that would be encountered in terms of their judicial enforcement. There, the Constitutional Court stated:

“It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers...the fact that will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability...therefore, it is our view that the inclusion of socio-economic rights in the New Constitution does not result in the breach of the Constitutional Principles”⁴⁶

However we now have to consider the people in all of this as they are part and parcel of this transformation. How does one effect transformation if there will be no improvement in their welfare, education, employment, housing, and other areas where gaps have developed as a result of discriminatory practices and policies? How does one convince the millions of squatters and impoverished people that the protection of civil and political rights is of value to them if they do not have the material, intellectual, social, and economic circumstances to make use of such rights?⁴⁷

The answer to this question was well responded to in the adoption of the final Constitution which contained a Bill of Rights that catered for both civil and political rights and socio-economic rights.

⁴⁴Currie I and de Waal J. **The Bill of Rights Handbook**. 5th ed. Juta 2005.

⁴⁵ Cited as *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, (1996) 1996 (4) SA 744 (CC)

⁴⁶Ibid paras 77-78

⁴⁷Van Wyk D et al. **Rights and Constitutionalism: The new South African legal order**.Juta 1994.

Through the agreement that was reached during the negotiations to include SERs in the Constitution, which was seen as a bold move from South Africa by a lot of countries, this Constitution came to be seen as the most progressive because it would contain justiciable civil and political rights and socio-economic rights in one document. This agreement saw South Africa move from one era to another, this being the sort of transition that would bring hope to a country previously engrossed in turmoil.

3.2.1 Socio-economic rights in a transforming constitution

The introduction of the final constitution into the country can be viewed as a period of transformation. This constitution was drafted with the past in mind as well as the addressing of the future. One has to look at the constitution as a document facilitating the construction of a new political, social and economic order, as a way of healing the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights.⁴⁸

Transformative constitutionalism can be taken as a process of moving from one era to another, a state whereby one leaves the past behind in order to explore a “better” tomorrow. Mureinik pointed out that the true shift from apartheid to post-apartheid South Africa is a move from “a culture of authority” to “a culture of justification- a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command. The new order must be a community built on persuasion, not coercion.”⁴⁹ Karl Klare supports this statement in his article by depicting transformative constitutionalism as an enterprise which will induce a large-scale social change through nonviolent political processes grounded in law, a transformation which will not be in the form of a ‘revolution’ but ‘reformation’ .

As Mureinik talks about the crossing over of a bridge, we must also come to understand that transformative constitutionalism is not merely crossing from one side of the bridge to the other and consider this transformation done. Transformation in a country with this type of history (apartheid) will take place for generations to come as society will always be open to change and challenges that will be brought by the decision to see change.

In regards to socio-economic rights in the transformation process it is no longer an option for judges to rely on the separation of powers doctrine or parliamentary rules as justification when having to make decisions regarding socio-economic cases. Langa states that under a transformative

⁴⁸ Preamble to the South African Constitution

⁴⁹ Mureinik E. **A bridge to where? Introducing the Interim Bill of Rights.** (1994) 10 *SAJHR* 32.

Constitution judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.⁵⁰ This process requires a shift in our thinking, from a view that the three tiers of government are not linked, to one that accepts that the law cannot be kept isolated from politics.⁵¹

Klare argues that South Africans have adopted a *post liberal* constitution, one which is committed to social transformation, although this point is not made with the intention to persuade readers that post liberal reading is the 'correct' interpretation of the South African Constitution. In this it is a document which depicts tolerance towards the history and future of the country. The Constitution comprehends that political freedom and socio-economic justice are intertwined, it intends not to merely to proclaim democratic political rights but to commit the South African people to achieve a new kind of society in which people actually have the social resources they need meaningfully to exercise their rights.⁵²

According to van der Walt, the transformative potential of SERs will depend on the willingness of the South African judges, practitioners and other participants in socio-economic rights litigation to revisit and refashion the existing traditional concepts that inhibit creative, innovative responses to SERs claims. Furthermore the status of SERs as justiciable rights in the South African Constitution vests in the judiciary.⁵³ The judiciary as an institution is obliged to develop new and innovative remedies if a breach of the relevant provisions in the Bill of Rights is established.⁵⁴

From the above statements one can gather that there are no longer arguments centred on the inclusion of socio-economic rights. Rather the debate now concentrates on the mandate that is given to judges, practitioners and other participants in making the effort to ensure that SERs are effectively implemented into the lives of South Africans, coming up with creative and innovative ways to refashion the existing traditional concepts.

3.3 The enforcement and protection of socio-economic rights

The inclusion of SERs in the constitution did not come without vigorous debate though the end result was positive. This does not mean that socio-economic rights cases can now be adjudicated without any glitches or that the terms of the debate have been abandoned entirely. They are rather

⁵⁰Justice Langa, P. **Transformative Constitutionalism**. Prestige lecture delivered at Stellenbosch University on 9 October 2006.

⁵¹ Ibid.

⁵² Klare, K E. **Legal culture and transformative constitutionalism**. (1998) 14 SAJHR 146

⁵³ Liebenberg S. **Socio-economic rights: adjudication under a transformative constitution**. Juta 2010

⁵⁴ Section 172 (1)(b) of the Constitution

situated in factors which contribute towards the realisation of socio-economic rights and also give guide to the potential of the judiciary to carve out an institutional role that will contribute to the social transformation of South Africa.⁵⁵

Section 7 (2) of the Constitution directs the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”. This instruction heeds the state to not only refrain from interfering with the enjoyment of rights but to act also to protect, enhance and realise their enjoyment.⁵⁶

The South African Bill of Rights contains a number of socio-economic rights which include:

- Rights dealing with labour relations;⁵⁷
- Environmental rights;⁵⁸
- Property rights;⁵⁹
- Rights of access to adequate housing;⁶⁰
- Rights of access to healthcare, sufficient food and water;⁶¹
- Right to social security;⁶² and
- Right to basic and on-going education.⁶³

The Constitutional court is the main platform for adjudicating over socio-economic rights cases including the executive and the legislature. However the enforcement of socio-economic rights are not particularly confined to the legislature, the executive and the judiciary. Chapter 9 of the Constitution establishes certain institutions supporting constitutional democracy, one in particular the Human Rights Commission in s184 of the Constitution, to promote respect for human rights and a culture for human rights.

Thus far the Constitutional Court has made some key decisions which have become contributing factors to the shaping of our jurisprudence when it comes to socio-economic rights cases.

⁵⁵ Pieterse M. ‘**Coming to terms with judicial enforcement of socio-economic rights**’ (2004) 20 *SAJHR* 383

⁵⁶ See D Brand, ‘Introduction to socio-economic rights in the south African constitution’ in Brand D and Heyns C (Eds). *Socio-economic Rights in South Africa*. 2005 PULP 9.

⁵⁷ The Constitution of the Republic of South Africa, section 23.

⁵⁸ *Ibid* section 24.

⁵⁹ *Ibid* section 25.

⁶⁰ *Ibid* section 26.

⁶¹ *Ibid* section 27.

⁶² *Ibid* section 27.

⁶³ *Ibid* section 29.

3.4 A comparison of the socio-economic rights in the South African constitution and the ICESCR

It has already been stated that South Africa has not yet ratified the ICESCR.⁶⁴ However, the South African Constitution has guaranteed SERs in the Bill of Rights. By taking this stance the Constitution can be seen to be directly implementing socio-economic rights in the country. This comparison will include both the similarities and the differences of the wording of the sections involved and also to establish whether the domestic implementation of SERs for South Africa is enough without the adoption of the ICESCR.

Article 2(1), of the ICESCR, obligates states to take on steps to the maximum of their resources, with a view of progressively realising the rights by all appropriate means, whereas the South African Constitution compels the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights,⁶⁵ meaning that the provision of that particular right will depend on the availability of the resources within the state. In its preamble the ICESCR⁶⁶ recognises human dignity as a key principle and in the South African context, the Constitution mentions dignity as a value which needs to be respected and protected⁶⁷ and can be used in the interpretation of SERs. Another right which should be used in the interpretation of SERs, is the right to self-determination, the ICESCR places emphasis on the latter as stepping stone to realising SERs.⁶⁸ The right to equality is provided for both in the ICESCR⁶⁹ and guaranteed in the Constitution.⁷⁰

However, as much as numerous similarities can be drawn between the Constitution and the ICESCR, the Constitution is found to be wanting when it comes to provision of the right to work⁷¹ when compared to the ICESCR. The ICESCR does not only provide for the right to work. It mandates the state to work towards achieving that right by including technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment.⁷² Linked to the right to work is the right to join a

⁶⁴ Parliament is however in the process of ratifying the ICESCR, a statement on the decision to ratify was made by parliament on the 10th of October 2012.

⁶⁵ Sections 26 (2) and 27 (2).

⁶⁶ Para 1 of the preamble to the ICESCR.

⁶⁷ Sections 7(2) and 10.

⁶⁸ Article 1 of the ICESCR.

⁶⁹ Article 2(2) of the ICESCR.

⁷⁰ Section 9 of the Constitution.

⁷¹ Section 22 of the Constitution.

⁷² Article 6 of the ICESCR.

trade union and the right to strike, which are both provided for in the ICESCR⁷³ and the Constitution.⁷⁴

Pertaining to the right to food, housing and clothing, both the ICESCR⁷⁵ and the Constitution⁷⁶ provide for the progressive realisation of these rights. Although these rights are listed under different sections in the Constitution, the ICESCR lists these rights as a component of a right to an adequate standard of living. In regards to provision for housing, the ICESCR provides for the right to a house and for the state to take appropriate steps,⁷⁷ whereas the Constitution provides only for access to a house by taking reasonable legislative and other measures.⁷⁸ As regards to the achievement of the highest attainable standard of physical and mental health, both the Constitution⁷⁹ and ICESCR⁸⁰ provide for the right to health. Finally concerning the right to education, the provision in the ICESCR⁸¹ is far more extensive than that in the Constitution⁸².

It is apparent that as much as there are differences between the Constitution and the Covenant there are many similarities as well. One can also come to the conclusion that the Constitution was drafted with the ICESCR in mind as most of these provisions would “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.⁸³ Hence I shall discuss the judgments made regarding socio-economic rights which will illustrate how the ICESCR has had an impact on our courts jurisprudence.

3.5 The status of the ICESCR on South African courts jurisprudence

South Africa has come a long way historically with the coming into effect of the 1996 Constitution. In this Constitution we see the transformation of South Africa into a democratic state with principles and values which apply to everyone living in the country. This Constitution provides for social justice to the previously disadvantaged through the adoption of various covenants⁸⁴ and policies. Section 39(1) (b) provides that ‘when interpreting the Bill of Rights, a court, tribunal or forum must consider

⁷³Article 8 of the ICESCR.

⁷⁴Section 23 of the Constitution.

⁷⁵Article 11 of the ICESCR.

⁷⁶Sections 26 and 27 of the Constitution. See also Secs 28 and 35(2) (e) in relation to children and detainees,
⁷⁷ICESCR.

⁷⁸Section 26 of the Constitution.

⁷⁹Sections 24 and 27 of the Constitution.

⁸⁰Article 12 of the ICESCR.

⁸¹Article 13 (1) of the ICESCR.

⁸²Section 29 (1) of the Constitution.

⁸³Preamble to the 1996 Constitution.

⁸⁴South Africa has already ratified other conventions which protect socio-economic rights i.e. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), the Convention on the Rights of the Child (1995) and the African Charter on Human and People’s Rights (1981).

international law'. In *Grootboom*;⁸⁵ Yacoob J held that s39 of the Constitution obliges a court to consider international law as a tool to interpretation of the B.O.R.⁸⁶ The general status and effect of international treaties in South Africa is provided for in s231 of the Constitution, which asserts features that characterise the application of international agreements in South Africa, as a result in the case of *Mazibuko*⁸⁷ the high court considered articles 11 and 12 of the ICESCR that guarantee respectively the rights to an adequate standard of living.⁸⁸ It affirmed and applied the reasoning of the CESCR in General Comment 15 on the right to water, including the essential elements of availability and accessibility, in interpreting the right to water under section 27(1) (b) of the Constitution, holding that the state is under an obligation to provide the poor with water and water facilities on a non-discriminatory basis.⁸⁹

However, one should note that, the court is not bound to apply international law, unless the same is directly applicable as domestic law in terms of sections 231 and 232 of the Constitution. As the courts are to 'consider' international law as depicted by s39 of the Constitution then there is no binding obligation upon the courts.

From the above paragraph one can take note how the courts sometimes places reliance on international human rights law in the interpretation of socio-economic rights, as there is evidence to illustrate how the drafters were inspired by the ICESCR in writing the BOR, in the case of *Bernstein and Others v Bester and Others NO* Ackerman J stated that 'the internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights'.⁹⁰

The full benefits of the convention can be enjoyed by the incorporation of international socio-economic rights law into the South African legal order, where the incorporation may be direct which will be more effective, by recognizing the role of international human rights in the drafting of socio-economic rights entrenched in the Bill of Rights and the significance that international human rights law has on the interpretation of SERs.

⁸⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

⁸⁶ See also *Makwanyane* 1995 (3) SA 391 (CC), paras. 35, 39, 304 and 362, which is an important case on the point of the application of international law in interpreting the Bill of Rights.

⁸⁷ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

⁸⁸ *Ibid* para 35.

⁸⁹ *Ibid* para 36.

⁹⁰ 1996 (4) BCLR 449 (CC), para 106.

However it is not only by adoption of these covenants that social rights and justice can be achieved but through the implementation of such policies as well. Hence the enjoyment of SERs can mainly be experienced through the judicial enforcement of such rights.⁹¹

3.5.1 Influence of international law in South Africa's SERs cases

From the time when the 1996 Constitution came into effect there have been numerous judgments concerning socio-economic rights. These judgments have gotten varied feelings from the public. In some they seem to have brought victory in terms of providing for SERs while in other cases the decisions have been to some extent disappointing to the concerned parties and therefore causing a decline in confidence in our court system. One should understand that SERs cases are to be taken at their individuality and cannot simply be regarded as a homogenous group.

In dealing with these cases that concern SERs the courts have made the use of international human rights law *vis a vie* the ICESCR when making decisions. I shall follow with cases that have been decided using direct incorporation of the ICESCR into our case law.

In the *Grootboom case*, the Constitutional Court considered the legality of the conduct of a local authority that evicted a group of squatters who had moved onto private land earmarked for low-cost housing without providing them with alternative shelter. A magistrate's court had ordered the squatters to vacate the land by a particular date or face eviction. However, the eviction, under the control of the municipality, took place a day early and in circumstances which saw the squatter's shacks and possessions deliberately destroyed. The squatters then applied to the high court that they be given basic shelter or housing under section 26.⁹² According to the courts this was a violation of the negative obligation in s 26 (1). The *Grootboom* case became a ground-breaking case in that it required of the constitution to show that socio-economic rights can be adjudicated in a positive way by giving way to the enforcement of negative obligations. In this case it was required of the court to prevent the state from acting in a way that infringes socio-economic rights directly.⁹³ "The humiliation suffered as a result of evictions from homes, forced removals and the relocation to land which is inadequate for housing needs has to be replaced by a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people

⁹¹Mubangizi J C. The Constitutional protection of socio-economic rights in selected African countries: A comparative evaluation (2006) 2 (1) *African Journal of Legal Studies* 1-19

⁹²*Government of the republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

⁹³ UN Committee on ESCR, General Comment No 3 (1990), The Nature of States Parties Obligation, UN Doc HRI/Gen 1/ Rev 1at 45 (1994).

to be removed unless it can be justified.”⁹⁴ In this case the courts adopted the reasonableness review approach. The Constitutional court explained it as follows: A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.⁹⁵ These measures would be determined in the following ways: it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs.⁹⁶

The court held that, the government’s project was unreasonable as it failed to make provision within its available resources for people who had no access to land, no roof over their heads, who were living in intolerable conditions or crisis situations.⁹⁷ In coming to its conclusion the court also considered international law as a guide to interpretation with its application in varying degrees, in that international law need not be taken as is and directly applied without taking into consideration regional law but it may be read in to an extent that it will substantiate the provision in issue. It was echoed in *Grootboom*, based on s 39 (1) (c) of the Constitution, that relevant international law can be a tool of interpretation in varying degrees.⁹⁸ This law included General Comment No 3 of the committee on ESCR which was used to interpret the meaning of “progressive realisation” and to decide on whether to adopt the minimum core approach.

The amici submitted that the ICESCR is of importance in understanding the positive obligations created by SERs in the Constitution. The court, without explicitly rejecting the minimum core component of sections 26 and 27 of the Constitution, held as follows:⁹⁹

Yacoob J [in *Grootboom*] indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the

⁹⁴*Jaftha v Schoeman* 2005 1 BCLR 78 (CC) paras 28 and 29. Where the Constitutional Court referred to article 11 (1) of the ICESCR and General Comment No 14 in deciding the meaning to be given to “adequate housing” before reaching its conclusion.

⁹⁵*Grootboom* (n 80 above) para 41.

⁹⁶*Ibid* para 41-43.

⁹⁷Judgment made in *Grootboom*.

⁹⁸*Grootboom* (note 80 above) para 66.

⁹⁹*Grootboom*(note 80 above). The amici in the *TAC (Minister of Health v treatment Action Campaign (2) 2002 (5) SA 721 (CC))* case also raised the same point.

state are reasonable, the socio-economic rights in the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them....

Therefore it would prove to be impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to socio-economic rights in sections 26 and 27 on a progressive basis...

The court when making its decision applied the reasonableness review and gave innovative reasons as to why they could not apply the minimum core obligation as follows:¹⁰⁰

Courts are not institutionally equipped to make the wide ranging factual and political enquiries necessary for determining what the minimum core standards should be ... [and added that] courts are ill suited to adjudicate upon issues where the court order could have multiple social and economic consequences for the community. The Constitution contemplates rather a more restrained and focused role for the courts.

In essence the Constitutional Court similarly observed that the term progressive realisation 'is taken from international law and Article 2.1 of the Covenant in particular'.¹⁰¹ Thus it is submitted that while the South African Constitution has not directly incorporated the provisions of the ICESCR, it has largely transformed the provisions of the ICESCR into its text; and hence, in essence, in unique circumstances, has domesticated the Covenant pre-ratification.¹⁰²

To date now there have been numerous SER cases which have been decided by the Constitutional Court a lot of these cases are mostly property/ housing related questioning s26 of the Constitution. However what one should take note of is that SER cases are looked at as individual cases and will in some cases, though with similar facts, not have the same judgments delivered. In the *Olivia Road* case, the Constitutional Court (CC) moved away from the previous approach used in *Grootboom*. Occupiers challenged the correctness of the decision and order of the SCA authorising their eviction by the City of Johannesburg (the City) on the grounds that the building they occupied was unsafe and unhealthy.¹⁰³ The court ordered the parties to engage with each other. They reached an agreement. The CC held it was essential for a municipality to engage meaningfully with the affected people before evicting them from their homes if such act would render them homeless. This duty is

¹⁰⁰ TAC para 34-35.

¹⁰¹ *Grootboom* para 45.

¹⁰² Kapindu R. 'From the global to the local The role of international law in the enforcement of socio-economic rights in South Africa' Community Law Centre 2009. 40

¹⁰³ National Buildings Regulations and Standard Act 103 of 1977 (NBRA) empowers local officials to issue a notice to occupiers to vacate premises when they deem it necessary for health and safety reasons (s12 (4) (b)) and failure to comply would lead to a criminal offence (s12 (6)).

also grounded in s26 (2) of the Constitution, which requires the City to act in a reasonable manner within its available resources.¹⁰⁴ The decision in this case was not made with the aim of creating a precedent or law that could be applied to other cases.

Also in *Residents of Joe Slovo Community and Others*,¹⁰⁵ Justice Ngcobo applied the guidelines in General Comment No 7 of the committee on ESCR. He observed that General Comment No 7 is in line with the law regulating evictions and should be followed in cases of relocations as a result of evictions. *It is also consistent with our jurisprudence on PIE.* In my view General Comment No. 7 must, as a general matter, be followed in relocations such as the ones involved in this case.¹⁰⁶ The Constitutional Court also applied General Comment No 14 together with article 11 (1) in deciding the meaning to be given to ‘adequate housing’.

However, the decision in the *PE Municipality case*¹⁰⁷ was different. Here an eviction was sought against people who had occupied private land within the municipality jurisdiction. Application was based on s6 of PIE¹⁰⁸ which states as follows: “an organ of state may institute proceedings for the eviction of an unlawful occupier within its area of jurisdiction”. Respondents were willing to vacate provided some form of security of tenure would be provided. The court held it would not ordinarily be just and equitable to order eviction if proper discussions and or mediation had not been attempted and therefore respondents would remain on land.

The inference that can be drawn from the above is that international human rights law, particularly the ICESCR and the general comments of the CESCR, have played a very important role in the judicial enforcement of the right to housing.

Another case which brought development to SER was the *Khosa case*,¹⁰⁹ where a group of non-SA citizens with permanent residence status challenged some provisions of the Social Assistance Act, to the extent that it reserved the right to social assistance for South African citizens only. The challenge was based on section 27(1) (c) of the constitution, the state based their arguments on resource constrains but the CC stated that s27 provided for “everyone” and therefore legal immigrants could

¹⁰⁴ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC).

¹⁰⁵ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2011] ZACC 8; 2011 (7) BCLR 723 (CC).

¹⁰⁶ *Ibid* para 237.

¹⁰⁷ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) (1 October 2004).

¹⁰⁸ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

¹⁰⁹ *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) (4 March 2004)

not be excluded and therefore found the states limitation in providing for social assistance to legal immigrants unjustifiable under section 36.

The *TAC* case¹¹⁰, the same as the *Grootboom* case, the reasonableness review was applied. The Court limited its consideration of international law to the ‘minimum core obligations’. The facts were that the government restricted the distribution of nevirapine (an anti-retroviral drug that significantly reduces the likelihood that HIV will be transmitted from mother to child at birth) only to pilot sites relying on arguments such as efficacy, safety as well as lack of resources. Therefore, the application sought to challenge the reasonableness of its restrictive distribution by the government, as this meant that for a period of time preventative treatment for MTCT would not be available throughout the public health system. The courts holding in *Grootboom* that reasonableness entails comprehensiveness was the basis for its decision that the government’s policy on the prevention of mother-to-child transmission (MTCT) of Human Immuno Virus (HIV) (MTCT) was unreasonable.¹¹¹ Reference to the general comments of the CESCR is limited to General Comment 3 that defines the general nature of the obligations of states parties to the ICESCR of which one would expect the courts to have made use of General Comment No 14 on the right to the highest attainable standard of health’.¹¹²

The first case concerning health to be brought before the Constitutional Court was the *Soobramoney* case which dealt with a claim for provision of renal dialysis treatment at state expense, brought by a chronically and terminally ill man. The court held that there was no violation of the appellants’ right to emergency medical care as it was ‘an ongoing state of affairs.....which is incurable’.¹¹³ Although it could be said that the appellant’s right to healthcare in s 27(1) and (2) of the Constitution was breached, it was concluded that these sections use the terms “everyone” and “available resources” and so this would result in consequences where there would be need for prioritisation in terms of the reduction of resources to be provided in other sectors of medical care.¹¹⁴ In this case the courts omitted to apply s39 of the Constitution and therefore no international law was used in interpreting the right to health.

¹¹⁰ *TAC* (2) 2002 (5) SA 721 (CC).

¹¹¹ *TAC* para 17.

¹¹² General Comment No 14, para 12.

¹¹³ *Soobramoney* (note 3 above) para 21.

¹¹⁴ *Ibid* para 19.

The most recent case, being the *Mazibuko* case¹¹⁵ there was a dispute over the termination of water supply and respondents challenged the courts on their rights to access to water. O'Regan J did not make a decision as such but left the matter for the legislature and the executive and the institutions of government describing them as best to investigate social conditions in the light of available budgets.

It is evident from the above statements and case law that the ICESCR has some sort of influence, although the evidence may not be pin pointed to a particular point, the ICESCR has contributed in 'progressive' manner in our jurisprudence and in some way added substance to our "skeletal" Constitutional provisions and given the provisions in the Bill of Rights more strength. With the references that the courts have made to the ICESCR in dealing with the B.O.R issues, there remains a lot of room for improvement in the analysis and interpretation of international law in Constitutional jurisprudence.¹¹⁶ With the extensive provisions, such as education and the right to work, the country could gain and achieve a lot with the ratification of the ICESCR in terms of the aim to eradicate poverty and illiteracy in the country.

3.6 Conclusion

From the above cases one can see what an influence the ICESCR has had on most of the socio-economic rights cases decided in the South African Constitutional Court, mostly having to use Article 11, General comment 3, 7 and 14 to get a wider scope on the definition of "adequate housing".¹¹⁷ What we should understand is that socio-economic rights are an innovative feature of the constitution and in a way create law in the form of judges when making decisions. An inference can be drawn that the ICESCR should be ratified without further delay as it has played a pivotal role in aiding with SER case decisions and South Africa is already indirectly applying the ICESCR with the similar provisions that are entrenched in the Bill of Rights.

¹¹⁵ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC)

¹¹⁶ Kapindu, 43.

¹¹⁷ *Japhta* case (n46 above), *Grootboom* case (n44 above).

4

The ratification of the ICESCR in South Africa: Investigating the delay in ratification and its benefits.

4.1 Introduction

The ICESCR has played a pivotal role in the shaping of South Africa's jurisprudence into becoming a human rights conscious state. The Constitution provides for international law to be used when interpreting the rights in the constitution by the courts. International law has also been seen by the courts to be providing a framework within which the rights in the constitution can be evaluated and understood.¹¹⁸ South Africa has already signed the covenant and what remains is the ratification of the covenant. In this chapter I explore the challenges faced in the ratification of said covenant and also reasons why it has taken the country almost a decade to decide on the ratification of the covenant.

4.2 The standing of the ICESCR in South Africa

Within the findings of this case study it is without doubt that the South African government cannot delay further the ratification of the ICESCR. As with the numerous times that the government has promised ratification, the recent announcement in the Cabinet meeting that the ICESCR will be ratified,¹¹⁹ has received positive response from all concerned stakeholders. The announcement was made in 2012 and now 2 years later the ICESCR has not yet been ratified and is yet still to be tabled before parliament in terms of section 231 (2) of the Constitution. This development in the ICESCR in South Africa has been welcomed with much anticipation and excitement by the NGO's and it can only be hoped that there will be no further delays concerning the ratification as with previous opportunities missed out on because of the reasons given by government which were said to be obstructing the ratification process.

4.3 Challenges concerning the ratification of the ICESCR

The protection and enforcement of socio-economic rights has always proved to be a challenging task in different parts of the world in numerous ways. One of the challenges which are prevalent in sub-

¹¹⁸Chenwi (note 35 above).

¹¹⁹ Statement released by GCIS on 10 October 2012 that the cabinet has approved that South Africa should accede to the United Nations ICESCR. Published on NGO Pulse <http://www.ngopulse.org> (accessed March 2013).

Saharan Africa is the lack of resources. Although lack of resources cannot be used as an excuse for a country not to provide for socio-economic rights, it is the most substantial reason in African countries surrounding the challenges of providing such. In South Africa the ICERSCR has been applied in our courts. South Africa became party to the ICESCR when former head of state Nelson Mandela signed the treaty in 1994. However this signing alone does not bind the country to the covenant but only gives an obligation not to act against the object and spirit of the treaty.

The government has been given numerous opportunities to ratify the covenant but to no avail. They have though given some reasons as to why they have delayed when it comes to ratifying the ICESCR.

In 1993 Nelson Mandela pledged in writing that “human rights will be the light that guides our foreign affairs.” A free South Africa, he said, would take its place at the forefront of global efforts to promote and foster democratic systems of government.”

In 2000 now President Jacob Zuma stated that the “ratification and implementation of international human rights instruments” along with the “mechanisms to monitor the implementation and protection of such rights” are a key component of the global human rights agenda.¹²⁰

Our representatives have also made statements to the UN stating the desire to ratify the treaty. In addition, in May 2006, South Africa claimed the following to the United Nations: “The Permanent mission of the Republic of South Africa to the United Nations herewith encloses a record outlining South Africa’s voluntary pledges and commitments with respect to the promotion and protection of human rights as a requirement of the United Nations General Assembly resolution 60/251 of 15 March 2006: Instruments in the Process of Ratification – The South African Government is in the process of endorsing the following important human rights instruments: The International Covenant on Economic, Social and Cultural Rights (ICESCR).”¹²¹

In 2010 President Jacob Zuma again stated reasons for such delay when questioned regarding non-ratification of the ICESCR, i.e. “the ICESCR is said to be in conflict with the provisions of the Constitution of the Republic of South Africa and secondly due to problems in identifying a lead department that can oversee the implementation of the treaty once ratified by South Africa. With regard to the latter, Government Departments had indicated that the wide scope of the ICESCR goes beyond their individual mandates and therefore it is difficult for them to take responsibility for its implementation. Government Departments also felt they lack the authority and coordinating

¹²⁰ Address by Deputy President Jacob Zuma to the President of the General Assembly of the United Nations. Delivered in Geneva, 26 June 2000.

¹²¹ Note No 143/06, 02 May 2006, UN Human Rights Council

capacity to instruct and organize other Government Departments for the implementation of this human rights treaty.”¹²² The most substantial objection has been that the constitutional Bill of Rights provides sufficiently for socio-economic rights and therefore there is no convincing reason to ratify the ICESCR.¹²³

However one should note that for most of the rights that the constitution provides for, the ICESCR provides for those particular rights in an extensive manner.¹²⁴

So in so far as the ICESCR is concerned there exists no practical reason as to the non-ratification of the covenant. The theoretical reasons have been tabled and what we need to do now is to put the covenant into practice and let the covenant provide substance to some of our provisions in the Bill of Rights as it has been illustrated in some of the Constitutional Courts cases. I shall discuss the benefits of ratification in order to show the need for such.

4.3.1 Should South Africa ratify the ICESCR?

South Africa has both regional and international commitments concerning SERs. At the regional level, South Africa has already ratified the African Charter,¹²⁵ African Charter on the Rights and Welfare of the Child (African Children’s Charter)¹²⁶ and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol)¹²⁷ which provide for both CPRs and SERs. At the international level South Africa has ratified the CEDAW and the CRC, both of which provide for CPRs and SERs in respect of women and children.

One persistent objection of South Africa to approve the ICESCR has been that the Bill of Rights sufficiently provides for SERs. However, as noted in the previous chapter, the nature and scope of some of the SERs provided for in the Bill of Rights are not the same as those in the ICESCR. For instance, the right to work is not as explicitly provided for in the Bill of Rights and the right to education is not extensive as in the ICESCR. Therefore, the ratification of the ICESCR will cure the

¹²²Parliamentary Monitoring Group, ‘Questions and replies: Question No. 1225’, submitted on 4 May 2010. Available at <http://www.pmg.org.za> (accessed 14 August 2014)

¹²³ Centre for human rights (University of Pretoria). ‘Should South Africa ratify the International Covenant on Economic, Social and Cultural Rights? Memorandum to the Department of Justice and Constitutional Development, South Africa (12 June 2009) 2.

¹²⁴See part 3 of this study. 3.4

¹²⁵South Africa ratified the African Charter on 9 July 1996.

¹²⁶ This charter was adopted on 11 July 1990 and entered into force on 29 November 1999.

¹²⁷ African Women’s Protocol was ratified on 17 December 2004.

lacunas of the South African Bill of Rights by obliging the government to implement its provisions, using the ICESCR as a guide.¹²⁸

The ICESCR has contributed actively (see *Grootboom case*) in the enforcement of SER's in South Africa and has thereby also assisted in the strengthening of the provisions in chapter 2 of the Bill of Rights. The constitution recognises the value of international law by requiring courts to consider it when interpreting the rights in the constitution.¹²⁹ The ratification of the ICESCR will have a direct impact on the interpretation of the constitutional SERs provisions in South Africa. The Constitution provides that in interpreting the bill of rights reference must be made to international law.¹³⁰ Hence ratification of the ICESCR will bind South Africa and will enhance the interpretation of SERs provisions in the Constitution.

From what we have witnessed through the contribution of the ICESCR to our Constitutional Courts cases, is it not logical that concentration is now emphasized on when the ICESCR will be ratified? The South African government has over a number of events promised the ratification of the covenant but to no avail. One should not assume that the delay by the government is due to the fact that the ICESCR will not contribute positively. Rather, it seems that the scepticism arises with respect to its implementation and whether our Constitution will be rendered fragile due to the ICESCR. The ratification of the ICESCR will bring about an obligation to the country to move as expeditiously and effectively as possible towards realizing the listed obligations.¹³¹

The ratification will also place some obligation on the government by adapting to promote the rights in the ICESCR and to also determine their domestic application.¹³² The ICESCR and the Constitution will be working at par in order to fulfil the fundamental rights of the people and that will also give substance to the provisions in the Bill of Rights.

However, one should take note that, if South Africa ratifies the ICESCR, it would have to carry out a proper introspection of its legislation and policies. As a consequence, laws and policies which run

¹²⁸ Hardowar R. Improving domestic enforcement of socio-economic rights through international law: Ratification of the International Covenant on Economic, Social and Cultural Rights by South Africa. 2009. PULP 35.

¹²⁹ Sections 39 (1) and 233 of the Constitution.

¹³⁰ *Grootboom* para 45.

¹³¹ *The Bill of Rights handbook*. 2005.

¹³² UN Committee on ESCR General Comment 9: The Domestic Application of the Covenant, UN Doc E/C.12/1998/24 (1998) [1].

counter to the latter and spirit of the ICESCR will have to be repealed. Taking into account the history of the country one has to consider whether really the ratification of the ICESCR is necessary.

Although ratification will also bring another form of mechanism to aggrieved parties in terms of SERs, what with the levels of poverty and illiteracy, will the people who are mostly affected and in need of SERs be able to gain access to said platform in order to have their grievances heard and attended to?

The aim with the ratification of the ICESCR is to promote a better human rights protection system in South Africa. The state's main excuse for not having ratified as yet seems to be the bill of rights. However, one should ask, if the regional implementation of SERs is sufficient then why are people still living in deplorable conditions, with the levels of poverty and illiteracy? Clearly the domestic provisions are not enough to curb the challenge faced in providing SERs to the masses. Hence ratification of the ICESCR will bring the benefits of exerting the General Comments to pressurize the government into action with regards to these rights.

Although the ratification of the ICESCR will be beneficial when it comes to broadening the provisions provided in the bill of rights it will [ICESCR] however have to be gradually implemented considering the current state of the country with regards to the population, poverty levels and available resources. Therefore there is no credible reason for failing to ratify the ICESCR as the South African Constitution can be seen as a guiding light in the fight for the protection of social and economic rights.¹³³

4.4 Benefits of ratifying the ICESCR and its Optional Protocol for South Africa

The ratification of the ICESCR will mostly have positive ramifications for South Africa, especially in advancing the effective implementation of socio-economic rights at national level, as it is with the positive influence it has had on helping with our socio-economic rights cases decisions.¹³⁴ The ratification will not only reaffirm South Africa's commitment to socio-economic rights but will also signal its commitment to the alleviation of poverty and ensuring social justice for all. Ratification will

¹³³Pillay A. 'The International Covenant on Economic, Social and Cultural Rights: Time to ratify' (2002) 3 (1) ESR Review 3.

¹³⁴Mashava L. 'Time to ratify the International Covenant on Economic, Social and Cultural Rights' (2003) 2 (3) ESR Review 18.

indicate a clear and unambiguous commitment by South Africa to the plight of its poor through promotion of development through both domestic and international means.¹³⁵

Secondly, the state reporting mechanism under the ICESCR will provide an opportunity for introspection in relation to the implementation of socio-economic rights and will further promote the culture of accountability to national and international human rights standards that the South African Constitution encourages. The reporting procedure, set by the CESCR, would complement the efforts of the SAHRC in monitoring the implementation of socio-economic rights which has thus far been overwhelmed with challenges.

Third, ratification of the ICESCR will help ensure that South Africa's jurisprudence on socio-economic rights develops in harmony with the normative standards set by the CESCR. The Constitutional Court, in developing its socio-economic rights jurisprudence, has made reference to the provisions of the ICESCR and the interpretive approach adopted by the CESCR. Interpretative guidance will be one of the benefits of ratification as opposed to the inconsistency adopted within our courts where some principles of international law have in some cases been embraced and in other cases rejected and therefore resulting in a jurisprudence that is mixed up.¹³⁶ This would encourage for the use of the minimum core approach developed by the CESCR, which caters for the needs of the poor in providing more specific and effective remedies.¹³⁷ Hence ratification would not only serve to align government practices with the ICESCR but also force the courts to take relevant international law principles more seriously.¹³⁸

Fourthly, ratification of the ICESCR will correct any distortions that may arise from South Africa's currently incomplete recognition of some rights or from any legislation and policies that are not in line with international human rights standards. Ratification will result in South Africa extending the scope benefits, for instance, in relation to the right to education and work, in order to better provide for the poor, marginalized and vulnerable and as a result limiting the notion that the SER provisions in the Bill of Rights are sufficient on their own.

The ratification will also assist in shaping policy and legislation. The ICESCR together with the General Comments will serve as guiding tools for the adoption and implementation of socio-economic policies and legislation.

¹³⁵ Ibid.

¹³⁶ Pieterse M. 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience.' (2004) Human Rights Quarterly. 2004

¹³⁷ See General Comment No 3 above.

¹³⁸ Chenwi (note 35 above).

There is no credible reason for non-ratification of the covenant as the South African Constitution is the guiding light in the fight for protection of socio-economic rights. The covenant imposes no greater duty than that which is already imposed by the Constitution on its government.¹³⁹ Positively when a country ratifies the CESCER, several advantages flow from this act; when a country is unable to meet its obligations due to lack of resources, the covenant provides for a country to call on international community members for assistance and support, e.g. UN Agencies.¹⁴⁰ The provisions in the covenant and the interpretation of these provisions by the Committee can assist South African courts in the interpretation of SERs in the BOR.

The ICESCR can thus make an important contribution to government initiatives as well as civil society advocacy and litigation aimed at advancing SERs in South Africa.

4.5 Additional benefits of ratifying the ICESCR and its OP-ICESCR

4.5.1 State reporting mechanism

As mentioned earlier in this study the regional enforcement mechanism (this being the SAHRC) has come under much criticism for being not nearly enough or effective when it comes to the monitoring of the implementation of socio-economic rights. The protection and enforcement of SERs under the ICESCR are ensured by state reporting procedures. State reporting procedure is a process whereby a state party sends periodic reports on a regular basis on the state of its human rights situation in its domestic jurisdiction along with measures that it has taken to meet its obligations under the treaty it has ratified.¹⁴¹ This procedure will help make the enforcing of SERs more practical as it uses a diplomatic means to engage in a constructive dialogue. As South Africa is already accustomed to submitting periodic reports under the African Charter to the African Commission, this requirement would not prove to be a difficult task since the African Charter has been largely inspired by the ICESCR in its SERs provisions.

4.5.2 The advantage of ratifying the OP-ICESCR

The ratification of the OP-ICESCR is not yet an issue as the ratification of the ICESCR is required first before a state can become party to the OP-ICESCR, but for the sake of full enjoyment of the ICESCR, it is important that it is also ratified. The OP-ICESCR came into force recently (5 May 2013) after

¹³⁹ Pillay (note 130 above).

¹⁴⁰ Ibid.

¹⁴¹ Article 16 and 17 give guidelines on the specific treaty documents to be submitted (24 March 2009), UN DOC E/C.12/2008/2 Usually, States must report initially within two years of accepting the ICESCR and thereafter every five years. www.ohchr.org/english/bodies/cescr (Accessed 21 August 2014)

receiving its 10 ratifications from different countries. Chenwi describes the coming into force of the OP-ICESCR as the beginning of a new dawn in the enforcement of SERs at the international level, with consequential positive impacts at national level and says that the OP-ICESCR would encourage state parties to ensure more effective local remedies for SER violations.

The OP-ICESCR (hereafter the Protocol) promotes the culture of accountability and helps empower poor, vulnerable and marginalized groups. These are the objectives that the South African Constitution promotes. The Protocol will give access to a method to contend with the violation of SERs by providing a mechanism through which accountability for SERs can be strengthened and abuses linked to such rights can be identified and addressed.¹⁴²

4.7 Conclusion

It is fact that the ratification of the ICESCR will have more positive than negative impacts in South Africa. Although one cannot expect the changes to occur overnight but understand that it will be a process which will yield positive results to the country and to an individual as a whole. Therefore with the recent developments one can only be eager to experience the additional improvements that the ICESCR will assist in bringing to the country.

¹⁴²Chenwi (note 35 above).

5

Conclusion and Recommendations

Conclusion

In this study I provide a brief history of the ICESCR together with its provisions and how it has influenced the enforcement of SERs in the South African courts and the country's human rights jurisprudence. I also give insight into the benefits that South Africa can gain from ratifying the ICESCR and its Optional Protocol. Although the Constitution makes provision for most of the rights in the ICESCR, although not as intensely, the Constitution does in some form lack especially when it comes to the right to education and the right to work. The application of the ICESCR in the Constitutional Court has contributed towards positive outcomes of the SERs cases and therefore one can recommend that South Africa should ratify the ICESCR and its Optional Protocol as this will enhance the application of SERs domestically and also enable South Africa to assume a leading role in human rights at the African regional level.¹⁴³

One has to take note that the ratification of the ICESCR and its OP will not bring changes overnight with regard to the role played by SERs in South Africa. However, the ratification will assist the courts in the interpretation of the SERs in the South African Bill of Rights, as it is evident that international law can play a positive role in our courts taking into account the *Grootboom* case where general comments from the Committee have had an impact in the interpretation of SERs.

With the announcement by cabinet of the imminent ratification of the ICESCR, the country can expect positive influence and changes to SERs; this will also encourage the use of the 'minimum core' concept which was singled out in our previous cases.¹⁴⁴

Recommendations

This part of the study is to provide suggestions which can be used for the implementation of the ICESCR after it has been ratified as well as its domestic enforcement through the Constitution. These suggestions are directed towards the groups that play an active part in foreseeing the enforcement of SERs in our country (this includes the government, the courts, the media, NGOs, etc.)

¹⁴³ Ibid

¹⁴⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), *Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 (CC) and *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC)

The role of the government in terms of the ICESCR should not only stop with ratification, but should go beyond that. It should go further by ensuring that the department chosen (Labour department) to monitor the implementation of the ICESCR does so effectively and can in some way be held accountable for unreasonable failure to implement provisions.

The courts in this regard will also play a role of ensuring that the ICESCR is domestically implemented in applying the ICESCR provisions directly in our cases and using the ICESCR to interpret the rights guaranteed in the Constitution, as the Constitution already provides for the need to use international law.

The media and the NGOs will assist greatly when it comes to creating awareness of an individual's SERs as the media is able to frame public opinion. Both of these stakeholders can work together by holding workshops in rural communities, where mostly illiteracy is rife, to educate people about SERs as to how they work and how they can benefit from them (SERs). This can also include seminars to discuss the challenges that were previously faced with regards to implementing SERs. With the announcement by cabinet to ratify the ICESCR, both the media and the NGOs can be used to introduce the ICESCR and its functions together with the limitations and therefore in all bringing a much wider concept of understanding of the ICESCR amongst the people, even those that are least literate.

The ratification of the ICESCR will further give way for the use of the 'minimum core' concept which will lessen the onus of the burden of proof being on the applicant. This will promote the use of state resources to the maximum of their availability and going further to provide some form of relief if the former cannot be achieved.

With the suggestions mentioned above it is recommended that South Africa should ratify the ICESCR with no further delay taking into account that the government is trying to move the country into an era where there is less poverty, unemployment and illiteracy, for certain the ICESCR will not improve these challenges overnight but it will assist the country's situation in a great way.

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