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Approach to Socio-Economic Rights – A
Comparative Perspective

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**JUDICIAL ADHERENCE TO A MINIMUM CORE APPROACH
TO SOCIO-ECONOMIC RIGHTS – A COMPARATIVE PERSPECTIVE**

Fifth Cornell Inter-University Graduate Student Conference

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I. Introduction

Today's world is witness to extraordinary inequality and the most desperate poverty¹. Millions of people across the world have no access to adequate food or water, basic health care or minimum levels of education². There are many avenues through which to approach the issue of improving socio-economic conditions. Courts, especially recently, have in certain countries, been seeking to ameliorate these conditions, to some extent, through the means of socio-economic rights adjudication.

For courts to effectively empower people to realize their socio-economic rights, attention to implementation of judgments is essential. A strong normative base for such judgments is just as crucial, for it serves as the foundation on which implementation is based. The standards and tests courts rely on and courts delineate in the course of socio-economic rights litigation, may affect and influence the degree to which courts can translate abstract rights into tangible reality. Minimum core is one such standard. The concept of "minimum core" in the realm of socio-economic rights seeks to confer minimum legal content for such rights³. Judicial adherence to a minimum core approach is when courts take it upon themselves to give specificity to socio-economic rights which are usually framed in general terms. While the concept of minimum core is seemingly simple and evidently important, it is plagued by complexities and inherent paradoxes, as shall be demonstrated in the course of this paper. Such complexities surface in the legislative and administrative spheres, but are exacerbated when the concept is in context of judicial application.

In socio-economic rights adjudication across the world, courts have used the minimum core approach sparsely and often not at all. Courts which have used the minimum core approach have differed vastly in how they have applied the notion. Scholars, even those in complete agreement regarding the justiciability of socio-economic rights, are in vicious disagreement⁴ on whether or not courts should adopt a minimum

¹ World Bank, Poverty Drops below 1 Billion, says World Bank, Doc. 2007/159/DEC (Apr. 15, 2007). Also see Andrew Walker, *Richest 2% own 'half the wealth'*, B.B.C. NEWS, December 5, 2006, < <http://news.bbc.co.uk>>; *Eradicate Hunger and Extreme Poverty*, <http://www.millenniumcampaign.org/site/pp.asp?c=grKVL2NLE&b=185518>.

² *Id.*

³ Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 113 (2008).

⁴ In support of minimum core, see for example, Marius Pieterse, *Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUMAN RIGHTS QUARTERLY 796 (2007). *Giving Socio-economic Rights Teeth: The Minimum Core and its Importance*, 119 S. AFR. L. J. 484 (2002) and for arguments against minimum core, see for example, Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163 (2006); Mark S. Kende, *The South African Constitutional Courts Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT'L L. 617 (2004).

core approach, clarifying the concrete content of entitlements embodied by socioeconomic rights and on whether or not this is essential in enhancing the transformative potential of socio-economic rights. Some scholars assert that when courts adopt the minimum core approach, the executive is provided with a greater understanding of what obligation arises from the right in question and individuals are better able to hold the executive accountable for not meeting the minimum guaranteed by a legal right.⁵ Others are vehement in their belief that the minimum core approach, for various reasons, is simply inappropriate as a tool of judicial decision – making.⁶

In light of the differing approaches undertaken by courts in various countries across the world and conflicting scholarly opinion, this paper will explore from both an ‘is’ and an ‘ought’ perspective, how far courts are willing to give rights minimum content and whether the current trends in judicial adherence to minimum core can be improved upon.

The scope of the paper is limited to judicial adherence to the concept of minimum core in strictly national contexts. The deliberation of any international monitoring bodies or supranational tribunals will thus not be considered. Furthermore this paper is not an examination of the minimum core approach in its entirety (for example how legislatures deal with the concept) but only so far as it applies to socio-economic rights adjudication.

Following the introduction to the paper, Section II provides a conceptual understanding of minimum core and examines the controversial elements of the concept. Section III thereafter examines, through the use of illustrative cases in different national contexts, the question of how far courts have been willing to give content to socio-economic rights in adherence to the concept of minimum core. Subsequent to a brief exploration of relevant case law and scholarly debate around such case law, the issue addressed is whether an acceptance of the minimum core approach is essential if courts wish to meaningfully adjudicate socio-economic rights. A qualified affirmative leads to examining through an analytic framework, a different paradigm through which courts ought to or perhaps could consider approaching the concept of minimum core. Part IV will embody the conclusion to the paper.

II. Minimum Core: Of Limitations and Promises

This section explores the conceptual understanding of minimum core. The minimum core concept suggests that there are degrees of fulfillment of a right and that a certain minimum level of fulfillment

⁵ Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163, 163 (2006).

⁶ *Id.*

takes priority over a more extensive realization of the right.⁷ Framed in more simplistic terms, the minimum core approach seeks to confer a minimum legal content for socio-economic rights⁸. However a plethora of understandings imbue this notion of minimum core.

Young offers a useful paradigm within which to showcase such different understandings of the concept.⁹ Her framework encompassing international, regional and national jurisprudence and the work of many scholars, presents three approaches to understanding minimum core. The first approach, the essence approach, locates minimum content of a right in the protection of liberal values such as human dignity, equality and freedom and also in the more technical measure of basic needs and survival.¹⁰ The second approach, the consensus approach, situates the minimum core in the minimum consensus surrounding economic and social rights.¹¹ The third approach, the obligations approach, prescribes minimum content to a right in light of the obligations raised by the right, rather than the right itself¹². So if a court is deciding to give minimum content to a right, it may be influenced by any of these various understandings. In this context it may also be revealed that each of the aforementioned approaches suffers from serious normative difficulties, not insuperable, by any means, but which render judicial application of the concept problematic. For instance in the essence approach, there is conceptual confusion, for there is ample scope for disagreement given that minimum core will look different for an advocate of human flourishing in comparison with an advocate for basic survival, just as the core will look different for different instantiations of both survival and dignity¹³. The consensus approach begs the question: whose consensus is to count?¹⁴ The obligations approach is dampened by the reality that particular forms of duties are polycentric and ranking them as core and non core is near impossible¹⁵.

The lack of clarity that clouds the concept is further highlighted in the fact that the very first articulation of minimum core by the UN Committee on Economic, Social and Cultural Rights (hereafter referred to as

⁷ David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1, 13 (2003).

⁸ LEHMANN, *supra* note 5, at 163.

⁹ *See generally*, YOUNG, *supra* note 3. Different understandings of minimum core also emerge from David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1, 13 (2003), Sandra Leibenberg, *South Africa's evolving jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty*, 6 L. , DEMOCRACY & DEV. 159 (2002); Geraldine van Bueren, *Alleviating Poverty through the Constitutional Court*, 15 SAJHR 52 (1999).

¹⁰ *Id.* at 126-138.

¹¹ *Id.* at 140-147.

¹² *Id.* at 151-163.

¹³ *Id.* at 138.

¹⁴ *Id.* at 148.

¹⁵ *Id.* at 163

the Committee) is itself plagued by paradox. General Comment 3 states¹⁶, “... the obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.” Further on, it continues... “it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.”¹⁷ If minimum core brings with it the sense of the non-negotiable, then should it be contingent on anything? The intention of the Committee was to articulate a basic level of content which if States failed to meet, would result in there being a heavy burden of proof to demonstrate lack of available resources. Of course, the resource related contingency is necessary for these rights are very resource oriented. Governments may well be in a situation where there are insufficient resources to meet obligations articulated within socio-economic rights. It is also possible that the concrete element of minimum core might fall through the cracks while government lawyers and politicians demonstrate the art of sophistry.

The Committee has gone on to give substance to the ICESCR’s enumerated rights to food¹⁸, health¹⁹, housing²⁰, and education²¹ and the emerging right to water²² and national courts have been known to draw on these interpretations when they adopt the minimum core approach.

Countless questions continue to arise with respect to application of this concept. Is the minimum core in one country the same as the other? In an intra country context, is it context-sensitive or context-blind? Is it a more general or more precise prescription of content to the parent right? Which treatments, for instance, should be included in the right to an adequate minimum standard of health care and to which sections of society should this apply to? These issues arise all the time in policy debate where targeted policies are created in the legislative, executive or judicial sphere. But to fashion a *minimum standard* in face of all these questions is more challenging. Policy and rights are different.

Should the lack of clarity which clouds the concept lead to abandoning the minimum core approach? ²³ Those who advocate for court adherence to a minimum core approach in socio-economic rights adjudication, argue on the basis of persuasive illustrations, that without identifying tangible content

¹⁶ See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Report on the Fifth Session, Supp. No. 3, Annex III, P 10, U.N. Doc. E/1991/23 (1991) [General Comment No. 3], paragraph 10.

¹⁷ *Id.*

¹⁸ General Comment 12

¹⁹ General Comment 14

²⁰ General Comment 4

²¹ General Comment 13

²² General Comment 15

²³ For a position on such abandonment, see Mark Tushnet, *Social Welfare Rights and Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1904 (2004).

within rights which are often so abstract in their formulation and explicitly linking such content to the actual satisfaction of material need, socio-economic rights are reduced to meaningless rhetoric²⁴. The millions of people, who are severely deprived, for instance, of healthcare, food, shelter and education, are ill-served by rights which do not translate into any tangible guarantees. Minimum core is important because when it comes to positive rights, governments can often cite resources for lack of progress or bring in a temporal argument that projects are in progress. In the mean time there are people who continue to suffer. So while it is recognized that some elements of the rights will be met with time, there should be priority given to a minimum level of entitlements which the government is compelled to address expeditiously and if they do not, good cause must be shown. Of course there are those that argue that this might be limiting rights; that governments will fulfill the bare minimum and then do nothing but while this may happen, the concept does not lend itself to this, as it argues for progressive realization of the other non-core elements of the right. As regards lack of clarity, a number of legal standards are not clear such as customary international law for instance which suffers from enormous conceptual problems²⁵, but is nevertheless recognized and used.

If the legislature frames socio-economic rights in general terms, then courts, through their interpretive role can legitimately give and should give, meaningful content to such rights and such content may be considered to be minimum core for that right, since once the highest court in a country has declared specific content to a right, in common law countries at least this will followed in other cases.

There can be weak and strong forms of the minimum core approach²⁶, the weak form is giving specific content to the right by deciding the case, so for instance, if we are to consider a hypothetical, deciding that forceful evictions sans alternative accommodation is violative of the right to housing can be minimum content to that right. But a court adhering to a strong form of minimum core may base such a decision on the fact that everyone is entitled to access to adequate accommodation which provides cover from the elements and thus forceful evictions sans alternative accommodation are violative of the right to housing. The latter is much broader in scope and more problematic in application as shall be seen in the course of this paper.

²⁴ Marius Pieterse, *Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUMAN RIGHTS QUARTERLY 796 (2007).

²⁵ Michael J. Glennon, *Sometimes a Great Notion*, WOODROW WILSON QUARTERLY (2003); Jonathan Charney, *Universal International Law*, 87 AJIL 529, 536-37(1993).

²⁶ The weaker-stronger framework was inspired by the stronger-weaker forms of judicial review analysis in context of socio-economic rights in Rosalind Dixon's article. See Rosalind Dixon, *Creating Dialogue about Socio-Economic Rights: Strong-Form versus Weak –Form Judicial Review Revisited*, 5 INTLJCL 391(2007). Also see, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2007)

Despite the enormous limitations inherent in the concept of minimum core, it does have the promise of transformative potential, especially with a more pluralistic embrace of all the different concepts depending on the situation. Thus courts should adopt a minimum core approach but it is important to recognize the normative problems with this approach and consider how this ought to influence the manner in which courts approach this concept in the future.

III. Minimum Core: Examining the ‘Is Versus Ought’ Question

The extent to which courts have been willing to give content to rights and how the courts ought to proceed with respect to the minimum core approach is examined herein.

a. Minimum Core- Judicial Application of The Concept (The “Is” Aspect)

This section examines the extent to which courts have been willing to give content to rights. A number of national constitutions have included justiciable socio-economic rights²⁷ and in other countries, civil and political rights have been interpreted so as to encompass within their ambit, certain socio-economic rights²⁸. However it is case law that shall be examined in this section. While discussions of minimum core dominates socio-economic rights discourse in the international realm of supervision and also the scholarly discourse around socio-economic rights, the concept is not used as much in the context of socio-economic rights adjudication at the national level²⁹.

Although it would be interesting to study cases from all the countries which adopt or reject the minimum core concept, unfortunately the scope of this paper is limited to examining only selected countries and cases. Broadly three approaches to minimum core can be identified in the case law. A wholehearted acceptance of the minimum core approach with reference to the international discourse on socio-economic rights, as is the case with the Colombian Constitutional court, an acceptance of the minimum core approach which is a more domesticated understanding of the concept, as is the case with the Indian Supreme Court and the State of New York and an outright rejection of the concept as is the case with the South African Constitutional Court.

²⁷ For example, South Africa and Colombia.

²⁸ For example, India and Ireland.

²⁹ YOUNG, *supra* note 3, at 124.

Colombia:

The Constitutional Court of Colombia (hereinafter referred to as Court) explicitly embraces the minimum core approach in socio-economic rights adjudication.³⁰ The Court defines minimum content of such rights in conformity with the various interpretations given by the UN Committee on Economic and Social Rights with respect to different rights. Human rights treaties dealing with non-derogable rights are on the same level as the Constitution in Colombia³¹. As regards the International Covenant of Economic, Social and Cultural Rights, its provisions must be used to interpret relevant sections of the Constitution³². In this context obligations under the International Covenant on Economic, Social and Cultural Rights (Colombia is member state) as interpreted by the Committee on Economic Social and Cultural Rights (CESCR) holds weight. Several cases have identified the minimum core of socio-economic rights such as the right to health and the right to housing, in light of CESCR observations.³³ One relevant case was decided very recently in Colombia. In July 2008, the Constitutional Court handed down a decision³⁴ in which it ordered a dramatic restructuring of the country's health system. The judgment came as the culmination of an enormous amount of litigation to enforce the right to health. The Court demonstrated its commitment to the minimum core approach by giving very specific content to the right to health through its mandate that the right is immediately enforceable for certain categories(which it defines in detail) of plaintiffs even though they are unable to afford health care. For these categories, the Court has ordered the provision of a wide range of goods and services, including viral load tests for HIV/AIDS as well as anti-retrovirals, costly cancer medications, and even the financing of treatment of patients abroad when appropriate treatment was unavailable in Colombia, all of which are considerably resource intensive measures. The Court's decision is particularly relevant for the discussion herein because of its explicit adoption of the right to health framework set out by the United Nations Committee on Economic, Social and Cultural Rights (UN ESC Rights Committee). Further, when pronouncing on the right to health, the Court distinguished an essential minimum core of the right to health based on the POS(mandatory health plan)/POSS (subsidized mandatory health plan), which was to be immediately enforceable, and other elements that are subject to progressive realization taking into account resource constraints.³⁵

³⁰ Julieta Ripoll, *Someone write to the Colonel: Judicial Protection of the Right to survival in Colombia*, SELA PANEL 2: THE INSTITUTIONAL STRATEGIES FOR ERADICATING POVERTY 10(2005); Also see CC decision, C-251, 1997; CC decision, SU-225, 1998.

³¹ Art 93, Constitution of Colombia, 1991.

³² *Id.*

³³ CC decision, T-859, 2003; CC decision, T-025, 2004; CC decision, T-585, 2006.

³⁴ CC decision, T-760, 2008.

³⁵ See generally, Alicia Ely Yamin, & Oscar Parra Vera, *The role of courts in defining health policy: The case of the Colombian Constitutional Court*, http://www.law.harvard.edu/programs/hrp/documents/Yamin_Parra_working_paper.pdf

India

In Indian case law, there is no explicit mention per se of “minimum core”, nevertheless the concept appears to be used on a regular basis, couched in language such as “the essential minimum of the right”³⁶ and “what is minimally required”³⁷. There are however no references to the author’s knowledge, where the UN Committee on Economic and Social Rights interpretation of minimum core has been referenced by the Supreme Court of India (hereinafter the Court) in cases relating to socio-economic rights. Thus there is a more domesticated understanding of the concept which has been confirmed by scholars to constitute minimum core. There are many relevant cases of which two are showcased herein.

In the case of *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Anor*³⁸, the petitioner, a resident of West Bengal, was severely injured after falling off a train and thereafter was refused treatment at six successive State hospitals because the hospitals either had inadequate medical facilities or did not have a vacant bed. The Court declared that the right to life articulated in the Indian Constitution (Article 21) imposes an obligation on the State to safeguard the right to life of every person. Declaring the right to health as being incorporated under the right to life, the Court further asserted that denial of timely medical treatment necessary to preserve human life in government-owned hospitals is a violation of this right. The petitioner was awarded compensation and the Court ordered the Government of West Bengal to pay the petitioner compensation for the loss suffered and to formulate a blue print for primary health care with particular reference to treatment of patients during an emergency. While the court did not specifically use the term ‘minimum core’, Muralidhar argues that the decision in *Paschim Banga* constructed the right to emergency medical care for accident victims as a core minimum to the right to health³⁹. Most telling is the Court’s insistence that this obligation on the State stands irrespective of constraints in financial resources⁴⁰. This indicates that the court considers the delineated minimum to be a non –negotiable. Of course the practicality of such a view might be disputed. Later in another case, the Supreme Court held that State Obligations are contingent on resources.⁴¹

³⁶ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) AIR SC 2426, 2429

³⁷ See generally throughout the order, *People's Union for Civil Liberties v. Union of India & Ors*, *In the Supreme Court of India*, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001-Commentary, <[HTTP://WWW.ESCRINET.ORG/CASELAW/CASELAW_SHOW.HTM?DOC_ID=401033](http://www.escribnet.org/caselaw/caselaw_show.htm?doc_id=401033)

³⁸ *Supra* note 31.

³⁹ Dr. S. Muralidhar, *Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PRACTICE* (Yash Ghai and Jim Cottrell eds., 2003).

⁴⁰ *Supra* note 31

⁴¹ *State of Punjab v. Ram Lubhaya Bagga*, (1998) 4 SCC 117

In the case of *People's Union for Civil Liberties v. Union of India & Ors*,⁴² the People's Union for Civil Liberties, claimed that starvation deaths had occurred in the country despite excess grain stocks, leading to a violation of the right to food. The Supreme Court of India expressed serious concern and contextualized the right to food under the fundamental right to life and was emphatic in its finding that the right was being blatantly violated. The Court refused to hear arguments concerning the non-availability of resources given the severity of the situation and in an unprecedented interim order directed all the State Governments and the Union of India to effectively and immediately enforce eight different Centrally-sponsored food schemes to the poor. Again the specific mention of minimum core was missing but at a number of instances the court mentioned minimal requirements under the order and gave very specific content to the right to food. For instance it ordered that all individuals without means of support (older persons, widows, disabled adults) are to be granted free grain and that State governments should progressively implement the mid-day meal scheme in primary schools with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days for each student.

State of New York (NY)

The United States Constitution does not include socio-economic rights but some of the State Constitutions do. The State of NY has a provision on the right to education. *Campaign for Fiscal Equity (CFE) v State of NY* is an important case under this provision. The case does not use the precise term, "minimum core" or reference the minimum core interpretations of the UN Committee on Economic and Social Rights but the case does use terms such as "constitutional minimum" repeatedly.⁴³ In assessing adequacy of education, it was held that the constitutional minimum or floor included basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury. This is very much framed in terms of minimum core obligations. In a case prior to CFE, the NY Court of Appeals held that the state constitution entitles students to a "sound basic education"⁴⁴. The requirement of providing "a sound basic education" appears to have that weight of minimum core, because the CFE case used that as a standard while determining government obligations. In this case, CFE asserted that the State of NY was failing in its constitutional obligation to provide a sound basic education to thousands of its schoolchildren. After a long process, the Court of Appeals ruled for CFE on May 8, 2003⁴⁵. The Court of Appeals gave the State of NY until July

⁴² *Supra* note 32

⁴³ *Campaign for Fiscal Equity v State of NY*, 100 N.Y. 2d 893 (N.Y. 2003), para 3; *Campaign for Fiscal Equity v State of NY*, 8 N.Y. 3d 14, 861 N.E. 2d 50 (N.Y. 2006).

⁴⁴ *Levittown v. Nyquist*, 57 N.Y.2d 27 (N.Y. 1982).

⁴⁵ *Campaign for Fiscal Equity v State of NY*, 100 N.Y. 2d 893 (N.Y. 2003)

30, 2004 to comply with its order. Because the State failed to meet this deadline, three court-appointed referees were given until November 30, 2004 to submit a compliance plan to the State Supreme Court and this plan was accepted. However with respect to the funding, the Court deferred to the State for the determination of the amount of requisite funding. A decision was awarded on November 20, 2006⁴⁶, which affirmed that the state's constitution required that every public school child in the State of NY has a right to a "sound basic education" defined as "a meaningful high school education" and that the state has the responsibility to increase funding for New York City's public schools.

South Africa:

In South Africa, the Constitutional Court, in two very high profile cases, has outright rejected the minimum core approach. In the case of *Government of Republic of South Africa v Irene Grootboom and Others*⁴⁷, the petitioners, forced by appalling living circumstances to illegally occupy land were forcibly evicted and in desperation they settled on a sports field and in an adjacent community hall.⁴⁸ In *Grootboom*, before the Constitutional Court, the national, provincial, and local government bodies were challenging an order from the Cape High Court, which required the appropriate government organ to provide shelter to the petitioners. The Constitutional Court (hereinafter called the Court), found a violation to the right to adequate housing under Section 26 of the Constitution. Basing its judgment on the reasonableness standard, the Court held that the State housing system in place did not meet the standard of reasonableness as it unreasonably failed to consider and address those in most terrible need of housing. The Court issued a declaratory order requiring the state to implement progressively, within its available resources, a comprehensive program to realize the right of access to adequate housing with provisions which undertook to provide shelter for those in desperate need of housing either due to intolerable living conditions or crisis situations⁴⁹. In response to a request from amicus curiae to delineate an immediately enforceable right within the right to housing, the Court explicitly rejects the "minimum core" approach used by the United Nations Committee on Economic, Social and Cultural Rights as unavailable to it because it lacks the extensive information resources of the Committee⁵⁰. Another relevant case is *Minister of Health v Treatment Action Campaign*⁵¹ (hereinafter referred to as the TAC case) in which there was a constitutional challenge brought by TAC ⁵²against the government's policy of limiting the

⁴⁶ Campaign for Fiscal Equity v State of NY, 8 N.Y. 3d 14, 861 N.E. 2d 50 (N.Y. 2006)

⁴⁷ *Government of Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC) para. 2 (S. Afr.)

⁴⁸ *Government of Republic of South Africa v Grootboom*, Case CCT 11/00, Explanatory Note (*issued by the Constitutional Court*).

⁴⁹ *Id.* at paras 53, 54, 66

⁵⁰ *Id.* at para 24.

⁵¹ *Minister of Health v Treatment Action Campaign* (No. 2) 2002 (5) SA 721 (CC) (S. Afr.)

⁵² The Treatment Action Campaign or TAC is a South African AIDS activist organization.

provision of Nevirapine, a drug to prevent mother to child transmission (PMTCT) of HIV to a limited number of ‘pilot sites’.⁵³ The Court basing its decision yet again on the reasonableness standard found that the government program in this case failed the reasonableness test and ordered the government to remove without delay the restrictions that prevented Nevirapine from being made available outside the pilot sites. The government was also required, as part of an immediate national program to be created within available resources, to extend testing and counseling facilities related to mother-to-child transmission (MTCT) throughout the public health sector.⁵⁴ However here too, in response to an amicus curiae appeal for a delineation of minimum core, the Court formally rejects the minimum core obligations in the case asserting that it is impossible to give everyone access to a “core” service immediately. The Court went on to enunciate that courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards should be.⁵⁵

However recently there has been a shift in the trajectory in South Africa with respect to the minimum core, at least by the High Court (the case is now before the Constitutional Court), with the judgment delivered by the High Court, explicitly referencing minimum core obligations and the CESCR’s interpretation of the minimum core with respect to water. Significantly, the judgment holds that it was the belief of the court, that the Constitutional Court never dismissed the minimum core approach but had just found itself handicapped by lack of information. The High Court for this case had access to the relevant information and therefore proceeded with the minimum core approach. The High Court also opined that the right to water lends itself more easily to the minimum core approach than the right of access to adequate housing⁵⁶. It will be interesting to see how the Constitutional Court approaches this case.

Analysis

This section demonstrates that there are courts which are willing to embrace the minimum core approach wholeheartedly as is the case with the Colombian Constitutional Court and to a less defined extent, as is the case with the NY Court of Appeals and the Indian Supreme Court. So definitely there is, in some countries and states, judicial adherence to the minimum core approach, although this is not necessarily explicit. The South African Constitutional Court has explicitly rejected the minimum core approach but I

⁵³ Mark Heywood, *Preventing Mother-to-Child HIV transmission in South Africa- Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health*, 19 SAJHR 278 , 278(2003).

⁵⁴ *Supra* not 42, at para 135.

⁵⁵ *Id* at para 26.

⁵⁶ See generally, Linidiwe Mazibuko & Ors v The City of Johannesburg & Ors, Case No. 06/13865, High Court of South Africa (Witswatersrand Local Division), esp. paras 131, 133, 134; Andrew L. Magaziner, *The Trickle Down Effect: The Phiri Water Rights Application and Evaluating, Understanding, and Enforcing The South African Constitutional Right to Water*, 33 N.C.J. INT’L L. & COM. REG. 509 (2008); Sonkita Conteh, *Analysis of the Judgment of the High Court of South Africa*, COHRE (2008).

would argue that minimum core obligations appears to be the inarticulated premise based upon which socio-economic rights litigation in South Africa is decided in certain cases. Bilchitz through a painstaking analysis attempts to show how the courts in Grootboom or TAC could not have arrived at the conclusions that they did without giving some content to the right in question⁵⁷. For example emergency housing could be considered minimum core content conferred on the right to housing. Perhaps a smokescreen and mirrors approach is useful given the many legitimate reasons the courts have to not adopt an explicit minimum core approach such as, for instance, lack of information and yet given the importance of the minimum core approach. So the rejection of the minimum core by the South African Courts could be characterized as a red herring in that it distracts from the actual machinations of the cases. In fact this leads me to argue that in light of the weak minimum core approach and the strong minimum core approach adopted in Chapter II, all case law, by the very determination of the case before it, ends up reading some content into the right in question. That is, it is most likely that the weak form of minimum core approach (without the terminology of minimum core being explicitly used) is almost always satisfied in case law. Of course it is possible to have such a weak form of minimum core as to render the concept utterly meaningless but this has not been true for the case law examined herein which has given robust content to rights. It is the demarcation of core and non core obligations and the providing of very specific content to rights that sets aside some countries such as Colombia apart from other countries. Another issue of interest is that although in South Africa a weak form of the minimum core approach was used in comparison to a strong form of minimum core approach in India, overall the trend of implementation has been better in the case of South African judgments⁵⁸. Of course this could be due to many reasons but it goes to show that simply adopting the minimum core approach might not necessarily improve a court's ability to deliver the transformative potential of socio-economic rights.

In the case of South Africa, the rejection of minimum core inspired much discourse and a brief consideration of the arguments will be useful when evaluating how courts ought to proceed in regard to minimum core.

It may be argued from the aforementioned case law and the written work of scholars that that the South African Court formally and some argue, even legitimately, passes up the "minimum core" approach: 1) in deference to the doctrine of separation of powers, 2) due to a belief that prioritization of entitlements

⁵⁷ BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS 139-145 (2007).

⁵⁸ For a comparative understanding of the implementation aspect of socio-economic rights jurisprudence, *see* Cohe, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, The Centre on Housing Rights & Evictions, (2003); *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PRACTICE* (Yash Ghai and Jim Cottrell eds., 2003). Joie Chowdhury, *The Role of Courts in Recognizing Socio-Economic Rights* (April 20th, 2008) (unpublished thesis).

within rights can lead to distorted allocation of resources⁵⁹ which would constitute an unworkable and inflexible means of addressing socio-economic rights problems, although as Pieterse said minimum core obligations are not closed off to exceptional circumstance justifications of non-compliance⁶⁰, 3) to reserve discretion to decide future economic rights cases under the very fact-dependent “reasonableness” rubric, an important point especially for countries which have a system of precedents⁶¹,4) because creating clear enforceable entitlements without regard to the facts at hand and the effect on society at large, can have unintended devastating consequences opening the floodgates of litigation which would not be manageable⁶² and 6) due to concern with lack of capacity and resources of the Court to deal with complex determinations demanded by socio-economic rights (as was expressed in Grootboom and TAC).⁶³

A number of scholars supportive of the minimum core approach are highly critical of the court's unwillingness to venture down the minimum core path and find the various objections raised by the court unpersuasive⁶⁴. The proponents of minimum core look for more specificity in judgments which is more easily ensured when courts adopt the minimum core approach rather than use just the reasonableness standard. What is the level of specificity desired by the proponents? For instance, in the TAC case, the court read the rights in question and then in light of facts and evidence and constitutional values and standards determined that's the government's policies were unreasonable. Bilchitz argues⁶⁵ that in line with the UN Committee's interpretation, the Court could have read into the right to health, an obligation to provide services necessary for healthy child development and against this defined content it could then have made the claim that the government's actions in withholding Nevirapine were unreasonable. The

⁵⁹ Murray Wesson, *Grootboom and Beyond: Reassessing the Socioeconomic jurisprudence of the South African Constitutional Court*, 20 SAJHR 27,32 (2004) Albie Sachs, *The Judicial Enforcement of Socio-Economic Rights: The Grootboom case*, in DEMOCRATIZING DEVELOPMENT-THE POLITICS OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 131, 144 (PERIS JONES SND KRISTIAN STOKKE EDS., 2005).

⁶⁰ Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*, 26 HUM. RTS. Q. 882, 898 (2004).

⁶¹ If the Court were to say, X and Y are minimum components of the right to health or the right to housing, it would be bound in future cases to those determinations, even if underlying circumstances change, such as the available resources of the South African government.- Aarhi Belani, *The South African Constitutional's Court's Decision in TAC: A "Reasonable" Choice?*, iii(CHRGJ, Working Paper No. 7, 2004).

⁶² See generally, If the Court were to say, X and Y are minimum components of the right to health or the right to housing, it would be bound in future cases to those determinations, even if underlying circumstances change, such as the available resources of the South African government.- Aarhi Belani, *The South African Constitutional's Court's Decision in TAC: A "Reasonable" Choice?*, iii(CHRGJ, Working Paper No. 7, 2004).

⁶³ Joie Chowdhury, *The Role of Courts in Recognizing Socio-Economic Rights* (April 20th, 2008) (unpublished thesis), p. 53.

⁶⁴ David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 SALJ 484, 484 (2002), Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?*, 6 L., DEMOCRACY & DEV. 159, 174 (2002); Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 SAJHR 448, 458 (2004); Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 SAJHR 206 (2000).

⁶⁵ BILCHITZ, *supra* note 7, at 8.

court would also have thus addressed a broader policy question which would have made socio-economic rights something real and meaningful to the masses. Bilchitz's analysis is not misplaced. With sufficient information at its disposal, this is perhaps something the court might have considered, but this is also a much larger undertaking and not always the manner in which courts undertake the reasonableness enquiry. While I would argue that even now the TAC case has read into the right to health quite specific content, what Bilchitz envisages would exploit the transformative potential of the right more (contingent to other conditions such as resource availability and political will). Distilled, the essence of critics' concerns is that the court has failed to grasp a golden opportunity to "fast-track" constitutional transformation by using the minimum core to set clear benchmarks for the legislature and executive, benchmarks that prioritize the welfare of the poorest in South Africa⁶⁶. Many of the criticisms leveled at the Constitutional Court's failure to adopt the minimum core approach can be challenged, but it is beyond the scope of the paper to engage in such detailed analysis.⁶⁷

Now to move beyond the discussion centering on the South African Constitutional Court, many of the aforementioned reasons or problems which may have led the Court to have rejected the minimum core approach are rather generic in nature and one could imagine many courts confronting similar issues. And apart from the aforementioned problems, there are countless other issues courts must confront. Some countries might face bigger challenges in dealing with minimum core than others. Consider that in India there are one billion people, and one out of every seven person may be a slumdweller⁶⁸ and jobs are concentrated in only a few parts of the country, which means just having a house anywhere is not good enough, accommodation near big cities is often essential just for bare survival. In such a case determining minimum core and declaring a section of specified content of the right to adequate housing as immediately enforceable, is more difficult because of the huge financial and logistical issues involved. Additionally courts that are judging socio-economic rights cases are most likely courts which are already pushing boundaries; but courts might want the freedom to test on a case to case basis, how far they ought to go and an explicit adoption of the minimum core approach would defeat such freedom⁶⁹. Not binding themselves in by declaring a minimum core leaves an escape hatch for judges which might be crucial in determining how far they are willing to push limits. Furthermore there are many factors which influence the court's ability to make minimum core pronouncements, for example the extent of constitutionalism in

⁶⁶ LEHMANN, *supra* note 5, at p. 181.

⁶⁷ The critics have been challenged in: Mark S. Kende, *The South African Constitutional Courts Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT'L L. 617, 621-628 (2004); Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163, 182-193 (2006).

⁶⁸ Census 2001, NSSO (National Sample Survey Organizations) 2002

⁶⁹ Interview with Cathy Albisa, Executive Director of the National Economic and Social Rights Initiative.

that particular country. If the Constitutional Court is not taken seriously, then there is little point in making pronouncements which will never crystallize into policy. There are also so many political questions courts face when embracing the minimum core approach. Only the counter-majoritarian issue will be addressed here, selected, as it repeatedly arises in the course of academic discussion on this issue. The basic argument underlying this issue is that courts should restrain themselves from influencing policy because judges are unelected and their participation in policy making is undemocratic⁷⁰. But sometimes courts because of their privileged position of being shielded somewhat from accountability are able to take difficult decisions and to protect democratic principles which have been agreed upon through democratic processes, fulfilling their role as judges, a role which democratic society has agreed upon.⁷¹ *Brown versus Board of Education*⁷², a case which although ostensibly civil and political in nature had huge ramifications for education rights, was definitely not a popular decision. Perhaps it could only have been the courts which could have brought about such drastic change. Probably desegregation of schools could not have been a policy implementable by a Southern governor. But nevertheless, the counter-majoritarian question is an issue around which there is much heated debate and there is the possibility that if courts are not careful, their legitimacy may be undermined. So while considering the way forward, with respect to judicial adherence to minimum core, this is an issue which must be taken into account that courts constantly need to do a balancing act; reflecting appropriate deference and respect for the legislation or policy made by a democratic parliament; while on the other hand giving sufficient weight and protection to democratic principles. This necessarily handicaps to some extent, the ability of courts to act as freely as they may wish to. With respect to the practical complexities attaching to judicial application of minimum core which are exacerbated by the normative confusion surrounding the concept as depicted in Section II, this paper has merely scraped the tip of the iceberg. All this is not to argue that there should not be a minimum core approach, but is to indicate that the problems are very real.

But why must there be a minimum core approach to socio-economic rights? In the face of all the difficulty the concept entails, why does it remain an important notion? The short play that follows demonstrates the reason well.

⁷⁰ Reynaud N. Daniels and Jason Brickhill, *The Counter-Majoritarian Difficulty and the South African Constitutional Court*, 25 PENN ST. INT'L L. REV. 371, 376 (2006).

⁷¹ *Id.*

⁷² 347 U.S. 483 (1954)

3 act dramatization of the emptiness of socio-economic rights

ACT 1: On the Streets

Member/Citizen: I am hungry.

State/Society: (*Silence*) . . .

Member/Citizen: I want food!

State/Society: (*Dismissive*) You can't have any.

Member/Citizen: Why?

State/Society: You have no right to food.

Member/Citizen: (*After some reflection*) I want the right to food!

State/Society: That would be impossible. It will threaten the legitimacy of the constitutional order if we grant rights to social goods. Rights may only impose negative obligations upon us. We cannot trust courts to enforce a right to food due to their limited capacity, their lack of technical expertise, the polycentric consequences of enforcing a positive right, blah blah blah. . .

Member/Citizen: (*Louder*) I want the right to food!!

State/Society: (*After some reflection*) All right, if you insist. It is hereby declared that everyone has the right to have access to sufficient food and water and that the State must adopt reasonable measures, within its available resources, to progressively realize this right.

Member/Citizen: Yeah! I win, I win!

State/Society: Of course you do.

ACT 2: In Court

Member/Citizen: I want food, your honor.

State/Society (Defendant): That would be impossible, your honor. We simply do not have the resources to feed her. There are many others who compete for the same social good and we cannot favor them above her. If you order us to feed her you are infringing the separation of powers by dictating to us what our priorities should be. We have the democratic mandate to determine the pace of socioeconomic upliftment, and currently our priorities lie elsewhere.

Member/Citizen: (*Triumphantly*) But I have the right to food!

State/Society (Court): Member/Citizen is right. It is hereby declared that the State has acted unreasonably by not taking adequately flexible and inclusive measures to ensure that everyone has access to sufficient food.

Member/Citizen: Yeah! I win, I win.

Everyone: Of course you do.

ACT 3: Back on the Streets

Member/Citizen: I am hungry.

State/Society: (*Silence*) . . .

Member/Citizen: I want food!

State/Society: We have already given you what you wanted. You have won, remember? Now please go away. There is nothing more that we can do.

Member/Citizen: But I am hungry!

State/Society: Shut up.

(*Member/Citizen mutely attempts to swallow the judgment in her favor.*)

PIETERSE, 2007 at p. 817.

Pieterse alleges the “emptiness” of socioeconomic rights jurisprudence which does not embrace the minimum core approach. He demonstrates his meaning by the means of this short three act dramatization. General pronouncements by the courts do little to fulfill the rights guaranteed by various Constitutions. Pieterse’s argument as reflected in the dramatization is powerful. People who are deprived daily of the most basic of amenities, need rights to work for them and minimum core, while a flawed and problematic

concept, is perhaps one way to achieve this. If courts wish to meaningfully adjudicate socio-economic rights, then rights must be given content. This would appear indisputable. And to this extent, there must be a minimum core approach. What is not as convincing however is a rigid formulation of minimum core as defined by its proponents which envisages not just giving minimum content, but delineating core and non core obligations within that content with the former being immediately enforceable and the latter to be progressively realized and that there must be an explicit adoption of the approach by the court.

What appears to be vital is not whether courts adhere to some rigid understanding of the minimum core approach (as seen in the case of South Africa, implicit acceptance is not necessarily less effective) but that, at the very least, courts should strive to fulfill the aspirations which drive the minimum core concept, i.e. give specific content to rights and attempt to translate abstraction into tangible guarantees. This can be achieved in ways other than an explicit adoption of the minimum core approach. In light of this and the discussion in the course of this paper and limitations courts might face in using the minimum core approach, it would appear that courts may be well served by a re-conceptualization of judicial application of the minimum core approach.

b. The way forward (The “Ought” Aspect)

Recommendations

Certain recommendations on the issue of judicial adherence to the minimum core approach are outlined in this section.

Normative elements:

A COMBINATION APPROACH⁷³: A combined approach by courts using both the minimum core approach and the reasonableness standard addresses many of the concerns expressed in the course of the paper, namely that more objective content must be provided to rights and that courts face real limitations. It is also conducive to allowing the executive to work within resources and inevitable handicaps. This is not a new approach, it is used in certain country contexts⁷⁴, but after a detailed analysis of the various methods applied by courts, this appears to be the best path to realize the transformative potential of socio-economic rights, to the extent this is possible through a normative basis.

⁷³ The idea for the combination approach took seed in my master’s thesis but in a much less developed form. See Joie Chowdhury, *The Role of Courts in Recognizing Socio-Economic Rights* 51 (April 20th, 2008) (unpublished thesis).

⁷⁴ For instance India and South Africa

The reasonableness standard is used in national contexts in largely similar ways and “must be determined on the facts of each case.”⁷⁵ The primary critique of the reasonableness standard, which is one among very many, is that the reasonableness test fails to award meaningful content to socioeconomic rights, rendering it excessively subjective in nature.⁷⁶ Some components of the reasonableness review are evident in the case law: is the legislative or other government action comprehensive and well-coordinated; can it facilitate realization of the right in question; is it balanced and flexible to the extent necessary; and does it include all significant segments of society and take into account those persons in the most dire need? Thus the reasonableness standard is not as “amorphous” as critics like to claim. Nevertheless Ian Currie argues that reasonableness is no more than a relational standard—ends measured against means. It is not an obligation to provide *something specific*. Read in this way, the socioeconomic rights are not a right to, say, a roof over your head or anti-retroviral drugs, but only to have evaluated the reasonableness.⁷⁷ It has been suggested that if the South African court would use the reasonableness test alongside the minimum core approach then the aforementioned primary critique is addressed and the realization of socioeconomic rights would be more effectively achieved⁷⁸. Bilchitz believes that while using the reasonable standard, deference is not owed to the government in defining the content of a right but only in allowing it a ‘margin of appreciation’ to decide which measures it will adopt in fulfilling its obligations. In giving effect to the right, the measures the government adopts must be reasonable in relation to the objective it seeks to achieve which is to realize that the rights enunciated in the Constitution.⁷⁹

A combination approach does seem desirable. Through minimum core a combined approach endows rights with clarity, while maintaining the reasonableness approach allows “a margin of appreciation” which provides the executive the necessary flexibility in executing court orders and attempts to balance individual and community needs against government constraints.

I also feel that when using the combination approach and measuring government actions against such an approach, the level of scrutiny should necessarily never degenerate into the rational basis test. There must

⁷⁵ GROOTBOOM, *supra* note 38, at para 92

⁷⁶ Marius Pieterse, *Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUMAN RIGHTS QUARTERLY 796,800 (2007). *Also see generally*, David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1 (2003); Sandra Liebenberg, *South Africa’s Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?* 6 LAW, DEMOCRACY & DEV. 159 (2002); Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*, 26 HUM. RTS. Q. 882 (2004).

⁷⁷ Iain Currie, *Bill of Rights Jurisprudence*, ANN. SURV. S. AFR. L. 36, 72 (2002).

⁷⁸ BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS 139-148 (2007); *Also see*, Jackie Dugard, *Judging the Judges: Towards An Appropriate Role for the Judiciary in South Africa’s Transformation*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW 965 (2007); DAVID BILCHITZ, *Giving Socio-economic Rights Teeth: The Minimum Core and its Importance*, 119 S. AFR. L. J. 484 (2002).

⁷⁹ BILCHITZ, *supra* note 51.

always be a higher level of scrutiny. Courts so far have appeared to use a level of scrutiny which is far beyond the rational basis test and this trend must continue. Courts must also go further than they have in examining budgetary details when governments assert that resources are unavailable to meet the minimum core and to progressively realize other components of the right.⁸⁰

STRONG AND WEAK FORMS OF THE MINIMUM CORE APPROACH: While I advocate for a combination approach as being the route through which minimum core is best realized, whether or not there is express acceptance of minimum core, is not as important. South Africa poses a good example in support of this stance as does the State of New York. Also minimum core approaches may vary in terms of the extent of detail given to the content enunciated for a particular right, as long as courts try within the best of their ability and within their limitations, to do all they can to meet the aspirations behind minimum core, i.e. to give specific content to rights to the level possible and practicable and to transform rights into reality, again to the extent feasible. And a country using a weak form of the minimum core approach may well change trajectory and adopt the strong form in time as has happened in South Africa. If the results of a very aggressive minimum core approach seem problematic, courts can revert back to a less strong form of the concept. Thus there is an idea of a spectrum, along which countries can adjust and readjust their positions.

In Section II, various understandings informing the concept of minimum core were explored. When courts decide on minimum content, no single understanding necessarily trumps the other; it would depend on the case involved, the rights in questions, the ideological biases of the court and indeed the nation. A pluralistic approach to the multitude of conceptual understandings of minimum core is perhaps best suited to leverage its transformative potential.

Two issues of concern in the context of this paragraph is as follows: with respect to an implicit acceptance of the minimum core approach, while it might be realistic, it promises no guarantees as such. Secondly a strong form of the minimum core approach is likely to engender accusations of high levels of judicial activism and judicial activism, as practice has shown, while having many positive aspects can be very problematic as well⁸¹. At the end of the day no approach seems perfect.

⁸⁰ LEHMANN, *supra* note 5, at 193.

⁸¹ Jamie Cassels, *Judicial Activism and Public Interest Litigation in India, Attempting the Impossible*, 37 AM. J. COMP. L. 495 (1989); Gerald E Beller, *Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India*, 36 WEST POL Q. 513,528 (1983); Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L L. REV. 673 (2007).

BEYOND THE TRADITIONAL CONCEPTUALIZATION:

With respect to the combination approach, more traditional forms of the minimum core approach (strong or weak) may be utilized, but a conception of minimum core which goes beyond the traditional and consists in the deconstruction of the minimum core concept could also be considered. Such a deconstruction would reach for discrete elements⁸² which aspire for the same objectivity and concrete guarantees the minimum core approach is geared towards. There would be a normative difference of course but largely the desired effect of the minimum core concept and the discrete elements would be similar.

Such discrete elements could include for instance courts focusing on supervising and enforcing the more positive obligations attached to economic and social rights by using indicators and benchmarks and the more negative obligations by an assessment of state responsibility and causality. This brings a sense of objectivity to rights. Of course such an approach requires openness and revisability otherwise their fixed and uncritical usage may well flout the substantive promise of human rights. Minimum core is about setting limits. Another way to set limits is through the element of balancing through proportionality reasoning and costs consideration. Such balancing is not the same as minimum core which does not focus on efficiency in the same way, but is arguably often better suited to socio-economic rights adjudication given the multitude of competing interests.⁸³ Such elements are nothing new, they are as old as the hills, but it may be useful to recognize them as elements which while very different conceptually from the minimum core concept, broadly share the same aspirations as to what makes socio-economic rights effective. If for some reason, courts in particular country are unwilling to embrace the minimum core concept because of the normative and practical difficulties associated with it, then the courts will need almost inevitably turn to these more discrete elements.

Technical Elements:

SEPARATION OF POWERS AND THE NY APPROACH: If courts find themselves in a situation while formulating minimum core content, where they feel that detailed policymaking is required and they find the legislature not stepping up to the task or where they would have to determine an amount of money to finance immediately enforceable minimum core obligations, adopting the NY approach (CFE v State of NY⁸⁴) may satisfy separation of powers anxiety. In the CFE case the Court first allowed the government to act within a specific time frame and when the government did not return with an appropriate policy

⁸² See generally, YOUNG, supra note 3.

⁸³ See YOUNG, supra note 3, at 164-174.

⁸⁴ Campaign for Fiscal Equity v State of NY, 100 N.Y. 2d 893 (N.Y. 2003); Campaign for Fiscal Equity v State of NY, 8 N.Y. 3d 14, 861 N.E. 2d 50

plan within that time, the court took it upon itself to frame policy through a panel. So when it comes to very policy oriented matters, the courts may consider deferring to the State but should also be proactive if the State does not fulfill what is mandated of it.

A SUPPORT SYSTEM: As seen in the case of the South African Constitutional Court, having access to information and expertise, is essential to be able to formulate minimum core content. In many countries such as India and Colombia, courts are overburdened and may not have the resources to gather the information needed and the executive may well not be co-operative. A system similar to that of Special Rapporteurs within the UN⁸⁵ but consisting of experts from within the country, could be established to provide technical assistance to the courts on different thematic issues. There could for instance be a roster from which courts could call on members of such a system, experts in their field willing to volunteer their time for a worthy cause.

CONTEXTUALITY: The aforementioned recommendations are very generic and will of course if utilized, have to be modified depending on the country in question.

A Cautionary Note

There is an argument made⁸⁶ which resonates with the UN Committee on Economic and Social Rights reference to ‘international assistance’⁸⁷, that “available resources” to meet the minimum core and then to progressively realize the non core elements, include international assistance. In thinking of how this would be judicially applied, given how a lot of international assistance whether from nation states or international financial institutions usually come with heavy conditionalities, it may not be the best idea for courts to encourage governments to seek international assistance before declaring resource constraints in meeting obligations. This would obviously depend on the situation. If there is humanitarian crisis like in Burma or say a famine, then yes, governments should seek help from the international community and if not, courts should direct them to; but certainly this should not always be the case, firstly to avoid conditionalities which may be debilitating to development in the long run⁸⁸ and secondly to avoid an excess of dependency which again can be detrimental in the long run for example, by styming the growth of home grown solutions.

⁸⁵ The role of Special Rapporteurs can be found at, *Country and Thematic Special Rapporteurs*, <http://www.unhchr.ch/html/menu2/xtraconv.htm>

⁸⁶ See, for example, Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763, 792 (2003).

⁸⁷ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Report on the Fifth Session, Supp. No. 3, Annex III, P 10, U.N. Doc. E/1991/23 (1991) [General Comment No. 3], para 13.

⁸⁸ See for example, *The Policy Roots of Economic Crisis and Poverty*, the SAPRI Report (2004).

Finally, one issue which would be fascinating to examine in more depth is how judicial adherence to minimum core in the national context can be influenced by horizontal and vertical transferability, namely by international trends and trends in other countries pertaining to interpretations of minimum core. However such an examination is beyond the scope of this paper.

IV. Conclusion

This paper thus examines the ‘is and ought’ aspect of judicial adherence to the concept of minimum core. After an analysis of how the concept has been judicially applied and post-consideration of legitimate concerns voiced by scholars, this paper has attempted to recommend a way forward where the emphasis is more on meeting the aspirations driving minimum core, than fulfilling any rigid requirements mandated by the concept. The framework recommended eschews the stranglehold of semantics and does not require for explicit use of the term, “minimum core”. There still appears to be a sense of unease with the concept of minimum core in national contexts resulting in there not being that many relevant cases; so in a way this paper has framed its recommendations more on what the author anticipates than necessarily knows.

On an end note, it must be highlighted that the minimum core approach is simply one tiny element of what can transform abstract legalese into concrete entitlements. Simply using minimum core terminology may mean little, as can be seen in the differing rates of success in implementing judgments in India and South Africa, with the implementation generally being better in the latter country which did not adopt the minimum core approach. It would be interesting to see implementation results of the Colombian Constitutional Court which openly embraces the minimum core approach, but of course it would difficult to separate the effect of using that approach from other factors influencing implementation. Many other factors are essential to be in place along side the minimum core approach, for example, political will, independence of the judiciary and so on, for the transformative potential of socio-economic rights to be truly realized. But the minimum core approach creates an impetus for change, on the basis of which paper rights are imbued with tangibility.

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