Defining the Minimum Core Obligations-Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa

Mesenbet Assefa*

Abstract

The Minimum Core obligations as stipulated by the Committee on Economic, Social and Cultural Rights under the General Comment 3 on the nature of states parties’ obligations has been one of the most important articulations that set the scene for judicial enforcement of socio-economic rights at least on theoretical grounds. This notion is significant in that it intends to avoid the complacency of states on realizing socio-economic rights based on the rhetorical ground of “progressive realization”. It seeks to establish a floor right where states can not justify failure to meet the most essential levels of socio-economic rights. Nevertheless, the meaning of the minimum core has been controversial both in terms of its theoretical basis as well as its judicial application.

This article seeks to look into both the theoretical approaches as well as the conundrums involved in the judicial application of the concept. In making such inquiry the writer has dealt with notable literatures and case laws on the notion of the minimum core. Principally, the article focuses on analyzing the two landmark decisions of the Constitutional Court of South Africa and to a lesser extent that of the Supreme Court of India and the Constitutional Court of Columbia. In doing so, the writer believes that judicial adherence to the notion of the minimum core is essential for the enforcement of socio-economic and that this is feasible in the current legal discourse.

Introduction

In recent years the jurisprudence of socio-economic rights has generated a lot of academic writings and jurisprudential debates both nationally and internationally. One of the reasons for such academic curiosity is the fact that it is the unexplored and fresh area of international human rights law. Many of the substantive rights of the International Covenant on Civil and Political Rights (ICCPR) to a large extent have been defined by the Human Rights Committee. This has been possible largely due to the rich jurisprudence that it has been able to generate both from the state reports that it receives and the individual complaints mechanism. Apart from this, regional human rights supervisory mechanisms such as the European Court of Human Rights have had a
significant contribution. The lack of strong nexus between the implementation of civil and political rights and resource constraints coupled with their clearer articulation has helped in the general development of the jurisprudence on civil and political rights and their application both domestically and internationally.

This is not true, however, in the case of socio-economic rights. Until very recently the international community has not been able to adopt an optional protocol that would enable the Committee on Economic, Social and Cultural Rights (CESCR) to receive individual complaints from states parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR).  

1 Efforts are being made to correct this historical asymmetry by adopting an Optional Protocol to the ICESCR which would enable it to receive individual complaints from its states parties. Nevertheless, the legacy of this historical asymmetry has been the lack of jurisprudence on socio-economic rights that could serve as a benchmark for the implementation of the substantive rights domestically.

One of the most difficult articulations of the CESCR has been the notion of minimum core obligations. As an exception to the general obligation of states to realize socio-economic rights progressively, states parties have the obligation to implement minimum core obligations immediately. Yet, there have been difficulties in articulating what constitutes minimum core of each of the rights enshrined in the covenant. The series of general comments adopted to elaborate the contents of the rights though useful, fail to give a definitive answer to our query of the minimum core.

Apart from the General Comments of the Committee and other international human rights instruments, the South African Constitutional Court provides a unique opportunity to understand some of the normative framework provided in the ICESCR and the application of the substantive rights domestically and some of the conundrums involved

* Mesenbet Assefa Tadeg, LL B- Bahir Dar University , LL M- University of Pretoria, South Africa, Lecturer of Law, Director-Mekelle University Human Rights Center (Email: messiassefa@yahoo.com)

in this regard. Although some countries have incorporated socio-economic rights as justiciable in their constitutions, the experience of South Africa is significant in the discussion of minimum core obligations.\(^2\) This is due to the fact that the constitutional Court of South Africa has dealt with socio-economic rights claims of individuals and has been able to generate a robust jurisprudence in this regard, including the notion of minimum core obligations. The purpose of this article is to show some of these international and national jurisprudential developments on defining the meaning of the minimum core and some of the challenges of such kind of articulation in the general discourse of socio-economic rights.

1.1. General Obligations of States Parties in the Enforcement of Socio-Economic Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^3\) outlines the major obligations of states parties in relation to the protection and promotion of socio-economic rights. In general, states parties have three major obligations in relation to socio-economic rights; these include the obligations to respect; obligation to protect and obligations to fulfil.\(^4\)

The obligation/duty to respect requires states parties to the ICESCR to refrain from interfering with the enjoyment and exercise of socio-economic rights. It imposes an obligation to abstain from interfering with individuals/people’s rights. The prohibition of the state from interfering with the enjoyment of socio-economic rights may relate to a law or conduct.

\(^2\) See for example the Constitutions of Colombia and India in this regard.


The duty to protect on the other hand requires states parties to prevent violation of human rights by third parties. While the obligation to respect is passive in its nature, obligation to protect is pro-active and calls up on states to remove those obstacles perpetrated by private parties on the enjoyment of socio-economic rights. To do this, a state is required to undertake legislative, administrative and other measures, including the provision of effective remedies so that the poor and vulnerable part of the population will not be adversely affected by more powerful actors such as the state itself, landlords, banks, companies etc.\textsuperscript{5}

The duty to fulfill, which is the most controversial issue, requires states to take positive measures to ensure that people who lack access to socio-economic rights are provided with these rights at state expense. There are two dimensions of the duty to fulfill. The first duty relates to the obligation of the state to assist individuals and communities to gain access to socio-economic rights. This includes adopting appropriate policies and legislation that facilitate and regulate access to socio-economic rights. The second is a duty to provide these various goods and services directly whenever an individual or group is unable to gain access to these things through the resources at its disposal.\textsuperscript{6}

International human rights law, nevertheless, does not demand automatic fulfillment of socio-economic rights to individuals. The ICESCR states that states have only the obligation to provide socio-economic rights progressively.\textsuperscript{7} Obviously, the articulation of progressive realization was motivated because of the resource constraints of states to realize fully socio-economic rights. However, the ICESCR also provides for immediate application and implementation of the rights enshrined in the covenant. These include, no-discrimination,\textsuperscript{8} the duty to take steps to start the implementation of the rights\textsuperscript{9} and “a

\textsuperscript{5} Ibid.

\textsuperscript{6} Ibid, para. 6 &7.

\textsuperscript{7} Art. 2(1) ICESCR.

\textsuperscript{8} Art. 2(2) ICESCR.
minimum core obligation to ensure the satisfaction of, at the very least, minimum essential level of each of the rights”.

1.2. Minimum Core Obligation Under International Law

Before considering the experience of the South African Constitutional Court on the notion minimum core obligations, it is important first to lay down the meaning of minimum core obligations under international law as provided in General Comment 3 of the CESCR. A sound understanding of the minimum core obligations at the international level will be important to lay down the groundwork of this paper.

The CESCR is the most authoritative body that interprets the normative content of the provisions of the ICESCR. Although the CESCR has not been able to receive individual complaints from nationals of member states, it has been able to develop important benchmarks on the nature of the rights and obligations enshrined in the ICESCR through the General Comments that it adopts periodically. So far the CESCR has given 15 general comments that have clarified the contents of the rights incorporated in the ICESCR and the nature of states parties’ obligations in respect of the covenant. General comment 3 in detail elaborates the nature of state parties’ obligations that is provided in Article 2(1) of the ICESCR. The Committee stated that thorough extensive experience gained through the examination of state reports;[11]

…a minimum core obligation to ensure the satisfaction of, at the very least minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential food stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the covenant.

---

9 Art. 2(1) ICESCR.


A closer look at the wordings of General Comment 3 shows that the requirement of minimum core obligations is a qualified one, i.e., there are certain conditions that must be met before a state is said to have failed to meet its minimum core obligations.

The first requirement is that of a numerical one. According to the General Comment, for a state to be in violation of its obligation of minimum core, there has to be a significant number of people who are deprived of essential services. What constitutes a significant number of people is difficult to establish and it is virtually impossible to put a fixed number to it. However, the CESCR in its subsequent general comment has resolved the ambiguity of the above requirement by stating that the minimum core establishes a right which can be claimed by all people.\(^\text{12}\) Thus, the state has the obligation to realize its core minimum obligations as a matter of individual right.

The second and more important requirement is similar to the general case of any socio-economic right, i.e., ‘any assessment as to whether a state has discharged its minimum core obligations must also take into account of resource constraints applying within the country concerned.’\(^\text{13}\) Even if this may sound similar to that of the general requirement of progressive realization in Article 2 of the ICESCR; it is different in terms of the qualified nature of the obligation. According to the General Comment, to justify failure of a state to meet its minimum core obligations to lack of available resources, ‘it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’.\(^\text{14}\)

Accordingly, at the heart of the concept of minimum core obligations is the establishment of a prima facie violation of the covenants obligations by a state party who fails to fulfil the minimum core. It has a tremendous probative role in terms of putting enormous

\(^{12}\) Committee on Economic, Social and Cultural Rights, General Comment 15 (2003) para. 44 (c).

\(^{13}\) Committee on Economic Social and Cultural Rights, Supra note 10.

\(^{14}\) Ibid.
burden on the state to prove the failure of the state to fulfil its minimum core obligations. It thus shifts the burden of proof from the applicant who alleges the violation of his rights to that of the state.

The significance of the minimum core obligations cannot be overemphasized. The minimum core is an essential element of any right without which the right risks losing its substantive significance as a right. It provides a minimum threshold below which standards should not fall. It emphasizes that it is unacceptable for any human being to live without basic resources to maintain his survival.

The minimum core concept seeks to establish ‘a minimum legal content for the notoriously indeterminate claims of economic and social rights’.\(^{15}\) By adopting a minimalist rights strategy, it focuses towards the severest forms of material deprivation that have to be addressed as a matter of urgency. The ICESCR itself has interpreted the minimum core as a presumptive legal entitlement, a non-derogable obligation and an obligation of strict liability.\(^{16}\)

### 1.3. Determining the Content of The Minimum Core- Theoretical Perspective

One of the most difficult tasks of the articulation of the minimum core obligation has been determining their content. Although the CESCR has stated that the fulfilment of minimum core obligations of essential food stuffs, essential primary health care, basic shelter and housing or the most basic forms of education is incumbent on all states, it has not yet come up with sufficient standards to provide definitive benchmarks for the content of these rights.

---


Most of the endeavour for establishing the minimum core, however, has been more theoretical than practical. Young’s approach encompassing international, regional and national jurisprudence and scholarly works demonstrates three approaches to understanding the notion of the minimum core. The First approach- essence approach, tries to locate the minimum content of a right relating it with the protection of liberal values such as dignity, equality and freedom and the basic needs of survival. The consensus approach locates the minimum core in the minimum consensus reached with respect to socio-economic rights. Lastly, the obligations approach seeks to situate the minimum content of a right in terms of the obligations raised by the right rather than the right itself.

### 1.3.1. The Essence Approach

This approach seeks to establish the essential minimum of each right. It views the right’s core content as part of ‘the intrinsic value of each human right… [containing] elements… essential for the existence of that right as a human right.’ Young in this regard states,  

> It is the absolute, inalienable and universal crux, an ‘unrelinquishable nucleus that is the raison d’être of the basic legal norm, essential to its definition, and surrounded by the less securely guarded elements.

According to the essence approach, the core of the right is seen as the most basic feature and thus the foundation for its fulfilment. David Bilchitz for example, illustrates that at the core of the right to housing lies the right of the individual to be provided with shelter. According to him, this minimum core right flows from the right to be protected from exposure to outside elements, which in turn finds its basis on one’s ability to survive. The jurisprudence of the Inter-American Commission also demonstrates the connection

---


between rights of survival and basic needs which are vital for personal security.\footnote{Inter-American Commission on Human Rights, Annual Report OEA/Ser.L/V/II.50, doc.13 rev 1, at 2 (1980) www.iachr.org/annualrep/79.80eng.6.htm} In a more recent decision, the Indian Supreme Court in the case of People’s Union for Civil Liberties v. Union of India and Others contextualized the right to food under the right to life.\footnote{People’s Union for Civil Liberties v. Union of India and Others, Supreme court of India, writ Petition Civil No. 196 (2001).} The Court rejected the arguments of the respondents on the non-availability of resources and found that the right to food was blatantly violated. In another case, in the case of Paschim Banga Khet Mazdoor Samity v. Stat of West Bengal and Anor,\footnote{Pachim Bunga Khet Mazdoor Samity v. State of West Bengal  AIR SC 2426(1996).} the Indian Supreme Court reiterated the link between the right to health as implicit in the right to life.

Many scholars, particularly in relation to the South African Constitutional jurisprudence have also tried to link the concepts of human dignity\footnote{See S Liebenberg, The value of human dignity in interpreting socio-economic rights, South African Journal of Human Rights Vol. 21 (2005) p. 1.} and equality\footnote{PD Vos, Groothoom, the right of access to housing and substantive equality as contextual fairness, South African Journal of Human Rights Vol. 17 (2001) P. 259.} as a mechanism for supplementing the enforcement of socio-economic rights. Their propositions are innovative and helpful in strengthening our arguments for the enforcement of socio-economic rights in general. This, however, may give the wrong impression that socio-economic rights are not self-standing rights that are suited to judicial enforcement. Young also points out that there are often competing values and that from the notions of survival, life, dignity, different cores can be found for each specific right. For example, an interpretation of the right to education is linked heavily with freedom while an interpretation of the right to health relies more on dignity.\footnote{Young , Supra note 15 p. 14.}

\subsection*{1.3.2. The Consensus Approach}
The consensus approach rather than focusing on what the normative minimum of each right should be, focuses on where consensus has been reached in the content of the minimum core. According to this approach, the minimum core content is the ‘right’s agreed up on nucleus’.\(^{25}\) Thus, elements outside of the core translate to the plurality of the meaning and some of the disagreements surrounding the right.

The consensus approach states that a wider agreement on what constitutes the core content of each of the socio-economic rights can be built by the evolving jurisprudence of states and the CESCR. However, due to the lack of individual complaints procedure under the ICESC, the CESCR has not been able to enrich the content of the minimum core obligations through its jurisprudence. Currently, efforts are being made to integrate the complaints mechanism through the adoption of an optional protocol. The lack of judicial enforcement of socio-economic rights in domestic judicial systems except in few countries such as South Africa has further complicated the problem.

It is, however, interesting to note that the CESCR has been able to develop some important benchmarks to determine the content of the minimum core through state reports that it receives and the ensuing general comments that it periodically gives. Although the consensus approach has not yet come up with a universal benchmark to define the minimum core content, it is significant in enriching the normative content of the minimum core progressively. Its focus on consensus also confers legitimacy for the enforcement of minimum core rights both internationally and nationally through constitutional litigation.

1.3.3. The Minimum Obligation Approach

This approach tries to correlate the minimum obligations to that of the concept of minimum core. The focus on duties required to implement the minimum core rights is aimed at analyzing realistic, institutionally informed strategies for the protection of

\(^{25}\) *Ibid*, p.15.
rights. It also tries to avoid the dichotomy of negative rights and positive rights by stating that both civil and political rights as well as economic, social and cultural rights have correlative duties to refrain from and perform certain acts. By doing so, it tries to make a point that the negative duties to refrain from are not more important than the positive duties.\textsuperscript{26}

Nevertheless, this approach even further complicates the problem in the sense that rather than focusing on developing the content of the minimum core rights it focuses on the obligations of states in wider terms. Although it helps in setting benchmarks on what steps should be taken to implement the minimum core rights, it doesn’t help much in defining the content of the minimum core rights as it focuses on wider obligations of states to implement these rights.

Thus, none of the above theories provide a concrete benchmark for determining the content of the minimum core contents of the right to essential food stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education. In this regard other scholars also state that Young’s approaches suffer from normative difficulties and make it judicial applications of the concept problematic.\textsuperscript{27}

Yet, the above approaches are significant in narrowing down the definition of the minimum core to a limited range of possibilities at least in a theoretical sense. Moreover, thanks to the work of the CESCR, there are already some important benchmarks as to what constitutes the minimum core of the specific rights. For example, the CESCR in its general comment on the right to food has emphasized on the right of individuals to be free from hunger.\textsuperscript{28} This becomes at least the base line where by the minimum core of the right to food can be established. The CESCR in its general comment on the right to health

\textsuperscript{26} Ibid p. 20.

\textsuperscript{27} Joie Chowdhury, \textit{Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights-a Comparative Perspective}, (Unpublished) (2009) p. 4. ; Cited based on the permission of the author.

\textsuperscript{28} Committee on Economic and Social rights, \textit{General Comment 12} (1999) para. 17.
has also stated that states have a minimum obligation on the provision of essential drugs as defined under the World health Organization (WHO) Action Plan on essential drugs.  

Apart from these international standards, it is also proper to deal with more concrete legal issues that have surfaced in relation to the minimum core in the course of deciding cases by taking the experience of the constitutional Court of South Africa.

1.4. The Approach of the Constitutional Court of South Africa on the Notion of Minimum Core Obligations

Since the constitutional change that took place in the country in 1994, South Africa has taken a path of socio-political transformation with an active Constitutional Court at the pinnacle of the judicial system. South Africa is one of the few countries in the world that has justiciable socio-economic rights in its constitution. The Constitutional Court (CC) has dealt with four major cases dealing with socio-economic right claims by individuals. While adjudicating these claims the CC has made it clear that it will not shy away from such cases because of their budgetary implications. A more critical question that is usually raised rather is thus, how does the Constitutional Court enforce socio-economic rights claims in a given case.  

Despite its courageous move in incorporating socio-economic rights as justiciable bill of rights in its constitution, South Africa has not yet ratified the ICESCR. Although South Africa is not yet a party to the ICESCR, the reasons behind the rejection of some aspects of the jurisprudence generated by the CESCR does not appear to flow from such lack of international commitment. It is rather based on the CC’s own normative conception of the


nature of the obligations that socio-economic rights engender.\textsuperscript{31} The CC is also caught up between the need to discharge its obligation of applying socio-economic rights on one hand and the need to maintain separation of powers by taking due cognizance of the legislative and executive branches of government on the other hand.

Although there are some scholars in support of the CC’s position,\textsuperscript{32} one of the major criticisms against the Constitutional Court has been its rejection of the notion of minimum core obligations, which is provided in the General Comment 3 para. 10 of the CESCR.\textsuperscript{33} Some have pointed out two major reasons for the Court’s rejection of the notion of minimum core obligations of the CESCR. First, they contend that the determination of what constitutes a minimum core obligation will be difficult in case the court adopts such a standard given the limited information the court has and the diverse needs of society. Secondly, they also state that the Court is not politically and institutionally equipped to deal with claims that would have arisen had they adopted this standard. The article will try to scrutinize the validity of these contentions by discussing the normative content of the minimum core obligations in international law first and raising important philosophical and legal questions.

The CC has declined to accept the concept of minimum core obligations in its landmark decision of \textit{Grootboom}.\textsuperscript{34} The court first stated that it would not be possible to determine the minimum core of the right of access to adequate housing because of the diversity in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} \textit{Grootboom & Others, Supra note} 30.
\end{itemize}
\end{footnotesize}
the needs and opportunities for the enjoyment of the right.\textsuperscript{35} Secondly, in the case of Treatment Action Campaign (TAC) the CC was skeptical about its competence to deal with claims that would have arisen had they adopted the minimum core standard.\textsuperscript{36} The article will try to scrutinize the validity of these arguments in the subsequent sections.

\subsection{1.4.1. The Difficulty of Determining the Minimum Core}

In the \textit{Grootboom} the CC while explaining the difficulty of defining the minimum core of the right to housing stated:\textsuperscript{37}

\begin{quote}
It is not possible to determine the minimum threshold for the progressive realization of the right to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right….
\end{quote}

In dealing with the specific case the court rather proceeded to deal with the case by stating that the question to be answered in the circumstances was whether the state has taken \textit{reasonable steps}\textsuperscript{38} to realize the right to housing as provided in Section 26 of the Constitution. According to the CC, the only thing that could be drawn from the concept of the minimum core obligations was its significance in serving as a factor in assessing the reasonableness of the measures taken by the state in particular circumstances.\textsuperscript{39}

\begin{flushright}
35 \textit{Ibid} para. 33.

36 \textit{Minister of Health v Treatment Action Campaign Case} CCT 8/02 (July 5, 2002) para. 35.

37 \textit{Grootboom & Others. Supra note} 30 para 32.

38 In the context of the Constitutional Court’s approach, the standard of reasonableness has evolved in determining socio economic rights claims.

39 \textit{Grootboom & Other, Supra note} 30 para 33.
\end{flushright}
Similarly, in the TAC the argument of the amici curiae to persuade the CC to adopt the notion of the minimum core based on S 27(1) & 7(2) was unsuccessful.\textsuperscript{40} The amici argued that the minimum core right is not subject to limitations of resource constraints and progressive realization under S 27(2). It stated that S 27(2) is not exhaustive of the state’s positive duty to fulfil; it supplements the unqualified core minimum obligation of the state in S 27(1) to ensure basic levels of the socio-economic rights of individuals. The court rejected these arguments and stated that S 27(2) defines and limits the full extent of the positive obligations imposed by S 27(1).\textsuperscript{41}

The major shortcoming of the CC in adopting the reasonableness review and rejecting the minimum core is that it discarded the possibility of individuals to claim immediate delivery of goods and services from the state. It made clear that Sections 26 and 27 confer no direct entitlement to socio-economic rights claims; they only entitle individuals to require the government to adopt a reasonable program.\textsuperscript{42}

David Blichiz criticizes the court’s characterization of the minimum core in \textit{Grootboom} as one involving complex questions to define the content of the obligation in the presence of diverse needs and opportunities for the enjoyment of socio-economic rights by different groups. According to him, the CC failed to distinguish the ‘invariant universal standard’ that must be met in order for an obligation to be fulfilled and the different methods that can be used to meet the constitutional obligation.\textsuperscript{43} The minimum core obligations incorporate ‘the standard of socio-economic provision necessary to meet

\textsuperscript{40} Compare Section 27 (1) Everyone has access to …. and Section 27 (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

\textsuperscript{41} \textit{Minister of Health, Supra note} 36 para 35.

\textsuperscript{42} Grootboom para 41 & 95; TAC para 32-39 & 123.

people’s basic needs’ which are the universal preconditions necessary for human survival.\textsuperscript{44}

Blitchitz’s criticism of the court’s reasoning, particularly referring to the diverse nature of people’s needs and opportunities is sound. Because, the minimum core seeks to establish universally applicable standards that are aimed at providing individuals the minimum threshold of socio-economic rights for their survival in spite of socio-economic differences among them and the difference in their needs. The logic behind this is that to live below these deplorable conditions is something that has to be avoided. It also aims at prioritizing the states obligation in the fulfilment of socio-economic rights.

The CESCR has been able to develop some important benchmarks for determining the core elements of the right to food, health, education and shelter. Thus, these international standards can be adapted to the South African context to elaborate on the concept of the minimum core in particular and Ss 26 & 27 in general. For example, in its general comment on the right to adequate food the CESCR \textit{inter alia} stated ‘violations occur when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger’.\textsuperscript{45} Thus, at the core of the right to food lies the right of the individual to be free from hunger and reciprocally the duty of the state to ensure this. In similar vein, one could also assert that at the core of the right to housing lies the right of the individual to be provided with shelter. Shelter forms the minimum core of the right to housing. This is also consistent with the principle of constitutional interpretation in the sense that whenever there are vague areas which need to be elaborated the constitution dictated that they be interpreted in reference to international law.\textsuperscript{46}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{44}] \textit{Ibid}, p.488.
\item[\textsuperscript{45}] Committee on Economic and Social rights, \textit{Supra note} 28.
\item[\textsuperscript{46}] See S 39(1)(b) of the Constitution of the Republic of South Africa.
\end{enumerate}
\end{footnotesize}
The CC could also have referred comparative jurisprudence of socio economic rights, specifically with respect to the minimum core to give content to it. Apart from the experience of the Indian Supreme Court we saw above, the Constitutional Court of Columbia is indispensable in the discussion of the concept. The Columbian Constitutional Court has taken a bold step by explicitly adopting the concept of the minimum core. In arriving at this conclusion the Court defined the minimum core in conformity with the various interpretations given by the CESCR with respect to socio-economic rights. Several cases of the Court reaffirmed the minimum core of socio-economic rights such as the right to health and the right to housing in accordance with the interpretations of the CESCR.⁴⁷ In a more recent case the Court decided, it reiterated its commitment to the minimum core and thereby ordered a dramatic restructuring of the Country’s health system.⁴⁸ One of the most interesting aspects of this decision is that when pronouncing the right to health, the court made a distinction between an essential minimum core of the right to health, which was immediately enforceable and other elements of the right to health that are subject to progressive realization taking into account resource constraints. Accordingly, the Court ordered the provision of a wide range of goods and services including viral load tests for HIV/AIDS and medication of anti-retroviral drugs and cancer medications to be effected immediately.

1.4.2 The Political And Institutional Competence Of The Court In Adopting The Minimum Core

The political and institutional competence of courts to adjudicate socio-economic rights claims has been questionable in different countries. The South African CC has, however, taken a bold step by stating that it has the competence to deal with socio-economic rights

---


claims on the basis of the constitutional provisions and hence the justiciability of socio-economic rights is not questionable.  

A closer look at the competence of the CC to adjudicate socio-economic rights particularly, referring to the minimum core and the enforcement of individual rights claims seem to suggest that it is somehow ambivalent about its position.

When it comes to the specific case of minimum core obligations, the CC in TAC stated that ‘it was not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum standards… should be’.  

It also stated that ‘it is impossible to give everyone access to the core service[s]’.

The article has tried to highlight some of the difficulties involved in defining the content of the minimum core and hence will not delve again in to that. Here the article will rather focus on the competence, i.e. whether the CC has the institutional ability and power to articulate the content of the minimum core.

The CC is the highest judicial body that has the power to interpret the provisions of the constitution and to settle constitutional disputes. Under this broad constitutional power, it has the competence to interpret the contents of the constitutional provisions dealing with socio-economic rights. Thus, it has the ultimate constitutional power to elaborate on these constitutional provisions.

It seems that the CC has shied away from its inherent role of giving meaning content to the constitutional provisions with respect to the notion of the minimum core. The fact that the CC has been reluctant about its role of giving meaning to the minimum core is inconsistent with its role as an ultimate interpreter of the constitution. Although

---


50 Minister of Health, Supra note 36 para 37.

51 Ibid, para 34.
determining the minimum core is a difficult task, it could have drawn from international law and national jurisprudence of other countries to elaborate on the normative foundation of the concept.

The other, and probably the most important criticism that is forwarded against the CC’s rejection of the minimum core is its failure to use this notion as a means of shifting the burden of proof from the claimant to that of the respondent state. As Blichitiz has pointed out, the minimum core is not an absolute standard but it rather seeks to establish a situation where fulfilment of the core obligations may be genuinely impossible. By establishing a *prima facie* violation of the minimum core, the general comment puts a heavy, but not impossible burden on the state to show that its resources are demonstrably inadequate to meet these needs. It is just a means for prioritizing the state resources to address the needs of people whose survival is threatened.\(^52\) In this way also the minimum core becomes instrumental in ensuring ‘practical justiciability’ of socio-economic rights.\(^53\)

In the constitutional context the CC could have used the notion of the minimum core in Ss 26(1) and 27(1) or alternatively a first constitutional inquiry of the provisions in Ss 26(2) and 27(2) which states ‘within available resources’ to apply to the minimum core obligations. The state could have also used the general limitation clause in S 36 to demonstrate that it has made every effort to satisfy the minimum core and its failure to do so is due to lack of resources.

Moreover, the CC could have adopted the notion of minimum core without engaging in extensive discussion of what their precise content is. Some point out that the acceptance of the concept of the minimum core obligations does not require the CC to define the

\(^{52}\) Blichitiz, *Supra note* 43 p.17.

\(^{53}\) Liebenberg, *Supra note* 22 p. 21.
basket of goods and services that must be provided.\textsuperscript{54} It could have avoided the temptation to define the minimum core of each right and define the general principles underlying the notion on case by case basis. For example, one component of the minimum core of the right to food is freedom from hunger; to ensure this however, the Court can give discretion to the state to have different policy options such as whether to grant cash grants, food vouchers, or the direct delivery of food parcels to people affected. This is an illustration in which the functions of courts is compatible with the principle of separation of powers and can balance criticisms that courts have no institutional competence to deal with such cases by giving discretion to the specific mechanisms of implementation.

The question of institutional competence of courts can also be attacked from a different angle. Of course, courts may not have the institutional competence to deal with all issues that are presented to them. How do they deal with election disputes, corruption charges, insanity defenses (of which they have no professional competence)? It is through the help of expert or professional evidence that they establish the factual and legal issues that help them in the determination of their final findings. Similarly, even if socio-economic rights claims particularly with respect to the minimum core may involve difficult legal and factual issues, this can be solved through expert evidence and getting the necessary information which are vital for the court to determine the legal and factual questions raised. In this regard, Joie Chowdhury also states that when Courts are overburdened with the task of evaluating the factual circumstances of a case, a support system could be devised similar to that of the Special Rapportuer of the UN system. Through such support systems, national courts can get technical assistance on different thematic issues, including the minimum core obligations.\textsuperscript{55}


\textsuperscript{55} Chowdhury, \textit{Supra note} 27 p. 22.
The argument that the CC is not politically equipped to deal with rights claims if it had adopted the minimum core relates to the wider skepticism about socio-economic rights claims adjudication in general. This argument is related with the traditional notion of separation of powers where each branch of the government—the legislature, executive and judiciary has distinct functions. Other authors have also suggested that because the minimum core concept incorporates substantively defined minimum content of socio-economic rights, there is a fear that it may drastically alter the separation of powers that exists between courts and other branches of government.\textsuperscript{56}

In an interesting article, Marius Pieterse explains some of these controversies by stating that we need to redefine the notion of separation of powers in the present context where courts have become more progressive and vigilant in their adjudications.\textsuperscript{57} Moreover, as the Constitutional Court has constitutional basis of the right and competence to deal with socio-economic rights, the argument questioning the political competence of the courts is shallow. As a constitutionally empowered court it has the competence to deal with the adjudication of socio-economic rights and defining the ensuing legal concepts that may flow from them such as the notion of minimum core obligations.

Furthermore, although the responsibility to ensure socio-economic rights is the primary obligation of the nation state, it must be clear that the fulfilment of socio-economic rights is also the responsibility of the international community. The CESCR has stated that the term “to the maximum of its available resources” in Article 2 of the ICESCR refers to both the resources available within a state and those available from the international community.\textsuperscript{58} Thus, it is logical to contend that a state can justify its failure to fulfill its minimum core obligation as well as the general obligations of progressive realization. Although this is something that has been framed in the international context, there is no


\textsuperscript{57} Pieterse, \textit{Supra note 54}.

\textsuperscript{58} Committee on Economic, Social, and Cultural Rights, \textit{Supra note} 10 para 13.
reason why this may not be used to justify failure to fulfill minimum core obligations in the domestic sphere. This would also reduce the tension between the compelling demands for the realization of the minimum core and the practical difficulties that need to be acknowledged if a state can demonstrate that it has made every effort both locally and internationally. This is significant in that courts would be vigorous enough to adopt the notion of minimum core obligations as there are wider opportunities for the state to realize socio-economic rights and if not its justification for failing to do so.

Conclusion

Socio-economic rights adjudication can have significant consequences in improving the livelihood of people who are in desperate need. One of the most important aspects of ensuring this is through judicial adherence to the minimum core in resolving socio-economic rights claims of individuals and groups.

The article has highlighted the intricacies involved in defining the minimum core both from domestic and international perspectives. Nevertheless, it is important to note that despite the existing challenges, there are important benchmarks that can help us adopt judicial adherence to the notion of the minimum core. The series of general comments of the CESCR and jurisprudential developments evolving in different countries illustrate that there is at least the normative basis to adopt judicial adherence to the minimum core. While there are Countries that have openly accepted the minimum core such as those of Columbia and in an implicit manner such as in India, the South African Constitutional Court has explicitly rejected the notion of the minimum core in two of its leading cases. The rejection of the notions of the minimum core obligations by the CC seems to be motivated by two major reasons. First the Court stated that it was impossible to determine the substantive content of the minimum core. While this has been the major difficulty in the articulation of the notion of the minimum core in national jurisdictions and the CESCR, there are at least some benchmarks that the Committee has been able to articulate in its various General comments. The CC could have used these benchmarks to define the contents of these rights, i.e. the right to housing and the right to health in
particular. Moreover, the CC could have also adopted the notion of the minimum core without engaging in extensive discussion on determining their content by linking them with the notions of survival, life, dignity and equality which are the foundational values of the Constitution itself. But more importantly, it could have consulted to comparative jurisprudence of other countries such as Columbia and India which have openly adhered to the notion of minimum core obligations.

The argument that the CC is not institutionally and politically equipped to deal with claims that would arise had it adopted the minimum core obligations falls under the general skepticism towards socio-economic rights adjudication. First one has to be clear about the fact that as reaffirmed by the CC itself the adjudication of socio-economic is not to be compromised because of resource implications. More importantly, the adoption of the minimum core does not entitle an automatic entitlement of socio-economic rights; it only requires the state to give the utmost priority in fulfilling basic needs of individuals. The minimum core obligation has a probative role in the sense that it shifts the burden of proof from the claimant to that of the state to show that it has used all its available resources as a matter of priority. The questionability of the CC’s competence to adjudicate claims based on minimum core is not tenable in that as in many areas judges are not expected to know everything. Yet, for determining factual circumstances that may require economic, social, health and broader policy related issues, they can be supported by expert evidence. In light of the foregoing discussions, it can be said that the rejection of the CC the notion of minimum core obligations was a ‘lost opportunity’ to adjudicate the highly difficult and indeterminate content of socio-economic rights in concrete and practical terms.