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HUMAN RIGHTS, MORAL PHILOSOPHY

THE IMMEDIACY OF ECONOMIC AND SOCIAL RIGHTS

MAY 23, 2018 | KATHARINE G. YOUNG

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In his report to the World Bank on the highly contested concept of “Minimum Core Obligations” in international human rights law, Professor Tasioulas proposes an interpretation which equates the concept with unqualified temporal priority: minimum core obligations are the sub-set of obligations associated with economic, social and cultural rights that must be *immediately* complied with *in full* by *all states*. These are special obligations, he suggests, to which the ICESCR’s express doctrine of “progressive realization” does not apply. These obligations are understood as invariant in content for all states parties (despite states’ different background resources), uniform and constrained by their connection to a particular right. They are to take priority, *ceteris paribus*, over other obligations associated with economic, social and cultural rights.

I have great sympathy for efforts to limit the reach of the progressive realization doctrine, and to reinforce the conceptual priors that drive the content of economic, social and cultural rights. And Tasioulas’s preference for an approach that directs attention to the time frame in which obligations must be discharged is very

important. Yet his equation of priority with immediacy is a short-term, ameliorative, and likely counterproductive approach to the intolerable and all-too familiar delay that attends these rights. In this brief comment, I want to outline what I take to be the broad question of temporality in the ordering of economic, social and cultural rights obligations, the way Tasioulas's answer may minimize it, and why it matters.

Let me first commend the important contribution, to public policy audiences, offered by the crisp distinction of the various roles imported onto the minimum core concept. Since the Committee on Economic, Social and Cultural Rights first expressed the view, in 1990 with General Comment No. 3, that where a "significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education", that state is "prima facie, failing to discharge its obligations", that seemingly uncontroversial view has been deployed in multiple ways. The concept itself has stood in as a proxy for rules of justiciability or non-derogation, or to the values of human dignity or basic needs.^[1] Indeed, my 2008 article pointed to these competing – and often incompatible – interpretations as a reason for directing research and practical energies elsewhere: first, to improve the reliability of indicators and other monitoring data in measuring realization, including of the rights of the most vulnerable; second, to explore balancing and proportionality as doctrines that have become flexible, if highly debated, tools to enforce rights; and third, to give concrete content to the extraterritorial obligations set out in article 2(1) of the ICESCR and elsewhere. And indeed, it is in these directions that the last decade of scholarship on economic and social rights have focused, alongside the recognition that such rights, while becoming standard in many of the world's constitutions and statutes, were diverging in substantive legal content.^[2]

And yet the minimum core persists: attractive to those who might think a minimalist content is the most we can hope for under background conditions of extreme poverty and inequality and invariably limited resources. For Tasioulas, this means ascribing temporal priority – that minimum core obligations should be those of "immediate effect". Let us leave to one side that this interpretation is contrary to the Committee's and other regional

efforts to demarcate “minimum core obligations” and “immediate obligations” as separate categories, and to interpret each in light of the indivisibility and interdependence of all human rights. Perhaps departures such as Tasioulas’s may be warranted – interpretive efforts are not always consistent and may anyway be evolving. Instead, let us examine what is implied by a strategy to limit the doctrine of “progressive realization” by expanding the reach of the minimum core.

I suggest that this proposal for “minimum core obligations”, which are to be discharged immediately and prior to other obligations, replicates age-old distinctions between categories of rights, and fails to appreciate the distinctiveness of the idea that, when moral rights are transposed to legal rights, they create legal duties on the state (as a primary matter). The preferable view is to maintain an interpretation of economic, social and cultural rights that is conducive to regional and network efforts at setting standards, more open to claimants’ demands, and better equipped to address the prevailing framework of laws that contribute to such stark material deprivation.

First, advocates of the distinction between “first generation” civil and political rights, and “second generation” economic, social and cultural rights claimed that these two types of rights were fundamentally different, in that only the former could lead to obligations of immediate effect. The argument in support of economic, social and cultural rights had to overcome precisely that view, by proving that that immediacy did not correlate with importance. Tasioulas’s attempt to privilege a sub-set of economic, social and cultural rights that acquire this same status essentially brings back that ill-fated distinction, only this time internal to the category of economic, social and cultural rights.

While some interpretations of progressive realization also reinforce that distinction, the better view is that the obligation does not set out a space of unaccountable delay whenever resources are required. An obligation towards progressive achievement, as it appears in the Universal Declaration of Human Rights of 1948, applies to all rights; its special formulation for economic, social and cultural rights was contested at the time of the ICESCR’s drafting,

with some representatives suggesting a reasonable time frame, or even a time limit, should accompany the clause. The Committee's General Comments have pointed to an obligation to take expeditious and effective steps as part of progressive realization, and duties of non-retrogression have also been analysed. And the omission of progressive realization in subsequent treaties, such as in CEDAW – despite some reversals, such as the CRPD – might suggest a recognition that accountability and appropriate flexibility can be generated without it.

In addition to reviving that distinction, Tasioulas misunderstands the nature of the primary duty bearer: the state. His emphasis on an unqualified priority for certain obligations fails to appreciate that, for the state, temporal sequence cannot be commanded by a “minimum core” of rights. Immediacy in fact pertains to all claimants. The most vulnerable can, of course, demand special duties, but to insert a doctrine which requires other obligations to be suspended until those duties are discharged is to misunderstand this role. It may play into certain neoliberal prescriptions that have been discredited on various grounds, as my 2008 article warned, and at the very least entrench a stunted idea of state obligations to oversee – and even to plan – the economy.

Let me demonstrate with an example from the right to education. Tasioulas asserts that a state cannot prioritize high-level research institutes over the provision of primary schools. This point is, of course, elementary and wholly independent of the proposed minimum core doctrine: the ICESCR itself, in one of its longest articles, sets out important priorities. Primary education is to be compulsory and free for all; higher education is to be equally accessible, on the basis of capacity.^[3] But to require the discharge of core obligations towards primary education *before* other levels are addressed is to misunderstand this article, the much more nuanced General Comment No. 13, and the task of a state. How might a government respond to a transnational corporation, seeking to market secondary and tertiary education, for instance, if it is to be put in breach of its duties if it does not wait until primary education is secured? Clearly, a state's legal obligations to take steps to regulate this sector are just as important – and just as immediate – as the former.

Delay of rights is akin to denial of rights – a premise recognized, among other charters of rights, in the 1215 Magna Carta. The intolerable waiting associated with the full realization of economic and social rights must be monitored: infringements, including those induced extraterritorially, must give rise to enforcement (encompassing the soft measures Tasioulas helps to specify). This interpretation is consistent with the idea that economic and social rights rest on freedoms that are both especially important and socially influenceable, in one important formulation:^[4] an interpretation which extends to *all* economic and social rights, not just those confined to a “minimum core”. Human rights are designated – and warrant that designation – because they are for the here and now. We should not elevate a minimalist, ameliorative and short-term doctrine in order to make that clear.

^[1] Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 *Yale J. Int’l L.* 113 (2008).

^[2] See, e.g., the many contributions of the forthcoming *The Future of Economic and Social Rights* (Katharine G. Young, ed., Cambridge University Press), including, as especially pertinent, Ran Hirschl et al, *Justiciable and Aspirational ESRs in National Constitutions*; and Olivier de Schutter, *A Proposed Framework on Progressive Realization and Public Finance*.

^[3] ICESCR, art. 13.

^[4] E.g., Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 315-356.
