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Conceptualising Minimalism in Socio-economic Rights

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By recognising the "minimum essential levels" of the rights to food, health, housing and education, the concept of the "minimum core" seeks to establish a minimum legal content for socio-economic rights.

In international law and South African constitutional law, the concept purports to address the inherent relativism of a "progressive realisation" standard of obligation [see article 2(1) of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and sections 26(2) and 27(2) of the South African Constitution Act 108 of 1996 (the Constitution)] by providing a common baseline for monitoring and enforcement. Such a baseline helps to dispel the criticisms that socio-economic rights are uniquely unquantifiable in any system of rights; that negative obligations are the only area in which socio-economic rights gain judicial traction; or that courts act illegitimately if they deal with the enforcement of socio-economic rights separately from the issue of practicable remedies. When the Constitutional Court rejected, or at least deferred, the opportunity to articulate the minimum core concept for the right to housing in *Government of Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (Grootboom case) and the right to health in *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (TAC case), many socio-economic rights advocates were disappointed.

Yet, the minimum core concept is not without its critics, even among those committed to socio-economic rights. When examining the concept's use by the United

Nations (UN) Committee on Economic, Social and Cultural Rights (the Committee), Craven (1995: 143-4, 152) was concerned that it directed international attention only to the realisation of rights in developing countries. In the South African context, Lehmann (2006) has suggested that the concept tends to rank different claimants of rights, while ignoring the more salient assessment of rights versus macroeconomic growth or defence policies. And one of South Africa's most forthright proponents of the minimum core has provided an equivocal endorsement, by advocating a "principled" and "pragmatic" use of the concept, depending upon the right at stake (Bilchitz, 2007: 220-5).

Even the primary conceptual questions remain unanswered. A 2002 publication, *Exploring the Core Content of Economic and Social Rights*, contained quite opposing views on whether the minimum core was country-specific or absolute, and otherwise context-specific or context-blind (Brand & Russell, 2002). This conceptual puzzle is reflected in practice. The Committee itself, for instance, appears divided: it has sometimes equated the minimum core with a presumptive legal entitlement [see eg General Comment No 3 on the nature of states parties' obligations, UN doc. E/1991/23 (1991)] and on other occasions considered it a non-derogable obligation [see eg General Comment No 14 on the right to health, UN doc. E/C.12/2004 (2004)].

If conceptual confusion is the problem, conceptual analysis may be the solution. This article suggests that many of the proposals for the minimum core concept rest on several rationales. In this article, we focus on three main ones, which are based on the following approaches to the minimum core: the essence approach, the consensus approach and the obligations approach (Young, 2008). Disaggregating these approaches helps to delimit the practical ambitions of the concept and determine its practical operation in international human rights and domestic law.

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The essence approach

The first approach locates the minimum core in the "essential" minimum and is commonly used by those seeking an absolute or non-derogable foundation for socio-economic rights. This approach prescribes a moral foundation or justification to the minimum core, such as how the liberal values of human dignity, equality and freedom or the more technical measure of basic needs is minimally sustained within core formulations of rights.

Coomans (2002: 166-7) regards the minimum core content as the embodiment of "the intrinsic value of each human right ... [containing] elements ... essential for the very existence of that right as a human right." While the normative argument is, of course, central to rights, supporters of this approach adopt a more strident and yet more compromising viewpoint. It is more strident because it dispenses with general, broad and accommodating descriptions of rights, preferring a pointed focus on the "hierarchy within the hierarchy" of the material interests protected by socio-economic rights. Yet it is paradoxically more compromising, because it recognises – and encourages – the limits to rights at their periphery, discarding the view of rights as substantive trumps. This compromising viewpoint sits easily with the limitations clause in section 36 of the Constitution, if not with the Constitutional Court's view that sections 26(1) and 27(1) do not protect self-standing rights decoupled from sections 26(2) and 27(2) [see *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) (Khosa case) and the amici's argument in the TAC case].

Nevertheless, disagreement persists over what makes up the normative minimum. For example, the Committee's original formulation in General Comment No 3 – that the "minimum essential levels of each of the rights" require the provision "of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education" – suggests a categorical (or more flatly instrumental) formula of "basic needs" amounting to survival and

life. This focus is useful because it directs attention to the most urgent steps necessary for the satisfaction of rights as a precondition for the exercise of all rights (Shue, 1996). Such an emphasis is able to transcend the prioritisation of civil and political rights over socio-economic rights by drawing attention to the moral equivalence of subsistence rights and security rights because of their mutual relation to survival.

As Bilchitz (2007) has indicated, the survival-based core has the additional advantage of pointing to the requirements for rights protections that are apparently self-evident, rather than requiring a more controversial examination of what is needed for the satisfaction of more elaborate aims and of a "thicker" understanding of the good life. For proponents of the survival-based view, the boundaries drawn around the minimum core are neater and more cognisable than those around the more ambitious formulations. Yet a focus on survival and needs may disclose little about what basic functioning deserves priority and how broader values such as human flourishing are protected.

The need for additional values was made clear by the difficulties encountered in deciding the appropriate limits to the right to emergency medical treatment for people who are chronically or terminally ill in *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC). A value-based core provides an emphasis on higher aims, such as human dignity, which go beyond mere survival. Indeed, dignity-based values have been used by the Constitutional Court to supplement survival-based inquiries when interpreting socio-economic rights (eg in the *Khosa* case and in *Mashavha v President of the Republic of South Africa and Others* 2004 (12) BCLR 1243). This focus has carried the interpretation of socio-economic rights in a more expansive direction, which is at the same time more focused on vulnerable or disadvantaged claimants (Liebenberg, 2005: 1, 18). Nevertheless, dignity cannot comprehensively settle the issue, at least in its subjective sense, because of the problem of low expectations in vulnerable groups and that of anti-constitutional attitudes. Other values, like equality and freedom, are also to be considered. Dignity itself cannot settle the issue, especially if "the issue" is understood as setting the absolute content of rights.

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Due to the fact that the normative foundations are open to disagreement, the minimum core will look different to an advocate of human flourishing in comparison with an advocate of basic survival. For this reason, the use of a normatively freighted "reasonableness" inquiry, rather than the minimum core, would seem more appropriate in determining the content of socio-economic rights (Wesson, 2004: 284). This explains the course taken by the Constitutional Court in Grootboom and TAC. The vehicle of reasonableness is substantively different from inquiry into a minimum essential core of a right, in that it is more normatively open and sociologically framed.

The consensus approach

The second approach situates the minimum core in the minimum consensus surrounding socio-economic rights. Under this theory, the fledgling concept of the minimum core gains universal credibility by tying its fortunes to the basic – and not hypothetical – consensus reached within the communities constituting each field. Such an approach unites the themes of legitimacy and self-government common to both international and constitutional law and is consistent with the practice-bound determinations of the Committee, which originally relied largely on state reports to formulate the minimum core (General Comment No 3). Applying this consensual scale to socio-economic rights has advantages in ascertaining the settled meaning of each right's "core", while allowing pluralist disagreement at its fringes.

At international law, the search for the minimum consensus looks to the breadth of the ratification of the ICESCR and the measures taken by its states parties towards compliance. It also looks at additional treaties with overlapping content or more

specific obligations with respect to socio-economic rights, such as those under the Convention on the Rights of the Child, 1989 (Van Bueren, 2002: 183-4). The decisions of supranational bodies also become relevant to giving content to a minimum core (Marcus, 2006: 53, 63). Moreover, the approach goes beyond explicit international agreement to refer to national measures for protecting socio-economic rights, such as federal and state constitutional texts, stable and long-lasting legislative regimes and judicial precedent.

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The consensus approach tracks the voluntarist structure of treaty-based and customary international law and the basis of the social contract in liberal constitutional theory. Additionally, consensus serves as an operational guide for determining normative principles. Consensus is important because it reveals the normative standards that evolve with reason (Waldron, 2006: 128).

Whether necessary for sovereignty and self-government on the one hand, or for principled legality on the other hand, the consensus approach to the minimum core is nevertheless beset by limitations. In brief, the approach fails because it makes legitimate only the lowest common denominator of international protection; a problem exacerbated by the scarcity of explicit pronouncements on what the minimum formulations of socio-economic rights are and what they should be. Moreover, this approach fails in its inability to give appropriate guidance on how to determine consensus. In other words, it is difficult to determine the source of norms which count as the most legitimate basis for formulating minimum core obligations: judicial consensus as a special place for unfolding reason; governmental and intergovernmental declarations as a more appropriate test for legitimate law (captured at a particular, normatively charged moment or subject to ongoing development); or the consensus established between special experts in policy areas influencing socio-economic rights (such as public health, education, housing or land reform), who are more familiar with the institutions and organisations that deliver the services aimed at realising rights. Moreover, it is not clear whether aspects of international economic consensus, like that held between influential neoliberal economists on economic growth, must be evaluated as instances of consensus or short-term deviations.

These practical questions suggest an important insight: namely, that focusing on consensus alone thwarts the definition of a minimum core. There is therefore good reason to explore other rationales for the minimum core concept, both because consensus pulls the content too broadly and thinly, and because its theoretical promise of self-governing pluralism in both international and constitutional law proves elusive.

The obligations approach

The problems predicted by the essence and consensus approaches point to a third, somewhat different approach. This approach investigates whether a minimum obligation (or obligations) can correlate to the minimum core. Of course, this approach is not a true alternative to the normative and consensus-driven approaches as it relies on and incorporates these justifications within its assessment of obligation. That is, the more normatively convincing and empirically accepted the definition of the essential protections, the easier it is to demarcate the attendant minimum obligations. However, that pragmatic connection between sound norms and effective duties can obscure a different set of influences on the definition of the core, which take the institutional competences and remedial opportunities as the paramount guide in setting the minimum core. This shift tracks two institutional concerns: that of jurisdiction for the Committee and that of justiciability for a court.

In recent years, the Committee has produced a template of "core obligations" that straddle different rights, duties of positive provision and wider institutional strategies. Chapman and Russell (2002: 1, 9) suggest that in focusing on obligations rather than content, one need not take a position on the hierarchy of the

elements of each right, but must concentrate on the more practical issue of timing. For example, "core obligations" encompass both obligations of conduct, which require a specific course of conduct (whether an act or omission), and obligations of result, which are fulfilled by a course of conduct left to the state's discretion. As a result, the general comments of the Committee have developed an extensive template of core obligations.

Nonetheless, the Committee's list of core obligations is far from coherent. The first attempt to enumerate core obligations leaned heavily on the "organising principles" that would be necessary to substantiate the content of each right in more concrete terms. In General Comment No 12 on the right to adequate food [UN doc. E/C.12/1999/5 (1999)], the Committee gave priority to principles of availability, accessibility and quality of food-related services. Since General Comment No 14 on the right to health, however, the Committee has listed "core obligations" as those which require immediate performance. It is difficult to determine whether the Committee designated these obligations as core because of their immediate practicability or their greater moral salience. Nevertheless, the core obligations are subject to criticism on both grounds (Pillay, 2002: 61, 66-8; Meier, 2006, 735-36).

The essence approach asks the right question: why, after all, should we respect socio-economic rights if we do not attach great importance to norms like survival or dignity?

To address the practicability of the core obligations (and by implication, their affordability) the Committee has proposed the duty of assistance and cooperation on the state parties and non-state actors who are "in a position to assist". Yet such an extraterritorial obligation of assistance is, as yet, critically underdeveloped. Without it, core obligations remain uncertain.

One explanation for this disjuncture is institutional. This explanation points to the jurisdictional turf wars between different international organisations and their increasingly fragmented international regimes, rather than to the paramount obligations which correlate with the minimum core of any right. It helps to explain, for instance, why the Committee's core obligations in relation to the right to work are so markedly different from those prioritised by the International Labour Organization [General Comment No 18 on the right to work, UN doc. E/C.12/GC/18 (2006)].

Institutional concerns are also at the root of efforts to align the minimum core with justiciability. Tushnet (2004: 1 895, 1 903-5), for example, has suggested that the minimum core concept coincides with a strong model of judicial review – requiring a large measure of scrutiny and a high level of justification in reviewing the acts of government that result in any deprivations of a strongly formulated substantive right. The approach that equates the minimum core with justiciability points to the over- and under-enforcement problems of rights that make it difficult to speculate about their shape and meaning outside of the judicial context. In its most exaggerated sense, the minimum core of each socio-economic right is whatever is left for a court to rule on after the institutional questions – of standing, mootness, the political question doctrine and remedies – have curtailed its ability to give expression to the right.

Not surprisingly, what is left of the minimum core may be minimal indeed. Without reconceiving the limits of the judicial role, this room is reserved mainly for the less controversial formulations, which do not risk costly remedies or intrusive demands. Equating the minimum core content with justiciability favours the negative articulation of socio-economic rights rather than holding the positive obligations to scrutiny, notwithstanding their equivalent effect on enjoyment. Even with an expanded recognition of justiciability, as we are seeing in South Africa, the alignment of the minimum core with judicial decision rules reduces the normative force of the concept.

Conclusion

Neither the essence, the consensus nor the obligations approach

satisfactorily resolves the problem of searching for the content of the minimum core. The essence approach asks the right question: why, after all, should we respect socio-economic rights if we do not attach great importance to norms like survival or dignity? Yet it precludes a pluralist interpretative frame. Moreover, merely pointing to normative goals does not by itself resolve problems of validity and application. The consensus approach commends itself by focusing on both agreement and validity, and yet the resulting core is likewise impeded by uncertainty as to whose agreement counts. Finally, the correlation between "core" rights and "core" duties addressed in the obligations approach is defeated by the problems of identifying the duty-holders and grounding obligations, given present institutional strictures.

Questions remain as to whether we can defer much of the supervisory and enforcement work to benchmarks and indicators, much of the obligations analysis to the assessment of causality and balancing, and much of the normative and political work to more open and substantive articulations of socio-economic rights. For each of these questions, the long-standing requirements of the concept of "rights" – that they be universal, predictable and of special importance – assists. As an additional concept, the minimum core provides little in the way of additional answers.

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