

ARTICLE

Downsizing Rights: Why the “Minimum Core” Concept in International Human Rights Law Should be Abandoned

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The minimum core of economic, social and cultural rights is an often-invoked concept in international human rights law and in the constitutional case law of several countries, especially South Africa. The minimum core has been understood in different ways, but commonly refers to the notion of some essential level of protection of economic, social and cultural rights. The minimum core has been criticised for being too indeterminate, too rigid, inappropriate for judicial determination, unhelpful in the real world and undermining rights protection. Most of these criticisms can be rebutted. But more problematic is that the minimum core can have the effect of undermining, or downsizing, rights protection. In particular, by using the minimum core only in relation to economic, social and cultural rights, the hierarchy between different generations of rights might become entrenched. It is difficult to reformulate the minimum core to overcome this problem; the weakness is embedded in the concept's very essence. Accordingly, the concept should be abandoned in both domestic and international human rights law. This abandonment should result in more robust protection of all-important economic, social and cultural rights—rights arguably neglected in New Zealand law and political life.

I Introduction

The concept of a “minimum core” was initially hailed, soon after its first formulations in the early 1990s, as a valuable way for defenders of economic, social and cultural rights to respond to common objections about such rights. However, over time the minimum core concept has become the subject of critical scrutiny by scholars and courts alike, and the

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ongoing value of the concept is now debatable. What is it that has proved controversial about the idea of a minimum core? Do the objections hold much weight? And what role should the minimum core concept play in future debates about economic, social and cultural rights?

This article sets out to answer these questions. It begins in Part II by outlining the minimum core concept. It then examines five issues that have been raised about the minimum core idea, which help to explain why it has proven so controversial: first, whether the minimum core concept is intolerably indeterminate; secondly, whether the concept is overly rigid; thirdly, whether the concept is incapable of application by courts; fourthly, whether the concept neglects deprived residents of developed nations; and fifthly, whether the concept undermines full protection of economic, social and cultural rights. Part III considers whether these controversies surrounding the minimum core can be resolved. This occurs in two stages of analysis. First, it attempts to sift through the five sources of contention to ascertain which objections directed towards the minimum core can be disposed of quickly, and which will require more thought and response. Then, it tries to determine whether the objections that remain from this filtration process require that the minimum core concept be reformulated or abandoned. Ultimately, the article concludes that the best way to resolve certain controversies may be to jettison the minimum core concept altogether. The conclusion is relevant not only to those working in international human rights law, but also to those interested in how case law on economic, social and cultural rights in New Zealand might be best developed.

II The Minimum Core: Background and Controversies

This part of the article provides an abbreviated background to the concept of the minimum core and explains why it has proven so controversial. Five controversies have been selected from the case law and academic literature because they are the most frequently raised doubts, they have a certain degree of plausibility and they are all concerns directed specifically at the concept of the minimum core (rather than being concerns—for instance, those relating to the separation of powers—that are antithetical to economic, social and cultural rights generally).

The “minimum core” idea was first properly invoked in 1990 by the Committee on Economic, Social, and Cultural Rights (the Committee) in its Third General Comment on *The Nature of States Parties’ Obligations*. The Committee expressed the view that “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”.¹ (Other concepts resembling the minimum core idea had emerged earlier—for example, in German constitutional law²—but these preceding expressions are better viewed as ancestors of a concept that was born in 1990.) There was an initial ambiguity in the meaning of the “minimum core” referred to by the Committee: it was unclear whether this represented a ranking of rights within the International Covenant on Economic, Social, and Cultural Rights (ICESCR), or a ranking of interests within each right. The example given by the Committee in its General Comment was as follows:³

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- 1 Committee on Economic, Social and Cultural Rights *General Comment No. 3: The Nature of States Parties’ Obligations* E/1991/23 (1990) at [10].
 - 2 Katharine G Young “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” (2008) 33 *Yale J Intl L* 113 at 124.
 - 3 Committee on Economic, Social and Cultural Rights, above n 1, at [10].

... a State party in which any 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 is, prima facie, failing to discharge its obligations ...

The example might be thought to have equated the minimum core to certain centrally important rights in the ICESCR. However, over time the minimum core came to be understood to mean a core of interests within all economic, social and cultural rights, with scholars such as Audrey Chapman developing the concept's content by deploying it to evaluate state compliance with the ICESCR.⁴ This could be described as the *normative dimension* of the minimum core: the division it creates between various interests within rights such as the right to housing and the right to health.

Although it did not endorse the concept, the South African Constitutional Court raised the profile of the minimum core further by considering arguments for and against the concept in cases such as *Minister of Health v Treatment Action Campaign (No 2)* and *Government of the Republic of South Africa v Grootboom*.⁵ These judgments created a further wave of academic literature about the minimum core. Much of this literature—by Sandra Liebenberg and David Bilchitz,⁶ amongst others—developed what might be called a *temporal dimension* for the minimum core concept: the idea that the minimum core requires immediate enforcement of some obligations, in contrast to other obligations which might be allowed more time to be realised. It also led to various accounts of what the minimum core entails. Katharine Young suggested that three approaches became popular: one based on tying the minimum core to normative foundations,⁷ another grounded in an overlapping consensus about what constitutes the minimum core,⁸ and still another focused on the obligations arising from the minimum core.⁹ All in all, then, the minimum core is best understood as a concept (which was sketched by the Committee but has been embroidered by academics and courts) containing a normative dimension and a temporal dimension. This has resulted in a variety of different, more detailed interpretations from scholars.

Out of this rich vein of academic (and, to a lesser extent, judicial) commentary on the concept, the minimum core has attracted some controversy. That controversy can be traced back to five ruptures in the debates around the minimum core. First, there has been a bluster of concern about the indeterminacy of the notion of a minimum core. The minimum core concept was developed initially to respond to the “inexact” nature of the obligation to progressively realise rights in the ICESCR, as Chapman points out.¹⁰ The fact that the concept itself seems indeterminate (despite the phrase “minimum core” connoting some scientific concreteness) has caused especial consternation for courts and scholars reckoning with the idea. Yacoob J, giving the judgment of the South African Constitutional Court in *Grootboom*, expresses this concern (stating, “it is to be noted that

4 Audrey R Chapman “A ‘Violations Approach’ for Monitoring the International Covenant on Economic, Social and Cultural Rights” (1996) 18 Human Rights Quarterly 23 at 46–65.

5 See *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15, [2002] 5 SA 721; and *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, [2001] 1 SA 46.

6 See David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, Oxford, 2007) at ch 6; and see also Sandra Liebenberg “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?” (2002) 6 Law, Democracy and Development 159 at 176.

7 Young, above n 2, at 116–117 and 126–140.

8 At 117 and 140–151.

9 At 117 and 151–164.

10 Chapman, above n 4, at 26.

the [third] general comment does not specify precisely what that minimum core is”),¹¹ but he is just one of many who has raised the spectre of indeterminacy.

Secondly, seemingly paradoxically, there has been a swirl of discussion over whether the minimum core notion is unduly rigid. The minimum core idea aims to give essential content to economic, social and cultural rights; it seeks to outline the basic obligations, or services or outcomes that need to be secured for rights to be respected. But that impulse towards concretising a floor of protection for rights has resulted in fear that the minimum core idea does not allow for sufficient flexibility—for a government in one jurisdiction, for governments across jurisdictions, and jurisdictions over time (as the content of the “core” may change). In this vein, in *Mazibuko v City of Johannesburg*, a South African Constitutional Court case concerning the right to access water, O’Regan J noted “[f]ixing a quantified content [for the right] might, in a rigid and counter-productive manner, prevent an analysis of context.”¹²

A third reason for the controversy is that some have questioned whether the minimum core concept is conducive to implementation by the courts. In *Grootboom*, Yacoob J lamented “the complexity of the task of determining a minimum core obligation” without “the requisite information” when considering a submission calling for enforcement of a minimum core of the right to housing.¹³ Whereas the Committee examined “reports by reporting states”, “[t]his Court does not have comparable information”, he said.¹⁴ While Yacoob J may have been referring to the information presented in the case before him, it is at least arguable that he was also commenting on the institutional limitations faced by courts more generally: unlike other bodies, courts cannot survey social science and public policy literature in order to determine the minimum core of a right.

A further source of contention relates to whether the minimum core cannot assist those who face deprivation in the developed world. As Young eloquently explains, this criticism:¹⁵

... faults the minimum core for directing our attention only to the performance of developing states, leaving the legal discourse of economic and social rights beyond the reach of those facing material deprivation in the middle or high income countries.

The idea is that the minimum core concept can only be deployed by those in developing countries, deflecting attention away from injustices in developed countries. Perhaps unwittingly, Murray Wesson demonstrated this problem, stating “[i]n the developed world one might argue that the minimum core has generally already been realised through the welfare state.”¹⁶

Finally, on a related note, it has been argued that because the minimum core focuses on the bare essentials of rights protection, it might diminish the need for states to fully respect the rights contained in the ICECSR. In Karin Lehmann’s words, when a court has to “distinguish between minimum, or essential, levels of health care versus non-essential forms of health care”, there is a danger that the “‘outer’ core” of rights protection that is

11 *Grootboom*, above n 5, at [30].

12 *Mazibuko v City of Johannesburg* [2009] ZACC 28, [2010] 4 SA 1 at [60].

13 *Grootboom*, above n 5, at [32].

14 At [32].

15 Young, above n 2, at 114 (footnote omitted).

16 Murray Wesson “Disagreement and the Constitutionalisation of Social Rights” (2012) 12 HRL Rev 221 at 242.

created (alongside the minimum core) is not properly protected.¹⁷ Also, because the minimum core is concerned with concrete realisation of a right in an immediate fashion, use of the minimum core concept may marginalise other obligations relating to the achievement and promotion of rights,¹⁸ and undermine longer-term efforts to secure rights protection.

III Can the Minimum Core Concept Survive these Criticisms?

A full consideration of the arguments for and against the minimum core might resolve the five controversies mentioned above. It may be the case that these controversies dissolve after careful thought is given to whether the underlying criticisms have any weight. This part of the article begins by adopting that strategy. However, it may be that some of these controversies have endured for good reason and cannot be so easily batted away. It may be that the only way such controversies can be resolved is through reformulating or abandoning the minimum core concept altogether. The latter section of this part considers that proposition.

On closer inspection, it seems that convincing counterarguments can be mounted to rebut the first four doubts raised about the minimum core concept above. While it is understandable that the South African Constitutional Court has raised doubts about indeterminacy, first of all, it is unclear that the minimum core of rights is any more indeterminate than the meaning of rights more generally—including “traditional rights” such as freedom of speech. It seems an entirely compelling response to this doubt that more determinacy can be achieved over time, by “reasoned elaboration” of principles through different cases (of the kind advocated for by the legal process school).¹⁹ Sandra Fredman notes, persuasively, that Robert Alexy’s method of principled optimisation can be used to determine “which parts of the obligation [pertaining to the minimum core] are urgent”.²⁰

As for the second concern relating to rigidity, Bilchitz explains that those making this criticism underestimate the flexibility in the minimum core—and to the extent that any rigidity exists, that is justifiable given the importance of the rights secured by the minimum core.²¹ Such a reply appears persuasive to those who accept at least that economic, social and cultural rights are defensible in principle.

The third source of controversy, relating to the courts’ inability to apply the minimum core concept, may contain a kernel of truth: a court may not always have sufficient information to determine the limits of a minimum core. However, this problem can be worked through on a case-by-case basis; it does not represent a fatal objection to the minimum core concept. As Liebenberg has noted, the lack of information is a challenge arising in the application of other rights as well, and a court need not be prescriptive in

17 Karin Lehmann “In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core” (2006) 22 Am U Intl L Rev 163 at 182.

18 See Jonathan Klaaren “A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights” (2005) 27 Hum Rts Q 539 at 552.

19 See the discussion in Jeremy Waldron *Torture, Terror, and Trade-offs: Philosophy for the White House* (Oxford University Press, Oxford, 2010) at 285.

20 Sandra Fredman *Human Rights Transformed* (Oxford University Press, Oxford, 2008) at 85.

21 Bilchitz, above n 6, at 208.

outlining the minimum core.²² Lack of information is a practical factor that courts should bear in mind, but it is not a consideration that undermines the minimum core concept.

Fourthly, it appears that the concern that the minimum core might lead to an excessive emphasis on developing countries’ standards can be met with a robust approach to implementing the minimum core in the developed world (which ensures that breaches are not overlooked), coupled with a willingness to maintain accountability in the developing world where the minimum core is not being satisfied. These four controversies can hence be resolved through careful reasoning and thoughtful responses to the doubts raised.

The fifth controversy, however, is not so easy to dissolve; indeed, it becomes even more difficult to overcome upon close scrutiny. Some might say that it is quite defensible to prioritise the minimum core over other aspects of a right. However, this is to neglect major components of economic, social and cultural rights through a gloss that arguably finds no basis in the text of the international covenants. It seems problematic for the status of rights that, in effect, rights might be read down to ensure compliance only with the minimum core. Liebenberg comments in general terms:²³

The strategic importance of socio-economic rights as tools in anti-poverty initiatives will diminish if the courts interpret them as imposing weak obligations on government and fail to protect them as vigorously as they do the other rights in the Bill of Rights.

Unfortunately, this may be the effect of enforcing the minimum core. Enforcing the minimum core may amount to imposing only “weak obligations on government” if only parts of rights are enforced.²⁴ More perniciously, it may lead to unequal protection between civil and political rights, and economic, social and cultural rights, since only the latter group is limited by the minimum core concept.

This lingering fifth controversy might be resolved by reformulating the minimum core concept or abandoning it altogether. Does Young’s reformulation of the minimum core provide a solution to the problem of two-tier protection of rights? Young proposes a focus on benchmarks and indicators of compliance with economic, social and cultural rights, coupled with recognising the open-ended nature of rights, the need for balancing rights against other interests, and the utility of using “minimum core” language as a rhetorical device.²⁵ This alternative approach is superficially alluring. But it does not escape the problem faced by the minimum core: namely, that a commitment to immediate yet partial enforcement of a right may imperil full protection of that right in the long term. Indeed, Young’s recommended use of benchmarks and indicators may exacerbate the problem, leading to further fixation on implementing minimum standards at the expense of more complete rights protection and promotion.

Ultimately, the problem of under-protection of rights through deployment of the minimum core concept seems so difficult to shake off that it might justify complete abandonment of the concept. Constraints of brevity prevent an alternative solution from being properly developed here. However, it is suggested that an approach placing more emphasis on the use of the proportionality test in analysis of economic, social and cultural rights may be valuable; that is, alleged breaches of economic, social and cultural rights should be evaluated with reference to a proportionality test, as occurs with breaches of

22 Liebenberg, above n 6, at 174.

23 At 160.

24 At 160.

25 Young, above n 2, at 164–173.

other rights.²⁶ That approach redirects attention from the definition of the right towards the propriety of state conduct, and allows judges to draw on more familiar jurisprudence. It also has the advantage of bringing economic, social and cultural rights onto the same plane as civil and political rights, something not achieved by use of the minimum core concept.

Some might say that this undermines the jurisprudence of the Committee. However, there is a need for constructive criticism of the Committee from supporters of economic, social and cultural rights; a commitment to the cause of such rights does not require a defence of all of the Committee's outputs. Others might argue that abandoning the minimum core could set back rights protection, removing the need for urgency and reintroducing indeterminacy. This is an empirical assertion that needs testing. But this article proceeds on the optimistic, positive presupposition that courts and rights-protecting institutions around the world may now be ready to more wholeheartedly embrace economic, social and cultural rights—inner core and outer core included—and that such a robust commitment can only advance protection of rights around the world.

IV Conclusion

In sum, this article has offered five reasons for the controversy of the minimum core concept. They need not be recapitulated here but can be synthesised in the following way: the minimum core concept has proven controversial because of uncertainty about the scope and content of the concept, and concerns about the implications of applying the concept (for courts, developed countries, and rights protection generally). The foregoing analysis has shown that most of these controversies can be resolved through consideration of counterarguments. But one controversy cannot be disposed of so easily: whether the minimum core concept undermines the full protection of economic, social and cultural rights. It has been suggested that this can only be resolved by abandoning the concept altogether.²⁷ The abandonment of the minimum core concept may, it is hoped, pave the way for a regime of promotion of economic, social and cultural rights that is more long-term, equivalent to the fuller protections offered to civil and political rights, and more conducive to the public interest.

No attempt has been made in this article to focus on New Zealand jurisprudence on economic, social and cultural rights. But as lawyers and judges begin their belated efforts to weave economic, social and cultural rights into the fabric of New Zealand law, the suggestion of this article is that they should not give the minimum core concept too much weight in the case law. Rather than deepening or enlarging human rights protection, the minimum core concept is likely—in effect—to downsize economic, social and cultural rights. This outcome must be resisted, given that economic, social and cultural rights have already been neglected in New Zealand law (and arguably in New Zealand politics) for some time, and that the realisation of these rights is an urgent ethical priority.

26 An approach with some similarities to my suggested solution is developed in: Xenophon Contiades and Alkmene Fotiadou "Social rights in the age of proportionality: Global economic crisis and constitutional litigation" (2012) 10 *ICON* 660.

27 This may have implications for civil and political rights, since some areas of civil and political rights jurisprudence (such as free speech jurisprudence on political speech as opposed to other forms of speech) have flirted with an equivalent of the minimum core concept.