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**LASDES E-JOURNAL**

# **RULE BOOK**

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## INDEX

1. RULES.....Page no. 03
2. SAMPLE MANUSCRIPT.....Page no. 06
3. COPYRIGHT AGREEMENT.....Page no. 12

# **LASDES E-JOURNAL**

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## MINIMUM CORE RIGHTS UNDER THE ICESCR

By Legal Aid & Social Development Educational Society

### Abstract

*Human Rights, in moral context, are independent rights irrespective of customary practices, international regulations or domestic laws. By the very virtue of humanity, some core fundamental human rights are obligatory to be observed by every State for every human being irrespective of any condition and prevailing circumstances.<sup>1</sup> In one understanding, Human Rights are broadly categorized as under civil, political, economic, social and cultural rights. Considering utility and optimization of such human rights one cannot concretely set an apex-threshold of their realization. Its utmost realization may vary from one state to another and be dependent on various factors such as state resources, regional context of such rights and administrative structures encompassing the Executive and the Judiciary. In such proposition, the concept of 'minimum core' becomes essentially important. Despite identification of human rights and the need for its normative realization, in practice, no state can stand out as a role-model for fulfilling all its obligations under human rights as the realization is progressive and not an identified goal. Thus, in this constant chase and growing understanding of human rights one has to identify a base-line, which will provide for a starting-point beneath which the entire postulate will lose its connotation. In respect of human rights being an existential and fundamental right, arguably requires a bare minimum standard of protected obligation and basic rights being extended to all of humanity. Hence, the concept of 'minimum core' could lead us towards a possible solution of providing a consensual set of basic human rights. For the present argument, it is restricted to economic, social and cultural rights in light of the International Covenant on Economic, Social and Cultural Rights (ICESCR).*

### Introduction

In 1990, the Committee on Economic, Social and Cultural Rights (CESCR) first adverted the concept of the 'minimum core' in the committee's General Comment No. 3 on the 'Nature of States Parties' Obligations' noting that, "a minimum core obligation to ensure the satisfaction of,

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<sup>1</sup> John Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now*, Commissioned by the Nordic Trust Fund and the World Bank, 2017, p. 1,5.

at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”<sup>2</sup> Expanding with an example it identifies right to food, essential & primary health care, shelter & housing and basic education as core minimum rights, incumbent and obligatory for the state to provide to all its citizens. The reasons that the committee decided to adopt the concept of minimum core were two-fold; first, they recognized it as a necessary obligation after experiencing compliance concerns in reports of states and second, if such a concept is not adopted then it would defeat the reason and purpose of the covenant. Soon after its adoption the idea of having a minimum core was flooded with controversy, including the very reasons for its adoption. In this article, I endeavour to identify the key objections to the concept of ‘minimum core’ and thereafter argue that despite controversies the concept of the minimum core is essentially important for realization of economic, social and cultural human rights.

Though surrounded by various controversies, the concept of minimum core has four key objections; first, uncertain contents leading to impractical implementation, second, prescribing an invariant minimum essential level of human rights across the world making it rigid or non-flexible, third, diminishing the need to secure full-potential of rights under the ICESCR (primarily in respect of developed nations) and fourth, no real basis for applying different standards for civil and political rights to that of economic, social and cultural rights. Although Bilchitz identifies the reasons for adoption to be elusive, but an improper or incorrect reason for adoption cannot dismiss the concept of minimum core altogether.

## **Conflicts and Skepticisms**

### **(a) First Objection**

The most outright skepticism of the concept of minimum core is that the covenant is unclear as to what formulates minimum core and therefore in absence of clear identification states cannot be expected to fulfill their obligation. As the South African Constitutional Court’s judge, Yacoob J., writes in *Grootboom*<sup>3</sup>, “the general comment does not specify precisely what that minimum core is.” Various attempts have been made to bundle out the minimum core obligations. Chapman records a set of minimum core requirements based upon the committee’s concluding observation over the period of time. The committee through general recommendations has itself elaborated to define and identify minimum core standards. A view adopted by the committee is

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<sup>2</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para 10.

<sup>3</sup> *Republic of South Africa v. Grootboom* (1) 2001 (1) SA 46.

that minimum core obligations are the ones which require immediate compliance. This would turn out to be harsh on states with constrained resources and at the same time the minimum core rights would remain practically non-justiciable. It further requires realization of rights over time as being a principal part of the covenant, where obligation of ‘conduct’ is distinguished from obligation of ‘result’. Every state participant is effectively required to take immediate measures to ensure compliance of the minimum obligation immaterial of the result. But this too fails to provide clear definition or content to the minimum core obligations.

Perhaps Fredman produces an effective solution building upon the concept of ‘principles’, developed by Alexy. Alexy’s approach is that principles are not binary in the sense of being fulfilled or breached, but instead can be satisfied to varying degrees. This would serve both the concept of minimum core and doctrine of progressive realization. If minimum core could be identified to be a set of principles, complimenting with the argument raised by Tasioulas that non-core obligations are enhanced standards and levels of minimum core obligations<sup>4</sup>, then minimum core could be idealized as a cohort of principles which support all economic, social and cultural rights. Fundamental Rights enshrined in the Indian Constitution share a similar feature. Article 21<sup>5</sup> of the Constitution has been interpreted in ADM Jabalpur<sup>6</sup> as sole repository of all rights to life. Likewise, Section 11<sup>7</sup> to the Bill of Rights in the South African Constitution guarantees right to life which requires principle-based application in practice.

### **(b) Second Objection**

The second objection is that the minimum core prescribes an invariant minimum essential level of human rights across the world. This universal standardization makes it rigid and non-flexible, not accounting for variation of resources across different states. Tasioulas defends that minimum core has to be universal otherwise it will lose its significance.<sup>8</sup> He clarifies that the minimum core obligations are so basic that they cannot vary between states as the covenant requires least, minimum and essential level of satisfaction. It is further arguable that the least-minimum ‘essential level’ establishes the right in the first place as the state formally obliges by conduct, which if not observed will defeat the objective of the covenant. Considering the aspect of state

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<sup>4</sup>Tasioulas, p. 16.

<sup>5</sup> Article 21- Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law

<sup>6</sup> ADM Jabalpur v. Shivkant Shukla AIR 1976 SC 1207.

<sup>7</sup> Section 11- Everyone has the right to life.

<sup>8</sup>Tasioulas, p. 4.

resources, Tasioulas comments that it could be a dilemma between availability versus allocation.<sup>9</sup> For example, The Indian government in June, 2019 has announced establishment of twenty-two new Medical Research Institutes at the cost of \$6.80 Billion Dollars, whereas the condition of basic primary education continues to deteriorate. Further, extreme circumstances including war and natural disaster could seriously handicap the state to allocate resources towards the minimum core. Signatory states are facing problems such as the ongoing internal disturbance in Iran and Bolivia; war struck scenarios in states like Syria, Iraq, Israel & Ukraine; Australian bushfire; terrorism in Pakistan and recent event of April-2015 Nepal earthquake disaster to quote a few possible examples of extreme circumstances. For resource-rich states like Australia it could be easier when compared to Pakistan or Nepal to give immediate effect to minimum core obligations. To this comes a unique solution, Tasioulas differentiates between ‘immediate compliance’ and ‘time to comply’ as two different concepts.<sup>10</sup> Where minimum core obligations are rights requiring ‘immediate compliance’, primarily defining minimum core, and ‘time to comply’ may differ across states. The states taking time to comply will have to demonstrate that all efforts and resources are being utilized for its fulfillment. This ensures that the standard of minimum core is universal and at the same time provides for flexibility.

Young<sup>11</sup> argues, as coded by Tasioulas, if the threshold is set at its lowest minimal level “by asking what is feasible for the most dysfunctional or ‘failed State’ in the world”<sup>12</sup>, then the minimum core would be generally realized in developed nations. In principle, this leads to the third objection that the minimum core diminishes the need to secure full-potential of rights under the ICESCR, especially in context of developed nations. In context of the minimum core rights, South African Constitutional Court’s judge O’Regan J. comments in Mazibuko<sup>13</sup> that, “a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context.” It is important to realize that the covenant is to be read as a whole, where it is incumbent for the developed states to oblige with minimum core and thereafter focus on non-core obligations under the doctrine of progressive realization. The text does not suggest any stagnation, rather expects states to continually fuel the threshold. It further might be the case

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<sup>9</sup>Tasioulas, p. 8.

<sup>10</sup>Tasioulas, p. 23, 24.

<sup>11</sup> Katharine Young, *The Minimum Core of Economic and Social Rights*, (2008) 33 Yale J. Int’l L.

<sup>12</sup>Tasioulas, p. 23.

<sup>13</sup>Mazibuko v. City of Johannesburg, [2009] ZACC 28 at 60.

where self-realized states in normative compliance of minimum core obligations may volunteer to assist and aid lagging states by sharing technology, research and surplus resources.

### **(c) Third Objection**

The last key objection to the concept of minimum core is that there is no real basis for applying different standards for civil and political rights to that of economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights (CESCR) stated that ‘The shocking reality ... [is] that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action.’<sup>14</sup> Though deeply interconnected, this ground reality expression denotes that the two set of rights have a different footing and thus require separate standard in operation. Fredman notes that major western democracies like Canada, United States of America and United Kingdom do not explicitly include socio-economic rights under their human right protection law.<sup>15</sup> In fact, this distinction creates more focus on economic, social and cultural rights; which otherwise would have remained infused with the other set of rights failing to demand its due status from the state. Even though these rights are ‘indivisible and interdependent and interrelated’<sup>16</sup> but can arguably be divided on basis of ideology, content, state interaction, justiciability and others.<sup>17</sup> Given the element of distinction this objection fails to demerit the minimum core concept because even if integrated with political and civil rights the concept will not lose its essence. Alternatively, the concept of minimum core provides an incentive for states to justify and contribute as participatory elements to the covenant by ensure minimum required enforcement and forming a baseline for progressive development of human rights.

### **Conclusion**

A modest reading of paragraph 10 of General Comment No. 3 will prima facie clarify that the expectation of the ‘minimum core’ concept is to ensure satisfaction of economic, social and cultural rights at its least, minimum and essential standards. In a way, it notifies that the existence of these rights should be felt in presence and practice in each participating state. This

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<sup>14</sup> Cited in Sandra Fredman, *Structure of Positive Duties* in Human Rights Transformed: Positive Rights and Positive Duties (2008), p. 60.

<sup>15</sup> Sandra Fredman, *Structure of Positive Duties* in Human Rights Transformed: Positive Rights and Positive Duties (2008), p. 62.

<sup>16</sup> Fredman, p. 62.

<sup>17</sup> Fredman, Chapter 3, p. 60-68.

standard is universal and requires immediate compliance by fulfilling obligations of ‘conduct’ and thereafter obligation of ‘result’. For states who normatively observe minimum core shall proceed to pursue the objective of the covenant under the doctrine of progressive realization. The minimum core concept positively propagates an assurance of achievement within lagging states to achieve the bare minimum standard; laying down a starting point.

State party failing to achieve minimum core obligations due to a lack of available resources are mandated to demonstrate that every effort was made to use all resources that were at its disposal. This comes across as a consequential remedy to protect the concept, an interim liberty which is not to be used leniently by states, but only after much due diligence. Thus, the minimum core concept will never fail its utility and will continue to be in function until bare minimum obligations are complied with by all member states.

Adding to the context and content of the minimum core obligations the comment further records as an example that, “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 under the Covenant.”<sup>18</sup> This example lays down a base for understanding the realm of minimum core, which covers basic rights like right to food, right to health care, right to shelter(housing) and right to education. One does not have to critically examine or interpret the text to understand the boundary within which the concept of ‘minimum core’ functions. In a way, identification of least, minimum and essential levels of each right have been signaled in the example. Amidst raging controversies, both lagging and leading states should utilize the ICESCR platform (in conjunction with allied organs<sup>19</sup>) to identify and codify outlining principles that connect to universally accepted economic, social and cultural rights. Thereafter, domesticating these identified principles into rights and duties, which may be pre-existing in legislations or through fresh enactments/amendments; thereby making them justiciable.

Thus, in light of the above submissions the minimum core concept is essential and relevant to ensure effective establishment, propagation and protection of economic, social and cultural rights in party states to the ICESCR. (Word Count: 2158 words)

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<sup>18</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, para 10.

<sup>19</sup> International Covenant on Economic, Social and Cultural Rights, *Resolution 2200A(XXI)*, 16 December 1966, E/1991/23, Part IV.

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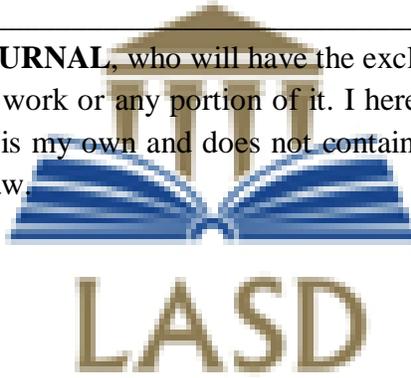
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