

**The Ambivalent Content of Minimum Core of Socio-Economic  
Rights and Its Reflection in Domestic Legal Systems  
A-Comparative Perspective**

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## Introduction

The recent wave of popular uprisings sweeps across the Arab world particularly the protest against the governments of Tunisia, Libya and Iraq, have their cause in the poor provision or lack of basic service, among others.<sup>1</sup> Their root causes of most of these skirmishes are the governments' failure to live up to their promises in terms of providing basic services and complained delay in housing project (particularly in Libya), food, water and power shortages.<sup>2</sup> Recently, South Africa had also experienced violent protests for lack of basic services. The protests "comes as frustrations boil over at the Government's record of fifteen years after Apartheid, at providing townships with basic services such as electricity, running water, housing, job and sanitation" .<sup>3</sup>

All these protests demand placing renewed emphasis upon socio-economic rights and violations of socio-economic rights should no more be treated with less urgency or their neglect is no more tolerable and action should be taken soon. In fact, one of the fundamental underpinnings of the international consensus on human rights norms is that all human rights are universal, indivisible, interdependent and interrelated and should be treated in a fair and equal manner with the same emphasis.<sup>4</sup> This in turn put all the civil, political, economic, social and cultural rights on an equal footing. To this end, for instance, everyone has the right to effective remedy in the event of violation of these

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<sup>1</sup> CNN World available at:

<http://edition.cnn.com/2011/WORLD/africa/03/06/middle.east.africa.unrest/>

<sup>2</sup> Ibid, One of the protesters in this protests told CNN that "One government comes and another leaves, and nothing has changed in this town for decades."

<sup>3</sup> Supra note 1

<sup>4</sup> See Vienna Declaration and Programme of Action, World conference on Human Rights, Vienna, June 1993, UN Doc A/CONF157/24(Part I) at 20 (1993, 32 ILM1661 (1993) Paragraph 5. it states that "all human rights are universal, indivisible and interdependent and interrelated."

fundamental rights.<sup>5</sup> Nevertheless, despite a rhetorical commitment to the indivisibility and interdependence of human rights, socio-economic rights are given lesser status and their enforcement is far behind that of civil and political rights though currently the scenario is being improved in that socio economic rights are enjoying better status and is very moving field.<sup>6</sup> Thirty six years after coming in to force of the Covenant on Economic, Social and Cultural Rights, hereinafter called the Covenant, the issues of food, water, health and work are pressing reality and far hope for the most of the world's population.<sup>7</sup> There are a number of reasons for difficulties facing effective enforcement and monitoring of the implementation of the Economic, Social and Cultural Rights.

The ideological perception about these rights as being social policy, benefit and welfare (aspirational goals) than legal entitlement requiring immediate action and realization as a result of which violation of Economic, Social and Cultural Rights tends to be viewed as social injustice than rights violation is one of those reasons.”<sup>8</sup> Though the covenant provides for progressive realization as standard for enforcement of various rights under the Covenant, this standard has a number of issues unresolved and as such constitute problematic standard to conceptualize.<sup>9</sup> Moreover, the vague and indeterminate way in which economic, social and cultural rights are articulated and lack of intellectual clarity

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<sup>5</sup>Universal Declaration of Human Rights adopted by General Assembly resolution 217, 1948, Art.8

<sup>6</sup> Asbjør Eide et.al (eds.), *Economic, Social and Cultural Rights: A Text Book*, Martinus Nijhoff Publishers, 1995, Page 15. See also Audrey Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, *Human Rights quarterly* 181(1996) 23-66 section II

<sup>7</sup> Mashood A. Baderin and Robert Mccorquodale (eds.) *Economic, Social and Cultural Rights in Action*, Oxford University Press, 2007, Page 19

<sup>8</sup> Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International, Law* Hart Publishing 2009, Page 5

<sup>9</sup> Audrey Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural rights* (Antwerp, Intersentia, 2002) page 4-5

as to the definition and scope of these rights continues to be one of the fundamental obstacles to further developing their content and to spelling out a framework for action that allows for their progressive realization.<sup>10</sup> In addition, the range of information required in order to monitor compliance with the Covenant effectively and the relative nature of state obligations (i.e. the fact that obligation of each state depends on the extent of available resource in the respective state) all present challenges to develop rigorous monitoring tools.<sup>11</sup>

The question of how to enforce social rights is still a work in progress. In this regard, over the last two decades promising achievements to the effect of developing mechanisms to deal with monitoring effective implementation of socio economic rights both at international and domestic legal system has been witnessed.<sup>12</sup> To this end, the work of the Committee on Economic, Social and Cultural rights<sup>13</sup> coupled with promising development in domestic legal systems of few countries like South Africa,

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<sup>10</sup> See Circle of Rights: Economic, Social and Cultural Rights Activism, University of Minnesota Human Rights Resource Center a Training Resource, Available at: [http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module8.htm#\\_edn1](http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module8.htm#_edn1) (accessed on 05/01/2011)

See also, Audrey Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, *Human Rights quarterly* 181(1996) 23-66

<sup>11</sup> See Audrey Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, *Human Rights quarterly* 181(1996) 23-66 n.16 (1987). See also Eitan Felner, A New Frontier in Economic and Social Rights Advocacy? Using Quantitative Data for Human Rights Accountability: Center for Economic and Social Rights, 2009 Page 2, available at:

<http://www.cesr.org/downloads/A%20new%20frontier%20in%20ESC%20advocacy.pdf> (Accessed on 07/01/2011)

<sup>12</sup> Fons Comans (ed.) *Justiciability of Economic and Social Rights, Experience from Domestic Systems* (2006, Intersentia), See also Audrey Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural rights* (Antwerp, Intersentia, 2002)

<sup>13</sup> The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts established under ECOSOC Resolution 1985/17 and empowered to monitor implementation of the International Covenant on Economic, Social and Cultural Rights by States parties



India, Columbia and Argentina are worth mentioning.<sup>14</sup> In this regard, the minimum core of socio economic rights dominates socio economic rights discourse in the international realm of supervision and also the scholarly discourse around socio-economic rights.<sup>15</sup> In addition, attempts has been made by scholars and various organs in the field to facilitate the operation of the “progressive realization” obligation attached to each right by introducing methodologies and approaches like the Core obligation approach, the Violation approach, role of indicators and bench marks, budget analysis approach and reasonableness test approach.<sup>16</sup> Though the concept of core content of a right has its origin in the work of various scholars,<sup>17</sup> the normative base of this approach laid its foundation in the General Comments of the Committee on Economic, Social and Cultural Rights, hereinafter called the Committee.<sup>18</sup>

The whole idea behind the development of the Minimum core approach to the economic and social rights is to narrow down the existing elusive and vague obligations of states under international human rights instruments and national constitutions by conferring minimum legal content to socio economic rights thereby by creating rights capable of claim and judicial enforcement, in the event of violation.<sup>19</sup> Putting simply the concept is introduced to facilitate the “progressive realization standard” under the Covenant.

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<sup>14</sup> Fons Comans (ed.) *Justiciability of Economic and Social Rights* at Supra note 12

<sup>15</sup> Joie Chowdhury , *Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights– A Comparative Perspective*, Cornell Law School Inter University Graduate Student Conference Papers, 2009

<sup>16</sup> Audrey R. Chapman: *The Status of Efforts to Monitor Economic, Social, and Cultural Rights*, Page 152

<sup>17</sup> See for instance Bilchitz David, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio- Economic Rights*, Oxford University Press, 2007, page 186

<sup>18</sup> Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No.3, *The nature of States parties obligations* (Art. 2, paragraph.10): 12/14/1990.

<sup>19</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 113 (2008).

In doing so, “the minimum core requires priority to be given to address the severest deprivation of socio economic rights while at the same time requiring concrete steps to be taken towards realizing a higher level of provision that guarantees individuals the necessary conditions for realizing a wide range of purposes.”<sup>20</sup> A state party which fails to “satisfy minimum core obligations due to unavailability of resources has to bear a heavy burden of justification 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.”<sup>21</sup> Nonetheless, there are a number of controversies and unsettled issues accompanying the concept starting from the basic one of terminology.<sup>22</sup> Can minimum core be enforced as individual rights? Can it provide a universal standard that are applicable across varied social, developmental and resource context of specific countries? What are the normative goals or criteria to determine minimum core of a particular right? Whether minimum core is absolute (context blind) right? All these issues gave rise to arguments among the scholars in the field justifying or objecting adoption of the approach as a tool for interpreting and monitoring implementation of socio economic rights. The paper will attempt to depict and analyze, these issues and the content and various theoretical framework underlying the minimum core approach and how the concept is being approached within the domestic legal systems of selected states.

Nonetheless, some controversies concerning socio economic rights like whether socio economic rights can be construed as rights or policy goals or whether they are capable of judicial enforcement by domestic courts are beyond the reach of the paper. In addition,

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<sup>20</sup>See Bilchitz David, Poverty and Fundamental Rights, Supra note 17

<sup>21</sup> CESCR’s General comment 3, Supra note 17

<sup>22</sup> Audrey Chapman and S. Russell (eds.), Core Obligations , Supra note 9, Page 8 & 9

the writer restricts analysis of the legal operation of the concept (both at international and constitutional level) to economic and social rights and as such any deliberation either by international bodies or domestic courts to apply the concept to cultural rights or other human rights is beyond the scope of the paper and hence will not be dealt with. In the course of dealing with the aforementioned issues surrounding the minimum core concept, the paper is organized into four chapters.

Chapter one is devoted to description of the origin of the Core Minimum Approach, the definition and theoretical framework underlying the concept and also other approaches to monitor enforcement of socio economic rights like indicators and benchmarks and budget analysis and their relation with the minimum core approach. As such attempt will be made to briefly describe the origin of the concept and how it takes its present form.

The second chapter is concerned with the description and analysis of how the concept is being approached at international level, with particular emphasis on the general comments of the Committee on economic, social and cultural rights (CESCR). Various issues and controversies surrounding the concept will also be raised and analyzed in this chapter.

The third chapter, being the most important part of the paper, will endeavor to explore and analyze in detail how the concept of Minimum core is being approached in domestic Legal Systems. To this end the status of socio economic rights under national constitutions will be examined. Besides domestic court jurisprudences involving litigation for the enforcement of socio economic rights and the standard applied by the courts will be seen in detail with especial emphasis on South Africa, India and Colombian experiences.

The final Chapter will, by way of conclusion, show whether the minimum core approach can be employed as an effective mechanism to interpret and monitor socio economic rights on the basis of the findings of preceding chapters and conclude. The chapter will end by concluding the discussion on the topic.

# CHAPTER ONE

## The Origin, Definition and Theoretical Framework of Minimum Core Approach

### 1.1 The Origin and Definition of Minimum Core Approach

#### 1.1.2 The Origin of Minimum Core Concept

The origin of minimum core concept has traced to various sources by different writers.<sup>23</sup>

Some trace the origin of the concept in the article written by Andreasson, skalnes, smith and stoke in 1987<sup>24</sup> and which is latter included in Limburg principle<sup>25</sup>. These scholars developed a notion that “essential content of a right are those that are necessary in order for individuals to be able to provide higher levels of socio economic well being for themselves in the future.”<sup>26</sup> Nonetheless, they didn’t provide what these higher level or threshold consists of. Yet others refer to national constitutions and works of constitutional courts as the first articulating the concept.<sup>27</sup> Accordingly the concept has recognized in some constitutions like the German constitution<sup>28</sup> and being applied in the

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<sup>23</sup> See, for instance, Katharine G. Young, The Minimum Core of Economic and Social Rights, at supra note 19. See also Bilchitz David, Poverty and Fundamental, at supra note 20 Page.186

<sup>24</sup> Bilchitz David, Poverty and Fundamental Rights at supra note 20, Page.186

<sup>25</sup> Ibid and Limburg principle is a non binding principle, aimed at furthering implementation of the ICESCR by elaborating the nature and scope of state parties obligation under the ICESCR. The principle is available at, [http://www.acpp.org/RBAVer1\\_0/archives/Limburg%20Principles.pdf](http://www.acpp.org/RBAVer1_0/archives/Limburg%20Principles.pdf). See also, Paul De wart and others (eds.) International law and development, Martinus Nijhoff publishers, 1988, page 277. Limburg principle is latter elaborated by Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, available at, [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)

<sup>26</sup> Ibid

<sup>27</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights, at supra note 23.

<sup>28</sup> Ibid

realm of civil and political rights as in the case of the South African Constitutional Court, which has recognized that there are core aspects of right to privacy.<sup>29</sup> For example, in the German basic Laws “there is the core or essential content of certain constitutional rights lying beyond the reach of permissible limitation.”<sup>30</sup> Even in the realm of international human rights laws the concept of core content has application in some of civil and political rights like the right to privacy, prisoner’s rights.<sup>31</sup> Hence, the notion of core aspect of a right is being used in another context and as such is not novel idea of application only in the adjudication of socio economic rights.

Nonetheless, the Committee on the Economic, Social and Cultural rights is the first international organ to articulate the concept in the discourse of socio economic rights.<sup>32</sup> The Committee introduced the concept of minimum core approach in 1990’s and since then the approach has been developed, modified and concretized in subsequent general comments in relation to particular rights in the Covenant like the rights to food, health, adequate housing and education.<sup>33</sup> The committee gave two reasons for introducing the concept in the interpretation of socio economic rights.<sup>34</sup> First, it found the concept as a necessary tool to check compliance with the obligation imposed by the Covenant and secondly the Covenant would largely be deprived of its *raison d’être* if read without the minimum core obligation.<sup>35</sup> However, the committee is not always consistent in its

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<sup>29</sup> Bilchitz David, Poverty and Fundamental Rights at Supra note 24, page 190

<sup>30</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights at supra note 27

<sup>31</sup> See Bilchitz David, Poverty and Fundamental Rights, Supra note 29. see also Fons Comans (ed.) *Justiciability of Economic and Social Rights, Experience from Domestic Systems* (2006, Intersentia)

<sup>32</sup> CESCR’s General Comment No. 3 at supra note 18

<sup>33</sup> Bilchitz David, Poverty and Fundamental Rights, Supra note 33 page 183

<sup>34</sup> Ibid

<sup>35</sup> Id. Page.186

development and interpretation of the minimum core as will be seen in the topics to come.

Following the Committee's introduction of the concept of minimum core obligation stating that there are different levels to the realization of a right,<sup>36</sup> various international organizations like WHO<sup>37</sup> and ILO<sup>38</sup> used the approach to set the threshold that member state has to, at the very least, meet in the right to health and the right to work under their respective instruments.

### 1.1.3 Minimum Core defined

Having a definition of content is necessary to have clear understanding of a particular right and serves as an important instrument for enforcement, as it makes it possible to suggest a minimum standard for evaluating the observance of a right and the right being violated, in the event of violation.<sup>39</sup> However defining minimum core content is a relatively unexplored area. As I mentioned above the concept of minimum core has been accompanied by a number of confusions starting from basic one of terminology.<sup>40</sup> It is usually known by interchangeable terms like minimum core, core content, essential element, core elements, and minimum state obligation.<sup>41</sup> Before embarking up on definition of 'minimum core', it is important to clarify what is meant by 'core content' of a right. Terminologies like core content, essential element or core elements, are synonymous and the writer will use the term 'core content' throughout the paper. Core

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<sup>36</sup> Ibid

<sup>37</sup> See for instance Declaration of Alma-Ata, International Conference on Primary Health Care , Alma Ata, USSR, 6-12 September 1978, adopted by the World health organization

<sup>38</sup> See various conventions of International labor Organization providing for Minimum rights of workers and Labor standards to be complied with by the member states

<sup>39</sup> Circle of Rights: Economic, Social and Cultural Rights Activism, Supra note 10

<sup>40</sup> Audrey Chapman and S. Russell (eds.), Core Obligations, Supra note 9, page 8&9

<sup>41</sup> Ibid

content refers to components of a particular right essential for the very existence of that right as a human right.<sup>42</sup> Thus “core content” of a human right refers to the most essential features of the right.

Having clarified core content, I will now proceed with the definition of ‘minimum core content’. Minimum core content has been defined differently by various authorities.

Chapman and S. Russell defined minimum core content as “the essential element or elements of a right without which the right loses its substantive significance as a human right” or “floor below which conditions should not permitted to fall.”<sup>43</sup> This very definition resembles the one given by Alston who described the ‘minimum core content’ as “an absolute minimum entitlement, in the absence of which state parties are considered to be in violation of its obligation.”<sup>44</sup> He states there would be no justification for elevating a claim to the status of a right if its normative content could be so indeterminate as to allow for the possibility that the right holders possess no particular entitlement to anything.”<sup>45</sup> Accordingly, the minimum core is a base line and constitutes a guarantee whose absence of which render the rights abstract hope giving no concrete entitlement for individuals. However, the definition tells nothing more than the need to identify minimum core content of a right without pointing how and on what bases to do so. The same is true for the International Human rights internship program definition of the term

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<sup>42</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights at supra note 30, n.67

<sup>43</sup> Audrey Chapman and S. Russell (eds.), Core Obligations, Supra note 9, page 9

<sup>44</sup> Manisuli Ssenyonjo, Economic, Social and Cultural Rights in International Law, Hart Publishing Ltd. 2009, n.115 (1987)

<sup>45</sup> Ibid



minimum core content as “the non negotiable foundation of a right to which all individuals, in all contexts and under all circumstances are entitled.”<sup>46</sup>

Minimum core content has also been defined as “elements of a right that are most essential or fundamental and such elements constitute minimum core content of right, which translate into minimum core entitlements for individuals or groups, and minimum core obligation for states.”<sup>47</sup> Accordingly, minimum core content is entitlement for individual while it is obligation for states. But this definition gives no guidance as to how to determine components of a right that are most essential or fundamental and which are not. Despite of all these attempts to define core content and minimum core content of a particular right, the most important issue remained to be the question of how or on what normative base to determine these minimum core contents of a particular socio economic rights. Three main theories or approaches providing different normative foundation for determination of minimum core of a particular right has suggested by scholars in the field and will be discussed in the very next topic.

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<sup>46</sup> The International Human Rights Internship Program(IHRIP), *Ripple in still water: Reflection by activists on Local and national level, work on economic, social and cultural Rights* chapter 2, cited in Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, Hart Publishing Ltd. 2009 page 65.

<sup>47</sup> Audrey Chapman, ‘A “Violation approach” for monitoring the International covenant on Economic, Social and Cultural rights’, at supra note 11; See also A Chapman and S Russel (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural rights* at supra note 43

## 1.2 Theoretical Framework of Minimum Core Approach

The question concerning on what normative foundation should the minimum core content of a particular socio economic right be determined is subjected to intense jurisprudential debate and gave rise to a number of theories.<sup>48</sup> There are three main approaches each providing different normative bases that should be considered in determination of minimum core content of a particular right: the minimum Core as normative essence, as a minimum consensus and minimum core as a minimum obligation.<sup>49</sup> Analysis of all these three perspectives is important to examine and grasp the foundations of these approaches and also to have holistic understanding of the concept. Accordingly the next topics will briefly discuss and analyze each model and asses the opportunities and drawbacks associated with each in light of the accomplishments anticipated by the concept like introducing a manageable legal impetus to global redistributive debates and other aspects of socio economic rights enforcement.<sup>50</sup>

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<sup>48</sup> See Fons Comans (ed.) *Justiciability of Economic and Social Rights, Experience from Domestic Systems* supra note 12 As well as Katharine G. Young, *The Minimum Core of Economic and Social Rights*: supra note 31

<sup>49</sup> See Katharine G. Young, *The Minimum Core of Economic and Social Rights*: supra note 42 Page 113-175

<sup>50</sup> *Id.* on page 121 and 122

### 1.2.1 Essence Approach (The Minimum Core as Normative Essence)

According to the Essence approach the minimum core of socio economic rights are the essential minimums or the intrinsic value of each right essential for the very existence of that right as a human right.<sup>51</sup> As such this approach is distinguished by its search for the “essential” minimum content of a particular right. But what are the normative goals that this approach aspires to base in determining minimum core of socio economic rights? The approach bases on “basic needs” of the rights-holders or material interest required for human dignity, equality, or freedom as normative minimum that should be given priority in each right.<sup>52</sup> As such the approach relies on two different and alternative normative foundations in the course of determining minimum core content of a particular right.<sup>53</sup> Young called these two normative foundations as needs based minimum and value based minimum.<sup>54</sup>

The need based minimum core reflects the aspects of the right which satisfy the “basic needs” of the rights-holders emphasizing on what is strictly required for life as normative minimum that should be given priority in each right.<sup>55</sup> As such essence approach orients the “core” of the right to the essential and minimally tolerable levels of food, health, housing, and education.<sup>56</sup> In this regard Limburg principle provides that states parties to the Covenant have the obligation “to guarantee respect for the minimum rights of

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<sup>51</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights*, Supra note 49

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Ibid

survival for all,” irrespective of available resources.<sup>57</sup> However, young is of the thought that neither the “basic needs” of rights-holders nor values like dignity, equality and freedom provides a sufficiently determinable standard to confer or formulate non negotiable minimum core content to socio economic rights.<sup>58</sup> Putting simply, what constitute minimum basic needs for individuals by itself is not clear and not objectively determinable standard to lend content to what is called the minimum core of socio economic rights nor do values like dignity, equality and freedom.

In fact the task of identifying essential levels of rights in light of basic needs and human dignity is difficult for the term themselves are vague and gives no guidance to do so. However David suggests the formulation of minimum core content of particular socio economic rights with reference slight different normative foundations than those suggested by Young.<sup>59</sup> His proposition “posits value in having positive experience, avoiding negative experience and what he called the realization of once life purposes as a guide to provide minimum core content to a particular socio economic right.”<sup>60</sup> In doing so he distinguished two thresholds of interests: minimal and maximal interests, having differing degree of urgency.

The minimal interest (first threshold) proposed by David attempts to lend content what Young called basic needs in essence approach. Accordingly, minimal interests of

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<sup>57</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights No.25, UN Document E/CN.4/1987/17

<sup>58</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights, Supra note 51. Young argues “it is hardly possible to reach on agreement on the technical measure of basic needs that are minimally sustained within core formulations of rights. Beside the need for basic needs for survival and decent life may highly be dependent on different factors in which a person or group of person is leaving thereby rendering the essence approach a problematic approach to substantiate the minimum core

<sup>59</sup> Bilchitz David, Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights, Supra note 33 Page 187 and 188

<sup>60</sup> Ibid

individuals constitute the situation in which people are most vulnerable and needy, facing threat to their lives.<sup>61</sup> The most urgent and minimal interest accordingly is that of “being free from threats to once survival because the inability to survive wipes out all possibility for realizing sources of value in the life of a being.”<sup>62</sup> For instance, the most urgent interest (the threshold) for Grootboom community in their initial dwellings on the water logged land is having at least minimal shelter that protects them from elements that compromise their health and their ability to survive.<sup>63</sup> Such urgency of the first interest strongly justifies recognizing an unconditional obligation to realize it as a matter of priority.<sup>64</sup>

He rightly argued, however, that “protection of the minimal interests is not ultimate end i.e. it is not only survival that matters, though it should be given priority as a matter of fact.”<sup>65</sup> This in turn necessitates protection of what he called maximal interest (medium – long term life goals) that are necessary for the fulfillment of a wide range of purposes.<sup>66</sup> For instance, for the Grootboom community, the maximal interest is getting suitable accommodation that not only protects them from danger to their health and their ability to survive but also adequate enough which enable them to achieve their life purposes beyond survival. i.e. somewhat higher standard of housing that enable them to develop and flourish. Accordingly, he refers the requirements of adequacy of the right to housing,

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<sup>61</sup> Bilchitz David, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, supra note 59

<sup>62</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights*, Supra note 58

<sup>63</sup> Ibid, See also *The Government of the Republic of South Africa and others vs Grootboom and others* 2001 (1) SA 46 (CC)

<sup>64</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights*, Supra note 62

<sup>65</sup> Ibid

<sup>66</sup> Ibid

identified by the Committee, the second threshold.<sup>67</sup> For instance, in the context of the right to food, this formulation differentiate the rights in to two essential levels: to get food required for once survival (as such death of people due to famine constitute violation minimum core of the right to food) whilst the quality of food, the caloric content is of secondary importance in this formulation. However, the fact that maximal interest should be dealt with less urgency compared to the minimal interest doesn't mean that maximal interest should be neglected.<sup>68</sup> To this end, he interprets the notion of progressive realization as a move to full realization of a particular right beginning from the realization of the minimal interest (minimum core obligation) to the realization of the maximal interest.<sup>69</sup> Accordingly, with regard to the right to housing progressive realization means, provision of accommodation that enable those in need to avoid danger to their life and then duty on state to take step to improve the adequacy of the housing to meet their other life purposes. This argument answers one of the objections against adoption of minimum core approach saying that it endangers the broaden goals /full realization of socio economic rights by shifting attention to the worst deprivation of material interest.<sup>70</sup>

In fact, the proposition of David that bases on once ability to survive as its threshold and normative foundation to confer minimum content to a particular right somewhat makes

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<sup>67</sup> *UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), U.N. Doc. E/C.12/1998/24 (6th Sess., 1991)*

<sup>68</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights*, *Supra* note 64. See also Audrey Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural rights* at *supra* note 37 Page 14 and 15

<sup>69</sup> Bilchitz David, *Poverty and Fundamental Rights* at *Supra* note 61 Page 193

<sup>70</sup> This is one of the objection against adoption of minimum core approach in the realm f socio economic rights as noted, Audrey Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural rights* *Supra* note 43 Page 14 and 15, Katharine G. Young, *The Minimum Core of Economic and Social Rights*: *supra* note 68. Page 114, and also D. Bilchitz, *Poverty and Fundamental Rights*: *supra* note 61

sense. As survival logically links to life, such formulation of the concept brings the material protections necessary for the once survival in the realm of the right to life. The right to life, being fundamental for all other human rights, imposes both positive and negative obligation on state.<sup>71</sup> That is, a state is obliged not only to refrain from taking life of individuals but also to take measure to protect lives of individuals.<sup>72</sup>

Beside, the Human Rights Committee extended the application of the right to life to the preventive health and food contexts, by requiring the adoption of positive measures.<sup>73</sup> Nonetheless, the question of what are the essential elements of a particular right that is necessary to avoid threat to once survival (the minimal interest) and fulfillment of which should be unconditional is left unanswered and thus requires further consideration. What are essential content of a particular right necessary for the protection of minimal interest? Putting simply what are minimally tolerable levels of food, health, housing required for the satisfaction of what David called minimal interest? Should determination of such essential content of a particular right left for courts to determine on case by case basis? If so can we construe such minimum core approach as applicable to all human beings (universal standard?)

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<sup>71</sup> The Committee on Civil and Political Rights, General Comment No. 06: The right to life (art. 6) 04/30/1982, Para. 3 and 4

<sup>72</sup> *Ibid*

<sup>73</sup> *Id*, at ¶ 5: The Comment stated that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics

### 1.2.2 The Consensus Approach (The Minimum Core as a Minimum Consensus)

The other approach proposed as a tool for determination of minimum core contents of socio economic rights is the consideration of the minimum core as a minimum consensus surrounding socio economic rights.<sup>74</sup> This approach is also called consensus approach. According to the Consensus approach, the minimum core content is the right's lowest common denominator agreed-upon.<sup>75</sup> As such, it relies on consensus-based hierarchy rather than a normative hierarchy unlike the essence approach.<sup>76</sup> In other words, Consensus approach situates the minimum core in the minimum consensus surrounding economic and social rights, rather than the values of human dignity or basic needs.<sup>77</sup> In doing so, this approach tries to articulate the normative foundation of the minimum core of socio economic rights based on agreement between or among states (like universal or regional human rights treaties), state practices (which may be evidenced from national measures for protecting economic and social rights, such as federal and state constitutional texts, stable and long lasting legislative regimes, and judicial precedent) and a synthesis of international jurisprudence flowing from either human rights treaties or international human rights bodies as founding the core content of each right.<sup>78</sup>

In fact consent forms bases of the general international law. Both treaty<sup>79</sup> and customary international law<sup>80</sup> requires state consent, at least in principle, to have

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<sup>74</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights Supra note 64, page 140 and 141

<sup>75</sup> Id, Page 148

<sup>76</sup> Ibid

<sup>77</sup> Ibid

<sup>78</sup> Id. n.154-156

<sup>79</sup> See the preamble of the Vienna Convention on the Law of Treaties(1969) which states that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally



a binding effect on states. With regard to consensus Young in her article advanced an argument that the importance of consensus is less with respect to human rights because both treaty-based and customary human rights norms, suggested higher moral goals which makes the norm of consensus is secondary.<sup>81</sup> However, I am of the thought that her argument though true in general, is not acceptable when it comes to the determination of the indeterminate content of socio economic rights. Sometimes rights are framed in vague phraseology leading to disagreement as to their meaning. As such any agreement about particular content of a given right is therefore important though the consensus might be secondary to the right. That is where the rights are articulated in vague phraseology, consent of states to the effect of determining minimum essential content of a particular right can not be said to override higher norms suggested by the Covenant. Nonetheless, the ability of consensus as a tool provide determinable content for particular economic and social right is limited owing to a number of factors: Lack of pronouncements, at least so far, by international conferences or agreements as to what constitute the minimum contents of economic and social rights and the fact that consensus approach makes legitimate only the lowest common denominator of international protection limit the ability of the approach to provide the desired minimum content for the rights.<sup>82</sup> Beside the approach unable to answer the question of whose consensus is to be considered.<sup>83</sup>

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recognized. See also Malcolm N. Shaw, *International Law*, Cambridge University press 6<sup>th</sup> Ed, 2008 Page. 909

<sup>80</sup> See also Malcolm N. Shaw, *International Law*, Cambridge University press 6<sup>th</sup> Ed, 2008 Page. 72

<sup>81</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights* at Supra note 74, page 145

<sup>82</sup> *Id.* page 147

In this regard Young noted that the determination of whose consensus should be taken in to account. She explained difficulty as *“whose consensus is to count: judicial consensus; governmental and intergovernmental declarations as a more appropriate test for legitimate law or the consensus established between special experts in policy areas influencing economic and social rights (such as those drawn from public health, education, housing, or land reform areas), who are more familiar with the institutions and organizations that constitute the concrete efforts to deliver on the material requirements behind rights.”*<sup>84</sup>

It should be noted that consensus might also be vary from society to society which in turn undermines the importance of consensus approach as a normative base for determining the minimum core of socio economic rights. All these factors makes the ability of the approach very limited to give guidance for determination of minimum core content of minimum core content of social and economic rights under the Covenant.

### 1.2.3 Obligation Approach (The Minimum Core as a Minimum Obligation)

Obligation approach is different from the previous two approaches which try to determine minimum core of socio economic rights based on normative goals like “human dignity” or “basic needs” of the rights holders (in case of essence approach) or the minimum consensus surrounding economic and social rights (in case of consensus approach). The obligation approach identifies set of duties required to be fulfilled for realization a specific rights and equate it to minimum core content of the right.<sup>85</sup> Accordingly

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<sup>84</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights, Supra note 81, n. 204 (1983)

<sup>85</sup> See general Comments of the Committee, for example the one of the core obligations of states in relation to the right to health is to ensure the right of access to health facilities, goods and service on a non discriminatory basis , especially for vulnerable or marginalized groups

minimum core of each right is core duties required to be performed for realization of the right as a whole rather than the contents or elements of the right themselves. For instance, the minimum right to housing is not minimum room for housing space or quality of house to be provided for the when the need arise, which is content of the right itself, rather it is equated to the duties required to fulfill the right to housing like existence of ‘national housing strategy.’<sup>86</sup> Chapman refers the minimum core obligation as minimum state obligations that entails essential requirement of the rights that a state party has to fulfill to be in compliance with its international obligation.<sup>87</sup> The Committee employed this very approach (emphasis on the obligations raised by a rights) to give substance to the rights to health, education, work and other socio economic rights under the Covenant thereby bringing shift of attention from the core contents of each right to core obligations required to perform the right.<sup>88</sup>

The shift to core obligation brings a new question of “what state has to do first to fulfill those elements of the rights that are the most essential or fundamental.”<sup>89</sup> Accordingly, “all components of the rights are important and the ultimate goal is full implementation but question is one of priority or timing rather than ranking the various components of the rights in some sort of hierarchy according to the relative worth.”<sup>90</sup>

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<sup>86</sup> CESCR’s *General Comment No. 4 at supra note 67*

<sup>87</sup> Audrey R. Chapman: *The Status of Efforts to Monitor Economic, Social, and Cultural Rights*, Page 352

<sup>88</sup> U.N. Econ. & Soc. Council [ECOSOC], *Comm. on Econ., Soc. & Cultural Rights, General Comment No. 18: The Right to Work (art. 6)*, ¶ 31, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006), *General Comment No. 14*, , ¶¶ 43-45; U.N. Econ. & Soc. Council [ECOSOC], *Comm. on Econ., Soc. & Cultural Rights, General Comment No. 15: The Right to Water (arts. 11, 12)*, ¶¶ 37-38, U.N. Doc. E/C.12/2002/

<sup>89</sup> Audrey Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural rights* at supra note 43 Page 9

<sup>90</sup> Ibid

In fact, determination of state's obligation might be difficult in the absence of some understanding of particular content of the right whose fulfillment should be given priority. That means identification of state obligation presupposes articulation of normative essence of a right which must imply set of obligation.

In this regard, the Committee through its interpretive general comments give minimum core of particular rights in the Covenant like the rights to food, health, adequate housing and education.

The focus on obligations or core duties required to implement a given rights, also brings the assessment of both obligations of conduct, which require taking an action 'reasonably calculated to realize the enjoyment of a particular right and obligations of result, requiring state to achieve specific targets.'<sup>91</sup>

In this regard, the Committee has also categorized the obligations imposed by socio economic rights on state parties as obligation of conduct, and result.<sup>92</sup> As such the undertaking in article 2 (1) "to take steps", is qualified by the obligation of conduct which impose on states obligation to take steps through deliberate, concrete and targeted action towards the fulfillment of the rights which must be accomplished as expeditiously and effectively as possible'.<sup>93</sup>

Where as obligation of result, requiring state to achieve specific targets which it related to satisfaction, at least of minimum essential levels socio economic rights like the rights

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<sup>91</sup> Id, page 12. See also D. Bilchitz, Poverty and Fundamental Rights: at supra note 55 Page 195

<sup>92</sup> See CESCR's General Comment 3 at supra note 17

<sup>93</sup> The International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI), Art. 2(1)

to food, housing, basic form of education and primary health care.<sup>94</sup> Some commentators have argue that the minimum core concept relates only to obligations of result because it is able to signal only the extent to which individuals are enjoying (or will enjoy) their rights rather than assess the policies and procedures that bring about that result.<sup>95</sup> I am of the thought that though the minimum core approach in general aims to avoid the severest deprivation of the rights, the core obligation approach consideration of the core obligations required to implement a rights in turn requires assessment not only the extent to which individuals are enjoying or will enjoy their rights (obligation of result) but also the policies and procedures that bring about that result (obligation of conduct).

In the recent general comments, the Committee recognized three key obligations flowing from socio economic rights: obligation to respect, protect and fulfill the rights.<sup>96</sup> The Committee has designated all three types of obligations as “core,” provided they impact on the prioritized content of economic and social rights.<sup>97</sup> The detail analysis of how the Committee is approaching the minimum core concept and how it is articulating the core duties required to implement a rights and related issues will be made in the next chapter.

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<sup>94</sup> See CESCR General Comment 3 at supra note 87. Also D. Bilchitz, *Poverty and Fundamental Rights*: at supra note 69, Page 185 and also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997.

<sup>95</sup> CESCR), General Comment No. 4 at Supra note 86

<sup>96</sup> See for instance, General Comment no.12 on the right to adequate food at (15) cited in D. Bilchitz, *Poverty and Fundamental Rights* at supra note 69, Page 184 n.17

<sup>97</sup> See Katharine G. Young, *The Minimum Core of Economic and Social Rights*, supra note 84

## 1.2.4 Other Approaches to Enforce Socio-Economic Rights

In addition to the above suggested normative foundation of the minimum core approach, the concept as a tool to evaluate and monitor compliance with the norms established in the Covenant can be backed and supplemented by other mechanisms. In this regard, scholars in the field suggest various alternative approaches like role of indicators & bench marks and budget analysis, beside the minimum core approach, with view to facilitate the operation of the unfounded “progressive realization” standard of the Covenant. Below each alternative approaches will be analyzed.

### 1.2.4.1 Indicators and Benchmarks

The aspiration of minimum core approach to facilitate realization of social rights by identify minimum core obligation of socio economic rights that is capale of being realized as matter of priority can be suplemmented by the indicators and benchmarks. That is, indicators and benchmarks can measure implementation of social rights in th course of progressive realization. Indicators can be defined as 'a set of statistics which “indicate” phenomena that are not directly measurable and may be based on either quantitative or

qualitative information, as long as it can be consistently measured over time.”<sup>98</sup>

Accordingly, indicator is a fact or a set of facts that indicate(s) level of something, like maternal mortality rate or literacy rate. Although indicators to monitor economic social rights might be the same with indicators in the field of development, the use of indicators for human rights monitoring or human rights approach to development is unique in that it focus on accountability.<sup>99</sup> Beside, human rights approach emphasized on the status of poor, disadvantaged and/or marginalized individual and communities.<sup>100</sup>

In general, in the realm of socio economic rights indicators can be used to monitor and assess state compliance with their human rights obligations under the Covenant.<sup>101</sup> Particularly, indicators can be employed to assess level of performance of state in the course of fulfilling the duty of progressive realization.

As such indicators can be employed to monitor events based violations, by using event based data, (E.g. Number of persons evicted from their normal place of residence on a particular date).<sup>102</sup> Such indicators are called ‘out come indicators’ measuring the extent to which a population enjoys or deprived of a specific right such as Child mortality rates or illiteracy rates.<sup>103</sup> To this end, the Committee referred to indicators and bench marks in a number of instances. For instance, the Committee on its on the general comment on

<sup>98</sup> Id. Page 165 n.297 (2001)

<sup>99</sup> Audrey Chapman, ‘A “Violation approach” for monitoring the International Covenant on Economic, Social and Cultural rights’ at supra note 47 Page 6. See also Audrey Chapman, Indicators and standards for monitoring Economic, Social and Cultural Rights, available at: [http://hdr.undp.org/docs/events/global\\_forum/2000/chapman.pdf](http://hdr.undp.org/docs/events/global_forum/2000/chapman.pdf) (Accessed on 15/02/2011), Chapman states, development and human rights indicators are not synonym though they two might overlap development indicators measure progress towards development not right.

<sup>100</sup> Ibid

<sup>101</sup> Eitan Felner; A New Frontier in Economic and Social Rights Advocacy? Supra note 11, page 6,

<sup>102</sup> Ibid, See also Sally Anne, monitoring Economic, Social and Cultural Rights using Quantitative and Qualitative Indicators, Center for Economic, Social and Cultural Right; Available at: [www.cesr.org](http://www.cesr.org) Also, <http://www.huridocs.org/tools/monitoring/databases>

<sup>103</sup> Ibid

the right to work states that a national employment strategy must define indicators on the right to work basing on ILO indicators such as the rate of unemployment, underemployment and the ratio of formal work to informal work.<sup>104</sup>

Beside, Indicators and benchmarks can also highly supplement to facilitate operation of minimum core as a starting point of the progressive realization standard by measuring state performance over a period of time. In this regard, the so called 'process indicators,' which measure various types of efforts being undertaken by the State can be employed to monitor and asses progressive realization.,<sup>105</sup>

Assessing progressive realization may requires analysis of trends in indicators (outcome data) over time taking in to account, among others, whether improvements have been made, has there been any retrogression/deterioration and rates of progress in relation to benchmarks.<sup>106</sup> As such indicators may measure not only whether the focus state is violated its human rights obligations but also to asses whether progress has been made.<sup>107</sup>

However, assessment of data for monitoring economic and social rights requires not only indicators but also benchmarks against which the indicators can be assessed.<sup>108</sup> For instance, mere knowledge of the fact that country X has 40% of literacy rate among its young population, wouldn't help to decide whether the rate is very high or low in relation to the country's development level, or whether the country has made progress in

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<sup>104</sup> CESCR's General Comment No. 18: The Right to Work (Art. 6 of the Covenant) at supra note 88

<sup>105</sup> Ibid

<sup>106</sup> Sally Anne, monitoring Economic, Social and Cultural Rights at supra note 102

<sup>107</sup> Eitan Felner; A New Frontier in Economic and Social Rights Advocacy? at Supra note 101

<sup>108</sup> Ibid



increasing the rate.<sup>109</sup> This scenario in turn brings the need for bench marks against which indicators can be assessed and judged.

Chapman defines benchmarks as “targets established by particular governments in relation to specific economic, social and cultural rights.”<sup>110</sup> Benchmarks can also be goals to be achieved and set taking into account to the differing situations of a specific country and are sometimes referred to as “minimum thresholds.”<sup>111</sup> As such, it can be goals in relation to human rights indicator, for instance, to reduce maternal mortality rate by half in 5 years. The use of indicators and benchmarks to assess a state compliance with its human rights obligations has been gaining a growing recognition in recent years.<sup>112</sup>

For the purposes of human rights monitoring, the following types of benchmarks against which to compare human rights indicators are suggested: International human rights standards, commitment taken either by a state or by a specific government, a past value of an outcome indicator or a process indicator (comparisons reveal if the state has made progress or has regressed in the level of ESC rights enjoyment), countries with similar levels of development as the focus country and Disaggregated national data (male/female, indigenous/non-indigenous, poor/non-poor, etc).<sup>113</sup> Here the standard question is whether disaggregated data reveal persistent disparities.<sup>114</sup> In fact state parties to the Covenant are

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<sup>109</sup> Ibid

<sup>110</sup> Audrey Chapman, Indicators and standards for monitoring Economic, Social and Cultural Rights, available at: [http://hdr.undp.org/docs/events/global\\_forum/2000/chapman.pdf](http://hdr.undp.org/docs/events/global_forum/2000/chapman.pdf) (Accessed on 15/02/2011)

<sup>111</sup> Audrey Chapman, ‘A “Violation approach” at supra note 99 page 165

<sup>112</sup> Eitan Felner; A New Frontier in Economic and Social Rights Advocacy? at supra note 107 Page 3

<sup>113</sup> Ibid. Accordingly, for instance, commitment taken either by a state or by a specific government can be measured in light of in a state’s constitution or basic education law to spend a certain percentage of its government budget on education; to increase number of children in primary school to 100% in 2015

<sup>114</sup> Ibid, See also Audrey Chapman, ‘A “Violation approach” for monitoring the International Covenant on Economic, Social and Cultural rights’ at supra note 108

under obligation to identify appropriate indicators and bench marks with the view to monitor state parties' obligation.<sup>115</sup>

Though the indicators and bench mark approach has still its own difficulties, it enjoys a number of advantages.

First, since this standard is set in a participatory process both on the parts of the Committee and the state party, taking in to consideration the reality in the focus state, it is provides effective way to asses state party's performance.<sup>116</sup> For instance the Committee sets, through the practice of "scoping" adjustable targets for each state party to be achieved by the next reporting period.<sup>117</sup> Secondly indicators and bench marks are dynamic and constantly changing" standards taking into account varied social, developmental and resource contexts of specific countries rather than absolute concepts.<sup>118</sup>

#### 1.2.4.2 Budget Analysis

One of the features of socio economic rights is that full realizations of most of the rights are dependent on availability of resources in the respective member states to the Covenant.<sup>119</sup> Basing on this general fact, some challenges the notion of minimum core alleging that the concept is rigid in that it requires immediate realization of the minimum

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<sup>115</sup> See The International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI), Art. 15

<sup>116</sup> See Katharine G. Young, The Minimum Core of Economic and Social Rights, at supra note 97 Page 166, n.307(2000)

<sup>117</sup> Id, n.300 (See General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, UN doc. E/C.12/2000/4, 11 August 2000. Also General Comment No. 15, *The Right to Water*, UN doc. E/C.12/2002/11, 20 January 2003.

<sup>118</sup> Audrey Chapman, 'A "Violation approach" at supra note 114

<sup>119</sup> The ICESCR Art. 2(1)

core of socio economic rights and as such fails to take in account scarcity of resources.<sup>120</sup> For instance the South African Constitutional Court in the Treatment Action campaign case failed to embrace the minimum core concept on the ground that the minimum core approach is rigid absolute and failed to take into account resource scarcity for it requires the government to do the impossible, i.e. ensuring access to core service for everyone immediately.<sup>121</sup> It is known that significant resource problem emanate from misallocation of resources, for instance due to expenditure on expensive weapon than to preventive healthcare.<sup>122</sup> As such monitoring implementation of the rights in general and that that of minimum core obligations in particular requires among other things, assessment of whether the state parties are effectively using the resources at their disposal to meet their obligation.<sup>123</sup> One way of doing so is to undertake budgetary analysis to assess sufficiency of government investment, the efficiency with which the government resources are being spent and the equity of patterns of expenditure.<sup>124</sup> Budget analysis may reveal important data to monitor state obligation under the Covenant like: the government's priorities,<sup>125</sup> the main beneficiaries of some budget allocations,<sup>126</sup> variations in allocations and spending over different periods.<sup>127</sup>

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<sup>120</sup> Minister of Health and Others v. Treatment Action Campaign and Others 2002(5) SA 72 1(CC)

<sup>121</sup> Id. at para at para 37

<sup>122</sup> See UN Committee on Economic, Social and Cultural Rights (CESCR): An evaluation of the obligation to take steps to the "maximum available resources" under Optional Protocol to the Covenant Statement, 2007. Available

at: [http://www2.ohchr.org/english/issues/escr/docs/e\\_c12\\_2007\\_1.pdf](http://www2.ohchr.org/english/issues/escr/docs/e_c12_2007_1.pdf)

<sup>123</sup> Audrey Chapman, 'A "Violation approach" at supra note 118

<sup>124</sup> Ibid

<sup>125</sup> Lilian Chenwi, Monitoring the progressive realization of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court n.279, Research paper written for Studies in Poverty and Inequality Institute, 2010, Community Law Centre, University of the Western Cape

The Committee has used budget analysis approach while reviewing state reports, in a number of instances. In its Concluding Observation on the combined initial and second and third periodic reports of Chad, the CESCR noted with concern that, despite the country's great natural wealth, funding for social services and public infrastructure was far from adequate.<sup>128</sup> In its Concluding Observations on the initial and third periodic reports of Angola, the CESCR raised concern over the decrease in the budget allocated to education between 2004 and 2006, despite the rapidly rising number of children in the school age.<sup>129</sup> Hence, budget analysis can be employed as supplementary mechanisms to back up minimum core obligation approach.

Eventually, has been mentioned so far, in essence of the minimum core is intended to establish certain classes of needs as enjoying priority over others<sup>130</sup> and the minimum core of a right constitute an immediately realizable entitlement derogation from which is only allowed up on demonstrating strong proof for non compliance with the minimum core obligation.<sup>131</sup>

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<sup>126</sup> Ibid

<sup>127</sup> Id. n.281

<sup>128</sup> Id, n.284. See also CESCR's Concluding Observations on the Combined Initial and Second and Third periodic Reports of Chad, UN doc. E/C.12/TCD/CO/3, 16 December 2009.

<sup>129</sup> Id, n.287. See also CESCR's Concluding Observations on the Initial to Third Periodic Reports of Angola, UN doc. E/C.12/AGO/CO/3, 1 December 2008.

<sup>130</sup> Wesson, M. (2004) *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights, 20, p284.

<sup>131</sup> See CESCR's General comment 3 para10 at supra note 32

## CHAPTER II

### International Approach to the Minimum Core Concept

#### 2.1 Characterization of the minimum core by the CESCR

As mentioned in the previous chapter, the origin of minimum core concept has traced to various sources by different writers.<sup>132</sup> Some trace the origin of the concept in the article written by Andreasson, skalnes, smith and stoke in 1987<sup>133</sup> and which is latter included in Limburg principle<sup>134</sup>. Yet others refer to the German Constitution as the first document articulating the concept.<sup>135</sup> Thus the concept has recognized in some constitutions like the German constitution<sup>136</sup> and being applied in the realm of civil and political rights as in the case of the South African Constitutional Court, which has recognized that there are core aspects of right to privacy.<sup>137</sup> As such it is not novel idea of application only in the adjudication of socio economic rights though the Committee on the Economic, Social and Cultural rights is the first international organ to articulate the concept in the discourse of socio economic rights.<sup>138</sup>

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<sup>132</sup> See for instance, Katharine G. Young, The Minimum Core of Economic and Social Rights: at supra note 116. See also Bilchitz David, Poverty and Fundamental at supra note 69, Page.186

<sup>133</sup> Bilchitz David, Poverty and Fundamental Rights at supra note 69 , Page.186

<sup>134</sup> Ibid and Limburg principle is a non binding principle, aimed at furthering implementation of the ICESCR by elaborating the nature and scope of state parties obligation under the ICESCR.. See also, Paul De wart and others (eds.) International law and development, Martinus Nijhoff publishers, 1988, page 277. Limburg principle is latter elaborated by Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, available at, [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html)

<sup>135</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights at supra note 132.

<sup>136</sup> Ibid

<sup>137</sup> Bilchitz David, Poverty and Fundamental Rights at Supra note 133, page 190

<sup>138</sup> CESCR's General comment 3 at supra note 131.

To this end, the Committee in its General Comment No. 3 states 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 and for a State party to be able to attribute its failure to meet at least its minimum core obligations to a 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.*<sup>139</sup>

Thus, the Committee depicted that there are essential levels of rights the fulfillment of which should be given priority and set higher burden of prove for failure to leave up to the minimum core obligation in this interpretative comment.

Latter on, the approach has been developed, modified and concretized in subsequent general comments in relation to particular rights in the Covenant like the rights to food, the right to the highest attainable standard of health, adequate housing and education.<sup>140</sup> For instance, in General Comment 14, the Committee states that the following constitute core obligations of on the right to the highest attainable standard of health:

*The obligation to ensure the right of access to health facilities, goods and services on a nondiscriminatory basis, especially for vulnerable or marginalized groups; to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; to ensure access to basic shelter, housing and sanitation, and an adequate*

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<sup>139</sup> Ibid

<sup>140</sup> Bilchitz David, Poverty and Fundamental Rights, Supra note 137 page 183

*supply of safe and potable water; to provide essential drugs, as from time to time defined under the WHO Action Program on Essential Drugs; to ensure equitable distribution of all health facilities, goods and services; and to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.*<sup>141</sup>

Despite the fact that the committee adopted minimum core concept and used it in the subsequent general comment to lend contents to various socio economic rights enshrined under the Covenant, there are yet Unclarities clouding the concept which will be demonstrated in the course of this chapter focusing on issues like, how the Committee characterize the concept, whether the minimum core is absolute derogable, whether it gives rise to individual rights and the reflection of the concept in the Committee's concluding observations.

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<sup>141</sup> CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (2000) para 43. Also\_Wesson, M. (2004) *Grootboom and Beyond at supra note 130* page 299

As mentioned in chapter one the concept of minimum core has approached from three different perspectives.<sup>142</sup> That is, minimum core as normative essence, the minimum core as minimum consensus and minimum core as minimum obligation each having their own distinct implication as to how to give or what constitute specific content to the rights under the Covenant.<sup>143</sup> Among these three perspectives towards the concept the Committee seems to characterize minimum core sometimes as normative essence, that is as obligation raised by the content of the right itself whilst it sometimes it also adopted obligation approach, that is characterizing minimum core as a core duties required to fulfill the rights.<sup>144</sup>

The Committee's original formulation of the concept tends to use the essence approach.<sup>145</sup> To this end, in its general comment 3 the committee emphasized and considered content of the rights itself as a minimum core by stating deprivation of essential foodstuffs, primary health care, basic shelter and housing, or of the most basic forms of education constitute prima facie violation of the Covenant.<sup>146</sup> Thus, the focus is on the essence of the rights itself. The essence approach emphasis on "aspects of the right which satisfy the "basic needs" of the rights-holders and orients the "core" of the right to the essential and minimally tolerable levels of food, health, housing, and education."<sup>147</sup>

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<sup>142</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights* Supra note 135

<sup>143</sup> Ibid

<sup>144</sup> See, for instance, original formulation of the concept under General Comment 3 and also how the concept has approach in General Comment 4 and 12 dealing respectively with the rights to adequate housing and food.

<sup>145</sup> CESCR's General Comment No. 3: Supra note 131

<sup>146</sup> Ibid

<sup>147</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights* Supra note 142



Though it is impossible, at least as of yet, to list what constitute essential minimum levels of each rights.

Nevertheless, in most of its subsequent general comments the Committee shifted towards obligation approach.<sup>148</sup> For instance, in the General Comments on the rights to work<sup>149</sup>, the right to adequate housing<sup>150</sup> or the rights to food<sup>151</sup> the committee emphasized on the core duties required to fulfill the rights than the core obligation raised by the raised by the rights themselves. For instance, in one of its general comments, the Committee put it in unequivocal language that,

*“the right to food shall not be interpreted in a narrow or restrictive sense which equates it with minimum package of calories, proteins and other specific nutrients.”*<sup>152</sup>

Accordingly, the Committee is of the view that, minimum core of each right is the core obligations required to implement or realize the rights rather than content of the rights itself.<sup>153</sup> As such, the essential minimum of the right to housing is not minimum room for housing space, which is content of the right itself, rather it is equated to the duties required to fulfill the right to housing like existence of ‘national housing strategy.’<sup>154</sup>

In the case of the right to health, for instance, access to health facilities on non discriminatory base constitute the minimum core of the right to health.<sup>155</sup> As such the minimum core of each right is equated to the duties required to fulfill the rights, rather

<sup>148</sup> See various general comments of the Committee subsequent to the general comment No. 3

<sup>149</sup> CESCR’s *General Comment No. 18: The Right to Work* at *supra* note 88

<sup>150</sup> CESCR’s *General Comment No 4: The Right to Adequate Housing* at *supra* note 95

<sup>151</sup> CESCR, *General Comment No. 12, The Right to Adequate Food*, UN doc. E/C.12/1999/5, 12 May 1999.

<sup>152</sup> *Id.* paragraph 6. See also Chapman, Audrey R.; Russell, Sage (eds.), *Core Obligations: at supra* note 89

<sup>153</sup> Audrey Chapman, ‘A “Violation approach” at *supra* note 118

<sup>154</sup> CESCR *General Comment No. 18: The Right to Work* *Supra* note 149

<sup>155</sup> CESCR’s *General Comment No. 14, The Right to the Highest Attainable Standard of Health*, at *supra* note 141

than contents of the rights itself. In fact, obligation approach enjoys a number of advantages over the essence approach in that in essence approach its difficult to determine essential minimum levels of each of rights, the normative base up on which the approach justify minimum core concept as mentioned in the previous chapter. For instance, what constitute core content of each right required for survival, basic needs or dignity? Or what is the amount minimum nutritional food package amounting to core minimum of the right to adequate food?

I am of the opinion that, it is hardly possible to reach on agreement on the technical measure of basic needs are minimally sustained within core formulations of rights<sup>156</sup> and its not for the committee by way of its interpretive comment to deal with such technicalities rather domestic courts are in a better position to do so taking in to account circumstances of the case. In addition, obligation approach provides easy tools for monitoring state parties' compliance with the Covenant obligation.<sup>157</sup> In this regard, one of the Committees justifications for introduction of the concept in socio economic rights is that, the concept helps to check state party's compliance with their obligation under the Covenant.<sup>158</sup>

In fact, obligation approach has also its own drawbacks with regard to the challenge of policentricity and others.<sup>159</sup> Nonetheless, the Committee identified what amounts to core obligations in each rights, having recourse to the work of the UN specialized agencies, the declarations of international gatherings of particular expertise, and a consensus of the

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<sup>156</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights* Supra note Supra note 147

<sup>157</sup> Ibid

<sup>158</sup> CESCR's General Comment No. 3: Supra note 145

<sup>159</sup> Chapman, Audrey R.; Russell, Sage (eds.), *Core Obligations*, at supra note 152. See also Katharine G. Young, *The Minimum Core of Economic and Social Rights* Supra note 156

Committee members themselves.<sup>160</sup> Having equated these core obligations with core minimum of the right itself, the Committee gave substance to various rights under the Covenant like the rights to health, work, and adequate food since early 1990's.<sup>161</sup>

Thus, the approach taken by the Committee towards the minimum core concept in subsequent general comment differs from the original formulation of the concept under the General comment 3.

### 2.1.1 Can minimum core obligations be derogated from?

The other important feature of the Committees approach to the concept of minimum core is the issue as to whether minimum core obligations are absolute or can resource constraint be invoked as a defense to justify noncompliance.

Simply putting, can lack of resource be invoked as a justification for failure to meet the minimum core of the rights?

The Committee's approach to the issue of derogability of the minimum core obligations is not consistent as can be seen from various interpretive comments of the Committee.<sup>162</sup>

Originally, the committee formulated the concept in such a way that there is a possibility to justify non fulfillment of the minimum obligations if the state party could establish that the non compliance is due to lack of available resources and every effort has been made

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<sup>160</sup>. Katharine G. Young, The Minimum Core of Economic and Social Rights Supra note 156

<sup>161</sup> See various General Comments of the Committee on Committee on Economic, Social, and Cultural Rights (CESCR) on each rights under the Covenant

<sup>162</sup>For instance compare the Committee's General Comment No. 13 and 14 with General Comment no.15. See Malcolm Langford, Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge University press, January 19, 2009, Page 193.

to use all available resources by prioritizing fulfillment of those minimum obligations.<sup>163</sup>

Thus minimum core obligation can be derogated from on condition that the derogating state could bear the higher burden of proving this higher standard.

For instance, under the General comment 15 dealing with the right to water, the Committee restates immediate obligations in relation to the right to water, like prohibition of any kind of discrimination<sup>164</sup> and obligation to take steps towards the full realization of articles 11 paragraph 1 and 12 of the Covenant.<sup>165</sup> Nonetheless, it also acknowledged qualification set under general comment on the account of resource constraints by way of allowing state parties to invoke resource constraints as an excuse to justify non compliance with minimum obligations.<sup>166</sup> Thus a state in which significant number of its people don't have access to water sufficient, safe, acceptable, physically accessible and affordable for personal and domestic uses<sup>167</sup> has to establish that the non compliance with the general comment No. 15 is due to situation beyond its control.

In fact one of the underlying principles of the Covenant is progressive realization of the social, economic and cultural rights, most of which has to do with resources issues.<sup>168</sup>

However, it also worth taking cognizance of what is meant by available resources both by the Covenant and the General Comments. Here resource refers to resources available

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<sup>163</sup> CESCR's General Comment No. 3: Supra note at Supra note 158

<sup>164</sup> International Covenant on Economic, Social and Cultural Rights Art. 2, para. 2

<sup>165</sup> Id. art. 2, para.1

<sup>166</sup> CESCR's General Comment No. 15, *The Right to Water*, UN doc. E/C.12/2002/11, 20 January 2003. See also Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge university press, January 19, 2009, Page 193ff

<sup>167</sup> CESCR's, *General Comment No. 15: The Right to Water*

<sup>168</sup> Art. 2 of International Covenant on Economic, Social and Cultural Rights. See also Fons and Comans (ed.) *Justiciability of Economic and Social Rights*, at supra note 42

from the private sector, the public and foreign states.<sup>169</sup> It is up to the state concerned to mobilize them all and put for the fulfillment, at least, of the minimum core of the socio economic rights under the Covenant. Beside significant resource problem emanate from misallocation of resources, for instance due to expenditure on expensive weapon than to preventive healthcare.<sup>170</sup> Thus any state parties justifying non compliance with its minimum core obligations by invoking resource constraint should prove that it tried its best to mobilize the required resources to meet its minimum core obligations and redirected the available resources in case of misallocation.<sup>171</sup> This may in turn require review of the government's policies and programs as to whether they encouraged resource flow towards the fulfillment of the essential minimum of the rights.<sup>172</sup> For instance, government may provide incentives for private sector to build primary health care or primary education. Also regard has to be made to whether there is misallocation of resources and attempts, if any, made by the government to channel the resources for the fulfillment of the minimum core of the rights at stake. Accordingly, minimum core obligations can be derogated from, up on condition that the derogating state can meet the standard of prove set by the Committee.

However, latter on the Committee shifts towards characterization of the concept as absolute entitlement below which no government should perform irrespective of available resources. In some of the general comments dealing with specific rights like general comment 13 on the right to education and general comment 14 on the rights to the highest

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<sup>169</sup> See CESCR's statement on An evaluation of the obligation to take steps to the "maximum available resources" at supra note 122

<sup>170</sup> Ibid and also Chapman, Audrey R.; Russell, Sage (eds.), Core Obligations, at Supra note 159

<sup>171</sup> CESCR's statement on An evaluation of the obligation to take steps to the "maximum available resources" Supra note 169

<sup>172</sup> Ibid

attainable standard of health, the Committee characterizes the concept as absolute obligation derogation from which is not allowed in any circumstances.<sup>173</sup> Under the general comment 13 the minimum obligation in the relation to the right to education is stated without qualification whilst general comment 14 restate obligation of the developed state to assist the developing one in accordance with Art. 2(1) of the Covenant thereby taking entirely new approach towards the issue of resource constraints.<sup>174</sup> This very general comment puts in unequivocal language that, “state party can not under any circumstance, whatsoever justify its non compliance with the core obligation which are not derogable”.<sup>175</sup> Accordingly, ‘lack of sufficient recourse does not exonerate state party from ensuring, at the very least, minimum essential levels of each of the rights guaranteed under the covenant.’<sup>176</sup> In doing so, the Committee restates the position taken by Limburg principle which makes obligation to guarantee respect for the minimum rights of survival for all absolute entitlement independent of available resources.<sup>177</sup> Such approach to the concept is also compatible with definition of minimum core attributed by some scholars stating that, “minimum core content is essential element/s of a right without which the right loose its substantive significance as human rights and it provides standards below which state should not permitted to fall in any case ”.<sup>178</sup> Such characterization makes minimum core obligations, immediate obligations and not subjecting to the notion of progressive realization.

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<sup>173</sup> Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No. 13 and 14

<sup>174</sup> Malcolm Langford, *Social Rights Jurisprudence*: at supra note 166 page 493. See also Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No. 13 and 14

<sup>175</sup> CESCR’s General Comment No. 14, at supra note 155

<sup>176</sup> Id. Paragraph 47

<sup>177</sup> See, *Limburg Principles* at supra note 57

<sup>178</sup> Chapman, Audrey R.; Russell, Sage (eds.), *Core Obligations*, Supra note 170

The derogability of minimum core obligation of socio economic rights involves a number of complexities.<sup>179</sup> For one thing, some of these obligations, for instance, minimum core obligation as related to the right to adequate housing, requires availability of resources and make it difficult to make it absolute minimum entitlement irrespective of resource constraints.<sup>180</sup>

I am of the view that, it is very important to deal with the derogability issue concerning minimum core obligations in terms of specific obligation at stake rather than as a general term. Because, for one thing what constitute minimum core content depends of the nature and characteristics of each specific rights. Beside, there are a number of factors that should be taken in to account in the determination whether a given core obligations of the rights at stake is derogable or not. This may include, the degree to which the obligation involves resource issues, the individual interest at stake, i.e. the urgency of the need, the case in which it can be addressed and the implication of policentricity.<sup>181</sup> For instance, if the portion of a population of a country is starved state should not be allowed to invoke resource constraints to provide basic food required for survival. That is when survival interest is at stake the provision of minimum essential level of the good required should not be derogable.<sup>182</sup> In this regard, the Committee identified some of the minimum core of socio economic rights which are nothing or little to do with resource constraints as non

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<sup>179</sup> Ibid and also Malcolm Langford, *Social Rights Jurisprudence*: Page 193ff at supra note 174

<sup>180</sup> CESCR's General Comment No 4, *The right to adequate housing* at supra note 150

<sup>181</sup> *The Government of the Republic of South Africa and others vs Grootboom and others* 2001 (1) SA 46 (CC). See also Bilchitz David, *Poverty and Fundamental Rights* – at supra note 134 page.204

<sup>182</sup> See, for instance, Bilchitz David , *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*; 19 S. Afr. J. on Hum. Rts. 1 (2003)

derogable.<sup>183</sup> These include the obligation to take steps which may include developing coherent and effective policies and programs with the view to fulfill the rights<sup>184</sup> prohibition of discrimination.<sup>185</sup> For instance, with regard to the right to adequate housing the minimum obligation to the adoption of a national housing strategy and effective monitoring of the situation with respect to housing are obligations of immediate effect.<sup>186</sup> Though the Committee has not put the minimum core obligation of people under desperate material deprivation as absolute rights, it required state parties to prioritize them<sup>187</sup>. For instance, the general comment on the right to adequate housing requires state to give some degree of priority consideration in the housing sphere for disadvantage group like elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas.<sup>188</sup>

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<sup>183</sup> Under General Comment No. 15, the Committee restates immediate obligations in relation to the right to water, like prohibition of any kind of discrimination<sup>183</sup> and obligation to take steps towards the full realization of articles 11 paragraph 1 and 12 of the Covenant.

<sup>184</sup> Ibid

<sup>185</sup> Ibid

<sup>186</sup> CESCR's, General Comment No.4, *The right to adequate housing at supra note 180*

<sup>187</sup> Ibid

<sup>188</sup> Ibid



### 2.1.2 Can Minimum Core be enforced as individual rights?

Human rights in general are meant to ultimately ensure dignified life for individuals whether it is framed in terms of individual or collective rights.<sup>189</sup> In doing so it could be invoked by individuals and enforced as such. Though the consideration of justiciability of socio economic right is beyond the reach of this paper and the paper assumes that it should be justiciable, below an attempt will be made to consider conceptual analysis of whether minimum core obligations can be enforced as individual rights.

As mentioned so far the concept of minimum core approach aspires to give specific legal content to socio economic rights<sup>190</sup> thereby making the rights susceptible to be claimed and enforced at domestic and international levels.<sup>191</sup> However, there are two lines of arguments concerning the issue of whether socio economic rights in general and minimum core obligations in particular can be invoked by individuals and enforced as such.<sup>192</sup> Putting simply, can individual claim particular good from state?

The first group argues infavour of individualized litigation system.<sup>193</sup> That is minimum core of socio economic rights should be claimed and enforced as individual rights. This group argues that if courts are unable to provide individual relief in specific circumstances, litigation of socio economic rights is longer effective tool for protecting individuals.<sup>194</sup> Beside, inability or unwillingness of courts to grant individual relief in at least severest deprivation of the rights, potentially discourage individuals to bring such

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<sup>189</sup> See Vienna Declaration and Program of Action, at supra note 4

<sup>190</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights, Supra note 160. See also, Bilchitz David, Poverty and Fundamental Rights at supra note 140, page 185

<sup>191</sup> Fons and Comans (ed.) Justiciability of Economic and Social Rights 48, at supra note

<sup>192</sup> See Bilchitz David, Poverty and Fundamental Rights Supra note 140, page 203

<sup>193</sup> Ibid

<sup>194</sup> Ibid

claims to courts.<sup>195</sup> That is, naturally when individual approach courts claiming rights violation the want something specific to be done with the view to remedy the alleged wrong. This is especially true for claimants under appalling and severest deprivation of material need as that of Grootboom community. Otherwise individuals do not have the incentive to bring socio economic rights claim to courts requiring adjustment or review of government policies or programs.<sup>196</sup>

The second line of argument says, the very nature of socio economic rights makes it difficult for governments to meet each individuals claim for particular good from state.<sup>197</sup> This group opposes individualized system of litigation for minimum core of socio economic rights by raising a number of arguments. First, individualized system of litigation for socio economic rights claims leads to undesired inequality among the society by letting the courts to remedy rights violation only suffered by those who are able and willing to bring their claims to the attention of courts.<sup>198</sup>

This very argument takes in to account the fact that majority of those suffering from violation of socio economic rights are poor people living in desperate poverty and don not even aware that they have such rights.

The other adverse impact of individualized approach to minimum core obligation is that it makes burdensome for the governments to develop and implement coherent policies and programs by drawing attention of governments to fulfill individuals orders.<sup>199</sup> In other words it is difficult or impossible for government to leave up to separate order of courts demanding the government to provide required good for a number of specified

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<sup>195</sup> Ibid

<sup>196</sup> Ibid

<sup>197</sup> Id. page 204

<sup>198</sup> Id. page 203

<sup>199</sup> Ibid

individuals. Adopting similar approach, the South African constitutional court in Grootboom held that “the Constitution did not create the right to shelter or housing immediately up on demand but a right to coherent and coordinated program designed to meet constitutional obligation”<sup>200</sup>

The concern of the court is, the difficulty for the government to meet the demands of thousands of South Africans living in appalling condition that will inevitably follow the courts precedent if judgment infavour of individualized approach to minimum core obligations has entered.<sup>201</sup>

Given the complexities involved in socio economic rights and individualized approach to minimum core concept, it is difficult to take a clear cut position on either of the aforementioned positions. Thus, the third mid way option balancing both individuals right to relief and also taking into account its impact on state should be developed.

In this regard David proposes that two standard solutions.<sup>202</sup> When the government have a program to fulfill such rights and individuals claims and prove that the policy has failed to threat them equally, courts may grant general order (not special order for individuals) demanding the government to rectify application of its program thereby indirectly answering the individual claims.<sup>203</sup>

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<sup>200</sup> Sunstein, Cass R., Social and Economic Rights? Lessons from South Africa (May 2001). U of Chicago, Public Law Working Paper No. 12; page 231 and 232

<sup>201</sup> The Government of the Republic of South Africa and others vs Grootboom at Supra note 181. In Grootboom the court justified why it decline minimum core approach to the adjudication of Socio economic rights,(though not convincing as such), stating that such approach of granting individual relief on ad hoc basis makes it difficult for court to address the problem of hundreds of thousands of South African in the same situations.

<sup>202</sup> Bilchitz David, Poverty and Fundamental Rights Supra note 192, page 204

<sup>203</sup> Ibid

However, where there is no program, courts should grant order requiring the government to develop necessary program to realize the right at stake.<sup>204</sup>

Nonetheless, such approach still fails to answer the some of the concerns of those arguing for individualized litigation system and approach to minimum core obligations. For instance, the courts order merely imposing an obligation on government to develop a program for the realization of the rights claimed may not answer the individual claim at least in short run. This is specially the case when the claimants are deprived of the minimal essential material need required for survival and face danger, as in the case of Grootboom community.<sup>205</sup>

Beside, as aforementioned, court order requiring the government nothing more than developing the program for the implementation of the claimed right will have adverse impact on future socio economic rights litigation by discouraging potential claimants from bringing their claims to courts.<sup>206</sup>

Yet, though the government has a program which treat every beneficiary equally this may not suffice. For instance, in Grootboom<sup>207</sup> though there is the national housing program which was being implemented without discrimination, the claims survival interest had put at stake. Thus, in such case the courts order should demand the government not only development and implementation of a program but also priority for those who face danger for their survival.<sup>208</sup> For instance, the order may require food to be rationed or

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<sup>204</sup> Ibid

<sup>205</sup> The Government of the Republic of South Africa and others vs Grootboom at Supra note 201

<sup>206</sup> Bilchitz David, Poverty and Fundamental Rights , at Supra note 197, page 204

<sup>207</sup> Supra note 210

<sup>208</sup> See, Malcolm Langford, Social Rights Jurisprudence, at supra note 179, Page 494. Also, Sandra Liebenburg, Beyond Civil and Political rights: Protecting Social, Economic and Cultural Rights under Bill of Rights – The South African Experience. Paper prepared for conference:

temporary housing for those who have no shelter at all, pending implementation of the program.

Coming to the CESRC's approach to this issue. The Committee's original formulation of the concept is seems to suggest group approach by stating "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>209</sup> Thus, the Committee employed the term, significant number of individuals than just putting it in terms of individual rights. Some scholar argued that, the phrase if 'a significant number of people is deprived' might be taken to mean that the minimum core does not intended confer individual right.<sup>210</sup> That is if the state is able to ensure for most of its people to have access to minimum essential levels of socio-economic rights, it doesn't fall short of its obligations under the ICESCR.<sup>211</sup> Nonetheless, the CESCR has resolved this ambiguity in its subsequent interpretive comments by stating that the minimum core establishes an individual right.<sup>212</sup> To this end, the Committee in General Comment 15, on the right to water, states that failure by state parties to ensure 'minimum essential level of the right is enjoyed by everyone' constitute violation of the right.<sup>213</sup>

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Protecting Human Rights, Center for Comparative Constitutional Studies, Melbourne Law School, 25 September 2007, available at: <http://acthra.anu.edu.au/articles/Liebenberg.pdf>

<sup>209</sup> CESCR's General Comment No. 3: at Supra note 163

<sup>210</sup> Wesson, M. (2004) *Grootboom and Beyond* at supra note 141 page 298

<sup>211</sup> Ibid

<sup>212</sup> CESCR General Comment 15: The Right to Water (2002) at supra note 166 Para. 44.

<sup>213</sup> Ibid

### 2.1.3 Reflection of the minimum core obligations in the CESCR concluding observation on selected state reports

As aforementioned the Committee introduced the concept of minimum core obligation with the view to require member state to ensure, at least, minimum essential levels the rights under the Covenant and non compliance of which constitute prima facie violation of the Covenant.<sup>214</sup> Moreover the Committee has done an extensive work in the subsequent general comments dealing with specific rights under the covenant to identify the minimum essential levels of each right. However the reflection of the general comments of the Committee on its work in the course of examining member state report is almost non existent.<sup>215</sup> In this regard, I have seen the Committee's concluding observation on state reports by Gambia, Honduras and Georgia among others and the Committee didn't use the minimum core as a tool to check compliance by these member states of their obligation to at least ensure minimum essential levels of each right under the Covenant. For instance, in its concluding observation given on Gambia's report, the Committee reaffirmed that "the fulfillment by the government of Gambia of the obligation imposed by the ICESCR can't be evaluated without taking into consideration the political, economic, and social condition prevailing in the country at the present time."<sup>216</sup> Having said that, though the Committee comes up with the fact that 68% of Gambian urban families didn't have enough food and also chronic malnutrition among children, which is clear to violation of the minimum obligation of the right to adequate food on the basis of the committee comment that:

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<sup>214</sup> CESCR's General Comment No. 3: at Supra note 209

<sup>215</sup> Malcolm Langford, Social Rights Jurisprudence, at supra note 208 Page 494.

<sup>216</sup> Committee on Economic, Social, and Cultural Rights (CESCR), 1994a, Concluding Observations on Gambia available at:

<http://www.ohchr.org/EN/countries/AfricaRegion/Pages/GMIndex.aspx>

*State party in which any significant number of individuals are deprived of essential food stuffs, prima facie constitute failure to discharge its obligations under the covenant by the state concerned*<sup>217</sup>

, the concluding observation on the state party concerned did not make any reference to the concept of minimum core obligation.

Likewise, despite the fact that the Committee found high unemployment rate in Georgia<sup>218</sup> among others and absence of lack of national housing strategy in Honduras,<sup>219</sup> the committee neither viewed these facts from minimum core content of the right to work and the right to housing respectively and establish violation accordingly. Absence of housing strategy in Honduras, in addition to the minimum core content of the right to Housing, is also in violation of the progressive realization standard under the Covenant which requires member states to take immediate and concrete step with the view to realize the rights.<sup>220</sup> Even in one of its comment the Committee held that the obligation to monitor extent of realization of socio economic rights and to devise strategies and programs for their promotion are not derogated from under guise of resource constraint.<sup>221</sup> Accordingly, devising strategies and programs with the view to promote full realization of socio economic rights are immediate obligation and inadequacy of the recourse can't be invoked as an excuse for non compliance. However, the Committee

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<sup>217</sup> CESCR's General Comment No. 3: at Supra note 209

<sup>218</sup> Committee on Economic, Social, and Cultural Rights (CESCR), 2002. Concluding Observations on Georgia available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.83.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.83.En?Opendocument)

<sup>219</sup> Committee on Economic, Social, and Cultural Rights (CESCR), 2001 Concluding Observations on Honduras, available at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.57.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.57.En?Opendocument)

<sup>220</sup> , International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 2

<sup>221</sup> CESCR's General Comment No. 3: at Supra note 217, Para. 11

only employs its loose language of “principal subject of concern” rather than calling it violation.

To sum up, the Committee is undertaking much work to build minimum core of each rights under the Covenant, through its General Comments thereby contributing to the evolving jurisprudence of economic, social and cultural rights by way of giving specific legal content for the rights. Nevertheless, the Committee though concluded from state parties report that they are not leaving up to their obligation to ensure minimum essential levels of the rights under the Covenant as dealt by the Committee under its various interpretive Comments, it does not situate its criticism within the framework of minimum core obligation.<sup>222</sup> Putting in more simplistic terms, the minimum core concept has not reflected in the Committees concluding observation on state parties report.

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<sup>222</sup> Malcolm Langford, Social Rights Jurisprudence, at supra note 215 on Page 493



## 2.2 Regional Approach to the Concept of Core minimum

Regional Human Rights Organizations have not much dealt with the concept of minimum core content so far, the only exception being an attempt by the Inter American commission on Human rights. Following the entry into force in 1999, of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” as an extension of the American Convention on Human Rights the inter American Commission on human rights begin to deal with regional implementation of various socio economic rights enshrined in the Protocol.<sup>223</sup>

Though the explicit language of the protocol sets the standard of “progressive realization” standard<sup>224</sup>, the Commission seems to adopt the minimum core approach as well.<sup>225</sup> To this end, the Commission held that member states of the Organization of American States obliged to guarantee a minimum threshold of economic, social and cultural rights regardless of the level of economic development.<sup>226</sup> Nevertheless, the commission did not went further in clarifying what are those minimum threshold that impose immediate obligations on member states, though I am of the view that the Commission has in mind the General Comments of the Committee on Economic, Social and Cultural rights on the core obligations of various rights under the Covenant.

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<sup>223</sup> Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), 16 November 1999, A-52,

<sup>224</sup> Ibid Art. 1

<sup>225</sup> CESCR's General Comment No. 3: at Supra note 221

<sup>226</sup> IACHR, 'Press Communiqué', No14/93, Washington DC, 10 August 1993, In annual Report of the Inter American Commission on Human Rights 1993

## CHAPTER III

### Reflection of Minimum Core Approach in Domestic Legal Systems

#### 3.1 Introduction

The justiciability of socio economic rights in general and the introduction the notion of minimum core concepts in the discourse of socio economic rights in particular are relatively recent development and subjected to intense jurisprudential debate and different school of thought.<sup>227</sup> Among the challenges leveled against justiciability of socio economic rights some concerned the issues of legitimacy of courts to enforce socio economic rights which is heavily involves policy consideration, the issue of separation of power, cost implications of socio economic rights are the notable ones.<sup>228</sup> Nonetheless, following introduction of the notion of minimum core by the CESCR General Comment No.3 and the Committee's subsequent interpretive general comment there is encouraging development in the past decades towards development of justiciability of socio-economic rights in states like South Africa, India, Brazil, Columbia and Hungary.<sup>229</sup> However, the idea of minimum core is not strongly featured and consistently developed in the domestic laws and jurisprudences of domestic courts of states though attempt has been made by domestic courts of Columbia, Brazil India and very limited attempt has made in South Africa to apply the concept in one way or another to socio-economic rights litigations. Even in those jurisdiction in which there is complete agreement regarding the

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<sup>227</sup> See for instance, Katharine G. Young, *The Minimum Core of Economic and Social Rights* at supra note 190. She depicted three different and possible normative foundations for the minimum core concept.

<sup>228</sup> See Sandra Liebenburg, *Beyond Civil and Political rights: Protecting Social, Economic and Cultural Rights Under Bill of Rights* at supra note 208

<sup>229</sup> Fons and Comans (eds.) *Justiciability of Economic and Social Rights*, supra note 1 191. See also Chapman, Audrey R.; Russell, Sage (eds.), *Core Obligations*, at supra note 170

justiciability of socio-economic rights, courts have used the minimum core concept to lend content to socio economic rights rarely and often not at all.<sup>230</sup> Furthermore, even in case of application minimum core by courts, the latter adopt different approaches in how they have applied they notion in the realm of socio economic rights adjudication.<sup>231</sup> In this regard, domestic courts jurisprudences of socio economic rights have showed three general approaches to the concept of minimum core:<sup>232</sup> First, The complete acceptance of the minimum core approach with reference to the international discourse on socioeconomic rights, as is the case with the Colombian Constitutional court.<sup>233</sup> Secondly, an acceptance of the minimum core approach in a more domesticated understanding of the concept, as is the case with the Indian Supreme Court and the State of New York and thirdly, rejection of the concept as is the case of the South African Constitutional Court.<sup>234</sup> This very chapter is devoted to the analysis of the extent to which Socio economic rights are incorporated in national constitution and domestic courts are willing to embrace the concept of minimum core to lend content to socio economic rights cases, drawing from the experiences of South Africa, India, Columbia and Ethiopia.

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<sup>230</sup> Joie Chowdhury , Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights– A Comparative Perspective, Cornell Law School Inter University Graduate Student Conference Papers, 2009

<sup>231</sup> Ibid

<sup>232</sup> Ibid

<sup>233</sup> Ibid

<sup>234</sup> ibid

### 3.2 Status of Socio Economic Rights and Minimum Core Approach

#### Under National Constitutions

One of the striking differences between constitutional rights before 20th century and the contemporary constitutions is that the latter incorporated provisions or section to the effect of recognizing and protecting economic, social and cultural rights with the notable exception of the United States constitution.<sup>235</sup> Some even argues that “democratic constitution should ensure that people will not live in desperate conditions because, a right to minimal social and economic guarantees can be justified not only on the ground that people in desperate conditions should have dignified life but also on the ground that democracy require a certain independence and security for everyone.”<sup>236</sup>

Put in more simplistic terms constitutional recognition of socio economic rights became one of the underlying features of the contemporary democratic constitution. To this end, the constitution of South Africa, India, Columbia, Hungary, Spain among others recognize socio economic rights in most explicit terms.<sup>237</sup>

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<sup>235</sup> Sunstein, Cass R., Social and Economic Rights? Lessons from South Africa at supra note 200 page 221 and 235. Note that that absence of constitutional guarantees of socio economic rights in the U.S and other western constitution stems from their perception that socio economic rights are policy goals and not susceptible to be framed in terms of rights.

<sup>236</sup> Ibid

<sup>237</sup> See Chapman, Audrey R.; Russell, Sage (eds.), Core Obligations, at supra note 229

### 3.2.1 The South African Constitution

As a transformative constitution, the South African Constitution aims at transforming the South African society from the divisions and inequality of the past to a society based on democratic values, social justice and fundamental human rights, and improving the quality of life of all citizens.<sup>238</sup> As such, constitutionally entrenched socio-economic rights have very crucial to achieve the transformative aim and feature of the constitution.

The South African Constitution is now renowned as one of the most progressive constitutions in the world, for the comprehensive list of not only the traditional civil and political rights but also economic, social and cultural rights in its Bill of Rights.<sup>239</sup>

To this end, the constitution recognizes a range of socio economic rights which includes, the rights of everyone to have access to adequate housing including a prohibition on arbitrary eviction,<sup>240</sup> the rights of everyone to have access to health care service including reproductive health care,<sup>241</sup> access to sufficient food and water<sup>242</sup> and access to social security.<sup>243</sup> Beside, the constitution also enshrines socio-economic rights consisting of children rights<sup>244</sup> and also the property clause requires state to foster equitable access to

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<sup>238</sup> See the Preamble of the 1996 South African Constitution and also Linda Stewart , *Adjudicating Socio-Economic Rights Under a Transformative Constitution*, 2010 available at: <http://www.ialsnet.org/newsletter/articles/ConLaw/stewart.pdf>

<sup>239</sup> Danie Brand and Christof Heyns (eds) *Socio-Economic Rights in South Africa* [PretoriaUniversity Law Press, Pretoria, 2005, xiv+309 pp, ISBN 0-620-34086-X (p/bk)]

<sup>240</sup> See S. AFR. CONST. section 25

<sup>241</sup> See S. AFR. CONST. section 27(3) provides that “ everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance and also no one may be refused emergency medical treatment.”

<sup>242</sup> See S. AFR. CONST. section 27(1) (b). Also Malcolm Langford, *Social Rights Jurisprudence*, at supra note, Page 212 78.

<sup>243</sup> See S. AFR. CONST. section 27(1) (C)

<sup>244</sup> See S. AFR. CONST. section 28

land, land distribution and tenure security.<sup>245</sup> Finally, it also comprises labor rights, environmental rights, the language and cultural rights.<sup>246</sup>

Apart from recognizing extensive range of socio economic rights, the Constitution went further with the view to realize implementation of the rights. To this end, the Constitution, has taken three important steps.

First, “it commands the state to respect, protect, promote and fulfill the rights and requires the state at the same time to take reasonable legislative and other measure within its available resource, to realize progressive realization of the rights.”<sup>247</sup> Basing on this and other provisions of the constitution, the Constitutional Court developed and applied reasonableness standard to check compliance of the governments programs and actions in various socio economic rights cases, though it rejected minimum core concept as will be seen in detail in the coming topics.<sup>248</sup>

Secondly, the constitution also mandates the South African Human Rights Commission to monitor and report annually on state’s organs implementation of socio economic rights.<sup>249</sup> In doing so, it creates a sort of national monitoring body to check and report on state’s compliance with the socio economic rights.

Thirdly, the Constitution makes socio economic rights justiciable thereby giving the courts the power to interpret these rights in the course of adjudicating socio economic

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<sup>245</sup> See S. AFR. CONST. section 25

<sup>246</sup> See S. AFR. CONST. section 30 and 31

<sup>247</sup> See for instance section 26(2) and 27 (2). See also Danie Brand and Christof Heyns (eds) *Socio-Economic Rights in South Africa* page.208 at supra note 239

<sup>248</sup> See for instance *The Government of the Rep. of S. Africa and Others v. Grootboom* at supra note 205. Also *Treatment Action Campaign* case at supra note 120

<sup>249</sup> Danie Brand and Christof Heyns (eds) *Socio-Economic Rights in South Africa* at Supra note 239

right disputes.<sup>250</sup> Justiciability of socio economic rights under the constitution has three important effects in turn.<sup>251</sup>

First, it curbs the problem of legitimacy of courts to deal with socio economic rights.<sup>252</sup> Note that one of the challenges leveled against justiciability of socio economic rights is that, courts lacks legitimacy to adjudicate socio economic rights since the latter involves policy consideration, separation of power and resources implications.<sup>253</sup> However, the constitution resolved this challenge by making the rights justiciable.<sup>254</sup> Put in more simplistic terms, the legitimacy of the South African Courts to adjudicate socio-economic rights can't be challenged since the power to deal with the rights is vested up on the courts by virtue of the constitution.

Secondly, justiciability of socio economic rights enables the courts to engage with interpretation and application of socio economic rights enshrined under the constitution to resolve cases before them.<sup>255</sup> In this regard, the Constitutional court in a number of instance, lend content to various socio economic rights provided under the constitution.<sup>256</sup> Thirdly, the justiciability of socio economic rights, apart from solving challenge of legitimacy and the interpretation, interpretation and application of the

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<sup>250</sup> The Constitution provides directly enforceable socio economic rights right. See for instance, sections 26 and 27 of the Constitution among others. see also Eric C. Christiansen, Adjudicating non justiciable rights: Socio-Economic Rights and The South African Constitutional Court, 2007 page 323, available at:

[http://www3.law.columbia.edu/hrlr/hrlr\\_journal/38.2/Christiansen\\_preview.pdf](http://www3.law.columbia.edu/hrlr/hrlr_journal/38.2/Christiansen_preview.pdf)

See also Wesson, M. (2004) *Grootboom and Beyond at supra note* 141

<sup>251</sup> Fons and Comans (ed.) Justiciability of Economic and Social Rights at supra note 229 page to 211

<sup>252</sup> Id. on page 211

<sup>253</sup> Eric C. Christiansen, Adjudicating non justiciable rights at Supra note 250

<sup>254</sup> Fons and Comans (ed.) Justiciability of Economic and Social Rights Supra note 251 page 208 foot note 5

<sup>255</sup> Ibid

<sup>256</sup> See Danie Brand and Christof Heyns (eds) Socio-Economic Rights in South Africa at supra note 249

constitutional socio economic rights cases, enables the courts to hear challenges of constitutionality of statutory common law or customary laws.<sup>257</sup> Accordingly one can challenge the constitutionality of various laws and regulation enacted by the legislature to give effect to the constitutional socio economic rights.

One of such instance is the Khosa case in which the applicants brought a case to the constitutional court challenging the constitutionality of the South African Social security Act.

Beside, though justiciability of socio economic rights under the constitution was the subject of intense academic and public debate at the beginning (the discussion of which is beyond the reach of this paper), judicial enforcement of socio economic rights serves the transformative aim of the constitution.<sup>258</sup> As such the constitution creates extensive system for the realization of socio economic rights.<sup>259</sup>

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<sup>257</sup> Fons and Comans (ed.) Justiciability of Economic and Social Rights Supra note 254

<sup>258</sup> Malcolm Langford, Social Rights Jurisprudence, supra note 222, Page 79. Key elements of this transformation include the dismantling of a plethora of racist and sexist laws.

<sup>259</sup> Eric C. Christiansen, Adjudicating non justiciable rights at Supra note 253



### 3.2.2 The Indian Constitution

India, being the largest democracy and the second most populous country in the world,<sup>260</sup> has managed to reduce the level of poverty owing to the economic development the country has been through.<sup>261</sup> However, significant portion of the population unable to afford basic needs like shelter, clothing food, health and education yet.<sup>262</sup> Likewise the South African Constitution, the Indian Constitution comprises both civil and political and also social, economic and cultural rights.<sup>263</sup> Part of the constitution which contains the directive principle of state policy contains list of socio economic rights which more or less corresponds to the one recognized under the International Covenant on Economic, Social and Cultural rights to which India is a party.<sup>264</sup>

To this end, the Constitution enshrines:

*the right to equal justice and free legal aid, right to work, to education and to public assistance in certain cases, provision for just and humane conditions of work and maternity relief, living wage for workers, participation of workers in management of industries, provision for free and compulsory education for children, promotion of educational and economic interests of Scheduled Castes, duty of the State to raise the level of nutrition and the standard of living and to improve public health*

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<sup>260</sup> See UNFPA information available at: <http://www.unfpa.org/pds/>

<sup>261</sup> See Fons and Comans (ed.) Justiciability of Economic and Social Rights, at supra note 257

<sup>262</sup> Id. on page 237

<sup>263</sup> Ibid. See also, the Part III and Part IV of the Indian Constitution

<sup>264</sup> Malcolm Langford, Social Rights Jurisprudence, at supra note 258 on page 103

*among others.*<sup>265</sup>

These rights correspond to the rights recognized under the Covenant. However, despite the fact these rights are recognized under the Constitution, the latter imposed severe limitation on justiciability of these rights by the Constitution by making these rights not to be enforced by the judicial body.<sup>266</sup> To this end, the relevant provision of constitution states:

*“The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”*<sup>267</sup>

In doing so, Indian courts are stripped of their constitutional legitimacy to deal with the adjudication and enforcement of socio economic rights. Thus, the approach taken by the Constitution of India, entrusted the legislature not the courts with the enforcement of socio economic rights.<sup>268</sup> The relevant part of the constitution reads the government will take in to account these rights in the governance of the country<sup>269</sup> thereby attempting to encourage legislative attention to these rights without involving the judiciary.<sup>270</sup> Such approach, though helps by ensuring that courts will not be entangled with administration social programs, without involvement of the judiciary the constitutional guarantees of the

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<sup>265</sup> See part VI of the Indian Constitution, available at, <http://lawmin.nic.in/coi/coiason29july08.pdf>

<sup>266</sup> See Art. 37 of the Indian Constitution

<sup>267</sup> Ibid

<sup>268</sup> Sunstein, Cass R., Social and Economic Rights? Lessons from South Africa (May 2001) supra note 235 on page 224

<sup>269</sup> See Art. 37 of the Indian Constitution

<sup>270</sup> Sunstein, Cass R., Social and Economic Rights? Supra note 268

rights will be meaningless because it leaves no option for individual to seek remedy in case of violation of the rights.<sup>271</sup>

Thus, the constitution of India, *prima facie*, leaves no room for justiciability of socio economic rights nor for adoption of the minimum core approach.<sup>272</sup> Nonetheless, the Indian Supreme Court employed two mechanisms for the adjudication and enforcement some of the socio economic rights provided under the DPSP.<sup>273</sup>

First, the court used interpretation of other values and rights of the constitution in the way that promotes judicial enforcement of the socio economic rights.<sup>274</sup> Thus, the court turn non justiciable Directive Principles of Social Policy (DPSP) into actionable rights - through reading these Directive Principles with the enforceable right to life in Article 21.<sup>275</sup> “The court held that the right to life include the right to live with human dignity which among other things fulfillment of basic necessities of life such as adequate nutrition, clothing and shelter.”<sup>276</sup> This in turn enables the court to overcome challenge of justiciability and enforcement concerning the rights enumerated in the DPSP.<sup>277</sup> The Supreme Court, in another case<sup>278</sup> took the view that what was fundamental in the governance of the country could be no less significant than that which was fundamental

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<sup>271</sup> Ibid

<sup>272</sup> See Joie Chowdhury , Judicial Adherence to a Minimum Core Approach at supra note 230

<sup>273</sup> Malcolm Langford, Social Rights Jurisprudence, at supra note 250 on page 102 to 124

<sup>274</sup> Ibid. See for instance, *Paschim Banga Khet major Samity v. State of West Bengal* (1996) 4SCC37

<sup>275</sup> *Paschim Banga Khet major Samity v. State of West Bengal* (1996) 4SCC37.

<sup>276</sup> Fons and Comans (ed.) *Justiciability of Economic and Social Rights*, at supra note 261 P. 240

<sup>277</sup> Ibid

<sup>278</sup> *Kesavananda Bharati v. The State of Kerala and Others* (AIR 1973 SC 1461)

in the life of an individual and therefore fundamental rights and DPSP are complementary.<sup>279</sup>

Secondly, “with the view to enforce the rights of the poor, the Court developed a liberalized procedure for public interest litigation (PIL) including relaxed standing rules, a more inquisitorial judicial approach often involving fact-gathering commissions, mandatory remedies and detailed supervision of enforcement”.<sup>280</sup>

Coming to the incorporation of the minimum core concept in the Indian legal system, neither the Constitution nor the Supreme Court jurisprudences explicitly mention minimum core in the socio economic rights discourse as has been framed by the Committee on Economic, Social and Cultural rights.<sup>281</sup> However, “the concept happens to be employed by the court couched in the language such as the essential minimum of the right<sup>282</sup> and what is minimally required”.<sup>283</sup> Thus there is a more domesticated understanding of the concept which has been confirmed by scholars to constitute minimum core<sup>284</sup> as will be explored latter in this very chapter. As such, constitutional entrenched socio economic rights in India differ from that of the South Africa in that the latter makes socio economic rights justiciable and entrusted the judicial organ with the power to adjudicate socio economic right cases.

<sup>279</sup> See Fons and Comans (ed.) Justiciability of Economic and Social Rights, at supra note 276 P.239

<sup>280</sup> Tara Usher, Adjudication of Socio-Economic Rights: One Size Does Not Fit All, ©2008 UCL Human Rights Review, vol. 1, no. 1, 2008 pp. 154-171, ISSN: 978-0-9560806. Available at, <http://www.uclshrp.com/images/uploads/pdf/HRR%20-vol%201%20-%209%20USHER.pdf>

<sup>281</sup> See Joie Chowdhury, Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights at supra note 272

<sup>282</sup> Paschim Banga case at supra note 275. See also See Joie Chowdhury, Judicial Adherence to a Minimum Core at supra note 272, Page 9

<sup>283</sup> See the order, People's Union for Civil Liberties v. Union of India & Ors, In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001-Commentary, [HTTP://WWW.ESCRNET.ORG/CASELAW/CASELAW\\_SHOW.HTM?DOC\\_ID=401033](HTTP://WWW.ESCRNET.ORG/CASELAW/CASELAW_SHOW.HTM?DOC_ID=401033). See Joie Chowdhury, Judicial Adherence to a Minimum Core at supra note 281

<sup>284</sup> Ibid

Beside, the Indian Supreme court has not out rightly rejected the minimum core concept as in the case of the South African Constitutional court. Rather the court opted for more domesticated understanding and application of the concept in the socio economic rights discourse as will be seen in detail in the latter part of the this chapter.

### 3.2.3 The Colombian constitution

Columbia is one of the countries that have incorporated socio economic rights in their Constitutional framework and developing promising jurisprudence in the adjudication of these rights.<sup>285</sup> In this regard, the Constitution recognizes long list of socio economic rights which among others include, the right to work and rights related to work<sup>286</sup>, the freedom to form and join trade unions<sup>287</sup>, the right to social security<sup>288</sup>, the right to health and environmental protection,<sup>289</sup> the right to adequate housing<sup>290</sup> and the right to education.<sup>291</sup>

The approach taken by the Colombian Constitution towards enforcement of socio economic rights little slightly differs from that of South Africa in that the constitution does not explicitly permit the direct judicial enforcement of many social rights.<sup>292</sup>

In fact the constitution provides for writ of protection (Accion de tutela).<sup>293</sup> The relevant provision of the Constitution states:

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<sup>285</sup> See the English version of the Constitution of Colombia (1991), chapter II, available at: [http://confinder.richmond.edu/admin/docs/colombia\\_const2.pdf](http://confinder.richmond.edu/admin/docs/colombia_const2.pdf)

<sup>286</sup> The Colombian Constitution(1991) Art.53, 25 and 26

<sup>287</sup> The Colombian Constitution(1991) Art.39

<sup>288</sup> The Colombian Constitution(1991) Art.48

<sup>289</sup> The Colombian Constitution(1991) Art.49

<sup>290</sup> The Colombian Constitution(1991) Art.51

<sup>291</sup> The Colombian Constitution(1991) Art.67

<sup>292</sup> See Fons and Comans (ed.) Justiciability of Economic and Social Rights, at supra note 276, Page 365

<sup>293</sup> The Colombian Constitution (1991) Art. 86

*Every person has the right to file a writ of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights, when that person fears the latter may be violated by the action or omission of any public authority.*<sup>294</sup>

Though Tutela action, is meant primarily for the enforcement of civil and political rights, the Constitutional Court based on broad interpretation of the constitution held that it could also be used for the protection of social rights in at least two kind of situations:<sup>295</sup>

*“first, whenever social rights must be treated as fundamental rights, either because the case involves a group that deserves special protection by the state e.g. children or because the social rights whose protection is invoked does not imply an economic expenditure on the part of the state. Secondly, whenever the court considers social rights may enforced indirectly via the doctrine of ‘connexity.’”*<sup>296</sup>

Accordingly, an individual can petition the court demanding immediate protection when her/his fundamental constitutional rights, which also include socio economic rights enshrined under the constitution, are threatened or violated by an act or omission of public authority.<sup>297</sup>

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<sup>294</sup> Ibid

<sup>295</sup> See Fons and Comans (ed.) Justiciability of Economic and Social Rights supra note 292

<sup>296</sup> Ibid

<sup>297</sup> Malcolm Langford, Social Rights Jurisprudence at supra note 258, Page 146

Beside, the Constitution makes international treaties ratified by Columbia part of the domestic legal system and to have overriding effect over the national laws.<sup>298</sup>

As such obligations under the ICESCR as interpreted by the CESCR and other treaties like International labor treaties ratified by Columbia and the Additional Protocol to the American Convention in the area of Economic, Social and Cultural rights not only holds significant weight but also take precedence over the national laws in the event of inconsistency between the two.<sup>299</sup>

Eventually, Constitution of Columbia like that of the South Africa and Indian Constitutions makes no explicit reference to the concept of minimum core. However, the Constitutional Court through its case law adopted the concept and develops economic, social and cultural rights with immediate effect using interpretation of other constitutional values and principles.<sup>300</sup> To this end, the court has developed direct applicability of economic, social and cultural rights through three interpretive practices.<sup>301</sup> First, through broad interpretation of fundamental rights such as the right to the right to life, dignity and physical integrity.<sup>302</sup> Secondly, through the concept of minimum condition for dignified life and thirdly, through the concept of 'unconstitutional state of affairs'.<sup>303</sup> The Columbian Constitutional Court adopted the minimum core approach and applied in the enforcement of various socio economic rights cases as it has

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<sup>298</sup> See The Columbian Constitution(1991) Art.53 and Art.93

<sup>299</sup> Ibid. See also Fons and Comans (ed.) Justiciability of Economic and Social Rights at supra note 295 page 145

<sup>300</sup> Joie Chowdhury , Judicial Adherence to a Minimum Core at supra note 281

<sup>301</sup> See Fons and Comans (ed.) Justiciability of Economic and Social Rights supra note 292 page 147

<sup>302</sup> Ibid

<sup>303</sup> Ibid

been framed by the CESC.R.<sup>304</sup> Thus the approach of the Columbian Constitutional Court is direct transplantation of the concept and as such differs from that of South Africa which out rightly rejected the concept<sup>305</sup> and also from the Indian constitutional court approach which though not rejected nor made explicit reference to the concept, adopt a more domesticated understanding of the concept, as highlighted above.<sup>306</sup> Nonetheless, the Columbian Constitutional Court has not been consistent in its case law concerning the meaning to be given to the term minimum condition for dignified life, as will be seen in the latter part of this chapter.<sup>307</sup>

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<sup>304</sup> Ibid, See socio economic rights jurisprudences of the Columbian Supreme court, for instance, Unification Judgment SU-225/98 and also Tutela Judgment T-236/98

<sup>305</sup> The Government of the Rep. of S. Africa and Others v. Grootboom and also Minister of Health and Others v. Treatment Action Campaign and others at Supra note 248,

<sup>306</sup> See the Indian Supreme Courts precedent. For instance, Francis Carolie Mullin v. The Administrator, Union Territory of Delhi (1981) 25 CR 516, 529, Paschim banga Khet Samity v. State of West Bengal, Case No. 169, Judgement of 6 May 1996 and also the People's Union for Civil Liberties (PUCL) v. Union of India

<sup>307</sup> Ibid and also Malcolm Langford, Social Rights Jurisprudence page 148 particularly foot note 29



### 3.2.4 The Ethiopian Constitution

Ethiopia is one of the most populous countries in Africa, ranking second, with the population of 88,013,491 by 2010/2011.<sup>308</sup> The country has also among the countries having highest number of people living below poverty line in the continent. It is estimated to be 38.7% of the total population earn less than one U.S dollar per day.<sup>309</sup> Which means about 32.5 million people live without having their basic needs fulfilled. Given this fact, one can easily imagine how luxury it would be for the majority of the people to afford basic necessities of life like shelter, education, housing food, basic health care. This scenario in turn makes provision basic health care, adequate housing, social security and food among others with the view to ensure dignified life for vulnerable part of the society. As such recognition and realization of socio economic rights has of paramount importance to make those goods accessible in the lives of poor and also for the protection of their right and in the interest of justice. To this end, socio economic rights is granted legal recognition both under the Ethiopian Constitution<sup>310</sup> and subsidiary laws as well as international human rights declaration and treaties to which Ethiopia is a party including the International Covenant on Economic, Social and Cultural Rights and the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>311</sup> Nonetheless, though socio economic rights are incorporated in the constitutional frame work, they are framed more in generic terms even than that of the

<sup>308</sup> See: CIA World Fact book 2011 Population 2011 Country Ranks, available at: [http://www.photius.com/rankings/population/population\\_2011\\_0.html](http://www.photius.com/rankings/population/population_2011_0.html) (accessed on 05/05/2011)

<sup>309</sup> See the World FactBook, available at: <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> (accessed on 05/05/2011)

<sup>310</sup> See Constitution of the Federal Democratic Republic of Ethiopia. (1995). Proclamation No. 1/1995. Negarit Gazeta Year 1, No.1 , Art. 40 throughout Art. 44

<sup>311</sup> See, The International Covenant on Civil and Political Rights (ICCPR), Art. 14, Universal Declaration of Human Rights (UDHR), Art. 6 and also Article 55(c), of Charter of the United Nations

ICESCR.<sup>312</sup> In this regard one can see the provision of the constitution dealing with the right to property,<sup>313</sup> on economic, social and cultural rights,<sup>314</sup> on labor rights,<sup>315</sup> related to the right to development<sup>316</sup> and concerning environmental rights<sup>317</sup> the framers of the Constitution have employed very loose and vague phraseology in the formulation of the rights. For instance under article 41 of the constitution dealing with Economic, Social and cultural Rights it is provided:

*“Every Ethiopian citizen has the right to engage freely in economic activity and to pursue livelihood anywhere in the national territory, has the right to choose his/ her means of livelihood, occupation and profession and also has the right to equal access to publicly funded social services. Besides starting from sub article 4 of article 41, the Constitution enumerated state obligations to allocate increasing resources to provide public health, education and other social services, to provide rehabilitation and assistance to the physically and mentally disabled, the aged and to children who are left without parents or guardians. In addition, State shall pursue policies which aim to expand job opportunities for the unemployed and indigent and shall accordingly undertake programs and public works projects and all measures necessary to increase opportunities for citizens to find gainful employment.”<sup>318</sup>*

However, neither the legislature nor the courts has attempted to give specific contents for those socio economic rights, exceptions being few legislations regulating expropriation of

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<sup>312</sup> See Constitution of the Federal Democratic Republic of Ethiopia. (1995). Proclamation No. 1/1995. Negarit Gazeta Year 1, No.1 , Art. 40 throughout Art. 44 of the constitution

<sup>313</sup> The 1995 Constitution of Ethiopia, Art. 40

<sup>314</sup> Id. Art. 41 of the Constitution

<sup>315</sup> Id. Art. 42

<sup>316</sup> Id. Art 43,

<sup>317</sup> Id. Art. 44

<sup>318</sup> Ibid

private property by state and labor rights. For instance, with regard to expropriation of private property provision of the Constitution prescribes: “Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.”<sup>319</sup> Beside, the Federal expropriation proclamation enacted by the parliament,<sup>320</sup> requires the government to justify that expropriation of private property is necessitated by public interest, due notice for the property owner about the fact that his or her property is to be expropriated and payment of just compensation for the property owner in the advent of expropriation.<sup>321</sup> Beside, the Federal Expropriation Proclamation, (Proc. No. 401/2004) enumerated the kinds of works that are considered as beneficial to the public.<sup>322</sup> These preconditions to expropriate private property, I can say, constitute the minimum core of the right to property and prohibition against eviction. Basing on this very legislation the Ethiopian courts are dealing with vast amount of cases brought challenging expropriation of the private property by the government mainly for construction of public goods like road and other infrastructures and investments.<sup>323</sup>

In other areas of socio economic rights, the competency of the Ethiopian judiciary to enforce socio economic rights are so limited and the courts jurisprudence in this area is nil. In fact, the Art. 9(4) of the constitution depict that “all international agreements

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<sup>319</sup> Art. 40(8) of the Constitution

<sup>320</sup> Expropriation of Land Holdings for Public Purpose and Payment of Compensation Proclamation. (2005). Proclamation No.455/2005. Negarit Gazeta. Year 11, No.43

<sup>321</sup> Ibid, Art. 3 and the following

<sup>322</sup> See The Proc. No. 401/2004), Article 2/2

<sup>323</sup> see Daniel Weldegebriel AMBAYE , Land Valuation for Expropriation in Ethiopia: Valuation Methods and Adequacy of Compensation, available at:  
[http://www.fig.net/pub/vietnam/papers/ts04c/ts04c\\_ambaye\\_3753.pdf](http://www.fig.net/pub/vietnam/papers/ts04c/ts04c_ambaye_3753.pdf)

ratified by Ethiopia are an integral part of the laws of the country”.<sup>324</sup> As such, since Ethiopia ratified the ICESCR, labor treaties, ACRWC and other international human rights agreements dealing with socio economic rights, individuals can invoke the rights contained therein before domestic courts. Moreover, Art. 13(2) of the Constitution states that:

The fundamental rights and liberties contained in this Chapter shall be interpreted in conformity with the Universal Declaration of Human Rights, international human rights covenants, humanitarian conventions and with the principles of other relevant international instruments which Ethiopia has accepted or ratified.<sup>325</sup>

Thus, international human rights instruments accepted by Ethiopia guide the interpretation of bill of rights section of the constitution. To this end, one can safely conclude that, since Ethiopia is party to the ICESCR, the interpretative comments which has been developed by the UN Committee on Economic, Social and Cultural rights dealing which minimum core of the rights to adequate housing, basic health care, the rights to food, the right to social security and others should guide interpretation of the socio economic rights entrenched in the constitution and other subsidiary legislations.

Nonetheless, the constitution has no provision to the effect of dealing with justiciability of socio economic rights. Neither do the socio economic rights enshrined in the constitution framed as directly enforceable right.<sup>326</sup>

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<sup>324</sup> Art. 9(4) of the Constitution

<sup>325</sup> See Art. 13(2) of the Constitution

<sup>326</sup> Note that the South African judiciary passes the challenge of legitimacy to adjudicate socio economic rights litigations, for the socio economic rights are included in the constitution as directly enforceable right

In fact, Art. 37 of the constitution states, “Every person has the right to bring justiciable disputes to and to obtain a decision or judgment by, a court of law or, where appropriate, by another body with judicial power.”<sup>327</sup> However, it neither explicitly empower the judicial bodies to enforce the rights nor define justiciable matter. “Nor there exist subsidiary laws proving for a comprehensive definition or establishes standard for determining the justiciability of a constitutional matter.”<sup>328</sup> Thus, the Ethiopian courts jurisprudence on socio economic rights in general and adoption of the minimum core concept in particular are almost non existence.

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<sup>327</sup> Art. 37 (1) of the Constitution

<sup>328</sup> Solomon Abebe, Judicial Implementation of socio economic rights in Africa, a student paper submitted to the Central European University, 2007, page 76.

### 3.3 Analysis of Domestic Court Jurisprudences

As has been mentioned so far, domestic courts jurisprudences of socio economic rights have showed three general approaches to the concept of minimum core:<sup>329</sup> First, The complete acceptance of the minimum core approach with reference to the international discourse on socioeconomic rights, as is the case with the Colombian Constitutional court.<sup>330</sup> Secondly, an acceptance of the minimum core approach in a more domesticated understanding of the concept, as is the case with the Indian Supreme Court and the State of New York and thirdly, an outright rejection of the concept as is the case of the South African Constitutional Court.<sup>331</sup>

In this very topic, I will explore the extent to which the minimum core concept is transplanted in the domestic legal context with particular emphasis on the how far the courts in South Africa, India and Columbia went to embrace the concept in the adjudication of socio economic rights.

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<sup>329</sup> Joie Chowdhury , Judicial Adherence to a Minimum Core Approach at supra note 300

<sup>330</sup> Ibid

<sup>331</sup> ibid

### 3.3.1 The South African Experience

As mentioned earlier, one of the major obstacles for the judicial enforcement of socio economic rights is the challenge of legitimacy that courts often face to deal with such matters.<sup>332</sup>

However, the South African judiciary passes the challenge of legitimacy to entertain and adjudicate socio economic rights litigations, for the socio economic rights are included in the constitution as directly enforceable right.<sup>333</sup> Thus, the courts have constitutional legitimacy to deal socio economic rights cases. Although of course the extent to which they can enforce socio-economic rights remains fairly open. Moreover, the power of judicial review conferred up on the judiciary by the constitution enable the court to review executive laws, policies and programs compatibility with the constitutional guarantees.<sup>334</sup> This in turn makes South Africa a leading country not only by having constitutionally entrenched socio economic rights but also by developing promising jurisprudences in the adjudication of the rights.

Following inclusion of directly enforceable rights in the South African Constitution in 1996, five prominent cases concerning socio economic have been brought to the attention of the Constitutional court: *Government of the Republic of South Africa v Grootboom*,<sup>335</sup> *Soobramoney v Minister of Health (KwaZulu- Natal)*,<sup>336</sup> *Minister of Health v Treatment*

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<sup>332</sup> See Sandra Liebenburg, *Beyond Civil and Political rights: Protecting Social, Economic and Cultural Rights Under Bill of Rights*, at supra note 228

<sup>333</sup> See for instance, Wesson, M. (2004) *Grootboom and Beyond* at supra note 250

<sup>334</sup> S. AFR. CONST. sections 167(4) and(5), 169 (a) and 172

<sup>335</sup> *The Government of the Republic of South Africa and others v. Grootboom* at supra note 248

<sup>336</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

Action Campaign,<sup>337</sup> *Khosa v Minister of Social Development*,<sup>338</sup> and *Mazibuko and Others v City of Johannesburg*.<sup>339</sup>

Though the constitutional court ruled over a number of socio economic right cases, my analysis of the court's socio economic rights jurisprudences is only limited to how the court approach the minimum core concept in dealing with the cases with particular emphasis on court's judgment in *Grootboom*, *Treatment Action Campaign* (hereinafter called TAC) and *Mazibuko* rather than the more general consideration of the court's interpretation of the socio economic rights provisions enshrined in the Constitution. It worth keeping in mind that, among the three approaches taken by national courts towards inclusion of the minimum core concept in the national legal system, the South Africa Constitutional Court, opted for the first option, by rejecting the concept<sup>340</sup> as will be seen below.

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<sup>337</sup> *Minister of Health and Others v. Treatment Action Campaign and Others* 2002(5) SA 72 (CC)

<sup>338</sup> *Khosa & Ors v Minister of Social Development & Ors*. 2004(6) BCLR 569 (CC)

<sup>339</sup> *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009)

<sup>340</sup> See the judgment of the court in *Grootboom* and TAC. See also Joie Chowdhury , *Judicial Adherence to a Minimum Core Approach* at supra note 329



### 3.3.1.1 Government of the Republic of South Africa v Grootboom

The decision of the South African Constitutional Court in *South Africa v. Grootboom*, hereinafter called *Grootboom*, is one of the leading examples of the judicial enforcement of socio economic rights and laid foundation for the subsequent cases.<sup>341</sup> The case concerned the right to housing under section 26 and 28 of the South African Constitution.<sup>342</sup> In this very case the applicant, Irene Grootboom was one of several hundred desperately poor people, half of whom were children, living in an informal squatter settlement which lacked running water, electricity, sewage and refuse removal services.<sup>343</sup> Though they had applied for low cost housing from the municipality, they were placed and kept on waiting list for a number of years.<sup>344</sup> Latter on, though the group moved onto vacant private land, they were evicted by the owner and subsequently moved to a nearby municipal sports field and erected plastic sheeting to live in.<sup>345</sup> It was at this juncture that the respondent's attorney brought an application to the High Court demanding provision of adequate basic shelter or housing until they obtained permanent accommodation.<sup>346</sup> The Constitutional court considered and adjudicates the case s 26(1) and (2) of the Constitution, which states:

(1) Everyone has the right to have access to adequate housing.<sup>347</sup>

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.<sup>348</sup>

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<sup>341</sup> See Dixon, Rosalind, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, *International Journal of Constitutional Law* July, 2007

<sup>342</sup> See the *Government of the Republic of South Africa and v Grootboom* at supra note 335

<sup>343</sup> Ibid

<sup>344</sup> Ibid

<sup>345</sup> Ibid

<sup>346</sup> Ibid and also the summary of the *Grootboom* case Sunstein, Cass R., *Social and Economic Rights? Lessons from South Africa* at supra note 270 page 227

<sup>347</sup> S. AFR. CONST. sections 26(1)

The court not only acknowledged the significant background provided the International Covenant on Economic, Social and Cultural Rights, (the Covenant signed but not yet ratified by South Africa) and but also it referred to the concept of the minimum core approach developed by the CESCR.<sup>349</sup> However, the court rejected the minimum core approach in lieu of the reasonableness test to check constitutionality of the state housing program and framed the issue as:

Whether the measures taken by state to realize the right to have access to adequate housing as recognized by section 26 are reasonable?<sup>350</sup> In other words, what reasonableness require from the government to realize section 26 of the constitution within the available resources of the state?<sup>351</sup> Accordingly, reasonableness requires ‘comprehensive’,<sup>352</sup> ‘coherent’,<sup>353</sup> ‘balanced’ and ‘flexible’ program directed towards the progressive realization of the right to access adequate housing.<sup>354</sup> Moreover, the Court held that a ‘program that excludes a significant sector of society cannot be said to be reasonable.’<sup>355</sup>

Assessed against the reasonableness test developed by the Court, the state’s housing program falls short of the governments obligation under section 26 of the Constitution to

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<sup>348</sup> S. AFR. CONST. sections 26(2)

<sup>349</sup> See the Grootboom case at supra note 342 and also the summary of the Grootboom case on Sunstein, Cass R., *Social and Economic Rights? Lessons from South Africa* at supra note 346 page 229

<sup>350</sup> See *The Government of the Republic of South Africa v. Grootboom and others* at supra note 342 Para. 40

<sup>351</sup> Ibid

<sup>352</sup> Ibid

<sup>353</sup> Id. para. 41.

<sup>354</sup> Id. para. 43

<sup>355</sup> Ibid

the extent that it failed to provide emergency relief to people without any form of shelter.<sup>356</sup>

Though the court is of the view that the program should be ‘implemented with due regard to the urgency of the situations it is intended to address’,<sup>357</sup> it held that neither section 26 nor section 28 create a direct (free standing rights) and enforceable right to housing immediately upon demand.<sup>358</sup> The Court, as such, refused to recognize any form of housing immediately on demand or individual entitlement to such right. As such, in *Grootboom*, the court adopted a very cautious approach and attempted protect the interests of those in need of protection, leaving the primary responsibility for coordinating socio-economic programs in the hands of the state, which in turn has little or no meaning for the immediate demand of the *Grootboom* community in light of the peril they had been through. I am of the view that one can rightly say the court approach is little or no more than what is called the administrative law approach to the socio economic rights enforcement in which the role of the court is “to guard against arbitrariness by ensuring that the resource allocation adopted by the agency is rational”.<sup>359</sup>

The court rejected the minimum core concept pointing to the alleged difficulties associated with the identification of what constitute the minimum core of a right.<sup>360</sup> The court held that it needs sufficient information about the needs and opportunities to determine what the minimum core in case of the right of access to adequate housing

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<sup>356</sup> Id. para. 44

<sup>357</sup> Id. para 67

<sup>358</sup> Id. para 71 and also Sunstein, Cass R., *Social and Economic Rights? Lessons from South Africa*, May 2001 page 231 at supra note 349

<sup>359</sup> See Wesson, M. (2004) *Grootboom and Beyond*, at supra note 333 page 289

<sup>360</sup> See the *Grootboom* case Para. 32

should be and moreover the needs in the context of the rights to housing is diverse which in turn present its own difficulties in defining the minimum core.<sup>361</sup> Put in the language of the court,

*it would not be possible to determine the minimum core of the right of access to adequate housing without first determining the ‘needs and opportunities’ for the enjoyment of the right these are, however, diverse; some need land, others need land and houses, and yet others require financial assistance. This raises the question of whether it is indeed possible to stipulate a minimum core that is valid in such a range of contexts.*<sup>362</sup>

However, the courts reasoning in rejecting the minimum core approach is too generic and unconvincing owing the following reasons:

First, I am of the view that the court’s characterization of the minimum core approach and the reasonableness test developed by the court as a mutually exclusive concept is erroneous. That is, there is no inconsistency between the reasonableness test as has been developed by the court and the minimum core concept as developed by the CESC. Hence, the court could have interpreted the reasonableness test in the way that accommodates the minimum core approach and applied it simultaneously. Here it should be kept in mind that the text of the constitution do not prohibit minimum core which in

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<sup>361</sup> Ibid. see also Bilchitz David, Poverty and Fundamental Rights at supra note 202, page 197

<sup>362</sup> See The Grootboom case at Supra note 350

turn means there is no provision in the constitution which prohibit the court from adopting the concept.<sup>363</sup>

Beside, as has been argued by David Bilchitz fulfillment of the minimum core should be regarded as the first stage of progressive realization.<sup>364</sup> In doing so, “the courts reasonable test which it applies to the progressive realization of the right could also be adapted to cover survival interest and leads to a presumption that governments program fall short of the test of reasonableness if certain minimum are not met,” as has been argued by Sandra Liebenburg.<sup>365</sup> Hence, the court should have required the state to bear the burden of proving why it couldn’t fulfill the minimum core of the goods.

Secondly, the argument of the court that it needs sufficient information about the needs and opportunities to determine what the minimum core in case of the right of access to adequate housing is problematic in that such information is not necessary to determine what the minimal interest of people are.<sup>366</sup> Not that the concept of minimum core aspires to give specific contents to socio economic rights in the way that prioritize fulfillment of minimal interest of human beings.<sup>367</sup> In fact, there are issues yet unresolved concerning normative foundations of minimum core approach concerning how to determine what constitute minimal interest.<sup>368</sup> However, this is not the case regarding Grootboom community. To this end, David Bilchitz convincingly argued that, “what constitute minimal interest of a people in Grootboom community was quite clear: what they want

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<sup>363</sup> See Wesson, M. (2004) *Grootboom and Beyond* at supra note 359 page 302

<sup>364</sup> Bilchitz David, *Poverty and Fundamental Rights* – at supra note 361, page 193

<sup>365</sup> See Sandra Liebenburg 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in *J Squires et al (eds) The road to a Remedy* page 73-88. See also Malcolm Langford, *Social Rights Jurisprudence*: supra note on page 494

<sup>366</sup> Bilchitz David, *Poverty and Fundamental Rights* at Supra note 364 on page 199

<sup>367</sup> See Katharine G. Young: *The Minimum Core of Economic and Social Rights*, supra note 227

<sup>368</sup> See the different normative foundation for the minimum core as depicted by Young and David Bilchitz

protection from elements and an environment that would be injurious to their health”.<sup>369</sup>

Though such approach could have repercussions for the right to housing generally beyond the Grootboom community, every possible effort should be made to do away with such undignified and appalling living condition.

Thirdly, it is known that the CESCR which is entrusted with the mandate of monitoring whether state parties are leaving up to their obligation under the Covenant, urges the state parties “to ensure the satisfaction of, at least the minimum essential levels of each of the rights” under the Covenant<sup>370</sup> and developed, through its interpretive comments, an extensive list of what constitute the minimum core of the right to adequate housing,<sup>371</sup> basic health care,<sup>372</sup> right to work<sup>373</sup> and other rights under the Covenant.<sup>374</sup> In this regard, largely concur with the arguments of professor Wesson that there is no apparent reason why the minimum core of the right to adequate housing as has been identified and developed by the CESCR could not be used and judiciously adapted to South African context.<sup>375</sup>

Yet, Yacoob J’s argument that the diverse nature of the needs in the context of the rights to housing as presenting its own difficulties in defining the minimum core is not valid. In this regard it worth keeping in mind that One of the functions of courts in general are giving specific content to abstract rights and the same holds true in case of the function of

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<sup>369</sup> Bilchitz David, *Poverty and Fundamental Rights* at Supra note 366

<sup>370</sup> CESCR’s General Comment No. 3. para. 10 at supra note 225

<sup>371</sup> CESCR’s General Comment No 4, *the right to adequate housing* at supra note 180

<sup>372</sup> CESCR’s, General Comment No. 14: The right to the highest attainable standard of health, at supra note 155

<sup>373</sup> CESCR’s General Comment No. 18: The Right to Work (art. 6) at supra note 154

<sup>374</sup> CESCR’s General Comment No. 3. para. 10 at Supra note 369

<sup>375</sup> See Wesson, M. (2004) *Grootboom and Beyond* at supra note 363 page 301

courts in the enforcement of socio economic rights.<sup>376</sup> As such, as argued by David Bilchitz, the diverse nature of the needs in the context of the rights to housing would not preclude the court from stipulating the minimum core obligation of the state and leaving it to state to determine what that obligation requires in particular circumstances.<sup>377</sup> This could best be implemented if followed by the exercise of the court's supervisory jurisdiction. In doing so, I don't agree with the argument that the problem of the Grootboom judgment lies not with the approach of the court but with failure to exercise supervisory jurisdiction. Of course, I agree that the courts supervisory jurisdiction can do much to follow up whether the government is acting as required by the constitutional provision as interpreted by the court. However, the most important thing is that the court should have listed minimum and specific duties of the state thereby letting the executive to have a clearer understanding what is required of it by the reasonable legislative measure under of S. 26 of the constitution while at the same time making it easier for individuals to hold the executive accountable for its failure to deliver their most pressing needs.<sup>378</sup> Putting in more simplistic terms, the court should first try its best to tackle the problem that leads to non implementation of its judgment by state through framing its orders in clear and specific terms, such as the order in Khosa and those parts of TAC that required that required that restrictions on the availability of Nevirapine be lifted.<sup>379</sup> In

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<sup>376</sup> David Bilchitz, Poverty and Fundamental Rights at supra note 369 page 198

<sup>377</sup> Ibid

<sup>378</sup> Karin Lehmann, In Defense of the Constitutional Court: Litigating Socio- Economic Rights and the Myth of the Minimum Core." American University International Law Review 2006, page 2

<sup>379</sup> See Wesson, M. (2004) *Grootboom and Beyond* at supra note 375, page 306 foot note 80

doing so the court can even do away with the need for supervisory jurisdiction as has been held by professor Wesson.<sup>380</sup>

Generally, I am of the thought that, though the judgment of the court in Grootboom has laid important foundation for the subsequent cases, the court in Grootboom is erroneous in holding that the court is not suppose to dictate the extent to which state should consider the needs of vulnerable groups that have a legitimate claim to public resources. Having held such belief the court did little to address the claims of vulnerable sectors of society than what it could have done. Rather, the court should have adopted the minimum core approach as has been developed by the CESCR and also by requiring the state to prove that every effort has been made to provide emergency housing for the people under threat to their survival interest. Eventually, sharing the belief of a number of scholars in this field, I am of the thought that the court could have acted as an effective agent of social change more that what it has done. That is, “the approach of the Constitutional Court is ultimately ineffective, and will do little to promote the interests of vulnerable sectors of society, or further the transformative vision of the Constitution.”<sup>381</sup>

Below, I will analyze the courts approach to the minimum core in Treatment Action Campaign and Khosa case together.

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<sup>380</sup> Ibid

<sup>381</sup> See The Government of the Republic of South Africa v Grootboom and others at supra note 362



### 3.3.1.2 Minister of Health v Treatment Action Campaign (TAC)

The Treatment Action Campaign case (also called KwaZulu- Natal), hereinafter called TAC, is concerned with the rights to access to health care service and others under S. 27(1) (a) and 27(2) and 28 (1) (c) of the Constitution.<sup>382</sup> The TAC case brought to the constitutional court challenging the government policy restricting provision of Nevirapine drug<sup>383</sup>, to a limited number of research and training sites. The government tried to justify the policy by stating that the restriction was to evaluate the effectiveness of the drug though the safety of the drug had been approved by the Medicines Control Council and the WHO.<sup>384</sup> The restriction on the provision of the drug in turn had the effect of excluding a significant and vulnerable sector of society – HIV positive pregnant women, and their children, falling outside those sites – from that service.<sup>385</sup> The issue before the Court was, therefore, whether the restriction of the drug to the research sites constituted a violation of certain rights by way of excluding those women and children from accessing the service unjustifiably.<sup>386</sup>

The Constitutional court found the government's reasons unconvincing and held that the policy fails to consider mothers and new born children who don't have access to these sites and ordered that Nevirapine should be made available at all public hospitals and clinics.<sup>387</sup> In addition, the government was ordered to take 'reasonable' measures to

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<sup>382</sup> See Minister of Health and Others v. Treatment Action Campaign at supra note 337

<sup>383</sup> Ibid. See Nevirapine is antiretroviral drug that reduces incidences of mother to child transmission of HIV/AIDS at birth.

<sup>384</sup> See Treatment Action Campaign case at Supra note 382

<sup>385</sup> Ibid

<sup>386</sup> Ibid and also Bilchitz, David, Towards a Reasonable Approach to the Minimum Core at supra note 182 on page 2 and 3

<sup>387</sup> See Treatment Action Campaign case at Supra note 382 para 135(3)(c).

extend testing and counseling facilities – necessary in some instances for the administration of Nevirapine – throughout the public health sector.<sup>388</sup>

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<sup>388</sup> Ibid para 135(3)(d).

### 3.3.1.3 Mazibuko and others v City of Johannesburg and others

Mazibuko and Others v City of Johannesburg, hereinafter called Mazibuko concerned the case brought by five residents of Phiri in Soweto (the applicants) challenging the water policy of the city of Johannesburg stipulating a basic minimum of water supply to resident of the town to be 6 kilolitres per household per month or 25 liters per day alleging that the Law is in conflict with the Water Services Act and the right to have access to sufficient water set out in section 27 of the Constitution.<sup>389</sup> In addition, the applicants challenged the constitutionality of installation of pre-paid water meters in Phiri which charged consumers for use of water in excess of the free basic water allowance.<sup>390</sup>

The South Gauteng High Court held the water policy of City of Johannesburg unconstitutional and ordered the basic minimum of water supply should be increased to 50 liters per person daily to the applicants and 'similarly placed' residents of Phiri so as to be compatible with the right to have access to sufficient water set out in section 27 (2) of the Constitution.<sup>391</sup> The Supreme Court of Appeal varied this order, holding that 42 liters of water per day should be supplied per person, on the basis of expert evidence and directed the City to reformulate its policy accordingly.<sup>392</sup>

The Constitutional Court, having referred to its previous jurisprudence, rejected the Court of Appeals decision.<sup>393</sup> The Court found that the City's Free Basic Water policy fell within the bounds of reasonableness and therefore did not contravene either section 27 of

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<sup>389</sup> Mazibuko and Others v City of Johannesburg at supra note 339

<sup>390</sup> Ibid

<sup>391</sup> Ibid

<sup>392</sup> Ibid

<sup>393</sup> Ibid

the Constitution or the national legislation regulating water services.<sup>394</sup> The court rejected not merely determining the minimum content of water but also adopting a quantified standard determining the 'content' of the right.<sup>395</sup> As such, the Constitutional Court held that the right of access to sufficient water does not require the state to provide upon demand every person with sufficient water.<sup>396</sup> Rather it requires the state to take reasonable legislative and other measures progressively to realize the achievement of the right of access to sufficient water, within available resources.<sup>397</sup> The court once again failed to embrace the minimum core approach for the same reason stated in the earlier precedents in *Grootboom* and *Treatment Action Campaign*. That is the court is institutionally inappropriate body to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realization of the right.<sup>398</sup>

I am of the view that the High Court and SCA went too far in their efforts to lend normative clarity to the right by prescribing a specific amount of water per person. As such, the constitutional court's approach in rejecting a quantified standard in determining the 'content' of the right to sufficient water is right in a sense that courts though is appropriate body to give specific contents to rights by way of interpretation should not go to the extent of such specificity as has been done by the lower courts. "That is by prescribing a fixed amount of water (for example 42 or 50 liters water per person per day)

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<sup>394</sup> Ibid

<sup>395</sup> Ibid

<sup>396</sup> Ibid

<sup>397</sup> Ibid

<sup>398</sup> Ibid see for instance *Mazibuko CC Case CCT 39/09 2009 ZACC 28*, at ¶ 67

the courts over-formulate policy.”<sup>399</sup> In addition such level of specificity makes it difficult for the court to set and maintain uniform standard that is applicable to every similar cases with such level of specificity. Beside, the reliability of expert evidence to make such quantification to give specific content to the right to water might lead to inconsistency because if other experts will be sent to other areas similar to Soweto they could come up with different quantity as minimum amount of water needed for an individual.

Nonetheless, saying that the court should not deal with the right to sufficient water with such level of specificity do not bar the court from giving minimum content to the right at relatively general level by using a broader universal standard which may not necessarily have to be quantified.<sup>400</sup> In this regard, the could adopt the minimum core of the right to access to sufficient water developed by the CESCR in its general comment No. 15.

Surprisingly, the court refrained from giving content to the right to access to sufficient water on ironic interpretation of the text of the constitution especially Section 27 of the Constitution.<sup>401</sup> Accordingly the court held that

*The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. As such the rights enshrined under the Constitution acquire content by such legislative measures which is subjected to the constitutional standard of reasonableness.*<sup>402</sup>

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<sup>399</sup> Linda Stewart , Adjudicating Socio-Economic Rights Under a Transformative Constitution, 2010at page 506

<sup>400</sup> Ibid. See also David Bilchitz, Towards a Reasonable Approach, supra note 386, at 7-8 and David Bilchitz, Poverty and Fundamental rights, supra note 376, at 158.

<sup>401</sup> Linda Stewart , Adjudicating Socio-Economic Rights at 506 & 507

<sup>402</sup> *Mazibuko CC Case CCT 39/09 2009 ZACC 28*, at ¶ 67

In fact the interpretation of socio-economic rights demands a careful balancing act in that courts should be careful not to encroach up on the power of the legislative or executive branch of the government by engaging in formulation of government policy while formulating the meaning of a specific socio-economic right. <sup>403</sup> However it should be noted that not only the text of the constitution doesn't prohibit the court from specifying content of the right but also such approach is based on the wrong assumption the legislative measure like the Water Services Act is specific enough to lend content to the right thereby replacing the role courts in this regard. Such approach renders courts inappropriate body to specify content of socio economic rights. Nonetheless, it worth noting that beside the role of legislative and executive to realize socio economic rights, courts also have a quasi law-making role to translate these constitutional rights into enforceable legal claims.<sup>404</sup>

Such engagement of courts and especially the Constitutional Court assists the legislature and the executive to have a clearer understanding of where to start progressive realization. Beside, engagement of the court in lending specific content to the right enable individuals to have clear knowledge as to the duties of the other branches of the government and held them responsible in the event of their failure to leave up to the courts order. Thus, though the court should not go to the extent of quantifying the minimum content of the right, it is appropriate role of courts to lend specific content of the right to sufficient water, preferably through adoption of the minimum core approach owing to the aforementioned advantages associated with the concept. Finally, I am of the

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<sup>403</sup> Linda Stewart , Adjudicating Socio-Economic Rights supra note 399 same page

<sup>404</sup> Danie Brand, *Introduction to Socio-Economic Rights in the South African Constitution*, in Socio-Economic Rights in South Africa 1, 17-18 (Danie Brand & Christof Heyns eds., PULP 2005)

thought that the Court not only rejected the minimum core approach on unconvincing grounds but also failure of the Court to give contents to the right is step back compared to what the court at least did in the earlier cases especially in Treatment Action Campaign and Khosa.

#### 3.3.1.4 Khosa v Minister of Social Development

The Khosa case is concerned with the rights to access to social security and others under section 27 of the Constitution.<sup>405</sup> The case was brought to the constitutional court by the applicants who were permanent residents in South Africa, challenging the Social Assistance Act provisions reserving the rights to social assistance solely for citizens and claimed that the restriction imposed by the Act is in violation of s 27(1)(c), 55 and 9, the equality guarantee of the Constitution.<sup>406</sup> As such, like the previous cases of Grootboom and TAC, Khosa concerns the exclusion of a particular group – in this instance, permanent residents – from a socio-economic program from which others already benefited.<sup>407</sup> The Court held, amongst other things, that the Constitution gave “everyone” the right to have access to social security – not merely citizens – and that “everyone” would include those residing in the country legally.<sup>408</sup> The state was consequently ordered to extend social grants to all permanent residents who meet the relevant criteria.<sup>409</sup>

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<sup>405</sup> Khosa & Ors v Minister of Social Development at supra note 338

<sup>406</sup> Ibid

<sup>407</sup> Wesson, M. (2004) *Grootboom and Beyond: at supra note 379, page 297*

<sup>408</sup> Khosa & Ors v Minister of Social Development at supra note 405

<sup>409</sup> Ibid

As a matter of fact, TAC and Khosa benefited largely from the jurisprudence that the Court developed in Grootboom.<sup>410</sup> Moreover, in both TAC and Khosa cases, the court displayed greater assertiveness beyond what it has done in Grootboom.<sup>411</sup>

The judgment in TAC enabled any HIV-positive pregnant woman to claim Nevirapine as of right in any public health centers in South Africa and as such create individual rights to the drug saving the positive aspect of the order relating to progressive provision of testing and counseling facilities.<sup>412</sup> Especially, the court in Khosa goes further that what it has done in Grootboom to the extent of imposing far-reaching financial obligations upon the state, thus requiring the latter to extend social grants to all permanent residents in the country and thereby sharpening the reasonableness standard to some extent.<sup>413</sup> Nonetheless, despite the progress made in these two cases, the constitutional court declines to embrace the minimum core concept.

The court in TAC judgment gave two basic reasons for its failure to adopt the minimum core approach. First, the court held that “it was not institutionally equipped to make the wide ranging factual and political enquiries necessary for determining what the minimum standards . . . should be”<sup>414</sup> Secondly, the court is of the view that the minimum core approach is rigid, absolute and failed to take into account resource scarcity for it requires the government to do the impossible, i.e. ensuring access to core service for everyone

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<sup>410</sup> Charles Ngwenya, *Adjudicating Socio economic Rights-Transforming South African Society?*

Available at: <http://www.ajol.info/index.php/pelj/article/viewFile/43483/27018>

<sup>411</sup> See Wesson, M. (2004) *Grootboom and Beyond* at supra note 407, page 296 and 297

<sup>412</sup> See Treatment Action Campaign case supra note 387

<sup>413</sup> See Wesson, M. (2004) *Grootboom and Beyond* supra note 411, page 197 foot note 56

<sup>414</sup> Treatment Action Campaign case at supra note 412 para 37.



immediately.<sup>415</sup> However, the aforementioned reasons forwarded by the court to reject the minimum core approach are unconvincing owing to the following reasons.

Concerning the first reason given by the court stating that the court is not equipped to determine what constitute the minimum core of the right, I couldn't see why the court should make such inquiry to determine what constitute the minimum core of each right in the existence of the one developed by the CESCR. It should worth noting that, not only the south African constitution text do not prohibit the minimum core approach but also section 39 of the Constitution allows the court can have reference to international human rights documents through what is called purposive approach (the mechanism often used by the Court).<sup>416</sup> I have no doubt that the CESCR interpretive general comment is one of such documents though South Africa has not ratified the Convention yet. Putting simply, the court could have used the minimum core obligation as has been developed by the CECSR in its various interpretive general comments

Accordingly, I entirely agree with the Professor Wesson counter argument that the Court could have used core elements of the socio economic rights as developed by the CESCR and the court gave no reason nor does any convincing reason has given so far why the minimum core rights of socio economic rights as has been developed by the CESCR could not be judiciously adapted to the South African context.<sup>417</sup>

Coming to the second reasoning of the court, the court held that the minimum core is rigid and absolute in that it requires the state to provide everyone with access to core

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<sup>415</sup> Ibid

<sup>416</sup> See Section 39 of the S.AFR. Cons. See also Shadrack Gutto, *Equality and non-discrimination in South Africa: the political economy of law and law making*, New Africa Books, 2001, page 196 and 197

<sup>417</sup> See Wesson, M. (2004) *Grootboom and Beyond* at supra note 413, page 301

service immediately.<sup>418</sup> I am of the thought that the court misconstrued the concept and made vague and general statement.

As has been mentioned so far, in essence of the minimum core is intended to establish certain classes of needs as enjoying priority over others and the minimum core of a right constitute an immediately realizable entitlement derogation from which is only justified up on demonstrating strong proof for non compliance with the minimum core obligation.<sup>419</sup> Thus, one can rightly hold that, the minimum core is rigid in a sense that it requires any human being who face treat to their survival to be provided with basic goods immediately and requires states to bear the heavy burden of demonstrating that every effort has been made as a matter of priority to fulfill the minimum core of the right.<sup>420</sup> Such rigidity is logical and should also be perceived as the positive aspect of the concept for we must be intolerant of undignified living conditions in which individuals face threat to their survival.<sup>421</sup> Beside, the concept as has been originally framed by the CESCR is not absolute in that the Committee leaves an option to justify non compliance, by stating:

*In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a 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<sup>422</sup>.*

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<sup>418</sup> Treatment Action Campaign case at supra note 412

<sup>419</sup> CESCR's General Comment No. 3 para 10 at supra note 370

<sup>420</sup> Ibid and also Bilchitz, David , Towards a Reasonable Approach to the Minimum Core: supra note 386, page 15 and 16

<sup>421</sup> Ibid

<sup>422</sup> General Comment 3 at supra note 419

However, the court preferred to give vague statement about the concept than requiring the government to establish why it couldn't provide basic shelter, food water and other necessities of life within short period of time if not immediately. Putting in more simplistic terms, instead of dismissing the minimum core as 'impossible', the Court could require the state to show why it unable to meet the minimum core, employing the standard of proof mentioned above as set by the CESC. <sup>423</sup>

Eventually, though I concur with the view that the South African constitutional court jurisprudence of socio economic rights cases is the leading in laying foundation for the adjudication of these rights, the courts failure to embrace the minimum core approach render the court to contribute less than what it could have done had the court embraced the concept .

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<sup>423</sup> Ibid and also Wesson, M. (2004) *Grootboom and Beyond* at supra note 417

### 3.3.2 The Indian Experience

As mentioned so far, India among the leading countries in developing jurisprudence in the discourse of socio economic rights adjudication and enforcement.<sup>424</sup> Adjudication of socio economic rights in India results largely from the work of the Supreme Court interpretation of other values and rights under the Constitution rather than the constitution itself.<sup>425</sup> In fact the Indian Constitution has recognized socio economic rights and the country has ratified the ICESCR.<sup>426</sup> However, the Constitution imposed severe limitation on justiciability of these rights thereby keeping these rights beyond the reach of the judicial body.<sup>427</sup> Thus the constitution of India, *prima facie*, leaves no room for justiciability of socio economic rights nor for adoption of the minimum core approach. In doing so, Indian courts are stripped of their constitutional legitimacy to deal with the adjudication and enforcement of socio economic rights and this in turn make the court to face the challenge of legitimacy to deal with enforcement of these rights.<sup>428</sup>

As such, the situation in India differs from that of South Africa in that the constitutional socio economic rights in India are not directly enforceable unlike in the South African scenario. Nonetheless, the Indian Supreme court has developed jurisprudence in the discourse of socio economic rights through two mechanisms.<sup>429</sup> First, through

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<sup>424</sup> S. Muralidhar, *The Expectation and Challenges of Judicial Enforcement of Social Rights* on Malcolm Langford, *Social Rights Jurisprudence*: at supra note 297, Page 102ff

<sup>425</sup> See DPSP (part IV) of the Indian Constitution is not justiciable and how the court intervene with the socio economic right through interpretation of other values of the constitution like the right to life. See also for instance, *Paschim Banga Khet major Samity v. State of West Bengal* (1996) 4SCC37, supra note 282

<sup>426</sup> See DPSP (part IV) of the Indian constitution

<sup>427</sup> See Art. 37 of the Indian Constitution

<sup>428</sup> See Malcolm Langford, *Social Rights Jurisprudence*: at supra note 297 page 117

<sup>429</sup> See Fons and Comans (ed.) *Justiciability of Economic and Social Rights*, supra note 301 page 246

interpretation of other values and rights of the constitution in the way that promotes judicial enforcement of the socio economic rights.<sup>430</sup> For instance Francis Carolie Mullin v. The Administrator, Union Territory of Delhi case, “by interpreting the DPSP with the enforceable right to life in Article 21, the court held that the right to life include the right to live with human dignity which among other things include fulfillment of basic necessities of life such as adequate nutrition, clothing and shelter.”<sup>431</sup> This in turn enables the court to overcome challenge of justiciability and enforcement concerning the rights enumerated in the DPSP.<sup>432</sup> In fact, one can hardly imagine dignified life without fulfillment of basic necessities of life as envisaged by the court and state should strive to fulfill at least the minimum core of these rights as a starting point of progressive realization.

Secondly, “with the view to enforce the rights of the poor, the Court developed a liberalized procedure for public interest litigation (PIL) including relaxed standing rules, a more inquisitorial judicial approach often involving fact-gathering commissions, mandatory remedies and detailed supervision of enforcement”.<sup>433</sup>

The Supreme court played an important role not only by enforcing socio economic rights under the DPSP through interpretation of other values and rights of the constitution but by giving specific legal content to the rights.<sup>434</sup> To this end, the court developed a more

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<sup>430</sup> See socio economic jurisprudences of the Indian Supreme court, for instance, the People's Union for Civil Liberties (PUCL) v. Union of India

<sup>431</sup> Francis Carolie Mullin v. The Administrator, Union Territory of Delhi (1981) 25 CR 516, 529. Also Malcolm Langford, Social Rights Jurisprudence at supra note 428 P. 240

<sup>432</sup> Ibid

<sup>433</sup> Tara Usher, Adjudication of Socio-Economic Rights: One Size Does Not Fit All, at supra note 289

<sup>434</sup> See for instance in the Paschim banga judgement, the court delineated emergency medical care as a core right thereby lending specific content to the right to health under the Constitution

domesticated understanding of the minimum core approach than directly referring to the one that has been developed by the CESCR. Below, I will explore how the Supreme court has approached the concept of minimum core concept in its jurisprudence laying special emphasis on the right to health and food in light of the decision of the court in two cases: the case of *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Anor* and the case of *People's Union for Civil Liberties v. Union of India & Ors.*

### 3.3.2.1 *Paschim Banga Khet Mazdoor Samity & Others v State of West Bengal & Anor*

The case of *Paschim Banga* concerned the right to life under Art. 21 of the constitution and other provisions of the Constitution like Art. 31 and 47.<sup>435</sup> In this case, the petitioner, “a resident of West Bengal, was severely injured after falling off a train and thereafter was refused treatment at seven successive State hospitals because the hospitals either had inadequate medical facilities or did not have a vacant bed.”<sup>436</sup>

The Court in its verdict held that, denial of timely medical treatment necessary to preserve the petitioner’s life in state-owned hospitals amounts to violation of the rights to life.<sup>437</sup> The Supreme Court not only contextualized the right to health as being an integral part of the right to life<sup>438</sup> and held the state in violation of its constitutional obligation but went further to the extent of ordering payment of compensation for the petitioner and

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<sup>435</sup> *Paschim banga* case at supra note 424

<sup>436</sup> See summary of *Paschim Banga* case, available at, [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=401236](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=401236).

<sup>437</sup> See *Paschim banga* case at Supra note 435

<sup>438</sup> See *Paramanand Katara v. Union of India* (1989)4 SCC 286 and also *Francis Carolie Mullin* case at supra note 431

directed the government to formulate the blue print for primary health care with especial emphasis on emergency medical care.<sup>439</sup>

More interestingly, the court held that the rights to access emergency medical treatment can't be impaired by invoking resource constraints.<sup>440</sup> However the court latter in another case state qualified its approach and held that state resource is limited and obligation of the state with regard to employees entitlement to medical benefit is contingent up on availability of resources.<sup>441</sup>

As such the court's approach is useful in lending specific content to the right to health by way of delineating emergency medical care as a core right which in turn helps to evaluate the extent of state obligation and helps to facilitate progressive realization of the right .<sup>442</sup>

Delineation of emergency medical care as non derogable and minimum core of the right to health is also suggestive of health priorities will have to be tailored to meet these specific minimum obligations.<sup>443</sup>

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<sup>439</sup> Paschim banga case at Supra note 437

<sup>440</sup> Ibid

<sup>441</sup> See State of Punjab v. Ram Lubhaya Bagga, (1998) 4 SCC 117. See also *Consumer Education and Research Centre v. Union of India* (1995 3 SCC 42)

<sup>442</sup> S. Muralidhar, The Expectation and Challenges of Judicial Enforcement of Social Rights on Malcolm Langford, Social Rights Jurisprudence at Supra note 424 page.114 Note, though the court has not explicitly mentioned the concept of the minimum core as developed by the CESCR in this very case as elsewhere, some Muralidhir has observed that the decision in *Paschim Banga* delineates the right to emergency medical care for accident victims as forming a core minimum of the right to health. see also the summary of the case available at: [http://www.escri-net.org/caselaw/caselaw\\_show.htm?doc\\_id=401236](http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=401236).

<sup>443</sup> Ibid

### 3.3.2.2 The People's Union for Civil Liberties (PUCL) v. Union of India

In PUCL v. Union of India case, the Supreme Court is requested to intervene and remedy the paradox of food scarcity prevalent over parts of the country in the midst of large food stock within the state reserve.<sup>444</sup> The People's Union for Civil Liberties, approached the Supreme Court of India claiming that the government failed to make available the minimum food to tackle starvation death occurring in the drought stricken area leading to a violation of the right to food.<sup>445</sup> Though the government invoked resource scarcity as a defense the court rejected it and found the state in violation of the fundamental right to life.<sup>446</sup> As such the court contextualized the right to food under the fundamental right to life and granted interim order requiring all the State Governments and the Union of India to effectively and immediately enforce eight different Centrally-sponsored food schemes to the poor.<sup>447</sup> Though the court has not explicitly mentioned the minimum core approach in this very case, the court identified the minimum core right to food thereby lending specific content to the right. To this end, "the court required the state to provide food for the aged, infirm, disabled, destitute, women and men who are in danger of starvation, pregnant and lactating women and destitute children without means of support and that State governments should progressively implement the mid-day meal scheme in primary schools with a minimum content of 300 calories and 8-12 grams of protein each day of school for a minimum of 200 days for each student."<sup>448</sup>

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<sup>444</sup> People's Union For Civil Liberties (Pucl) V. Union Of India And Another 1997 AIR (SC) 568

<sup>445</sup> Ibid and also Fons and Comans (ed.) Justiciability of Economic and Social Rights, supra note 429

<sup>446</sup> People's Union For Civil Liberties (Pucl) V. Union Of India case at Supra note 444

<sup>447</sup> Ibid

<sup>448</sup> Malcolm Langford, Social Rights Jurisprudence at supra note 428 page, 117



In general, even though the court made no explicit reference to the minimum core; it has embraced the concept though not as exactly as the CESCRC framed it.<sup>449</sup> Besides, the court's assertive approach to interpret the right to life in the way that leads to the enforcement of socio economic rights under the DPSP of the constitution has the following paramount importance.<sup>450</sup>

- Such approach enable the court to overcome the challenge of competency and legitimacy of the judiciary to adjudicate and enforce socio economic rights, an area which have long been perceived as falling within the competency of other organ of the state.<sup>451</sup>
- In addition, judicial intervention in the enforcement of socio economic rights helps to bring about major changes and modification in the relevant state policies and regulation.<sup>452</sup>
- Finally, the court's assertive approach helps not only by addressing the immediate demand of the vulnerable sector of the society but also identified benchmarks and indicators in several key areas concerning economic, social and cultural rights. For instance, "the decision in Paschim Benga delineates, the court the right to emergency medical care for accident victims as forming a core minimum of the right to health whilst the order in PUCL v. Union of India underscore the right of access for those below the poverty line to food supplies as forming the bare non-

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<sup>449</sup> See Joie Chowdhury, Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights at supra note 340, page 9

<sup>450</sup> See Fons and Comans (ed.) Justiciability of Economic and Social Rights, supra note 445 page 147

<sup>451</sup> Ibid and also Malcolm Langford, Social Rights Jurisprudence at supra note 448 page, 117

<sup>452</sup> Ibid

derogable that is essential to preserve human dignity.”<sup>453</sup> However, the Indian Supreme court approach towards the minimum core concept, as termed as a more domesticated understanding of the concept gave no reason why it couldn’t applied the CESCR’s interpretive general comments nor developed a uniform standard that could be applied across the whole range of socio economic rights cases.

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<sup>453</sup> Social Rights Jurisprudence at supra note 448, page 118

### 3.3.3 The Columbian Experience

As has been mentioned so far, Columbia is one of the countries that have incorporated socio economic rights in their Constitutional framework and developing promising jurisprudence in the adjudication of these rights.<sup>454</sup> In addition to recognizing socio economic rights, the Constitution provides for directly enforceable rights thereby enabling the judicial organ to enforce the rights though it limits justiciability of many social rights unlike that of South African Constitution.<sup>455</sup> The court using the power entrusted up on it to enforce socio economic rights adjudicate a number of cases.<sup>456</sup>

Though the Constitution of Columbia like that of the South Africa and Indian Constitutions makes no explicit reference to the concept of minimum core, the Constitutional Court through its case law adopted the minimum core of socio economic rights as it is framed by the Committee on Economic, Social and Cultural rights.<sup>457</sup> The approach taken by the Columbian constitutional court towards the enforcement of socio economic rights however differs from both South Africa and Indian's Constitutions in that the former allowed explicitly the International Covenant of Economic, Social and Cultural Rights, (which Columbia has ratified) be used to interpret relevant sections of the Constitution and this in turn render the interpretive comment of the CESCR to have of paramount importance.<sup>458</sup> As such, the approach taken towards the minimum core by

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<sup>454</sup> S. Muralidhar, The Expectation and Challenges of Judicial Enforcement of Social Rights at supra note 442 page 102. Also See Fons and Comans (ed.) Justiciability of Economic and Social Rights, supra note 450 page 356 and 357

<sup>455</sup> See Fons and Comans (ed.) Justiciability of Economic and Social Rights, Supra note 450 Page 365 Also the English version of the Constitution of Colombia (1991), chapter II, available at: [http://confinder.richmond.edu/admin/docs/colombia\\_const2.pdf](http://confinder.richmond.edu/admin/docs/colombia_const2.pdf) at supra note 61

<sup>456</sup> See the Columbian constitutional court socio economic rights jurisprudences like Unification Judgment SU-225/98 and Tutela Judgment T-236/98.

<sup>457</sup> Joie Chowdhury, Judicial Adherence to a Minimum Core Approach at supra note 449, page 9

<sup>458</sup> Art 93, Constitution of Colombia, 1991

the Columbian Constitutional Court differs from that of South Africa which rejected the concept<sup>459</sup> and also from the Indian constitutional court approach which though not rejected, made no explicit reference to the concept rather adopted a more domesticated understanding of the concept, as highlighted above.<sup>460</sup> In this regard, the Court has delineated the minimum core of socio-economic rights such as the right to health and the right to housing, in light of CESCR observations.<sup>461</sup>

Below I will explore the how the Columbian Constitutional court characterized and used the minimum core approach to lend specific content to the socio economic rights entrenched in the constitution in light of the right to health cases brought to the attention of the court.

As has been mentioned so far, the Columbian Constitutional Court has developed the concept of *minimo vital* through its case law and used it as a tool for the direct enforcement of economic, social and cultural right.<sup>462</sup> Although *Minimo vital* is not delineated in the constitution, the court constructed it from the right to life, right to health, the right to work and social security and defined it to mean the ‘minimum condition for dignified life.’<sup>463</sup> However, “the court has not been consistent in its case law and has given different meanings to this concept. Sometimes it refers to the right to

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<sup>459</sup> Charles Ngwena, *Adjudicating Socio economic-Transforming South African Society?* Supra note 410

<sup>460</sup> Fons and Comans (ed.) *Justiciability of Economic and Social Rights*, Supra note 450

<sup>461</sup> CC decision, T-859, 2003; CC decision, T-025, 2004; CC decision, T-585, 2006. see also Joie Chowdhury , *Judicial Adherence to a Minimum Core Approach*, Supra note 457 page 8

<sup>462</sup> See Malcolm Langford, *Social Rights Jurisprudence*: supra note 451 page 149

<sup>463</sup> See Tutela Judgment T-207/95, Tutela Judgment T-254/93, T-539/94 and Tutela Judgment T431/94

minimum condition for a dignified life as an implicit fundamental right,<sup>464</sup> whilst on the other occasion it has employed this concept as a test to determine if violation of economic, social and cultural rights is so closely related fundamental rights ('fundamental rights by connection') that it requires immediate protection."<sup>465</sup>

Nonetheless, using the *minimo vital*, the Columbian court delineate the minimum core of the socio economic rights cases brought to the attention of the court. To this end, I will explore the decision of the court in relation the right to health which I think is very relevant in that the Columbian Constitutional Court in this very case adopted the minimum right to health as has been framed by the CESC.R.

The court demonstrated a high level of judicial activism in several cases concerning the right to health by giving very specific content to the right thereby making it immediately enforceable and ordering both public and private institution to comply the court's order the Court has ordered the provision of a wide range of goods and services.<sup>466</sup> In one of the cases, the court ordered the state to provide free vaccination for children and the poor and held that unavailability of vaccination program to include these children constitute violation of the core content of the right to health.<sup>467</sup> Yet in another case, referring to the notion of the minimum condition for dignified life the court ordered a private company to supply an ear plant for a 10 year old boy who has been deaf from birth<sup>468</sup> whilst in still

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<sup>464</sup> See for instance, Tutela Judgment T-236/98, Tutela Judgment T-260 and Tutela Judgment T-841/04

<sup>465</sup> see Malcolm Langford, *Social Rights Jurisprudence*, supra note 462, page 48 Foot note 29

<sup>466</sup> See for instance, Tutela Judgment T-117/99, Unification Judgment SU-043/95, Unification Judgment SU-111/97, Unification Judgment SU-039/98, Tutela Judgment T-236/98, T-093/00 and Tutela Judgment T-421/01. See also Fons and Comans (ed.) *Justiciability of Economic and Social Rights*, Supra note 460 page 153 and see also Joie Chowdhury , *Judicial Adherence to a Minimum Core Approach* , Supra note 461 page 8

<sup>467</sup> Unification Judgment SU-225/98

<sup>468</sup> Tutela Judgment T-236/98

another case the court pass an order demanding financing of treatment of patients abroad up on finding no appropriate treatment was available in Colombia.<sup>469</sup>

Eventually, “ as a result of an enormous amount of litigation to enforce the right to health, in July 2008, the Constitutional Court rendered a judgment in which it ordered a dramatic restructuring of the country’s health system.”<sup>470</sup>

Though the Constitutional Court is making an encouraging move through its case law by adopting the minimum core of socio economic rights as it is framed by the CESCR, it went too far in its efforts to lend normative clarity to the right in some cases by demanding the state and private entities to the extent of financing of treatment of patients abroad. It might be difficult for courts adopt such an expansive approach towards available resources. Yet the court also happen to encroach up on the mandate of other branches of the government by requiring the state to restructure the country’s health system.

### 3.4 *Conclusion*

Despite the fact that the UN Committee on Economic, Social and Cultural Rights has developed a serious of interpretive general comment with the view to give specific legal content to the loosely framed rights under the Covenant and also though the discussion concerning the minimum core of socio economic rights dominates socio-economic rights discourse in the international realm of supervision and also the scholarly discourse around socio-economic rights, the concept is not strongly featured or transplanted and

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<sup>469</sup> Tutela Judgment T-165/95

<sup>470</sup> See Tutela Judgment T-760, 2008. see also Joie Chowdhury, Judicial Adherence to a Minimum Core, Supra note 461 page 8

consistently developed in the domestic laws and jurisprudences of domestic courts in the context of socio-economic rights adjudication and enforcement.

## CHAPTER IV

### 4.1 Towards More Robust Approach (Conclusion)

The paper explored the minimum core approach to the socio economic rights and the extent to which the concept is featured and transplanted in the domestic legal system to adjudicate and enforce socio economic rights with especial emphasis on the experience of South Africa, India, Ethiopia and Columbia.

Despite a rhetorical commitment to the indivisibility and interdependence of human rights, socio economic rights are treated with less urgency and at a time even considered as a policy goals than rights.<sup>471</sup> In this regard, the vague and indeterminate way in which economic, social and cultural rights have historically been articulated continues to be one of the fundamental obstacles to further developing their content and to spelling out a framework for action that allows for their progressive realization.<sup>472</sup> The Covenant required state to take steps “with a view to achieving progressively the full realization” of economic, social and cultural rights “to the maximum of their available resources.”<sup>473</sup> Though the covenant provides for progressive realization as standard for realization of various rights under the covenant, this standard has a number of issues unresolved and as such constitute problematic standard to conceptualize. In addition, the vague nature in which state parties obligations are framed presented a major obstacle to the enforcement

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<sup>471</sup> See Vienna Declaration and Program of Action, at supra note 189 Paragraph 5, states that “*[a]ll human rights are universal, indivisible and interdependent and interrelated.*” See also Asbjør Eide et.al (eds.), *Economic, Social and Cultural Rights: A Text Book*, Martinus Nijhoff Publishers, 1995, Page 15 and Sunstein, Cass R., *Social and Economic Rights? Lessons from South Africa* at supra note 349. P. 222 to 223

<sup>472</sup> Circle of Rights: Economic, Social and Cultural Rights Activism at supra note 10

<sup>473</sup> See Art. 2 of ICESCR



of socio economic rights and also to develop tools for their implementation.<sup>474</sup> Beside, at national level, judicial enforcement of socio economic rights become onerous owing to various reasons like the perception that realization of socio economic rights is resource intensive and the challenge of legitimacy that national courts are presented with to enforce these rights.<sup>475</sup> Nonetheless, over the last two decades promising developments to the effect of promoting effective implementation of socio economic rights both at international and domestic legal system has been witnessed.<sup>476</sup> To this end, the work of the Committee on Economic, Social and Cultural rights<sup>477</sup> coupled with national courts jurisprudence in countries like South Africa, India and Columbia are worth mentioning.<sup>478</sup> Thus, introduction of the minimum core concept by the Committee and efforts to adjudicate socio economic rights in some jurisdiction has much to do with lending specific content to the rights thereby bringing a paradigm shift on the earlier perception overshadowed the entire socio economic rights discourse. Especially, the introduction of the minimum core concept to the socio economic rights by the CESCR is a big step forward in lending content to the rights which in turn leads to the adjudication of the rights and scholarly debate over the concept concerning socio economic rights enforcement.

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<sup>474</sup> Eitan Felner, *A New Frontier in Economic and Social Rights Advocacy? Using Quantitative Data for Human Rights Accountability*: Center for Economic and Social Rights, 2009

<sup>475</sup> Fons Comans (ed.) *Justiciability of Economic and Social Rights*, at supra note 460

<sup>476</sup> *Ibid.* See also Audrey Chapman and S. Russell (eds.), *Core Obligations*: at supra note 237

<sup>477</sup> See CESCR's General Comment 3 at supra note 422. Also subsequent interpretive comments of the Committee on various rights in the Covenant

<sup>478</sup> Fons Comans (ed.) *Justiciability of Economic and Social Rights*, at Supra note 475. See also Audrey Chapman and S. Russell (eds.), *Core Obligations*: at supra note 476

The whole idea behind the Minimum core approach is to narrow down the existing elusive, vague and indeterminate way in which economic, social and cultural rights have historically been articulated by conferring minimum legal content to the rights thereby by creating rights capable of claim and judicial enforcement, in the event of violation.<sup>479</sup> Hence, in essence, minimum core approach is intended to establish certain classes of needs as enjoying priority over others and the minimum core of a right constitute an immediately realizable entitlement derogation from which is only justified up on demonstrating strong proof for non compliance.<sup>480</sup> The concept seeks to confer “a minimum legal content for socio-economic rights by suggesting that there are degrees of fulfillment of a right and that a certain minimum level of fulfillment takes priority over a more extensive realization of the right.”<sup>481</sup>

In fact, the origin of minimum core concept has traced to various sources like written work of scholars and national constitutions by different writers and as such it is not novel idea of application only in the adjudication of socio economic rights.<sup>482</sup> For instance, some writers link the minimum core to similar notions in German constitutional law.<sup>483</sup> However, the UN Committee of Economic, Social and Cultural rights is the first international organ to articulate the concept in the discourse of socio economic rights.<sup>484</sup>

The committee gave two reasons for introducing the concept in the interpretation of socio

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<sup>479</sup> G. Young, The Minimum Core of Economic and Social Rights: at supra note 367

<sup>480</sup> CESCR's General Comment No. 3, Supra note 477

<sup>481</sup> Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163, 163 (2006). See also supra note 14

<sup>482</sup> See, for instance, Katharine G. Young, The Minimum Core of Economic and Social Rights at supra note 479. See also David Bilchitz, Poverty and Fundamental Rights at supra note 376, Page.186

<sup>483</sup> Ibid

<sup>484</sup> CESCR's General Comment No. 3 at Supra note 480

economic rights.<sup>485</sup> First, it found the concept as a necessary tool to check compliance with the obligation imposed by the Covenant and secondly the Covenant would largely be deprived of its *raison d'être* if read without the minimum core obligation.<sup>486</sup>

Having introduced the concept in General Comment 3 Paragraph 10,<sup>487</sup> the CESCR has been developed, modified and concretized in subsequent general comments to formulate specific content to particular rights in the Covenant like the rights to food, health, adequate housing and education.<sup>488</sup> However, the committee is not completely consistent in its characterization of the concept. One of such inconsistency is displayed concerning the issues of whether the minimum core can be enforced as individual rights. The Committee's original formulation of the concept is seems to suggest group approach by stating:

*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>489</sup>

Accordingly, the phrase **significant number of individuals** seems to be suggestive of group rights. Some scholar argued that, the phrase if 'a significant number of people is deprived' might be taken to mean that the minimum core does not intended confer individual right.<sup>490</sup> Nonetheless, the CESCR has resolved this ambiguity in its subsequent

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<sup>485</sup> Ibid

<sup>486</sup> Ibid and see also Bilchitz David, Poverty and Fundamental Rights at supra note 482

<sup>487</sup> CESCR's General Comment No. 3 at Supra note 484

<sup>488</sup> Bilchitz David, Poverty and Fundamental Rights at supra note 4486 page 183

<sup>489</sup> CESCR's General Comment No. 3: at Supra note 487

<sup>490</sup> Wesson, M. (2004) *Grootboom and Beyond* at supra note 423 page 298

interpretive comments by stating that the minimum core establishes an individual right.<sup>491</sup>

To this end, the Committee in General Comment 15, on the right to water, states that failure by state parties to ensure ‘minimum essential level of the right is enjoyed by everyone’ constitute violation of the right.<sup>492</sup>

The other area of inconsistency is regarding derogability of minimum core obligations. Originally, the committee formulated the concept in such a way that there is a possibility to justify non fulfillment of the minimum obligations if the state party could prove that the non compliance is due to lack of available resources and every effort has been made to use all available resources by prioritizing fulfillment of those minimum obligations.<sup>493</sup>

Thus, minimum core obligation can be derogated from on condition that the derogating state could bear the higher burden of proving this higher standard. However, latter on the Committee shifts towards characterization of the concept as absolute entitlement, below which no government should perform irrespective of available resources. In some of the general comments dealing with specific rights like general comment 13 on the right to education and general comment 14 on the rights to the highest attainable standard of health, the Committee characterizes the concept as absolute obligation derogation from which is not allowed in any circumstances.<sup>494</sup> Nonetheless, latter on the Committee remedied the confusion by stating any state parties justifying non compliance with its minimum core obligations by invoking resource constraint should prove that it has tried its best to mobilize the required resources to meet its minimum core obligations and

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<sup>491</sup> CESCR General Comment 15: The Right to Water (2002) at supra note 212 Para. 44.

<sup>492</sup> Ibid

<sup>493</sup> Ibid

<sup>494</sup> CESCR’s General Comment No. 13 and 14

redirected the available resources in case of misallocation.<sup>495</sup> Apparently too the General Comment on Social Security reverts to the idea of a derogable minimum core. The CESCR acknowledged resource scarcity concerning the rights to social security by way of stating the significant financial repercussion it has for States parties and only requires the right be given appropriate priority in law and policy.<sup>496</sup>

Yet there are varying approaches among scholars concerning the normative foundation up on which the specific content to socio economic rights should be formulated. Putting in more simplistic terms, there are various approaches regarding normative foundation of the concept. That is, the minimum core as normative essence, the minimum core as a minimum consensus and the minimum core as a minimum obligation each approach having its strength and drawbacks.<sup>497</sup> Among the proposed and the potential normative base for the minimum core, the CESCR mainly employed the obligation approach to determine the specific content of socio economic rights. The obligation approach identifies set of duties required to be fulfilled for realization a specific rights and equate it to minimum core content of the right.<sup>498</sup> That is the Committee emphasized on the obligations raised by the rights to give substance to various rights under the Covenant thereby bringing shift of attention from the core contents of each right to core obligations required to perform the right.<sup>499</sup>

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<sup>495</sup> CESCR's statement on "An evaluation of the obligation to take steps to the "maximum available resources" at supra note 171.

<sup>496</sup> General Comment No. 19, *The Right to Social Security*, UN doc. E/C.12/GC/19, 4 February 2008 Para.41

<sup>497</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights* at supra note 482

<sup>498</sup> See general Comments of the Committee, for example the one of the core obligations of states in relation to the right to health is to ensure the right of access to health facilities, goods and service on a non discriminatory basis , especially for vulnerable or marginalized groups

<sup>499</sup> See CESCR's General Comment No. 18 *The Right to Work* (art. 6) ¶ 31, General Comment No.14 ¶¶ 43-45& General Comment 15 *The Right to Water* (arts. 11, 12), ¶¶ 37-38

The shift to core obligation brings a new question of “what state has to do first to fulfill those elements of the rights that are the most essential or fundamental.”<sup>500</sup> Accordingly, “all components of the rights are important and the ultimate goal is full implementation but question is one of priority or timing rather than ranking the various components of the rights in some sort of hierarchy according to the relative worth.”<sup>501</sup> As such realization of core obligations are initial step and the final goal is full realization of the right. Beside, in addition to lending specific content to socio economic rights identification of core duties can serve as important indication as to where to start the progressive realization.

Despite all the issues associated with it, the concept of minimum core approach to socio-economic rights remains an important notion in the realm of socio economic rights.

I am of the thought that the minimum core approach to the socio economic rights is a realistic and viable option to enforce socio economic rights both at domestic and international forum owing to the following advantages, associated with the concept:<sup>502</sup>

- The essence of minimum core approach is to establish certain classes of needs as enjoying priority over others. In doing so, the concept requires priority to be given to the fulfillment of the most urgent needs thereby directing resources where they are most needed. In this regard, the CESCR defined resource to mean resources available from the private sector, the public and foreign states.<sup>503</sup> It is up to the state concerned to mobilize them all and put for the fulfillment, at least, of the minimum core of the socio economic rights under the Covenant and any state

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<sup>500</sup> Audrey Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural rights* at supra note 476 Page 9

<sup>501</sup> Ibid

<sup>502</sup> Wesson, M. (2004) *Grootboom and Beyond* at supra note 490 Page 303

<sup>503</sup> See CESCR’ statement on evaluation of the obligation to take steps to the “maximum available resources” at supra note 495.

parties justifying non compliance with its minimum core obligations by invoking resource constraint should prove that it tried its best to mobilize the required resources to meet its minimum core obligations and redirected the available resources in case of misallocation.<sup>504</sup> Though it might be difficult for courts adopt such an expansive approach towards available resources as has states by the Committee, in the event of non compliance with the minimum core duties, courts should require governments to bear the burden of proving that all efforts have made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>505</sup>

- Minimum core also promises to introduce clarity to the national courts socio-economic jurisprudence, by ensuring that the state has a clear understanding of its priorities.<sup>506</sup>
- The minimum core facilitates the “progressive realization standard” under the Covenant. That is, the concept enable a clearer formulation of the concept of progressive realization, by ensuring that the state has a starting-point from which to begin full realization of the rights. In this regard, identification of what constitute minimum core could be reached by identifying the set of duties required to be fulfilled for realization a specific rights as has rightly done by the CESCR.<sup>507</sup> Beside, other tools like the use of bench marks and indicators and budget analysis can assist implementation of social rights.

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<sup>504</sup> Ibid

<sup>505</sup> CESCR’s General Comment 3 Para.10

<sup>506</sup> Wesson, M. (2004) *Grootboom and Beyond at supra note 502*

<sup>507</sup> Bilchitz David, *Poverty and Fundamental Rights at supra note 482. Page 493*

- Finally, “the minimum core has the advantage of converting programmatic socio-economic rights into individual entitlements. This, it might be argued, would place resources directly into the hands of individuals, thereby contributing to the achievement of substantive equality.”<sup>508</sup> As has been mentioned above the CESCR’s characterization of the minimum core has displayed inconsistency concerning the issues of whether the minimum core can be enforced as individual rights. That is, the Committee’s original formulation of the concept under General Comments No.3 paragraph 10 seems to suggest group approach. Nonetheless, the CESCR has resolved this ambiguity in its subsequent interpretive comments by stating that the minimum core establishes an individual right.<sup>509</sup>

Yet in spite of all the aforementioned advantages associated with the minimum core concept, reflection of the concept in national legal system even in those jurisdiction in which there is complete agreement regarding the justiciability of socio-economic rights, is so rare or often not existed at all, though attempt has been made by domestic courts of Columbia, Brazil and India to apply the concept in one way or another to socio-economic rights litigations.<sup>510</sup> Furthermore, even in case of adoption minimum core by domestic courts, the latter characterize the concept differently.<sup>511</sup> In this regard, domestic courts jurisprudences of socio economic rights have showed three general approaches to the concept of minimum core:<sup>512</sup> First, the complete acceptance of the minimum core

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<sup>508</sup> Wesson, M. (2004) *Grootboom and Beyond* at supra note 506

<sup>509</sup> CESCR General Comment 15: The Right to Water (2002) at supra note 491 Para. 44.

<sup>510</sup> see Joie Chowdhury , Judicial Adherence to a Minimum Core at supra note 470. See also the Columbian, Indian , Brazil and South African socio economic rights case jurisprudences

<sup>511</sup> Joie Chowdhury , Judicial Adherence to a Minimum Core at supra note 510

<sup>512</sup> Id. page 7



approach with reference to the international discourse on socioeconomic rights, as is the case with the Colombian Constitutional court.<sup>513</sup>

Secondly, an acceptance of the minimum core approach in a more domesticated understanding of the concept, as in the case with the Indian Supreme Court and the State and thirdly, rejection of the concept as is the case of the South African Constitutional Court.<sup>514</sup> For instance, In Grootboom case, the South African Constitutional Court refused to recognize any form of housing on demand or individual entitlement and, in doing so, declined to adopt the notion of minimum core.<sup>515</sup> Rather the court opted for the so called reasonableness test to check the constitutionality of the state housing program though the reasoning of the court to reject the minimum core is unconvincing as has depicted earlier.

Generally, despite the fact that the UN Committee on Economic, Social and Cultural Rights has developed a series of interpretive general comment with the view to give specific legal content to the loosely framed rights under the Covenant and also though the discussion concerning the minimum core of socio economic rights dominates socio economic rights discourse in the international realm of supervision and also the scholarly discourse around socio-economic rights, the concept is not strongly featured or transplanted and consistently developed in the domestic laws and jurisprudences of domestic courts in the context of socio-economic rights adjudication. Eventually, I am of the view that the concept of minimum core to socio economic rights provides a more

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<sup>513</sup> Id. page 8

<sup>514</sup> Id. page 6, 7 and 8 , See for instance in Grootboom, the South African Constitutional Court refused to recognize any form of housing on demand or individual entitlement and, in so doing, declined to adopt the minimum core.

<sup>515</sup> The Government of the Republic of South Africa and others vs Grootboom at supra note 381

precise standard and the CESCR's adoption of it can be considered as a step forward to implement the rights. The concept not only offers a more feasible standard to facilitate the progressive realization standard and to monitor state performance but also can guide national judicial bodies to adjudicate socio economic rights by formulating specific content of socio economic rights.

## 4.2 Bibliography

### Books

- ❖ Asbjorn e al (eds.), Economic, Social and Cultural Rights (2<sup>nd</sup> Edition, Kluwer Law International, 2001)
- ❖ Asbjor Eide et.al (eds.), Economic, Social and Cultural Rights: A Text Book, Martinus Nijhoff Publishers, 1995
- ❖ Audrey Chapman and S. Russell (eds.), Core Obligations: Building a Framework for Economic, Social and Cultural rights (Antwerp, Intersentia, 2002)
- ❖ Audrey R. Chapman, The Status of Efforts to Monitor Economic, Social, and Cultural Rights pp. 143-164, Cambridge University Press, December 2009
- ❖ Bilchitz David, Poverty and Fundamental Rights – the Justification and Enforcement of Socio economic Rights, Oxford University Press 2007
- ❖ Bilchitz, David , Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence; 19 S. Afr. J. on Hum. Rts. 1 (2003)
- ❖ Chapman, Audrey R.; Russell, Sage (eds.), Core Obligations: Building a Framework for Economic, Social and Cultural Rights, (2001) Intersentia: Antwerp [Belgium]-Oxford [UK] -New York [US]
- ❖ Fons and Comans (ed.) Justiciability of Economic and Social Rights, Experience from Domestic Systems, Intersentia,2006
- ❖ Malcolm Langford, Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge university press, January 19, 2009
- ❖ Manisuli Ssenyonjo, Economic, Social and Cultural Rights in International, Law Hart Publishing 2009
- ❖ Mashood A. Baderin and Robert Mccorquodale (eds.) Economic, Social and Cultural Rights in Action, Oxford University Press, 2007
- ❖ [Shadrack Gutto](#), Equality and non-discrimination in South Africa: The political economy of law and law making New Africa Books, 2001,

## Articles and Journals

- Audrey Chapman, Indicators and standards for monitoring Economic, Social and Cultural Rights, available at:  
[http://hdr.undp.org/docs/events/global\\_forum/2000/chapman.pdf](http://hdr.undp.org/docs/events/global_forum/2000/chapman.pdf)
- Chapman, Audrey R. A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, *Human Rights Quarterly* - Volume 18, Number 1, February 1996, pp. 23-66
- Charles Ngwena, Adjudicating Socio economic-Transforming South African Society? :A Response to Linda Jansen Van Rensburg's Paper .
- Available at: <http://www.ajol.info/index.php/pej/article/viewFile/43483/27018>
- Circle of Rights: Economic, Social and Cultural Rights Activism, University of Minnesota Human Rights Resource Center a Training Resource, Available at:  
[http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module8.htm#\\_edn1](http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module8.htm#_edn1)
- Brand, Danie (2005) 'Introduction to Socio-Economic Rights in the South African Constitution' in Danie Brand & Christof Heyns (Eds.) *Socio-Economic Rights in South Africa* Pretoria University Law Press, pp. 1-56.
- Daniel Weldegebriel AMBAYE , Land Valuation for Expropriation in Ethiopia: Valuation Methods and Adequacy of Compensation, available at:  
[http://www.fig.net/pub/vietnam/papers/ts04c/ts04c\\_ambaye\\_3753.pdf](http://www.fig.net/pub/vietnam/papers/ts04c/ts04c_ambaye_3753.pdf)
- Dixon, Rosalind, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, *International Journal of Constitutional Law* July, 2007
- Eitan Felner, A New Frontier in Economic and Social Rights Advocacy? Using Quantitative Data for Human Rights Accountability: Center for Economic and Social Rights, 2009 Page 2, available at:  
<http://www.cesr.org/downloads/A%20new%20frontier%20in%20ESC%20advocacy.pdf>
- Eric C. Christiansen, Adjudicating non justiciable rights: Socio-Economic Rights and The South African Constitutional Court, 2007 page 323, available at:  
[http://www3.law.columbia.edu/hrlr/hrlr\\_journal/38.2/Christiansen\\_preview.pdf](http://www3.law.columbia.edu/hrlr/hrlr_journal/38.2/Christiansen_preview.pdf)
- Joie Chowdhury , *Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights– A Comparative Perspective*, *Cornell Law School Inter University Graduate Student Conference Papers*, 2009

- Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio. Economic Rights and the Myth of the Minimum Core.*" American University International Law Review 2006, page
- Katharine G. Young, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, 33 YALE J. INT'L L. 113, 113 (2008).
- Lilian Chenwi, Monitoring the progressive realization of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court , Research paper written for Studies in Poverty and Inequality Institute, 2010, Community Law Centre, University of the Western Cape
- Linda Stewart , Adjudicating Socio-Economic Rights Under a Transformative Constitution, 2010 available at : <http://www.ialsnet.org/newsletter/articles/ConLaw/stewart.pdf>
- Paul De wart and others (eds.) International law and development, Martinus Nijhoff publishers, 1988
- Sally Anne, monitoring Economic, Social and Cultural Rights using Quantitative and Qualitative Indicators, Center for Economic, Social and Cultural Right; Available at: [www.cesr.org](http://www.cesr.org)
- Sandra Liebenburg, Beyond Civil and Political rights: Protecting Social, Economic and Cultural Rights Under Bill of Rights – The South African Experience. Paper prepared for conference: Protecting Human Rights, Center for Comparative Constitutional Studies, Melbourne Law School, 25 September 2007, available at: <http://acthra.anu.edu.au/articles/Liebenberg.pdf>
- Solomon Abebe, Judicial Implementation of socio economic rights in Africa a student paper submitted to the Central European University, 2007,
- S. Muralidhar, The Expectation and Challenges of Judicial Enforcement of Social Rights on Malcolm Langford, Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge university press, January 19, 2009, Page 102ff
- Sunstein, Cass R., Social and Economic Rights? Lessons from South Africa (May 2001). U of Chicago, Public Law Working Paper No. 12;
- Wesson, M. (2004) *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, South African Journal on Human Rights, 20, p284.

## General Comments and recommendations of the CESCR

- ✚ General Comment No. 1, *Reporting by States Parties*, UN doc. E/1989/22, 24 February 1989.
- ✚ General Comment No. 3, *The Nature of States Parties Obligations*, UN doc. E/1991/23, 14 December 1990.
- ✚ General Comment No. 4, *The Right to Adequate Housing*, UN doc. E/1992/23, 13 December 1991.
- ✚ General Comment No. 11, *Plans of Action for Primary Education*, UN doc. E/C.12/1999/4, 10 May 1999.
- ✚ General Comment No. 12, *The Right to Adequate Food*, UN doc. E/C.12/1999/5, 12 May 1999.
- ✚ General Comment No. 13, *The Right to Education*, UN doc. E/C.12/1999/10, 8 December 1999.
- ✚ General Comment No. 14, *The Right to the Highest Attainable Standard of Health*, UN doc. E/C.12/2000/4, 11 August 2000.
- ✚ General Comment No. 15, *The Right to Water*, UN doc. E/C.12/2002/11, 20 January 2003.
- ✚ General Comment No. 16, *The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN doc. E/C.12/2005/4, 11 August 2005.
- ✚ General Comment No. 18, *The Right to Work*, UN doc. E/C.12/GC/18, 6 February 2006.
- ✚ General Comment No. 19, *The Right to Social Security*, UN doc. E/C.12/GC/19, 4 February 2008.
- ✚ General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights*, UN doc. E/C.12/GC/20, 10 June 2009.
- ✚ UN Committee on Economic, Social and Cultural Rights (CESCR) : An evaluation of the obligation to take steps to the “maximum available resources” under Optional Protocol to the Covenant Statement, 2007.
- ✚ CESCR Concluding Observations on the Combined Initial and Second and Third periodic Reports of Chad, UN doc. E/C.12/TCD/CO/3, 16 December 2009.

🏳️ CESCRC Concluding Observations on the Initial to Third Periodic Reports of Angola, UN doc. E/C.12/AGO/CO/3, 1 December 2008.

## Treaties, Declarations and Domestic Laws

- ❖ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986:
- ❖ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.
- ❖ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", 543-545], OEA/Ser.L/V/III.43, doc. 11 (1999).
- ❖ Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.
- ❖ Constitution of the Federal Democratic Republic of Ethiopia. (1995). Proclamation No. 1/1995. Negarit Gazeta Year 1, No.1
- ❖ Convention concerning Employment Promotion and Protection against Unemployment, (ILO No. 168), 71 ILO Official Bull. 80, entered into force Oct. 17, 1991.
- ❖ Declaration of Alma-Ata, International Conference on Primary Health Care , Alma Ata, USSR, 6-12 September 1978, adopted by the World Health Organization
- ❖ Expropriation of Land Holdings for Public Purpose and Payment of Compensation Proclamation. (2005). Proclamation No.455/2005. Negarit Gazeta. Year 11, No.43 (Ethiopia)
- ❖ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.
- ❖ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

- ❖ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights No.25, UN Document E/CN.4/1987/17
- ❖ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997.
- ❖ Malcolm N. Shaw, International Law, Cambridge University press 6<sup>th</sup> Ed, 2008
- ❖ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. res. 63/117 (2008).
- ❖ The Committee on Civil and Political Rights, General Comment No. 06: The right to life (art. 6) 04/30/1982,
- ❖ The Constitution of Columbian (1991)
- ❖ The Constitution of India 1950 (Updated up to 94th Amendment Act)
- ❖ The Constitution of the Republic of South Africa, 1996,
- ❖ The South African Social Security Act, 2004
- ❖ Vienna Convention on the Law of Treaties(1969)
- ❖ Vienna Declaration and Program of Action, World conference on Human Rights, Vienna, June 1993, UN Doc A/CONF157/24(Part I)at 20 (1993, 32 ILM1661 (1993)
- ❖ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).



## Table of Cases

### South African Constitutional Court cases

- ❖ The Government of the Republic of South Africa and others vs Grootboom and others 2001 (1) SA 46 (CC)
- ❖ Minister of Health and Others v. Treatment Action Campaign and Others 2002(5) SA 72 1(CC)
- ❖ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)
- ❖ Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009)
- ❖ Khosa & Ors v Minister of Social Development & Ors. 2004(6) BCLR 569 (CC)

### Indian Supreme Court cases

- ❖ Francis Carolie Mullin v. The Administrator, Union Territory of Delhi (1981) 25 CR 516, 529,
- ❖ Paschim banga Khet Samity v. State of West Bengal, Case No. 169, Judgement of 6 May 1996
- ❖ People's Union For Civil Liberties (PucL) V. Union Of India And Another 1997 AIR (SC) 568
- ❖ Paramanand Katara v. Union of India (1989)4 SCC 286
- ❖ State of Punjab v. Ram Lubhaya Bagga, (1998) 4 SCC 117
- ❖ Consumer Education and Research Centre v. Union of India (1995 3 SCC 42)

### Columbian Constitutional Court cases

- Tutela Judgment T-207/95,
- Tutela Judgment T-254/93,
- Tutela Judgment T-539/94
- Tutela Judgment T431/94
- Tutela Judgment T-236/98,

- Tutela Judgment T-260
- Tutela Judgment T-841/04
- Tutela Judgment T-117/99,
- Tutela Judgment T-236/98, T-093/00
- Tutela Judgment T-421/01
- Tutela Judgment T-236/98
- Tutela Judgment T-165/95
- Tutela Judgment T-760, 2008
- Unification Judgment SU-043/95,
- Unification Judgment SU-111/97,
- Unification Judgment SU-039/98,
- Unification Judgment SU-225/98