THE MINIMUM CORE OF ECONOMIC AND SOCIAL RIGHTS: A CONCEPT IN SEARCH OF CONTENT
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The minimum core:

Used in an attempt to establish a minimum legal content for the notoriously indeterminate claims of economic and social rights.

By focusing on a minimum threshold, the debate around socio-economic rights is supposedly simplified. However, the minimum core has been subjected to substantial criticism.
Criticism:

- The minimum core threatens the broader goals of economic and social rights.

- It pretends a determinacy and a universality that does not exist and tends to rank the needs of claimants.

- It primarily focuses on developing states.
The minimum core in international law:

The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. In 1990 the committee issued its General Comment on the minimum core.

The minimum core in international law

The minimum core initiates a common legal standard while giving state parties the latitude to implement rights over time, depending upon the availability of necessary resources, rather than requiring them to guarantee rights immediately.

Despite this flexibility, “progressive realization” requires the taking of “deliberate, concrete and targeted” steps and prohibits retrogressive measures.
The minimum core in constitutional law

The concept inherits its structure from the German Basic Law, where the “core” or “essential content” of certain constitutional rights lies beyond the reach of permissible limitation.

In constitutional law, the minimum core can require a particular level of justification by the state if the minimum of the right is not satisfied. It can therefore assist in the development of a justiciable minimum for economic and social rights.
The minimum core as Normative Essence:

Gives definition to the core elements of the right by virtue of their relation to a superior or foundational norm such as survival, life or human flourishing.

- **A Needs-Based Core: Life, Survival and Basic Needs**

Orients the “core” of the right to the essential and minimally tolerable levels of food, health, housing, and education.
A value-based core goes further than the “basic needs” inquiry by emphasizing not what is strictly required for life, but rather what it means to be human.

The Essence Approach sets up a normative investigation into why we value economic and social rights, raising the important issues of survival and human dignity. However, agreement between different constitutional dispensations is an impossibility.
1) Defining “minimum consensus”

- The minimum core as minimum consensus approach attempts to ascertain where consensus has been reached on the core content of a right.

2) “A core of certainty and a penumbra of doubt …”

- This comparison illustrates the ability of the Consensus Approach to facilitate the accepted meaning of the core of a right, while allowing for pluralist disagreement on external elements at the edge of the core.
The minimum core as “minimum consensus”

3) Political legitimacy and validity for the universal application of the minimum core
   - The Consensus Approach is methodologically focused on observed empirical agreement, which has implications for the normative goals of sovereign equality and self-governance.

4) A positivist approach to “uncovering” consensus
   - The Consensus Approach attempts to “uncover” a converging set of principles through a comparative analysis of the protection of socio-economic rights.
The minimum core as “minimum consensus”

5) Consensus as a normative concept…
   - The Consensus Approach reaches for consensus as a norm, as opposed to the normative values of human dignity or basic need.
   - Implications of the centrality of consensus in human rights.

6) Limits of consensus

7) Conclusion
The minimum core as “minimum obligation”

1) Defining “minimum obligation”
   - The *Obligation Approach* attempts to determine whether a set of minimum obligations can correlate to the minimum core of a right.

2) Emphasising obligations and duties
   - Duties of rights versus elements of rights
   - Positive-negative rights dichotomy
The minimum core as “minimum obligation”

3) The *Obligation Approach* at the international level
   - The Committee’s project of defining “core obligations” is one of ranking and delineating the multiple obligations that correlate with the realisation of socio-economic rights.

4) The *Obligation Approach* at the national level
   - The *Obligations Approach* serves to substantiate the minimum core by reference to the justiciability of socio-economic rights.

5) Conclusion
The content in search of a concept

- Essence, Consensus & Obligations Approaches are unsatisfactory

- The quest for a minimum core in reverse
  - Premise: the ventures/operations at stake in the concept of the minimum core

- More relevant questions of benchmarking, limiting, globalizing and claiming can be pursued
Prescribing Content: Indicators & Benchmarks

Distinguishing different rights and obligations as “core” and “non core” rights and obligations

Supervise and enforce positive obligations by using indicators & benchmarks

Supervise and enforce negative obligations by assessing state responsibility and causality
- CESCRI uses “scoping”

- Indicators include the Human Development Index; what is needed to maximize human capabilities

- Uncritical usage of benchmarks can be detrimental

- Risk is diminished if used in a participatory process and their connection to rights is as a dynamic and ever-changing standard

- Requires an open, revisable formulation of rights as opposed to the fixed boundaries of a minimum core
Justifying limits: The move to balancing

- Essence Approach

- Opponents emphasize the importance of cost considerations
  - Rights become manageable tools for balancing different, (even differently weighted) considerations.

- Emergence of balancing/proportionality reasoning

- South African Constitutional Court = balancing and proportionality to justify limits

  - *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC); constitutions world-wide
Signaling Extraterritoriality: The Globalist Challenge

- **CESCR:**
  “National responsibilities for all States and international responsibilities for developed States, as well as others that are ‘in a position to assist’”

- Minimum core obscures questions of causality and liability in this area

- What of questions of institutional responsibility, cooperation or interdependence?
- CESCIR has made credible analyses of extra territoriality
A word on language

- Concept directs attention and priority to those groups most marginalized, vulnerable and subject to the greatest level of material disadvantage in the area of social and economic rights.

- Language deployed has profound political consequences, creates stigma.

- It must be examined how the concept of the minimum core may confront dominant discourses of material deprivation.

Conclusion
Questions/ discussion