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Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the *Canadian Charter of Rights and Freedoms*?

ANIA KWADRANS*

Les manquements aux droits économiques, sociaux et culturels (DES) fondamentaux minimaux privent les personnes et les groupes les plus vulnérables de la société des ressources nécessaires à leur vie et à leur bien-être rudimentaire. Les États ont l'obligation d'assurer la disponibilité de recours significatifs pour de tels manquements. Bien que l'articulation d'une obligation fondamentale minimum en matière de DES présente certains défis, et que les critiques de ce concept croient que les tribunaux n'ont pas la compétence institutionnelle requise pour le mettre en œuvre, il s'agit tout de même d'un outil important pour la prise de décision. L'obligation fondamentale minimum met l'accent sur la recherche des objectifs sous-jacents des droits de la personne : la protection des groupes vulnérables et marginalisés contre les formes les plus graves de déprivation et de souffrance. Elle renforce l'indivisibilité et l'interdépendance – et conséquemment la justiciabilité – de tous les droits de la personne. Prenant à titre d'exemples deux décisions récentes relatives aux droits à un logement adéquat et aux soins de santé au Canada, cet article avance que l'obligation fondamentale minimum est prometteuse. En effet, elle peut servir d'aide à l'interprétation dans l'évaluation du contenu des droits à la vie et à la sécurité de sa personne, en vertu de l'article 7 de la *Charte*, et ce, en respectant pleinement les limites institutionnelles applicables et les obligations internationales du Canada en matière de droits de la personne.

Violations of the minimum core economic and social rights (ESR) deprive society's most vulnerable individuals and groups of the very resources that are essential to life and basic well-being. States have an obligation to ensure that meaningful remedies are available for such infringements. Though articulating a minimum core for ESR poses challenges, and critics of the concept find it beyond the institutional competence of courts, it remains an important tool for adjudication. The minimum core focuses the inquiry on the underlying goals of human rights: the protection of vulnerable and marginalized groups from the most serious forms of deprivation and suffering. It reinforces the indivisibility and interdependence—and, consequently, the justiciability—of all human rights. Using the examples of two recent cases considering the rights to adequate housing and health care in Canada, this paper suggests that the minimum core may have potential to serve as a useful interpretive aid to assess the content of rights to life and security of the person under section 7 of the *Charter*, in full respect of institutional boundaries, and in a matter that is consistent with Canada's international human rights obligations.

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THE UNITED NATIONS (UN) SPECIAL RAPPORTEUR ON ADEQUATE HOUSING has identified homelessness as “an extreme violation of the rights to adequate housing and non-discrimination, and often also a violation of the rights to life, to security of the person ... and to freedom from cruel and inhuman treatment.”¹ Yet, as the Special Rapporteur observes, homelessness “has not been addressed with the urgency and priority that ought to be accorded to so widespread and severe a violation of human rights.”² Indeed, in 2007, Miloon Kothari, the former Special Rapporteur on the right to adequate housing, noted with alarm that,

Canada has [had] a reputation around the world for its progressive housing policies and programmes, but that is no longer the case ... Canada’s successful social housing programme, which created more than half a million homes starting in 1973, no longer exists. Canada has fallen behind most countries in the Organization for Economic Cooperation and Development in its level of investment in affordable housing. Canada has one of the smallest social housing sectors among developed countries.³

Despite the massive scope of the problem and its terrible impact on the lives and security of hundreds of thousands of Canada’s most vulnerable, Canadian courts have had only one opportunity to consider the human rights implications of Canadian governments’ failure to act to alleviate this suffering.⁴ In the case of *Tanudjaja v Canada (Attorney General)*,⁵ the Ontario Superior Court of Justice and a majority of the Court of Appeal for Ontario denied the applicants, all poor and suffering from homelessness or inadequate housing, access to a hearing.⁶ By dismissing the case, on a motion brought by the respondents, as disclosing no reasonable cause of action, the courts effectively denied at the outset the possibility that the crisis may

¹ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, 31st Sess, UN Doc A/HRC/31/54 (30 December 2015) at para 4, online: <daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/294/52/PDF/G1529452.pdf> [Special Rapporteur on Housing].

² UN Commission on Human Rights, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, 61st Sess, UN Doc E/CN.4/2005/48 (3 March 2005), summary, online: <daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/103/60/PDF/G0510360.pdf>.

³ As cited in Michael Shapcott, “UN to Canada: Take action on housing, homelessness!” *Wellesley Institute* (22 October 2007) online: Wellesley Institute <wellesleyinstitute.com/housing/un_to_canada__take_action__on_housing__homelessness_/> [perma.cc/P8RL-Y8N5].

⁴ There have been at least two cases which have considered the human rights of the homeless: *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29 [Adams] and *BC/Yukon Association of Drug Survivors v Abbotsford (City)*, 2014 BCSC 1817 [Abbotsford]. However, unlike *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410, 116 OR (3d) 574 [Tanudjaja, ONSC] and *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, 123 OR (3d) 161 [Tanudjaja, ONCA]—which were a direct challenge to the failure of governments in Canada to devise an effective strategy to reduce and eliminate homelessness, and which sought a remedy requiring the governments to take positive action to eliminate homelessness and inadequate housing—*Adams* and *Abbotsford* considered the narrower issue of the legality of bylaws that penalize actions associated with being homeless, such as the erection of temporary shelters in public areas.

⁵ *Tanudjaja*, ONSC and *Tanudjaja*, ONCA, *supra* note 4.

⁶ Leave to appeal to the Supreme Court of Canada was denied.

engage Canada's obligations to protect the rights to life and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms (Charter)*.⁷

The UN Committee on Economic, Social and Cultural Rights (CESCR) has stated that, much like the right to be free from homelessness, "[h]ealth is a fundamental human right indispensable for the exercise of other human rights."⁸ Louise Arbour, former Supreme Court of Canada (SCC) justice and UN High Commissioner for Human Rights, has stressed that health care is "a cornerstone of Canadian values, a way of honouring our fundamental commitment to each other" and "a matter of obligation at law owing to a duty which goes to the core of the protection and promotion of human dignity."⁹ Yet in 2012, the federal government implemented drastic cuts to its Interim Federal Health Program (IFHP), which had the effect of denying necessary health care to many refugees and refugee claimants.¹⁰ When the constitutionality of the cuts was challenged before the Federal Court of Canada (FC) in *Canadian Doctors for Refugee Care v Canada*,¹¹ despite making a factual finding that the denial of health services resulting from the cuts to the IFHP "are causing illness, disability, and death,"¹² the FC refused to find that the rights to life and security of the person under section 7 of the *Charter* were engaged. The FC held that because the government had "intentionally set out to make the lives of these disadvantaged individuals even more difficult than they already are,"¹³ the targeted cuts to the IFHP constituted cruel and unusual treatment prohibited under section 12 of the *Charter*. However, the court found that the right to life, on its own, imposes no obligations on governments to ensure access to health care necessary for life.

In both cases, poor, vulnerable, sick, and marginalized individuals were denied access to meaningful remedies for their claims under the *Charter* section 7 rights to life and security of the person based on a rigid, arbitrary, and outdated distinction between positive and negative rights and concerns regarding justiciability that flow from that distinction. This paper aims to challenge that position. Denying access to rights claims and remedies based on section 7 of the *Charter* to individuals who are ill, disabled, and who are dying because they are denied access to necessary shelter or health care starkly demonstrates that new judicial approaches are required to deal with these problems and increase access to justice for those whom the government has disempowered.

This paper looks to international human rights law, and in particular the concept of minimum core obligations, as a potential tool towards achieving this goal. It argues that the approach of the Canadian judiciary is inconsistent with Canada's international human rights obligations under the *International Covenant on Economic, Social and Cultural Rights*

⁷ See Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24 JL & Soc Pol'y 10; Margot Young, "Charter Eviction: Litigating Out of House and Home" (2015) 24 JL & Soc Pol'y 46 [Young, "Charter Eviction"]; Yutaka Dirks, "Community Campaigns for the Right to Housing: Lessons from the R2H Coalition of Ontario" (2015) 24 JL & Soc Pol'y 135.

⁸ UN Committee on Economic, Social and Cultural Rights, 4: *The Right to the highest attainable standard of health*, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 1 [*General Comment 14*].

⁹ Louise Arbour, "LaFontaine-Baldwin lecture 'Freedom from want': from charity to entitlement" (3 March 2005) online: United Nations Human Rights <ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3004&LangID=E> [perma.cc/8D2G-CR56].

¹⁰ In addition, migrants had already largely been, and continue to be, excluded from accessing benefits under the IFHP prior to the 2012 cuts.

¹¹ *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651, 28 Imm LR (4th) 1 [*Canadian Doctors*]. An appeal to the Federal Court of Appeal was withdrawn by a newly elected federal government in December 2015.

¹² *Ibid* at para 1049.

¹³ *Ibid* at para 10.

(ICESCR), which not only require States Parties to progressively realize economic and social rights (ESR), but also to guarantee a basic minimum core content of these rights. Interpreted consistently with international human rights law, the minimum core can play an important role in informing the interpretation of section 7 of the *Charter*.

This paper begins by setting out that ESR, like the right to health and housing, are interdependent with and indivisible from all other human rights. Deprivations of housing, water, food, or health are often issues of life or death because they constitute denials of the necessities of life. This paper then introduces the concept of the minimum core, a presumptive legal obligation to provide all individuals within a State Party's territory or under its jurisdiction a basic level of ESR. Any failure to provide minimum core entitlements must be strictly justified by demonstrating that the State Party has endeavoured to use all resources available to satisfy those obligations.

The minimum core has been subject to vigorous scholarly debate. Critics of the minimum core argue that it sets out obligations in absolute and rigid terms that are not reflective of different countries' socioeconomic and cultural realities. Conversely, adopting relative definitions of the minimum core to reflect those differences makes the concept impossible to articulate in universal terms. Critics also assert that because the fulfilment of ESR entails positive action on behalf of the state in terms of policy-making and budgetary allocations, these matters are unsuitable for the judiciary to consider.

This paper relies on the example of the Constitutional Court of South Africa (CCSA), which has explicitly considered the use of the minimum core in ESR adjudication.¹⁴ Agreeing with the critics, the CCSA has rejected the minimum core and instead adopted a reasonableness approach for assessing government policies on the provision of ESR. There are examples where the CCSA's reasonableness approach has led to the ordering of substantive entitlements. Nevertheless, proponents of the minimum core worry that an approach to adjudication based solely on the reasonableness test in the abstract, absent any delineation of the content or scope of the ESR in question, runs the danger of depriving those rights of specific content and legitimizing the continued hardship suffered by society's most vulnerable individuals.

However, acknowledging the conceptual difficulties with the minimum core, much of the debate has moved towards preserving some of its key features—the need to give substance to ESR and subject governments to a higher level of scrutiny—to bolster the reasonableness approach and to encourage defining the substantive content of ESR. Substantive reasonableness requires courts to consider at the outset the needs and interests of the claimants. Then, courts must determine whether those needs and interests fall within the scope of the right in question and the weight to be accorded to them. Only against this backdrop should a government policy be assessed.

This paper considers how substantive reasonableness and the values underlying the minimum core may apply to the Canadian context. This paper suggests that the systematic deprivation of health care from refugees, refugee claimants, and irregular migrants, and widespread homelessness and inadequate housing in an affluent country such as Canada both

¹⁴ Section 1(1) of the Citation of Constitutional Laws, 2005 (Act No. 5 of 2005). The minimum core was considered in the context of claims for the violation of the rights to housing and health under Sections 26 and 27 of the South African Constitution. Section 26 of the Constitution provides that "Everyone has the right to have access to adequate housing. Similarly, Section 27 guarantees to everyone the right to have access to health care services, sufficient food and water, and social security. With regard to both sets of rights, the Constitution requires the government "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."

constitute crises that trigger positive obligations to remedy those deprivations. In both cases, Canadian courts have declined to consider these issues in light of section 7 of the *Charter* as matters of the rights to life and security of the person.¹⁵ This constitutes an increasing divergence from the norms established in international human rights law regarding the interdependence and indivisibility—and, consequently, justiciability—of all human rights.

This paper concludes by exploring whether the minimum core and substantive reasonableness approaches may provide courts with a useful interpretive tool to meaningfully vindicate human rights. This paper suggests that the minimum core may assist in more clearly determining which needs and interests are justiciable under section 7 of the *Charter*. It also proposes that under section 1 of the *Charter*, the minimum core may invite a greater degree of scrutiny into, and less deference towards, government budgetary choices. Further inquiry into the concept's applicability to *Charter* proportionality inquiries is warranted. Finally, this paper suggests that incorporating a minimum core or substantive reasonableness approach may promote democratic dialogue by giving a voice to the vulnerable and marginalized.

I. THE INTERDEPENDENCE AND INDIVISIBILITY (AND JUSTICIABILITY) OF ALL HUMAN RIGHTS

States Parties to the *ICESCR*¹⁶ have undertaken to “take steps ... to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] by all appropriate means.”¹⁷ The historical separation of civil and political rights, enshrined in the *International Covenant on Civil and Political Rights (ICCPR)*,¹⁸ from the ESR, set out in the *ICESCR*, has led to the misconception that civil and political rights are enforceable in courts while ESR are not justiciable. Adherents of this view argue that unlike civil and political rights, which are negative rights constituting restraints on government action, ESR prescribe positive government action that is better left to the political realm.¹⁹ As further evidence of this distinction between negative and positive (and justiciable and non-justiciable) rights, they point to the fact that the *ICESCR* requires States Parties only to “progressively realize” ESR; that, unlike the *ICCPR*,²⁰ the *ICESCR* does not include the right to access to justice

¹⁵ In *Tanudjaja*, ONSC and *Tanudjaja*, ONCA, *supra* note 4, by determining on a preliminary motion that the claim, including under section 7, did not disclose a reasonable cause of action because it was not justiciable; and in *Canadian Doctors*, *supra* note 11, by finding that section 7 was not engaged by the claim.

¹⁶ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 [ICESCR]. Canada is a State Party to the *ICESCR*.

¹⁷ *Ibid* art 2.

¹⁸ 19 December 1966, 999 UNTS 171, Can TS 1976 No 47.

¹⁹ Malcolm Langford, “The Justiciability of Social Rights: From Practice to Theory” in Malcolm Langford, ed, *Social Right Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) at 8.

²⁰ *Supra* note 18. Part II Art. 2(3) states: Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

and an effective remedy for rights violations; and that the *ICCPR* contains an optional complaints procedure while at its inception the *ICESCR* did not.²¹

This distinction between positive and negative rights has now largely been rejected by the international community and in academic circles. The justiciability of ESR has also been established through national constitutions that incorporate ESR as legally enforceable and constitutionally binding.²² Further, in many contexts where ESR are not explicitly constitutionally protected, judiciaries have affirmed the interdependence and indivisibility of all human rights by linking ESR matters to the rights (among others) to life, security of the person, non-discrimination, and freedom from cruel and inhuman treatment.²³

Craig Scott and Patrick Macklem characterize the debate as casting “positive and negative freedom as theatrical rivals rather than supporting actors.”²⁴ And as the Special Rapporteur on the right to health put it, “[t]he division between both sets of rights is artificial, given there is no intrinsic difference between them. Both may require positive actions, are resource-dependent and are justiciable.”²⁵ Traditional “negative” rights require positive government action to establish a governmental apparatus to secure these rights for individuals.²⁶ This includes the appointment and training of public officials, monitoring mechanisms, and the maintenance of accountability mechanisms. On the other hand, ESR also place negative duties on governments. Absent compelling justifications, governments have a duty to refrain from interfering with ESR-related resources that individuals already possess.²⁷

²¹ Bruce Porter, “Rethinking Progressive Realization: How should it be implemented in Canada?” *Background Paper for a Presentation to the Continuing Committee of Officials on Human Rights* (4 June 2015), online: Social Rights Advocacy Centre <socialrights.ca/documents/publications/Porter%20Progressive%20Implementation.pdf> [perma.cc/L4ZZ-8U7F].

²² E.g., Argentina, Brazil, Colombia, Costa Rica, Italy, Kenya, Mexico, Portugal, Russia, South Korea, Spain, South Africa, Venezuela.

²³ In India, for example, the High Court of Delhi in *Laxmi Mandal v Deen Dayal Harinagar Hospital and Others*, WP(C) 8853/2008, Judgment of 4 June 2010, High Court of Delhi at para 20 stated: “The right to health [forms] an inalienable component of the right to life under Article 21 of the Constitution.” And the Indian Supreme Court in *Francis Coralie Mullin v The Administrator, Union*, (1981) 1981 AIR 746, 1981 SCR (2) 516 at para 6 stated: “The right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.” As another example, the Supreme Court of Bangladesh has established that “[the] right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution free water and air, bare necessities of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity” in *Dr. Mohiuddin Farooque v Bangladesh* 48 DLR (1996) 438 at para 17.

²⁴ Craig Scott & Patrick Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (1992) 141 U PA L Rev 1 at 85.

²⁵ UN General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, 69th Sess, UN Doc A/69/299 (11 August 2014) at para 7.

²⁶ Cass R Sunstein, “Social and Economic Rights? Lessons from South Africa” (2001) 11:4 Constitutional Forum 123 at 124.

²⁷ David Bilchitz, “Socio-economic rights, economic crisis, and legal doctrine” (2014) 12:3 IJCL 710 at 714 [Bilchitz, “Socio-economic rights”]; *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT 11/00) [2001] 1 SA 46 at para 34, 2000 (11) BCLR 1169 [Grootboom].

In 1993, the *Vienna Declaration and Programme of Action*²⁸ was adopted at the World Conference on Human Rights. The Declaration emphasized that “[a]ll human rights are universal, indivisible and interdependent and interrelated” and emphasized that “[t]he international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.”²⁹ In 1997, a group of more than 30 experts adopted the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, which affirmed that any person or group whose ESR are violated “should have access to effective judicial or appropriate remedies at both national and international levels” and stressed that “[t]he fact that the full realization of most [ESR] can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States ...”³⁰ Finally, in 2008, the UN General Assembly adopted an optional complaints procedure under the *ICESCR*, eradicating “the final vestiges of the historic distinction between the two sets of rights.”³¹

In 2003, the CESCR, the treaty body tasked with clarifying the provisions of the *ICESCR* and promoting and monitoring State Party compliance with the Covenant, emphasized States Parties’ obligation under Article 2 of the *ICESCR* to employ “appropriate means” to realize ESR. Based on this principle, the Committee affirmed that “whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”³² While the Committee has recognized that the right to an effective remedy may not require a judicial remedy in all cases, and that administrative remedies may suffice where they are “accessible, affordable, timely and effective,” it has made clear that any classification of ESR as “beyond the reach of the courts” is “incompatible with the principle that the two sets of human rights are indivisible and interdependent” and would “drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”³³

Likewise, the UN Human Rights Committee, the treaty body for the *ICCPR*, has linked poverty and deprivation to a threat to the right to life,³⁴ and consistently found that the rights guaranteed under the *ICCPR* contain positive obligations³⁵ to ensure access to the necessities of life, including food,³⁶ health care,³⁷ adequate housing,³⁸ and amenities such as electricity, water, and sanitation.³⁹

²⁸ *Vienna Declaration and Programme of Action* (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993), online: OHCHR <ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> [perma.cc/YP7N-ZNDD].

²⁹ *Ibid* at para 5.

³⁰ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (22–26 January 1997) at paras 8, 22, online: University of Minnesota Human Rights Library <umn.edu/humanrts/instree/Maastrichtguidelines_.html> [perma.cc/W27K-JHRR].

³¹ Porter, *supra* note 21 at 2.

³² UN Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, 19th Sess, UN Doc E/C.12/1998/24 (3 December 1998) at para 9 [*General Comment* 9].

³³ *Ibid* at paras 9–10.

³⁴ UN Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 68th Sess, UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) at para 10.

³⁵ UN Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 16th Sess (30 April 1982) at para 5.

³⁶ Human Rights Committee, *Concluding observations of the Human Rights Committee*, 72nd Sess, UN Doc CCPR/CO/72/PRK (27 August 2001) at para 16.

³⁷ UN Human Rights Committee, *Ms. Yekaterina Pavlovna Lantsova v The Russian Federation*, Communication No. 763/1997, UN Doc CCPR/C/74/D/763/1997 (2002) at para 9.2; Human Rights Committee, *Concluding observations on the third periodic report of Paraguay*, 107th Sess, UN Doc CCPR/C/PRY/CO/3 (29 April 2013) at para 13; Human Rights Committee, *Concluding observations of the Human Rights Committee*, 77th Sess, UN Doc

II. THE MINIMUM CORE

In establishing the obligation to progressively realize ESR, the *ICESCR* acknowledged that the full realization of all ESR may not be immediately attainable by States Parties, particularly when resource constraints are considered.⁴⁰ At the same time, the CESCR worried that progressive realization would be misinterpreted as somehow making ESR entirely aspirational:

[T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.⁴¹

The CESCR has developed a number of approaches to countering the idea that progressive realization does not impose any immediate obligations on states. It emphasizes that states have an obligation to take steps toward the full realization of Covenant rights which are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”⁴² and that obligations to “devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.”⁴³ States have an obligation under article 2 of the *ICESCR* to “to work out and adopt a detailed plan of action for the progressive implementation” of each of the rights contained in the Covenant by developing “clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant.”⁴⁴ Ensuring non-discriminatory enjoyment of ESR is also an

CCPR/CO/77/MLI (16 April 2003) at para 14; Human Rights Committee, *Concluding observations of the Human Rights Committee: The Gambia*, 81st Sess, UN Doc CCPR/CO/75/GMB (12 August 2004) at para 17; Human Rights Committee, *Concluding observations by the Human Rights Committee: Venezuela*, 71st Sess, UN Doc CCPR/CO/71/VEN (26 April 2001) at para 19; Human Rights Committee, *Concluding observations of the Human Rights Committee: Guatemala*, 72nd Sess, UN Doc CCPR/CO/72/GTM (27 August 2001) at para 19; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Kosovo (Serbia)*, 87th Sess, UN Doc CCPR/C/UNK/CO/1 (14 August 2006) at para 14.

³⁸ UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, 65th Sess, UN Doc CCPR/C/79/Add.105 (7 April 1999) at para 12 [*Canada Concluding Observations 1999*].

³⁹ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, 99th Sess, UN Doc CCPR/C/ISR/CO/3 (3 September 2010) at paras 18, 24.

⁴⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States Parties obligations*, 5th Sess, UN Doc E/1991/23 (1991) at para 9 [*General Comment 3*].

⁴¹ *Ibid.*

⁴² *Ibid* at para 2.

⁴³ *Ibid* at para 11.

⁴⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment 1: Reporting by States parties*, 3rd Sess, UN Doc E/1989/22, annex III (1989) at para 4.

immediate obligation under the Covenant.⁴⁵ In addition, the CESCR has developed and applied the concept of minimum core obligations for ESR.

The minimum core constitutes “minimum essential levels of each of the rights” that States Parties are required to satisfy immediately rather than to progressively realize, including “essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education”⁴⁶ The minimum core serves as a basis for enforcing a basic substantive level of ESR and for delineating immediate obligations.⁴⁷ The minimum core is a presumptive legal obligation. States Parties bear a heavy burden in justifying a failure to meet this obligation: they must demonstrate that “every effort has been made to use all resources that are at [their] disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”⁴⁸

The concept of the minimum core as a tool for the vulnerable to claim tangible, essential resources necessary for the fulfilment of a minimally acceptable standard of life has been subject to vigorous scholarly debate. Critics of the approach maintain that an absolute, universal minimum core is impossible to articulate given the highly contextualized nature of socioeconomic needs and challenges that countries face.⁴⁹ Differing degrees of economic wealth and diverse social structures among countries may result in varied conceptualizations of the minimum core of ESR.⁵⁰ Consequently, any universal conception of these rights is thought to be “trimmed, honed, and shorn of deontological excess.”⁵¹ Critics also argue that delivering the minimum core is impractical due to resource constraints and competing needs and interests. They also posit that it creates obligations that are exclusively positive and thus beyond the competence of judiciaries, undermining deliberative democracy.⁵²

Many questions and difficulties arise when attempting to articulate the minimum core. Should we conceptualize the essential minimum of an ESR as the necessities for mere survival or those required to maintain human dignity and foster human flourishing?⁵³ The minimum core’s content will differ depending on which of these two normative foundations an advocate adopts.

⁴⁵ *General Comment 3*, *supra* note 40 at para 1.

⁴⁶ *Ibid* at para 10.

⁴⁷ Marius Pieterse, “Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience” (2004) 26 Hum Rts Q 882 at 897 [Pieterse, “Possibilities and Pitfalls”].

⁴⁸ *General Comment 3*, *supra* note 40 at para 10.

⁴⁹ Katharine G Young, “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” (2008) 33 Yale J Int’l L 113 at 116 [Young, “Minimum Core”].

⁵⁰ Karin Lehmann, “In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core” (2006) 22:1 Am U Int’l L Rev 163 at 183–184.

⁵¹ Young, “Minimum Core,” *supra* note 49 at 113.

⁵² Pieterse, “Possibilities and Pitfalls,” *supra* note 47 at 899; Sandra Liebenberg, “Socio-Economic Rights: Revisiting The Reasonableness Review/Minimum Core Debate” in Stu Woolman and Michael Bishop, eds, *Constitutional Conversations* (Cape Town: Pretoria University Law Press, 2008) 305 at 313–321 [Liebenberg, “Socio-Economic Rights”].

⁵³ For example, while David Bilchitz argues that the minimum core should be focused on survival needs and “requires us to recognize that it is simply unacceptable for any human being to have to live without sufficient resources to maintain their survival,” (in David Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 SAJHR 1 at 15 [Bilchitz, “Towards a Reasonable Approach”]), Amartya Sen and Martha Nussbaum take a “capabilities approach” founded in human dignity. As stated by Nussbaum: “[t]he core idea is that of the human being as a dignified free being who shapes his or her own life, rather than being passively shaped or pushed around by the world in the manner of a flock or herd animal.” In other words, the goal is capability and opportunity, rather than mere functioning/survival. See Martha Nussbaum, “Women and equality: The capabilities approach” (1999) 138:3 Int’l Lab Rev 227 at 234. See also Amartya Sen, *Poverty and Famines, An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press, 1981).

Which countries, branches of government, or organizations should be given the power to define what substantive immediate guarantees ESR carry?⁵⁴ Is the minimum core to be determined in the abstract and therefore universally, or is it context-specific, to be determined on a case-by-case basis, such that any conceptualization of a minimum core is relative to the socioeconomic conditions of a particular state? If the minimum core is founded in survival needs, what relevance does the concept have to middle- and high-income countries? When facing resource constraints, how is a state to prioritize certain ESR entitlements over others?⁵⁵ For example, should an HIV-positive person who needs retroviral medications to live be prioritized over an individual who suffers from chronic, debilitating migraines that seriously erode her dignity and quality of life?⁵⁶ In other words, “must life always prevail over quality of life?”⁵⁷ Sandra Liebenberg explains that the difficulty with the minimum core “is that social needs are in fact interconnected and that no clear-cut distinction exists between core and non-core needs” and that the approach “does not reflect the fact that people may have other important needs which do not meet the threshold for survival, but which warrant prior consideration in a constitutional order founded on the values of human dignity, equality and freedom.”⁵⁸

Critics also argue that the minimum core approach inappropriately infringes on the separation of powers, and that determining the scope of the minimum core is beyond the institutional competence of courts.⁵⁹ This critique rests in the concern that in adjudicating on the content and scope of ESR, judges “will assume greater power over setting socioeconomic policy, which they are neither competent enough to decide nor accountable enough to administer.”⁶⁰

Carol Steinberg argues that courts applying the minimum core approach and ordering the fulfillment of a minimum content of ESR amounts to placing a “constitutional straightjacket” on the legislature.⁶¹ Moreover, she states that the minimum core approach may even have negative systemic effects by triggering a backlash to perceived judicial activism against democratically determined priorities, “[forestalling] the constitutional conversation between the three branches of government.”⁶²

These concerns can be roughly grouped into three categories: (1) difficulties in defining the content of the minimum core; (2) challenges in meeting a diversity of needs when under resource constraints; and (3) concerns regarding institutional roles.⁶³ These apprehensions led the CCSA, which explicitly considered the application of the minimum core, to reject its use. With respect to the right to adequate housing, the Court stated in *Government of the Republic of South Africa and Others v Grootboom and Others*:⁶⁴

⁵⁴ Young, “Minimum Core,” *supra* note 49 at 147–148.

⁵⁵ Lehmann, *supra* note 50 at 185–189; Carol Steinberg, “Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-Economic Rights Jurisprudence” (2006) 123 SALJ 264 at 275–276.

⁵⁶ Lehmann, *supra* note 50 at 188–189.

⁵⁷ *Ibid* at 189.

⁵⁸ Liebenberg, “Socio-Economic Rights,” *supra* note 52 at 318, 319.

⁵⁹ Steinberg, *supra* note 55.

⁶⁰ Young, “Minimum Core,” *supra* note 49 at 159.

⁶¹ Steinberg, *supra* note 55 at 274.

⁶² *Ibid* at 269.

⁶³ Liebenberg, “Socio-Economic Rights,” *supra* note 52 at 306.

⁶⁴ *Grootboom*, *supra* note 27. In this case, the respondents were part of a community that had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied for an order requiring the government to provide them with adequate shelter or housing until they obtained permanent accommodation. For additional discussion of the *Grootboom* case, see Lilian Chenwi, “Implementation of Housing Rights in South Africa: Approaches and Strategies” (2015) 24 JL & Soc Pol’y 68.

It is not possible to determine the minimum threshold for the progressive realization of the right to access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right The determination of a minimum core in the context of the “right to have access to adequate housing” presents difficult questions. This is so because the needs in the context of adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of the minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people.⁶⁵

The CCSA held that questions of socioeconomic policy are primarily a matter for the legislature and the executive, and so in any ESR challenge, rather than considering the content of the rights in question, the court will examine “whether the legislative and other measures taken by the state are reasonable.”⁶⁶ The CCSA elaborated that the reasonableness standard will not require courts to consider whether “other more desirable or favourable measures could have been adopted, or whether public money could have been better spent,” because “a wide range of possible measures could be adopted by the state to meet its obligations” which would all satisfy the reasonableness test.⁶⁷

The CCSA developed a set of criteria for assessing whether a government programme or policy is reasonable. The CESCR subsequently adopted these criteria as the test to be used in the *ICESCR*’s optional complaints mechanisms.⁶⁸ Consequently, these criteria became integrated into international human rights law. The reasonableness factors include:

- (a) The extent to which the measures taken were deliberate, concrete and targeted toward the fulfilment of economic, social and cultural rights;
- (b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
- (c) Whether the State party’s decision (not) to allocate available resources was in accordance with international human rights standards;
- (d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;

⁶⁵ *Grootboom*, *supra* note 27 at paras 32–33.

⁶⁶ *Ibid* at para 41.

⁶⁷ *Ibid*.

⁶⁸ See Porter, *supra* note 21 at 5–6. In doing so, the CESCR seemingly moved away from the minimum core standard. However, the CESCR and special procedures continue to advocate for minimum core obligations in General Comments, Reports, and other commentary.

- (e) The time frame in which the steps were taken;
- (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations of risk.⁶⁹

Given the difficulties of the minimum core approach, reasonableness is often perceived as a more accommodating option for adjudicating ESR. As noted by Liebenberg, the reasonableness approach provides courts “with a flexible and context-sensitive basis for evaluating socio-economic rights claims” by allowing “government the space to design and formulate appropriate policies to meet its socio-economic rights obligations.”⁷⁰ Meanwhile, reasonableness mandates continued scrutiny of government policies to ensure that they adhere to the requirement of inclusiveness and prioritize relief to the most vulnerable and marginalized in society.⁷¹

The requirement to prioritize individuals and groups whose needs are the most urgent is seen in particular to set a threshold requirement that gives ESR substantive content. And indeed, in some cases the reasonableness approach has led the CCSA to order the provision of specific necessary goods and services, such as antiretroviral medication to prevent mother-to-child HIV transmission,⁷² and social assistance to permanent residents in South Africa.⁷³

Nevertheless, some scholars remain concerned that even in these successful cases, the court focused only on the reasonableness of the government action while avoiding giving content and scope to the ESR in question. In Liebenberg’s view, because the reasonableness approach does not begin “with a principled focus on the content and scope of the right and situation of the claimants,” it relieves states of having to provide justifications for rights infringements.⁷⁴ Similarly, Stuart Wilson and Jackie Dugard argue that applying the reasonableness test in the abstract of any understanding of the interests and needs in question,

[undercuts] the court’s ability to engage head on with the claimants’ needs and lived experiences of poverty. Instead, the Court tends to prefer a facial examination of state policy, implicitly accepting the conceptions of reasonableness and possibility upon which those policies are drafted and implemented. This tends to reproduce the exclusion from policy formulation and implementation processes which have brought the claimants to court in the first place.⁷⁵

Thus, the reasonableness approach has been criticized for potentially fostering the problem that originally concerned the CESCRR with respect to progressive realization: the danger that ESR will be deprived of any meaningful content and enable the continued suffering of the

⁶⁹ UN Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” Under an Optional Protocol to the Covenant*, 38th Sess, UN Doc E/C.12/2007/1 (21 September 2007) at para 8 [CESCR, *Maximum Available Resources*].

⁷⁰ Liebenberg, “Socio-Economic Rights,” *supra* note 52 at 321–322.

⁷¹ *Ibid.*

⁷² *Minister of Health and Others v Treatment Action Campaign and Others*, (CCT 8/02) [2002] ZACC 15, 2002 (5) SA 721 [Treatment Action Campaign].

⁷³ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, (CCT 13/03, CCT 12/03) [2004] ZACC 11, 2004 (6) SA 505 (CC).

⁷⁴ Liebenberg, “Socio-Economic Rights,” *supra* note 52 at 323.

⁷⁵ Stuart Wilson & Jackie Dugard, “Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights” (2011) 22 Stellenbosch L Rev 664 at 673 [Wilson & Dugard].

most vulnerable and marginalized. David Bilchitz argues that the minimum core is necessary to clarify precise state obligations in relation to ESR: “The current system of invoking the amorphous notion of reasonableness does not provide a clear and principled basis for the evaluation of the state’s conduct by judges or other branches of government in future cases.”⁷⁶ Marius Pieterse contends that rejecting the minimum core results in “the ‘dumbing down’ of the content of social rights, which seem ... to boil down to only a general expectation on the state to act reasonably in its attempts to realize these rights.”⁷⁷ He adds that the reasonableness standard fails to acknowledge and prioritize the hardship ESR claimants face, and that this approach is thus ineffective at correcting “the diminution of human dignity suffered as a result of such hardship.”⁷⁸

Indeed, as Kameshni Pillay observes, these concerns manifested in the aftermath of the *Grootboom* decision. In a study of the implementation of the CCSA’s judgment two years later, Pillay found that community members did not experience any significant improvements in their daily lives. They still lived with rudimentary housing built so densely that there was a constant threat of fires erupting, and with inadequate sanitation that led to flooding and illness.⁷⁹ The same problem of translating rights into concrete, tangible entitlements also presented itself in the CCSA’s subsequent case of *Mazibuko and Others v City of Johannesburg and Others*.⁸⁰ The claimants, all from very poor households, argued that the city of Johannesburg’s policy of limiting the supply of free basic water and conditioning water supply on the installation of pre-payment water meters violated their right to water. The policy created conditions where the supply of water was insufficient to satisfy their daily requirements, as they could not afford to pre-pay for water beyond the allocated free amount. The CCSA held that the water policy was reasonable: “the City is not under a constitutional obligation to provide any *particular* amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realize the achievement of the right.”⁸¹ In coming to this conclusion, the CCSA would not consider evidence regarding the daily hardships the claimants experienced and what constituted “sufficient water.”⁸²

Refusing to ascribe substantive content to ESR creates the danger that ESR adjudication will sideline “the very interests that prompted the inclusion of justiciable socioeconomic rights”⁸³ and cause the “institutional containment and suppression of the needs [ESR] represent.”⁸⁴ To reject the minimum core altogether in favour of an approach based solely on examining the reasonableness of state actions in the abstract risks creating the very danger that the CESCSC sought to avoid: that the obligation to progressively realize rights will be misconstrued to deprive ESR of meaningful content and legitimize the deprivation of vulnerable and marginalized groups.

⁷⁶ Bilchitz, “Towards a Reasonable Approach,” *supra* note 53 at 10.

⁷⁷ Pieterse, “Possibilities and Pitfalls,” *supra* note 47 at 898.

⁷⁸ Marius Pieterse, “Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited” (2007) 29 Hum Rts Q 796 at 804 [Pieterse, “Eating Socioeconomic Rights”].

⁷⁹ Kameshni Pillay, “Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights” (2002) 6:2 Law Democracy & Development 255.

⁸⁰ (CCT 39/09) [2009] ZACC 28, 2010 (3) BCLR 239 (CC) [*Mazibuko*].

⁸¹ *Ibid* at para 85.

⁸² Sandra Liebenberg & Katharine G Young, “Adjudicating social and economic rights: Can democratic experimentalism help?” in Helena Alviar Garcia, Karl Klare & Lucy A Williams, eds, *Social and Economic Rights in Theory and Practice: Critical Inquiries* (New York: Routledge, 2005) at 244 [Liebenberg & Young].

⁸³ Pieterse, “Eating Socioeconomic Rights,” *supra* note 78 at 798.

⁸⁴ *Ibid* at 799.

III. SUBSTANTIVE REASONABLENESS

In order to preserve the benefits of the reasonableness approach—its flexibility, context-sensitivity, openness, and facilitation of greater participation and deliberation in defining the scope of ESR—while also countering the dangers that such an approach may deprive the ESR of meaningful content and legitimize continued deprivation, scholars like Liebenberg have advocated for a “substantive reasonableness” approach. Substantive reasonableness preserves “the features of the minimum core approach that require heightened scrutiny of acts and omissions which result in a denial of basic needs.”⁸⁵ This approach relies on the minimum core and the values underlying it—the “desire to protect vulnerable people from serious social and economic threats to their survival, health, and basic functioning of society”⁸⁶—to promote the development of normative content to ESR during adjudication employing the reasonableness test. Liebenberg argues that,

until some understanding is developed ... of the content of the right, the assessment of whether the measures adopted by the state are reasonably capable of facilitating its realization takes place in a normative vacuum. Reasonableness review should thus be developed in a way which incorporates a principled and substantive interpretation of the content of socio-economic rights. Such an interpretation should seek to elucidate the purposes and interests which these rights protect⁸⁷

Following Liebenberg’s proposal for substantive reasonableness, Wilson and Dugard suggest that any ESR analysis must start with identifying the needs and interests the litigants have come forth to claim. The next step is to determine whether those interests fall within the scope of the ESR in question and, if so, to assess the weight they ought to be accorded. Only then should the reasonableness of the government’s actions be assessed in light of this context.⁸⁸ When the issues at hand deal with basic necessities of life and well-being, the minimum core approach of heightening the burden of justification and lowering the degree of deference owed to the state can be incorporated into the analysis of whether the government’s actions were reasonable. But this is only possible when a preliminary identification of the interests and needs in question, and an assessment of whether they fall within the scope of a right and of the weight they should be accorded, is undertaken.⁸⁹

Katharine Young suggests that using the minimum core to inform the reasonableness approach requires discarding “the goals of fixture, closure, and determinacy structured in the concept by its advocates.”⁹⁰ Similarly, Liebenberg adds that the minimum core can be useful if we abandon its goal of universality in favour of a context-specific, case-by-case analysis of whether the State must furnish goods or resources to particular claimants.⁹¹

⁸⁵ Liebenberg, “Socio-Economic Rights,” *supra* note 52 at 330.

⁸⁶ Sandra Liebenberg, “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?” (2002) 6 *Law Democracy & Development* 159 at 174 [Liebenberg, “South Africa’s evolving jurisprudence”].

⁸⁷ Liebenberg, “Socio-Economic Rights,” *supra* note 52 at 324.

⁸⁸ Wilson & Dugard, *supra* note 75 at 672–673.

⁸⁹ Liebenberg, “Socio-Economic Rights,” *supra* note 52; Wilson & Dugard, *supra* note 75.

⁹⁰ Young, “Minimum Core,” *supra* note 49 at 116.

⁹¹ Liebenberg, “South Africa’s evolving jurisprudence,” *supra* note 86 at 174.

There remains a great deal of room for courts to articulate substantive content to ESR without overstepping their institutional boundaries. While the CCSA rejected the minimum core as a “self-standing right conferred to everyone,” it did indicate that the minimum core could possibly be relevant to the reasonableness analysis.⁹² As Bilchitz points out, the minimum core “does not represent any particular means by which a socio-economic right can be realized; rather, it represents the standard of socioeconomic provision necessary to meet people’s basic needs,”⁹³ leaving governments to choose among a number of policy options to fulfill that standard. Unlike the CCSA, the Colombian Constitutional Court adheres to the minimum core approach and has engaged the concept in a range of ESR cases. The Court has not shied away from ordering concrete, substantive remedies and structural injunctions, or from retaining supervision over the implementation of the remedy in order to facilitate dialogue between the legislature and stakeholders in fashioning a response that is consistent with constitutional standards.⁹⁴

In Canada, scholars have argued that the constitutional structure and the range of remedial options open to judges allow courts to issue judgments that leave space for the legislature to consider various options and respond in a manner consistent with its broader policy objectives. They argue that this promotes a “judicial dialogue” with other branches of government that is democracy-promoting rather than anti-democratic.⁹⁵ Further, the exercise of judicial review promotes democracy in allowing aggrieved minorities whose interests are traditionally overlooked in the legislative process to have a voice in the democratic debate.⁹⁶

Courts should “be alert to the ways in which the denial of access to the particular right creates or reinforces patterns of inequality and marginalisation in society.”⁹⁷ As the minimum core addresses some of the direst aspects of socioeconomic deprivation, a higher level of judicial scrutiny under the reasonableness approach is warranted.⁹⁸ As suggested above, courts can give ESR concrete, substantive content without unduly infringing on the powers of the legislature if the process facilitates dialogue and participation. The consequences of failing to do so can be severe. As stated by Liebenberg, “[w]ithout a recognition of this basic standard, the enjoyment of

⁹² *Treatment Action Campaign*, *supra* note 722 at 34.

⁹³ David Bilchitz, “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance” (2002) 119 SALJ 484 at 488.

⁹⁴ See Joie Chowdhury, “Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights—A Comparative Perspective” (2009) Cornell Law School Inter-University Graduate Student Conference Paper, Paper 27; César Rodríguez-Garavito, “Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America” (2011) 89:7 Tex L Rev 1669.

⁹⁵ Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue: Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All) (1997) 35:1 Osgoode Hall LJ 76; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited—or ‘Much Ado About Metaphors’” (2007) 45 Osgoode Hall LJ 1; Andrew Petter, “Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn’t Such a Good Thing After All)” (2007) 45 Osgoode Hall LJ 147; Kent Roach, “Dialogic Judicial Review and its Critics” (2004) 23 SCLR (2d) 49; Kent Roach, “Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience” (2005) 40 Tex Int’l LJ 537. In other jurisdictions, see *e.g.*, CRG Murray, “The Continuation of Politics, by other means: Judicial Dialogue under the Human Rights Act 1998” in Roger Masterman & Ian Leigh, eds, *The United Kingdom’s Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford: Oxford University Press, 2013); Rodríguez-Garavito, *supra* note 94.

⁹⁶ Kent Roach, “Sharpening the Dialogue Debate: The Next Decade of Scholarship” (2007) 45 Osgoode Hall LJ 169 at 172.

⁹⁷ Liebenberg, “Socio-Economic Rights,” *supra* note 52 at 328.

⁹⁸ Benjamin Oliver Powers, “The ‘Reasonableness’ of Poverty: Progress and Pitfalls in South Africa’s Socio-economic Jurisprudence” (2014) *Senior Projects Spring 2014*, Paper 3.

all other rights is imperilled and the foundational constitutional values of human dignity, equality and freedom will ... ‘have a hollow ring.’”⁹⁹

IV. CRISIS IN CANADA

Critics of the minimum core suggest that because minimum core obligations aim to prevent deprivation of the most basic resources necessary for life, the concept has no application to high-income countries where most individuals experience a higher standard of living. Bilchitz, however, compellingly argues that the minimum core approach remains relevant even to countries like Canada when they are dealing with situations of crisis. Bilchitz describes two forms of crisis: personal and structural. A personal crisis exists when “individuals are in desperate circumstances and lack the ability to meet the very general necessary conditions for being free from threats to their survival or basic well-being.”¹⁰⁰ A structural crisis forms when there are many individuals suffering from personal crises, and “the causes of the situation are themselves connected with one or more social or economic system or structure. Any solution to the circumstances in question requires addressing the more general structural features that have given rise to the problem.”¹⁰¹ Bilchitz argues that “times of personal crisis are ... the very conditions under which the general obligations flowing from [ESR] have the greatest importance and the positive obligations, in particular, become activated.”¹⁰² This is true regardless of the broader socio-economic conditions of any particular state. Canada faces at least two significant crises that trigger the obligation of positive action: the deprivation of health care from refugees and irregular migrants, and the critical situation of homelessness across the country.¹⁰³

A. CUTS TO REFUGEE HEALTH CARE

In 2012, the federal government made significant cuts to Canada’s IFHP which had, for five decades prior, provided comprehensive health insurance coverage for refugees and refugee claimants. The pre-2012 IFHP provided health care benefits for medical care of an urgent or essential nature, emergency dental conditions, immunizations, preventative medical care,

⁹⁹ Liebenberg, “South Africa’s evolving jurisprudence,” *supra* note 86 at 174.

¹⁰⁰ Bilchitz, “Socio-economic rights,” *supra* note 27 at 716.

¹⁰¹ *Ibid* at 717.

¹⁰² *Ibid* at 719.

¹⁰³ Another crisis that cannot be overlooked but that is not covered in this paper is the situation of Indigenous peoples in Canada. Crises in this context include the federal government’s underfunding of child welfare services on First Nations reserves, resulting in more children being removed from their families than during the residential school era, and the epidemic rates of violence against Aboriginal women. Until only very recently, Canada has ignored virtually universal calls from UN treaty bodies, Special Rapporteurs, provincial premiers, and civil society and Aboriginal organizations to call a national inquiry into the 1200 cases of missing and murdered Aboriginal women and to institute a coordinated national plan of action on violence against women. In December 2015, the new Liberal government announced the launch of a national inquiry into missing and murdered indigenous women: “Government of Canada Launches Inquiry into Missing and Murdered Indigenous Women and Girls” (8 December 2015) online: < <http://news.gc.ca/web/article-en.do?&nid=1023999>>. For information on Missing and Murdered Aboriginal women, see Amnesty International, “Canada: Submission to the UN Human Rights Committee” (5 June 2015) at 20–24, online: Amnesty International <amnesty.org/download/Documents/AMR2018062015ENGLISH.pdf> [perma.cc/CUC7-3LY2]. See the *First Nations Child and Family Caring Society of Canada v Canada*, 2016 CHRT 2 judgment regarding the challenge to the government’s underfunding of Indigenous child welfare.

contraception, dental and vision care, essential prescription medications, prenatal and obstetrical care, and immigration medical examinations. These benefits were provided to all individuals under the administrative control of Canada's immigration authorities, whether they were refugees, refugee claimants, failed refugee claimants, individuals entitled only to a Pre-Removal Risk Assessment (PRRA),¹⁰⁴ victims of human trafficking, or immigration detainees. Coverage was available until such persons either became eligible to receive provincial or territorial health insurance, or left the country.¹⁰⁵ Irregular migrants¹⁰⁶ were not covered by the IFHP and not entitled to health care in Canada.¹⁰⁷

The 2012 changes were instituted by way of two Orders-in-Council by the Governor in Council, resulting in a new, tiered system of health benefits to persons in need of protection in Canada: Expanded Health Care Coverage (EHCC),¹⁰⁸ Health Care Coverage (HCC)¹⁰⁹ and Public Health or Public Safety Health Care Coverage (PHPS).¹¹⁰ The tier a person will be

¹⁰⁴ Individuals subject to deportation orders generally receive one final assessment of whether they should not be removed because of a risk of persecution or torture or other ill treatment if returned to their country of origin: *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 112–114 (*IRPA*).

¹⁰⁵ The changes instituted are described in great detail in *Canadian Doctors*, *supra* note 11 at paras 32–87.

¹⁰⁶ There is no universally accepted definition for “irregular migrants.” However, the term most often refers to “migrants who enter or stay in a country without correct authorization.” See UN High Commissioner for Human Rights, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (United Nations: New York and Geneva, 2014) at 4.

¹⁰⁷ See *e.g. Toussaint v Canada*, 2011 FCA 213 at para 14, [2013] 1 FCR 374 [*Toussaint*]; See also *Nell Toussaint v Canada*, Communication Submitted for Consideration Under the First Optional Protocol to the International Covenant on Civil and Political Rights, online: Social Rights in Canada <socialrightscura.ca/documents/legal/tousaint%20IFBH/Toussaint%20v%20Canada%20HRC%20No%202348-2014.pdf> [perma.cc/TX3R-QNR2].

¹⁰⁸ As described in *Canadian Doctors*, *supra* note 11 at paras 67–68: EHCC is the highest level of insurance available under the 2012 IFHP. It is similar to the level of health insurance coverage available to low-income Canadians, and substantially equivalent to the benefits provided under the pre-2012 IFHP. EHCC pays for the services of hospitals, physicians, nurses, and other health care professionals. Coverage is also provided for laboratory, diagnostic, and ambulance services, translation services for health purposes, and supplemental services and produces such as prescription medications, emergency dental services, vision benefits, and assistive devices. Those entitled to EHCC benefits include most government-sponsored refugees and some privately-sponsored refugees, victims of human trafficking, and some individuals admitted under a public policy or on humanitarian and compassionate grounds.

¹⁰⁹ As described in *Canadian Doctors*, *supra* note 11 at paras 69–74, HCC benefits are similar to the health insurance benefits received by working Canadians through their provincial or territorial health insurance plans, with the proviso that services and products are only covered “if they are of an urgent or essential nature” as defined in the IFHP. Individuals falling into this category receive coverage for hospital in-patient and out-patient services; access to physicians, nurses, and other health care professionals; and laboratory, diagnostic, and ambulance services, but only if their health problems are of an urgent or essential nature. HCC benefits do not include routine primary health care services such as annual check-ups, preventative health care, and standard screening tests, and the costs of most prescription medications. Those entitled to HCC benefits include refugee claimants from non-DCO countries, recognized refugees, successful PRRA applicants, most privately sponsored refugees, and all refugee claimants whose claims were filed before 15 December 2012, regardless of their country of origin.

¹¹⁰ As described in *Canadian Doctors*, *supra* note 11 at paras 75–78: PHPS benefits apply to refugee claimants from DCO countries and failed refugee claimants. These benefits only insure health care services and products necessary or required to diagnose, prevent, or treat a disease posing a risk to public health or public safety. Individuals coming from DCO countries are further restricted by the *Immigration and Refugee Protection Act*, which prevents them from working for the first 180 days they are in Canada. This exacerbates the impact of their limited health coverage and hinders their ability to fund access to medical services and medication on their own. There is one final tier, which applies to individuals in need of protection who are found inadmissible and only entitled to Canada's PRRA process. These individuals are not entitled to any health care whatsoever. People who fall within this category are refugee claimants found to be inadmissible to Canada on security grounds, or because of criminal activity, or human

entitled to under the 2012 IFHP depends on a number of factors, including (a) the stage of the refugee determination process an individual finds him/herself in; (b) whether the individual is from a Designated Country of Origin (DCO);¹¹¹ (c) if the individual is not a refugee claimant, the person's status in Canada (e.g., permanent resident, resettled refugee, victim of human trafficking, person with a positive PRRA decision); (d) whether the individual receives federally-funded resettlement assistance; and (e) whether the individual is being detained.¹¹²

The cuts made to the IFHP in 2012 resulted in all refugees other than government-sponsored refugees losing coverage for medications, vision, and dental care. Refugees from DCOs lost all health coverage, including for urgent and essential care, except for conditions that posed a threat to public health and security.¹¹³ Refugees entitled only to a PRRA lost coverage even for conditions threatening public health and security. The cuts were widely decried by medical practitioners, refugee and human rights advocates, and other prominent Canadians.¹¹⁴

To use Bilchitz's terminology, the 2012 cuts to the IFHP can be described as a structural crisis that triggers Canada's positive obligations to protect the ESR of people deprived of necessary health care. Such a crisis would normally engage the Canadian government's positive obligations to act immediately and ensure necessary health care to a particularly vulnerable and marginalized group.¹¹⁵ However, where the government itself is actively causing such a crisis, individuals deprived of necessary health care should be able to claim remedies for the violation of their right to necessary health care before Canadian courts.

rights violations. It also includes those who fail to file their refugee claims in a timely manner and those who have previously made an unsuccessful refugee claim.

¹¹¹ Section 109.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, allows the Minister to designate "safe" countries of origin (DCO). Refugee claimants arriving in Canada from DCO countries are subject to a fast-tracked refugee determination procedure (s 111.1). Two such countries are Mexico (which currently has epidemic rates of torture: See Amnesty International, *Paper Promises, Daily Impunity: Mexico's Torture Epidemic Continues*, Index: AMR 41/2676/2015, online: <amnesty.org/en/documents/amr41/2676/2015/en/> [perma.cc/SMX9-VWUM]) and Hungary (where the Roma population face widespread discrimination and persecution: See Julianna Beaudoin, Jennifer Danch & Sean Rehaag, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015) Osgoode Legal Studies Research Paper Series, Paper 94). For a full list of DCOs, see Government of Canada, "Designated countries of origin," online: <cic.gc.ca/english/refugees/reform-safe.asp> [perma.cc/AC66-V7TA].

¹¹² See *Canadian Doctors*, *supra* note 11.

¹¹³ Canadian Doctors for Refugee Care, "The Issue," online: <doctorsforrefugeecare.ca/the-issue.html> [perma.cc/MWH6-QW37].

¹¹⁴ See e.g. "Day of Action": Doctors, activists protest refugee health care cuts" *CTV News* (15 June 2015), online: CTV News <ctvnews.ca/canada/day-of-action-doctors-activists-protest-refugee-health-care-cuts-1.2423023> [perma.cc/R9XJ-KK6E]. Following the Federal Court's decision, the Federal Court of Appeal ordered the government to implement the FC's remedy while the appeal was pending and restore access to IFHP benefits: See 2014 FCA 252. While the government restored some of the benefits, it failed to fully comply with the FCA's order: See Jennifer Bond, "Ottawa ignores rule of law in refugee health cuts case" *The Star* (11 November 2014), online: <thestar.com/opinion/commentary/2014/11/11/ottawa_ignores_rule_of_law_in_refugee_health_cuts_case.html> [perma.cc/4BT7-CBF2].

¹¹⁵ Indeed, the new federal government, elected in October 2015, withdrew the government's appeal of the FC's judgment in *Canadian Doctors* in December 2015. The new Liberal government has restored IFHP benefits to all Syrian refugees, and has promised to fully restore health care to refugees and refugee claimants of other nationalities by April 2016: see "Statement from the Minister of Immigration, Refugees and Citizenship and the Minister of Justice and Attorney General of Canada" (16 December 2015), online: <news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1025029&crtr.tp1D=980> [perma.cc/R73K-VR4R]; "Restoring Fairness to the Interim Federal Health Program" (18 February 2016), online: <http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1034619&crtr.tp1D=1> [https://perma.cc/XBK2-U4T2].

The constitutionality of the Orders-in-Council was challenged before the Federal Court of Canada in *Canadian Doctors*. In that case, the FC made a factual finding that the denial of health services resulting from the cuts to the IFHP “are causing illness, disability, and death,”¹¹⁶ evoking the desperate circumstances of individuals being unable to meet their basic needs for survival and basic well-being. Consequently, the FC found that the cuts constituted cruel and unusual treatment in violation of section 12 of the *Charter*. The court also held that the differential treatment of refugees from DCOs under the Program was discriminatory and violated section 15 of the *Charter*. However, the FC rejected the applicants’ argument that the cuts to the IFHP discriminated against refugees and refugee claimants on the basis of their immigration status, re-affirming the decision in *Toussaint*¹¹⁷ that “immigration status” does not constitute an analogous ground under section 15.¹¹⁸

However, despite acknowledging that “the fact that a particular claim may involve a request that the government spend money in a particular way is not necessarily fatal to the claim,”¹¹⁹ the court refused to find that the rights to life and security of the person were engaged, stating that section 7 does not confer a “free-standing constitutional right to state-funded health care”¹²⁰ In doing so, the FC reinforced the same false dichotomy between positive and negative rights that it purported to reject by distinguishing precedents from the circumstances in *Canadian Doctors: Chaoulli v Quebec*¹²¹ was different because “the Supreme Court was not asked ... to *require* that the Province of Quebec fund specific health services for the applicants” but rather to strike down the prohibition on Quebec residents spending their *own* money to access private health care.¹²² With respect to *Canada v PHS Community Services Society*,¹²³ the FC found that there is “a world of difference between requiring the state to grant an exemption that would allow a health care provider to provide medical services funded by others and requiring the state itself to fund medical care.”¹²⁴ Citing *Flora v Ontario Health Insurance Plan*,¹²⁵ the court noted that “there is nothing in the 2012 IFHP that limits the ability of those seeking the protection of Canada to spend their own money to obtain health care” while at the same time recognizing that “the right of those affected to pay for their own medical treatment will be a largely illusory one.”¹²⁶

Reducing a right to a right to pay for a right runs contrary to the very essence of universal human rights, including the right to health care. While the FC acknowledged that “Conventions

¹¹⁶ *Canadian Doctors*, *supra* note 11 at para 1049.

¹¹⁷ *Toussaint*, *supra* note 107.

¹¹⁸ *Canadian Doctors*, *supra* note 11 at para 870. While the scope of this paper has been restricted to an analysis of how the right to life under section 7 has been interpreted, it is worth noting that in international human rights law, it has been established that non-citizens fall within the “other status” category of non-discrimination provisions of virtually all human rights treaties. For instance, the Committee on the Elimination of Racial Discrimination has stated that “xenophobia against non-nationals, particularly migrants, refugees and asylum seekers, constitutes one of the main sources of contemporary racism” and has urged all States Parties to “refrain from denying or limiting” access to health services to non-citizens: See UN Committee on the Elimination of Racial Discrimination, General Recommendation 30 on discrimination against non-citizens, 65th Sess (19 August 2004), preamble, para 36.

¹¹⁹ *Canadian Doctors*, *supra* note 11 at para 522.

¹²⁰ *Ibid* at para 741.

¹²¹ 2005 SCC 35, [2005] 1 SCR 791.

¹²² *Canadian Doctors*, *supra* note 11 at paras 533–534.

¹²³ 2011 SCC 44, [2011] 3 SCR 134 [*Insite*].

¹²⁴ *Canadian Doctors*, *supra* note 11 at para 539.

¹²⁵ 2008 ONCA 538, 91 OR (3d) 412.

¹²⁶ *Canadian Doctors*, *supra* note 11 at para 564.

to which Canada is a signatory are relevant as interpretive guides in a Charter analysis and they will thus be taken into account for that purpose,” no international human rights principles were considered in the section 7 analysis.¹²⁷ Moreover, the respondents’ (inaccurate, as this paper argues) submissions “that there is no right in Canada to health care based on international law, [and] that the scope of the international legal right to health is contested” remained unaddressed.¹²⁸

B. HOMELESSNESS AND INADEQUATE HOUSING

In Canada, homelessness can and has been described as a serious and ongoing structural crisis.¹²⁹ Steady withdrawal of investments in affordable housing and social assistance by the federal and provincial governments since the beginning of the 1980s has created a crisis where over 235,000 Canadians experience homelessness each year, with 35,000 experiencing homelessness on any given night.¹³⁰ Enduring homelessness during harsh winters has particularly devastating effects, prompting the UN Human Rights Committee to express concern that “homelessness in Canada has led to serious health problems and even to death” and to urge Canada to “take positive measures required by article 6 [the right to life under the *International Covenant on Civil and Political Rights*] to address this serious problem.”¹³¹ In 2010, precarious housing and homelessness remained “a deep and persistent problem in Canada.”¹³²

In 2009, the British Columbia Court of Appeal acknowledged the issue of homelessness in Victoria as a situation that engages and applies the “most lofty of guaranteed human rights—the rights to life, liberty and security of the person—to the needs of some of the most vulnerable members of our society for one of the most basic of human needs, shelter.”¹³³ Most recently, in the October 2015 judgment *Abbotsford*,¹³⁴ although the Supreme Court of British Columbia found that bylaws prohibiting the erection of temporary shelters violated section 7 of the *Charter*, the conclusion was reached on the basis of protecting individual autonomy to make fundamental personal choices. The court held, problematically, that “the right to obtain the basic necessities of life is [not] a foundational principle underlying the guarantees of s. 7.”¹³⁵

In *Tanudjaja*, a number of applicants brought a *Charter* challenge against the federal and Ontario governments, arguing that their actions and omissions in addressing the crisis of homelessness and inadequate housing violated their rights to life, security of the person, and equality. The claim was based on the fact that the governments’ failure to address homelessness through an effective strategy resulted in the most serious deprivations among the most disadvantaged and marginalized groups, stating: “Canada and Ontario have either taken no

¹²⁷ *Ibid* at paras 474–475.

¹²⁸ *Ibid* at para 469.

¹²⁹ For a succinct summary of the housing crisis in Canada, see Young, “Charter Eviction,” *supra* note 7.

¹³⁰ Stephen Gaetz, Tanya Gulliver & Tim Richter, *The State of Homelessness in Canada 2014* (Toronto: The Homeless Hub Press, 2014) at 4–5, online: The Homeless Hub <homelesshub.ca/sites/default/files/SOHC2014.pdf> [perma.cc/A4QB-WHTS].

¹³¹ UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Canada*, CCPR/C/79/Add.105 (7 April 1999) at para 12 [*Canada Concluding Observations 1999*].

¹³² Wellesley Institute, *Precarious Housing in Canada* (2010) online: Wellesley Institute <wellesleyinstitute.com/wp-content/uploads/2010/08/Precarious_Housing_In_Canada.pdf> [perma.cc/AV6Y-W47B].

¹³³ *Adams*, *supra* note 4 at para 4.

¹³⁴ *Abbotsford*, *supra* note 4.

¹³⁵ *Ibid* at para 181.

measures, and/or have taken inadequate measures, to address the impact of [policy] changes on groups most vulnerable to, and at risk of, becoming homeless.” In failing to act, the applicants argued that the governments “have created and sustained conditions which lead to, support and sustain homelessness and inadequate housing.”¹³⁶ The Notice of Application underscored that “[h]ousing is a necessity of life” and that international human rights law imposes on the federal and provincial governments the positive obligation to “take reasonable and effective measures to ensure the realization of the right to adequate housing.”¹³⁷ The applicants emphasized the impact these policy choices have had on the lived realities of homeless people and the inadequately housed, leading to “reduced life expectancy, hunger, increased and significant damage to physical, mental and emotional health and, in some cases, death,” with disproportionate impacts on women, people with disabilities, Aboriginal people, refugees and migrants, racialized communities, seniors, and youth.¹³⁸

The applicants sought a declaration that the failure to adopt a strategy to address homelessness violated their rights to life and security of the person under section 7 of the *Charter*; that the failure to address the needs of groups disproportionately affected by homelessness by adopting a strategy targeting the needs of the most disadvantaged groups violated the right to equality under section 15; and that Canada and Ontario have obligations under the *Charter* to “implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing.”¹³⁹ The applicants also sought an order requiring the governments to implement a strategy to address homelessness “developed in consultation with affected groups” and including “timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms.”¹⁴⁰ The applicants also asked that the court remain seized of supervisory jurisdiction in order to receive reports on the implementation of the remedial measures ordered.¹⁴¹

The applicants’ arguments addressed the failures of governments to meet any of the requirements the CESCR has found to be of immediate application—ensuring at a minimum essential levels or the core content of the right, ensuring the non-discriminatory enjoyment of the right, and adopting clearly targeted strategies for the full realization of the right over time. The claim highlighted the systemic nature of the widespread personal crises that must be addressed by the governments in order to alleviate the hardship suffered. In such circumstances, Canada’s positive obligations to relieve the deprivation are triggered under international human rights law.

However, in response to the Notice of Application, the respondents successfully brought a preliminary motion before the Ontario Superior Court of Justice to strike the case out on the basis that it disclosed no reasonable cause of action. The Ontario Superior Court dismissed the

¹³⁶ *Tanudjaja v Canada*, Amended Notice of Application at para 14, online: <socialrightscura.ca/documents/legal/Amended%20Not.%20of%20App.(R2H).pdf> [perma.cc/SR5D-A4ZY] [Notice of Application]. On Appeal before the Court of Appeal for Ontario, the Appellants emphasized that their claims were based not only on a *failure to act*, but also in concrete actions undertaken by the governments, stating: “Actions by the Respondent governments to amend laws, policies and programs” in the areas of affordable housing, income support, and accessible housing “have created and sustained increasingly widespread homelessness and inadequate housing, and produced severe health consequences and death among the most marginalized groups in society, contrary to *Charter* s 7 and s 15.” See *Tanudjaja v Canada*, Factum of the Appellants, online: <socialrightscura.ca/documents/legal/motion%20to%20strike/CA%20R2H%20Appellant%20Factum.pdf> [perma.cc/5AES-Y3S7] at para 3.

¹³⁷ Notice of Application, *supra* note 136 at paras 6, 8.

¹³⁸ *Ibid* at paras 27–33.

¹³⁹ *Ibid* at 3–4.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid*.

claim, holding that the applicants failed to point to a concrete government decision or action that engaged *Charter* scrutiny, that “[t]here is no positive obligation on Canada or Ontario to act to reduce homelessness and there are no special circumstances that suggest that such an obligation be imposed in this case,”¹⁴² and that “what the applicants seek would require the court to cross the institutional boundary and enter into the area preserved for the Legislature.”¹⁴³ The Court of Appeal for Ontario upheld the Superior Court’s dismissal of the claim, finding that the claim was not justiciable because “there is no sufficient legal component to engage the decision-making capacity of the courts,”¹⁴⁴ that “the absence of any impugned law” does not permit analysis under section 1 of the *Charter*,¹⁴⁵ and that “there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless.”¹⁴⁶ With respect to its institutional capacity to hear the case, the Court of Appeal stated:

This is not a question that can be resolved by application of law, but rather it engages the accountability of legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a “court-like” function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity.¹⁴⁷

In dismissing the case, the Court of Appeal for Ontario denied the claimants an opportunity to present evidence of their lived experiences of deprivation, their interests, and their needs, which had been compiled in a record of 16 volumes, close to 10,000 pages in length, containing 19 affidavits of which 13 were expert affidavits.¹⁴⁸ Feldman JA, dissenting, stated that the motion judge’s most significant error was to strike the claim without allowing an assessment of this voluminous evidentiary record: “It is premature and not within the intent of *Gosselin* to decide there are no ‘special circumstances’ in such a serious case, at the pleadings stage.”¹⁴⁹ Feldman JA also stressed that motions to strike “should not be used ... as a tool to frustrate potential developments in the law”¹⁵⁰ since the question of whether section 7 of the *Charter* imposes positive obligations on governments remains an open one.¹⁵¹

¹⁴² *Tanudjaja*, ONSC, *supra* note 4 at para 82.

¹⁴³ *Ibid* at para 87.

¹⁴⁴ *Tanudjaja*, ONCA, *supra* note 4 at para 27.

¹⁴⁵ *Ibid* at para 32.

¹⁴⁶ *Ibid* at para 33.

¹⁴⁷ *Ibid* at paras 33–34.

¹⁴⁸ *Tanudjaja v Canada (Attorney General)*, Factum of the Attorney General of Canada at para 8, online: <socialrightscura.ca/documents/legal/motion%20to%20strike/AG%20Canada%20Factum%20OCA.pdf> [perma.cc/D3U2-PQYJ] [*Tanudjaja* AGC Factum]

¹⁴⁹ *Tanudjaja*, ONCA, *supra* note 4 at paras 64, 66.

¹⁵⁰ *Ibid* at para 49.

¹⁵¹ *Ibid* at para 62

C. REINFORCING THE INTERDEPENDENCE AND INDIVISIBILITY OF HUMAN RIGHTS IN CANADA

Liebenberg and Young suggest that an approach that fails to give content to and delineate the scope of ESR “may lead to unpredictable and potentially arbitrary judicial interventions.”¹⁵² This has certainly been the case in Canadian ESR jurisprudence, particularly in relation to section 7 of the *Charter*. In *Gosselin v Quebec*, the SCC considered the 1984 social assistance scheme implemented by the Quebec government that excluded citizens under 30 from receiving full social security benefits. While it did not find a violation of section 7 of the *Charter*, the Court “left open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.”¹⁵³ In 2011, the SCC found that the government’s refusal to exempt Insite, a supervised drug injection site, from the operation of the *Controlled Drugs and Substances Act* violated section 7 of the *Charter* because it prevented injection drug users from accessing necessary health services, putting their lives in danger.¹⁵⁴ That same year, the Federal Court of Appeal held that the denial of access to the IFHP for irregular migrants engaged the right to life under section 7 of the *Charter*, but that the denial was consistent with the principles of fundamental justice.¹⁵⁵ Yet, in *Canadian Doctors*, the FC refused to find that the section 7 *Charter* right to life was engaged at all by the 2012 cuts to the IFHP.¹⁵⁶

While courts in British Columbia held in 2009 and 2015 that the prohibition against temporary overnight shelters for the homeless violated section 7 of the *Charter*, in *Tanudjaja* the Court of Appeal for Ontario refused the homeless a hearing altogether. And despite the Court’s reluctance in *Tanudjaja* to venture into questions of policy and resource allocation, the SCC had no trouble, after finding a violation of the *Charter* section 15 right to equality in *Eldridge v British Columbia*, with ordering hospitals in British Columbia to provide sign language interpretation services when necessary in the delivery of health services.¹⁵⁷ As the FC observed in *Canadian Doctors*, “Courts have been far less reluctant to impose positive obligations on governments in order to ensure substantive equality.”¹⁵⁸

Moreover, in *Doucet-Boudreau v Nova Scotia*, the SCC upheld a structural injunction imposed by the trial judge for Nova Scotia to construct French-language schools in order to preserve residents’ section 23 minority education rights under the *Charter*.¹⁵⁹ The order included continued court supervision over the implementation of the remedy, requiring the government to provide the court with periodic progress reports. The Court stated:

The power of courts to issue injunctions against the executive is central to s. 24(1) of the *Charter* which envisions more than declarations of rights. Courts do take actions to ensure that rights are enforced, and not merely declared Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful

¹⁵² Liebenberg & Young, *supra* note 82 at 238.

¹⁵³ *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para 83, [2002] 4 SCR 429.

¹⁵⁴ *Insite*, *supra* note 1233.

¹⁵⁵ *Toussaint*, *supra* note 1077 (Leave to SCC denied, the case is being petitioned to the UN Human Rights Committee).

¹⁵⁶ *Canadian Doctors*, *supra* note 11 at para 741.

¹⁵⁷ [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].

¹⁵⁸ *Canadian Doctors*, *supra* note 11 at para 556.

¹⁵⁹ 2003 SCC 62, [2003] 3 SCR 3.

protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies.¹⁶⁰

The more recent ESR cases dealing with the right to life demonstrate that Canada lags behind the international community in recognizing the indivisibility and interdependence of all human rights. At least on the international stage, Canada has maintained that the *Charter* is the primary vehicle by which it fulfills its international human rights obligations, and that section 7 of the *Charter* protects everyone in Canada against deprivations of the basic necessities of life.¹⁶¹ For example, Canada has stated that the right to life “requires Canada to take the necessary legislative measures to protect the right to life [which] may relate to the protection of the health and social well-being of individuals.”¹⁶² Yet, this has clearly not borne out in Canadian courts. In its Concluding Observations on Canada in March 2016 the CESCR criticized Canada for failing to ensure the justiciability of ESR in domestic courts and access to remedies for disproportionately disadvantaged and marginalized groups, including homeless persons. The Committee recommended that Canada broaden “the interpretation of the Canadian Charter of Rights and Freedoms, notably sections 7, 12 and 15, to include economic social and cultural rights, and thus ensure the justiciability of Covenant rights.”¹⁶³ The Special Rapporteur on adequate housing has also stressed that the judiciary of a State Party to the *ICESCR* “must develop its capacity and commitment to adjudicating [homelessness] claims, including where the claims seek a remedy requiring positive measures.”¹⁶⁴ In its March 2016 observations the CESCR also took Canada to task for withholding health care from undocumented migrants, and recommended that Canada “ensure access to the Interim Federal Health Program without discrimination based on immigration status.”¹⁶⁵ So too, in July 2015, the Human Rights Committee recommended that Canada ensure, as a requirement under the *ICCPR*, that all refugee claimants and migrants in Canada have access to essential health care.¹⁶⁶ The CESCR has warned that States Parties who maintain arbitrary and rigid distinctions between “positive” and “negative” rights significantly impede the capacity of courts to protect those who are most vulnerable and marginalized.¹⁶⁷ The SCC has established that Canadian law must develop consistently with international human rights law and, absent express indications to the contrary, should be presumed to conform with international human rights standards.¹⁶⁸ As such, Canadian

¹⁶⁰ *Ibid* at paras 70, 87.

¹⁶¹ *Adams, supra* note 4 at paras 98–99, 161–162; UN Committee on Economic, Social and Cultural Rights, *Responses to the Supplementary Questions Emitted by the United Nations Committee on Economic, Social and Cultural Rights (E/C.12/Q/CAN/1)* (November 1998) at paras 1, 53; UN Committee on Economic, Social and Cultural Rights, *Summary Record of the 5th Meeting*, 8th Sess, UN Doc E/C.12/1993/SR.5 (25 May 1993) at para 21.

¹⁶² UN Human Rights Committee, *Initial reports of States parties due in 1977: Addendum – Canada*, UN Doc CCPR/C/1/Add.62 (15 September 1983) at 23.

¹⁶³ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on the sixth periodic report of Canada*, UN Doc E/C.12/CAN/CO/6 (4 March 2016).

¹⁶⁴ Special Rapporteur on Housing, *supra* note 1 at para 91(n).

¹⁶⁵ *Ibid* at paras 49–50.

¹⁶⁶ UN Human Rights Committee, *Concluding Observations on the sixth periodic report of Canada*, UN Doc CCPR/C/CAN/CO/6 (13 August 2015) at paras 5–6.

¹⁶⁷ *General Comment 9, supra* note 32 at para 10.

¹⁶⁸ *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22–27; *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at 348–352, Dickson J, dissenting on other grounds; *R v Sharpe*, 2001 SCC 2 at paras 175–178; *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 30–32; *Health Services and Support – Facilities Subsector Bargaining*

courts remain an important (but by no means the sole¹⁶⁹) avenue for the vulnerable to obtain meaningful redress for the violation of their human rights and access to substantive entitlements. As a State Party to international human rights treaties, Canada must get over this justiciability barrier and Canadian courts must ensure access to justice and meaningful remedies for the infringement of *all* human rights under the *Charter*. As the CESCR has stated:

A state party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not ‘appropriate means’ within the terms of article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other “means” used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.¹⁷⁰

V. APPLICABILITY OF THE MINIMUM CORE TO CANADA

Might the concept of the minimum core or substantive reasonableness be productively brought to bear on the interpretation and application of section 7 of the *Charter*? The above analysis of the concept suggests that the minimum core approach may provide an interpretive aid in assisting Canadian courts to bring Canada into compliance with its international human rights obligations by shifting the focus of the inquiry to the values underpinning the minimum core and ESR generally: the protection of vulnerable and marginalized groups from the most serious forms of deprivation and human suffering. As the substantive reasonableness approach suggests, the starting point in any inquiry should be the interests and needs of the claimants as experienced through their lived realities, then a determination of whether those needs and interests fall within the scope of the right in question and the weight that should be accorded to them. Only *then* ought a state policy be assessed in terms of its reasonableness, in the context of the substance of the right in a particular case. If circumstances are so degrading as to threaten the lives and basic well-being of individuals, minimum core obligations are not being met, individuals are found in situations of crisis, governments bear the duty to undertake immediate action to alleviate suffering, and courts have an obligation to provide meaningful remedies to vindicate these rights. These are precisely the types of concerns that warrant heightened *Charter* scrutiny. In the

Association v British Columbia, 2007 SCC 27 at para 69–74, 79; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 62–70, 75; *R v Hape*, 2007 SCC 26 at para 55.

¹⁶⁹ *General Comment 9*, *supra* note 32 at para 9; Porter, *supra* note 21. Other scholars have highlighted some problems with public interest advocacy as an avenue for social change: See e.g. Corey S Shdaimah, “Dilemmas of ‘Progressive’ Lawyering: Empowerment and Hierarchy” in Austin Sarat & Stuart A Scheingold, eds, *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* (Stanford: Stanford University Press, 2005) 239; Michael McCann & Helena Silverstein, “Rethinking Law’s ‘Allurements’: A Relational Analysis of Social Movement Lawyers in the United States, in Austin Sarat & Stuart Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998) 261 at 266; Michael McCann, “How Does Law Matter for Social Movements” in Bryant G Garth & Austin Sarat, eds, *How Does Law Matter?* (Evanston, IL: Northwestern University Press: American Bar Foundation, 1998) 76; Balakrishnan Rajagopal, “International Law and Social Movements: Challenges of Theorizing Resistance” (2002) 41 *Colum J Transnat’l L* 397.

¹⁷⁰ *General Comment 9*, *supra* note 32 at para 3.

context of the analysis of the rights to life and security of the person under section 7 of the *Charter*, this paper suggests that the minimum core approach is relevant in several ways.

A. THE JUSTICIABILITY QUESTION

Canadian courts have a responsibility to ensure that Canadian law develops consistently with the norms and principles established in international law.¹⁷¹ International human rights law mandates that States Parties provide a certain substantive, tangible, minimum core of ESR necessary for survival and basic necessities for life. The CESCR recognizes that there may be circumstances where even the minimum core content of ESR may be impossible to fulfil, but requires a high standard of justification from States Parties to the *ICESCR* if that is the case. States must demonstrate that they have attempted to use all available resources to meet their minimum obligations on a priority basis.¹⁷²

Under international human rights law, the minimum core should not be confused for a standard of justiciability, which instead derives from the principle that effective remedies must be provided to all components of ESR, including the requirement to progressively realize those rights. However, the fact that allegations of infringements of the minimum core require a high degree of scrutiny into government policy choices and budgetary allocations suggests that access to courts is indispensable in ensuring that minimum obligations are fulfilled, since judiciaries are particularly well-positioned to undertake such analyses. States Parties to the *ICESCR* bear the obligation of providing access to hearings and meaningful remedies for the violation of ESR, especially when it comes to matters of necessities for life and basic well-being.

The minimum core may assist courts in distinguishing general matters of socio-economic policy that are beyond the proper role of courts from those which engage *Charter*-protected rights. Courts should not decline to hear ESR-related claims merely out of concern that they will infringe on the legislature's policymaking powers by potentially ordering the government to take positive action to address the deprivation in question. The minimum core can assist courts in delineating those aspects of ESR that most directly engage *Charter*-protected interests and values and provide courts with guidance as to the appropriate standards against which government policies and programs ought to be assessed. To decline to consider a claim because of a reluctance to order the provision of tangible goods or to give ESR substance has the consequence of depriving the rights of any meaningful content—particularly for the most disadvantaged. As this paper has suggested, courts have a flexible array of options in considering these issues in a manner respectful of other branches of government. If the minimum core is accepted as an interpretive tool for the adjudication of ESR-related claims, the focus shifts towards illuminating the obvious: that the deprivations and hardships faced by society's most vulnerable and marginalized are inherently questions of life and security of the person that should attract *Charter* scrutiny.

Further, the minimum core may be helpful not only in establishing the justiciability of ESR, but also in determining which interests and needs connected to socioeconomic deprivations fall within the proper scope of section 7 of the *Charter*. If government action or inaction results directly in individuals freezing on the streets, or dying because they lose access to necessary health services, these must be recognized as fundamental human rights issues protected by the *Charter*. The minimum core refocuses the analysis on the lived realities of some of the most

¹⁷¹ See *supra* notes 166-168.

¹⁷² *General Comment 3*, *supra* note 40 at para 10.

vulnerable individuals and groups in Canada. The severity of their suffering falls well within the scope of section 7 and should be accorded significant weight, and only then should the acceptability of the government's policy and budgetary choices be assessed in this context.

B. PRINCIPLES OF FUNDAMENTAL JUSTICE AND SECTION 1 PROPORTIONALITY ANALYSIS

Infringements of section 7 of the *Charter* are permitted if they are in accordance with the principles of fundamental justice, including the principle of gross disproportionality. A law's impact will be grossly disproportionate when it is "so extreme that [it is] *per se* disproportionate to any legitimate government interest."¹⁷³ Those infringements must further be "demonstrably justified in a free and democratic society" under section 1 of the *Charter*,¹⁷⁴ which the SCC determined requires a separate proportionality analysis that considers whether the infringements are rationally connected to a legitimate objective, whether they impair the right as little as possible, and whether the effects of the measures taken are proportionate to the aims sought.¹⁷⁵ If, as in both *Canadian Doctors* and *Tanudjaja*, the deprivations in question engage the minimum core—in other words, survival and basic necessities for life and well-being—it is difficult to imagine how imposing or enabling these hardships could be proportionate to any legitimate objective.

Bilchitz argues that proportionality "only works where we have a pre-existing understanding of the content of particular rights and the weight to be accorded to them."¹⁷⁶ The minimum core is essential in establishing this pre-existing understanding. In order to determine whether a right is minimally impaired, "one needs to have some understanding of the pre-existing content of such a fundamental right as otherwise the test will be meaningless: how can one judge the impact of different measures on a right if one does not know what one is having an impact upon?"¹⁷⁷ Similarly, with respect to the final balancing of effects of the infringements against the stated aim, Bilchitz states that,

it is only possible to make a judgment as to whether the harms to the right caused by the limiting measure are proportional to the benefits to be achieved by it if we have some pre-existing idea as to what the right entails, and how to judge the seriousness of any violation thereof. The inquiry also requires us to have some understanding of the "weight" or strength of the interests that are affected.¹⁷⁸

It may be the case that sometimes, as in *Eldridge*,¹⁷⁹ the content of *Charter* rights may be informed by principles of reasonableness and proportionality. However, there is no question that the more traditional analysis under the *Oakes* test works best when the content of the right is considered separately from the consideration of whether a limitation on the right is reasonable

¹⁷³ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 47, [2002] 1 SCR 3.

¹⁷⁴ While the SCC has noted that once a violation of section 7 is found it is difficult to justify (see *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 95, [2015] 1 SCR 331), such a violation was found to be justified under section 1 recently by the ONCA in *R v Michaud*, 2015 ONCA 585.

¹⁷⁵ *R v Oakes*, [1986] 1 SCR 103 at para 70, 53 OR (2d) 719.

¹⁷⁶ Bilchitz, "Socio-economic rights," *supra* note 27 at 737.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Eldridge*, *supra* note 157.

and demonstrably justifiable. The minimum core may therefore help inform the implementation of the well-developed proportionality inquiry established in Canadian law. In the case of homelessness in Canada or denials of access to health care necessary to preserve life, courts need not engage with more difficult questions of how fully Canada ought to have realized the rights to housing or health based on its current level of development and available resources. What is at stake in these cases is the minimum core, the most essential levels of enjoyment of these rights. In such cases, claimants must have access to courts to seek effective remedies, and courts have a clear responsibility to demand of governments clear and compelling evidence to justify any violations of these fundamental rights.

C. GREATER BUDGETARY SCRUTINY UNDER SECTION 1

Hardships and deprivations involving matters concerning the minimum core should attract a higher degree of scrutiny from courts into the government's prioritization of budgetary allocations. The SCC has stated that, while it will look at budgetary considerations as a justification for rights violations under section 1 of the *Charter* with great skepticism, "the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis."¹⁸⁰ In *Newfoundland (Treasury Board) v NAPE*, the SCC held that the government of Newfoundland's legislation to deny female employees in the health sector pay equity was discriminatory. However, the Court also held that this discrimination was justified under section 1 as a measure to deal with a fiscal crisis after deeper scrutiny of evidence provided by the state regarding its budgetary decisions.¹⁸¹ Thus, while violations of the minimum core—or socioeconomic deprivations engaging life and security of the person—*may* be justified on the basis of government decisions in setting priorities and making budgetary allocations, such justifications should be approached with a high degree of scepticism and subjected to a heightened burden of justification. As Liebenberg stated, a "failure to ensure ... basic social provisioning should only be justifiable when resources are demonstrably inadequate, or other competing justifications exist."¹⁸² In order to allow courts to make a proper assessment of the government's justification, "courts should examine resources available in the national budget as a whole as opposed to focusing exclusively on existing allocations."¹⁸³ This in turn requires governments to "place the necessary budgetary and policy information before the court in support of its justificatory arguments."¹⁸⁴

Special attention should be paid to scrutinizing rights-based versus non-rights-based budgetary allocations. Karin Lehman, for instance, argues that,

[t]he true discontent that informs constitutional adjudication about socio-economic rights is with the government's macro-economic policy choices and with the government's broad budgetary allocations. It is with the choice of neo-liberal, macro-economic policies that prioritize growth rather than redistribution, and with the

¹⁸⁰ *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 72, [2004] 3 SCR 381[NAPE]; *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 218–219.

¹⁸¹ *NAPE*, *supra* note 180.

¹⁸² Liebenberg, "Socio-Economic Rights," *supra* note 52 at 328.

¹⁸³ *Ibid* at 329.

¹⁸⁴ *Ibid*.

government's decision to spend twice as much on defense than on either the provision of education and health.¹⁸⁵

As Lehman points out, courts “would have little difficulty in finding that a father’s purchase of the latest BMW is unreasonable if it means that his children are reduced to a diet of bread, water, and gruel.”¹⁸⁶ Another basis of comparison, according to Porter, would be the resource allocations of other states that have similar levels of development.¹⁸⁷

D. CREATING BENCHMARKS FOR THE REALIZATION OF ESR—IN COURT AND OUTSIDE OF COURT

The above analysis suggested that the minimum core approach, contrary to perceptions that it is counter-majoritarian and anti-democratic, can actually foster democracy by encouraging a dialogue between the judiciary, legislature, and relevant stakeholders. This can be accomplished through implementing a remedy over which the court maintains supervisory jurisdiction, or by stakeholders working together outside of the courtroom in a participatory manner to establish priorities, create goals, and set concrete, minimum benchmarks for the realization of ESR. Wilson and Dugard note that individuals and groups come to the courts when their voices have been overlooked in the democratic process.¹⁸⁸ As such, in adopting a substantive reasonableness approach that preserves the minimum core, the mere fact of starting the *Charter* analysis by ascertaining the needs, interests, and lived realities of individuals and groups affected by severe socioeconomic deprivations adds a voice to the debate that has been overlooked in the democratic process as well as by the judiciary when it dismisses a matter for lack of justiciability.

The CESCR has identified such stakeholder participation as a significant element in determining whether a government is acting reasonably with respect to the fulfilment of any particular ESR.¹⁸⁹ As the Special Rapporteur on adequate housing has put it, states must recognize the homeless and the vulnerable as “rights holders resilient in the struggle for survival and dignity” and “as central agents of the social transformation.”¹⁹⁰ While the reasonableness standard “imposes an obligation on all actors to make decisions consistent with a firm commitment to the progressive realization of ESR, with access to judicial and effective remedies and meaningful participation by rights-holders,”¹⁹¹ the minimum core approach highlights the need to give substantive content to those rights by setting tangible benchmarks for the provision of concrete resources, in the short- medium- and long-term, to fulfil ESR. The minimum core also provides a reminder that in setting these benchmarks, the needs of the most vulnerable should be prioritized.

VI. CONCLUSION

¹⁸⁵ Lehmann, *supra* note 500 at 196.

¹⁸⁶ *Ibid* at 197.

¹⁸⁷ Porter, *supra* note 21 at 7.

¹⁸⁸ Wilson & Dugard, *supra* note 75 at 670–671.

¹⁸⁹ CESCR, *Maximum Available Resources*, *supra* note 69 at para 11.

¹⁹⁰ Special Rapporteur on Housing, *supra* note 1 at para 17(c).

¹⁹¹ Porter, *supra* note 21 at 7.

Though articulating the minimum core is fraught with difficulties, the concept remains an important reminder to the States Parties to the *ICESCR* of what is at stake when considering matters of ESR: deprivation of society's most vulnerable individuals and groups from the very resources that are essential to life and basic well-being. Especially in societies like Canada where the general standard of living is quite high, the state cannot permit these types of deprivations—let alone be responsible for causing them—and has an obligation to act to alleviate such hardships. When states fail to fulfil their obligations under international human rights law, courts have an obligation to provide remedies for ESR violations. States' obligations under international human rights law extend to all branches of governments, which all have heightened obligations to protect and fulfil the minimum core of ESR. The minimum core of ESR and substantive reasonableness are potentially useful interpretive aids to assess the content of *Charter* rights and to order meaningful remedies for their violation in full respect of institutional boundaries. This paper considered a number of areas where the minimum core could play a role in the adjudication of ESR in Canada, suggesting that by re-orienting the focus from preconceived notions of institutional roles or false divisions between civil and political and ESR, back to the human experience of those who claim their *Charter* rights in these cases, Canada might catch up with the rest of the international community in affirming the interdependence, indivisibility, and justiciability of all human rights.