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TRIPARTITE DIVISION OF THE HUMAN RIGHTS OBLIGATIONS OF THE STATE IN RELATION TO THE RIGHT TO HEALTH

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ABSTRACT
The right to health is one of the fundamental human rights for which states undertake obligations under international law and national law. This right is dependent on several other rights and is equally important. What this right entails is best defined by the obligations that it imposes on states. These obligations of the states are further divided into categories and the purpose of this division is to ensure maximum state responsibility and accountability. This article discusses the various layers of state obligations corresponding to the right to health. The researchers have employed the tripartite typology (duties to respect, protect, and fulfil), examining contexts of different jurisdictions and identifying comprehensive instances of the application of this typology. The research provides a study of how the right to health may be upheld and provided optimally by adhering to this tripartite typology of state's obligations.
Keywords: civil and political rights, economic, social and cultural rights, human rights, right to health, right to life, state obligations, tripartite typology of human rights obligations.

1. Introduction

The right to health has been recognized as a basic human right through a number of international treaties. Article 55 of the UN Charter provides the promotion of this right, along with other socio-cultural and socio-economic rights. Since the UN's establishment in 1945, it has been formulated and incorporated into international instruments more formally and explicitly. As evaluated by de Schutter, the ICCPR (1966) and ICESCR (1966) categorized human rights provided in the UDHR (1948) based on the different approaches required from states in order to implement them (de Schutter, 2014). The right to health as provided originally by the UN charter has been recognized by the ICESCR (1966, article 123).

The tripartite typology of states' human rights obligation has proved to be a major advancement in the progression as well as the realization of socio-cultural and socio-economic rights, (de Schutter, 2014, 285), as it classifies the state's responsibility, regarding these rights, into three layers, (A. Eide, The Right to Adequate Food as a Human Right, 1987, 24). This typology can be used as an effective tool for measuring and assessing the state's performance in the provision of these rights. For the purpose of this paper, the tripartite typology will be evaluated concerning the right to health

For all practical purposes, in understanding the state's obligation as per the tripartite typology, it is preferred to first consider the nature of the right to health. Therefore, the first section of this paper will focus on the right to health, its development as a fundamental human right on a large scale globally, and its interdependence on other rights. The second section will deal with the development of a tripartite typology of state's obligations in addition to applications thereof, concerning the right to health.

2. Development of the right to health

The right to health had been in existence and realized before 1945 in several instruments. However, the beginning of post-World War II development in this area can be traced back to the declaration adopted at the UN Conference in 1945, which lead to the establishment of the WHO. The Constitution of WHO was adopted in 1946. The preamble of the said Constitution defines health and declares enjoyment of the highest possible standards of health as a fundamental right. The explicit nature of this definition is also reflected in several other subsequent international instruments e.g. CEDAW (article 12), CERD (article 5), CMW (article 28), CRC (article 24), CRPD (article 25), ICECSR (article 12), and UDHR (article 25).

The characterization of the terminology "right to health" varies depending on the nature and objective of the particular instrument providing this right. However, most of these definitions focus on adequate standards of mental, physical, and social comfort in addition to the state's responsibility with respect to the provision of this very fundamental right. The CESCR provides an elaborated interpretation of this right by explaining "the highest attainable standard of health". It also makes access to adequate facilities, education, environment, and participation in decision-making, a part of this right, (CESCR, General Comment. 14, 2000, para 11).

2.1. The right to health in nexus to other human rights

International law emphasizes that human rights are indivisible, interdependent, and interrelated. It can be deduced, therefore, that the right to health is interrelated to more fundamental rights not only in terms of realization but also in terms of violation. The ICJ reiterates this in its Advisory Opinion in *The Wall* case, where the court formed the opinion that by constructing a wall in the occupied territory of Palestine, Israel created a barrier in the enjoyment of peoples' right to health among other human rights, in that territory, (ICJ, *Legal Consequences of the Construction of a Wall, 2004*, para 134). Thus, it is evident from this opinion that an act that may have been a hindrance in movement and access extended in effect to become an impediment to the right to health.

More interestingly, the relationship between the right to health and other human rights has been relied upon by the ECtHR, even though there is no express provision of the right to health in the ECHR. The ECtHR, however, will consider a case related to the right to health established on various other articles and the rights they contain in the said convention, (ECHR, 2015). The nexus of the right to health to other fundamental human rights, for the purpose of consideration of health-related cases by the court, is usually based on articles 2, 3, 8, and 14 of the ECHR. Analyzing article 2 of the convention, which offers the right to life, an inference may be drawn, that if a claim of the right to health can be brought based on this article, then the right to health is impliedly incorporated in and entailed by the right to life.

3. The development of the tripartite typology

The categorization of human rights through the ICCPR (1966) and the ICESCR (1966) gave rise to the notion that the rights contained in the former covenant impose a negative obligation on the states while those provided by the latter impose a positive obligation on the state, (Hesselman & Toebes, 2015, 11). The typology of state's obligations had been proposed for the first time by A. Eide (1983), whereby he proposed four layers of state's obligations comprising obligations to respect, to protect, to ensure, and to promote rights. The very typology had been reviewed in another subsequent report by A. Eide (1987) when he revised and proposed a tripartite layer of state's obligations i.e. the obligation to respect, to protect, and to fulfil, (A. Eide, The Right to Adequate Food as a Human Right, 1987, para 24).

This typology brought civil as well as political rights and socio-economic rights to a very similar level as far as types of obligations and violations of such obligations had been concerned, as provided by Maastricht Guidelines, (The Maastricht Guidelines, 1998, para 6). This concept is also reflected in obligations imposed on states under the ECHR, (ECHR, 2015, article 5).

Considering the notion of "highest attainable standard of health" as provided by the ICESCR (1966) in article 12, and the general nature of the right to health being dependent on adequate state measures considering the available resources makes tripartite typology of obligations relevant to determining state responsibility which is discussed for each type of obligation in the subsequent sections.

3.1. The obligation to respect

This obligation imposes a negative duty on states requiring them to abstain from meddling in socio-cultural and socio-economic rights, (The Maastricht Guidelines, 1998, para 6). For the tenacity of the right to health, this may be looked upon as a state's responsibility not to limit, or obstruct access to health care facilities based on any discrimination or otherwise, (CESCR, General Comment. 14, 2000, para 12). The advisory opinion of ICJ in *The Wall* case also reflects that states are under an obligation not to impede and thereby interfere with the right to health, (ICJ, *Legal Consequences of the Construction of a Wall*, 2004, para 134). This obligation even extends to require a state to refrain from polluting, unlawfully, the air, the soil, and the water, e.g. pollution caused by state-owned facilities and state-conducted activities, (CESCR, General Comment. 14, 2000, para 34).

The Supreme Court of Pakistan (SCP) also considered a similar scenario in *Shehla Zia v WAPDA* (1994), whereby the petitioners challenged the building of a high-tension electric power grid station, by WAPDA, in their neighborhood due to the health hazards and electromagnetic field hazards that local residents might be exposed to. The SCP assertively held that the right to health is essential to the right to life, (The Pak Constitution, 1973, article 9) and hence the SCP, ordered for preparing a report to assess the negative impacts of such a high-tension electric power grid station on the health of surrounding local residents, (SCP, *Shehla Zia v WAPDA*, 1994).

The state must ensure its responsible approach in not impeding the right of the people by acts of its own. On the other hand, where the state machinery takes adequate steps for the provision of the right to health, the act or omission of a third party, e.g. the error of judgment by a medical professional, may not amount to the state's violation of the obligation to respect, (ECtHR, *Byrzykowski v Poland*, 2006).

3.2. The obligation to protect

The state is required to regulate and control third-party activities associated with the right to health e.g. marketing of medical equipment and medicine, the educational and professional standard of medical practitioners, traditional practices requiring female genital mutilations etc., (CESCR, General Comment. 14, 2000, para 35). This obligation entails the legislative measures as well as other necessary steps that the government has to adopt in order to prevent third parties from intervening in the right to health.

The ACHPR deals with this issue in communication against the Nigerian government. Whereby, it held that besides direct involvement by the government in oil production near the Ogoni population which affected their right to health, it had also facilitated a private sector company in this regard. The government's act, therefore, amounted to a failure of Nigeria's obligation to respect the right to health of the Ogoni population and also to a failure of protecting this right from third-party interference, as said by new research, (ACHPR, *Communication No. 155/96*, 2001, para. 53-54).

While the margin of appreciation would allow a state to meet the end with different approaches and to uphold national interests, it also calls for striking a fair balance and must not be to the utter disadvantage of the right to health or other associated rights of the individuals, (ECtHR, *López Ostra v Spain*, 1994, para 58).

3.3. The obligation to fulfill

This obligation necessitates the state to take steps to actually implement the right to health. This equally involves the adoption of steps like national policy making, public health infrastructure, training of professionals, immunization, making underlying determinants of health equally accessible to all, etc., (CESCR, General Comment. 14, 2000, para 36). This obligation put a positive duty on states, more of an expectation that they will do their utmost to facilitate the realization of the right, (ACHPR, *Communication No. 155/96*, 2001, para 47).

In the case of *Mendoza Beatriz Silva et al, v State of Argentina*, (SC Argentina,2008), the complainants alleged that their right to a healthy environment was violated due to the lack of proper drinking pure water, sanitation facilities as well as the pollution caused by private sector activities near the river basin where they resided. The court ruled that in order to ensure the complainants' right to a healthy environment, the state was required to take necessary steps for guaranteeing the improvement of the standard of the residents' lives, the environmental restoration, as well as the prevention of future contamination. Similarly, the order of the SCP in *Shehla Zia v WAPDA* (1994), reflects that the state's authorities had a commitment to fulfill the right to health by the initiation of public consultation and objection procedures in potentially hazardous or harmful projects, (SCP, *Shehla Zia v WAPDA*, 1994, para 18).

4. Conclusion

The tripartite typology of states' obligations has provided for concretization and justiciability of the right to health by defining the role of the states from three different aspects i.e. the obligation to protect, respect, and fulfil. This definition helps locate a breach or violation by the state and leads to grounds for accountability of the state. It has also given the right to health due importance in terms of realization that would otherwise not be so effective. Since the right to health is interdependent on other basic human rights, this typology provides for the progress of associated rights which in turn may prove to be useful

to ensure the enjoyment of the right to health in accordance with the conception of the "highest achievable health standard".

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ABBREVIATIONS & ACRONYMS

ACHPR	African Convention on Human and People's Rights
CEDAW	Convention on Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic Social and Cultural Rights
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social, and Cultural Rights
Pak Constitution	Constitution of the Islamic Republic of Pakistan
PLD	Pakistan Legal Decisions
SCP	Supreme Court of Pakistan
UDHR	Universal Declaration of Human Rights
WAPDA	Water and Power Development Authority
WHO	World Health Organization