

The Nature of Palestine's obligations under the ICESCR:

The Rights to Work and Health as Case Studies

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The Nature of Palestine's obligations under the ICESCR: The Rights to Work and Health as Case Studies

Elias Al-Hihi

Abstract:

In 2014, Palestine ratified the International Covenant on Economic, Social and Cultural Rights. As a state party to an international treaty, Palestine owes certain obligations towards its citizens and the international community. This study attempts to outline these obligations, their content and provide an assessment of compatibility between the legal and factual situation in Palestine and the covenant's obligations. Since the covenant covers a wide range of rights, the compatibility assessment shall be confined to the right to work and the right to health.

1. Introduction:

In 2012, Palestine was recognized as a non-member observer State by the United Nations General Assembly.¹ Regardless of the debated nature of recognition in international law,² the international community considered that Palestine was now competent to ratify international treaties. In April 2014, Palestine ratified seven core human rights treaties and an optional protocol.³ Notably, Palestine did not submit a single reservation to any of the treaties it joined. Among the ratified treaties was the International Covenant on International Economic, Social and Cultural Rights (ICESCR).

With the ratification of the ICESCR, Palestine has certain obligations towards the international community, these obligations are primarily the fulfillment of its ICESCR commitments in good

¹ UN General Assembly, Status of Palestine in the United Nations: resolution/ adopted by the General Assembly, 4 December 2012, A/RES/67/19.

² Shaw, Malcom, *International Law* (7th ed.). Cambridge: Cambridge University Press. p. 322-324.

³ <https://unispal.un.org/DPA/DPR/unispal.nsf/0/262AC5B8C25B364585257CCF006C010D>. Last visited 6 Aug. 2018.

faith and the cooperation with the international community in the realization of these rights.⁴ More importantly, Palestine has obligations towards Palestinian citizens. The protected rights within the ICESCR must be enjoyed by the population in a manner that is consistent with the covenant. Otherwise, the object and purpose of the covenant -enjoyment of ICESCR rights- would not be fulfilled. In light of this, it is important to analyze the extent of Palestine's obligations under the covenant and determine the compatibility of the Palestinian legal system with our international obligations.

The covenant covers a wide range of economic, social and cultural rights. Therefore, while the study shall outline the general obligation of states with regards to all the rights enshrined within the covenant, the assessment of compatibility between the Palestinian system and the covenant's obligation shall be limited to one or two of the Covenant's rights. Namely; the right to work and the right to health.

This paper chose the right to work and the right to health as case studies due to the factual situation in Palestine. Palestinians have been recently protesting the worsening economic conditions.⁵ Furthermore, the ongoing blockade and the domestic Palestinian political situation had led to the worst social and economic conditions that the Gaza Strip had seen since the creation of the PNA in 1993.⁶ These conditions raise questions with regards to the obligations of Palestine as a state party to the Covenant.

The study shall be divided into two parts: the first shall address the binding nature of the covenant and determine the general obligations of state parties. The second shall undertake an

⁴ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, article 26. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, article 2.

⁵Worsening economic conditions in the West Bank, *Haaretz* (last visited 6/12/2018). <https://www.haaretz.com/middle-east-news/.premium-world-bank-report-standard-of-living-in-the-west-bank-is-dropping-1.5908617>. (Last visited 6/12/2018). *See also*, Palestinians protest against the proposed draft of the social security law, *Al-Jazeera* (last visited 6/12/2018). <https://www.aljazeera.com/news/2018/11/cancelled-palestinians-protest-social-security-law-181116154423135.html>.

⁶ Worsening health situation in Gaza, *Haaertz* (last visited 6/12/2018). <https://www.haaretz.com/middle-east-news/palestinians/.premium-gaza-health-system-collapsing-40-percent-of-medicine-runs-out-1.5803856>.

analysis of the Palestinian legal system and its compatibility with the covenant's obligations through the lens of the right to work and the right to health.

2. The binding nature of the covenant and the obligations of State parties.

The ICESCR (hereinafter the Covenant) is one of three documents that form the international bill of human rights.⁷ Both the ICESCR and the International Covenant on Political and Civil Rights (ICCPR) were derived from the Universal Declaration of Human Rights (UDHR). Many argue that the UDHR, contrary to the two covenants, is not a statement of legal obligations but rather a standard of achievement for all states. This view however has been contested by many legal scholars, it is argued that after more than 60 years of its adoption, some human rights within the covenant have acquired a customary law status and thus became binding upon all states.⁸ The UDHR does not make a distinction as to the binding nature of the civil and political and economic, social and cultural rights within it. Regrettably, many view civil and political rights to be binding while economic and social rights to be aspirational.⁹ Academics usually distinguish between the obligations within the covenants as being positive and negative;¹⁰ civil and political rights only require states to refrain from certain acts (e.g. the prohibition on states to torture) while economic and social rights being positive requiring the allocation of resources for their realization. This however, is not entirely accurate, even civil and political rights require the state to take positive steps and allocate resources. For example, the provision of justice within the ICCPR require the state to allocate budget to that purpose.¹¹ More importantly, all rights are

⁷ The other two documents are the Universal Declaration of Human Rights (UDHR) of 1948 and the International Covenant on Civil and Political Rights (ICCPR) of 1967.

⁸ Alston & Ryan Goodman, *International Human Rights, The Successor to International Human Rights in Context: Law, Politics and Morals*, Oxford University Press, 2013. P. 144.

⁹ CESCR, *Concluding Observations: Poland*, UN Doc. C.12/POL/CO/5 (20 November 2009), para 9.

¹⁰ Buergenthal & others, *International Human Rights in a nutshell*, 5th edition, West Academic Publication, 2017.

¹¹ Khalil, Asem, *Courting Economic and Social Rights in Palestine: Justiciability, Enforceability and the Role of the Supreme Constitutional Court*, *Journal Sharia and Law*, College of Law, U.A.E. University, forthcoming n.77, January 2019, p. 4.

universal, inseparable and inter-dependent.¹² The real enjoyment of civil and political rights would require the realization of economic and social rights.¹³

The Covenant protects a wide range of social and economic rights including the right to work and to just and favorable conditions; the protection of the family, mothers and children; an adequate standard of living, including adequate food, clothing and housing; the highest attainable standard of physical mental health, and the right to education.¹⁴

Article 2 of the Covenant outlines the general obligation of state parties by stating that “each State party to the Covenant undertakes to take steps... *to the maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant...”. The required steps are to be taken by states individually and collectively through international cooperation. The article further prohibits discrimination of any kind in the enjoyment of Economic, Social and Cultural (ESC) rights. The article also takes note of the economic situation in developing countries by allowing them to freely decide whether economic rights are recognized to non-nationals.

The obligation to take steps “to the maximum available resources” is vague and does not provide a clear criterion to measure a state’s performance. The Committee on Economic, Social and Cultural Rights (CESCR) (Hereinafter the Committee), established in 1985 to monitor implementation of the Covenant,¹⁵ addressed the nature of state parties’ obligations in its General Comment No. 3.¹⁶ In its comment, the Committee clarified that while the covenant calls for the progressive realization of ESC rights, other obligations are of immediate effect. Particularly, the

¹² UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF, 157/23. Cite Vienna conference of 1993. para. 5.

¹³ *Supra* note 8.

¹⁴ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, Arts. 6-14

¹⁵ For more information on the CESR: <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>.

¹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties’ Obligations (Art.2, Para. 1, of the Covenant), 14 December 1990.

obligations to “take steps” and to “guarantee the rights will be exercised without discrimination” are of an immediate nature. The Committee dueled upon the interpretation of the phrase “take steps” by examining the other authentic translations of the Covenant. It arrived at the conclusion that states must adopt steps that are “deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”.¹⁷

The Committee indicated that the appropriate measures to be adopted can be administrative, financial, educational or in any other form. Two specific policies that the Committee views as essential are legislative measures and judicial remedies. It is important for each state to adopt legislative measures to fulfill their obligations. Some of these legislative measures are of immediate effect such as the adoption of legislation against discrimination. The Committee noted that the Covenant and the obligations within it do not require a particular political and economic system. The obligations of the Covenant can be fulfilled in both capitalist and socialist systems as long as it is democratic, and all human rights are respected.¹⁸

The Committee then moved to the meaning of the phrase “progressive realization”; it clarified that the phrase was coined due to practical and realistic constraints on states’ resources. It emphasized that despite the fact that realization of ESC rights is over time, it should not be understood as “depriving the obligation of all meaningful content”.¹⁹ Therefore, there is a minimum core obligation on all state parties to the Covenant. This minimum core obligation obliges each state to provide essential levels of each of the rights. To illustrate on the minimum core obligation, the Committee stated that if a group of individuals lack basic shelter, food or primary health care, the state had clearly failed its obligations.

Unlike the ICCPR, the Covenant is silent on the issue of derogation. This however does not mean that a state of emergency permits derogation from all ESC rights. The CESCR in General

¹⁷ *Id.*, para. 3.

¹⁸ *Id.*, para. 6-8.

¹⁹ *Id.*, para. 9.

Comment 14 indicated that core ESC rights cannot be derogated from under any circumstances of emergencies or lack of resources.²⁰ These core rights include: the right to access to health facilities, access to the minimum essential food, access to basic shelter, housing and sanitation, to provide essential drugs, to ensure equitable distribution of all health facilities and services, to adopt and implement a national public health strategy and plan of action.²¹

The phrase “by all appropriate means” in article 2 of the Covenant provides flexibility for states and a margin of discretion in the measures they adopt for the implementation of the Covenant. General Comment No.9 clarified that while domestic incorporation of the Covenant is desirable, it is not the only means by which a state can enforce the Covenant’s rights. The Committee indicated that each state must make available “appropriate means of redress, or remedies”. The remedies do not need to be judicial, administrative remedies can also be sufficient.

With regards to justiciability, the Committee is of the view that “there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimension”.²² In Palestine, it has been pointed out that only the right to education and the rights of children are explicitly recognized as justiciable by the Palestinian Basic Law. Other economic and social rights are regulated through ordinary laws which provide for the justiciability for a number of them.²³

²⁰ UN. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), para. 47.

²¹ *Id.*, para. 43.

²² UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998.

²³ For a deeper discussion of the justiciability of ESC rights in Palestine, please see: Khalil, *Supra note* 11.

Complications arising out of legal and factual circumstances:

Before moving forward with the discussion, it is important to point out an issue or two that affect the enforcement of ESC rights in Palestine and the obligations of the state of Palestine:

First, the amended Palestinian Basic Law of 2003 does not spell out the hierarchy of international treaties within the Palestinian system. Therefore, it is not clear under the words of the Basic Law whether Palestine considers international treaties self-executing and whether international treaties take primacy over national laws. The only guidance that appear on the issue comes from the Supreme Constitutional Court decisions (the Court or SCC hereinafter).

In 2017, the SCC issued a decision according primacy to international treaties over national laws.²⁴ The issue of the hierarchy of international treaties came before the SCC when a first instance court referred a case in which the United Nations Relief and Work Agency for Palestinian Refugees (UNRWA) was a party. The agency pleaded immunity before the lower court in light of the headquarters agreement between the Palestinian authority and the agency.

The Court found that international treaties are to be accorded primacy over national laws, even if not published in the official Gazette, unless they contradict with the Palestinian religious, political and cultural morals. The court did not address the question of whether international treaties take primacy over the Basic Law.

In 2018, the SCC received a request from the Minister of Justice to offer its interpretation of Article 10 of the Basic Law,²⁵ the power to interpret the provisions of the Basic Law is

²⁴ حكم المحكمة الدستورية العليا الفلسطينية، المنعقدة في رام الله، رقم ٢٠١٧/٠٤، بتاريخ ٢٠١٧/١١/١٩.

²⁵ تفسير دستوري صادر عن المحكمة الدستورية العليا الفلسطينية، المنعقدة في رام الله، رقم ٢٠١٧/٥، بتاريخ ٢٠١٨/٣/١٢.

established for the SCC through article 103 of the Basic Law. Among the questions the Court considered; the hierarchical status of international treaties within the Palestinian legal system, the process of incorporating international treaties within the Palestinian legal system and the nature of Palestine's human rights obligations and responsibilities.

The Court answered the question of the hierarchical status of international treaties as follows: international treaties are supra-national but infra-constitutional. In reaching its conclusion, the Court established that constitutional rules are the cornerstone for the foundation of any legal system. Therefore, no legal document can take precedence over it.²⁶

The Court addressed the question of Palestine's obligations towards human rights by stating that the respect of human rights is achieved through the incorporation of these rights within the domestic system while taking regard of their compatibility with the Palestinian religious and cultural identity.²⁷ In other words, if a ratified treaty of human rights establishes a right that is not compatible with the Palestinian religious or cultural identity, such a right would not be enforced in Palestine. This means that Palestine would not adhere to its international obligations.

As whether treaties are directly incorporated within the Palestinian legal system, the Court was of the opinion that international treaties are not laws to be enforced domestically per se, but rather, they should be enforced by incorporation through domestic laws. When incorporated, international treaties are supra-national, and courts would apply them when dealing with cases. This evidently means that the SCC went out of its way and ultimately its authority under its mandate to create a new source of law; international treaties. Furthermore, the SCC made the domestic enforceability of international treaties and their superiority over national laws conditioned on their publications in the official Gazette.²⁸ A process similar to that required for

²⁶ *Id*, p. 94.

²⁷ *Id*, p. 95.

²⁸ *Id*, p. 96.

the enforceability of ordinary national laws.²⁹ When published, international treaties are supra-national, and courts apply them over national laws in case of inconsistency. It should be noted that none of the treaties ratified by Palestine had been published yet, this however does not mean that Palestine's obligation towards the international community is not in effect.³⁰

Second, since Palestine has been occupied since 1967, both Palestine and Israel are bound by the Covenant's obligations. The extent of the obligations depends on the level of control and authority exercised by each of the two states in the Occupied Palestinian territories.

To further clarify this complex situation, in 1967, both the West Bank (including east Jerusalem) and the Gaza Strip were occupied by Israel. In 1993, The Palestinian Liberation Organization and Israel signed the Oslo Accords. Accordingly, Israeli delegated administrative and security powers in the West Bank (excluding east Jerusalem) and the Gaza Strip to the newly created Palestinian National Authority (PNA). The Oslo Accords created three types of areas within the West Bank categorized depending on the level of control exercised by the PNA and Israel in each of these areas. Areas A are territories where the PNA exercises full administrative and security authority, areas B are territories where the administrative and security authorities are shared between the PNA and Israel, and areas C are territories where Israel retained full Administrative and security authority.³¹ The recognition of Palestine as a state in 2012 did not change the factual situation on the ground.

As for the Gaza Strip, despite the fact that Israel unilaterally withdrew from the Strip in 2005, it retained remote control over territorial entry points, the territorial sea and the territorial

²⁹ The Amended Basic Law of the State of Palestine, March 2003, art. 116.

³⁰ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, art. 27.

³¹ See: <http://america.aljazeera.com/multimedia/2014/7/west-bank-security.html>. (last visited 6/12/2018)

airspace.³² In light of this, Israel is an occupying power of the Gaza Strip only with regards to the obligations of the Fourth Geneva Convention for the protection of the civilian population.³³

In light of the above, and since both Israel and Palestine are parties to the Covenant, it is concluded that both Israel and Palestine are bound by the Covenant to provide ESC rights to the civilian population under their jurisdiction. This paper is only concerned with the obligations of Palestine under the Covenant. Therefore, the discussion shall be limited and is to be understood as concerning territories where Palestine is considered the state exercising jurisdiction, whether that jurisdiction was exercised individually or jointly with the occupying power. At the same time, the study notes that one of the main obstacles that face the Palestinian authority in fulfilling its obligations is the practices of the Israeli occupation in the Occupied Palestinian Territories (OPT).³⁴

Conclusion on the nature of the Covenant's obligations:

Palestine as a party to an international binding treaty have certain obligations towards the international community and more importantly its citizens. ESC rights are binding and should be enjoyed by all citizens without discrimination. Palestine must work progressively for the realization of these rights within its available resources. Until such realization is achieved, Palestine has a minimum core obligation towards its citizens, such obligation requires Palestine to provide minimum essentials of each of the rights enshrined within the Covenant.

3. The Compatibility of the Palestinian legal system with the Covenant's obligations

³² See: <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/10/AR2005081000713.html>. (last visited 7/12/2018).

³³ HRC, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (2009) UN Doc A/HRC/12/48, paras 273-9. For a different "functional" approach towards the question of occupation in Gaza, *please see*: M. Sassoli, "The Concept and the Beginning of Occupation" in A. Clapham, P. Gaeta, M. Sassòli (eds.), *The 1949 Geneva Conventions, A Commentary* [OUP, Oxford, 2015], at p. 1411-1413, para 47-51.

³⁴ CESCR, Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights on the state of Israel, 16 December 2011. *See also*, Human Rights Council, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 15 March 2018.

After establishing the general obligations of Palestine as a state party, this study shall now address the Palestinian legal system and determine its compatibility with the Covenant. The right to work and the right to health shall be taken as case studies. This test of compatibility shall determine what measures, if any, Palestine needs to undertake towards the progressive realization of socio-economic rights.

a. The Right to Work and Just and Favorable Conditions of Work (Article 6-8)

The right to work is guaranteed by the Basic Law of 2003, article 25 stipulates that “Every citizen shall have the right to work, which is a duty and honor. The Palestinian National Authority shall strive to provide work for any individual capable of performing it”. This is consistent with article 6 of the Covenant requiring State parties to work progressively for the realization of this right. States also bear obligations of immediate effect in this regard; to ensure the enjoyment of the right to work without discrimination and to take steps towards the realization of article 6. Taken steps shall include “technical and vocational guidance and training programs”.³⁵ Palestine regulated the right to work in the Labor law of 2000,³⁶ the law prohibits discrimination of any kind³⁷ and obliges the Ministry of Labor to develop and implement training programs on the principle of equal opportunity.³⁸ The ministry had provided 21 free training program covering a wide range working fields.³⁹

The right to work includes the obligations to respect, protect and fulfil, these obligations require the state to refrain from interfering with the right to work, protect the exercise of the right from the interference of third parties and to provide, facilitate and promote the right. Fulfilment of the

³⁵ ICESCR, article, 6 (2).

³⁶ Palestine Legislative Council, Labor Law No. (7) for Year 2000, March 2000.

³⁷ *Id.*, article 2.

³⁸ *Id.*, articles 18-22.

³⁹ Palestine’s Initial Report on the International Covenant of Economic, Social and Cultural Rights, p. 20.

right to work includes the facilitation and promotion of the right; this is achieved through the adoption of positive measures and programs to raise awareness about the right to work and its enjoyment.⁴⁰ Another step that the CESCR considers to be a core obligation is the adoption of a National Employment Strategy (NES);⁴¹ the NES must involve the full respect for the “principles of accountability, transparency, and participation by interested groups”.⁴² It must aim at eliminating discrimination in the working field and define indicators for monitoring compliance of states with their international obligations. The Palestinian initial report on the ICESCR does not make a reference to any NES despite the fact that a NES was adopted in 2010.⁴³ Within the past few years, no NES had been adopted.

General Comment No. 18 on the right to work clarified that the work offered must be “decent”, thus, the work must respect the fundamental rights of the worker as well as his right to safe conditions of work.⁴⁴ Article 7 of the Covenant compliments article 6 by establishing the right of workers to just and favorable conditions of work. These conditions of work include fair wages, equal remuneration for work of equal value, safe and healthy working conditions, rest, leisure, paid annual leave. The CESCR clarified that this list is non-exhaustive and extends to include other rights and obligations, such as the prohibition of forced labor,⁴⁵ freedom from sexual harassment and paid maternity.⁴⁶ Remuneration -which extends beyond the notion of wage to include additional direct or indirect allowances- must be sufficient to enable the worker and his

⁴⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, para. 27, 28.

⁴¹ *Id.*, para. 31.

⁴² *Id.*, para. 38-47.

⁴³ Palestinian National Authority, Ministry of Labor: National Employment Strategy, November 2010.

⁴⁴ *Supra note* 40, para. 6.

⁴⁵ For the definition of forced labor: ILO Convention No. 29 concerning Forced or Compulsory Labor, 1930, article 2, paragraph 1.

⁴⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 23: The Right to just and favorable conditions of work (Art. 7 of the Covenant), 27 April 2016, para. 6.

or her family to “enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing and additional expenses such as commuting costs”.⁴⁷

The Palestinian Labor Law appears to adhere to these obligations, chapter 5 of the Labor Law regulates working hours and the conditions of work in a manner that is consistent with the Covenant. The working place must meet the standard safety conditions established by the regulations of the Council of Ministers. Chapter 6 prohibits employment of children under the age of 15, it also provides that minors shall not be employed in dangerous industries or nightly jobs. Chapter 7 regulates the work of women, it prohibits discrimination, prohibits women from working in dangerous jobs or for extra hours during pregnancy and provides for paid maternity leave for a period of ten weeks. Chapter 8 establishes the “Labor Inspection Commission”, a body responsible for monitoring the enforcement of labor related regulations, the commission also conducts regular inspections of working places to make sure they meet the safety conditions requirements.

Sexual harassment however is not regulated in the law, the Penal Code also fails to specifically criminalize the crime of sexual harassment within the working environment. The draft penal code however criminalizes such a crime, thus, bringing Palestine closer to its obligations.⁴⁸

With regards to justiciability, the CESCR clarified that states also have an obligation to make remedies available to injured individuals. Remedies include adequate reparation, restitution, compensation, satisfaction or guarantees of non-repetition.⁴⁹ Article 4 of the Palestinian Labor Law exempts workers from paying judicial fees in cases related to their work, a provision that aims to protect workers and enhance the justiciability of the right to work.

⁴⁷ *Id*, para. 18.

⁴⁸ *Supra note 39*, para. 82.

⁴⁹ *Supra note 46*, para. 57.

Although the Labor Law appears to be consistent with the provisions of the Covenant, the situation is different in practice and specifically in the field of equal enjoyment of economical rights for women and men. A gap appears to exist between women and men in the working field. For example, the percentage of working force in 2016 in Palestine (West Bank and the Gaza Strip) was 45.5%, men constituted 71.4% of this working force while women participation mounted to 18.9%. Furthermore, despite the fact that unemployment rates in Palestine are high, women appear to constitute the majority of unemployed individuals. In 2016, unemployment rates in Palestine were 25.7%, women constituted 43.9% of this percentage while men constituted 21%.⁵⁰ With regards to minimum wage, while the Council of Ministers set the monthly minimum wage at 1450 ILS,⁵¹ a percentage of 35.9% of individuals working in the private sector are underpaid.⁵²

The Collective dimension of the right to work is represented in the right of workers to form unions and conduct strikes. Such rights are guaranteed by article 8 of the Covenant, collective bargaining is exercised on behalf of the workers to guarantee their rights and represent their interests. The Palestinian Basic Law guaranteed these rights in article 25; the Labor Law also regulated workers' strikes in articles 66 and 67. It should be noted that the aforementioned articles of the Labor Law only apply to workers in the private sector, governmental employees are covered by a different law that lacks this kind of provisions. In 2008, a decree law was issued which regulated the right to strike for public workers by extending the application of article 67 of the Labor Law to cover public workers.⁵³ In 2017, another decree law was issued that prohibited certain categories of public workers from the right to strike (the list included members of security forces, workers in the health sector and members of the judiciary),⁵⁴ the importance of

⁵⁰ State of Palestine, Palestinian Central Bureau of Statistics, Labour Force Survey (October-December, 2016), Round (Q4/2016), tables 4, 12.

⁵¹ Palestine, Council of Ministers, resolution No. 11, 2012.

⁵² الجهاز المركزي للإحصاء الفلسطيني، مسح القوى العاملة الفلسطينية، لتقرير السنوي: ٢٠١٧. ص. ٢٧ - ٣٣.

⁵³ Decree law available at: <http://muqtafi.birzeit.edu/pg/getleg.asp?id=15886>.

⁵⁴ Decree law available at: <http://muqtafi.birzeit.edu/pg/getleg.asp?id=16937>.

their services and the public interest were cited as reasons for such prohibition. It had been argued that the decree law should have instructed that these categories of public workers have the right to strike as long as the minimum essential service are provided to the public.⁵⁵

In conclusion with regards to the right to work, the labor law appears to adhere to the majority of the Covenant's obligations. A problem exists however in enforcing the labor law properly. It is suggested that the state of Palestine adopts the necessary legislative and administrative measures to monitor the enforcement of the law.

b. The Right to the Highest Attainable Standard of Health (Article 12).

The right to health includes both freedoms and entitlements; with regards to the former, the right to health confers freedom from interference in one's health and body such as non-consensual medical treatment. As for the latter, the right confers entitlement to access essential medicines and equal opportunity for people to enjoy the highest attainable standard of health. The CESCR issued a general comment on the right to health clarifying that the right to the highest attainable standard of physical and mental health is not confined to the right to health care. Indeed, the right to health encompasses a number of socio-economic factors that contribute to a healthy life such as "food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment".⁵⁶ The right to health is one of the most fundamental rights that depends in its realization on the enjoyment of other rights within the Covenant.

In its general comment, the Committee reaffirmed that the right to health is read in connection with the other provisions of the charter and particularly articles 2 and 3 on non-discrimination and equal treatment. States must not discriminate in access to health care on any grounds

⁵⁵ المركز الفلسطيني لاستقلال المحاماة والقضاء "مساواة"، مجلة العدالة والقانون، العدد الثاني والثلاثون، نيسان ٢٠١٨، ص. ١٠١-١١١.

⁵⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Rights to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000.

including race, color, sex, language, religion, political opinion and sexual orientation. Furthermore, states have a special obligation to provide those with no sufficient means with the necessary health insurance and care. If a state inappropriately invests in expensive curative health services that are accessible only to a small fraction of the population, instead of primary and preventive health care, the state would have discriminated against the majority of its population.⁵⁷

Similar to other rights under the Covenant, the right to health imposes two obligations of immediate effect on states. Those are the obligations to take steps and to guarantee the exercise of the right without any discrimination are of immediate effect.⁵⁸

The right to health imposes on states the obligations to respect, protect and fulfill. To respect the right to health is to refrain from interfering in the enjoyment of it; it requires states to refrain from denying or limiting equal access to health care. For example, states must not discriminate against or prevent access to health care to prisoners, illegal immigrants, asylum seekers or women. The obligation to protect on the other hand requires states to adopt legislative and administrative measures aimed at; ensuring equal access to health services provided by third parties, ensuring that privatization of the health sector does not result in the non-availability or accessibility to health services. States must also work towards abolishing harmful traditional practices such as female genital mutilation. Finally, the obligation to fulfil requires states to recognize the right to health and adopt a national health policy aimed at realizing the right. The obligation to fulfil requires states to facilitate, provide and promote the right to health. Facilitation of the right to health requires the adoption of positive measures. Providing the right to health requires states to allow individuals incapable of exercising their right on their own to enjoy it. Promoting the right to health requires states to undertake actions that maintain and restore the health of the population.

⁵⁷ *Id*, para. 18, 19.

⁵⁸ *Id*, para. 30-32.

According to the CESCR, the right to health contains a number of essential elements that should be present at all times:⁵⁹

Availability: states are required to make available, in sufficient quantities, public health facilities, goods, services and programs. This also includes the availability of potable drinking water and adequate sanitation facilities.

Accessibility: all health-related facilities and services must be available to all individuals without any form of discrimination. Accessibility includes a physical aspect requiring states to guarantee that individuals with disabilities, older persons, women and children have to access the facilities. Another aspect of accessibility relates to affordability; all services and goods must be affordable to the population, whether provided publicly or privately. Individuals also have the right to seek and access information concerning health issues.

Acceptability: states must ensure that all health-related services are respectful of medical ethics and cultural differences of groups within the society.

Quality: health facilities, goods and services must be culturally, scientifically and medically of good quality.

Within Palestine, the Palestinian Basic Law does not explicitly recognize a right to health. It does however, recognize the right of everyone to be free from non-consensual medical experiments.⁶⁰ Only article 22 of the Basic Law passingly mentions that social, health, disability and retirement insurance shall be regulated by law. The right to health is regulated by the Public Health Law of 2004, the law provides a list of duties the Ministry of Health must perform towards the realization of the right to health. These duties cover a wide range of fields related to

⁵⁹ *Supra note* 56, para. 12.

⁶⁰ Palestinian Basic Amended Law, article 16.

health such as providing governmental preventive, diagnostic, curative and rehabilitative health services.⁶¹

According to the Palestinian Health Information Center, the Palestinian Ministry of Health provides primary health care in the West Bank in more than 70% of the existing 587 clinics. In Gaza however, the ministry accounts for only 32% of the 152 primary health clinics. Furthermore, statistics show that 82% of Palestinians are covered by some form of prepayment for health care; the government health insurance covers primary services, secondary care, prescription medicines on the essential medicine list and tertiary care services that are purchased from private and other health facilities.⁶² The initial report of Palestine on ESC rights indicates that there are 6 forms of governmental health insurance in Palestine covering hundreds of thousands of families. These forms of insurances allow individuals to purchase pills and medicine at a low price.

The ministry provides a wide number of services for women and children, most of these programs relate to infant's health and immunizations. Women are also provided with guidance and advice on motherhood and child care. The ministry also takes precautionary measures in this regard such as the requirement of medical tests before marriage in order to protect the family against genetically inherited diseases or sexually transmitted ones.⁶³

One major problem that faces the Ministry of Health is the shortages of medical supplies.⁶⁴ Another is the dependency on health services provided by the UNRWA.⁶⁵ Furthermore, the majority of clinics outside of East Jerusalem (i.e in the West Bank and Gaza) do not have any

⁶¹ For a full list of duties, please see: Palestinian Legislative Council, Public Health Law No. (20) 2004, article 2.

⁶² World Health Organization, Health conditions in the occupied Palestinian territory, including east Jerusalem, and in the occupied Syrian Golan, Report by the Director-General, A71/27, 18 May 2018.

⁶³ *Supra note 39*, para. 174-200.

⁶⁴ *Supra note 62*, para. 17.

⁶⁵ *Supra note 34*, report of the special rapporteur, para. 35.

radiotherapy or nuclear imaging technology, leaving cancer patients totally dependent on the facilities of East Jerusalem which requires them to first obtain security permits from Israel.⁶⁶ With regards to the Gaza Strip specifically, due to the continued blockade on the Gaza Strip and the recent conflicts, its health sector is highly impacted and its capacities are limited.⁶⁷ For example, around 200 essential medicines were completely out of stock by the end of January 2018. Electricity shortages in Gaza had forced hospitals to temporarily shut down or modify their working schedules depending on the availability of electricity.⁶⁸

Turning to mental health, reports indicate a steady increase in visits to mental health clinics in the OPT. The continuing occupation and violence had resulted in making the OPT by 2013 the territory with the largest burden of mental disorders in the Eastern Mediterranean region.⁶⁹ Palestine has only two mental hospitals with a limited number of beds.⁷⁰ The Ministry of Health (MoH) had responded to this problem in its national mental health strategy which aims at enhancing resources for the treatment of mental health and raising awareness on the issue.⁷¹

Conclusion on compatibility assessment:

The legal system in Palestine appears to adhere to the majority of the obligations of the Covenant with regards to the right to work and health. A real gap exists however between the law and its application. The enforcement and monitoring mechanism in place are not effective to ensure compliance and respect of the law.

⁶⁶ *Supra note 62*, para. 17.

⁶⁷ *Id.*, para. 18.

⁶⁸ *Supra note 34*, report of the special rapporteur, para. 37.

⁶⁹ R. Charara et al, “The Burden of Mental Disorders in the Eastern Mediterranean Region, 1990-2013” (2017), 12(1) PLoS One.

⁷⁰ *Supra note 65*, para. 54.

⁷¹ Palestinian Ministry of Health, National Mental Health Strategy – Palestine, 2015-19 (June 2015).

The right to work in Palestine is constitutionally protected and is further regulated by law. The majority of the Labor's law provisions adhere to Palestine's obligations under the ICESCR. Palestine however needs to take steps to effectively monitor the application of the right to work in the field of equal treatment and equal payment between men and women.

The right to health lacks any constitutional protection, only certain aspects that relate to medical experiments and maternity appear to be addressed by the constitution. Health related rights and services appear to be adhered to by the Public Health law. Similar to the right to work, a gap appears to exist between the law and its application. In the field of health, many of the problems faced are due to the continuing occupation and Israeli policies. This is specifically seen with regards to the condition in the Gaza Strip.



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