

Healthcare in the Spectrum of Human Rights. An Introduction

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The human right to the highest attainable standard of health¹ frequently evokes skeptical reactions. After all, human rights differ from moral postulates in that they impose binding obligations on the state, which under international law figures as the formal guarantor of the rights of those living under its jurisdiction. If that is true, however, how can a certain standard of health become a legally binding entitlement? Obviously, efficient and comprehensive healthcare presupposes an expensive infrastructure, which not every state can afford.² Even affluent states face the problem of increasing healthcare expenses, which they may feel unable fully to shoulder in the long run. For economically impoverished states in the global south, the situation is much more dramatic; scarcity of resources may even hamper the development of a minimum healthcare infrastructure. In the light of such obvious contingencies, how can the state »guarantee« a right to health for everyone? If the state promises what is beyond its control, such a promise

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- 1 For an overview on the right to health see Mann et al. (1999); Toebe (1999); Riedel (2009); Tobin (2012); Wolff (2012); Saul et al. (2014). For basic issues regarding the right to health see WHO (2008); Clapham (2009); Grodin et al. (2012); San Giorgi (2012); Toebe et al. (2014); Kavanagh (2016); Yamin (2017).
 - 2 See Campbell et al. (1986); Beyrer/Pizer (2007); Gostin (2014); Harris et al. (2014); Cruft et al. (2015).

does not seem to be fully reliable. Do we have to conclude that the proclaimed human right to health is illusionary? Is it but an empty promise?³

Radical critics of the right to health go a step farther by contending that the semantics of a right to health might in the long run weaken the validity claims of international human rights in general.⁴ Human rights are a particularly strong category of norms. Based on due respect for »the inherent dignity [...] of all members of the human family«,⁵ they have the elevated status of »inalienable rights«. Accordingly, human rights claim priority over other legal norms. Now, by inserting an entitlement that in practice depends on the availability of adequate resources and other socio-economic contingencies, the framework of human rights may eventually lose much of its stability and reliability. This at least is what skeptical commentators have objected.⁶

Such criticism has a long tradition, it sometimes culminates in a general juxtaposition of civil and political rights (CP rights), on the one hand, and economic, social and cultural rights (ESC rights), on the other. While CP rights, like freedom of conscience, freedom of religion, freedom of expression etc. claim *unconditional* validity, ESC rights, like the rights to education, housing or health remain merely *conditional*, given their resource-dependency. This in turn implies that ESC rights do not have the same elevated normative status as the »classical« CP rights – or so the critics would argue. They may go on to declare that CP rights chiefly impose *negative duties* on the state. For example, in order to do justice to freedom of expression or freedom of religion what the state has to do is merely refrain from exercising censorship or from harassing religious minorities, respectively. Not to do the wrong thing seems to be enough. By contrast, ESC rights require expensive infrastructural investments in schooling, housing or healthcare etc. They thus impose *positive duties* upon the state. This difference between negative and positive duties manifests itself also in the lan-

3 »The Right to Health – an Empty Promise?« was the title of our conference at the Berlin-Brandenburg Academy of Sciences and Humanities (September 2015).

4 See Wolf (2012) for an overview on the human right to health and its critics.

5 Universal Declaration of Human Rights (1948), first sentence of the preamble.

6 See Campbell et al. (1986); Beyrer/Pizer (2007); Harris et al. (2014); Cruft et al. (2015).

guage of »obligations to respect« versus »obligations to fulfil«. Whereas CP rights call for respect by the state, ESC rights postulate far-reaching state activities – or so is the assumption. Finally, by carving out a sphere free from undue state inferences, CP rights are *rights to freedom*. Many of those rights – like freedom of expression or freedom of assembly – actually carry »freedom« in their titles. By contrast, the heading of ESC rights is less clear. Assuming that they inter alia rectify the consequences of social inequalities, they sometimes figure under the title of *rights to equality*.

The juxtaposition of CP rights and ESC rights may thus lead to the impression that these two categories of rights are essentially different, perhaps even antagonistic, as illustrated in the following table:

Table 1: Juxtaposition of CP rights and ESC rights

CP rights	ESC rights
unconditional validity negative state obligation (to respect) rights to freedom	merely conditional validity positive state obligations (to fulfil) rights to equality

The consequences drawn from such an antagonistic conceptualization can be different. While radical critics of ESC rights reserve the title of human rights to CP rights, moderate critics push ESC rights to the margins of the human rights debate in order to keep the priority of the »classical« CP rights in place. This also manifests itself in different degrees of skepticism towards the right to health.

However, the antagonistic conceptualization of CP versus ESC rights has come under increased pressure in recent decades. It no longer represents the state of the international debate.⁷ The UN committee in charge of monitoring the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) played a leading role in the ongoing effort to develop a more comprehensive normative framework. An important part of the work undertaken by the Committee was carving out »core elements« of the various ESC rights, including the right to health.⁸ It has become obvious

⁷ See Krennerich (2016).

⁸ See Tobin (2012); Müller (2016).

that not all the elements of those rights are equally resource-dependent. Take the example of non-discrimination. Even an economically less developed country with a poor schooling infrastructure cannot give boys privileged access to schools, to the detriment of girls. This would be a flagrant case of discrimination and a clear violation of the right to education. Invoking limited resources would not justify such discrimination. Likewise, a country with scarce resources in healthcare cannot distribute those resources in a discriminatory fashion, for instance, by prioritizing members of a particular ethnic group or social class. This is an obvious problem also in rich Western countries, as illustrated by the inevitable competition over scarce organs, which must meet criteria of transparency, fairness and non-discrimination. With regard to such »formal« criteria, however, countries like Norway and Burkina Faso are ultimately on the same page. This is an important insight. In other words, the focus on core elements of ESC rights has contributed to the awareness that not all aspects of these rights are entirely dependent on resources. Of course, the right to health covers many other aspects as well. It also includes an obligation for the state pro-actively to develop an appropriate health infrastructure, which naturally is a long-term project. While core elements have an immediate obligatory nature, other aspects of the right to health accommodate more leeway. With regard to the latter aspects, the state has a broader degree of discretion for implementing the right in a step-by-step fashion (progressive realization).⁹

When looking again at the CP rights, we may realize that things are not entirely different there. Without denying remaining conceptual differences, CP rights, too, cover various aspects, which likewise can be differentiated according to the logic of core elements and broader areas. Take the example of freedom of religion or belief. While the forum internum, i.e. the inner nucleus of a person's faith formation, even enjoys absolute protection,¹⁰ external manifestations of one's religious convictions can be limited, provided that all the criteria for such limitations are fully satisfied. Moreover, although issues like the treatment of religious diversity in the school curricu-

9 For an overview on state obligations and progressive realization see De Schutter (2014).

10 See Article 18(2) ICCPR (International Covenant on Civil and Political Rights). There are only few absolute norms in international human rights law. Examples include the prohibition of torture and prohibition of slavery.

lum have an impact on the general atmosphere in a society and thus fall within the scope of freedom of religion or belief, human rights law does not specify any detailed rules, which the state is supposed to follow in this field.

Generally speaking, every human right – whether categorized as CP or as ESC right – is internally differentiated. While some aspects are immediately obligatory, other aspects allow for more leeway. Admitting this, however, must have consequences. It means to replace the antagonism of »unconditional« rights versus »conditional« rights by a more nuanced language. The question where exactly to draw the line between unconditional and conditional elements of human rights guarantees runs *across the entire spectrum of CP and ESC rights*. At any rate, to assume a neatly ordered bifurcation, like in table 1, fails to capture the complexity of the problem.

The same is true for the distinction between »negative« and »positive« state obligations. Let us start with CP rights. Not to do the wrong thing would certainly not be enough for a state to discharge its human rights obligations. In order to realize freedom of expression, for example, the state has to provide effective protection to journalists under threat. NGOs promoting freedom of expression have furthermore demanded that the state facilitate the development of community radios for ethnic minorities and indigenous peoples, which requires far-reaching infrastructural investments. Likewise, to be able to enjoy their freedom of religion or belief, religious minorities may need an appropriate status position as a collective legal entity, which presupposes legislative efforts for that purpose. Finally, one should not forget human rights in general presuppose a functioning and independent judiciary, which one cannot take for granted. These examples may suffice to demonstrate that CP rights demand manifold state activities way beyond the proverbial »negative« duties of non-censorship and non-oppression.

Just as CP rights imply positive state obligations, i.e. obligations to *protect and fulfil*, ESC rights inter alia require of the state an attitude of *respect*. The state cannot implement the right to food without respecting people's dietary customs, including dietary rules based on moral or religious convictions. This is part of the right to food itself. To give another example, the right to education presupposes respect for specific needs and vulnerabilities of students from minorities and their parents. The right to health, in

turn, requires a respectful attitude towards patients. As the ESC Committee points out in its General Comment No. 14 (2000) on the right to health:

»All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality [...].«

These are very clear words. Many violations of ESC rights follow from a lack of due respect.¹¹

Again, the neatly applied differentiation between negative and positive duties and their location in the CP and ESC camps, as illustrated in table 1, fails to do justice to the complex tasks ahead. Since the late 1990s, the ESC Committee and other UN bodies have in fact used a more adequate scheme. It has become customary to distinguish between three main state obligations, i.e. obligations to respect, to protect and to fulfil.¹² The decisive point is that these obligations apply to *all human rights*, across the whole range of CP and ESC rights. In other words, not a single right would flourish without due respect, without efficient protection and without a workable infrastructure provided by the state. In this regard, CP rights and ESC rights are again on the same page.

Finally, one has also to overcome the ideological bifurcation of rights to freedom versus rights to equality. This opposition fails to make any sense. In the context of human rights, freedom and equality are two closely interwoven principles. Neither can exist without the other. Without a due account of equal implementation, freedom would end up as the privilege of the happy few, and without the spirit of freedom, equality could easily be mistaken for sameness, uniformity or homogeneity. Human rights in general are *rights of equal freedom* specified for the various aspects of human life.¹³ Take, for example, the right to marry a spouse of one's choice, which usually figures as a CP rights. It applies equally to men and women. Moreover, the equality principle has recently led to an opening up for same-sex couples as well. Freedom of religion or belief likewise has an equality dimension, because it challenges discriminatory practices and structures

11 E/C.12/2000/4, 11. August 2000, para. 12.

12 See Krennerich (2016).

13 See Bielefeldt (1998).

based on people's religious or non-religious convictions. The right to fair trial – again a CP right – would amount to a mockery of human rights unless it is effectively open for everyone equally, including economically impoverished people. Indeed, no CP right can count as a human right unless it remains within a systematic framework of equality and non-discrimination.

When turning back to ESC rights, we can correspondingly find the principle of freedom in all of them. Take the example of the right to housing. It inter alia serves as one of the most important safeguards of personal privacy (which itself counts as a CP right). »My home is my castle« is an early-modern slogan demanding respect for privacy. Moreover, without adequate housing family life can hardly flourish in freedom. To give another example, the right to work includes the prohibition of forced labour, thus also contributing to the guarantees of human freedom. Finally, the right to health presupposes respect for the autonomy of patients.¹⁴ To quote again from the General Comment issued by the ESC Committee:

»The freedoms [as contained in the right to health] include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.«¹⁵

Informed consent of patients, which specifies the principle of autonomy, has become an international standard without which the right to health would be inconceivable. Incidentally, healthcare professionals, too, should experience respect for their rights to freedom, including their freedom of conscience.¹⁶

We thus have good arguments to replace the bifurcation of CP and ESC rights, as contained in table 1 by a holistic paradigm, in which CP and ESC rights mutually reinforce each other, as illustrated in the following scheme:

14 See Weisstub et al. (2008).

15 E/C.12/2000/4, 11. August 2000, para. 8.

16 Bielefeldt (2016).

Table 2: CPESC-rights (mutually reinforcing rights)

CPESC-rights
Unconditional core elements + broader areas
State obligations to respect, protect and fulfil
Freedom and equality together defining the human rights approach

The new paradigm is important for the interpretation of all human rights. It also provides guidance for the understanding of the right to health. This has a number of implications. It underlines the need of carving out *core elements* of the right to health, in particular core obligations falling upon the state. Some articles in this volume are dedicated to further clarifying this important task. While resource-dependency remains an undeniable feature of the right to health, even in rich countries, the human rights nature much rests on the possibility of identifying core elements that apply universally. Another important consequence is the obligation to respect, which deserves more attention. It is understandable that much academic work currently undertaken deals with the obligation to fulfil, since this seems to be the area, where the right to health receives its practical contours. However, without due reflection on the obligation to respect, policies of implementing ESC rights could easily end up in mere cost analyses and utilitarian calculations of benefit distribution. It is worth highlighting in this regard that respect is more than a »negative duty« narrowly understood as merely refraining from doing harm. Respect presupposes a positive attitude of appreciating every human being as always »an end in itself«, to say it in Kantian terms. This respect also demands treating human beings as self-responsible subjects, which in turn requests rights to freedom for everyone equally.

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