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An Explication on Broadening the Definition and Scope of Maximum Available Resources under the General Comment 14 of the ICESCR to include Islamic Taxation in Financing the Right to Health

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Abstract

There exists no comprehensive definition on what constitutes "available resources" as envisaged under article 2.1 of the International Covenant on Economic, Social and Cultural Rights. There is also an absence of an extensive discourse on this definition beyond stating that it refers to both the resources existing within a state as well as those available from the international community through international cooperation and assistance. The definition does not recognize Islamic forms of taxation that are domestically available to an Islamic as well as a secular state. Accordingly, the problem identified in this explication is that of linking zakat; a form of Islamic taxation, to the concept and definition of maximum available resources. The book by Waris (2015) argues that there is a link between taxation and human rights (the right to health being among such rights). Waris pushes this proposition to the point of demonstrating the validity of the argument that rights require resources for their realization and subsequent enforcement, but she stops short of discussing the exact fiscal mechanism that could be used for the realisation and enforcement of specific rights. This explication having identified this gap aims to advance an argument that allows for broadening the international community understands of what constitutes maximum available resources that a state can utilise to finance the right to health. It proposes the introduction of zakat as a potential method of mobilising financial resources domestically available and argues for its inclusion in the definition and scope of maximum available resources.

Keywords: Zakat; Islamic Taxation; Right to Health; Finance; Maximum Available Resources

Introduction

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health" [1,2]. This declaration of the right to health itself, however, does not suffice for its realisation. Instead, its realisation can be progressively achieved through the development of an equitable tax and effective health governance systems as necessary prerequisites for achieving this right. Accordingly, financial resources and governance of health systems are critical to the realisation of the right to health. Article 2.1 of the ICESCR states that: This means that states have a legal obligation to respect, protect and fulfill economic, social and cultural rights and are expected to take progressive action towards their fulfillment. Consequently, a state is to allocate the maximum of its available resources towards the realisation of this right. In the event a state fails to allocate the maximum of its available resources to realizing the right to health, the state under the Maastricht Guidelines on violations of economic, social and cultural rights will be [3] considered to be in violation of the Covenant. This is the background against which this explication shall propose zakat as an additional source of revenue that a government can access and explore as a means to fulfil its obligation to use its 'maximum available resources' in order to finance the right to health. This also goes towards the United Nations Economic Commission for Africa recommending that African states domestically mobilize their resources towards financing their developmental objectives [4]. The progressive realization of the right to health is one such development objective of African governments.

The Rationale for Including Zakat within the Definition and Scope of Maximum Available Resources

The rationale in using zakat as an available financial resource rests its validity on a lack of a comprehensive definition and extensive discourse on what constitutes "available resources".

The UN Committee on Economic, Social and Cultural Rights in 2007 made a statement entitled, "An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant," to define what constitutes maximum available resources, however, the statement did not give this definition beyond stating that it refers to "both the resources existing within a state as well as those available from the international community through international cooperation and assistance." This explication builds on this interpretation to include zakat as a resource existing within a state.

Further, although the United Nations Committee on Economic, Social and Cultural Rights, the United Nations Committee on the Rights of the Child, several United Nations Special Rapporteurs and other legal experts have made some notable headway in the discourse on what constitutes maximum available resources, there is still a need for a further clarification on what the concept of maximum available resources means and how states can apply it in practice. Often a narrow interpretation is adopted, assuming that available resources have been fixed by previous policy choices and that the government's main duty lies in efficient administration of these resources. However, no mention of zakat as an available resource is made in government policies of either Muslim or secular states. This is rightly so since zakat is an Islamic form of taxation and its collection as revenue is reserved for Muslim states. Secular states do not enforce religious doctrines. This is the rationale behind secular states not legislating on, nor providing for the collection of zakat within their territory. As a result when it comes to the practical application of maximum available resources to finance the right to health, states have tended to limit their analysis to budget expenditures and international assistance [5], overlooking the potential of zakat as an additional source of revenue available to realize the right to health. Several UN Special Rapporteurs and Independent Experts have also addressed the meaning of 'maximum available resources.' For example the former Special Rapporteur on the Realization of Economic, Social and Cultural Rights Danilo Türk noted that: This means that financing economic, social and cultural rights of which the right to health is among its features, is dependent upon adequate health systems and enforcement mechanisms that make the right to health not only universally available, but affordable, accessible and of adequate quality. In other words, finance and governance are inextricably linked to the realisation of the right to health. It is against such analysis that this explication promotes zakat using a financial and governance perspective to propose a gradual form of revenue generation within the Kenyan state. This in turn shall enable a larger proportion of a state's population to enjoy the right to health as a result of the additional revenue since it is the objective of zakat, to have governments function effectively and cater for the welfare of its population. In this respect the collection of zakat [6,7] by a state becomes important in order to ensure that revenue is distributed equitably [8]. The note by Danilo Türk is further supported by the theory of equitable revenue distribution that has been alluded to in the Qur'an. In Chapter [9] verse 60 of the Qur'an the following has been stated: This passage is important in contemporary Islamic jurisprudence [10] as it identifies the categories of zakat beneficiaries. The poor and needy are to be given priority over the other beneficiaries. Importance is to be placed on this legislative provision to legitimise and authorise the collection of zakat to finance the right to health of the poor and needy citizens of a state.

The obligation of governments to use the 'maximum of available resources' to realize the right to health according to Magdalena Sepulveda, the Independent Expert on the Question of Human Rights and Extreme Poverty [11] means that governments must mobilize resources within the country to its utmost ability. Recognizing zakat as a potential source of revenue shall enable a state to utilise its utmost ability to mobilize resources. This explication uses Sepulveda's observation to draw attention to the role of zakat in fulfilling a state's obligation to using its maximum available resources that can be raised domestically. This explication also utilises Olivier de Schutter's, the Special Rapporteur on the Right to Food, 2009 report on Brazil, which drew attention to the role of taxes in fulfilling the obligation to using the 'maximum available resources'. In that report, it is said as follows: This statement recognises the importance of taxation to the concept of maximum available resources. It acknowledges the need for introducing tax reforms. Reform is associated with either a complete overhaul of the existing system or structures in place or by introducing additional systems and structures to work side by side with the existing systems and structures. Accordingly, this explication recommends a legislative framework to be included in secular state laws that allow for the introduction of zakat as well as its administration and management in order to finance the right to health.

Justifying Zakat as an Alternative Source for Financing the Right to Health

The universality of the right to health has been analysed in the context of the Millennium Development Goals (MDGs), and other poverty reduction papers. It has been argued by Waris in her paper on "Linking taxation to the realisation of the Millennium Development Goals in Africa" [12,13] that finance plays an important part in the realisation of the right to health. According to her, neither the MDGs nor poverty reduction papers have so far explicitly discussed tax systems. Instead, the discussion has been around finding means through domestic resources to finance the realisation of the right to health. Accordingly, the view that is being advanced is to look for means to increase tax than for developing countries to seek for an increase in aid. Her work further points to the argument of increasing taxes as being greater in importance than planned debt relief, since it is less prone to dependency on other states and resource sources [14]. However, in the opinion of the author of this explication, an increase in taxation only serves to create a disparity between the rich and the poor and is not feasible in a state, like Kenya for example, where more than half of its population lives below the poverty line. Accordingly, an alternative means of raising revenue ought to be considered. Zakat provides for an additional source of revenue for a state. However, the importance of zakat as a source of revenue generation has not to date been explored either by the World Health Organisation (WHO), International Monetary Fund (IMF) or the World Bank (WB). Instead increase in taxation and borrowings from the IMF and WB are encouraged.

The Declaration on the Right to Development (DRD) [15] in article 3 states: States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from. Waris interprets the article to bring out three important basic principles. Firstly, she writes, that it is the primary responsibility of states to apply policies aimed at improving the well being of the population. This means that if zakat can finance the deficit in a country's health budget, then the state has an obligation to utilise this additional source of revenue. Secondly, that the human person is the central subject and should be the active participant and finally that there should be distribution of benefits. As a result the DRD has placed the responsibility of the realisation of the right to development on individual states as well as on states collectively for all peoples. Waris points out that an important development that is marked by such interpretation is that the DRD through its article 3 clearly articulates that it is the state's obligation to implement the right to development. In the opinion of the author of this explication, zakat can be argued under the right to development approach as a financing tool whose proceeds can be utilised towards development. The essence of development is to improve a country's economy and in turn provide for the socio economic rights of its nationals. A country cannot function on the backs of unhealthy people. Health, therefore, is a key determinant of an improved economy.

The realisation of the right to health requires states to link resource allocation to this right. The conventional resources obtained through taxation are apportioned for allocation towards different sectors. The health sector may not receive the budget necessary for the progressive realisation of the right to health hence, it is imperative that other resources be identified. It is the view of this explication that Waris is linking conventional tax to the realisation of human rights. Relying on her reasoned argument, this explication advances zakat using the right to development approach to propose it as a method to finance the right to health. There is a dearth in the literature surrounding the financing of health where key concepts and practices of Islamic governance have been identified that will inform the administration and management of zakat as a method of financing the right to health. Existing academic literature concerns development and use of technical assistance and leadership development training [16] of those who govern in the health sectors of low and middle income countries; however no discussion and examination of the principles of Islamic governance to achieve the right to health is currently being considered. There is no academic debate and discussion on examining health insurance and social security institutions by introducing principles of Islamic governance, which will then be used to introduce zakat into national health policies to finance the right to health.

Kawabata and Carrin in their article published in the Bulletin of the World Health Organization titled "Preventing impoverishment through protection against catastrophic health expenditure" [17] found that most. Developing countries struggle to achieve protection against catastrophic health expenditures and health shocks. The insurance option is often not a viable means of pooling to implement the right to health for all due to the limited capacity of governments to make contributions due to fiscal constraints. Using their findings as a discussion point this explication introduces an alternative form of financing the right to health that will enable governments to achieve their obligations under General Comment [14,18]. This obligation has been elaborately specified in article [12] of the General Comment. Russel and Gilson in their article titled "User fee policies to promote health service access for poor: a wolf in sheep's clothing?" [19] Published in the International Journal Health Services have also stated that there is a need for governments to come up with a mechanism to finance the right to health. Their article however, stopped short of proposing a mechanism that governments can use to finance the right to health and neither did they consider the possibility of zakat as a method to promote access to health services for the poor. The issue of health financing is not a new one and has been a constant source of academic and policy discourse through the centuries. Sherry A Glied in her working paper [20] revealed that most health care systems are based on one or several of a number of financing programs, which often co-exist side by side. These include: general revenue financing [21], social insurance financing [22], private insurance financing [23] and out-of pocket payments [24]. There is no mention of zakat in these models.

General Comment [14] and General Comment 3 link the realisation of the [25,26] right to health to the obligation of a state to prioritize funding for health in its budget, taking into account constraints due to the limits of available resources. The General Comments contain no extensive discussion on what resources are available to a state. Hence, there is a theoretical and methodological gap in understanding of what available resources mean for a state. The General Comments [3,14] refer to the obligation of a state to make use of the maximum available funds and resources to realize the right to health.

The Current Financing Challenges in Enforcing Health Rights, Hence the Need to Tap into Zakat Revenue

Taxation is a common method through which states raise public funds for health by prepayments, as opposed to out-of-pocket payments at the point of service delivery. Several states have achieved universal (or near universal) access to health facilities, goods and services through the utilization of tax revenue to finance health [27]. This is not the same for developing countries that face financial barriers as a result of their poor population and unemployment factors. Therefore, developing states may not be collecting sufficient taxes from its population to finance the right to health. A number of Muslims live in developing countries and annually pay their zakat. This explication takes that as a consideration to advance its proposal of using zakat to finance the right the health. The use of zakat shall aid a state in raising revenue which, it cannot collect ordinarily or by increasing the tax it charges

its population. However, this explication is not ignorant of the fact that many states have experienced success in raising revenue from value added tax (VAT) [28]. VAT has been adopted by close to 140 states and now accounts for substantial proportions of revenue collection in many states, particularly in the developing world [29]. However, under the right to health, consumption taxes (such as VAT and excise) must not disproportionately burden the poor. This explication notes that VAT may operate regressively, with the poor spending larger portions of their income on VAT than the wealthy [30].

Accordingly, VAT and other forms of consumption taxes that are primarily regressive are not in accordance with the obligation of states to respect the right to health [31]. International tax competition has proliferated as a result of globalization and the increasing mobility of capital and its corresponding elasticity in response to taxation. Tax competition triggers a race to the bottom, wherein states attempt to attract foreign direct investment through tax incentives and other tax abatements for foreign investors and low or non-existent trade and capital gains taxes [32]. Tax competition reduces tax revenue in developing states and weakens their ability to raise sufficient funds to finance health [33]. As a result, in some developing countries, revenue lost from tax incentives amounted to nearly twice the budget for health [34] High-income states have also experienced diminished tax revenue from taxation of capital income as a result of tax liberalization in developing states [35] Multinational corporations have shifted their assets offshore to take advantage of tax havens and engaged in transfer pricing in order to claim profits in low-tax jurisdictions and avoid paying higher taxes in the states in which they are domiciled [36] This shows that states are losing out on revenue. While coming up with measures to ensure that harmful tax practices are done away with, this explication proposes that a state must also look at other alternatives to generate revenue domestically. The alternative that is proposed is that of using the zakat.

The justification of introducing zakat has become important in light of Allison Christians research paper entitled, "Fair Taxation as a Basic Human Right". In her paper, Allison found that International tax competition has placed the burden of taxation in many states on consumption and income or wage based taxes rather than taxes on business profits and capital income [37,38]. However, income and wage based taxes became difficult to collect in states with large informal sectors, including most of the developing world. These states, she found, incur significant administrative costs associated with tax collection from the informal sector, experience high levels of tax evasion and face difficulties in maximizing income tax bases [39-51].

Conclusion

In conclusion, this explication views that in order to ensure the availability of adequate, equitable and sustainable funding for health, as required by the right to health, a state should not be left to rely primarily on tax revenue from sectors that are difficult to regulate. Instead a state should also make efforts to collect zakat in order to finance the achievement of health rights.

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