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سلسلة العلوم القانونية



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عنوان البحث .. ملخص عربي و إنكليزي (كلمات مفتاحية في نهاية الملخصين).
- 1- مقدمة
 - 2- هدف البحث
 - 3- مواد وطرق البحث
 - 4- النتائج ومناقشتها .
 - 5- الاستنتاجات والتوصيات .
 - 6- المراجع.

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- عنوان البحث .. ملخص عربي و إنكليزي (كلمات مفتاحية في نهاية الملخصين).
- 1. مقدمة.
- 2. مشكلة البحث وأهميته والجديد فيه.
- 3. أهداف البحث و أسئلته.
- 4. فرضيات البحث و حدوده.
- 5. مصطلحات البحث و تعريفاته الإجرائية.
- 6. الإطار النظري و الدراسات السابقة.
- 7. منهج البحث و إجراءاته.
- 8. عرض البحث و المناقشة والتحليل
- 9. نتائج البحث.
- 10. مقترحات البحث إن وجدت.
- 11. قائمة المصادر والمراجع.
- 7- يجب اعتماد الإعدادات الآتية أثناء طباعة البحث على الكمبيوتر:
 - أ- قياس الورق 25×17.5 B5.
 - ب- هوامش الصفحة: أعلى 2.54- أسفل 2.54 - يمين 2.5- يسار 2.5 سم
 - ت- رأس الصفحة 1.6 / تذييل الصفحة 1.8
 - ث- نوع الخط وقياسه: العنوان . Monotype Koufi قياس 20
- . كتابة النص Simplified Arabic قياس 13 عادي . العناوين الفرعية Simplified Arabic قياس 13 عريض.
- ج . يجب مراعاة أن يكون قياس الصور والجداول المدرجة في البحث لا يتعدى 12سم.
- 8- في حال عدم إجراء البحث وفقاً لما ورد أعلاه من إشارات فإن البحث سيهمل ولا يرد البحث إلى صاحبه.
- 9- تقديم أي بحث للنشر في المجلة يدل ضمناً على عدم نشره في أي مكان آخر، وفي حال قبول البحث للنشر في مجلة جامعة البعث يجب عدم نشره في أي مجلة أخرى.
- 10- الناشر غير مسؤول عن محتوى ما ينشر من مادة الموضوعات التي تنشر في المجلة

11- تكتب المراجع ضمن النص على الشكل التالي: [1] ثم رقم الصفحة ويفضل استخدام التهميش الإلكتروني المعمول به في نظام وورد WORD حيث يشير الرقم إلى رقم المرجع الوارد في قائمة المراجع.

تكتب جميع المراجع باللغة الانكليزية (الأحرف الرومانية) وفق التالي:

آ . إذا كان المرجع أجنبياً:

الكنية بالأحرف الكبيرة . الحرف الأول من الاسم تتبعه فاصلة . سنة النشر . وتتبعها معترضة (-) عنوان الكتاب ويوضع تحته خط وتتبعه نقطة . دار النشر وتتبعها فاصلة . الطبعة (ثانية . ثالثة) . بلد النشر وتتبعها فاصلة . عدد صفحات الكتاب وتتبعها نقطة . وفيما يلي مثال على ذلك:

-MAVRODEANUS, R1986- Flame Spectroscopy. Willy, New York, 373p.

ب . إذا كان المرجع بحثاً منشوراً في مجلة باللغة الأجنبية:

. بعد الكنية والاسم وسنة النشر يضاف عنوان البحث وتتبعه فاصلة، اسم المجلد ويوضع تحته خط وتتبعه فاصلة . المجلد والعدد (كتابة مختزلة) وبعدها فاصلة . أرقام الصفحات الخاصة بالبحث ضمن المجلة . مثال على ذلك:

BUSSE,E 1980 Organic Brain Diseases Clinical Psychiatry News , Vol. 4. 20 – 60

ج . إذا كان المرجع أو البحث منشوراً باللغة العربية فيجب تحويله إلى اللغة الإنكليزية و التقيد

بالبنود (أ و ب) ويكتب في نهاية المراجع العربية: (المراجع In Arabic)

رسوم النشر في مجلة جامعة البعث

1. دفع رسم نشر (20000) ل.س عشرون ألف ليرة سورية عن كل بحث لكل باحث يريد نشره في مجلة جامعة البعث.
2. دفع رسم نشر (50000) ل.س خمسون ألف ليرة سورية عن كل بحث للباحثين من الجامعة الخاصة والافتراضية .
3. دفع رسم نشر (200) مئتا دولار أمريكي فقط للباحثين من خارج القطر العربي السوري .
4. دفع مبلغ (3000) ل.س ثلاثة آلاف ليرة سورية رسم موافقة على النشر من كافة الباحثين.

المحتوى

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40-11	د . سنان عمار د. أحمد اسماعيل محمد إقبال أنق	كوفيد-19 والأشخاص النازحون داخلياً- الفئات الأكثر تضرراً والأقل حمايةً
76- 41	د . سوسن الشيخ محمود د. داليا سويد علي برهو الحسين	التزام الطبيب بالإعلام
102-77	د . سنان عمار د. أحمد اسماعيل محمد إقبال أنق	تعزيز الوصول إلى الهوية القانونية في سياق النزوح والعودة- تحليل قانوني للقانون رقم 13 لعام 2021 والمرسوم التشريعي رقم 07 لعام 2021
140-103	د . سنان عمار د. أحمد اسماعيل محمد إقبال أنق	تحديات حقوق الإسكان والأراضي والملكية للنساء السوريات النازحات والعائدات: إطار تحليلي

كوفيد-19 والأشخاص النازحون داخلياً - الفئات الأكثر تضرراً والأقل حمايةً

محمد إقبال أنق³ الدكتور أحمد اسماعيل² الدكتور سنان عمار¹

الملخص

كان لجائحة كوفيد-19 المسببة لفيروس كورونا تأثيراً هائلاً على كل بلد تقريباً في العالم. تتناول هذه المقالة بيان الآثار المباشرة وغير المباشرة لهذه الجائحة، وعمليات الإغلاق التي حصلت خلالها وما رافقها من آثار اقتصادية فاقمت من تبعاتها على السكان الأكثر ضعفاً، والأشخاص النازحين داخلياً، على وجه التحديد. تشير نتائج المقالة إلى التزام الدول القانوني، بموجب قانون حقوق الإنسان، للتصدي لهذه الجائحة وحماية الأشخاص النازحين داخلياً، ومع ذلك، فإن بعض تدابير الاحتواء للجائحة التي اعتمدها الدول المختلفة تنطوي أيضاً على تدخلات شديدة في عدد من حقوق الإنسان، بما في ذلك - على سبيل المثال لا الحصر - حرية التنقل والحق في الحرية الشخصية والحق في العمل والحق في التعليم. وخلصت المقالة إلى ضرورة أن تكون الاستجابة شاملة ومتكاملة، وأن التدابير الوقائية يجب أن تكون قانونية وضرورية ومتناسبة مع هدف حماية الصحة العامة بما يتوافق مع المتطلبات والمعايير القانونية، وأن يتم إدراج الأشخاص النازحين داخلياً في خطط اللقاح واستراتيجيات الحماية.

الكلمات المفتاحية:

النازحون داخلياً، جائحة كورونا، تأثير، حقوق الإنسان، النزوح الداخلي، الحماية، اللقاحات.

- 1- طالب دكتوراه في القانون العام، قسم القانون العام، كلية الحقوق، جامعة دمشق.
- 2- الأستاذ المساعد في القانون العام، قسم القانون العام، كلية الحقوق، جامعة دمشق.
- 3- الأستاذ المساعد في القانون العام، قسم القانون العام، كلية الحقوق، جامعة دمشق.

Introduction:

COVID -19 is having an unprecedented impact on all countries, both in terms of prompting the scaling of public health preparedness and response and protection of vulnerable populations, and in terms of requiring mitigation of broader social and economic impacts.⁴ People affected by humanitarian crises, particularly those displaced and living in communal settings, are often faced with challenges including vulnerabilities distinct from those of the general population. These vulnerabilities are further heightened by the disparate health and socio-economic impacts of COVID -19, and if not appropriately addressed could push IDPs even further behind other populations.⁵

Internal displacement is a cause for concern as the number of internally displaced persons annually is astounding. In 2017, 30.6 million people were forced out of their homes due to conflict and disasters.⁶ This slightly fell to 27.8 million in 2018 with 54.3% of total disaster displacement coming from the East Asia and Pacific while 69.1% of conflict displacement came from Sub-Saharan Africa.⁷ Unfortunately, 2019 saw a huge spike in new displacements at 33.4 million, noted as the highest in 12 years. The long-standing conflict and violence led to approximately 4.57 million new conflict displacements. More alarming is that 2019 holds the highest ever recorded total of conflict displacement at 45.7 million people and a

4- COVID-19 is a disease caused by a new strain of coronavirus. ‘CO’ stands for corona, ‘VI’ for virus, and ‘D’ for disease. Formerly, this disease was referred to as ‘2019 novel coronavirus’ or ‘2019-nCoV.’ On 11 March 2020, World Health Organisation (WHO) made the assessment that COVID-19 can be characterized as a pandemic. Further background information is available at: <https://www.who.int/news/item/27-04-2020-who-timeline---covid-19> [accessed 03 April 2021].

5- International Organisation of Migration (IOM), COVID-19 Mobility Impacts Update Series, Impact on IDPs, 16th edition, 11 October 2020, available at: <https://dtm.iom.int/reports/covid-19-%E2%80%94-impact-idps-16> [accessed on 27 March 2021].

6- Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council (NRC), Global Report on Internal Displacement, (2018). Geneva. Available at: <https://www.internal-displacement.org/global-report/grid2018/> [accessed 18 February 2021].

7- Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council (NRC), Global Report on Internal Displacement, (2019). Geneva. Available at: <https://www.internal-displacement.org/sites/default/files/publications/documents/2019-IDMC-GRID.pdf> [accessed 20 February 2021].

first time estimate of 5.1 million total disaster displacements leading to a final tally of 50.8 million IDPs.⁸

The COVID-19 pandemic has created multiple crises for internally displaced persons. Lockdowns have affected the organisations they may usually receive assistance from, which in many cases have struggled to provide the same amount and type of support as they previously had, while travel restrictions have limited the access of both aid and personnel to many regions in need.⁹ In camps as well as in dense urban areas where many IDPs reside, a lack of basic health infrastructure, overcrowding, and poor sanitation all contribute to the risk of transmission and infection. These direct health risks as well as secondary impacts on their protection, rights, livelihoods demonstrate the crucial need for increased and sustained investment in their protection and assistance around the globe.¹⁰

This article begins with the conceptual exploration of IDPs in the humanitarian setting, protection provided for their rights and the responsibility to protect them. It then examines the COVID-19 restrictions in the limits of human rights and determine on the consideration for compliance of the preventive measures with the international law. Findings indicated that public health is one of the identified legitimate aims which may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. The article also mapped the implications of COVID-19 on the lives of IDPs which not only increases humanitarian need but also exacerbates the existing and already complex barriers to IDPs seeking solutions. Among the dimensions are access to healthcare, issues of overcrowding, poor

8- Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council (NRC), "Global Report on Internal Displacement." (2020). Geneva. Available at: <https://www.internal-displacement.org/global-report/grid2020/> [accessed 20 February 2021].

9- Richard Skretteberg, "A global overview of displacement crises in 2019," available at: <https://www.nrc.no/shorthand/fr/79.5-million-people-displaced-in-the-age-of-covid-19/index.html> [accessed 01 April 2021].

10- IOM, "Populations at risk: Implications of COVID-19 for hunger, migration and displacement," November 2020, available at: https://www.iom.int/sites/default/files/populations_at_risk_-_implications_of_covid-19_for_hunger_migration_and_displacement.pdf [accessed 02 April 2021].

shelter, scarce resources, limited access to reliable information and vaccines.

The article ends with highlighting the efforts to respond to IDPs related COVID-19 challenges, including The UN Special Rapporteur on the human rights of IDPs, International Organization for Migration (IOM), United Nations High Commissioner for Refugees (UNHCR) and COVID-19 Global Humanitarian Response Plan (GHRP) considering the fact that the national authorities are responsible for public health responses and COVID-19 immunization while the role of the international organizations is complimentary. Access to vaccines shall be equal and non-discriminatory. The article draws attention to the international coordination mechanism support and the role of UNHCR and other UN agencies to ensure that IDPs are effectively included in national vaccine strategies.

Methods:

The objective of this paper is to determine the impact and consequences of the COVID-19 pandemic on IDPs as well as ensuring informed national and international response and accountability for provision of humanitarian assistance and further development of recommendations

The academic related articles which link IDPs protection to the COVID-19 are very limited in the Arab world. Hence, the methodology includes integrating direct reporting from the reports of the United Nation agencies including the International Organization for Migration (IOM), the United Nations High Commissioner for Refugees (UNHCR) and World Health Organisation (WHO) and international organisation of whom are the Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council (NRC). Sources are weighed for relevance and accuracy, and then condensed. Instances of reported cases of IDPs with COVID-19 are checked for confirmation as per reported by the IOM and UNHCR.

Questions explored in the paper include: what are the short-and longer-term effects of the pandemic and concomitant challenges on protection of IDPs? How would the preventive measures to contain

the pandemic be non-discriminatory and warranted under human rights law? Who is responsible to provide vaccines to IDPs and are there any international coordination to ensure IDPs get vaccinated? It then offers key take-aways and recommendations aimed at a variety of actors.

Result and discussion:

COVID-19 can affect anyone. For internally displaced people (IDPs), who already have difficulty accessing adequate housing essential services and a decent income, the impacts of the pandemic are likely to be significant. Although it is still too early to fully assess the effects of this unprecedented crisis on IDPs' lives, evidence is emerging of the ways in which the pandemic is heightening IDPs' existing vulnerabilities and creating new risks. Its immediate effects on health and wellbeing, and its longer term social and financial consequences mean that IDPs will need more assistance than ever.

Chapter One: Understanding internal displacement in the legal related context of COVID-19:

Considering that displacement may occur across borders such as refugee influxes, or within a country because of disasters or armed conflict, this paper only concentrates on the internally displaced persons who have been forced or obliged to flee or to leave their homes and do not, unlike refugees, across the national borders.¹¹ The justification lies in the fact that IDPs are generally more vulnerable to contracting diseases, like COVID-19, because of where they initially find shelter in a host community. As they step into a new city, they usually have no access to safe housing, which is worsened by the lack of proper support and helpful information on what to do. They also lack the necessary support systems to promote a secure and healthy life.

11- According to the 1951 Convention on the Status of Refugees, a "refugee" is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country." The UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, available at: <https://www.refworld.org/docid/3be01b964.html> [accessed 03 April 2021]

Section One: Exploring the concept and scope of definition of IDPs:

According to the Guiding Principles on Internal Displacement, (IDPs) are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border."¹² Analysis shows that the UN cites "armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters" as the causes of IDPs forced from their homes to another within an "internationally recognized state border". Is it time to expand and improve on this definition? Is an epidemic or a pandemic a new driver to displacement? Or has it always been an unseen or unrecognized variable? Beyond immediate responses to the growing social, economic, and physical insecurity globally, how do we address issues of the internally displaced in the face of a pandemic as they are more likely being excluded from the general narrative?

1. Rights of IDPs during pandemics:

Internally displaced persons enjoy human rights that are articulated by international human rights instruments and customary law. In situations of armed conflict, moreover, they enjoy the same rights as other civilians to the various protections provided by international humanitarian law. The pandemic further undermines progress on all dimensions of fragility. In times of crises, the most essential right is to access health.¹³ Once persons have been displaced, they retain a

12- While the UN Guiding Principles on Internal Displacement are not legally binding, their authority has been recognized globally, particularly as they draw from international humanitarian and human rights law. The Africa Union in particular has codified the UN Guiding Principles on Internal Displacement with the 2009 Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the so-called "Kampala Convention," preceded by the 2006 Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons). The UN High Commissioner for Refugees (UNHCR), Guiding Principles on Internal Displacement, 22 July 1998, available at: <https://www.refworld.org/docid/3c3da07f7.html> [accessed 03 April 2021]

13- IOM, UNHCR and WHO (2020), *Joint Press Release: The rights and health of refugees, migrants and stateless must be protected in COVID-19 response*, available at: <https://www.unhcr.org/news/press/2020/3/5e836f164/rights-health-refugees-migrants-stateless-must-protected-covid-19-response.html>. [accessed 03 April 2021]

broad range of economic, social, cultural, civil and political rights, including the right to basic humanitarian assistance (such as food, medicine, shelter), the right to be protected from physical violence, the right to education, freedom of movement and residence, political rights such as the right to participate in public affairs and the right to participate in economic activities (Principles 10-23).¹⁴

2. Responsibility to protect IDPs in humanitarian and emergency settings:

The primary responsibility for protecting internally displaced persons, and all persons within their own country, rests with the national authorities of the country. National responsibility is a core concept of any response to internal displacement. It is a fundamental operating principle of the international community and is routinely emphasized by governments themselves, as a function of their sovereignty.¹⁵ Yet, it is sometimes the very governments responsible for protecting and assisting their internally displaced populations that are unable or even unwilling to do so, and might even be directly involved in forcibly uprooting civilians.¹⁶

Reflecting on the realities of COVID-19, Authorities must ensure that internally displaced people have access to public health information in a relevant local language and a format that is easy to access, including for children and people with disabilities, and that they are covered by prevention and control measures. Authorities must adopt the necessary legal, policy and/or ad hoc measures to remove any barriers preventing internally displaced people from accessing health care and make sure that they have equal access to life-saving testing and treatment. Ensuring the participation of internally displaced people and host communities in decision-

14- The Guiding Principles on Internal Displacement compiles human rights and humanitarian law relevant to internally displaced persons. Further background are available at: <https://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx> [accessed 04 April 2021]

15- Global Protection Cluster (GPC), Handbook for the Protection of Internally Displaced Persons, June 2010, available at: <https://www.refworld.org/docid/4790cbc02.html> [accessed 3 April 2021]

16 Addressing Internal Displacement: Framework for National Responsibility, The Brookings Institution-Bern Project on Internal Displacement, 2005. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/04_national_responsibility_framework_Eng.pdf [accessed 04 April 2021]

making and implementation processes is also key to the success of any national and local response measures.¹⁷

Section Two: Examining the COVID-19 restrictions in the limits of human rights:

The national responses to the pandemic have been characterized by the taking of measures severely limiting the enjoyment of personal freedoms, to an extent that was unprecedented in democratic countries in times of peace. While taking different forms in various countries, the measures adopted broadly aim at enforcing social distancing among the population.¹⁸ The COVID-19 pandemic threatens the enjoyment of human rights, most prominently the right to life and the right to health. The right to life is most evidently affected by the outbreak of COVID-19, which has already killed tens of thousands of individuals around the world. States have a due diligence obligation to protect individuals from deprivation of life caused by private persons.¹⁹ This due diligence obligation could be read as including protecting individuals from threats to life posed by others carrying an infectious and deadly disease, such as COVID-19. Indeed, the obligations of States to respect and ensure the right to life also encompass foreseeable threats and the taking of measures to address life-threatening diseases.²⁰ One of the rights most clearly affected by the measures adopted by many States in response to the COVID-19 pandemic is freedom of movement. Many countries restricted movement within their borders.

17- Reducing the impact of the COVID-19 pandemic on internally displaced people, ICRC and IFRC, 16 June 2020, available at: <https://www.icrc.org/en/publication/reducing-impact-covid-19-pandemic-internally-displaced-people> [accessed 28 March 2021]

18- Helen Davidson, 'Around 20% of global population under coronavirus lockdown' *The Guardian* (24 March 2020), available at: <https://www.theguardian.com/world/2020/mar/24/nearly-20-of-global-population-under-coronaviruslockdown> [accessed 04 April 2021]

19- Alessandra Spadaro, COVID-19: Testing The Limits of Human Rights, European Journal of Risk Regulation as part of the Cambridge Coronavirus Collection, available at: <https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/covid19-testing-the-limits-of-human-rights/DED8334F9C1D793ACDB43054A2A9F19C> [accessed 25 March 2021]

20- General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, available at: <https://www.refworld.org/pdfid/4538838d0.pdf> [accessed 04 April 2021]

1. Compliance of preventive measures with the international law:

The question naturally arises of whether the measures briefly outlined above are legitimate. Human rights treaties specifically envision two tools which can and are being used by States to take measures to manage the COVID-19 pandemic which interfere with some human rights: limitations and derogations. Limitations allow precisely for the balancing of individual and collective interests and are built into several provisions of the International Covenant on Civil and Political Rights (ICCPR) and of the European Convention on Human Rights (ECHR) and its Protocols. Limitations to non-absolute rights are allowed when they are prescribed by law, pursuant to a legitimate aim and when such limitation is necessary in a democratic society and proportionate to the identified legitimate aim, meaning that no other less restrictive alternative is available.²¹ Covid- related legislations must comply with legal principles and should be scrutinized thoroughly by parliamentarians and human rights commissions. Any temporary legislation that potentially impacts a state's human rights legislation must be legal and proportional. While human rights law permits certain limitations on human rights in narrowly applicable situations, these should comply with the Principles on the Limitation and Derogation of Provisions.²² This is grounded in the general principle of 'non-retrogression', meaning that states should not permit human rights protections to deteriorate unless there are strong justifications, which puts the burden of justification on the state to demonstrate that it has only adopted a retrogressive measure after it has considered all the options carefully, has assessed the impact, and has fully used its maximum available resources. Public health is one of the identified legitimate aims which may be invoked as a ground

21- The UN Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, adopted on 24 April 2020, available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf> [accessed 04 April 2021]

22 UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, available at: <https://www.refworld.org/docid/4672bc122.html> [accessed 04 April 2021]

for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population.²³

2. Legal considerations in connection with the COVID-19 pandemic:

States must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction. They must observe the following requirements and conditions when exercising emergency powers in connection with the COVID-19 pandemic:²⁴

2.1 Where measures derogating from the obligations of States parties under the Covenant are taken, the provisions derogated from and the reasons for the derogation must be communicated immediately to the other States parties through the Secretary-General.

2.2 Derogating measures may deviate from the obligations set out by the Covenant only to the extent strictly required by the exigencies of the public health situation. Their predominant objective must be the restoration of a state of normalcy, where full respect for the Covenant can again be secured. Derogations must, as far as possible, be limited in duration, geographical coverage and material scope, and any measures taken, including sanctions imposed in connection with them, must be proportional in nature.

2.3 States parties should not derogate from Covenant rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights, such as article 12 (freedom of movement), article 19 (freedom of expression) or article 21 (right to peaceful assembly), in conformity with the provisions for such restrictions set out in the Covenant, or by invoking the possibility of introducing reasonable limitations on certain rights, such as article 9 (right to

23- UN Economic and Social Council, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) UN Doc E/CN.4/1985/4, para 22. Available at: <https://undocs.org/en/E/CN.4/1985/4> [accessed 04 April 2021]

24- Op.Cit. The UN Human Rights Committee, Statement on derogations from the Covenant in connection with the COVID-19 pandemic, P.2.

personal liberty) and article 17 (right to privacy), in accordance with their provisions.

2.4 States parties may not resort to emergency powers or implement derogating measures in a manner that is discriminatory, or that violates other obligations that they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed.

Chapter Two: Mapping the impact and implications of Covid-19 on IDPs:

The movement restrictions and other measures imposed by countries as a response to the pandemic are directly impacting the daily lives and circumstances of IDPs and host communities.²⁵

Livelihoods are being interrupted and access to healthcare, where it is available, remains limited. Many communities hosting internally displaced populations lack adequate investments in health, water and sanitation infrastructure, in addition to the issues of overcrowding, poor shelter, scarce resources, limited access to reliable information, social discrimination, and marginalization of certain groups, all of which have the potential to exacerbate social tensions and increase the risk of emergent localized conflict. The impact felt by these communities not only increases humanitarian need but also exacerbates the existing and already complex barriers to IDPs seeking solutions. When addressing COVID-19 and its impacts on IDPs, it is first important to understand how IDPs experience the pandemic and related challenges. This section briefly presents key areas where IDPs are most negatively affected.

1. Health implications:

IDPs are one of the most adversely affected populations by COVID-19. A recent World Health Organization editorial discusses the challenge of addressing COVID-19 within displaced populations due to factors such as the impossibility of social distancing in many contexts; poor treatment outcomes due to other infectious diseases such as tuberculosis and malaria; misinformation, and

25- Op.Cit. IOM, Populations at risk: Implications of COVID-19 for hunger, migration and displacement, November 2020, available at: https://www.iom.int/sites/default/files/populations_at_risk_-_implications_of_covid-19_for_hunger_migration_and_displacement.pdf [accessed 16 April 2021].

stigmatization that reduce IDPs' ability to receive information, testing, and treatment.²⁶ These issues are compounded by the broader structural issues of poor health and sanitation infrastructure in many countries where IDPs live.²⁷ The lack of testing and limited access to data on the pandemic in crisis-affected countries in Africa, for example, has led to fears that the COVID-19 response is fighting the epidemic in the dark, with widespread ramifications both within countries and around the globe.²⁸ It is assumed that in many low-income countries, particularly those affected by conflict, cases are much higher than official numbers suggest. Given the under-testing in many refugee camps, it is hard to fully understand the impact of the virus and the level of support required to combat it.

The Internal Displacement Monitoring Centre (IDMC) has published some reports and expert opinions regarding the internal displacement situation during the pandemic. In the 2020 mid-year update²⁹ there have been estimated 3.6 million displaced in Yemen. In addition, 2362 COVID-19 infections and 643 deaths have been confirmed in this country. until 04 March.³⁰ However, it is highly likely that these numbers are underestimated due to the low testing capacity and the current conflict situation in Yemen. An IDMC survey has reported that 45% of internally displaced people have reported symptoms consistent with COVID-19, as compared to 30% of non-displaced people.³¹ This could be motivated by displacement

26- Alemi, Q., Stempel, C., Siddiq H. & Kim, E. (2020) Refugees and COVID-19: achieving a comprehensive public health response. Bulletin of the World Health Organization. Available at: <https://www.who.int/bulletin/volumes/98/8/20-271080/en/> [accessed 16 April 2021].

27- Lancet, The. "COVID-19 will not leave behind refugees and migrants." *Lancet (London, England)* 395.10230 (2020): 1090. Available at: <https://pubmed.ncbi.nlm.nih.gov/32247379/> [accessed 16 April 2021].

28- IRC (2020) Press Release: As confirmed COVID cases more than double in July across African countries, a lack of testing in crisis-affected contexts keeps responders in the dark about the real spread of the disease, warns IRC. Available at: <https://www.rescue-uk.org/press-release/confirmed-covid-cases-more-double-july-across-african-countries-lack-testing-crisis> [accessed 16 April 2021].

29- Internal Displacements Monitoring Centre (2021) Internal Displacements Monitoring Centre. Available at: <https://www.internal-displacement.org/>. [accessed 17 April 2021].

30- Sydney C (2021) Displacement severity on the rise after a challenging year. Internal Displacements Monitoring Centre. <https://www.internal-displacement.org/expert-opinion/displacement-severity-on-the-rise-after-a-challenging-year>. [accessed 16 April 2021].

31- Yasukawa L (2021) New survey shows how COVID-19 exacerbates the critical needs of Yemens's IDPS. Internal Displacements Monitoring Centre. <https://www.internal->

conditions, lack of water, hygiene and overcrowding. This type of survey has been useful to produce estimates of the impact of the pandemic on the number of potential infected and to analyze barriers to access to treatment in positive cases. As of the September 2020, there were 186 confirmed COVID-19 cases reported among IDPs, with a total of 200 in Nigeria, 116 in Iraq, 03 in Somalia, 08 in Mali and 57 in South Sudan.³² The limited conduction of COVID-19 tests and the absence of reporting of infected cases resulted in the absence of any updated database of the full number of people infected with COVID-19.³³

2. Movement restrictions and immediate protection needs:

Countries have taken measures that restrict movement. Measures identified in this category are either introduced to control entry onto the territory of a State or to control movement within a territory. Measures directed at control of entry are the most commonly implemented movement restrictions. They include partial border closures, international flight suspensions and visa restrictions or suspensions.³⁴ Other measures directed at control of internal movement are curfews, and the establishment of surveillance and monitoring systems.

Lockdowns and restrictions on freedom of movement mean IDPs in both camps and urban areas face the risk of starvation amid lost livelihoods and limited assistance, as well as increased insecurity. Lockdowns have also affected the organisations they may usually receive assistance from, which in many cases have struggled to

displacement.org/expert-opinion/new-survey-shows-how-covid-19-exacerbates-the-critical-needs-of-yemens-idps. Accessed 4 Mar 2021

32- Op.Cit. IOM, Populations at risk: Implications of COVID-19 for hunger, migration and displacement, November 2020, available at: https://www.iom.int/sites/default/files/populations_at_risk_-_implications_of_covid-19_for_hunger_migration_and_displacement.pdf [accessed 16 April 2021].

33- Alexandra Bilak, IDMC Annual Report (2020), available at: <https://www.internal-displacement.org/sites/default/files/inline-files/Alexandra%20Bilak%20GRID%202020%20opinion%20piece%20AR.pdf> [accessed 17 April 2021].

34- IOM, Global Mobility Restriction Overview, Weekly Update: 12 April 2021, available at: <https://displacement.iom.int/system/tdf/reports/DTM-COVID19%20Global%20Overview%20Output%2012.04.2021%20FINAL.pdf?file=1&type=node&id=11253> [accessed 17 April 2021].

provide the same amount and type of support as they previously had, while travel restrictions have limited the access of both aid and personnel to many regions in need. In camps as well as in dense urban areas where many IDPs reside, a lack of basic health infrastructure, overcrowding, and poor sanitation all contribute to the risk of transmission and infection.³⁵ In Iraq, service delivery to some formal IDP camps improved due to easing of movement restrictions but service delivery remains a challenge in nine of the 62 camps in which humanitarian actors have recorded partial or no-access to the camps.³⁶

3. Livelihoods and Economic Impacts:

With possible long-term effects, internally displaced families are extremely vulnerable to livelihood loss and financial insecurity compared to members of the host city or community.³⁷ IDPs have suffered some of the largest economic impacts of lockdowns and restrictions on movement. These direct health risks as well as secondary impacts on IDPs protection, rights, livelihoods, and access to basic services. Many internally displaced people will be disproportionately affected by the economic repercussions of lockdown measures, given their already precarious circumstances and heavy dependence on casual labour and/or external support (from host communities, authorities and humanitarian organizations) to meet their basic needs. As such, they will be even more vulnerable to exploitation and abuse, including sexual violence.³⁸

35- UNHCR, Impact of COVID-19 on the protection of displaced and stateless populations, West Africa, 15 April 2020, available at: <https://data2.unhcr.org/en/documents/details/77587> [accessed 12 April 2021].

36- Op.Cit. IOM, COVID-19 Mobility Impacts Update Series, Impact on IDPs, 16th edition, 11 October 2020.

37- The World Bank (2019) Informing durable solutions for internal displacement, <https://www.worldbank.org/en/topic/poverty/publication/informing-durable-solutions-for-internal-displacement>. [accessed 17 April 2021].

38- Reducing the impact of the COVID-19 pandemic on internally displaced people, ICRC and IFRC, 16 June 2020, Page 02, available at: [Reducing the Impact of the COVID-19 Pandemic on Internally Displaced People | International Committee of the Red Cross \(icrc.org\)](#) [accessed 13 April 2021].

Authorities are primarily responsible for assisting internally displaced people within their jurisdiction, without discrimination. Many internally displaced people living in camps depend on humanitarian aid for survival.³⁹ Those living outside camps mostly depend on informal livelihood opportunities and support from host communities, both of which may be affected by COVID-19 containment measures and their economic repercussions. Where containment measures are imposed, authorities must organize and/or facilitate alternative methods of delivering aid and providing services to internally displaced people and host communities that protect the health of internally displaced people and humanitarian workers, taking into account the specific needs of older people, people with disabilities, children and other vulnerable groups.⁴⁰ In camps and camp-like settings, the provision of aid should be organized in line with appropriate measures for physical distancing, infection prevention and control and crowd management, to prevent too many people gathering in one place at the same time.⁴¹

4. Access to education:

Displaced children may face additional barriers in accessing education as schools or the organisations providing special educational programmes have been forced to close. This may include situations where displaced children have no access to the technological means or other support structures to continue their education from home.⁴² The negative outcomes of prolonged closures disproportionately impact displaced children. This situation is especially precarious for girls, most at risk of permanently

39 Op.Cit. UNHCR, Impact of COVID-19 on the protection of displaced and stateless populations, West Africa, 15 April 2020

40 UNHCR, Livelihoods, food and futures: COVID-19 and the displaced, a series of stories published on 11 April 2021, available at: <https://storymaps.arcgis.com/stories/4b999f79628644df84ccb7c10a9edd9e> [accessed 13 April 2021].

41- IASC, Interim Guidance: Scaling-up COVID-19 outbreak readiness and response operations in humanitarian situations including camps and camp-like settings, March 2020, available at: <https://interagencystandingcommittee.org/other/interim-guidance-scaling-covid-19-outbreak-readiness-and-responseoperations-camps-and-camp> [accessed 29 April 2020].

42- COVID-19 and the human rights: Guidance, OHCHR, available at: https://www.ohchr.org/Documents/Issues/Migration/OHCHRGuidance_COVID19_Migrants.pdf [accessed 14 April 2021].

dropping out. In response, UNHCR has taken measures to ensure displaced children and youth can access distance learning alternatives as part of national responses and offered health training for teachers and community awareness-raising activities on COVID-19, while upgrading water and sanitation facilities in and around learning spaces.⁴³

5. Gender-based violence (GBV) and child protection concerns:

Crises exacerbate age, gender, and disability inequalities and place women, girls, and other vulnerable populations at increased risk of sexual and gender-based violence, specifically intimate partner violence (IPV)⁴⁴. In fact, IPV may be the most common type of violence that women and girls experience during emergencies, resulting in profound physical and psychosocial harm. In the event of COVID-19 outbreaks in development and humanitarian settings, IPV incidents may surge if movement restrictions or quarantine measures are put in place. However, at the time when many women and girls need life-saving care and support more than ever, evidence suggests that those services are likely to decrease as service providers are overburdened and preoccupied with handling COVID-19 cases.⁴⁵ In principle, life-saving SGBV interventions should continue to ensure critical SGBV response services are available all the time for those who are in need, while non-life-saving activities with a large number of people (e.g., community sensitization/outreach, group awareness /information sessions) can

43- UNICEF, Policy Brief: Education during COVID-19 and beyond, August 2020, available at: https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/08/sg_policy_brief_covid-19_and_education_august_2020.pdf [accessed 14 April 2021].

44- Intimate partner violence", can be defined as a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner. Abuse is physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person. This includes any behaviors that frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound someone. UNHCR, Protecting forcibly displaced women and girls during the covid-19 pandemic, March 2021 available at: <https://reporting.unhcr.org/node/30367> [accessed 14 April 2021].

45- United Nations Population Fund (UNFPA), Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, published on 27 April 2020, available at: [Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, Female Genital Mutilation and Child Marriage | UNFPA - United Nations Population Fund](#) [accessed 14 April 2021].

be temporarily held off, or redesigned in a way to minimize the risks of infection.⁴⁶

UNICEF also estimates that more than 150 million children vulnerable during COVID-19, for three main reasons:⁴⁷ children have specific susceptibilities to infection during infectious disease outbreaks; Infectious diseases can disrupt the environments in which children grow and develop; and measures used to prevent and control the spread of infectious diseases can expose children to protection risks. Moreover, children face additional protection risks, if schools are closed, girls in development or humanitarian settings maybe less able to access health, hygiene, and protection messaging and their caregiving burdens may increase. The economic impact of public health emergencies may force families to take their children, particularly their daughters, out of school to work, potentially leading to transactional sex, or child early or forced marriages. All children are at risk of becoming separated from their caregiver during infectious disease outbreaks, as their caregiver may die, be quarantined, or become unavailable for other reasons.⁴⁸

Chapter Three: International efforts to respond to IDPs related COVID-19 challenges:

The COVID-19 pandemic has proved that it does not respect borders and cannot be faced by one country alone. The Covid- 19 complexity of challenges and its various forms and impacts entail a collective response to be multifaceted. For this reason, multilateralism, not unilateralism must be fostered to respond to the occurring multilateral challenges. The challenges that may be faced by global health efforts have Social, political, and economic dimensions, but despite those challenges, there's a critical need for synergy between all the global actors.

46- Ibid. UNFPA, Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, p. 3.

47- UNICEF, COVID-19 and children, UNICEF Data hub, March 2020, available at: <https://data.unicef.org/covid-19-and-children/> [accessed 15 April 2021].

48- UNICEF, Migrant and displaced children in the age of COVID-19: How the pandemic is impacting them and what can we do to help, June 2020, available at: <https://www.unicef.org/media/83546/file/Migrant-and-displaced-children-in-the-age-of-COVID-19.pdf> [accessed 15 April 2021].

1. The UN Special Rapporteur on the human rights of IDPs:

IDPs are at heightened risk of exposure to COVID-19 due to limited access to healthcare, water, sanitation, food and adequate housing, and often face discrimination. The UN Special Rapporteur on the human rights of internally displaced persons⁴⁹ called on governments to exercise their sovereign responsibility to protect them based on the Guiding Principles on Internal Displacement and without diverting from existing delivery of humanitarian assistance.⁵⁰ States must scale up humanitarian assistance to internally displaced persons in light of the pandemic, while taking the appropriate measures to prevent the transmission of COVID-19 and protect humanitarian workers. The Special Rapporteur highlighted that the situation of displacement might increase the already high vulnerability of older people and people with underlying health conditions to COVID-19. Displaced people with disabilities or belonging to minority groups or indigenous communities might face even more barriers in accessing essential services and healthcare.

2. The International Organization for Migration (IOM):

IOM⁵¹ has mentioned IDPs facing increasing risks of exposure to the virus and other diseases, further amplified by the rising number of the displaced, thus the need for relocation and improved monitoring. Likewise, the COVID-19 pandemic provides opportunities to closely examine the actual direct and reverberating impacts of an

49 The Special Rapporteur on the human rights of internally displaced persons is an independent human rights expert appointed by the United Nations Human Rights Council. The first Special Rapporteur on the human rights of internally displaced persons was appointed in September 2010, with the same functions as the former Representative of the Secretary-General on the human rights of internally displaced persons. Further background is available at: <https://www.ohchr.org/en/issues/idpersons/pages/idpersonsindex.aspx> [accessed 17 April 2021].

50 OHCHR, COVID-19: Do not forget internally displaced persons, UN expert urges Governments worldwide, 01 April 2020, available at: <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25763&LangID=E> [accessed 17 April 2021].

51- IOM, or as it was first known, the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME), was born in 1951 out of the chaos and displacement of Western Europe following the Second World War. Further background is available at: <https://www.iom.int/iom-history> [accessed 17 April 2021].

epidemic or pandemic on IDPs.⁵² During 2020, the Organization successfully supported nearly 35 million people in 60 countries impacted by humanitarian crises with COVID-19 related interventions; close to 37 million people with COVID-19-related risk communication messages and community engagement efforts; over 2,600 stranded migrants to return home in a safe and dignified manner; approximately 240,000 people to rebuild their livelihoods; 570 health facilities in dozens of countries with essential health services, including routine immunizations; and 19 million people with critical water, sanitation and hygiene supplies, and installed or rehabilitated over 19,200 handwashing facilities.⁵³

3. United Nations High Commissioner for Refugees (UNHCR):

UNHCR⁵⁴ is committed to working in close concert with national authorities and other relevant actors to ensure that all COVID-19 related prevention and response initiatives at the national level include persons of concern, while at the same time closely monitoring the application of these measures to ensure that people are not exposed to specific protection risks.⁵⁵ UNHCR and The Global Alliance for Vaccines and Immunizations (GAVI)⁵⁶ signed a Memorandum of Understanding (MoU) on 03 February 2020, with the overall goal of ensuring refugees and other forcibly displaced can access vaccines on par with nationals. The MoU also looks at

52- Op.Cit. IOM, COVID-19 Mobility Impacts Update Series, Impact on IDPs, 16th edition, 11 October 2020.

53- IOM, COVID-19 Response Report during 2020, available at: <https://www.iom.int/news/iom-looks-back-one-year-covid-19-response-appeals-usd-812-million-2021> [accessed 17 April 2021].

54 The office of the United Nations High Commissioner for Refugees (UNHCR) was created in 1950, during the aftermath of the Second World War, to help millions of Europeans who had fled or lost their homes. Further background is available at: <https://www.unhcr.org/history-of-unhcr.html>

55- Impact of COVID-19 on the protection of displaced and stateless populations, UNHCR, April 2020, <https://data2.unhcr.org/en/documents/details/77587> [accessed 17 April 2021].

56 The GAVI Alliance (formerly the Global Alliance for Vaccines and Immunisation) is a global health partnership of public and private sector organizations dedicated to “immunisation for all”. It provides a unique opportunity for a wide-range of partners to build consensus around policies, strategies, and priorities and to recommend responsibility of implementation to the partner with the most experience and insight in the area. GAVI has developed innovative approaches to international health and development. Further background is available at: https://www.who.int/workforcealliance/members_partners/member_list/gavi/en/ [accessed 17 April 2021].

expanding coverage and quality of immunization services, promoting equity in access and uptake of vaccines, and strengthening health systems at community and primary care level.⁵⁷ UNHCR has been advocating for the equitable inclusion of refugees, internally displaced and stateless populations in national vaccines plans through the COVAX Facility⁵⁸, a global initiative that brings together governments and manufacturers to ensure that COVID-19 vaccines reach all populations, including those in low income countries and those at risk of being left behind, such as refugees and stateless. Since the vast majority of the world's refugees are hosted in low- and middle-income countries, support of host country governments is crucial to ensure that refugees are also included in the roll-out of the vaccine.⁵⁹

4. COVID-19 Global Humanitarian Response Plan (GHRP):

The COVID-19 Global HRP is a joint effort by members of the Inter-Agency Standing Committee (IASC), including UN, other international organizations and NGOs with a humanitarian mandate, to analyse and respond to the direct public health and indirect immediate humanitarian consequences of the pandemic, particularly on people in countries already facing other crises.⁶⁰ The GHRP addresses the additional needs from the COVID-19 pandemic building on, but without prejudice to the ongoing humanitarian operations for pre-COVID-19 emergencies. Funding ongoing plans

57- UNHCR COVID-19 Preparedness and Response, 17 February 2020, available at: <https://reporting.unhcr.org/sites/default/files/UNHCR%20Global%20COVID-19%20Emergency%20Response%2017%20February%202021.pdf> [accessed 17 April 2021].

58 COVAX is one of three pillars of the Access to COVID-19 Tools (ACT) Accelerator, which was launched in April by the World Health Organization (WHO), the European Commission and France in response to this pandemic. Bringing together governments, global health organisations, manufacturers, scientists, private sector, civil society and philanthropy, with the aim of providing innovative and equitable access to COVID-19 diagnostics, treatments and vaccines. The COVAX pillar is focussed on the latter. Further background is available at: <https://www.gavi.org/vaccineswork/covax-explained> [accessed 17 April 2021].

59- UNHCR, Global COVID-19 Response Report during 2020, available at: <https://reporting.unhcr.org/sites/default/files/COVID-19%20progress%20report%20-%2004.10.20%20-%20FINAL.pdf> [accessed 17 April 2021].

60- The United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Global Humanitarian Response Plan COVID-19, December 2020, available at: <https://www.unocha.org/sites/unocha/files/Global-Humanitarian-Response-Plan-COVID-19.pdf> [accessed 17 April 2021].

remains an utmost priority given that people targeted in these plans will be the most affected by the direct and indirect impact of the pandemic. Ensuring that humanitarian plans are fully resourced is essential to avoid further loss of lives and suffering, and the aggravation of vulnerabilities. It will also help affected people to better cope with the new emergency and will be an important stabilizing factor in these fragile contexts.⁶¹

Chapter Four: Responsibility to provide vaccines to IDPs:

The national authorities are responsible for public health responses and COVID-19 immunization. The delivery and administration of the vaccines to beneficiaries will be coordinated by the national health authorities. National, international organizations and civil society partners may be requested to support these efforts.⁶²

1. Ensuring equal and non-discriminatory access to vaccines:

Everyone is entitled, on an equal footing with others, to enjoy access to all the best available applications of scientific progress necessary to enjoy the highest attainable standard of health.⁶³ The International Covenant on Economic, Social and Cultural Rights (ICESCR) requires States to achieve the progressive realisation of the rights protected by the Covenant, including the right to health, both individually and through international assistance and co-operation.⁶⁴ States which are able to do so should provide assistance, especially economic, scientific and technical, to developing countries for immunisation against major infectious diseases and for the prevention, treatment and control of epidemic

61- Ibid. OCHA, Global Humanitarian Response Plan COVID-19, December 2020, P. 4.

62- Op.Cit. ICRC and IFRC, Reducing the impact of the COVID-19 pandemic on internally displaced people, P. 03.

63- Committee on Economic Social and Cultural Rights (CESCR), General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the Covenant), para. 70. Available at: <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> [accessed 18 April 2021].

64- ICESCR article 2.1. See also CESCR General Comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para. 1, of the Covenant). Available at: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [accessed 19 April 2021].

and endemic diseases.⁶⁵ Access to vaccines and medicines is disturbingly uneven in many places, with poorer health outcomes for women and girls, national, ethnic, religious, racial and linguistic minorities, indigenous populations, persons living in poverty, persons with disabilities, migrants, particularly undocumented migrants, stateless persons, and others experiencing marginalisation. COVID-19 infection rates and outcomes for minorities and people in vulnerable groups have mirrored these patterns, in part due to structural inequalities and discrimination. These facts raise a substantial risk that these populations and groups will fall behind in vaccines rates relative to others. Women and girls risk discrimination in vaccine distribution for many reasons, including higher rates of poverty and the impact of societal norms.⁶⁶ Focused efforts are essential to remove barriers, pre-empt potential discrimination, and monitor distribution to ensure equality and avoid discrimination. These efforts are not only essential to protect human rights, but to ensure the effectiveness of the vaccines campaign. Vaccines distribution plans need to ensure full accessibility for persons with disabilities. Similarly, emerging issues including testing access and protocols, data collection and retention, “immunity passports”, surveillance and tracking tools, and the discriminatory treatment of persons who have recovered from COVID-19 all require intensive attention in this context.⁶⁷

2. The international coordination mechanism support:

As for the international coordination or donor support mechanisms for countries to roll out vaccines, the COVAX, the vaccines pillar of

65- CESCR, General Comment No. 14 (2000) on the right to the highest attainable standard of physical and mental health (art.14 of the Covenant), paras. 43-45. See also UN Human Rights Experts: Universal access to vaccines is essential for prevention and containment of COVID-19 around the world (9 November 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26484&LangID=E> [accessed 19 April 2021].

66- OHCHR Guidance Note on CEDAW and COVID-19, available at: https://www.ohchr.org/Documents/HRBodies/TB/COVID19/Guidance_Note.docx and COVID-19 and Women’s Human Rights (OHCHR), available at: https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf [accessed 18 April 2021].

67- Racial Discrimination in the COVID-19 Context (OHCHR), available at https://www.ohchr.org/Documents/Issues/Racism/COVID19_and_Racial_Discrimination.pdf

the Access to COVID-19 Tools Accelerator (ACT) is the global collaboration to accelerate the development, production, and equitable access to COVID-19 vaccines.⁶⁸ It aims to coordinate a global risk-sharing mechanism for pooled procurement and equitable distribution of COVID-19 vaccines: 187 countries and donors are engaged. More than 2 billion USD have been raised to support vaccines procurement for 92 Low- and Middle-Income Countries (LMICs) which have been identified as priority countries for support. Many of those countries are refugee hosting countries. The COVAX Fair Allocation Framework provides the guiding principles for an equitable distribution. Governments are encouraged to include all populations, independent of their residency and legal status, including refugees, IDPs, stateless persons, migrants, and other Persons of concern. The key to achieving this is inclusion of all populations into national vaccines strategies. However, recognizing that there may be humanitarian populations not included, COVAX partners have proposed a humanitarian buffer which commits 5% of real time COVID-19 vaccine volumes until the end of 2021 (~100m doses) to populations affected by conflict and humanitarian emergencies. The humanitarian buffer is expected to be approved in March 2021. The buffer is expressly reserved as a measure of last resort, not as substitute for not including refugees in national plans.⁶⁹

3. The role of UNHCR to support access of IDPs to vaccinates:

The IASC Principles are working very closely with GAVI, WHO, UNICEF and others within COVAX on the fulfilment of the allocation framework to all persons, including humanitarian populations, refugees, stateless, IDPs and migrants. To ensure that IDPs situations are effectively included in national vaccine

68- The ACT-Accelerator is organized into four pillars of work: diagnostics, treatment, vaccines and health system strengthening. Each pillar is vital to the overall effort and involves innovation and collaboration. Available at: <https://www.who.int/initiatives/act-accelerator> [accessed 18 April 2021].

69- The COVAX Humanitarian Buffer, 30 March 2021, available at: <https://www.gavi.org/vaccineswork/covax-humanitarian-buffer-explained> [accessed 18 April 2021].

strategies and the roll-out, advocacy efforts must be focused on all vulnerable groups, yet indiscriminatory. The health cluster will be a key partner in the work of UNHCR to support the access of IDPs to vaccines.⁷⁰

Conclusion:

This paper has shown the limited protection provided to contain and mitigate the spread of the COVID-19 pandemic across the world's most vulnerable, displaced populations is breath-taking in scope. The challenges require a strategy tailored to the specific needs and circumstances of the displaced population in question – a strategy that is workable in a context that will undoubtedly include significant resource constraints. That said, there are common elements across the countries and continents reviewed above, which lend themselves to key principles and recommendations that should be part of any effective humanitarian response to the pandemic. IDPs should be included in the national and local preparedness and response strategies and social protection plans relating to the Covid-19 pandemic. Authorities must ensure that internally displaced people have access to public health information in a relevant local language and a format that is easy to access, including for children and people with disabilities, and that they are covered by prevention and control measures. Authorities must adopt the necessary legal, policy and/or ad hoc measures to remove any barriers preventing IDPs from accessing health care and make sure that they have equal access to life-saving testing and treatment. They must ensure that all internally displaced persons have access to water, sanitation, facilities for personal hygiene, adequate housing and food.

The response to COVID-19 must be inclusive to be effective. International assistance to address the pandemic must reach all vulnerable populations, including the refugees, asylum seekers, and the internally displaced. Governments should ensure that the forcibly displaced living in both camp and non-camp settings are included in prevention and mitigation efforts. Humanitarian actors shall improve access to water, sanitation, and hygiene (WASH)

70- UNHCR, COVID-19 Vaccinations: Update No. 2, 24 March 2021, available at: <https://data2.unhcr.org/en/documents/download/85682> [accessed 19 April 2021].

facilities. International organisations should prioritize the deployment of qualified medical personnel to IDP-dense areas, along with personal protective equipment and other medical supplies such as gloves and masks for humanitarian health workers to ensure their safety in addressing COVID-19 outbreaks in displacement camps. They should take steps now to support establishment of capabilities within displaced communities for implementation of isolation and quarantine procedures in accordance with best medical and public health advice and practices. The operational humanitarian response shall also enhance communications and the flow of information through developing information campaigns to ensure displaced communities have accurate and current information about the coronavirus and response efforts. Humanitarian actors shall ensure that psychosocial support is available for women and girls' survivors of GBV and adapt to working modalities where IDPs can be further reached and assisted. Eventually, the United Nations shall accelerate the international efforts to provide vaccines to IDPs through consistent mechanisms with the States where they live in the letter and word of the international law. The COVID-19 pandemic does offer a critical moment to push for new forms of multi-stakeholder multilateralism and create multilateral innovation that offers a window of opportunity to help advance a long-overdue overhaul of global cooperation structures to advance protection of IDPs.

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التزام الطبيب بالإعلام

طالب دكتوراه: علي برهو الحسين قسم القانون الخاص في كلية الحقوق – جامعة دمشق

إشراف الأستاذ الدكتور فواز صالح

أستاذ في قسم القانون الخاص في كلية الحقوق – جامعة دمشق.

المُلخَص

تدور فكرة البحث حول مفهوم التزام الطبيب بالإعلام، وصفاته، وطبيعته القانونية، والأساس القانوني الذي بُني عليه، كما يتناول البحث تحديد مضمون هذا الالتزام، وذلك من خلال تحديد نطاقه في المراحل المختلفة التي يمرُّ بها العمل الطبي العادي، ابتداءً من مرحلة الفحص والتشخيص مروراً بمرحلة العلاج وصولاً إلى مرحلة ما بعد العلاج أو مرحلة المراقبة. كما يحاول هذا البحث أن يُحدّد نطاق التزام الطبيب بإعلام المريض في بعض الممارسات الطبية الحديثة، كعمليات التجميل والتجارب الطبية على الإنسان سواء ما كان منها ذا طابع علاجي أو ذا طابع علمي. كما تناول البحث الحالات التي تستدعي تخفيف هذا الالتزام كحالة المريض العاطفي شديد التأثر، وحالة المريض بمرضٍ خطيرٍ ميؤوسٍ من شفائه، وكذلك الحالات التي يُعفى فيها الطبيب من الالتزام بالإعلام كحالة الاستعجال والحالات التي تقتضيها المصلحة العامة، وتتازل المريض عن حقه بالإعلام. وحاولنا المقارنة بين النصوص ذات الصلة والتي وردت في قوانين بعض الدول كالقانون الفرنسي والقانون المصري والقانون الجزائري والقانون السوري. وفي نهاية البحث، حاولنا تلخيص ما توصلنا إليه من نتائج، أهمها أن الالتزام بالإعلام يُعدُّ ضماناً أساسية في حماية حق المريض في تقرير مصيره وحماية سلامته الجسدية وحقه بالحياة، كما أوصينا بضرورة سن قواعد قانونية خاصة في مجال العمل الطبي، تكون على قدر عالٍ من الدقة والكفاية بحيثُ تشمل كافة مجالات العمل الطبي على نحوٍ يجعلها قادرة على تحقيق هدفها في حماية المرضى وتطور العلوم الطبية.

الكلمات المفتاحية: الالتزام بالإعلام، العمل الطبي، التشخيص، العلاج، إعلام المريض.

The doctor's obligation to inform

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Summary

The research idea revolves around the concept of the doctor's commitment to the media, its qualities, its legal nature, and the legal basis on which it was built. The research also deals with defining the content of this commitment, by defining its scope in the different stages that the normal medical work goes through, starting from the stage of examination and diagnosis through the stage Treatment through to the post-treatment or observation stage. This research also tries to define the scope of the doctor's commitment to inform the patient about some modern medical practices, such as cosmetic operations and medical experiments on humans, whether they are of a curative nature or of a scientific nature. The research also dealt with cases that require reducing this obligation, such as the emotional state of the severely affected patient, the condition of the patient with a hopelessly serious illness, as well as the cases in which the doctor is exempt from the obligation to inform, such as a state of urgency and cases required by the public interest, and the patient waives his right to information. We tried to compare the relevant texts mentioned in the laws of some countries, such as French law, Egyptian law, Algerian law and Syrian law. At the end of the research, we tried to summarize the results we have reached, the most important of which is that adherence to the media is a fundamental guarantee in protecting the patient's right to self-determination and the protection of his physical integrity and right to life. It is sufficient to include all areas of medical work in a way that it is able to achieve its goal of protecting patients and advancing medical sciences.

Keywords: commitment to information, medical work, diagnosis, treatment, patient information.

مُقدِّمة:

تُعدُّ المهنة الطَّيِّبة فناً وعلماً، فهي تستلزم احترام كرامة المريض، والسَّهر على راحته. ويحكم الطَّبيب جانبيين أساسيين، الأول يقتضي من الطَّبيب المعرفة التَّامة بفن الطَّب وعلومه وبذل الجَّهد في تقديم خدماته ومسايرة التَّقدم العلمي؛ أما الجَّانب الآخر فهو الجَّانب الأخلاقي، ويتمثَّل بالتزام الطَّبيب بأداب المهنة، والتي تفرض عليه أن يكون رحوماً، ومتواضعاً، وواعياً في تصرُّفاته، ولا يتوانى عن مدِّ يد العون لمن يطلبها.

أدَّى هذا الأمر إلى ضرورة تقنين عمل الطَّبيب، ومحاولة تحقيق التَّوازن بين مصلحة المريض وضرورة المحافظة على جسده وصون حرمة من جهة، وإعطاء الطَّبيب حيزاً من الحرِّيَّة في القيام بعمله على النحو الفنيِّ المطلوب من جهةٍ أخرى.

ولا شكَّ في أنَّ العلاقة بين الطَّبيب ومريضه تتسم بعدة خصائص؛ أهمَّا أنَّها مبنية على ثقة المريض التَّامة بطبيبه، كما أنَّها تُعدُّ علاقة غير متكافئة؛ فبينما يتمتَّع الطَّبيب بالكفاءة والخبرة العلميَّة والاختصاص مما يجعله في المركز القوي، نجد أنَّ المريض يكون في مركز الضَّعيف بسبب مرضه من ناحية، وجهله بالأمر والمسائل المتعلِّقة بالمجال الطَّبي من ناحيةٍ أخرى.¹

وبغية تحقيق التَّوازن في هذه العلاقة فقد فرضت التَّشريعات، وقواعد أخلاقيات مهنة الطَّب، على الطَّبيب احترام إرادة مرضاه من خلال إلزام الطَّبيب بإحاطة المريض علماً بكل ما يتعلَّق بحالته المرضيَّة مع الأخذ بالحُسابان مدى نسيبة هذا الالتزام ودرجته مقارنةً بنوع المرض، وشخصيَّة المريض وحالته، ومن ثمَّ الحصول على رضاه بأيِّ تدخل طبي. هذا الرضاء الذي يمتاز بخصوصيته في نطاق العقد الطَّبي، إذ لا يمكن وصفه بالعمومية التي تُغطي كل فترة العلاج، إنما هو رضاء خاص بكلِّ علاجٍ على حدة، لذا فإنَّ كل علاجٍ جديد يقترحه

¹إكرام لروي، إرادة المريض في العقد الطبي في التَّشريع الجزائري، رسالة ماجستير، جامعة العقيد دراية أدرار، 2014، ص2. راجع أيضاً في المعنى ذاته، ياسر المرعي، عقد العلاج الطَّبي وآثاره، أطروحة دكتوراه، جامعة دمشق، 2014، ص 211.

الطبيب يحتاج إلى رضا جديد من المريض، وكل عمل طبي يقدمه الطبيب يحتاج إلى رضا خاص به.²

فيجب أن يُدلي الطبيب بالمعلومات الكافية لتبصير المريض، إمّا للمريض شخصياً أو لمن يُمثله، كما ينبغي أن تكون المعلومات دقيقة وواضحة بالنسبة إلى المريض كي يتمكن من اتخاذ قراره على نحو سليم، والضابط في مدى كفاية هذه المعلومات هو معيار موضوعي.

لم ينص المرسوم التشريعي رقم 12 لعام 1970 والمتعلق بتنظيم مزاوله المهنة الطبية في سورية على التزام الطبيب بالإعلام، وكذلك الأمر بالنسبة إلى قانون نقابة الأطباء رقم 16 لعام 2012 فقد جاء خالياً من ذكر هذا الالتزام في معرض حديثه عن واجبات الأطباء. بينما أتى نظام واجبات الطبيب وآداب المهنة في سورية لعام 1978 على الإشارة إليه، وذلك في المادة /17/ منه، إذ جاء فيها أنه " على الطبيب عدم إخفاء خطورة المرض عن المريض ولا يجوز له البوح بالترجيح المُميت إلا بكل حيطةٍ وحذر، ويستحسن أن يُحاط بالأهل علماً في حال إخفاء الأمر عن المريض".

- إشكالية البحث:

تتمثل إشكالية البحث بالنسبة إلى القانون السوري على نحو خاص بعدم وجود نصوص خاصة وواضحة تُبيّن مدى التزام الطبيب بإعلام المريض ومضمونه وطبيعته.

وتتمثل هذه الإشكالية في محاولة الإجابة عن التساؤلات الآتية:

- ما مفهوم التزام الطبيب بالإعلام وماهي طبيعته القانونية؟
- ما هو الأساس القانوني الذي بُني عليه هذا الالتزام؟
- ما هو نطاق تطبيق هذا الالتزام في مراحل العمل الطبي سواء أكان عادياً أم من الممارسات الطبية الحديثة الواردة على جسم الإنسان؟

² زينة غانم يونس العبيدي، إرادة المريض في العقد الطبي -دراسة مقارنة-، أطروحة دكتوراه، جامعة الموصل، 2005، ص9.

– ماهي الحالات التي يُخفف فيها هذا الالتزام، وماهي الحالات التي يُعفى فيها الطبيب من التزامه بالإعلام؟

– أهمية البحث:

للبحث أهمية من الناحيتين العلمية والعملية.

الأهمية العلمية للبحث: تكمن الأهمية العلمية للبحث في كونه يسלט الضوء على أحد أهم الالتزامات المُلقاة على عاتق الطبيب تجاه مرضاه، محاولاً بيان تفاصيله من خلال تحديد مفهومه وصفاته ومضمونه، فيكون بذلك عوناً لرجال الطب والقانون على حدٍ سواء في تحقيق مصلحة المرضى.

الأهمية العملية للبحث: تكمن الأهمية العملية للبحث من كونه يرتبط بالعمل الطبي، ولما لهذا العمل من أهمية بالغة بسبب تأثيره المباشر في الحياة الاجتماعية وتناوله لأكثر الحقوق قدسيةً عند الإنسان وهو حقه في الحياة والحق بالسلامة الجسدية، مع ما يتمتع به الجسد من حرمةٍ ومعصوميةٍ، مما يُلقى على المُشرع ضرورة سنّ القوانين التي تؤطر عمل الطبيب وتوضيح التزاماته ومنها الالتزام بالإعلام، حتى ينشر الطمأنينة في نفوس الأفراد.

– أهداف البحث:

يهدف البحث إلى بيان مفهوم التزام الطبيب بالإعلام، وتحديد صفاته ونطاق تطبيقه على مراحل وأنواع العمل الطبي؛ كما يهدف البحث إلى تحديد طبيعة التزام الطبيب بالإعلام، ومدى كفاية النصوص القانونية النافذة لصون حق المريض بالإعلام.

– منهج البحث:

اعتمدنا في هذا البحث المنهج التحليلي، وذلك من خلال استعراض النصوص القانونية المتعلقة بالبحث، ومدى ملائمة القواعد القانونية العامة لطبيعة التزام الطبيب بالإعلام، ومدى الحاجة إلى إصدار قواعد خاصة لسد أي فراغ تشريعي. كما اعتمدنا المنهج المقارن، وذلك من خلال استعراض بعض نصوص القوانين ذات الصلة كالقانون الفرنسي والقانون المصري، والقانون الجزائري، إضافةً إلى القانون السوري.

- خطة البحث:

تم تقسيم هذا البحث إلى مبحثين، تناولنا من خلالهما ماهية التزام الطبيب بالإعلام ومضمون الالتزام بالإعلام وخاتمة تلخص أهم النتائج والتوصيات التي توصلنا إليها، وذلك على الشكل الآتي:
المبحث الأول: ماهية الالتزام بالإعلام.

المطلب الأول: مفهوم الالتزام بالإعلام.

المطلب الثاني: الأساس القانوني لالتزام الطبيب بإعلام المريض.

المبحث الثاني: مضمون التزام الطبيب بالإعلام.

المطلب الأول: نطاق الالتزام بالإعلام.

المطلب الثاني: حالات تعديل الالتزام بالإعلام.

خاتمة تتضمن النتائج والتوصيات.

المبحث الأول

ماهية التزام الطبيب بإعلام المريض.

حتى نستطيع الإلمام بماهية التزام الطبيب بإعلام المريض، يجب علينا أن نُعرف بهذا الالتزام (مطلب أول). ومن ثمَّ نبين الأساس القانوني الذي يُبنى عليه التزام الطبيب بإعلام المريض (مطلب ثانٍ).

المطلب الأول: التعريف بالالتزام بالإعلام:

سنتطرق في هذا المطلب إلى توضيح معنى الالتزام بالإعلام (الفقرة-1-) ومن ثمَّ نبيِّن الطَّبيعة القانونيَّة للالتزام بالإعلام (الفقرة-2-).

الفقرة-1-: معنى الالتزام بالإعلام:

حتى يتوضَّح لدينا معنى التزام الطبيب بإعلام المريض، لا بُدَّ لنا من تعريف هذا الالتزام (أولاً)، ومن ثمَّ نبيِّن أوصافه (ثانياً).

أولاً: تعريف الالتزام بالإعلام:

عرّف جانب من الفقه الالتزام بالإعلام بأنه " إعطاء الطبيب لمريضه فكرةً معقولةً وأمينَةً عن الموقف الصّحي، بما يسمح للمريض أن يتّخذ قراره بالقبول أو الرّفص، ويكون على بينة من النتائج المُحتملة للعلاج أو للجراحة."³ ويؤخذ على هذا التعريف بأنه لم يوضّح طبيعة الالتزام بالإعلام، كما لم يتناول حالة ما إذا كان المريض غير قادر على إدراك تلك المعلومات وأثرها في صحّته.

في حين عرّفه آخرون بأنه " الوسيلة الصّروية للتأكد من تعاون المريض بالنسبة إلى التدابير التي ينوي الطبيب اتّخاذها في حالة المريض، ومن أجل العلاج الذي يقتضي اتّباعه، ويقع الطبيب في خطأ إذا لم يُعلم المريض عن المخاطر التي يحتملها العلاج المُقترح."⁴

ويؤخذ على هذا التعريف بأنه جاء قاصراً على ذكر أهميّة إعلام المريض بالمخاطر المُحتملة من العلاج الذي ينوي الطبيب القيام به، من دون إعلامه بمخاطر عدم العلاج، هذا من ناحية؛ كما أنه أغفل ذكر طبيعة الالتزام بالإعلام، وحالة ما إذا كان المريض غير مدرك لحالته الصّحية من ناحية أخرى.

ويرى قسم ثالث من الفقه أنّ الالتزام بالإعلام يعني " التزام الطبيب بإعلام المريض قبل مُباشرة العمل الطّبي عليه، بكل ما يتعلّق بحالته الصّحية والعلاج المُلائم له، ومخاطر العلاج ومخاطر الامتناع عن العلاج، أي أن التّبصير هو ذلك العرض المستوفي الذي يُقدّم للمريض بشأن حالته الصّحية بطريقة سهلة

³- وائل عزّت، الحدود الموضوعية للالتزام بالتّبصير بشأن نقل وزراعة الأعضاء البشرية، المجلة القانونية، جامعة الزقازيق، مصر، 2005، ص4.

⁴- مراد بن صغير، مدى التزام الطبيب بإعلام المريض - دراسة مقارنة -، المجلة النقدية للقانون والعلوم السياسيّة، عدد خاص، الجزء الأول، 2008، ص175، مُشار إليه لدى سايب عبد النور، الممارسات الطبيّة الحديثة الواردة على جسم الإنسان، أطروحة دكتوراه، جامعة مولود معمري، الجزائر، 2018، ص 316.

ومُبَسَّطة من دون الاكتفاء بالعبارات والمصطلحات العلميّة ذات المدلول الطّبي، التي لا يفهمها المريض بحُسابه رجلٌ عادي.⁵ وهذا التّعريف وعلى الرّغم من أنه وضّح مضمون الالتزام بالإعلام إلا أنه لم يذكر طبيعته، ولم يتناول حالة ما إذا كان المريض غير كامل الأهليّة القانونيّة، أو كان وضعه الصّحي لا يسمح بتبصيره بالذّات. ولقد حاول القضاء في فرنسا وضع تعريف لالتزام الطبيب بإعلام المريض وذلك بالتركيز على مواصفاته، حيثُ عرّفته محكمة النّقض الفرنسيّة في أحد قراراتها بأن " الإعلام يجب أن يكون سهلاً ومفهوماً وصادقاً وملائماً وتقريبياً".⁶ وعليه يُمكن أن تُعرّف الالتزام بالإعلام بأنه " واجب قانوني وأخلاقي على الطبيب، يتعيّن عليه بموجبه إعلام المريض أو من يقوم مقامه، على نحوٍ مُبسط ومفهوم بكل ما يتعلق بحالة المريض الصّحية، والطرائق العلاجيّة المُقترحة، ومخاطرها، والأضرار التي تنشأ عن العلاج أو عدم العلاج، كل ذلك قبل القيام بالعمل الطّبي على جسمه، ما لم تستدعي الظروف التّغاضي عنها، كحالة الضّرورة أو الاستعجال.

ثانياً: صفات الالتزام بالإعلام:

نصّت المادة 1111-2 من قانون الصحة العامّة الفرنسي على حق المريض بالإعلام من خلال تزويده بالمعلومات الكاملة عن حالته الصّحية، وعن العلاج المقترح والمخاطر المتوقعة.⁷ كما نصت المادة 21/ من لائحة آداب مزاولة

⁵- بوخرس بلعيد، خطأ الطبيب أثناء التّدخل الطّبي، رسالة ماجستير، جامعة مولود معمّري، الجزائر، 2011، ص69.

⁶- وائل عزت، المرجع السّابق، ص5.

⁷ Art 1111-2. C.S.P.F "Toute personne a le droit d'être informée sur son état de santé. Cette information porte sur les différentes investigations ، traitements ou actions de prévention qui sont proposés ، leur utilité ، leur urgence éventuelle ، leurs conséquences ، les risques fréquents ou graves normalement prévisibles qu'ils comportent ainsi que sur les autres solutions possibles et sur les conséquences prévisibles en cas de refus. Elle est également informée de la possibilité de recevoir ، lorsque son état de santé le permet ، notamment lorsqu'elle relève de soins palliatifs au sens de l'article L. 1110-10 ، les soins sous forme ambulatoire ou à domicile. Il est tenu compte de la volonté de la personne de bénéficiaire de l'une de ces formes de prise en charge. Lorsque ، postérieurement à l'exécution des investigations ، traitements ou actions de prévention ، des risques nouveaux sont identifiés ، la personne concernée doit en être informée ، sauf en cas d'impossibilité de la retrouver.

المهنة في مصر الصادرة سنة 2003 على مضمون هذا الالتزام، إذ جاء فيها أنه "على الطبيب أن يوفر لمريضه المعلومات المتعلقة بحالته المرضية، بطريقة مبسطة ومفهومة". كما نصت المادة 43 من مدونة أخلاقيات مهنة الطب في الجزائر على الصفات الواجب توافرها في الإعلام إذ جاء فيها أنه "يجب على الطبيب أو جراح الأسنان أن يجتهد لإفادة مريضه بمعلومات واضحة وصادقة بشأن أسباب كل عمل طبي". وفي سورية فقد نصت المادة 17/ من نظام واجبات الطبيب وآداب المهنة، الذي أقره المؤتمر العام لنقابة الأطباء في نيسان لعام 1978 والمُصادق عليه من وزير الصحة بتاريخ 25 حزيران لعام 1978، على أنه "على الطبيب عدم إخفاء خطورة المرض عن المريض ولا يجوز له البوح بالترجيح المُميت إلا بكل حيطةٍ وحذر، ويستحسن أن يُحاط الأهل علماً في حال إخفاء الأمر عن المريض".

ويتضح من خلال التعريف الذي قالت به محكمة النقض الفرنسية⁸ والنصوص التشريعية سالفة الذكر أنّ الالتزام بالإعلام يجب أن يكون سهلاً وواضحاً ومفهوماً وصادقاً وملائماً وتقريبياً؛ يُضاف إلى ذلك وجوب أن يكون هذا الالتزام سابقاً لمرحلة التّدخل الطّبي، وأن يكون كافياً وكاملاً، كما أنه يوصف بكونه من الالتزامات الممتدة.

1. الالتزام بالإعلام مرحلة سابقة للتّدخل الطّبي:

إذ يجب إعطاء المعلومات للمريض في وقتٍ مناسب، وتعدُّ هذه الصفة غاية في الأهمية، إذ من دونها سيفقد تنفيذ هذا الالتزام الفائدة التي شرّع من أجلها، ألا وهي مساعدة المريض على اتخاذ قراره بشأن العمل الطّبي المزمع القيام به، من

لكل فرد الحق في إبلاغه بحالته الصحية. وتتعلق هذه المعلومات بمختلف التّحقيقات أو العلاجات أو الإجراءات الوقائية المقترحة وفائدتها، ومدى ضرورتها وعواقبها، والمخاطر المتكررة أو الخطيرة التي يُمكن توقعها عادةً، فضلاً عن الحلول الممكنة الأخرى، والعواقب المتوقعة في حالة الرّفص، كما يتم إخطاره بإمكانية تلقيها عندما تسمح حالته الصحية بذلك. لاسيما عندما يخضع للرعاية التلطيفية المقصود في المادة 10-11 في العيادات الخارجية أو الرعاية المنزلية. تؤخذ في الحسبان رغبة الشخص في الاستفادة من أحد أشكال الرعاية هذه. عندما يتم تحديد مخاطر جديدة بعد إجراء التّحقيقات أو العلاجات أو الإجراءات الوقائية، يجب إبلاغ الشخص المعني، إلا في حال تعذر الحصول عليها.

⁸ الهامش رقم 7/ في الصفحة 8.

خلال رفده بالمعلومات الطبيّة الخاصّة بحالته المرضيّة، وطريقة المعالجة التي سيّتبّعها الطّبيب، ومخاطرها المُحتملة⁹. وعلى ذلك فقد نصّ قانون الصّحة العامّة الفرنسي في المادة 1111-1/4 على أن " كل شخص يتّخذ قراراً بشأن حالته الصّحية وذلك بعد إعلامه من قبل طبيبه.¹⁰ فالغاية من التزام الطّبيب بالإعلام هي منح المريض فرصة للتفكير بشأن حالته الصّحية؛ لاتّخاذ قراره الملائم بشأن قبول أو رفض العلاج المقترح، وإرادة واعية ومدركة لكل جوانب المرض، وما يتوصل به من علاج.¹¹

2- أن يكون الإعلام سهلاً وواضحاً ومفهوماً:

ويقتضي ذلك أن يراعى الطّبيب عند تزويد مريضه بالمعلومات التي تشرح وضعه الصّحي، وبطريقة العلاج التي سيتم اتّباعها، ومخاطرها، ومقدار الثقافة الطّبيّة للمريض، بحيث تكون مفهومه له، وواضحة، وبلغة عاميّة بعيدة عن استخدام المصطلحات الطّبيّة، وهذا يختلف بطبيعة الحال فيما إذا كان المريض شخصاً عادياً أو طبيياً، فالمعلومات التي تُعطى للمريض العادي غير تلك التي تُعطى للمريض الطّبيب، فالمرضى العادي قد لا يفهم المصطلحات الطّبيّة، ومن ثمّ لا يمكن الخوض معه بالتفاصيل العلميّة للعمليّة العلاجيّة، بعكس المريض الطّبيب الذي ينبغي إعلامه بالتفاصيل العلميّة للعمليّة العلاجيّة.¹² إذ يلتزم الطّبيب بمراعاة الظروف الشخصيّة للمرض، كالسن، والمستوى التّقافي،

⁹فواز صالح، تأثير التّفكّم العلميّ في مجال الطبّ الحيوي على حقوق المرضى، دراسة مُقارنة، مجلّة جامعة دمشق للعلوم الاقتصاديّة والقانونيّة، المُجلّد 25، العدد 2، 2009، ص 489.

¹⁰ Art 1111-4.C.S.P.F" Toute personne prend ، avec le professionnel de santé et compte tenu des informations et des préconisations qu'il lui fournit ، les décisions concernant sa santé."

¹¹-فايزة مزيت، الالتزام بالإعلان في العقد الطّبي بين القانونين الجزائري والفرنسي، رسالة ماجستير، كلية الحقوق والعلوم السّياسيّة، جامعة عبد الرحمن ميرة، 2015، ص 18. راجع أيضاً بهذا المعنى، بن صغير مُراد، مدى التزام الطّبيب بتبصير المريض، دراسة تأصيليّة مُقارنة، مجلّة الحقوق، الكويت، العدد 4، السنة 34، كانون الثّاني، 2010، ص 269.

¹²- ايمن خالد مساعده ونسرين محاسنه، الالتزام القانوني بتبصير المريض بالتّدخل العلاجي المُقترح، علوم الشريعة والقانون، المُجلّد 37، العدد 1، 2010، ص 187.

والجنس، فلا ينبغي على الطبيب أن يتعامل مع مرضاه بطريقة واحدة، وإنما ينبغي عليه أن يتفاعل مع كل مريض فيراعي ظروفه الخاصة عند إعلامه¹³.

3- أن يكون صادقاً وملائماً:

فالعلاقة بين المريض والطبيب تقوم على أساس من الثقة والتعاون المتبادل، ولهذا يجب على الطبيب إعلام المريض بطبيعة ونوع العلاج أو العمل الجراحي ومخاطره المحتملة بصدق، وأي إخفاء أو كذب غير مبرر من قبل الطبيب يجعل رضاء المريض مشوباً بالغلط أو التدليس؛ وتطبيقاً لذلك فإن الكذب الذي يهدف إلى تضليل المريض، وحمله على قبول طريقة معينة للعلاج يريدها الطبيب لهدف مادي أو تجريبي يُعد سبباً لانعقاد مسؤولية الطبيب¹⁴.

وينبغي أن يكون الإعلام مُلائماً لحالة المريض؛ فإذا كان المريض ممن يمتلكهم هاجس الخوف، أو أن من شأن إعلامه بكل المعلومات التي تشرح وضعه الصحي أن يزيد من سوء حالته، فلا بأس من إخفاء بعضها أو استخدام الكذب التفاؤلي « le mensonge optimiste » ، وهو الذي يؤدي إلى تحسين حالته الصحية ولا يؤثر في حالته النفسية، فوفق العميد كاربونييه (Carbonnier) لا يُعد الكذب خطأً موجباً للمسؤولية إذا كان هدفه الوحيد هو مصلحة المريض، ولكن لا يجب الوصول إلى هذا الهدف عن طريق التدليس والاحتيال فمصلحة المريض هي الأساس¹⁵.

4- يُعد الالتزام بالإعلام من الالتزامات الممتدة:

أي أنه لا يقتصر على مرحلة معينة من مراحل العمل الطبي وينتهي بانتهائها، بل إن الطبيب يلتزم باحترام إرادة المريض بإعلامه بكل مراحل العمل الطبي فحسباً أو تشخيصاً أو علاجاً، وحتى المرحلة اللاحقة على العلاج¹⁶، إذ لا

¹³ محمد حسين منصور، المسؤولية الطبية، دار الجامعة الجديدة، الإسكندرية، مصر، 2006، ص44.

¹⁴ سالم عبد الرضا طويرش الكعبي، التزام الطبيب بتبصير المريض، مجلة جامعة ذي قار، العراق، العدد3، المجلد 2، 2006، ص29.

¹⁵ سالم عبد الرضا طويرشي الكعبي، المرجع السابق، ص31.

¹⁶ زينة غانم يونس العبيدي، إرادة المريض في العقد الطبي " دراسة مقارنة"، المرجع السابق، ص22.

يكتفى بالإعلام السابق على مرحلة العلاج. فيمتاز هذا الالتزام بأنه من الالتزامات الممتدة.

الفقرة-2:- الطبيعة القانونية للالتزام بالإعلام:

تنقسم الالتزامات المدنية من حيث الهدف على نحو عام إلى التزام بتحقيق نتيجة أو التزام بغاية والتزام ببذل بعناية أو التزام بوسيلة. ويكون الالتزام المدني التزاماً بتحقيق نتيجة إذا كان المدين به ملزماً بتحقيق نتيجة معينة أيّاً كانت الوسائل التي يستخدمها في سبيل تحقيق تلك النتيجة، فإذا لم تتحقق هذه النتيجة عدّ المدين مخطئاً عن عدم تنفيذ التزامه، ومن ثمّ تقوم مسؤوليته المدنية تجاه الدائن، وهذا خطأ مفترض، فالقرينة قطعية بخصوص الخطأ ولكن يمكن نفي المسؤولية في هذه الحالة بإثبات السبب الأجنبي.¹⁷

أمّا الالتزام ببذل عناية أو الالتزام بوسيلة فهو الالتزام الذي لا يكون فيه المدين ملزماً بتحقيق نتيجة معينة، وإنما يلزم ببذل جهد معين في سبيل تحقيق تلك النتيجة. ومن ثمّ فإنّ عدم تحقق النتيجة المرجوة من الالتزام لا يفترض بالضرورة خطأ المدين، ويجب على الدائن إذا ادعى قيام مسؤولية المدين أن يثبت أنه لم يبذل العناية المطلوبة منه في تنفيذ الالتزام، والأصل أن تكون درجة العناية المطلوبة من المدين هي العناية التي يبذلها الشخص العادي، ما لم ينص القانون أو الاتفاق على زيادة هذا المقدار من العناية أو انقاصه.¹⁸

ومن هنا يُثار التساؤل حول الطبيعة القانونية لالتزام الطبيب بإعلام المريض، فهل هو التزام بتحقيق نتيجة (أولاً) أم التزام ببذل عناية (ثانياً).

أولاً: التزام الطبيب بإعلام المريض التزام بتحقيق نتيجة:

يرى بعض الفقه في الالتزام بالإعلام أنه التزام بتحقيق نتيجة، ويستند في ذلك إلى الغاية من الإعلام؛ وتتجلى في حماية إرادة المريض. إذ يقاس الوفاء بالالتزام هنا بتحقيق النتيجة المتمثلة في الغاية منه، وهي سلامة الإرادة. ولما

¹⁷فواز صالح، القانون المدني - مصادر الالتزام (ج1 المصادر الإرادية)، منشورات جامعة دمشق،

2012، ص341.

¹⁸عبد الرزاق السنهوري، الوسيط في شرح القانون المدني (نظرية الالتزام بوجه عام) (مصادر

الالتزام)، ج1، دار احياء التراث العربي، بيروت، لبنان، بلا/تا، بند 428، ص656.

كانت سلامة الإرادة أمراً باطنياً فيستدل على تحققها بإقرار المريض بالموافقة على العلاج بإرادة مستتيرة، بعد أن تمّ إعلامه بظروف المرض وسبل العلاج منه، والآثار التي قد تترتب عليه.

ويؤخذ على هذا الرأي أنه يحابي مصلحة الطبيب بما يكفله له من حماية جزئية من المساءلة القانونية خاصة في الحالات التي يستلزم التبصير الحصول على إقرار خطي من المريض بحصول التبصير، وبالمقابل يُعد قيوداً على حرية المريض الذي غالباً ما يجهل الكثير من تفاصيل وآثار التبصير.¹⁹

ثانياً: التزام الطبيب بإعلام المريض بالتزام بوسيلة:

يرى آخرون بأنّ الالتزام بالإعلام هو التزام بوسيلة، وذلك بالنظر إلى مضمون الالتزام بالإعلام، والذي يقوم على تزويد المريض بكم من المعلومات حول ظروف المرض وسبل العلاج المقترحة وما يترتب عليها من مخاطر مُحتملة. ويُنظر في الوفاء بالالتزام هنا إلى نوع الجهد الذي يبذله الطبيب في تزويد المريض بالمعلومات المطلوبة.²⁰

ونحن نرى بضرورة التمييز بين الالتزام بالإعلام بحد ذاته، إذ يُعدّ التزاماً بتحقيق نتيجة نظراً لوضوح النصوص التي توجب على الطبيب القيام به، والتي سبقت الإشارة إليها؛ وبين كم وكيف المعلومات التي يجب أن يتضمنها إعلام الطبيب لمريضه، إذ يُعدّ التزامه في هذه الحالة التزاماً ببذل عناية. والمعيار هنا معيار موضوعي يتمثل بالطبيب العادي الذي يوجد في ظروف الطبيب المُلتزم بالإعلام ذاتها، مع الأخذ بالحُسبان شخصية المريض المُستهدفة.

المطلب الثاني: الأساس القانوني لالتزام الطبيب بإعلام المريض:

على الرّغم من اتفاق الفقهاء على ضرورة الالتزام بالإعلام وأهميته، إلا أنهم اختلفوا على الأساس الذي يُبنى عليه هذا الالتزام.

¹⁹موسى رزيق، الالتزام بتبصير المريض: دراسة تحليلية، المجلة الدّولية للقانون، كلية الحقوق، جامعة الكويت، 2016، ص8.

²⁰الالتزام القانوني بتبصير المريض بالتدخل العلاجي المُقترح، أيمن خالد مساعده ونسرين محاسنه، المرجع السابق، ص187.

فمنهم من وجد أن الالتزام بالإعلام يجد أساسه في أخلاقيات ممارسة مهنة الطب، بينما يذهب آخرون إلى بنائه على أساس إنساني، وقال رأي ثالث إن التزام الطبيب بإعلام مريضه يجد مصدره في مفهوم حسن النية، بينما أكتفى آخرون بأن الالتزام بالإعلام يجد أساسه في التصوص القانونية ذاتها.

الفقرة -1-: الالتزام بالإعلام يجد أساسه في أخلاقيات ممارسة مهنة الطب:

إذ يتأكد وجود الالتزام بالإعلام من الناحية الأخلاقية من كون الإخبار بالحقيقة مطلوب بحد ذاته كمبدأ أخلاقي مستقل، كما أن فيه احترام لاستقلالية المريض في اتخاذ قراره واختيار ما يناسبه بكل حرية، وهو يُعبّر عن الوفاء بالعقد المُبرم ضمناً بين المريض والطبيب، ومن شأنه توطيد أواصر الثقة بينهما بما يُحقق التعاون المثمر والفعال بينهما.²¹

الفقرة -2-: الالتزام بالإعلام يُبنى على أساس إنساني:

ويتمثل ذلك في ضرورة احترام الحياة الإنسانية للمريض، من خلال ضمان حقه بالتفكير بهدوء وتروّي ليتمكن من تقرير مصيره، كما أن من شأن إخفاء الحقيقة عن المريض والكذب أن يُعدّ اعتداءً على حرية المريض وسلامة جسده، فهذا الالتزام يفرض باسم الإنسانية واحترام جسم الإنسان.²²

الفقرة -3-: التزام الطبيب بإعلام مريضه يجد مصدره في مبدأ حسن النية:

يُعدّ مبدأ حسن النية من أهم المبادئ القانونية التي تحكم مرحلتي تكوين العقد ونفيده، ولا تقتصر أهميته على هاتين المرحلتين، وإنما يُعدّ أيضاً من أهم المبادئ التي تحكم مرحلة ما قبل التعاقد.²³ وهو ذاته مُنبثق من الالتزام الإيجابي

²¹مراد بن صغير، مدى التزام الطبيب بإعلام المريض - دراسة مقارنة -، المجلة النقدية للقانون والعلوم السياسية، عدد خاص، الجزء الأول، 2008، ص 182.

²²- حسام الدين كامل الأهواني، المشاكل القانونية التي تُثيرها عمليات زرع الأعضاء البشرية، مجلة العلوم القانونية والاقتصادية، المجلد 17، العدد 1، مطبعة جامعة عين شمس، 1975، ص 92، مُشار إليه لدى ساييب عبد النور، المرجع السابق، ص 320.

²³فواز صالح، القانون المدني(المصادر الإرادية للالتزام)، منشورات جامعة دمشق، 2021، ص131.

بالصدق والأمانة مع المريض، الذي يُقابله الموقف السلبي المُتمثل بالغش أو الخداع أو التضليل وضمن السلامة.²⁴

الفقرة -4-: الالتزام بالإعلام يجد أساسه في النصوص القانونية ذاتها:

ويعرض أصحاب هذا الرأي في سبيل تدعيم وجهة نظرهم مجموعة من القوانين التي أوجبت على الطبيب تبصير مريضه قبل البدء بالعمل الطبي.²⁵ ونحن نرى أن عدّ النصوص القانونية أساساً للالتزام بالتبصير ينم عن سطحية في فهم جوهر هذا الالتزام؛ فالنصوص القانونية حين أوجبت هذا الالتزام فهي قامت بتأطيره قانونياً فقط من خلال التأكيد على الزاميته، لكن هذا لا يعني أنه لم يكن موجوداً. لذا فإننا نتفق مع الرأي القائل إنَّ واجب الطبيب بالتبصير يُبنى على أساس أخلاقي وإنساني من خلال حق الشَّخص في معرفة ما يؤثر في صحته البدنية، لأن الشَّخص لا يستطيع أن يبني رأياً في قبول العلاج من عدمه ما لم يبصِّره الطبيب بطبيعة العلاج وأهميته ونتائجه المتوقعة ومخاطره وبدائله.²⁶ لذا فالرأي عندي فإنَّ الالتزام بالإعلام يجدُ أساسه في الواجب الإنسان والأخلاقي الذي يفرض على الطبيب احترام إرادة مريضه؛ أي أننا نؤيد الرأيين الأول والثاني مجتمعين.

²⁴ -عز الدين قمرأوي، بعض التَّخمينات حول مسألة رضا المريض، مجلة جامعة وهران 2، العدد 2، 2018، ص 10.

²⁵ - وائل عزت، الحدود الموضوعية للالتزام بالتبصير بشأن نقل وزراعة الأعضاء البشرية، المرجع السابق، ص 5.

²⁶ - أيمن خالد مساعده ونسرين محاسنة، الالتزام القانوني بتبصير المريض بالتَّخل العلاجي المُقترح، دراسات، علوم الشريعة والقانون، المجلد 37/1، العدد 1، 2010.

المبحث الثاني

مضمون التزام الطبيب بالإعلام

سنحاول من خلال هذا المبحث أن نُبيّن نطاق الالتزام بالإعلام (مطلب أول)، ومن ثمَّ نحدد الحالات التي يُعفى فيها الطبيب من التزامه بإعلام المريض (مطلب ثانٍ).

المطلب الأول: نطاق التزام الطبيب بالإعلام:

في الواقع إن كان التزام الطبيب بإعلام مريضه قد غداً بديهياً، لما فيه من احترام لإرادة الشّخص في حقه بقرير مصيره، ولما يبعثه من تعزيز أو اصرّ الثقة بين الطبيب ومريضه، فإنّ نطاق هذا الالتزام لم يعد محدداً على نحوٍ شامل، فهناك من يقول إنّ الطبيب مُلزم بإعلام مريضه فقط بالمخاطر المتوقعة من تلك التي تكون نادرة الحدوث حتى لا يكون ذلك عائقاً أمام الطبيب في أداء مهمته؛ بينما يوجب آخرون الزام الطبيب بإعلام مريضه عن كل مخاطر العمل الطّبي حتى لو كانت بعيدة الاحتمال، من أجل يتمكن من اتّخاذ قراره على نحوٍ سليم وواعي؛ في حين ذهب قسم ثالث إلى أنّ الطبيب يملك سلطة تقديرية في اختيار المعلومات التي يُعلم بها مريضه، ويحكمه في ذلك معيار الحرص والعناية التي ينبغي أن يلتزم بها عند مباشرة العمل الطّبي؛ في حين يرى آخرون أنّ المعيار المُتبع في هذا الخصوص هو ما استقر عليه من قبل أهل المهنة أي وضع المعيار من قبل أهل الطّب أنفسهم.²⁷

ونحن نرى بضرورة التّفصيل في ذلك؛ فالعمل الطّبي لم يعد يقتصر في وقتنا الرّاهن على تقديم العلاج اللازم للمحافظة على سلامة حياة المريض، ومساعدته على تخطي آلامه أو التّخفيف منها؛ بل نجد بأنّ تطور الطّب أسهم على نحوٍ مباشر إلى استحداث مُمارسات طبيّة لم تكن موجودة في السّابق أو أنها كانت

²⁷سهي الصباحين ومنير هليل وفیصل شطناوي، الالتزام بالتبصير في الجراحة التجميلية- دراسة مقارنة بين القانون الأردني والقانون المصري والفرنسي، مجلة جامعة النجّاح للأبحاث (العلوم الإنسانيّة)، المجلّد 26، العدد7، 2012، ص1639.

محصورة على نطاق ضيق، وذلك كما في حال الطب التجميلي أو التجارب الطبية التي تتخذ من جسم الإنسان محلاً لها.

واستتبع ذلك بالضرورة اختلاف نطاق الالتزام بالإعلام، في حال كانت الأعمال الطبية عادية (العلاج العادي)، وبين ما إذا كانت تلك الأعمال من الممارسات الطبية الحديثة.

وعلى ذلك وجدنا أن نحدد نطاق التزام الطبيب في العمل العادي (الفقرة-1) ومن ثم نبيّن نطاق هذا الالتزام في الممارسات الطبية الحديثة (الفقرة-2).

الفقرة-1: نطاق الالتزام بالإعلام في العمل الطبي العادي:

يمر العمل الطبي العادي بثلاثة مراحل هي: مرحلة الفحص والتشخيص (أولاً) ومرحلة العلاج (ثانياً) ومرحلة ما بعد العلاج (ثالثاً).

أولاً: الالتزام بالإعلام في مرحلة الفحص والتشخيص:

تعدّ مرحلة التشخيص من أهم مراحل العمل الطبي؛ إذ سيبنى على نتائجها طريقة العلاج التي سيتبعها الطبيب مع مريضه، ويقصد بالتشخيص تحديد نوع المرض، عن طريق حصر خصائصه، وأعراضه، وأسبابه. وقد عرفه جانب من الفقه بأنه " مهمة يحاول فيها الطبيب معرفة المرض ودرجة خطورته، وتطوره، وجمع ما يحيط به من ظروف المريض، وحالته الصحية العامة وسوابقه المرضية، والتأثيرات الوراثية."²⁸ وعرفه آخرون بأنه " التعرف على طبيعة المرض وصفاته وأسبابه، أو تقدير الطبيب لحالة المريض اعتماداً على الأعراض التي ظهرت عليه."²⁹ كما يُعرف التشخيص بأنه " العمل الذي يحدد من خلاله الطبيب المرض، بحصر خصائصه، وأعراضه وأسبابه، ويحدد مخاطر حدوث المرض بدلالة ميول واستعداد المريض."³⁰ وغالباً ما يسبق التشخيص طرح الطبيب لبعض الأسئلة على المريض لمعرفة مكان الألم، والأعراض التي يُعاني منها،

²⁸فايزة مزيت، المرجع السابق، ص31.

²⁹حورية مسعودي وعبد السلام مسعودين، الخطأ الطبي، رسالة ماجستير، جامعة عبد الرحمن ميرة، الجزائر، 2015، ص41.

³⁰فهد دخين العدواني، العمل الطبي في القانون المقارن والأحكام القضائية، مجلة جامعة الكويت، العدد الثاني والثلاثون، الجزء الثاني، ص541.

كما قد يتطلب الوصول إلى التشخيص اخضاع المريض لبعض الفحوصات كالتحاليل الطبيّة³¹ أو صور الأشعة. فأساليب التشخيص قد تطورت على نحو ملحوظ، فبعد أن كانت تعتمد بشكلٍ أساسي على اللمس وقياس ضغط الدّم بجهاز بسيط، صارت اليوم تعتمد على تقنيات علمية متطورة كالتحاليل المجهرية وصور الأشعة بمختلف أنواعها، وقد يتطلب التشخيص استعمال أجهزة ذات تأثير في المريض، كما قد يتطلب عملاً جراحياً استكشافياً كأخذ خزعة من الورم لتحديد طبيعته، وهو ما يتعين شرحه للمريض لكي يُميّز بين التّدخل الطبي الذي يكون الغرض منه العلاج عن التّدخل الطبي الذي يكون الغرض منه التشخيص فقط. إذ يجب في هذه المرحلة أن يُبيّن الطبيب للمريض تأثير الأجهزة التي سيستخدمها في عمليّة التشخيص ومدى ضرورة اللجوء إليها، وذلك بطريقة سهلة وبأسلوب مبسط وواضح.

ثانياً: الالتزام بالإعلام في مرحلة العلاج:

تُعدُّ مرحلة العلاج المرحلة الثانية من مراحل العمل الطّبي العادي، فبعد أن يُشخّص الطبيب المرض ويتعرف على نوعه ومدى درجة تطوره لدى المريض، فإنه يشرع بعملية العلاج، ويصفها بعض الفقه بأنها التّطبيق العمليّ لما أقرّه التشخيص الطّبي.³² وعُرّفت مرحلة العلاج بأنها "تلك المرحلة التي يتم فيها اتّباع الوسائل المُمكنة من أجل الوصول بالمريض إلى الشفاء قدر المُستطاع."³³ وقد عرّف آخرون العلاج بأنّه "الوسيلة التي يختارها الطّبيب، والمؤدية إلى الشفاء من المرض، أو الحد من اخطاره أو التّخفيف من الآلام النّاتجة عنه، سواء بتسكينها أو القضاء عليها."³⁴

³¹ وينظم عمل المختبرات الطبية في سورية المرسوم التشريعي رقم /42/ لعام 2012.

³² منصور عمر المعاينة، المسؤولية المدنية والجناحية في الأخطاء الطبية، جامعة نايف العربية للعلوم الأمنية، ط1، الرياض، 2004، ص75.

³³ عبد الرشيد مأمون، التّأمين من المسؤولية المدنية في المجال الطّبي، دار النّهضة العربيّة، القاهرة، 1986، ص214، مُشار إليه لدى فائزة مزيت، المرجع السّابق، ص32.

³⁴ فهد دخين العدوان، العمل الطبي في القانون المُقارن والأحكام القضائية، المرجع السّابق، ص546.

فيقوم الطبيب في هذه المرحلة بوصف العلاج المناسب لحالة المريض، وقد يكون هذا العلاج عبارة عن دواء أو غيره كعمل جراحي مُعَيَّن، إذ يجب عليه في هذه المرحلة إعلام المريض بطريقة العلاج وتنبيهه أو ذويه إلى ضرورة اتباع ما يُحدد لهم من تعليمات، وتحذيره من خطورة النتائج التي تترتب على عدم مراعاتها، وذلك بعد شرح الوضع العلاجي أو الجراحي وآثاره. فيشدد على الحرص في طريقة تناول الجرعة المُصرَّح بها وعواقب تجاوزها، ويُبين الإرشادات والمواعيد والمقادير التي ينبغي التقييد بها وعواقب الإخلال بها.³⁵ فالطبيب مُلزم بإخبار مريضه بصدق وأمانة عن لزوم العمليّة الجراحية من عدمها، وعن إمكانية الاستغناء عنها بالعلاج الطويل، فالغاية من الإعلام في هذه المرحلة هي إعطاء فكرة معقولة وصحيحة ودقيقة عن حالته الصحيّة كي يتسنى له في ضوء تلك المعلومات أن يُقرر قبول أو رفض التّدخل العلاجي المُقترح.³⁶

ثالثاً: الالتزام بالإعلام في مرحلة ما بعد العلاج:

لا ينتهي التزام الطبيب تجاه مريضه عند التّشخيص أو تقديم الوصفة الطّبيّة اللازمة للعلاج، بل يجب عليه أن يراقب حالة المريض، ومدى نجاعة العلاج الموصوف، كما أنّ الطّبيب الجراح يلتزم بالمُتابعة الطّبيّة للمريض للتحقق من نجاح العمليّة وتقديم العلاجات التكميلية التي هي من اختصاص الطّبيب الجراح وحده.³⁷ وتعدّ هذه المرحلة غاية في الأهميّة لما يترتب عليها من تحقيق سليم للوصول إلى شفاء المريض.

وعليه فيجب على الطّبيب إعلام مريضه بمدى استجابة جسمه للعلاج الموصوف، ويرشده إلى مُتابعة الوصفة الطّبيّة الخاصّة به أو التّقليل من جرعات الدّواء، أو التّوقف عن أخذه أو استبداله. ويجب عليه أن يُعلم مريضه بالاحتياطات التي ينبغي أن يتّبعها لتجنب أيّ تعقيدات صحيّة في المستقبل

³⁵ منصور عمر المعاينة، المرجع السابق، ص76.

³⁶فايزة مزيت، المرجع السابق، ص21.

³⁷أعراب بوليل، الطّبيعة القانونيّة للعقد الطّبي، رسالة ماجستير، جامعة أكلي محند أولحاج، الجزائر،

2013، ص48.

وذلك في حال نجاح العلاج؛ أمّا في حال فشل العلاج، فيجب على الطبيب أن يكون صادقاً مع مريضه حتى لا يفوت عليه فرصة أخرى للشفاء. والهدف من الإعلام اللاحق للعلاج هو تقديم النصّح للمريض، فعلى سبيل المثال: إذا كان المريض يُعاني من مشكلات في القلب ينبهه إلى ضرورة عدم بذل جهد إضافي والإكثار من وقت الراحة، أو الابتعاد عن الأماكن المُخصصة للمدخنين إذا كان يُعاني من أمراض بالجهاز التنفسي، بمعنى أنّ على الطبيب أن يبوح للمريض بكل المعلومات الممكنة والمُتعلّقة بحالته الصحيّة حتى يُحافظ على نتيجة العلاج إذا كانت إيجابية.³⁸

الفقرة-2:- نطاق الالتزام بالإعلام في بعض الممارسات الطبيّة الحديثة:

سنقتصر في هذه الفقرة على بيان مدى التزام الطبيب بإعلام المريض في عمليات التّجميل (أولاً)، ومن ثمّ نحاول توضيح نطاق التزامه بالإعلام في عمليات التّجارب الطبيّة على الإنسان (ثانياً).

أولاً: الالتزام في الإعلام في عمليات التّجميل:

إنّ جراحة التّجميل تختلف عن الجّراحة العلاجيّة، فليس القصد من عمليات التّجميل الشفاء، وإنّما تكون الغاية منها إصلاح تشويه يخدش الدّوق، أو يُثير الألم النفسي، وعُزفت الجّراحة التّجميليّة بأنّها "الجّراحة التي لا يكون الغرض منها علاجُ مرض عن طريق التّدخل الجّراحي، بل إزالة تشويه حصل في جسم المريض، بفعل مُكتسب أو خلقي أو وظيفي".³⁹ فالجّراحة التّجميلية لا تتصف بضرورة عاجلة تستوجب التّدخل الطّبي السّريع، فهي تتم في ظروف عاديّة مُتأنيّة، فيكون أمام المريض مُتسع من الوقت للتّفكير واتّخاذ قراره في الخضوع للعمليّة التّجميلية من عدمه. ومن هذا المنطلق كان منطقيّاً أن يلتزم طبيب التّجميل بأن يُقدم للمريض معلومات كاملة عن مخاطر الجّراحة، سواء أكانت

³⁸فايزة مزيت، المرجع السّابق، ص34.

³⁹ منذر الفضل، المسؤوليّة الطبيّة في الجّراحة التّجميليّة، مكتبة دار الثقافة، عمان، الأردن، ط2، 1995، ص6.

متوقعة أم نادرة الحدوث، وسواء أكانت جسيمة أم قليلة الأهمية.⁴⁰ لذا فإنّ التزام الطبيب بإعلام مريضه في عمليات التّجميل يتّصف بالشّدة والاتساع.

ثانياً: الالتزام بالإعلام في التّجارب الطبيّة على الإنسان:

إنّ حدود التزام إعلام الطّبيب للأشخاص الخاضعين للتّجربة الطبيّة يختلف باختلاف طبيعتها؛ فبينما نجده يتّسع في التّجارب الطبيّة العلميّة على الإنسان، نلاحظ إمكانية تضيّقه في التّجارب الطبيّة العلاجيّة.

1. الالتزام بإعلام الأشخاص الخاضعين للتّجارب الطبيّة العلميّة:

إنّ انتفاء الغاية العلاجيّة المباشرة من التّجارب الطبيّة العلميّة جعل لسلامة الأشخاص الخاضعين الأولويّة فوق أي اعتبارٍ آخر، فالتّدخل الطّبيّ في هذه الحالة يتم في ظروف عاديّة لا تحتوي على ضرورةٍ أو استعجال؛ لذلك فمن واجب الطّبيب أن يُقدّم معلومات طبيّة دقيقة وشاملة.⁴¹

وهذا ما حدا بالمشرّعين إلى إلزام القائمين على التّجربة الطبيّة العلميّة بشرح مفصّل لطبيعة التّجربة وخطواتها، ومدّتها، وأثارها المتوقعة، من مخاطر وفوائد، وتعبيد الطّريق أمام تكوين رأي سليم تماماً من قبل المتطوعين في قبول الخضوع للتّجربة.

وقد تضمّن إعلان هلسنكي لعام 1975 وتعديلاته هذا الالتزام في مبادئه العامّة (المبدأ 9) إذ جاء فيه "ينبغي أن توضح للشخص الأهداف والطّرق والفوائد المرجوة والمخاطر الكامنة للتّجربة المراد المشاركة فيها."

ونصت على هذا الالتزام المادة /386/ من قانون الصّحة الجزائري لعام 2018، إذ جاء فيها "لا يُمكن إجراء الدّراسات العياديّة إلا إذا عبّر الأشخاص المستعدون للخضوع للدّراسة العياديّة، أو عند تعذر ذلك، ممثلوهم الشّرعيون عن موافقتهم الحرّة والصّريحة والمستتيرة كتابياً، وبعد اطلاعهم من طرف الطّبيب الباحث أو

⁴⁰سهى الصباحين ومنير هليل وفيصل شطناوي، الالتزام بالتّصوير في الجّراحة التّجميليّة - دراسة مقارنة بين القانون الأردني والقانون المصري والفرنسي، مجلة جامعة النّجاح للأبحاث (العلوم الإنسانيّة)، المجلد 26، العدد 7، 2012، ص 1640.

⁴¹سنوسي بن عودة، التّجارب الطبيّة على الإنسان في ظلّ المسؤوليّة الجّرائيّة - دراسة مقارنة - أطروحة دكتوراه، جامعة أبو بكر بلقايد، الجزائر، 2018، ص 164.

الطبيب الذي يُمثله، لاسيما عن: - الهدف من البحث ومنهجيته ومدته، والمنافع المتوخاة منه، والصعوبات والأخطار المتوقعة والبدائل الطبية المُحتملة... حقهم في رفض المشاركة في بحثٍ ما أو سحب موافقتهم في أي وقت دون تحمّل أية مسؤولية ودون المساس بالتكفل العلاجي لهم."

كما أنّ المُشرع المصري أكد على تبصير المتطوعين للخضوع للأبحاث الطبية التي تجري على الأدميين بأهداف وطريقة التجربة والمخاطر والفوائد المتوقعة إضافة إلى إعلامهم بمصادر تمويل التجربة، وذلك في نصّ المادة /55/ من لائحة مزاوله المهنة الصادرة سنة 2003، إذ جاء فيها أنه " يلتزم الباحث بتعريف المتطوعين تعريفاً كاملاً وبطريقة واضحة بأهداف البحث والطرق البحثية التي ستستخدم في البحث والفوائد المتوقعة منه والمخاطر المحتمل حدوثها ومدى إمكانية تأثيرها على المتطوعين، كما يلزم تعريف المتطوعين بمصادر تمويل البحث وهوية الباحث المسؤول وانتمائه المؤسساتي، وتأكيد حق المتطوع في التوقف عن تطوعه لإجراء التجارب والاختبارات أو الانسحاب الكامل من البحث دون أن يلحق به أية عواقب سلبية نتيجة توقيفه أو انسحابه."

وبالمثل نجد أنّ المادة 1-1122 من قانون الصحة العامة في فرنسا قد ألزمت الطبيب بواجب إعلام المتطوع بأهداف التجربة ومدتها، ومنهجية العمل، والفوائد والمخاطر المتوقعة والاحتمالية الطبية البديلة عند التوقف المفاجئ، وطرق التكفل الطبية في نهاية التجربة، ورأي لجنة أخلاقيات الطب وتصريح السلطة المختصة، والحصول على المعلومات الخاصة بحالته الصحية التي تكون بحوزة القائمين على التجربة، وإعلامه بإمكانية منعه من المشاركة في عدة أبحاث في وقت واحد في أثناء فترة التجربة المنصوص عليها في العقد، وإعلامه بتسجيله في قاعدة البيانات الوطنية، وحقه في رفض المشاركة في التجربة أو العُدول عنها متى أراد من دون أن تقوم مسؤوليته أو يلحقه ضرر.⁴²

⁴²Art 1122-1 : alinéa 1 et 3 C.S.P.F : » Préalablement à la réalisation d'une à la personne une information est délivrée «recherche impliquant la personne humaine qui y participe par l'investigateur ou par un médecin qui le représente. Lorsque

الأمر بحسب ما إذا كانت التجربة ستجري في ظروف عادية أم أنّ هناك حالة ضرورة أو استعجال.

أ- الالتزام بالإعلام في التجارب العلاجية العادية:

لا يختلف نطاق الالتزام بالإعلام في هذه الحالة مع حالة الإعلام في التجارب العلمية من حيث اشتراط أن يكون الإعلام شاملاً ومُفصلاً ودقيقاً. إذ يجب على الطبيب الذي سيقوم بالتجربة إعلام المريض أو من يُمثّله بضرورة التجربة والفوائد المتوخاة منها والأضرار والمخاطر المُحتملة عند القيام بها، والانعكاسات الصحيّة في حال عدم القيام بها، حتى يستطيع المريض أو مُمثّله القانونيّ التعبير عن رضاه بإجراء التجربة عن بيّنة ومسؤوليّة.

ب - الالتزام بالإعلام في حالة التجارب العلاجية التي تستدعيها ضرورة أو استعجال:

ونكون أمام حالة ضرورة أو استعجال إذا كان يُخشى وقوع خطر جسيم وحال يُهدّد حياة الإنسان أو سلامته البدنيّة أو العقليّة بصورة لا تحتمل التأخير؛⁴³ أي أن يكون المريض في حالة صحيّة لا تسمح بإعلامه بالعلاج وطريقته ونتائجه المتوقّعة. وتتجه معظم التشريعات إلى إعفاء الطبيب من التزامه بالإعلام على

وهذه ترجمة النّص " قبل إجراء أي بحث يتعلّق بالإنسان، يتم تقديم المعلومات إلى الشّخص المُشارك به، من قبل المستقضي أو من قبل الطبيب الذي يُمثّله، عندما يكون المُستقضي شخصاً مؤهلاً يتم توفير هذه المعلومات من قبل ذلك الشّخص، أو من قبل شخص مؤهل آخر يُمثّله. تتعلّق المعلومات على وجه الخصوص بما يأتي: 1 - هدف البحث ومنهجيّته ومدته 2 - المنافع المُنتظرة وفي حال اندرج البحث المذكور تحت البند 1 أو 2 من الفقرة 1 من المادة 1121 يجب ذكر القيود والمخاطر المتوقّعة بما في ذلك حالة إيقاف البحث قبل نهايته، 3- وذكر البدائل الطبيّة المُحتملة 4- إجراءات الرعاية الطبيّة المتوقّعة في نهاية البحث إذا كانت هذه الرعاية ضرورية في حالة الإنهاء المُبكر للبحث أو الاستبعاد من البحث، 5- وإذن السلطة المُختصة المنصوص في المادة 1123-1 و تفويض السلطة المُختصة المذكورة في المادة 1123-12. 6- منع المُشاركة في وقت واحد في بحث آخر أو بمدة الاستبعاد 6 مكرر- فيما يتعلّق بالبحوث لغايات تجارية يجب ذكر شروط دفع التّعويض والتكاليف ذات الصّلة بالبحوث الإضافية إن وجدت في ظل الشّروط المنصوص عليها في المادة 1121-16-7. وعند الاقتضاء، ضرورة معالجة البيانات الشّخصية وفقاً لأحكام المادة 69 من القانون رقم 78-17 المؤرخ في 6 كانون الثاني 1978 المتعلّق بمعالجة البيانات والملفات والحريات. يتم إبلاغ الشّخص المطلوب مشاركته بحقه بالاطلاع أثناء البحث أو في نهايته بالمعلومات المُتعلّقة بصحته، التي يحتفظ بها المستقضي أو الطبيب أو الشّخص المؤهل الذي يُمثّله.

⁴³فايزة مزيت ولعلجة معوشي، الالتزام بالإعلام في العقد الطّبي بين القانونين الجزائري والفرنسي، المرجع السابق، ص44.

أن يُمارس عمله بكل أمانة ومصداقية، والضرورة تُقدّر بقدرها، فإذا كان للمريض أقرباء موجودون وجب إخبارهم، وإلا فيجب على الطبيب أن يُقدّم العلاج اللازم متغاضياً عن واجب الإعلام أو حتى أخذ الموافقة، وهو ما سنتحدث عنه بالتفصيل عند استعراض حالات الإعفاء من الالتزام بالإعلام.

المطلب الثاني: حالات تعديل الالتزام بالإعلام:

صحيح أنّ التزام الطبيب بإعلام مريضه يُشكّل ضماناً لاحترام إرادته في قبول التدخّل الطبيّ أو عدم قبوله، وعلى الرّغم من تغيّر نطاق هذا الالتزام اتساعاً وتضييقاً، إلا أنّ هناك حالات مُعيّنة يُخفف فيها التزام الطّبيب بالإعلام (الفقرة-1) وحالات أخرى يُعفى فيها الطّبيب من التزامه بالإعلام (الفقرة-2).

الفقرة-1:- حالات تخفيف الالتزام بالإعلام:

لما كانت الغاية من الإعلام حماية مصلحة المريض، ومساعدته على اتّخاذ قراره بما يجب أن يفعل بجسده، لذا يجب عدم المُبالغة بالإعلام لدرجة تجعله يعزف عن قبول العلاج، مما يلقي على كاهل الطّبيب حجب بعض المعلومات عن مريضه مُراعاةً لحالته النفسيّة. وقد نصّ على ذلك المُشرّع الجرائري في المادة 51 من مدونة أخلاقيات مهنة الطّب إذ جاء فيها أنه " يُمكن إخفاء مرض خطير عن المريض، لأسباب مشروعة يقررها الطّبيب أو جراح الأسنان بكل صدقٍ وإخلاص، غير أنّ الأسرة يجب إخبارها إلا إذا كان المريض قد منع مُسبقاً عملية الإفشاء هذه، أو عيّن الأطراف التي يجب إبلاغها بالأمر".

وعلى ذلك تنص المادة 17/ من نظام واجبات الطّبيب وآداب المهنة في سورية لعام 1978، إذ جاء فيها أنه " على الطبيب عدم إخفاء خطورة المرض عن المريض ولا يجوز له البوح بالترجيح المُميت إلا بكل حيطةٍ وحذر، ويستحسن أن يُحاط الأهل علماً في حال إخفاء الأمر عن المريض".

وعليه يُمكن القول إنّ تخفيف التزام الطبيب بإعلام مريضه يكون في حالتين: الحالة الأولى عندما يكون المريض عاطفياً وشديداً متأثراً (أولاً)، والحالة الثانية إذا كانت حالته ميؤوس منها (ثانياً).

أولاً: حالة المريض العاطفي شديد التأثير:

قد يكون المريض من الأشخاص العاطفيين والحساسين وشديدي التأثير، مما يجعل الطبيب في وضع صعب في إمكانية الإدلاء بكافة المعلومات عن حالته المرضية، والتي من شأنها أن تؤثر سلباً في حالته النفسية وتقلل فرص الشفاء. لذا يجب على الطبيب في هذه الحالة إنقاص كمية المعلومات التي يُلقِيها على مسامح المريض إلى الحد المعقول والمفيد لحالة مريضه.

ثانياً: حالة المريض بمرض ميؤوس من شفائه:

إذ أنّ هناك العديد من الأمراض التي لا يزال الطب عاجزاً عن إيجاد العلاج الشافي لها، كمرض السرطان، ونقص المناعة المكتسب (الإيدز)، فالنتيجة الحتمية لمثل هذه الأمراض حتى هذه اللحظة هي الموت. لذا فإنّ من شأن مجابهة المريض بحقيقة مرضه أن يؤدي إلى غرس اليأس في نفسه، والامتناع عن تلقي العلاجات المتاحة.

لذا يجب على الطبيب أن يفعل ما بوسعه لزرع روح الأمل لدى مريضه، وفي ذلك ذهب الأطباء في فرنسا إلى ضرورة إخفاء مثل هذه الأمراض عن المرضى وذلك لزرع الأمل والطمأنينة في أنفسهم؛ إضافة إلى ذلك فليس من مصلحة المريض إخباره بالعواقب المميتة لمرضه الخطير لأن ذلك سيزيد حالته سوءاً وإحباطاً.⁴⁴

الفقرة -2-: حالات إعفاء الطبيب من التزامه بالإعلام:

إنّ مصلحة المريض لها الاعتبار الأول والأخير في العمل الطبي، فغاية العمل الطبي هي انقاذ المريض ومحاولة شفائه أو التخفيف من آلامه قدر المستطاع، لذا فقد تستدعي مصلحة المريض ضرورة المباشرة بالتدخل الطبي من دون إعلامه، وذلك فيما لو استدعى لهذا التدخل ضرورة مُستعجلة (أولاً)، أو كان من شأن إخباره بالحقيقة أن يأتي بتصرف يضر بالمصلحة العامة (ثانياً)، وأخيراً فقد يتنازل المريض عن حقه بالإعلام لأسباب عديدة ويجب أن يحترم الطبيب في ذلك إرادة المريض (ثالثاً).

⁴⁴فايزة مزيت، المرجع السابق، ص44.

أولاً: حالة الاستعجال:

ونكون أمام حالة ضرورة أو استعجال إذا كان يُخشى وقوع خطر جسيم وحال يُهدّد حياة الأُنسان أو سلامته البدنيّة أو العقليّة بصورة لا تحتّم التّأخير؛⁴⁵ أي أن يكون المريض في حالة صحّيّة لا تسمح بإعلامه بالعلاج وطريقته ونتائجه المتوقّعة، ففي هذه الحالة يُعفى الطّبيب من التّزامه بالإعلام على أن يُمارس عمله بكلّ أمانة ومصداقية، والضرورة تُقدّر بقدرها، فإذا كان للمريض أقرباء موجودون وجب إعلامهم، وإلا فينبغي على الطّبيب أن يُباشر بالعلاج المُناسب متغاضياً عن واجب الإعلام. وهو ما أخذ به المُشرّع الفرنسي في المادة 1111-2 من قانون الصّحة العامّة،⁴⁶ وكذلك ما نصّت عليه المادة 4127-9 من القانون ذاته، إذ جاء فيها أن " كل طيبب يواجه أو يُخطر أنّ مريضاً أو جريحاً في خطر، عليه أن يقدم له المُساعدة أو يتحقّق من أنّه لقي العناية الضروريّة." ⁴⁷ كما نصت عليه المادة /344/ من قانون الصّحة الجّزائري إذ جاء فيها أنه " في حال رفض علاجات طبيّة يُمكن اشتراط تصريح كتابي، من المريض أو من مُمثّله الشّرعي، غير أنّه في حالات الاستعجال أو في حالة مرض خطير أو مُعدّ، أو عندما تكون حياة المريض مُهدّدة بشكلٍ خطير، يجب على مهني الصّحة أن يُقدّم العلاجات، وعند الاقتضاء تجاوز الموافقة".

ثانياً: ضرورات المصلحة العامّة:

قد تقتضي المصلحة العامّة اتّخاذ بعض التدابير الصّحية وذلك من دون إعلان الفئات المُستهدفة ومن دون حاجة إلى إذنه. كالفحوصات التي يباشرها الطّبيب المدرسي على نحوٍ دوري، أو التطعيم الإِجباري، كالتطعيم ضد الحصبة أو شلل

فايزة مزيت ولعجة معوشي، الالتزام بالإعلام في العقد الطّبي بين القانونين الجزائري والفرنسي، المرجع السابق، ص44.

⁴⁶ Art 1111-2.C.S.P.F «... Cette information incombe à tout professionnel de santé dans le cadre de ses compétences et dans le respect des règles professionnelles qui lui sont applicables. Seules l'urgence ou l'impossibilité d'informer peuvent l'en Dispenser.»

⁴⁷ Art 4127-9; C.S.P.F.' Tout médecin qui se trouve en présence d'un malade ou d'un blessé en péril ou ' informé qu'un malade ou un blessé est en péril ' doit lui porter assistance ou s'assurer qu'il reçoit les soins nécessaires.

الأطفال، وكذلك الفحص الإجباري قبل الزواج، والفحوصات التي تُجرى على المكلفين بالخدمة العسكرية.

وكذلك الأمر يُعفى من الإعلام الطبيب الذي أكتشف أنّ المريض يُعاني من مرضٍ مُعدٍ ولمس فيه إمكانية إلحاق الضرر بالآخرين، وعليه أن يُسارع في إخبار السلطات المعنية، وعلى ذلك تنص الفقرة 3 من المادة 46 من المرسوم التشريعي رقم 12 لعام 1970 إذ جاء فيها " على ذوي المهن الطبيّة التّقيّد بالواجبات الآتية:3- الإخبار عن الأمراض السارية وفق القوانين النّافذة".

ولعلّ الشاهد القريب عن هذا الفرض ما لاحظناه من تصرفات بعض المرضى المُصابين بفايروس كورونا، إذ بمجرد علمهم بطبيعة مرضهم باتوا يتصرفون بطريقة لا تمت للإنسانية بأي صلة، فنجدهم لا يدخرون جهداً في محاولة نقل العدوى إلى الغير من خلال اسالة اللعاب على أبواب المصاعد ورفوف المحال التجاريّة والسعال في وجوه من يُصادفونه.

ثالثاً: تنازل المريض عن حقه في الإعلام:

شُرِعَ الالتزام بالإعلام لحماية مصلحة المريض، من خلال إحاطته علماً بحالته الصحيّة، وبطريقة العلاج المُقترحة، وشرح تفاصيلها بالحدود التي بيّناها أعلاه، ولمّا كان الأمر كذلك، فلا مانع من أن يتنازل المريض من حقه في الإعلام، وهو عندما يقوم بذلك فإنه يكون مدفوعاً بأسباب عدة منها ثقته المُطلقة بالطبيب أو خوفه مما قد يسمعه، وعلى الطبيب في هذه الحالة أن يحترم رغبة مريضه.

وقد نصّ قانون الصّحة العامّة في فرنسا على هذه الحالة في المادة 1111-2-1111-2 إذ جاء فيها أنه " يجب احترام إرادة المريض الذي يرغب في أن يبقى جاهلاً بتشخيص حالته أو التّوقع الطّبي بشأن هذه الحالة."⁴⁸

⁴⁸ Art 1111-2.C.S.P.F :La volonté d'une personne d'être tenue dans l'ignorance d'un diagnostic ou d'un pronostic doit être respectée ، sauf lorsque des tiers sont exposés à un risque de transmission

لكن وعلى الرغم من هذا التنازل من جانب المريض يرى بعض الفقهاء بأن الطبيب يبقى مُلزماً بتقديم النصائح والإرشادات الضرورية لحماية صحة المريض.⁴⁹

وفي رأيي الشخصي فإن ما ذهب إليه هؤلاء الفقهاء من بقاء الطبيب مُلزماً بتقديم النصائح والإرشادات الضرورية لحماية صحة المريض على الرغم من تنازله عن حقه في الإعلام جديرٌ بالاتباع لما فيه من حماية إضافية للمريض.

الخاتمة:

من خلال بحثنا لموضوع التزام الطبيب بالإعلام، تبين لنا ضرورة ألا يقوم الطبيب بأي عمل على جسم المريض إلا بعد الحصول على رضاه، ذلك الرضا الذي لا يُعتدُّ به إلا إذا كان وليد إرادة حرة وواعية ومستتيرة، غير مشوبة بأي عيب من عيوب الإرادة كالغلط والتدليس والإكراه؛ وهو ما يُحتم على الطبيب قيامه بإعلام المريض بكل ما يتعلّق بحالته الصحية وبطريقة العلاج المزمع تقديمه والخيارات المتاحة، وذلك في مختلف مراحل العمل الطبي ابتداءً من مرحلة الفحص والتشخيص مروراً بمرحلة العلاج وانتهاءً بمرحلة المراقبة الطبية.

وقد نظّم المُشرّع الفرنسي هذا الالتزام على نحوٍ مُفصّل ودقيق في قانون الصحة العامة؛ وبالمثل قام المُشرّع الجزائري بتنظيمه في مدونة أخلاقيات الطب وقانون الصحة العامة لعام 2018؛ بينما اكتفى المُشرّع المصري بذكره في بعض نصوص لائحة آداب الطب لعام 2003؛ بينما لم يأتِ المُشرّع السوري على ذكره في المرسوم التشريعي رقم 12 لعام 1970 وتعديلاته المُتعلّق بتنظيم مزاوله المهنة الطبية والصيدلانية، ولا في القانون رقم 16 لعام 2012 الناظم لنقابة الأطباء. وإذ يُعدُّ هذا من قبيل النقص التشريعي فلا يقتصر هذا النقص في تنظيم هذا الالتزام مما يُحتم على المُشرّع السوري ضرورة سنّ قواعد قانونية تفصيلية تُنظّم العمل الطبي.

⁴⁹فايزة مزيت، المرجع السابق، ص 47.

أولاً- نتائج البحث:

توصلنا من خلال دراستنا هذه إلى مجموعة من النتائج تتمثل بالآتي:

- 1- تتوقف مباشرة العمل الطبي على موافقة المريض الحرة.
- 2- التزام الطبيب بالإعلام ذو طبيعة مزدوجة فهو يكون التزاماً بنتيجة من حيث القيام به، والتزام بعناية من حيث كم المعلومات التي يجب أن يُدليها الطبيب إلى المريض.
- 3- يُعدُّ الواجب الأخلاقي والإنساني أساساً لتقنين التزام الطبيب بالإعلام.

ثانياً- التوصيات:

خلصنا من بحثنا هذا إلى مجموعة من التوصيات، وهي:

- 1- ضرورة احترام إرادة المريض، بالنص صراحة على الالتزام بالإعلام.
- 2- تنظيم الالتزام بالإعلام على نحوٍ يحقق التوازن بين مصلحة المريض بحماية جسده، وحرية الطبيب في ممارسة عمله.
- 3- سنّ قواعد قانونية دقيقة ومفصلة للعمل الطبي.

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تعزيز الوصول إلى الهوية القانونية في سياق النزوح والعودة - تحليل قانوني للقانون رقم 13 لعام 2021 والمرسوم التشريعي رقم 07 لعام 2021

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الملخص

تتنبت الوثائق الشخصية والسجلات المدنية الوضع المدني والقانوني للأفراد، من خلال توثيق واقعات الولادة، والزواج، والطلاق، والوفاة، والغياب، والوصاية، والجنسية وسواها من واقعات الأحوال المدنية والشخصية. في حالات النزوح الداخلي، غالباً ما تُفقد الوثائق الشخصية أو تتضرر أو تتلف، كما أن أنظمة الأحوال المدنية الرسمية والتقليدية غالباً ما تتعرض للتلف أو الضياع. تحلّل هذه المقالة قضية الهوية القانونية في سياق النزوح والعودة إلى أماكن السكن الأصلي أو أماكن السكن المعتاد قبل النزوح. تلقى موضوع البحث هذا القليل من الاهتمام الأكاديمي، على الرغم من كونه قضية حماية قانونية ملحة. توضّح المقالة كيف أن التطورات التشريعية السورية الأخيرة في عام 2021 تسهّل وصول النازحين والعائدين إلى الهوية القانونية والوثائق المدنية. وخلصت المقالة إلى أن الحق في الهوية القانونية هو بوابة التمتع بحقوق أخرى، بما في ذلك الحق في الجنسية، والوصول إلى الخدمات الأساسية مثل الصحة والتعليم. كما تخلصت المقالة إلى وجوب تعزيز مبادرات الوعي القانوني بأهمية الوثائق والسجلات المدنية، وعدّها من الأولويات.

الكلمات المفتاحية: الأشخاص النازحون داخلياً، العائدين، الهوية القانونية، التوثيق المدني، حقوق الإنسان، النزوح الداخلي.

1- طالب دكتوراه في القانون العام، قسم القانون العام، كلية الحقوق، جامعة دمشق.

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**Enhancing Access to Legal Identity in the Displacement and
Return Context: Legal Analysis of Law No. 13 of 2021 and
Legislative Decree No. 07 of 2021**

M. Ekbal Anak⁴ Dr. Ahmad Ismaeel⁵ Dr. Sinan Ammar⁶

Abstract

Personal documentation and civil registries establish and provide evidence of the civil and legal status of individuals, including as it relates to birth, parentage, marriage and divorce, death, absence, guardianship and nationality. In situations of forced displacement, personal documentation is often lost, damaged or destroyed and both formal and traditional civil status systems seriously undermined. This article analyses the issue of legal identity in the Syrian displacement and return context. This topic of research has received surprisingly little academic attention, despite being an urgent legal protection issue. This article demonstrates how the recent Syrian legislative developments in 2021 facilitate access of the internally displaced persons (IDPs) and returnees to legal identity and civil documentation. The article concluded that the right to legal identity is the right to have other rights including nationality and to access basic services such as health and education. Enhancing the legal awareness initiatives regarding the importance of civil documents and records is also deemed a priority.

Key words: Internally displaced persons, IDPs, returnees, legal identity, civil documentation, human rights, internal displacement.

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Introduction:

The right to be recognized as a person before the law is one of the most basic human rights. Civil registration and documentation matters are paramount to addressing current humanitarian issues, to providing response and safeguarding the basic rights of IDPs, refugees, returnees and other crisis-affected populations. It is also an issue vital to creating conditions conducive for return of IDPs and refugees. The primary responsibility for creating conducive conditions rests with the national authorities, while the international humanitarian community plays important complementary and supportive roles.

Internal displacement is a cause for concern as the number of internally displaced persons annually is astounding. In 2017, 30.6 million people were forced out of their homes due to conflict and disasters.⁷ This slightly fell to 27.8 million in 2018 with 54.3% of total disaster displacement coming from the East Asia and Pacific while 69.1% of conflict displacement came from Sub-Saharan Africa.⁸ Unfortunately, 2019 saw a huge spike in new displacements at 33.4 million, noted as the highest in 12 years. The long-standing conflict and violence led to approximately 4.57 million new conflict displacements. More alarming is that 2019 holds the highest ever recorded total of conflict displacement at 45.7 million people and a first time estimate of 5.1 million total disaster displacements leading to a final tally of 50.8 million IDPs.⁹ Access to official civil documentation has been complicated in situations of forced displacement, as documents may be destroyed, damaged or confiscated while civil registry offices may cease to function, and their records may be destroyed or even intentionally targeted.

7- Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council (NRC), Global Report on Internal Displacement, (2018). Geneva. Available at: <https://www.internal-displacement.org/global-report/grid2018/> [accessed 18 February 2021].

8- IDMC and NRC, Global Report on Internal Displacement, (2019). Geneva. Available at: <https://www.internal-displacement.org/sites/default/files/publications/documents/2019-IDMC-GRID.pdf> [accessed 20 February 2021].

9- IDMC and NRC, Global Report on Internal Displacement, (2020). Geneva. Available at: <https://www.internal-displacement.org/global-report/grid2020/> [accessed 20 February 2021].

The article begins by providing a short account of how legal identity problems manifest themselves for IDPs through providing the conceptual definition, scope of their rights and the responsibility to protect them. A description is given of the extent of the problem and the consequences IDPs face due to a lack of legal identity. The article pays attention to the functioning of civil registry systems, and the issuance of civil status documentation such as birth certificates, marriage certificates, death certificates and identity cards. The article demonstrates the importance and instruments of facilitating the right of IDPs and returnees to access civil status documentation in light of the recent legislative developments in Syrian Arab Republic (Syria), especially the new Civil Status Law (CSL) No. 13 of 2021 and the legislative decree No. 07 Of 2021 which provided exemptions from the fines of delayed civil events. It analyses the issue of legal identity in the Syrian displacement and return context; and highlights the important need to clarify how legal identity can best be guaranteed and protected.

Methods:

The objective of this article is to determine the impact of the new legislative developments in Syria on facilitating the access of IDPs and returnees to legal identity and civil documentation, as well as ensuring informed national response and further development of recommendations. The article will also provide an opportunity to share information on existing legal frameworks with a view to fostering improved support for durable solutions for IDPs and returnees. The article would specifically highlight initiatives and support provided on civil registration and documentation issues; discuss progress and achievements in civil registration/documentation; and identify possible gaps, and agree on next steps to better prepare for support to access civil registration and legal identity.

The article draws upon international reports, statements and reports from UN field offices, the Office of the High Commissioner of Refugees (UNHCR) and organisation of whom are the Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council (NRC). The article also analyses the main two national

legal instruments: the new Civil Status Law No. 13 of 2021 and the legislative decree No. 07 of 2021.

Questions explored in the article include: what is the interlink between displacement and access to legal identity? What is the legal framework applicable at the national and international levels? To what extent the recent national developments positively impact access to civil documentation?

This article considered the evolution of civil registration and documentation as a human right under international law with particular focus being placed on the right to birth registration and the right to recognition as a person before the law in light of the international conventions. As having a legal identity enables someone to hold other rights under law including nationality and to access basic services such as health and education.

The article then maps how legal identity is protected under international law, in situations of displacement. It does this by setting out the key provisions relating to legal identity under international humanitarian law and international human rights law. Taking stock of this factual and legal analysis, the article ends by analysing why civil status documentation and legal identity is becoming so vital. The article concludes by suggesting how legal identity in situations of displacement and return can be protected and secured.

Chapter One: Understanding legal identity and civil documentation in contexts of displacement:

Civil registration is defined as the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events pertaining to the population, as provided through decree or regulation in accordance with the legal requirements in each country. As civil registration establishes the existence of a person under the law, it has been the fundamental means of conferring legal identity to an individual. Legal identity is thus defined as the basic characteristics of an individual's identity. For instance, name, sex, place and date of birth and family ties that are conferred through registration and the issuance of a certificate

by an authorised civil registration authority following the occurrence of a vital event such as birth, death, marriage or divorce.¹⁰

The Syrian crisis has resulted in the closure and destruction of many civil registry offices. New births, marriages, divorces, and deaths are often not entered into official records, leaving IDPs without documents to prove these events took place. Since not all records are digitally preserved, loss or destruction of original documents can result in the permanent loss of this information. Lack of civil registration and documentation services caused by the disruption of governance structures has serious consequences for all Syrian nationals, and IDPs and returnees in particular, as access to civil registration and documentation is critical for the enjoyment of fundamental rights, and for return to the place of origin when IDPs and refugees of facilitating or limiting the enjoyment of basic human rights, such as the right to food, the right are willing to return to their place of residence and rebuild their lives.

Section One: Defining internally displaced persons and responsibility for protecting them:

The Guiding Principles on Internal Displacement (GPID) defines Internally displaced persons as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border."¹¹

10- United Nations Department of Economic and Social Affairs (2014), Principles and Recommendations for a Vital Statistics System, Version 03, available at: <https://unstats.un.org/unsd/demographic/standmeth/principles/m19rev3en.pdf> [accessed 11 April 2021]

11- While the UN Guiding Principles on Internal Displacement are not legally binding, their authority has been recognized globally, particularly as they draw from international humanitarian and human rights law. The Africa Union in particular has codified the UN Guiding Principles on Internal Displacement with the 2009 Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the so-called "Kampala Convention," preceded by the 2006 Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons). The UN High Commissioner for Refugees (UNHCR), Guiding Principles on Internal Displacement, 22 July 1998, available at: <https://www.refworld.org/docid/3c3da07f7.html> [accessed 03 March 2021]

Analysis shows that the UN cites “armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters” as the causes of IDPs forced from their homes to another within an “internationally recognized state border”.

The primary responsibility for protecting IDPs, and all persons within their own country, rests with the national authorities of the country. National responsibility is a core concept of any response to internal displacement. It is a fundamental operating principle of the international community and is routinely emphasized by governments themselves, as a function of their sovereignty.¹² Yet, it is sometimes the very governments responsible for protecting and assisting their internally displaced populations that are unable or even unwilling to do so, and might even be directly involved in forcibly uprooting civilians.¹³

IDPs enjoy human rights that are articulated by international human rights instruments and customary law. In situations of armed conflict, moreover, they enjoy the same rights as other civilians to the various protections provided by international humanitarian law. Once persons have been displaced, they retain a broad range of economic, social, cultural, civil and political rights, including the right to basic humanitarian assistance, such as food, medicine, shelter, the right to be protected from physical violence, the right to education, freedom of movement and residence, political rights such as the right to participate in public affairs and the right to participate in economic activities.¹⁴

12- Global Protection Cluster (2010), Handbook for the Protection of Internally Displaced Persons, available at: <https://www.refworld.org/docid/4790cbc02.html> [accessed 03 March 2021]

13 Addressing Internal Displacement: Framework for National Responsibility, The Brookings Institution-Bern Project on Internal Displacement, 2005. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/04_national_responsibility_framework_Eng.pdf [accessed 04 March 2021]

14- The Guiding Principles on Internal Displacement compiles human rights and humanitarian law relevant to internally displaced persons. Further background are available at: <https://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx> [accessed 04 March 2021]

Section Two: Relevance of IDPs issues to lack of civil registration and documentation

IDPs are initially unable to replace personal documentation that was left behind, lost, destroyed, or confiscated in the conflict or disaster situation, or during fleeing their home.¹⁵ This can result in numerous issues, as such documents are often necessary to access basic services. The fact that IDPs may be unable to replace lost or destroyed personal documentation, even years after their initial displacement, impedes their ability to become self-sufficient (as such documents are essential to move freely, access social services, qualify for reconstruction or compensation funds, purchase or rent housing and land, enrol in school, and find employment in the formal labour market).¹⁶

Many IDPs are not aware how to issue personal documents or how to replace their lost ones. Replacement of documentation is often difficult for a variety of reasons, one of which is the complex administrative procedures. Furthermore, some documents can only be obtained from the area in which the person is registered in the civil status record which could be sometimes inaccessible in some operational contexts. Many IDPs are facing challenges in the birth registration for reasons related to their unawareness about the importance of registration, negligence, lack of proper official documents needed for registration, or their inability to access areas where their civil records are located.¹⁷

Section Three: Importance of legal identity revealed:

Having a legal identity is a basic human right. It allows IDPs to travel, work, go to school, get married, confirm parentage,

15- Baker, H.M. (2019). Iraq: No documents, no future, available at: <https://www.nrc.no/perspectives/2019/iraq-no-documents-no-future/> [accessed 07 March 2021]

16- Tull, K. (2019). Civil Documentation for Internally Displaced Persons (IDPs) in Protracted Displacement. K4D Helpdesk Report. Brighton, UK: Institute of Development Studies. Available at: <https://resourcecentre.savethechildren.net/library/civil-documentation-internally-displaced-persons-idps-protracted-displacement> [accessed 07 March 2021]

17- UN High Commissioner for Refugees (UNHCR), Echoes From Syria Issue 1 - June 2014, Protection Sector/issue 1, available at: <https://www.refworld.org/docid/53a933434.html> [accessed 11 April 2021]

receive health care, access government services, vote, inherit, buy and sell property – nearly everything. While many take the right to a legal identity for granted through the issuance of birth certificates, national identity cards, passports, and other documents¹⁸. This reveals how crucial civil status documentation is for IDPs can be, in terms to freedom of movement, the right to marry and the right to register a child, to protect its legal identity. They also show how closely the lack or loss of civil status documentation is linked to a heightened risk of statelessness. It is very challenging for a person to establish legal identity and to acquire a nationality without an officially recognized birth certificate or equivalent birth registration documentation. Persons without birth registration documentation or who have not been registered may be denied access to essential services including education and healthcare; they can face early marriages; they may be more vulnerable to illegal adoption, military recruitment, child labour and trafficking. The lack of birth registration or the absence of documents does not, on its own, make a person stateless, but it creates a high risk that people will not be considered nationals by any state.

Section Four: Mapping the legal framework on legal identity for IDPs and returnees:

The right to be recognised as a person before the law is in all major international human rights instruments. The fact that Sustainable Development Goal (SDG) 16.9 states that by 2030 there should be ‘legal identity for all’ makes it extra important to explore the issue of legal identity in armed conflict.¹⁹ This goal starts from birth registration. This article demonstrates that there is much to be worked out, in terms of deciding how the problem can best be

18- Clutterbuck, M., Cunial, L., Barsanti, P., & Gewis, T. (2018). Establishing legal identity for displaced Syrians. *Forced Migration Review*. Available at <https://www.fmreview.org/syria2018/clutterbuck-cunial-barsanti-gewis> [accessed 11 March 2021]

19- The Sustainable Development Goals (SDGs), also known as the Global Goals, were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030. The 17 SDGs are integrated—that is, they recognize that action in one area will affect outcomes in others, and that development must balance social, economic and environmental sustainability, at: <https://sdgs.un.org/goals> [accessed 21 April 2021]

solved in crisis-affected environments. Any solution must be delivered in a manner that not only provides everyone with a legal identity at birth but that is sensitive to the more multidimensional aspects of legal identity that accompany an individual through their life.²⁰

Every child has the right under international law to be registered at birth, as States have a duty to register all births that occur in their territory. This obligation on States is established by widely ratified international human rights treaties, including the **International Covenant on Civil and Political Rights**²¹ and the **Convention on the Rights of the Child**²². Both require States to proceed with registration immediately after birth and without discrimination of any kind, irrespective of the child's legal status or that of the parents.²³ **The Universal Declaration of Human Rights** affirms the right of every individual to recognition as a person before the law, which is linked to legal identity and established, *inter alia*, through registration of birth.²⁴ Birth registration is also essential to the implementation of safeguards for children who would otherwise be stateless, including the safeguards contained in the **1961 Convention on the Reduction of Statelessness**.²⁵ The principles of

20- Op.Cit. Tull, K. (2019). Civil Documentation for Internally Displaced Persons (IDPs) in Protracted Displacement. P.04.

21- International Covenant on Civil and Political Rights (ICCPR), Article 24(2); Convention on the Rights of the Child, Article 7(1). See also, UN Human Rights Committee, CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989, at: <http://www.refworld.org/docid/45139b464.html> ; and UNHCR, Conclusion on civil registration No. 111, 2013 (17 October 2013), at: <http://www.refworld.org/docid/525f8ba64.html> [accessed 17 April 2021]

22- UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 23 April 2021]

23- UN Human Rights Committee, General Comment 17 on Article 24 (Rights of the Child), 7 April 1989, at: <http://www.refworld.org/docid/45139b464.html> [accessed 18 April 2021]

24- The UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 23 April 2021]

25- UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <https://www.refworld.org/docid/3ae6b39620.html> [accessed 23 April 2021] and Article 7(2) of the Convention on the Rights of the Child also requires State parties to ensure the implementation of a child's right to birth registration and to a nationality, in particular where the child would otherwise be stateless. See also UNHCR, Guidelines on Statelessness No. 4: Ensuring Every

equality and non-discrimination are central to the implementation of universal birth registration because children who are vulnerable and marginalized are also more likely to be unregistered.²⁶ **The UN Committee on the Rights of the Child** has formulated simple birth registration standards for securing the registration of all children: a *universal*, well-managed registration system that is *accessible* to all and *free* of charge.²⁷

The **UN Committee on the Rights of the Child** has also emphasized the ‘importance of facilitating late registration of birth and ensuring that children who have not been registered have equal access to health care, protection, education and other social services’.²⁸ This obligation is further outlined in the **Guiding Principles on Internal Displacement**. It requires States to facilitate the issuance of new documents or the replacement of documents lost during displacement without imposing unreasonable conditions, such as the return to the area of habitual residence in order to obtain these or other required documents. The documents listed include those needed for the enjoyment of civil and political rights, protection against arbitrary arrest and detention, freedom of

Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness (21 December 2012), HCR/GS/12/04, at: <http://www.refworld.org/docid/50d460c72.html> [accessed 21 April 2021]

26- Office of the UN High Commissioner for Human Rights (OHCHR), Strengthening policies and programmes for universal birth registration and vital statistics development, A/HRC/33/22, 2016, at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/33/22 [accessed 21 April 2021]

27- UN Committee on the Rights of the Child (CRC), General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1, para. 25, at: <http://www.refworld.org/docid/460bc5a62.html> [accessed 21 April 2021]

28- CRC, General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1, para. 25, at: <http://www.refworld.org/docid/460bc5a62.html>. See also: UN Human Rights Council (HRC), Birth registration and the right of everyone to recognition everywhere as a person before the law: resolution adopted by the Human Rights Council, 24 March 2017, A/HRC/RES/34/15, at: <http://goo.gl/NeAgN3> ; HRC, Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights, 17 June 2014, A/HRC/27/22, at: <http://www.refworld.org/docid/53ff324e4.html> ; HRC, The right to a nationality: women’s equal nationality rights in law and in practice: resolution adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/7, para. 8, at: <http://www.refworld.org/docid/57e910044.html> ; HRC, Strengthening policies and programmes for universal birth registration and vital statistics development, 1 July 2016, A/HRC/33/22, at: <http://www.refworld.org/docid/57e13b2a4.html> [accessed 22 April 2021]

movement, and the right to vote, as well as economic, social and cultural rights, including education, adequate housing, and health care.²⁹

Registration of births is a constitutional and legal duty and the right of the new-born. The 2012 **Constitution of the Syrian Arab Republic** affirms that the State has the duty to protect children, as stipulated in article 20, paragraph 2, of the Constitution: “The state protects and encourages marriage, works to remove the physical and social obstacles that hinder it, protects motherhood and childhood, cares for young people and provides them with the conditions to develop their talents”. Syria also acceded to the International Covenant on Civil and Political Rights in 1969 and entered it into force in 1976.³⁰ Moreover, Article 12 of the Covenant stipulates that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his/her residence and shall be free to leave any country, including his/her own.³¹ Civil registration and documentation, have a legal dimension fully enshrined in national law and international instruments ratified by the Syrian Arab Republic³² as well as in other recognized compilations of legal principles.³³ **The Syrian Civil Status Law—Legislative Decree No. 26 of 2007,**

29- Principle 20 of GPID, at: <https://www.refworld.org/docid/3c3da07f7.html> [accessed 03 March 2021]

30- OHCHR, UN Treaty Body Database, Ratification Status for Syrian Arab Republic, at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=170&Lang=EN [accessed 23 April 2021]

31- Article 4 of the same Covenant stipulates that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin, at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 22 April 2021]

32- Date of ratification: Convention on the Rights of the Child (15 July 1993), International Covenant on Civil and Political Rights (21 April 1969), Convention for the Elimination of Discrimination Against Women (28 March 2003).

33- Key rights include the right of all human beings to recognition as a person before the law; the right of all children to a name, identity, birth registration and nationality; the right of children to know and be cared for by their parents; the right of women to enter into marriage only with their free and full consent; and, more broadly, the right of all persons to family life and family unity.

as amended by Law 20/2011, Decree 69/2012, Decree 70/2012, Law 24/2015 and Law 4/2017 and recently was replaced by Law No. 13 of 2021 outlines the roles and responsibilities of the civil registry, the key procedures for obtaining a birth certificates, death certificates, family booklets as well as the required national identity card. The second chapter will analyse the new civil status law No. 13 of 2021 as well as the legislative decree No. 07 of 2021 considering their impact on enhancing access to legal identity and civil documentation in the Syrian context.

Chapter Two: Impact analysis of the national legal developments to facilitate access to legal identity:

The Directorate of Civil Affairs in the Ministry of Interior in the Syrian Arab republic is the authority in charge of the registration of birth, death, marriage, divorce and the correction of records, in addition to issuing identity cards and family booklets for Syrian nationals. The Civil Registry Centre shall register the citizens' records electronically and add to them the newly occurring civil status events, whether occurring inside the State or abroad, and provide documents thereof; and provide personal identification cards and family booklets to the citizens in accordance with the provisions of this Law. The civil records of the civil registry shall have legal probative value and shall serve as a source of population statistics of all forms. During the displacement and return context, the main legal concerns include, but are not limited to the issuance of identity cards and family booklets, lineage and marriage authentication, birth registration and housing, land and property (HLP) issues including property registration and seeking damages.

This chapter highlights the impact of the national legal developments for IDPs and returnees to access to civil documentation and legal identity. Reference will be made to the Legislative Decree No. 07 of 2021 which provided exemptions from fees and fines for delayed civil events. The new Syrian Civil Status Law No. 13 of 25 March 2021 will be touched upon.

Section One: Exemption of delayed civil fines, Legislative Decree No. 7 of 2021

On 11 April 2021, the Syrian president Bashar Al-Asad issued the Legislative Decree No. 07 of 2021 which read as:” Syrian citizens, and the like, who have delayed registering civil status events, or obtaining the national identity card or the family booklet shall be exempted from the fees and fines provided for in the legislative decree No. 13 of 2021. This legislative decree shall be in force for six months as of its effective date”.³⁴

Analysing the legislative decree No. 07 of 2021, it exempts from the financial burden on Syrian nationals whether they are inside Syria or abroad, and those registered Palestinians inside Syria, to obtain the identity and family cards and recording their civil status incidents considering the fact that it is possible that nationals IDPs may have refrained from registering the civil incidents (birth, death or marriage) as a result of his financial hardship. For instance, the fine for delay in obtaining the family and personal cards is estimated at 7,000 SP, and that the fine for delaying the registration of the event, whether it is “birth, death, marriage or divorce” ranges from 5,000 to 20,000 SP. All these fines are included in the exemption decree. The decree will be implemented directly after its publication in the official gazette, and then it will be circulated to all directorates and centers of the civil registry.³⁵ As of writing this paper, the executive orders have not been issued yet. This legislative decree shall be in force for six months as of its effective date”.³⁶

The legislative decree No. 07 of 2021 is not the first step taken by the Syrian authorities to facilitate IDPs access to civil documentation and legal identity. It builds upon the Legislative Decree (LD) No. 11 of 02 July 2019 issued by the Syrian president Bashar Al-Asad related to exemption of fines and fee for the IDPs

34- Article 01 of the Legislative Decree No. 07 of 2021, available at: <https://www.sana.sy/?p=1357264> [accessed 13 April 2021]

35- The Head of Civil Affairs Directorate confirmed that pointed out that any citizen, or the like, can be directly exempted from the fines upon approaching the civil registry to register the civil incident that she/he was late in registering, indicating that the decree includes Syrian citizens, whether in Syria or abroad, including those of similar status, i.e. registered Palestinians. Al-Watan Newspaper, Issue No. 3457, 11 April 2021, available at: <https://alwatan.sy/archives/254452> [accessed 13 April 2021]

36- Article 01 of the Legislative Decree No. 07 of 2021.

as well as for the returnees for one year from July 2019 until July 2020.³⁷ The executive orders issued under decision No. 308 of July 2019 by the Minister of Interior indicated that Syrian citizens, and the like, who have delayed registering civil status events, or obtaining the national ID card or the family booklet shall be exempted from the fees and fines based on the following criteria:

1-The citizen shall be originating from the areas that have been subjected to terrorist acts. Such areas shall be determined by the Central Administration of Civil Affairs. Or from citizens who have been displaced in or out the Syrian Arab Republic. The case of internal displacement shall be proved by residence permit ‘Sanad Iqama’ or police investigations\ police report. The external displacement is confirmed by a departure statement issued by the Immigration and Passports Department, a passport, police investigations\ police report or the receipt of civil status documents from outside the country.

2-The civil events covered by the provisions of this decree shall take place after the date of 15/03/2011.

3-The due date of the personal or family card shall be after the date of 15\03 \2011.

The executive orders stated that the required documents to prove the civil event or obtain a personal or family card shall be submitted in accordance with the applicable legal procedures. It also stated that the provisions of this decree shall be applied to the Palestinian Arabs registered in the General Authority for Palestinian Arab Refugees in Syria, with regards to the above-mentioned principles. To quantify the impact of this legislative decree, it applies to the whole Syrian territories. For instance, it includes areas in Rural

37- Article 01 of the Legislative Decree No. 11 of 2019 read as: “Syrian citizens, and the like, who have delayed registering civil status events, or obtaining the national ID card or the family booklet shall be exempted from the fees and fines provided for in LD No. 26 of 12 April 2007 if the delay was due to their areas being subject to terrorist acts, or their displacement in/out of the Syrian Arab Republic caused by such terrorist acts”. The full text is available at: <http://www.sana.sy/?p=972031> [accessed 14 April 2021]

Damascus in 21 districts and 08 areas in Damascus to be exempted from fines and fees.³⁸

Section Two: the new Civil Status Law, law No. 13 of 2021

On 25 March 2021, the Syrian president issued Law No. 13 of 2021; the new Civil Status Law to replace the Civil Status Law promulgated by Legislative Decree No. 26 of 2007 and its amendments.³⁹ The new law includes fundamental amendments that will contribute to the development of civil status work in line with the automation system, improve the quality of services, simplify procedures and shorten them in a faster time, and in the easiest way to reduce the effort and costs. The new law provides for an electronic compilation of personal data pertaining to the civil status of citizens, expatriates and residents along with their national numbers.⁴⁰ The digital nature of the Civil Registry database means that the national numbers of citizens and residents will result in less chances of mistaken identities due to similar names and the ability to submit recordable data at any respective center in Syria wherever convenient. In practical terms, Syrian citizens including IDPs are no longer required to return to their home province to file registration papers or request services from the Civil Registry but rather can visit any such center nearest to them to carry out such procedures, which is a stark departure from previous practices.⁴¹ Following the

38- The researcher has only been permitted to read the areas at the premises of the Civil Registry Department. A case in point is the included areas in Damascus and Rural Damascus. The areas subject to terrorist acts in **Damascus** are: Jubar, Qabboun, Barzeh, Al-Qadam, Al-Tadamoun, Al-Abaseein and karajat Al-bolman and Yarmouk camp.in **Rural Damascus**, there are 21 Districts\ Civil Registry Departments which are: Al Tal, Harasta, Dummier, Harran Al-Awameed, Al-Nashabieh, az-Zabadani, Ain Al-Fijeh, Madaya, Jirud, Ma'loula, Al-Rhaiba, Daraya, Al-Hajar Al-Aswad, Yabroud, Al-Haramoun, Sa'sa, Kafar Batna, Muliha, Babila, Qudsaya and Arbin. A total of 114 City, sub districts and communities are included within these districts.

39- Civil Status Law No. 13 of 2021 is available at: <http://www.sana.sy/?p=1344988> [accessed 15 April 2021]

40- Article 01 of Law No. 13 stated that: "the One Civil Status Office of Syria (OCSOS) is the database comprising the information of all the State citizens, in which their events shall be registered wherever they occur, and a citizen shall be represented by a single record identified by his/her national number. It shall also include the events occurring to non-Syrians on the State territory".

41- Article 15 of Law No. 07 stated that: "When a citizen's civil status event occurs inside the State territory, the documents proving the occurrence of the event are to be provided to any civil registry center which shall register the event immediately".

displacement, it has become impractical and costly for many citizens to travel to their home provinces for such administrative processes. But the appropriate use of technology is determined by the environment in which it is being utilised. The use of any technology cannot be dissociated from concerns over adequate infrastructure, energy supply, and sustainability as well as growing concerns over security, scalability, and privacy. Hence, focus needs to be given on supporting the State with restoring basic necessities such as stabilising the conflict situation, providing life-saving services and building the minimum infrastructure, before technological solutions can prove to be the most beneficial or sustained.⁴² Some positive steps have been taken to address documentation issues. A legal aid programme funded by the Office of the United Nations High Commissioner for Refugees (UNHCR) includes counselling and assistance on documentation and registration issues. It also supports the technical rehabilitation of damaged civil registry centers and departments in affected areas during the crisis.⁴³ Measures to raise awareness of the importance of personal status documentation and existing procedures and build the capacities of local non-governmental organizations to provide internally displaced persons with technical assistance and legal advice have also been important.

The new civil status law also reaffirms that the civil registry may be transferred to other safe locations subject to the Minister's approval upon a request by the Central Administration and under its supervision. This is in the event that the civil registry, its software or its backups are at risk of loss/damage due to disturbances, war, natural disasters or state of emergency. The Central Administration

42- In emergency situations, such as conflict, displacement or public health emergencies, establishing reliable and resilient civil registration and identity systems can prove to be challenging and call for specific coordination and collaboration with the State and partner organisations to improve the systems and services in place and prevent situations of statelessness. Sandra Sfeir (2019), Civil Registration and Legal Identity in Humanitarian Settings, London School of Economics and Political Sciences. Available at: <https://blogs.lse.ac.uk/mec/2019/05/03/civil-registration-and-legal-identity-in-humanitarian-settings/> [accessed 18 April 2021]

43- UNHCR (2019). Global Report, at: https://reporting.unhcr.org/sites/default/files/gr2019/pdf/GR2019_English_Full_lowres.pdf#_ga=2.90002395.1934537385.1619166703-600627513.1612292315 [accessed 22 April 2021]

must also take the necessary measures to keep the computerized work active and reliable during emergencies.⁴⁴ In the event that the civil registers are lost or damaged, or the written/computerized records are deemed void for any procedural or technical reason, the most recent backup shall be referred to, subject to the Minister's approval, and the lost data shall be re-recorded.⁴⁵ The new civil status law states that the informant must provide a certificate proving its occurrence of any civil event along with its documents within three months as of the event's occurrence if it occurs inside the country. This amendment will help IDPs access civil registries at the nearest to avoid any financial fines in case they faced hardship to register the civil event within the previously stipulated period of 30 days⁴⁶.

Among the amendments several new procedural elements were introduced, which are likely to facilitate access to regular civil documentation by Syrian citizens within and outside the country. Such amendments include, inter alia, the possibility for a broader range of family members being able to request copies of civil documents for Syrians unable to access civil registries⁴⁷; and the clarification that wives, single adult children, legal custodians and their Legal representatives are entitled to obtain replacement family booklets.⁴⁸ This amendment aims to respond to the needs that emerged during the crisis, when the owner of the family booklet is

44- Article 09 of Civil Status Law No. 13 of 2021.

45- Article 10 of Civil Status Law No. 13 of 2021

46- Article 14 of Civil Status Law No. 13 of 2021. It is worth mentioned that article 14 of the cancelled civil status law No. 26 of 2007 (cancelled) stated that: "civil status event occurring inside Syria are to be reported within 30 days; whereas such event occurring outside Syria shall be reported within 90 days of the event".

47- Article 22 of Civil Status Law No. 13 of 2021 stated that: "The subject of a certain record may request from the head of Centre to have any relevant civil status documents provided to him/her or to his/her ascendants, descendants, spouse, siblings and their families, i.e. their spouses and children, or to the legal representative. Official entities shall also be entitled to such right".

48- Article 56 of Civil Status Law No. 13 of 2021 stated that: "A. Each of the following shall have the right to a first-time family booklet or a replacement due to loss/damage: The husband or the wife; Single adult children, if both parents are dead or absent due to travel or imprisonment, or the father is dead and the mother has remarried, or the mother had been divorced before the father died; The legal custodian, if there are no single adult children, and in accordance with Item (2) of this Clause. Legal representatives of the persons indicated in Clauses (A) and (B) may take the necessary measures to receive the family booklet on their behalf".

not available due to their death, disappearance or flight abroad but the wife or the legal custodian of the children (e.g. an uncle or grandparents). Additionally, the amendments mention the wife explicitly, which is important as in the past, it was up to the official in the registry department to accept their application.

Additional positive amendment is that the new civil status law abolished the rule determined by article 61 of Law 26 of 2007 which determined that replacements for family booklets will only be issued once a year, irrespective of the circumstances of the case, affecting those being multiply displaced in short periods with a heightened risk of losing civil documentation. As per the new civil status law, it is possible to obtain a replacement for the family booklet more than once a year.⁴⁹ The new civil status law considered the fact that any households lose or incur damages to their family booklets more than once a year due to multiple displacements. With the new amendment, many displaced households will be able to access official services or benefit from humanitarian assistance, as such documentation is required by various humanitarian actors.⁵⁰ The law requested every Syrian Arab citizen, male or female, who has completed fourteen years of age, must obtain a personal identification card from any civil registry centre in the State within one year of completing the aforementioned age. The new amendment will facilitate IDPs access to legal identity at the nearest civil registry available where they are living instead of the costly travel to their original civil registry where their civil records were first registered.⁵¹ In the event of damage/loss of a personal identification card, or correction/amendment to any of its information in the civil registry,

49- Article 61 of Law 04 of 2017 stated that: “The replacement of a lost/damaged family booklet will be issued only once a year”.

50- Attention shall be paid to the fact that Article 68 of Law No. 13 of 2021 stated that a penalty of one to six months’ imprisonment, or a fine of SYP 200,000 (two hundred thousand Syrian pounds) shall apply to anyone who keeps his/her family booklet after having claimed it lost and obtained a replacement; uses his/her family booklet in a manner contrary to reality after correcting or amending its information in the civil registry and before adding the changes to it.

51- Article 49 of Civil Status Law No. 13 of 2021. Once the identity card obtained, a valid personal identification card shall be deemed legal evidence of its holder’s identity, and he/she must have it on him/her at all times and present it to the public authorities when required.

its holder shall be required to apply for a replacement within thirty days as of the date of correction, amendment, damage or loss.

The new civil status law also facilitates the civil registration process of Maktoom persons who are any person whose father or both parents are registered in the State civil records, or descends originally from the State, but has not been registered within the set registration deadline.⁵² The new mechanism provided by Law No. 13 is that any correction or amendment of civil status records shall only be made upon a final court ruling. The civil magistrates' court shall consider motions of correction and amendment. The court hearing the case shall request from the concerned directorate to delegate a representative to attend the hearing.⁵³ Under this amendment, any civil magistrates' court will be competent for the judicial procedures instead of the court of the original civil record which might be in another district or governorate.

On the other hand, the new law reviewed the levels of administrative fees and fines for non-compliance with application deadlines for identity cards and family booklets. It is feared that Increasing their financial burden through such significantly increased fees and fines will lead to even greater exposure to risks associated with the lack of civil documentation and related vulnerabilities. It can be recognized that the increases are aimed at motivating the population to adhere more strictly to the deadlines, thereby addressing a situation where many persons are without such documentation. Similarly, fines for delayed registration of civil status events have seen significant increases, including the increase for delayed child registration.⁵⁴ For this reason, the legislative decree No. 07 was issued on 11 April 2021 to provide exemption from fees and fines provided for in the legislative decree No. 13 of

52- Article 01 of Civil Status Law No. 13 of 2021.

53 Article 44 of Civil Status Law No. 13 of 2021.

54- Article 61 of Civil Status Law No. 13 of 2021 stated that: "A fine shall be imposed for failure to report the occurrence of a civil status event as follows: SYP 5,000 (five thousand Syrian pounds) for failure to report within the deadline set forth in Article (14) of this Law; SYP 15,000 (fifteen thousand Syrian pounds) for failure to report within a year of occurrence of the event; SYP 20,000 (twenty thousand Syrian pounds) if a maktoom fails to apply for registration within a year of reaching the age of majority.

2021 withing a period of six months. The exemption is initially provided for all nationals inside and outside Syria irrespective of the original civil record.

Conclusion:

This article has shown that legal identity shall be understood as a humanitarian necessity – like food and water. Solutions must start with recognition of the fundamental importance of the right to a legal identity, continue with an understanding as to why some displaced persons have been unable to obtain such documentation, and conclude with practical steps and measures to assist displaced persons and returnees to obtain such vital documentation in full compliance with the national and international law. It demonstrates the cascading problems that can stem from a lack of legal identity including including housing, land and property (HLP) rights. The article has also explored that the long-term risk is that missing, expired or incomplete documentation could become a significant obstacle to return and other durable solutions.

The article also highlighted the positive impact of the recent national legal developments to enhance access to legal identity. Introduction of digital systems by Law No. 13 of 2021 would surely take some pressure off nationals to keep their own legal identity safe, for the duration of their lifetime. Yet it is important not to move too swiftly in this direction because digitalized systems also bring problems associated with data privacy and technical infrastructure, and these too would likely to become more profound in times of crises. On the other hand, the impact of the legislative decree No. 07 of 2021 is highly recognised in enhancing IDPs and returnees' access to civil documentation through the provision of exemption from fines and fees within a period of six month of its force. The distinguished point is the general text of this legal instrument which makes it applicable to all Syrian nationals in Syria and abroad irrespective of the original civil record. The article concluded with the need to enhance the concerted and coordinated effort by all stakeholders to facilitate the widespread confirmation of the legal identity of IDPs and returnees, allow

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them to access their basic rights and entitlements, support the national authorities in civil registration including through restoration of national civil registration systems to facilitate the rapid and affordable issuance of legal identity documents.

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تحديات حقوق الإسكان والأراضي والملكية للنساء السوريات النازحات والعائدات: إطار تحليلي

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الملخص

تتعلق حقوق الإسكان والأراضي والملكية بالحصول على منزل آمن بعيداً عن الخوف من الإخلاء القسري؛ أي مكان يوفر المأوى والأمان والقدرة على تأمين سبل العيش. لقد أدى النزوح الداخلي إلى زيادة نقاط الضعف الموجودة أصلاً لدى النساء من حيث تملك الأراضي وسواها. تبحث هذه المقالة في مدى تمتع النساء السوريات النازحات والعائدات بالحقوق في الإسكان والأراضي والملكية. كما تلقي الضوء على الأساس القانوني والمعياري الذي يدعم حقوق الإسكان والأراضي والملكية للنساء، على المستويين الوطني والدولي. تشير النتائج إلى تمتع النساء السوريات النازحات والعائدات بمجموعة واسعة من حقوق الإسكان والأراضي والملكية في ظل مزيج من الأوضاع القانونية والعرفية. لا توجد أيضاً قيود قانونية على وصول المرأة إلى الأرض. رغم ذلك، لا تزال ملكية المرأة للأراضي منخفضة للغاية، حيث يمتلك الرجال الغالبية العظمى من الأراضي. توصي المقالة العمل على ثلاثة مستويات: التعامل مع السلطات ذات الصلة، والمجتمع، وصانعي السياسات. وتختتم المقالة ببيان أن حقوق الإسكان والأراضي والملكية للنساء بالغة الأهمية، وأن مرحلة إعادة الإعمار تحتاج إلى منظور جنساني لدعم تمكين المرأة.

الكلمات المفتاحية:

النازحون داخلياً، النساء، عائدة، حقوق الإسكان والأراضي والملكية، النزوح الداخلي.

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Challenges to Housing, Land and Property Rights of Syrian Displaced and Returnee Women: Analytical Framework

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Abstract

Housing, land and property (HLP) rights are about having a home, free from the fear of forced eviction; a place that offers shelter, safety and the ability to secure a livelihood. Displacement has increased the existing vulnerabilities that women face in terms of land titling and ownership. This article examines the extent to which Syrian displaced and returnee women enjoy access to housing, land, and property (HLP) rights. It also highlights the legal and normative legal basis at the national and international levels which supports women's HLP rights. found that displaced and returnee Syrian women do have a range of HLP rights under the mix of statutory and customary situations. There are no legal restrictions on women's access to land. Though, women's land ownership remains very low, with the great majority of land owned by men. The article suggests working at three levels: engaging with the relevant authorities, the community and the policy makers. It concludes by saying that women's HLP rights are very critical, and the reconstruction phase needs to have such gender perspective to support women empowerment.

Key words: Internally displaced persons, IDPs, returnee, women, Housing, Land and Property rights, HLP, internal displacement.

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Introduction:

The impact of the prolonged crisis on people, services and access during the course of 2020 has led to a 21 per cent increase in the number of Syrians in need of humanitarian assistance, from 11 million in 2020 to 13.4 million in out of 17.5 million estimated to be the total population of Syria according to the Humanitarian Needs Overview (HNO) for 2021. Internally Displaced Persons (IDPs) constitute half of all people in humanitarian need in Syria in 2021 of whom women are over than 50 per cent ⁷

The right to Housing, Land and Property (HLP) refers to the totality of possible entitlements. This means women have legal rights in, access to and control over land, housing and property. “Legal rights in land, housing and property” broadly refers to security of tenure, that is, rights to own, lease, rent, mortgage or dwell on land, housing and property and the right not to be forcibly evicted.⁸ The challenges to HLP rights that women already faced in Syria prior to 2011 have been exacerbated by the crisis. Returnee and displaced women often lack the necessary documents to claim their rights, such as death certificates or marriage contracts needed for inheritance or engaging formal procedures to claim land or property rights. This may be the result of damage or loss of official documents.

In the context of this article, "women" refers to single, married, divorced, and widowed regardless of any race, class, ability, age, etc. This paper assumes that “women’s HLP rights” must be “independent” rights, that is, “rights that are formally untied to male ownership. On the other hand, the term "land" in this article refers

7- United Nations Office for the Coordination of Humanitarian Affairs. (2021). *Needs and Response Summary*. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/syria_2021_humanitarian_needs_overview.pdf (accessed 30 May 2021).

8- Bina Agarwal. (1994). *A Field of One’s Own: Gender and Land Rights in South Asia*. Cambridge: University of Cambridge. Available at: <https://genderandsecurity.org/projects-resources/research/field-ones-own-gender-and-land-rights-south-asia> (accessed 05 June 2021).

to all land whether it is agricultural, inherited, arable, leased, occupied, unoccupied, etc. The property” refers to immovable property. The term “housing” is used as it has been defined in international human rights law and refers to a physical structure in which people can reside, as well as the attributes required in order for housing to be adequate.⁹ This article begins with the legal framework that protects women’s HLP rights at the national and international level. It then examines the challenges women face in claiming their HLP rights. The article also reflects on the legal assistance provided for women to access HLP rights. Findings indicated that while Islamic jurisprudence and the legal system in Syria provide no barriers for women to access to, use of and control over land – and housing, social norms and traditions often stand as obstacles to the legal rights when it comes to women’s HLP rights.

Objective:

The objective of this article is to enhance the awareness and understanding of the Syrian HLP rights framework and regulation from the gender perspective, and help to identify main barriers and obstacles, and prospective solutions. Women’s HLP rights are the main conditions to guarantee the economic stability and protection as durable solution in the context of recovery.

Research questions:

The main research question consists to explore to which extent returnee and displaced women are having their HLP rights from a gender perspective in Syria. The following secondary questions are derived from the main question and will help to investigate and answer it:

- How multiple legal frameworks regulate women’s rights in access to HLP rights in Syria?

9- UN Committee on Economic, Social and Cultural Rights. (1991). *General Comment No. 4 on the Right to Adequate Housing*. UN Doc. EC/12/1991/41. Available at: <https://www.un.org/ruleoflaw/files/landandpropertypostconflict.pdf> (accessed 03 June 2021).

- What are the barriers which can be identified regarding the in accessing HLP rights by Syrian?
- What are main consequences of these barriers for women's land and property rights access in Syria?
- What need to be addressed to protect women's HLP rights in post-crisis situation?
- What are the best practices to promote and sustain women's access to HLP rights that can be used in Syrian context?

Methodology:

A qualitative process of research and data analysis is adopted. The available data was collected from the credible primary and secondary sources. Desk review is conducted to provide the overview of existing resources on HLP and gender alongside with analysis of existing Syrian laws and legal procedures.

Result and discussion:

Chapter One: Legal basis for women's HLP rights:

According to the Guiding Principles on Internal Displacement, (IDPs) are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border."¹⁰

Even though women's HLP rights are protected by international instruments and national laws, the legal protection doesn't treat women equally. International legal protection of HLP rights is based on key provisions within the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the

10- The UN High Commissioner for Refugees (UNHCR). (1998). *Guiding Principles on Internal Displacement*. Available at: <https://www.refworld.org/docid/3c3da07f7.html> [accessed 03 April 2021]

Elimination of all Forms of Discrimination Against Women (CEDAW). At the national level, the Syrian authorities have constitutionally promoted gender equality, but legal realities are often very different due to social, cultural, religious, and historical factors. The analysis of the contents of the personal status law (PSL), the nationality law, and the penal code indicate imbalanced enjoyment of rights by men and women in Syria.

Section One: International legal and normative framework

1. ICCPR, ICESCR, CERD and UDHR:

Syria is a party to several international instruments that require the State to protect and promote women's rights, including HLP rights, and to penalise persons who use violence or discrimination against them. These international legal frameworks cover the International Covenant on Economic, Social and Cultural Rights (ICESCR, accessed by Syrian Arab Republic on 21 April 1969) and the International Covenant on Civil and Political Rights (ICCPR, accessed by Syrian Arab Republic on 21 April 1969). Article 3 of the ICESCR calls on States parties to “undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant” and prohibits discrimination based on gender. Security of tenure was asserted by Article 11(1) which protects the right to adequate housing, and Article 2(2) which provides for non-discrimination. Additionally, the right to tenure security cannot be subject to any form of discrimination, further underscored by the Convention on the Elimination of Racial Discrimination (CERD, accessed by Syrian Arab Republic on 21 April 1969). This protection applies to a broad spectrum of tenure forms, including ownership, rental, informal settlements, and customary usage. Article 3 of the ICCPR guarantees equality between women and men, and Article 4 prohibits discrimination based on gender, among other “grounds of race, colour, sex, language, religion or social origin”. Article 17 also protects persons from arbitrary or unlawful interference with their

home. In addition, Articles 3 and 26 provide for non-discrimination and equal protection before the law.

The Universal Declaration of Human Rights (UDHR) also has many relevant provisions regarding gender equality and HLP rights protection, which are the basis of the ICCPR, ICESCR and CERD, but as a Declaration, it is not subject to ratification. Article 2 sets the principle of non-discrimination, including based on gender, in the enjoyment of rights guaranteed in the Declaration. Among many other rights, the Declaration recognizes the rights to property, food, housing and education. Article 25(1) also states that everyone has the right to an adequate standard of living including housing, and Article 17 provides that everyone has the right to own property without arbitrary interference.

2. CEDAW:

The Convention Against Elimination of Discrimination Against Women (CEDAW) is another important international legal instrument to promote the protection of women's rights at national level.¹¹ CEDAW calls on States parties to end discrimination against women in laws, policies and practices, including through the adoption of temporary special measures some of which concern HLP rights. For example, Article 14(2) (h) obliges states parties to eliminate discrimination against women in respect of women in rural areas to ensure they enjoy adequate housing. Articles 15 and 16 provide for gender equality and for equal rights regarding in property during and after marriage. On 28 March 2003, Syria acceded to CEDAW, but many reservations have been made referring to *sharia*.¹² The reservations made by Syrian Arab

11- On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3 September 1981. Available at:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (accessed 20 May 2021).

There are 189 country parties to CEDAW. Available at: <https://indicators.ohchr.org/> (accessed 20 May 2021)

12- Syria made reservations to article 2; article 9(2); article 15(4); article 16(1 sub c, d, f, g); article 16(2); and article 29(1) CEDAW. " subject to reservations to article 2; article 9, paragraph

Republic exclude the application of certain CEDAW provisions, most notably those that guarantee equal rights of men and women in matters pertaining to marriage and family life.

3. The Pinheiro Principles:

The 2005 Pinheiro Principles on housing and property restitution for refugees and displaced persons are endorsed by the United Nations Sub-Commission on the Promotion and Protection of Human Rights.¹³ These principles are highly relevant in the context of Syria due to the large numbers of internally displaced people, most of whom are women and children. They underscore the importance to consider women and their rights in the process. The Principle 4 hones on ensuring gender equality by States in the process of management of housing, land and property restitution programmes, land policies and practices, and avoid to disadvantage or discriminate women and girls: “This provision is meant to combat gender discrimination which may occur when only male ‘heads of households’ are informally recognised as rights holders or when they are provided with formal title to housing or other property ownership rights, leaving women without legal control over what should also be treated as their property. This bias is often most visible when women are regarded as the ‘head of the household’ only if they are single or otherwise unaccompanied by a man.”¹⁴

2, concerning the grant of a woman's nationality to her children; article 15, paragraph 4, concerning freedom of movement and of residence and domicile; article 16, paragraph 1 (c), (d), (f) and (g), concerning equal rights and responsibilities during marriage and at its dissolution with regard to guardianship, the right to choose a family name, maintenance and adoption; article 16, paragraph 2, concerning the legal effect of the betrothal and the marriage of a child, inasmuch as this provision is incompatible with the provisions of the Islamic Shariah; and article 29, paragraph 1, concerning arbitration between States in the event of a dispute.” See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec (accessed 01 May 2021)

13- UN Sub-Commission on the Promotion and Protection of Human Rights. (2005). *Principles on Housing and Property Restitution for Refugees and Displaced Persons*. Available at: <https://www.refworld.org/docid/41640c874.html> (accessed 20 May 2021)

14- Inter-Agency. (2007). *Handbook on Housing and Property Restitution for Refugees and Displaced Persons. Implementing the 'Pinheiro Principles*. p.36. Available at: <https://www.refworld.org/docid/4693432c2.html> (accessed 20 May 2021)

4. Guidance Note of The Secretary-General on the UN and Land and Conflict:

On 15 March 2019 the Secretary-General endorsed the Guidance Note of the Secretary General on “The United Nations and Land and Conflict”. This note supports human-rights based and gender-sensitive approach to promote women’s rights to access, own, control and inherit land in the context of the post-conflict assistance.¹⁵

5. Guiding Principles on Internal Displacement (GPID):

The Guiding Principles on Internal Displacement (GPID) of UNCHR adopted in 1998 set out the rights and guarantees relevant to the protection of internal displaced persons (IDPs) in all phases of displacement, in the context of equal access to rights and prevention of discrimination.¹⁶ The GPID compiles human rights and humanitarian law relevant to internally displaced persons. Those principles include a statement about equal access of women to shelter and housing: “Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies.”¹⁷

Section Two: National legal framework

Syria is a multi-religious country and has a mixed juridical system, which was historically developed based on French, Ottoman and Islamic Law.

1. The Syrian constitution:

Several articles of the Syrian Constitution of 2012¹⁸ confirm the religious pluralism, which is also reflected in the Personal Status

15- The Guidance Note is available at <https://unhabitat.org/node/142477> (accessed 09 May 2021)

16- While the UN Guiding Principles on Internal Displacement are not legally binding, their authority has been recognized globally, particularly as they draw from international humanitarian and human rights law.

17- Idem, Principle 7 (d), p.7 and Principle 18. p. 11.

18- Syria’s Constitution was approved by constitutional referendum on 26 February 2012, and came into effect on 27 February 2012, by order of Presidential Decree no. 94. An informal

Law regarding rights, status and position of women. First of all, the Constitution stipulates: “the state shall respect all religions and ensure the freedom to perform all the rituals that do not prejudice public order.”¹⁹ The following paragraph of the same article states: “the personal status of religious communities shall be protected and respected.”²⁰ In addition to religion and personal status, special mention is made to “the family,” with definition of “the family” in the Constitution as “the nucleus of society” and guarantee that “the law maintain its existence and strengthens its ties.”²¹

With regard to the position of women before the law and in society, the Constitution grants equality to all its citizens in article 33(3), expressed in following terms: “citizens shall be equal in rights and duties without discrimination among them on grounds of sex, origin, language, religion or creed.” Furthermore, it stipulate: “[t]he state shall provide women with all opportunities enabling them to effectively and fully contribute to the political, economic, social and cultural life, and the state shall work on removing the restrictions that prevent their development and participation in building society.”²² Regarding this statement, the Article 33 of the constitution commits Syria to promote and sustain gender equality and non-discrimination. Combined with Article 15 that define the protection of private property, and Article 17, that states the maintain of the right to in accordance with the law, those legal dispositions formally provide a solid basis to insure the respect of the women’s HLP rights.

translation is available at <http://extwprlegs1.fao.org/docs/pdf/syr152123E.pdf> (accessed 20 May 2021).

19- Article 3(3) Syrian Constitution 2012.

20- Article 3(4) Syrian Constitution 2012.

21- Article 20(1) Syrian Constitution 2012.

22- Article 23 Syrian Constitution 2012.

2. Personal status law:

As mentioned above the main law that regulates family relations is the Syrian Personal Status Law (PSL).²³ It was promulgated on 17 September 1953 as Law no. 59 and amended in 1975, 2000, 2003, 2010 and most recently through two amendments in 2019: Law No. 4 on 7 February 2019 and Law No. 20 on 27 June 2019 which introduced major amendments that can be considered as more favorable to women.²⁴

Notably, main Islamic legal materials generally support women's right to acquire, hold, use, administer, and dispose of property. explains: "Muslim women—unmarried, married, divorced, or widowed—have extensive independent rights to property under Islamic law and human rights. There is explicit recognition in the Quran of women's rights to property acquired through purchase, inheritance, *mahr*, and other transactions. There are no restrictions on the property a Muslim woman can purchase out of her earnings, on the gifts she may receive from her natal family or her husband's family, or on the she may enjoy as a beneficiary of a waqf. In all these respects, she is entitled to equal treatment with male members of the family."²⁵

2.1 Inheritance:

Inheritance rights are defined in Articles 260-304 of the 2019 Syrian Law on Personal Status. A woman may inherit from her father, mother, husband or children, and under certain conditions, from other family members.²⁶ Traditionally, the application of Islamic inheritance laws would allow women to inherit half the share of their male counterparts. This applies to all forms of property except

23- The PSL consists of 308 articles, divided into six books.

24- Law 34 of 1975, Law 19 of 2000, Law 18 of 2003, Decree 76 of 2010.

25- Sait and Lim. (2006). *Land Law and Islam: Property and Human Rights in the Muslim World*, UN Habitat and Zed Books, New York, p.108.

26- For more information about calculations of inheritance shares see PSL Art.596-616.

amiri lands which is inherited in equal shares.²⁷ Moreover, *Sharia* law provides significant protections for women's inheritance rights: it provides inheritance rules, which are supposed to cover needs of women within the family of the deceased husband with their own specific shares, and support women's rights under Islamic law to access, retain and manage their own land and wealth. Women's rights in relation to inheritance under the Shari'a signified an improvement upon their pre-Islamic position and historically stood in marked contrast to the less privileged position of women in Western societies, during the last century.

2.2 Dower/ Mahr:

The stipulation of a dower (*mahr*) is a vital condition for a valid marriage in Syria. The dower is a wife's prerogative and a husband's obligation, meaning that the husband has to pay or promise to pay the wife a sum of money (art. 54 of Personal Status Law).²⁸ According to this custom, the dower is typically divided into two parts, namely a prompt and a deferred dower. The husband pays the prompt dower to the bride upon the conclusion of the marriage contract. Meanwhile, payment of the other part of the dower is deferred without a specific payment date but should be paid if the marriage contract ends by divorce or death.

2.3 Maintenance/ alimony:

This maintenance obligation includes a marital home, clothing, food and medical care. If a husband fails to provide maintenance to his wife, she can go to court and file a *nafaqa*-claim against him, forcing him to fulfil his obligations.²⁹ A particular note for the protection of married women's property was made to Article 80, which addresses the maintenance in case when a husband is unable to pay. Under Article 80 (3), if a husband becomes insolvent, the

27- The Syrian Civil Code, as carried in Legislative Decree No. 84 of 1949, defines Amiri lands as the state-owned real estate, for which there may be right of disposal.

28- Article 54 PSL No. 04 of 2019.

29- Article 71 PSL No. 04 of 2019.

wife can seek endorsement from a judge, setting a fixed rate at which she will lend money to her husband to cover the maintenance, providing that this maintenance be repaid to the wife once the husband becomes solvent again. Article 75 of PSL provides that during the waiting period (*idda*) following the death of her husband, a widow shall have the right to live in the marital home.³⁰

Chapter Two: Barriers to rights and justice for displaced women's HLP rights in Syria

The present section proposes to overview main barriers that arise regarding to women's HLP rights in actual Syrian context, especially regarding displaced women. Some of them are gender-specific, such as the denial of inheritance rights and difficulties over security of tenure faced by divorced or widowed women, as result from the discussion about provisions stipulated in national legal framework. Others are crisis-related and impact-specific, usually resulting from internally displacement situation or resettlement. Case studies documented and analysed during this research provide an evidence-based demonstration that often, these issues are multi-layered and multi-faceted.

Section One: Gender-specific challenges:

The Syrian crises have reinforced gendered social norms that were already dominant in traditional patriarchal society. Widespread ideas of men as “head of family” and as protectors of the ‘weaker’ women and children strengthen gender unequal norms. It resulted in widespread social presumptions about different status of women and men inside of family, women's subordination and create presumption, that men should control women. Gender based stereotypes resulted in assumption that men are naturally prepared

30- Following a death, repudiation or other form of divorce, a woman enters a waiting period, the general principles of which are set out in Articles 120-127 of the PSL. The waiting period – during which a woman cannot re-marry, and a repudiation can be retracted – usually lasts several months, although it can be longer in special cases.

to use violence, and it was their duty to use it on behalf of their community.

1. Registration and ownership of land under male's name:

In 2006, only 5.3% of agricultural land was owned by women, and land holdings owned by women were on average smaller than those owned by men.³¹ For example, the results of the 1994 agricultural census show that the number of landowners in Syria reached 610,000 holders, among whom the percentage of male landowners was 94.7%, while the percentage of women landowners was only 5.3%. The data provided for 2002 demonstrate similar trend: 95% male farmers and only 5% of female farmers. The rate of assets related to agricultural resources was 82.5% for men and 57.4% for women, although women's general contribution to agriculture was estimated at 40%.³²

Usually, the only male name is recorded on documentation relating to ownership of a house. This practice can have extremely negative consequences for women in case of divorce, or death of their husbands. The absence of female name on the ownership documents can compromise her rights to claim the property rights. In reality, it implies for woman to lose her home and housing rights because there is no law on the splitting of assets accumulated during marriage.³³ Upon divorce, women are awarded property according to what is written in the marriage contract. In most of cases, the marital contract didn't refer to the assets accumulated during the

31- Japan International Cooperation Agency. (2006). *Gender Profile of the Syrian Arab Republic, Damascus*. p.32. Available at https://www.jica.go.jp/activities/issues/gender/reports/ku57pq00002hdw51-att/syr_2006_en.pdf (accessed 17 May 2021)

32- Samira Soubh, (2006). *The Role of Women in Agriculture and Gender Issues in Syria*, National Center for Agricultural Policies (NAPC), Working Paper, Ministry of Agriculture and Agrarian Reform, page 24, available at: http://agriportal.gov.sy/public/dwnld-files/working_papers/ar/18_womenrole_ss_ar.pdf (accessed 17 May 2021)

33- NRC. (2017). *Displacement, housing, land and property and access to civil documentation*. p.21. Available at https://www.ecoi.net/en/file/local/1405606/1930_1503398808_final-nrc-displacement-hlp-and-civil-doc-s-syria-23-07-2017-en.pdf (accessed 19 May 2021)

marriage. Under the property rights legal system that was in place in Syria before 2011, women had comparatively weaker rights than men regarding access to HLP rights. Women's names were not registered to HLP documents related to their primary residence and as mentioned above, there were no provision in marriage contracts regarding housing, land and property accumulated during marriage. Gender unequal access to property registration as consequence of cultural and social attitudes regarding property and assets registration was also highlighted by interviewed Islamic scholar who also confirmed the absence of formal legal barriers. It means that property is rarely registered in women's names and they didn't ask for joint ownership registration including in case when property or land is bought with women's substantial financial contributions. The importance to have HLP rights recognition and the land registration of the property on women's name is an important condition to empower women.

2. Depriving women from inheritance:

Inheritance is the main way for women to own a land. As consequence, the lack of women access to land ownership, usually acquired through inheritance, as a shared part of estate "is a crucial concern because without their own resources, women remain dependent and particularly if they are in an abusive relationship under marriage, it makes it very difficult to leave." This statement is confirmed by results of a field study, which was conducted on violence against women in 2005 by the General Union for Women, the Syrian Commission for Family Affairs, the Central Bureau of Statistics and the United Nations Housing Fund. The study covered 1,891 households from urban and rural areas in fourteen provinces and indicate that 17.4% of women did not receive any legal inheritance (among which 14.7% women in urban areas and 20.2% in rural areas), and only 24% of women received

compensation for part of their inheritance.³⁴ The following strategies are the common way to deprive women of their HLP rights.

2.1 Takharuj/ Renunciation:

Takharuj is a court-endorsed procedure by which one of the heirs renounce to his/ her share of inheritance in favour of other heirs with compensation in monetary form or assets.³⁵ Customarily in Syria, women waive their inheritance rights to land in exchange for money. The process is undertaken under the court and it is regulated under the law and the specific legal procedures (formulas) provided by *shari'a*. Perhaps, in practice there are various ways both outside and inside of the court procedures when women are subjected to treats, social ostracism and prejudices that pressure them to waive inheritance rights or to accept a smaller share. Usually, if renunciation regarding women's inheritance rights was carried out by means of using coercion, deception, shyness, exploitation, or fraud this give women an opportunity and right to challenge the renunciation that was not done legally.

2.2 Donations to male heirs prior to death:

Donations to sons while the owner (mother or father) is still alive are very common in Syria. This practice is specifically used in case when parents have only daughters and they wish to avoid the inheritance going to their brothers or relatives in deprivation of their own offspring's. In such a case, registration tax of 1% will be applied to sales within family members.³⁶ Unfortunately, the land registry database did not provide sufficient indications regarding the gender of the buyer to determine the number or rate of women who

34- European Union. (2010). *Report on the analysis of the national situation - Women's human rights and gender equality - Syria* Report, "Promoting equality between women and men in the Euro-Mediterranean region". P. 48. Available at: https://docs.euromedwomen.foundation/files/ermwf-documents/5668_2.139.nationalsituationanalysis-syria.pdf (accessed 20 May 2021)

35- Article 304 (1) PSL.

36- Article 05, Law of Real-Estate Sales Tax No. 15 of 29/03/2021.

access property by this was. This kind of property or land sale to family members prior to death is widespread regarding male heirs. The commonly asserted justification consists in considering this way as a guarantee to preserve and keep the family property in hands of male heirs and preventing it from being transferred to the husbands of the female relatives. By this way, many fathers transfer their properties to their sons while still alive either by donating the property or selling.

3. Difficulties over security of tenure faced by divorced or widowed women:

The concept of shared matrimonial property does not exist in the Syrian law. This can, in practice, compromise any legal claim of women regarding the housing. This also means that women are usually unable to stay in their marital homes in case of divorce or their husband's death.

The women face higher barriers than men in claiming property especially after divorce. The fact that women's names regularly do not appear on property documents limits their rights to claim for marital property subdivision, particularly given the other related provisions of the law. Upon divorce, women are customarily awarded property according to what is written in the marriage contract, and it usually do not cover any property accumulated during the course of the marriage. Another barrier concerns the difficulty of women to claim their share in marital property in the court, as well in front of customary authorities or within the statutory court system.³⁷ This will also undermine any future HLP restitution and compensation processes. Regarding widows, the interviewed lawyers and women consider that they should have a right to remain in their marital homes after the death of their

37- Laura Cunial, Kirstie Farmer and Rachel Sider. (2018), *Preparing the Ground for Property Restitution in the Syrian Arab Republic*, Paper prepared for presentation at the "2018 World Bank Conference on Land and Poverty", the World Bank - Washington DC, March 19-23. Available at: <https://www.oicrf.org/-/preparing-the-ground-for-property-restitution-in-the-syrian-arab-republic> (accessed 25 May 2021).

spouses. However, some women specify that the situation depends also on the age of widow and presence of children born during the marriage.

During the years of Syrian crisis, different trends emerged: several women faced unclear legal situations with husbands and fathers missing for years, and without formal confirmation of death or absence. They were unable to sell or inherit property or remarry.³⁸ Many of women who lost their husbands and/or fathers during the crisis, the lack of evidentiary documents, including death certificates, constitute one of main barriers to address potential HLP claims. Most of female-headed households, including war widows, are in particular need of legal assistance to claim for inheritance, custody and other family related issues³⁹. This underscores the importance of local authorities support to ensure the issue of personal documents, especially for women who experienced internally displaced situations.

Section Two: Crisis-related and socio-economic specific challenges:

The analysis of collected data also reveal a range of practical barriers that limit Syrian women's access to land.

1. Lack of civil and property documents:

Lack of civil documentation continued to be a key concern regarding HLP rights protection. In most cases, to receive legal assistance delivered by NGOs requires that an internally displaced person present an identity card, family booklet, and a lease contract. Perhaps, many persons left their basic documentation behind them, when they were leaving their homes in emergencies, or lost it in

38- UN Human Rights Council. (2016). *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, Available at: <https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/documentation.aspx> (accessed 30 May 2021).

39- UNOCHA. (2017). *Syria Humanitarian Response Plan*. Available at: <https://www.humanitarianresponse.info/en/operations/whole-of-syria/document/2017-syrian-arab-republic-humanitarian-response-plan> (accessed 30 May 2021).

confusion of multiple displacements, or had it confiscated or damaged. Several internally displaced women often lack the main documents requested to claim their inheritance rights before the courts, such as death certificates or marriage contracts. On the other hand, many administrative procedures are often costly and unsuccessful without paying bribes. Women forcibly displaced from formerly besieged areas are especially vulnerable. Most of them have no recognised marriage contract or birth certificates for their children, and in many cases their husbands were killed, missing or detained. For example, women who do not possess family booklets or marriage certificates are unable to address courts to claim their rights to marital property, or inheritance for her children.

2. Illiteracy and lack of awareness of HLP rights:

Low literacy level impedes women's understanding of the law and their ability to claim HLP rights, address the court or acquire land or other property. In rural areas the rate of female illiteracy rate is high because of limited access to education and low income. The burden of domestic and agricultural work leaves little time for rural women to learn to read, write and calculate. Tradition and poverty create disadvantage that reinforce gender-based inequality: regarding education the preference is usually given to boys.

2. Poverty and lengthy of judicial procedures:

The World Food Programme (WFP) reports that a record 12.4 million people- 60% of the Syrian population- are food insecure, according to the results of the nation assessment conducted in late 2020. This is by far the highest number ever recorded in Syria that can contribute further to the risks of gender-based violence and harmful practices.⁴⁰

40- World Food Program. (2021), *News release*. Available at: <https://www.wfp.org/news/twelve-million-syrians-now-grip-hunger-worn-down-conflict-and-soaring-food-prices> (accessed 27 May 2021)

To elaborate on HLP cases, the issue is also related to the complex procedures mentioned by lawyers, starting with the case that requires notifications to the heirs and take a long time, and it is a problem. The huge number of cases before the judges force them to give long deadlines that may usually bypass two months. When the notifications of the heirs are complete, there are other procedures that do not come in favor of the woman by the heirs who rely on procrastination in the case. It leads the woman to boredom and forfeit her right. At the least point the executive procedures that follow the issuance of the ruling of inheritance are very complicated, especially if the property is not cleared. Once again, this requires the woman to resort to the judiciary, to sort her share as little as possible, because the property is not divisible. In addition, the costs of the cases represent an important aspect for the woman, who are often unable to cover them, what can result in withdraw from filing the case, especially when woman considers that she win a little and need pay a lot.

The majority of displaced women cannot afford to pay costs to bring cases before the judiciary which may cost up to SP 300,000 up to 800,000 (120\$- 320\$) including the fees of lawyers. In response to this observation, the UNHCR obtained the official approval from the Syrian authorities to conduct HLP legal aid activities through implementing partners of SARC and Syria Trust for Development NGOs starting from October 2020. The UNHCR responsible staff member of the Legal Aid Support in Damascus developed participative strategies to provide free of charge legal services. Legal support and assistance are provided to the most vulnerable groups with focus on women and children. The legal services help them to register their main personal events and issue civil documentation including HLP documents before the Land Registry and courts. Legal issues concern property registration, lease agreements, damages claim, squatting and the procedures to issue alternative HLP documents. Around 300 lawyers are involved under Legal Aid program in Syrian governorates including 54 lawyers in Damascus and Rural Damascus District. The program is designed to reach beneficiaries, women and men, in local communities via

partners. During 2020, 8,883 individuals most of whom were IDPs, and returnee women attended legal awareness sessions on HLP related matters. There were also 947 related legal consultations on HLP related matters provided mainly to women in Damascus and Rural Damascus. As result of legal assistance provision and according to the Head of Syrian Arab Red Crescent (SARC) Legal Team, lawyers brought three cases on behalf of displaced women in rural Damascus in property registration and authentication issues. Lawyers also assisted in the issuance of 13 ownership documents for women during March 2021 which empowered women to claim their HLP rights, especially following their return to areas of habitual residence. Lawyers also provided free-of-charge 328 HLP/ cadastral legal services at request of displaced women who have returned back to their areas of origin late 2020 in Damascus and Rural Damascus.⁴¹

Conclusion:

The results of the analysis have implications both for policy and for research approaches to assessing how women's HLP rights are secured in the Syrian context of displacement. The article concluded that social norms and traditions stand as obstacles to women's HLP rights despite the fact that the Islamic jurisprudence and the national legal system in Syria provide no barriers for women to access to, use of and control over land. The research also found that excluding women from the benefits of property, including land and housing, is one of the most common forms of gender discrimination. According to the 4.2 Pinheiro Principle, States should ensure that HLP restitution programmes, policies and practices recognise the joint ownership rights of both male and female heads of households as an explicit component of the restitution process.⁴² This provision is designed to eliminate gender discrimination that occurs when only male heads of households are recognised as rights holders, leaving women without legal recognition of their legal property rights.

41- UNHCR. (2020). *Syria: fact Sheet*. Available at: <https://reliefweb.int/report/syrian-arab-republic/unhcr-syria-fact-sheet-september-2020> (accessed 06 June 2021).

42- Idem, Handbook on Housing and Property Restitution for Refugees and Displaced Persons: p.36.

Despite the heavy cultural constraints, post-crisis recovery offers Syria an opportunity to re-imagine the ways rural men and women share and manage natural resources and to build sustainable HLP rights. Research shows women's rights to housing, land and property are catalyst to ensure the social and economic development of local communities and increase food security. They contribute to the realization and enjoyment of a wide range of human rights such as the rights to an adequate standard of living, adequate housing, health, work and education. HLP rights increase women's empowerment and participation in decision-making within the household and in public life. It helps protect women from gender-based violence and other health risks and enables women to contribute to peace and stability in crisis-affected contexts and to the overall improvement of women's conditions.

It is recommended for the targeted humanitarian interventions to support women to overcome disadvantages in HLP and civil documentation. Failure to identify these issues and seek integrated solutions increases the long-term costs of crisis and undermines progress towards gender equity in the enjoyment of rights. The lawyers concentrated on the importance of women's awareness of obtaining death documents for their husbands after the legal period has passed. There need to be flexible arrangements without requirements of formal ownership, with the removal or tolling of statutes of limitations for initiating HLP claims.⁴³ The restitution process should also be gender-sensitive; addressing women's differing challenges vis-à-vis HLP rights and civil documentation.⁴⁴

The national authorities shall also develop and share national statistic that is disaggregated by gender, age and other factors so that humanitarian actors build their programming on a more solid basis. It is also recommended to amend all laws that may

43- Martin Clutterbuck. (2019). *Property Restitution in Post-Conflict Syria*. Forced Migration Review 57, Geneva. Available at: <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/syria2018/clutterbuck.pdf> (accessed 01 June 2021)

44- NRC. (2017). *Reflections on Future Challenges to Housing, Land and Property Restitution for Syrian Refugees*. <https://www.nrc.no/globalassets/pdf/briefing-notes/icla/final-hlp-syrian-refugees-briefing-note-21-12-2016.pdf> (accessed 01 June 2021)

discriminate against women and girls and enact a law imposing strict sanctions on those who disinherit members of a family, particularly women, from receiving their rightful shares. An integrated policy shall also be developed to deal with both past and present HLP issues in the areas affected by the latest displacement crisis, possibly as part of a broader recovery plan for those areas. Innovative information campaign shall include women, religious leaders, and community leaders along with the national authorities and local communities.

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