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AN ANALYSIS OF HUMAN RIGHTS WITH SPECIAL REFERENCE TO THE RIGHT TO HEALTH IN INDIA

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As human beings, our health and the health of those we care about is a matter of daily concern. Regardless of our age, gender, socio-economic or ethnic background, we consider our health to be our most basic and essential asset.

The Right to Health is a fundamental part of our human rights and of our understanding of a life in dignity. The right to the enjoyment of the highest attainable standard of physical and mental health, to give it its full name, is not new. Internationally, it was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The preamble further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

A. Key aspects of the right to health:

The right to health is an inclusive right. We frequently associate the right to health with access to health care and the building of hospitals. This is correct, but the right to health extends further. It includes a wide range of factors that can help us lead a healthy life.

The right to health includes following entitlements:

- The right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health;
- The right to prevention, treatment and control of diseases;
- Access to essential medicines;
- Maternal, child and reproductive health;
- Equal and timely access to basic health services;
- The provision of health-related education and information;
- Participation of the population in health-related decision making at the national and community levels.

B. Common misconceptions about the Right to Health:

The right to health is not the same as the right to be healthy. A common misconception is that the State has to guarantee us good health. However, good health is influenced by several factors that are outside the direct control of States, such as an individual's biological make-up and socio-economic conditions. Rather, the right to health refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realization. That is why it is more accurate to describe it as the right to the highest attainable standard of physical and mental health, rather than an unconditional right to be healthy.

C. The link between the right to health and other human rights:

Human rights are interdependent, indivisible and interrelated. This means that violating the right to health may often impair the enjoyment of other human rights, such as the rights to education or work, and vice versa.

The importance given to the "underlying determinants of health", that is, the factors and conditions which protect and promote the right to health beyond health services, goods and facilities, shows that the right to health is dependent on, and contributes to, the realization of many other human rights. These include the rights to food, to water, to an adequate standard of living, to adequate housing, to freedom from discrimination, to privacy, to access to information, to participation, and the right to benefit from scientific progress and its applications.

D. The right to health in perspective of international human rights law:

The right to the highest attainable standard of health is a human right recognized in international human rights law. The International Covenant on Economic, Social and Cultural Rights, widely considered as the central instrument of protection for the right to health, recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." It is important to note that the Covenant gives both mental health, which has often been neglected, and physical health equal consideration.

E. International human rights treaties recognizing the right to health

- The Convention on the Rights of Persons with Disabilities (20062[1]
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)[2]

[1] Art. 25, The Convention on the Rights of Persons with Disabilities (2006)

[2] Arts 28, 43 (e) and 45(c), The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

- The Convention on the Rights of the Child (1989)[3]:
- The Convention on the Elimination of All Forms of Discrimination against Women[4]
- The International Covenant on Economic, Social and Cultural Rights (1966)[5]
- The International Convention on the Elimination of All Forms of Racial Discrimination (1965)[6]

F. Moving Towards the Recognition of the Right to Health in India:

The Fundamental Rights and Article 21 form the basis of Right to Health. Article 21 of the Indian Constitution reads: "No person shall be deprived of his life or personal liberty except through procedure established by law." Till the 1970s the courts, by and large, had interpreted 'life' literally i.e. right to exist- right not to be killed. In late 1970s, the Supreme Court began to give an expanded meaning to the term 'life' appearing in Article 21. Over the years it has come to be accepted that life does not only mean animal existence but the life of a dignified human being with all its concomitant attributes. This would include a healthy environment and effective health care facilities. Today, therefore, the Fundamental Right to Life is seen in a broad context. As held in C.E.S.C, Ltd. v. Subash Chandra Bose[7], it has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in work place and leisure.

In Consumer Education and Research Centre and Ors. v. Union of India and Ors. [8] it was unanimously held by the Bench of three Judges thus:

"The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood to sustain the dignity of person and to live a life with dignity and equality."

It is no more res integral that in interpreting the scope and ambit of Article 21 of the Constitution, the Universal Declaration of Human Rights and the Directive Principles of State Policy enshrined in Part IV of the Constitution play a significant and effective role. The Supreme Court has time and again pressed into service the Human Rights Declaration and the Constitutional provisions in Part IV in interpreting Article 21.

Part IV of our Constitution which deals with Directive principles of State policy has several provisions that touch on the subject of health and one can refer to the text of Articles 39(e), 39(f), 42 and 47.[9]

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3 Art. 24, The Convention on the Rights of the Child (1989)

4 Arts. 11 (1) (f), 12 and 14 (2) (b) The Convention on the Elimination of All Forms of Discrimination against Women

5 Art. 12 The International Covenant on Economic, Social and Cultural Rights (1966)

6 Art. 5 (e) (iv) The International Convention on the Elimination of All Forms of Racial Discrimination (1965)

7 AIR 1992

8 (1995) 3 SCC 42)

9 The text of the Directive Principles dealing with health, is as follows:
Article 39(e): "that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength."
Article 39(f): "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."
Article 42: "The State shall make provision for securing just and humane conditions of work and for maternity relief."

There is a foundational logic for health concerns to be addressed through the language of human rights. While professional ethics in the medical profession have retained an individual-centric focus on curative treatment, the evolution of international human rights norms pertaining to health has created a normative framework for governmental action.

G. Judicial innovation and right to health:

To begin with, the right to health as a fundamental right grew as an offshoot of environmental litigation initiated by environmental activists regarding the environment issues. Undoubtedly the right to environment was crucial because a polluted environment affects public health. A pollution free environment as a fundamental right presupposes right to health as a fundamental right. Logically, the explicit recognition of the fundamental right to health should have preceded the fundamental right to good environment.

However, the development of jurisprudence in this branch has been the reverse. The right to unpolluted environment was recognized as a right in the first instance and from that followed the right to public health, health and health care.

The Supreme Court of India has adopted an approach of harmonization between fundamental rights and directive principles in several cases. With regard to health, a prominent decision was delivered in *Parmanand Katara vs. Union of India*[10]. Another significant decision which strengthened the recognition of the 'right to health' was that in *Indian Medical Association v. V.P. Shantha*.[11] In this case, it was ruled that the provision of a medical service (whether diagnosis or treatment) in return for monetary consideration amounted to a 'service' for the purpose of the Consumer Protection Act, 1986. The consequence of the same was that medical practitioners could be held liable under the act for deficiency in service in addition to negligence.

(a) Non-justiciable character to justiciable right-

In India, a distinction has been made between Fundamental Rights as contained in Part III of the Constitution and other socio-economic rights as contained in Part IV under the title Directive Principles of State Policy. While the Fundamental Rights under Part III are "justiciable", the rights enumerated in Part 1V are "non-justiciable". However, some developments in recent years have not only expanded the scope of the 'right to health' but have also called on state parties to the ICESCR to 'respect, protect and fulfill' their citizens' right to the same.

The expanded notion of the right to life has enabled the courts enforceability of economic and social rights. Expressions such as "basic necessities of life" "bare minimum expression of the human self" and "human dignity" found in several of the judgements have explored the import of "life" in Article 21.

Article 47: "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health."

[10] (1989) 4 SCC 286. The court held that every medical practitioner is professionally obligated to treat emergency cases with expertise and cannot refuse to offer treatment to such cases. The government hospitals further cannot refuse any kind of treatment unless it requires more technical expertise that too not without giving primary treatment. It also held that no legal procedures as prescribed under Criminal Procedure Code should act as a hindrance for a doctor to treat an emergency case and that of saving a person's life should be the primary action.

[11] AIR 1996 SC 550

In its interpretation of Article 21, the Supreme Court has also facilitated the emergence of an environmental jurisprudence in India, while also strengthening human rights jurisprudence. In several decisions, the right to a clean environment, drinking water, a pollution free atmosphere etc. has been given the status of inalienable human rights and, therefore, fundamental rights of Indian citizens.

Article 48-A which is one of the Directive Principles of State Policy states that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Till 1980 not much contribution was made by the courts in preserving the environment. In the case Municipal Council, Ratlam vs. Vardhichand[12] the Supreme Court of India interpreted Article 21 which guarantees the fundamental right to life and personal liberty, to include the right to a wholesome environment and held that a litigant may assert his or her right to a healthy environment against the State by a writ petition to the Supreme Court or a High Court.

(b) Right to Health a Fundamental Right- *In CESC Ltd. vs. Subash Chandra Bose[13], the Supreme Court relied on international instruments and concluded that right to health is a fundamental right.*

It went further and observed that health is not merely absence of sickness: The term health implies more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development. Facilities of health and medical care generate devotion and dedication to give the workers' best, physically as well as mentally, in productivity. It enables the worker to enjoy the fruit of his labour, to keep him physically fit and mentally alert for leading a successful economic, social and cultural life. The medical facilities are, therefore, part of social security and like gilt edged security, it would yield immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness, etc. Health is thus a state of complete physical, mental and social well being and not merely the absence of disease or infirmity. In the light of Articles 22 to 25 of the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and in the light of socio-economic justice assured in our Constitution, right to health is a fundamental human right to workmen. The maintenance of health is a most imperative constitutional goal whose realisation requires interaction by many social and economic factors.

(c) Direction by Supreme Court to States for Minimal Health Care facilities-

With regard to the access and availability of medical facilities, the leading decision of the Supreme Court was given in *Paschim Banga Khet Mazdoor Samiti* v. *State of West Bengal[14]*. The facts that led to the case were that a train accident victim was turned away from a number of

[12] AIR 1980 SC 1622. Some of the residents of the municipality filed a complaint before the Sub- Divisional Magistrate alleging that the municipality is not constructing proper drains and there is stench and stink caused by the excretion by nearby slum-dwellers and that there was nuisance to the petitioners. The Sub-Divisional Magistrate directed the municipality to prepare a plan with six months to remove the nuisance. The order passed by the SDM was approved by the High Court. The Municipality came in appeal before the Supreme Court of India and contended that it did not have sufficient funds to carry out the work directed by the SDM. The Supreme Court of India gave directions to the Municipality to comply with the directions and said that paucity of funds shall not be a defence to carry out the basic duties by the local authorities.

[13] AIR 1992

[14] AIR 1996 SC 2426 The Court issued notices to all State governments and directed them to undertake measures to ensure the provision of minimal primary health facilities. When confronted with the argument that the same was not possible on account of financial constraints and limited personnel, the Court declared that lack of resources could not be cited as an excuse for non-performance of a constitutionally mandated obligation.

government run hospitals in Calcutta on the ground that they did not have adequate facilities to treat him. The said accident victim was ultimately treated in a private hospital but the delay in treatment had aggravated his injuries. The Court realized that such situations routinely occurred all over the country on account of inadequate primary health facilities. The Court set up an expert committee to investigate the matter and endorsed the final report of the said committee. This report contained a seven-point agenda addressing several issues such as the upgrading of facilities all over the country and the establishment of a centralized communications system amongst hospitals to ensure the adequacy and prompt availability of ambulance equipment and personnel.

(d). Liability of Medical Practitioners-

In India, the theory of the inter-relatedness between rights was famously articulated in the *Maneka Gandhi*[15] decision. This became the basis for the subsequent expansion of the understanding of the 'protection of life and liberty' under Article 21 of the Constitution of India. The Supreme Court of India further went on to adopt an approach of harmonization between fundamental rights and directive principles in several cases. With regard to health, a prominent decision was delivered in *Parmanand Katara* v. *Union of India*[16]. The Court laid down the following guidelines for doctors, when an injured person approaches them:

i) Duty of a doctor when an injured person approaches him: Whenever, on such occasions, a man of the medical profession is approached by an injured person, and if he finds that whatever assistance he could give is not really sufficient to save the life of the person, but some better assistance is necessary, it is the duty of the man in the medical profession so approached to render all the help which he could, and also see that the person reaches the proper expert as early as possible.
ii) Legal protection to doctors treating injured persons: A doctor does not contravene the law of the land by proceeding to treat an injured victim on his appearance before him, either by himself or with others. Zonal regulations and classifications cannot operate as fetters in the discharge of the obligation, even if the victim is sent elsewhere under local rules, and regardless of the involvement of police. The 1985 decision of the Standing Committee on Forensic Medicine is the effective guideline.
iii) No legal bar on doctors from attending to the injured persons: There is no legal impediment for a medical professional, when he is called upon or requested to attend to an injured person needing his medical assistance immediately. The effort to save the person should be the top priority, not only of the medical professional, but even of the police or any other citizen who happens to be connected with the matter, or who happens to notice such an incident or a situation.

H. Obligation of State and private hospitals:

Fundamental Rights prescribes the duty and the obligations of the State vis-a-vis the citizens. Thus when one is talking about right to health and health care as a fundamental right we are speaking of the State's obligation and not the obligation of private players, either individual practitioners or private hospitals or nursing homes. This does not mean that private players do not

[15] (1978) 1 SCC 248

[16] AIR1989 SC2039 The court ruled that while the medical authorities were free to draw up administrative rules to tackle cases based on practical considerations, no medical authority could refuse immediate medical attention to a patient in need. The court relied on various medical sources to conclude that such a refusal amounted to a violation of universally accepted notions of medical ethics. It observed that such measures violated the 'protection of life and liberty' guaranteed under Article 21 and hence created a right to emergency medical treatment.

have an obligation to their patients or can behave in a negligent manner. But these players have no obligation to have a ceiling on their professional charges and so no obligation to provide free, subsidized or even cheap treatment. However, there are certain exceptions to this principle. It is in this context that privatization of health care needs to be viewed. The 'Right to Health' is inseparable from 'Right to Life', and the 'Right to Medical Facilities' as a concomitant of 'Right to Health' is also part and parcel of Right to Life. In a welfare state, the corresponding duty to the right to health and medical facility lies with the State.

The private health sector in India is very large. In 2002 an estimated 62 per cent of hospitals, 54 percent dispensaries and 35 per cent of beds were in the private sector. An estimated 75 percent of allopathic doctors are in the private sector and about 80 per cent are individual practitioners. Over 90 per cent of non-allopathic doctors work in the private sector. Private health services, especially the general practitioners, are the single largest category of health care services utilized by the people.[17]

The right to health, like all human rights, imposes three types of obligations on States parties: the obligations to respect, protect and fulfill. In turn, the obligation to fulfill contains obligations to facilitate, provide and promote. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with Article 12 guarantees. Finally, the obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

It is well known that private hospitals charge exorbitant fees. Private hospitals which are registered as charities, get tax exemption, get subsidized land from the government and get various other relaxations. The Public Trusts Acts which operate in many places provide that if the State has given certain amount of aid to 'charitable' hospitals these hospitals are liable to treat certain quota of patients totally free and certain other quota of patients on a subsidized basis.

CONCLUSION:

The India's Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations under taken by the Government in the welfare State. The Government discharges this obligation by running hospitals and health centers which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance.

The Supreme Court, while widening the scope of Article 21 of the Constitution held that in a welfare state, primary duty of the government is to secure the welfare of the people and more over it is the obligation of the government to provide adequate medical facilities for its people. Article 2l imposes an obligation on the state to safeguard the right to life of every person, preservation of human life is thus of paramount importance. The government hospitals run by the state are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment, results in violation of his right to life guaranteed under Article 21.

[17] http://www.academia.edu/1743189/Health_Care_Case_Law_in_India

SUGGESTIONS:

- Emphasis should be on developing appropriate methods and tools to measure the progress in realizing human rights, both in terms of outcomes as well as in terms of the process of implementation.
- More accountability about functioning of public bodies, particularly at the local level should be brought so as to systematically address corrupt practices, which are among the root causes of human rights infringement in India.
- Particular attention and policy focus should be on women and children who are considered as the most vulnerable group. The situation of minority communities, poor people, lower casts etc. with special emphasis on nutrition, access to safe water, access to basic medicines, working conditions and prevention of diseases also needs due consideration