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Research Paper Law

Right to Health and Medical Assistance as a Basic Human Right: an Analysis

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ABSTRACT

The idea of Human Rights for a liberal natural rights theorist is that we all have rights by virtue of our humanity. Individuals have certain kinds of rights as member of a particular community, but human rights belong to humanity and do not depend for their existence upon the legal moral practice of different communities and such philosophical grounds originated the concept of universality for the human rights.

Right to life would be meaningless unless medical care is assured to sick person. It has, however, not been guaranteed specifically in the Constitution of India. Of late, right to health and medical care has been interpreted to be part of right to life under Article 21 of the Indian Constitution. State is under an obligation to safeguard and preserve the right to life of every Citizen. It is the duty of the Government hospitals to provide medical assistance to a person in need.

In the present paper the researcher has analyzing the Right to health and medical assistance as a basic Human Right with the help of National and International perspectives.

KEYWORDS : Human Right, Right to Health, Medical Assistance, Judicial Response, Fundamental Rights, Health Facilities.

Introduction:

Human Rights are those rights, which are inalienable for an individual. The idea of Human Rights for a liberal natural rights theorist is that we all have rights by virtue of our humanity. Individuals have certain kinds of rights as member of a particular community, but human rights belong to humanity and do not depend for their existence upon the legal moral practice of different communities and such philosophical grounds originated the concept of universality for the human rights. Universal human right encompasses a concern of positive rights i.e. freedom from repressive governance policies. The doctrine of human rights has passed in to the realm of practical reality and has influenced the enactment of various statutes. The Universal Declaration of Human Rights was the first international text to list human rights although three years earlier it had been taken as prominent issue in the United Nation Charter. After enactment of the *Magna Carte* of human rights, the international community has enacted various laws for the protection of human rights of individual and watchdog to investigate agencies for violation of human rights. Indian Judiciary is now fully embraced with the "right revolution". Supreme Court has drawn support from the International Convention on Human Rights. Now the State is mandated to provide to a person all rights essential for the enjoyment of the right to life in its various perspectives.

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National and International Perspectives:

The incorporation of health concerns in the 'rights' discourse, both at the international and domestic level - recognizes that the legal system bears the responsibility of aiding the medical profession in advancing the 'right to health'. In fact, the onus on governmental agencies goes beyond aspects like the regulation of the medical profession and support for research and development (R&D) in the medical field. It also includes policy-choices pertaining to education, housing, environmental protection, labour laws, social security provisions and the protection of intellectual property among others. Since the end of World War II, many such aspects have come to be recognised as part of a 'right to health' in international human rights instruments, but there has been considerable disputation regarding the scope and nature of this right. Article 25 of the *Universal Declaration of Human Rights, 1948* (UDHR) encapsulated the 'right to health' in the following words:

"1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

While this declaration articulated the core elements of public health concerns, it did not create any binding obligations on the members of the United Nations. In subsequent years, the right to health came to be incorporated in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) which was presented before the UN General Assembly in 1966 and adopted in 1976. While Article 12(1) of the ICESCR referred to the 'right to health' in aspirational terms, Article 12(2) mandated specific measures on part of the state parties to the covenant. Its language reads as follows:

"1. The State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

It must be remembered that the rights enumerated in the ICESCR were subject to 'progressive realisation' and further contingent on the ability of State parties to muster adequate material resources for fulfilling the same. This condition was at the heart of the difference between rights enumerated in the ICESCR and those enumerated in the *International Covenant on Civil and Political Rights* (ICCPR) which

could be specifically enforced against State parties. The hierarchy between the rights enumerated in the two covenants reflected the cold-war politics over the prioritization of the same. Some of the rights enumerated in the ICCPR were given a 'non- derogable' status and individual complaints mechanisms have been created for the protection of the same. In comparison, the economic, social and cultural rights were not made the subject of any means of specific enforcement at the international level and have retained an aspirational character, in a manner akin to the Directive principles in the Constitution of India.

There are provisions relating to the protection and advancement of health in several conventions formulated under the aegis of the United Nations. Specific reference can be made to provisions in the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), the *Convention on the Rights of the Child* (CRC) and the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD). Apart from this several regional treaties and instruments have touched on issues pertaining to health.

In this regard, one can make a special mention of General Comment 14 issued by the *UN Committee on Economic, Social and Cultural Rights* in 2000. The said Committee made the following observations:

"The notion of the 'highest attainable standard of health' in Article 12.1 of the ICESCR takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health."

The World Health Organisation (WHO) issues the *International Health Regulations* from time to time as a guiding framework for domestic policies. There regulations have further strengthened the link between human rights and health. For instance, Article 3(1) of the same states: *"The new International Health Regulations shall be implemented with full respect for the dignity, human rights and fundamental freedoms of persons.*

Judicial Response:

In India, the theory of the inter-relatedness between rights was famously articulated in the *Maneka Gandhi* 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***.** In that case, the court was confronted with a situation where hospitals were refusing to admit accident victims and were directing them to specific hospitals designated to admit 'medico-legal cases'. 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.

Another significant decision which strengthened the recognition of the 'right to health' was that in *Indian Medical Association* v. *V.P.* Shantha. In that 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. This ruling has gone a long way towards protecting the interests of patients. However, medical services offered free of cost were considered to be beyond the purview of the said Act.

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.*The facts that led to the case were that a train accident victim was turned away from a number of 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 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. 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. Some commentators have argued that by recognizing a governmental obligation to provide medical facilities, the Court has created a justiciable 'right to health'.

Conclusion/Suggestions:

It is Concluded that Health and medical care is fundamental human right of every person and is integral facet to life. Without doubt, considerations of availability and access to medical facilities are the paramount challenge in our country. State is under an obligation to safeguard and preserve the right to life of every Citizen. It is the duty of the Government hospitals to provide medical assistance to a person in need. In recent years, considerable investment has been made for the expansion of the government run-healthcare infrastructure and the establishment of more medical and para-medical educational institutions. However, the enhancement of the scale of medical facilities is not a sufficient strategy by itself. While private sector investment in establishing full-fledged hospitals has to be encouraged, there should be adequate safeguards to ensure that the same also benefits the poorer sections and those in rural areas. The concern with an increasingly privatized healthcare sector is that it may cater largely to urban patients with high purchasing power.

1. In this respect, administrative and legal interventions may be required to ensure proper access to existing facilities. An integrated approach to advancing 'public health' recognises its relationship with policies for economic development and addressing social inequalities. Private hospitals are generally hesitant to provide medical care in medico legal cases. Specialized treatment is generally not available in State run hospitals even at district level and it is far too expensive in private hospitals. As such many people lose their lives due to financial constraints. Medical professionals should also take on the responsibility of catering to the needs of the weaker and underprivileged sections. It should be recognised that access to medical facilities is often dependent on determinants of social status such as caste, gender and class.
2. To regulate and mobiles private hospitals towards achieving the motto of providing health & medical care as a fundamental right, the registration of private nursing homes should be made compulsory and it should be laid down that they should at least possess minimum of facilities to cope up with emergencies viz. Ventilator, Cardiac, Difiblator, fully equipped operation theatre and ICU etc.
3. Modernized techniques should be used to interconnect different hospitals with the health department and an arrangement should be made to make direct payments to the hospitals, in appropriate cases, out of the said reserve since reimbursement procedures are cumbersome and time consuming.
4. The evolving law of medical negligence and consumer protection in India has already put the spotlight on the role of practitioners as well as intermediaries such as hospital managements and government agencies. Medical practitioners should not resent such

legal scrutiny, since the same is essential to deter the unscrupulous elements in the profession.

5. In recent years, substantial media attention has been given to controversial issues such as illegal organ trade as well as the widespread prevalence of quackery and the circulation of unsafe traditional medicines. The medical profession should cooperate with administrative and legal efforts to tackle these problems.

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