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A COMPARATIVE STUDY OF RIGHT TO HEALTH IN INDIA AND USA- Charu Atri¹**ABSTRACT**

One can say that “Health” is a concept which has been ill understood and more so ill defined, as far historically. Health was seen as a state of being which was free from disease, illness or injury, and for quite some time the physical aspect of the human body held importance and the mental aspect lay ignored. The WHO has defined health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. Attainment of the highest standard of health should be without the distinction of race, economic or social conditions or political affiliation. Article 25 (1) of the Universal Declaration of Human Rights states, “*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.*”

INTRODUCTION

Post-independence the Indian Government undertook steps to promote health among the citizens. The Constitution of India enshrines upon the state the responsibility to ensure protection of workers (Article 39), special provisions for disabled persons and other health standards (Article 41), basic nutrition (Article 47), basic standard of living (Article 47), public health (Article 47). Moreover, Article 21 of the Constitution provides for right to life and personal liberty which also encompasses right to health. The Indian Judiciary has been actively widening the facets of right to health throughout the years. As a result right to health is a part to right to life (Article 21), The Consumer Protection Act, 1986 (as amended to date) has the jurisdiction to determine if service provided by hospitals is satisfactory or not. The Central government has enacted various legislations for subject matters like human organ transplantation, termination of pregnancy, medical board of India etc.

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The present paper seeks to encapsulate the principles involved when health became a right in India. It seeks to study and analyse the reasons adopted by the Supreme Court to declare that the right to health was a part of right to life under Article 21. The paper also strives to understand the principles behind the counterpart of right to health in the United States of America, and analyses the systems in place in both the countries.

Unlike India, USA constitution does not envisage a right to health, but a right to obtain healthcare services through service providers and at one's own expense. There is also a lack of guarantee of healthcare to people less fortunate under the US constitution. The end of the Second World War saw the importance of insurance companies grow, and one would witness their increasing influence in the years to come when it came to access to healthcare in America.

The research paper seeks to comparatively analyze the principles observed in India and the USA when it comes to the right to health and healthcare. The paper takes on a journey through time and highlights the various watershed moments when health came under the purview of the government.

RIGHT TO HEALTH IN INDIA V RIGHT TO HEALTH IN USA

Significance of right to health is increasing day by day. Most of the nations around the world have now recognized right to health as a fundamental right that the state is under duty to protect.

What is common in India and USA is that both the country do not enlist right to health as a fundamental right in their constitution explicitly. However, what brings out the difference between the two systems is that how is right is approached and interpreted by their judiciary.

Indian constitution Part III does not explicitly include right to health as a fundamental right. This right was rather included under Part IV as a DPSP article 38, 39(e), 41, 42, 47, 48A. But The Supreme Court has in various cases read right to health under article 21 of the constitution i.e. right to life and liberty. **In *Bandhua Mukti Morcha v. Union of India*²**, Supreme Court held that, *“the right to live with human dignity, enshrined in Article 21, derives its life-breath from the directive principles of the State policy and particularly Clauses (e) and (f) of Article*

²(1984) 3 SCC 161

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39 and Articles 41 and 42”³. In *C.E.S.C. Ltd. & Ors v. Subhash Chandra Bose*⁴, SC stated that, “The right to social justice is a fundamental right. Right to livelihood springs from the right to life guaranteed under Art.21...The health and strength of a worker is an integral fact of right to life...In the light of Arts. 22 to 25 of the Universal Declaration of Human Rights, International Convention 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 workmen⁵.” Similarly in *Consumer Education & Research center v. Union Of India & Others*⁶, SC held that “the right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution...The health and strength of the worker is an integral facet of right to life. Denial thereof denudes the workman the finer facets of life violating Art.21.⁷” In *Pt. ParmanandKatara v. Union Of India & Ors*,⁸ it was held that “Article 21 of the Constitution casts the obligation on the State to preserve life⁹”. Thus casted a duty on the medical professional to render all the help and facilities to an emergency patient. Similarly in various other cases like *PaschimBangaKhetMazdoorSamity v. State of West Bengal*¹⁰, *Common Cause v. Union of India and Ors*¹¹, etc supreme court dealt with various facets of right to health and ruled on the importance of right to health as a fundamental right under article 21.

US federal constitution does not include socio-economic rights. Unlike Indian constitution that requires affirmative action for assurance of rights, US constitution requires no such actions. US constitution rather constraints/restricts government from taking action. Here emphasis is on negative rights rather than positive rights. US constitution neither mentions right to health as a distinct fundamental right nor is this right read under any other fundamental right by the judiciary. It has clearly been laid down in various cases, is now a settled law, that right to health is not a part of the US constitution.

What’s ironical is that right to health is said to have origin in US itself. US president Franklin Delano Roosevelt in his 1944 address, proposed “second bill of rights”. As the first bill of right

³ibid

⁴1992(1) SCC 441

⁵ibid

⁶1995 SCC (3) 42

⁷Ibid.

⁸1989 AIR 2039

⁹ibid

¹⁰1996) SC 2426.

¹¹ Writ Petition (Civil) 91 of 1992

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contains civil and political rights, this second bill of rights contained socio economic rights. He enlisted eight such socioeconomic rights out of which 'right to health' was one such right. He recommended incorporation of such rights in the US federal constitution itself. However, his attempt remained unsuccessful. It was after his death that his wife Eleanor Roosevelt when became the chairperson of the drafting committee for Universal declaration of Human rights (UDHR), she gave form to Franklins's proposal of second bill of rights in the language of UDHR. Article 25 UDHR gives recognition to right to health. It reads: "*Article 25: (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*". After UDHR, UN passed Covenant on Economic, Social and Cultural and Rights (CESCR). CESCR article 12(1) imposes obligation on all the signatory states to "*recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*". After this all the UN signatory rectified the covenant and took steps to include right to health under their respected domestic legal framework. US has till now not rectified this covenant. In an era where most the constitution all over the world recognize right to health as a fundamental right, many authors relate this unique approach of US to "*American exceptionalism*".

Though, socio economic rights are not mentioned in the US federal constitution but most of the US state constitutions recognize some or other socio economic right. About 15 state constitutions recognize right to health. This give rise to some questions like: Can we say that providing a right in the federal constitution and providing a right in the state constitution have the same implications? Can we say that the level of protection provided to a right by a state constitution is identical to the protection extended by the federal constitution? No, making such statements would not be correct. State constitutions are comparatively earlier to amend and are more vulnerable to the pressure from the interest groups. State constitutions are more flexible and could be easily molded according to the pressure groups. On the other side, the US federal constitution is very difficult to amend. Thus, the level of protection extended by it is much greater. In India, right to health is recognized in the national constitution itself and not left to the discretion of the states. Now the questions is why was there a need to give federal/national

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protection to such socioeconomic rights like right to health in India but no such need is felt in USA? Are the threats to such right more in India than it is in USA? or is it because that framers of the US federal constitution were simply ignorant to the needs of the poor? Many authors extend a chronological explanation to this absence of socioeconomic rights in the US federal constitution. They state that as the American constitution was drafted in late 18th century, at that time the jurisprudence regarding the importance of importance of these rights/entitlements was not very developed. It was only in late 19th century, that the legal fraternity realized the significance of these rights, thus most of the modern constitution contains these provisions as they were drafted after the idea of socio economic rights was significantly popularized. Cass R. Sunstein in his paper, “*Why Does the American Constitution Lack Social And Economic Guarantees?* (2003)” rejects this explanation for absence of socioeconomic rights in the US constitution. He argues that the constitutions are never static but are dynamic, they changes over time. A constitutional amendment could always be made to accommodate such changes and developments in the society. Thus, if the prime reason for non inclusion of socioeconomic rights in the original draft federal constitution was ‘chronological’, then amendment could have easily to be made to the original constitution in the late 19th century when the idea was significantly popularized. However, in fact no such amendment has been made yet. The idea of second bill of rights as suggested by Franklin Delano Roosevelt was also not accepted. If one argue that amendment was not made as amendment to the federal constitution is very difficult. Then if not amendment, atleast such right could have been included in the constitution through judicial interpretation as it is done in India, where the right to health was originally present as a DPSP is now shaped into a fundamental right not through an express amendment but by judicial interpretation. However, US judiciary on the other hand is reluctant to read right to health in the federal constitution. Thus, the chronological explanation couldn’t be said to be correct.

Can an explanation to it be provided by trying to understand this in relation to the ‘historical context’? As advocated by Aditya Nigam in his paper “*A Text without Author: Locating Constituent Assembly as Event*(2004)”, no understanding of a phenomenon could be said to be sufficient without relating it to the historical setting, that is reading it in ‘the context’. Many authors argue that as socioeconomic rights are mostly a result of socialist movement but “there was never a strong effort to move the United States in the direction of socialism or social democracy”¹² in American thus there is an absence of socioeconomic right in the US

¹²Cass R. Sunstein , “*Why Does the American Constitution Lack Socialand Economic Guarantees?*”, Harvard Law
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constitution. India's emphasis on socioeconomic rights and inclusion of such rights as DPSP provides the goals and aspirations that the framer of the Indian constitution wanted to achieve, is often associated with the socialist movement in India. It was the categorical denial of these rights in the colonial era, which inspired the framers of Indian constitution to include such right atleast as DPSP if not as fundamental right considering the economic constrains of the government at that time. In the Karachi session in 1931, Indian national congress passed a resolution that is often quoted as the "spiritual basis" of the DPSPs. This Karachi resolution contained provisions like "healthy conditions of work", "protection against the economic consequences of old age, sickness", "Protection of women workers, and specially adequate provisions for leave during maternity period" etc, this could be said as a early recognition or emphasis on the right to health by the then Indian national congress. Nehru called these DPSP as, "a dynamic move towards a certain objective". But this argument could also be criticized by quoting examples of some nation whose constitution put emphasis on socio economic rights even though the country never really faced a socialist movement.

If none of the above explanation is correct then what other explanation could be provided for India and USA having such different approach towards socioeconomic right? Why has right to health is read as a fundamental right in India but not in USA? A simple answer to both the questions would be giving a realist explanation [legal realism]. "The law is what the judge says it is" .Cass R. Sunstein in his article concluded that USA federal constitution don't include socioeconomic right because the judiciary there is reluctant to do so. But can we actually say that this is an appropriate conclusion? We still need to locate the reason as to why there judiciary there is reluctant to recognize socioeconomic rights as a part of their federal constitution but the judiciary in India has actively recognized various socio economic rights like right to health as a fundamental right. The researchers propose that the best explanation to this is in nature of the both states: India is a socialist state whereas America is a capitalist state. In India thus with the aim to narrowing the gap related to access to health facilities between rich and the poor, there is a right to health but in America there is a mandate to health insurance. This Mandate to health insurance is an expression of capitalist nature of American state.

MANDATE TO PURCHASE HEALTH INSURANCE IN USA

Since, United States Constitution doesn't explicitly give right to healthcare, but it has been

School; Harvard University - Harvard Kennedy School (HKS)(2003).

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remarked in many cases by the Supreme Court that the Constitution does provide implicit right to access healthcare services at one's own expenses from the willing medical providers. Thus it becomes pertinent to understand the insurance mandate in USA. Until 2019, individual health insurances were mandatory for the Americans and non-compliance resulted into tax penalty under the Patient Protection and Affordable Care Act (2010). Under the provisions of this Act, individuals were required to maintain minimum essential coverage for themselves and their dependents. This taxing power is conferred upon the State in US under the taxing and spending power and power to regulate interstate commerce in their Constitution. Several lawsuits were filed in the federal courts challenging constitutionality of this mandate in the Act. It was claimed that by imposing such mandate the liberty of the individuals living in different States have been encroached and by doing so the government has overreached its power.¹³ Though later on some States like Virginia and Idaho passed laws relating to federal mandate of health insurances and limited the federal powers relating to healthcare and made health insurances optional for the individuals. This may also result into a conflict between the Federal Laws and the State Laws which raises constitutional issues that are likely to be tilted toward the federal laws due to the supremacy clause of the Constitution.¹⁴

This mandate is no longer there from January 2019, at the federal level. But, handfuls of States still require having health insurances and non compliance results to tax penalty.

If we compare this mandate with India there are no laws that make health insurances compulsory for Indians. Though some private companies provide health insurance benefits to their employees but it is purely discretionary.

But many schemes have been launched by the Indian government like Rashtriya Swastha Bima Yojana, Pradhan Mantri Garib Kalyan Yojana and Ayushman Bharat where insurance is provided to people who are below poverty line. Such programs are there in US also, like the largest healthcare program of US, "Medicare". Medicaid and Children's health insurance program are such other programs that benefit persons below poverty just like in India. The power to provide healthcare is derived by the Article I section 8 of the constitution of US, where the Congress is given the power to collect taxes for "general welfare" of US. This taxing power has been interpreted very broadly by the Supreme Court and number of programs of diverse fields like education, veterans, environment, community development etc can be covered under it.

¹³Florida v US Department of Health and Human Services (28-06-2012 SC)

¹⁴ US Constitution Article VI, clause 2

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If we go by the data only 4 % of population of India right now has medical insurance cover, though Insurance Regulatory and Development Authority constantly urges for increasing health insurances. Whereas, the concept of insurance could be seen way back in 1850 in USA when the first U.S. insurance firm was founded and it had offered insurance for the injuries received during an accident. Medical insurances weren't introduced until 1920s, though individual hospitals and employers used to offer pre paid plans that used to cover medical expenses especially after the Second World War. Then the ideas of government sponsored health programmes also came up during this period. And then in 1965 came the Medicare and Medicaid plans in U.S. In the 1970s these changes in the law had also allowed the medical care through Health maintenance organizations. And as of now more than 92 percent population of US is insured out of which 68 percent are privately insured.

But this mandate has been criticized (especially by the libertarians) as government coercion that undermines the freedom of the citizens by forcing them to purchase health insurances regardless of whether they want it or not. It is not considered cost effective by some, and some argue that this mandate imposes a burden on healthy, young people to buy insurances and thereby this subsidizes the coverage of old and sick people. And by doing this the state has exceeded the constraints of power conferred upon it as it has gone beyond the duty of night watchman to that of coercion.

This disparity could be understood on the basis of ideologies adopted by the two countries while India leans heavily towards socialism. Initial years of independence also reflect the same through the five year plans and police frameworks which included public healthcare systems as an important part of planning process after we got independence. This aspect of being a service provider is missing in US where the State is acting more as a financier (especially when it comes to public healthcare with regards to insurance mandate). The State does not have any affirmative duty to meet the healthcare needs of its citizen. Financial companies that administer individual insurance plans in US have expanded their business enormously they have also played a major role in pressurizing countries from shifting welfare and health policies from public and social to individual and private.

These companies spent a huge amount of money for the denial of insurance rather than providing. It reveals their core capitalist interests which has left the right to health to a mere package of essential services covered by insurances.

Another important question which arises is whether medical insurances really result in better

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health of an individual or not. Studies have found that privately insured persons are not significantly better in health than the ones who are uninsured, whereas persons with public insurances have worse health and higher mortality rate than those of no insurances.¹⁵

The only benefit that could be associated with the medical insurances is that it prevents household budget from expensive medical care and therefore reduces overall economic hardships and that prevention can be said to be inherently improving the health. Therefore it might not be correct to assume that mandatory health insurance laws would unquestionably benefit Indians.

CONCLUSION

A close look at the Indian and the American counterpart *vis a vis* right to health bring to one's attention the stark dissimilarities of the two systems. The Apex Court of India recognizes that the right to health as a part of right to life, which means that the government has a duty to act when the right is being violated. No such element is present in the American counterpart. The inclusion of healthcare in the DPSPs as an endeavor of the government to achieve, hints towards a socialist character.

USA follows a capitalist market approach, which deepened after the Second World War. The Capitalist individualist approach treats healthcare and the right to health as a commodity or an article of trade. The commoditization of health makes American citizens dependent upon their ability to pay partially supported by their ability to afford insurance, which is highly uneven. Health and healthcare should not be dictated on the whims and fancies of political ideologies and interests of the most vulnerable should be considered when coming up with policy decisions on health and healthcare. For a country and its economy to flourish the government should invest heavily on three things: education, health and infrastructure. A healthy population would be instrumental in pulling the economy out of the slump, but only when health is provided at an affordable or free rate. It is observed that Indian healthcare system needs improvement but a capitalist highly industrialized nation like the US fell short by a huge margin, which became obvious during the ongoing Covid-19 pandemic. USA is the best example of a capitalist healthcare which treats health as a commodity, which puts its citizens at risk.

¹⁵Catherine E. Ross and John Mirowsky, *Does Medical Insurance Contribute to Socioeconomic Differentials in Health?*, 78 THE MILKY QUARTERLY, 291-321(2000)

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