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HEALTH AND THE INDIAN CONSTITUTION

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PREFACE

The Centre for Multi-disciplinary Development Research (CMDR) is a social science research institute in a moffusil area of Karnataka and it is sponsored by the Indian Council of Social Science Research (ICSSR), New Delhi. The Centre aims at undertaking analytical studies of conceptual and policy significance on the socio economic and cultural issues using multi-disciplinary perspectives and micro level information.

As a part of its publication programme the Centre has initiated a CMDR monograph series consisting of both invited contributions and the research studies completed at the Centre.

We are happy to present seventh in the monograph series under the title "Health and the Indian Constitution". This monograph consists of two studies. They are :

- 1) 'Constitutional Parameters of Health Economy' written by Prof. K. Raghavendra Rao a noted political scientist and
- 2) 'Health in the Indian Constitution' by Dr. P.R.Panchamukhi.

It is necessary to examine the constitutional provisions relating to different aspects of the social sector with a view to understanding the state's role as well as the role of the citizens with regard to the social services. The present monograph intends to highlight the constitutional provisions relating to the health sector.

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HEALTH IN THE INDIAN CONSTITUTION

Prof. P.R. PANCHAMUKHI

The Constitution of India which adopted by the Constituent Assembly on the 26th November 1949, came into force on the 26th January 1950. Indians were hankering for freedom “to shape their own destiny, to pursue their long proclaimed aims and aspirations and to create the national institutions that would facilitate the fulfillment of their aims.”¹ It appears that the desire for complete freedom and development with equity and justice, which the Indians were looking forward all through the period before the Independence, gets an opportunity for full expression in the form of the constitutions. Therefore, the Indian Constitution is unique both from the point of view of its contents and also for its size and form. It is said that the Indian Constitution is the longest and most detailed Constitution in the world, the original Constitution containing as many as 395 articles and 8 schedules touching upon different aspects of socio-economic, political and other aspects of life of the people. It is unique in another sense also, viz. very large number of amendments have been introduced in the Indian Constitution from time to time

depending upon the needs. This also indicates the readiness of the Indian system to make the changes, whenever required.

Apart from outlining the Fundamental Rights, Directive Principles and Fundamental Duties of the citizens, the Constitution highlights the necessity of the integration of the social and economic rights with the political freedom. In this sense, the Indian Constitution eminently indicates the Indian state being a welfare state. As Pt. Jawaharlal Nehru said, “Political freedom is only a means to an end, the end being the raising of the people to higher levels and hence, the general advancement of humanity.” It is this philosophy which is reflected in the Indian Constitution in terms of its different schedules and the contents of these schedules.

Even though health, as a sector, does not appear in many places of the Indian Constitution, there are indirect and tacit references to health of the people and the role the state has to play in the development of health of the people. In the following paragraphs, an attempt is made to analyse the various

1. Gramville Austin. Indian Constitution Corner Stone of a Nation 1972. pp. 27

aspects of the Indian Constitution so far as the health sector is concerned.

HEALTH IN THE PREAMBLE TO THE CONSTITUTION :

The Preamble to the Constitution which gives a broad direction for the Indian Republic, refers to social, economic and political justice and also equality of status and of opportunity. Under the term Social Justice, one can bring in the question of access to health care facilities and the principle of justice involved in the equality of access to these facilities. In the same way, equality of status and of opportunity may be taken to refer to the equality of practice of the medical profession, access to the medical educational institutions etc. In order to improve the citizens' socio-economic and health status.

REFERENCE TO HEALTH UNDER FUNDAMENTAL RIGHTS :

The above objectives are articulated in further details under the section entitled Fundamental Rights. For example: Provision No. 16, under the Fundamental Rights refers to equality of opportunity for all citizens in matters relating to employment or appointment to any state-run health care institutions.

In the same way, 16.2 forbids any type of discrimination in respect of employment of office under the state. Thus, citizens of any religion, race, caste, sex, descent, place of birth,

residence etc. could not be barred from seeking employment in the state-run health care institutions. Obviously, this clause would be meaningful only in the case of those who are eligible for employment in the state-run health care institutions.

Even though there is equality of opportunity for employment, the state can prescribe the necessary qualifications, which among other things may include mental excellence and physical fitness. In this sense, the mental and physical health level is taken as a qualifying condition for entry into the jobs in the state-run institutions.

Clause No.19 u/s 'Right to Freedom' refers to the right of the citizens to practice any profession or to carry on any occupation, trade or business. Thus, in the case of the eligible citizens, there is no restriction on the practice of medical profession to carry on the occupation in any part of the country.

The chapter on Fundamental Rights refers to the Right Against Exploitation under Article 24. It is said that no child below the age of 14 years shall be employed to work in any factory or mine or in any other hazardous employment. This also indicates the responsibility of the state to consider the health status of the young citizens children, while giving employment to them.

Thus, health status and physical fitness in the case of some occupations

are considered as the precondition for employment. It may also imply that, the health status or physical conditions of the job seekers are considered as restricting the right of employers to employ or even the right of the citizens to seek employment. Since these rights are justiciable, the state gets an authority to impose its preferences on the citizens in the interest of maintaining good health conditions in the country.

HEALTH UNDER THE DIRECTIVE PRINCIPLES :

Under Part IV of the Constitution outlining the Directive Principles of State Policy, there are a number of tacit references to the health development of the people. In fact, the fundamental rights and the Directive Principles constitute a conscience of our Constitution. It is true that the Directive Principles of State Policy are not justiciable suggesting that the state can excuse itself from implementing the various provisions under the head of Directive Principles. However, the contents of the Directive Principles which indicate the concern and the commitment of the Indian Constitution for social welfare and equality, do provide a definite direction for the policy making in the country. Clause No.38 under the Directive Principles refers to the state requiring to secure a social order for the promotion of welfare of the people. Certain principles of

policy to be followed by the state refer to the health and development of the people. For example, it is said that the state shall, in particular, direct its policy towards securing “that the citizens, men and women equally have the right to an adequate means of livelihood, 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 the avocations unsuited to their age or strength : 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.” Such policy clearly show responsibility and a concern that the state should have towards physical and psychological health of the Indian citizens irrespective of their social economic and demographic circumstances. Clause No.41 under the Directive Principles states as follows :

“The state shall, within the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sick-ness and disablement and in other cases of un-deserved want.”

The provision also shows that, as far as possible the state should strive to assist the citizens by physical and

financial provision in the situations of old age sickness and disablement. Hence, under this 'mandate' the state is required to provide the public health and medical care-preventives as well as curative and promotional services in the field of health.

Under Clause No.42 of the Directive Principles, there is a reference to the provision for just and human conditions of work and maternity relief. This implies that it is not simply the sickness or disablement which requires the state to intervene but it is also under the normal situations of work and the normal experiences of the citizens under certain circumstances that the state should provide the needed assistance. Thus, the state has to intervene to secure for these citizens, proper conditions in the place of work. Such conditions of work should be available to all citizens irrespective of their gender, region, language, community, race etc. Even though it is a normal occurrence for women, the maternity puts upon them great stress and mental tension, Under these circumstances also, the state needs to provide the succors and relief. This may take the form of financial assistance for anti-natal and post-natal care and providing the facilities for such care.

Due to a number of factors – historical, socio-economic, genetic etc., all the citizens do not have the same level of nutritional status and hence, health status. It is observed that the children of the socio-economically deprived

communities are highly prone to disease on account of the poor nutrition intake. The same problem is seen in the case of women of the socio-economically deprived sections of the population. The Directive Principles of State Policy prescribes as the duty of the state to raise the level of nutrition and the standard of living and to improve public health. Under Clause No.47 in the chapter on Directive Principles, it is said that the state shall record the raising of the level of nutrition and standard of living of its people and the improvement of public health as one of its primary duties. It is, in this context that the state is required to take steps to bring about 'Prohibition' of the consumption except for medical purposes of intoxicating drinks and of drugs, excessive doses of which are injurious to health. This indeed is a clear-cut articulation of the fraternal role of the state in protecting the health of the citizens according to the Indian Constitution. This implies a positive interference of the state with the consumer sovereignty. Such intervention or restriction of the freedom of the citizens is required in the case of what are known as the public goods or merit goods, with regard to which, not only the effects for the consumer from the use of these goods are injurious but there are also negative externalities for other citizens. With regard to intoxicating drinks, drugs, smoking etc. which lead to such injurious effects for the consumers and to these other than their

consumers as well as, the state has to intervene effectively to contain its consumption.

ANIMAL HEALTH, PLANT HEALTH AND ENVIRONMENT HEALTH :

When we are considering the question of whether the Indian Constitution has adequate references to the issue of development of health, we are invariably lead to focus our attention on human health. Unfortunately, in the general discussions of health, animal health does not receive adequate focus. The Indian Constitution however, has appreciated the importance of animal health as well. The Constitution also refers to the preservation and improvement of healthy environment which is so crucial for the improvement of health status of all living beings. For example, under the Clause No.48 of the chapter on Directive Principles of State Policy, there is a reference to the organization of agriculture and animal husbandry and also improvement of environment and safeguarding of forest and wild life. It is said that the state shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds and prohibiting the slaughter of cows and calves and other milch and draught cattle. The clause further states that the state shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

HEALTH UNDER FUNDAMENTAL DUTIES :

Just as there is a requirement that the state shall have to provide certain facilities and services to the citizens, there is mention in the Constitution, of a reciprocal requirement in the form of the fundamental duties of the citizens towards the country. Clause No.51A of the section on Fundamental Duties states that every citizen of India has the duty to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. In this sense, there is a joint responsibility from the state as well as the citizens towards the maintenance of human and animal health and also the long term issues relating to the improvement in the health conditions of the human beings and the animals. Under Chapter 111 of the Constitution referring to the state legislature. In this way, the Constitution has attempted to avoid the adverse implications of unsound mental health in the collective decision making process. Thus, the question of health and the issues of decision making and administration are attempted to be integrated in the Indian Constitution.

HEALTH IN THE INDIAN FEDERAL SET-UP :

The seventh schedule of the Indian Constitution mentions the specific responsibilities of different layer of

Government in a federal framework towards the question of health. Such responsibilities are indicated under the Union List, State List and the Concurrent List.

THE UNION LIST :

Court quarantines including hospitals connected therewith, seamens and marine hospitals are legitimately put under the Union List implying the responsibilities of the Union Government towards this function. Also the maintenance and development of the quality of goods to be exported out of India or transported from one state to another even within India are mentioned as the concern of the Union Government. This also is legitimate in view of the fact that only the Union Government can oversee such issues. The following items related to the health services and health status of the people are also put under the Union List. These items are considered under Clause No.58, 59, 81 and 84. They are reproduced below:

58. Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.
59. Cultivation, manufacture, and sale for export of opium.
81. Inter-state migration; Inter-State quarantine.

84. Duties of excise on tobacco and other goods manufactured or produced in India except -

- (a) alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medical and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

HEALTH AND THE STATE LIST :

Under the State List, there are direct references to the provisions of health care facilities. For example, Clause No.6 under the State List refers to public health and sanitation, hospitals and dispensaries. Clause No.7 refers to the pilgrimages within India in which case, the provision of health care facilities comes under the state responsibilities. Clause No.8 refers to the intoxicating liquors, the production, manufacture, possession, transport, purchase and sale etc. of which will have to be overseen by the State Government in the federal framework. Clause No. 10 refers to the burials and burial grounds, cremation and cremation grounds, proper maintenance of which is very crucial for human animal health. This also is put under the State List.

Interestingly, the plant health this also put under the State List since agriculture is treated as the state subject. Protection of the plants against pests and

prevention of plant diseases is considered as State Government's responsibility under Clause No. 14 of the State List.

Similarly, the preservation, protection and improvement of stock and prevention of animal diseases and of veterinary – training and practice are also put under the state responsibilities.

Most of the animal, human and plant health problems are the result of improper water management and absence of clean water supply. The entire subject of water is put in Clause no. 17 under the State List. Similarly, fisheries-promotion and fish breeds, protection of the fish from diseases is also kept under the state responsibilities.

Markets and fairs, inns etc. have implications for the health problems. The state is required to have an overall supervision of fairs, hotels, inns etc. so that the function of these would not cause health hazards.

The state has the prerogative of levying excise duties on alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics. With this, the state has an instrument of control of the consumption of these items which have powerful implications for the human health.

CONCURRENT LIST :

The following items are included under a Concurrent List – List III of the Indian Constitution. These items refer to

the various aspects of physical, mental and social health care policy, the policy with regard to drugs and medicines etc. These clauses are reproduced below :

3. Preventing detention for reasons connected with the security of the State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.
5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.
18. Adulteration of foodstuffs and other goods.
19. Drugs and poisons, subject to the provisions of entry 59 of List with respect to opium.
91. (20A. Population control and family planning).
24. Invalidity and old age pensions and maternity benefits.
92. (25. Medical education and universities, subject to the provisions of entries 63,64,65 and 66 of List I; vocational and technical training of labour.)
25. Medical and other professions.

28. Charities and charitable institutions.
29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.
30. Vital statistics including registration of births and deaths.
93. (33. Trade and commerce in, and the production, supply and distribution of)
 - (b) foodstuffs, including edible oilseeds and oils.

CONCLUDING OBSERVATIONS :

From the above discussion, it is clear that the Indian Constitution expresses its deep concern for human, animal, plant and aquatic health in India. It can also be seen that in the Indian Federal Set-up, different layers of Government have been vested with different responsibility towards various aspects of health. There seems to be a clear socio-economic rationale and administrative expediency in assigning these responsibilities. The Constitution also stipulates certain duties for the citizens towards contributing to the promotion of health in the country. There might be a number of deviations in the actual practice from the Constitutional provision. It should be admitted however, that a proper recognition of the need for such deviations in practice may be considered as a useful basis for the changes in the Constitutional required for the development of the health of the citizens, animals and

the plants in the Indian nation. The concept of health for all needs to cover the health of all living entities. It seems the Indian Constitutions has exhibited its appreciation of such a comprehensive perception of health for all. It is true that as in the case of universal elementary education, there is no stipulation of the time period so far as demand of the goal of health for all is concerned. However, the Constitution makers have also appreciated the need for flexible and pragmatic approach in not specifying any time frame for reaching the goals. The Constitution which is an articulation of the nation's intentions and endeavors should be interpreted so in the case of the goal of health for all as well, otherwise, unrealistic time stipulation for the goals would only arouse high expectations and their nonrealization would only lead to frustration. This is particularly true when we are considering a comprehensive concept of health for all inclusive of human, plant and animal and aquatic health, covering not only physical health but also mental health. It may, however be desirable to indicate some concrete steps of action with time stipulations at least with regard to some of action with time stipulations at least with regard to some items-certain non negotiable in the health sector. Which items are the nonnegotiable in the health sector has to be however decided from time to time and hence may form part of the collective decision making.

APPENDIX

THE CONSTITUTION OF INDIA

Main provisions of the Constitution, directly or indirectly referring to Health

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a (SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC) and to secure to all its citizens :

JUSTICE, social, economic and political ;

LIBERTY of thought, expression, belief, faith and worship ;

EQUALITY of status and of opportunity; and to promote among them all.

FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation] ;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

FUNDAMENTAL RIGHTS

Right to Equality

16. Equality of opportunity in matters of public employment.

(1) There shall be equality of opportunity for all citizens in

matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office (under the Government of, or any local or other authority within, a State or Union territory, any or Union territory) prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational

institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

NOTES

Art. 16(1) guarantees equality of opportunity to all citizens in the matters of appointment in State services. It does not, however, prohibit the State from prescribing the necessary qualifications and selective tests for recruitment for Government services. The qualifications prescribed may, besides, mental excellence, include physical fitness, sense of discipline, moral integrity, loyalty to the State. Where the appointment requires technical knowledge, technical qualifications may be prescribed. The character and antecedents of candidates may be taken into consideration for appointment in Government services. *Banarsidas V. State of U.P.A.I.R. 1956 S.C.520.*

Right to Freedom

- 19.** Protection of certain rights regarding freedom of speech, etc.
- (1) All citizens shall have the right -
- (g) to practice any profession, or to carry on any occupation, trade or business.
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operations of any existing law,

or prevent the State from making any laws, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of (the sovereignty and integrity of India). The security of the state, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.)

Right against Exploitation

- 24.** Prohibition of employment of children in factories, etc.

No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY NOTES

The Fundamental Rights and the Directive Principles constitute the 'conscience' of our Constitution. There is no conflict between the Directive Principles and the Fundamental Rights. They are complementary to each other. It can be said that the Directive Principles prescribe the goal to be attained and the fundamental rights lay down the means by which that goal was

to be achieved. It is not necessary to sacrifice either of them for the sake of the other, *Minerva Mills V. Union of India* (1980) 3S.C.C.625.

38. State to secure a social order for the promotion of welfare of the people.

[(1)] The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which, justice, social, economic and political, shall inform all the institutions of the national life.

[(2)] The State shall, in particular, strive to minimise the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged.

39. Certain principles of policy to be followed by the State.

The State shall, in particular, direct its policy towards securing -

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood ;
- (b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good ;
- (c) that the operation of the economic system does not result in the concentration of wealth and means

of production to the common detriment;

- (d) that there is equal work for both men and women;
- (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;
- (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.

41. Right to work, to education and to public assistance in certain cases.

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of underserved want.

42. Provision for just and humane conditions of work and maternity relief.

The State shall make provision for securing just and human conditions of work and for maternity relief.

47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

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 endeavor to bring about prohibition of the consumption except for medical purposes of intoxicating drinks and of drugs which are injurious to health.

48. Organization of agriculture and animal husbandry.

The State shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

(48A. Protection and improvement of environment and safeguarding of forests and wild life.

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.)

FUNDAMENTAL DUTIES

51A. Fundamental duties.

It shall be the duty of every citizen of India -

- (a) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

**CHAPTER III - THE STATE
LEGISLATURE**

General

Disqualification of Members

191. Disqualifications for memberships.

- (b) If he is of unsound mind and stands so declared by a competent court.

SEVENTH SCHEDULE

[Article 246]

List 1 - Union List

- 28. Port, quarantine, including hospitals connected therewith; seamen's and marine hospitals.
- 51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.
- 58. Manufacture, supply and distribution of salt by Union Agencies: regulation and control of manufacture, supply distribution of salt by other agencies.
- 59. Cultivation, Manufacture and sale for export of opium.
- 81. Inter-State migration; inter-state quarantine.
- 84. Duties of excise on tobacco and other goods manufactured or produced in India except -
 - (a) alcoholic liquors for human consumption;
 - (b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medical and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

List II- State List

Duties of excise on tobacco and other goods manufactured or produced in India except -

6. Public health and sanitation; hospitals and dispensaries.
7. Pilgrimages, other than pilgrimages to places outside India.
8. Intoxicating liquors, that is to say, that production, manufacture, possession, transport, purchase and sale of intoxicating liquors.
9. Relief of the disabled and unemployed.
10. Burials and burial grounds; cremations and cremation grounds.
14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.
15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.
16. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List 1.
21. Fisheries.

28. Markets and fairs.
31. Inns and inn-keepers.
51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :
 - (a) alcoholic liquors for human consumption;
 - (b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

List III- Concurrent List

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.
4. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
17. Lunacy and mental deficiency, including places for the reception or

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|-----------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|
| treatment of lunatics and mental deficient. | vocational and technical training of labour |
| 18. Adulteration of foodstuffs and other goods. | 27. Medical and other professions. |
| 19. Drugs and poisons, subject to the provisions of entry 59 of List I with respect to opium. | 28. Charities and charitable institutions. |
| 91 [20A. Population control and family planning.] | 29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants. |
| 24. Invalidity and old age pensions and maternity benefits. | 30. Vital statistics including registration of births and deaths. |
| 26. Medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; | 32. Trade and commerce in, and the production supply and distribution of :
(c) Foodstuffs, including edible oilseeds and oils. |

CONSTITUTIONAL PARAMETERS OF HEALTH ECONOMY

Prof. K. RAGHAVENDRA RAO

The total conceptuality of health economy which is implied in the whole system of regimen of health – its financing, its administration in relation to production and distribution, its use patterns and consumption predilections, its location within the overall economy – cannot be understood merely by confining to its economic aspects in the narrow sense, not even to the broader framework of political economy. While the proposal, formulation, design and operationalization of the project is certainly not too narrowly conceived, limiting itself merely to federal or local finances, supply and demand factors or consumption, production and distribution variables, and rightly so, it still suffers from either insufficient attention or near-total lack of attention to certain contextual dimensions. These may be spelled out as – the constitutional frame, the political system, the bureaucratic baggage, the socio-cultural determinants and the international environment. In this brief note, a review of the constitutional parameters that are likely to impinge systematically both as constraint and resource, will be attempted. However, it needs to be emphasized that the constitutional parameters do not operate in isolation

form the political process as well as the unpredictable judicial process. This fact must be kept in mind while examining the constitutional parameters. A broadly formulated and summary statement may be made first on the political process as it has been involving in the last forty-five years up until the recent overhauling of the system through privatization, liberalization, marketisation and internationalization of the polity and the economy. The first is that health has not been generally perceived as a politically heavy-weight or priority item in the political process. Seldom have politically significant personnel been asked to handle the health portfolio at the Centre or the State levels. The second is that there has been really no attempt to generate policy perspectives in the domain of health. Of course, there have been a plethora of programmes, schemes, strategies and packages, but no overall policy structuring the sense of an integrated statement of a long-ranging nature in the matter of health of the people. Over-bureaucratization of the post-colonial polity and the consequent reduction of a genuine political involvement, must have been at the root of heavy bureaucratization and an equally heavy

political bracketing-off of health as a priority problem facing the nation. The recent privatization and marketisation, in fact, may tend to bring about a greater accentuation of this de-politicization, though it would also mean a serious de-bureaucratization of the health domain, like many other domains. At the same time, there are limits to the extent of privatization with regard to the preventive and community aspects of health, though such limits may be less politically salient in regard to the curative or diagnostic dimension of health maintenance. One suggestion that the project may take seriously is that it should prepare a substantial contextual structure, involving a spelling out of contextual variables, including constitutional parameters, as a setting to its central concerns.

CONSTITUTIONAL PARAMETERS

A detailed consideration of the constitutional provisions bearing on the domain of health should be prefaced by one or two broad generalizations. The first is that our Constitution is so lengthy and so detailed that it has great potentialities for internal contradictions and ambiguities, and this would enable the policy-makers (executive or legislative) to resort to significant pragmatic/opportunistic manipulation. Political or bureaucratic skill or advantage is likely to bend the constitutional provisions one way or the other. The second and

perhaps a more important fact is that the Constitution as an overall structure lends itself to two divergent interpretations—one interpretation emphasizing its centralizing and Unitary propulsions and the other opposed interpretation emphasizing its federal implications. These two aspects enable the political process to gain the upper hand in turning the document into a political resource to be used into political game, whether intra-party or inter party. It also empowers the judiciary to move, with greater flexibility and thus give room for what may be described, for want of a better expression, judicial politics. The third fact is that some provisions of the constitution are justifiable while others or not. For instance, the Chapter Directive Principle of State Policy is not justifiable not enforceable, though the Supreme Court has recently held that the provisions of the Chapter should be kept in mind in handling down judicial decisions. The fourth fact is that there are provisions relating to health which have only an indirect or implicit bearing on it, and others which specifically address the domain of health. Bearing in mind these considerations, let us run through the Constitution to locate its provisions relevant to health domain.

THE PREAMBLE

This is, no doubt, not a specific provision of the Constitution, and yet is an important component as it defines the

overall ethos, framework, goals, objectives and commitments of the people of India from a long historical perspective. In a sense, the specific provisions that follow as Articles are supposed to flow from and operationally the general principles stated in the Preamble. All the broad principles enunciated in it have an indirect bearing on health. Take the characterization of the Indian polity as “Socialist, secular, democratic.” Socialist would mean that health as a necessary human resource should be subject to societal control and made a public/collective responsibility. In a socialist regime, health would be regarded as a social responsibility which means in practice the responsibility of the State or Government. Secular dimension would suggest that like all goods, health, should be made available irrespective of distinctions of caste/community/religion. Democratic feature would also move towards this goal, since democracy as a popular polity should promote the welfare of the people, and welfare would, of course, include physical welfare and thus health of the population. The three cardinal principle of justice, Liberty and Equality imply ultimately that health must be provided by the public authority as one of its main charges equally and impartially as one of its main charges equally and impartially to all individuals and sections. Yet, we can already note here a potential conflict between

equality and liberty, on the one hand, and a potential conflict between justice, on the one side, and equality and liberty, on the other.

DIRECTIVE PRINCIPLES OF STATE POLICY

The provisions under this head do not have technical enforceability in a court of law. Objectives and goals which are not immediately feasible though desirable are relegated to this part. The state is supposed to keep them in view in formulating its policies and programmes, but non-compliance with this does not attract judicial action. They are thus largely normative stipulations, left to the will and pleasure of the rulers at any given point of time. However, as already pointed out, the judiciary has since the 1970s claimed the right to make reference to these provisions whenever relevant to making a particular decision. Thus, they may be said to have acquired an indirect and contingent justifiability.

These provisions comprise Part IV of the Constitution, containing Articles 36 to 51. In sum, these provisions embody the ideals of economic and social democracy enshrined in the Preamble. Thus they amount to the demand for the establishment of a liberal welfare state. Achievements with regard to the implementation of this Part have been mostly made in terms of Articles 39 (b), 40 and 43. The first of these

concerns the land reforms, the second the Panchayat Raj and provisions are relevant in so far as they imply that health as a crucial component in individual and community welfare should be the responsibility of the local, rural, decentralized political system. Article 47 is also relevant to health. It refers to the objective of raising the standard of living of the rural population in particular, and this has included health and improved sanitation which are directly a health category but others which have an indirect bearing on health. The latter includes (a) better housing, (b) better communication, (c) wider education and (d) prohibition of intoxicating drinks and drugs.

In general, it appears that the poor record in implementing the objectives in Part IV is more due to lack of funds than to lack of will or motivation. Of course, there is also involved an overall bias in the polity economy towards the urban population and its interests.

FUNDAMENTAL RIGHTS AND FUNDAMENTAL DUTIES

The impact of Fundamental Rights in Part III on the subject of health must be regarded as important, if any, because Fundamental Rights are justifiable, legally enforceable. One important thing to note at the outset is that the Janata Government under Morarji Desai removed by the 44th Amendment, 1978, the right to property from the list of

Fundamental Rights by shifting it as an ordinary right under the new Article 300 A in Chapter IV of Part XII. Thus Articles 19 (1) (f) and 31, relating to right to property were taken out of the Part on Fundamental Rights.

Articles 14 to 16 embody the principle of equality and its corollary non-discrimination. But special provisions in favor of weaker sections is explicitly stated as not violative of this principle. Equality may be extended to include equal access to health services. But this is an implicit and somewhat tenuous link between equality and the domain of health. Article 17 abolishes untouchability, and it has an indirect connection with health insofar as the Article stipulates punishments for refusing admission to any person the public institutions including hospitals and dispensaries.

Article 19 confers on the individual the right to six freedom-freedom of association, freedom of movement, freedom of residence and settlement, and freedom of profession, occupation, trade or business. But all these freedoms may be restricted reasonably by the state, with the judiciary having the power to determine what constitutes a reasonable restriction. These rights have no bearing on the domain of health excepting perhaps in the case of the freedom to practice any occupation insofar as this may entail the freedom to pursue any occupation relating to the

domain of health. Article 24 prohibiting the employment of children below 14 in any factory or mine or engaged in any other hazardous employment, has a bearing on the health of the young. It may appear odd that Articles 25-28, relating to freedom of conscience and free profession, practice and propagation of religion has a bearing on the health. Yet potentially this is the case. This is because practicing a religion may involve acts violative of norms of health or sanitation, since most religions have their own notions of a healthy body or a healthy way of living. However, the Constitution itself clearly states that restrictions may be imposed on this freedom in the interest of health, besides public order or morality.

Article 29 and 30 refer to religious minorities, Article 30 permits a religious minority to establish and administer its own educational institutions, and the State cannot discriminate against them on the grounds of their being run by a religious community. This Article has some relevance to medical education and training, and thus a bearing on health.

Fundamental Duties came to be inscribed in the Constitution as part of Article 51 A Part IVA, by the 42nd Amendment of 1976. Ten Duties are enumerated as follows: to abide by the Constitution, respect the National Flag and National Anthem; cherish and follow the noble ideals of the freedom struggle; to protect the sovereignty,

unity and integrity of India; to defend the country; promote the spirit of common brotherhood amongst all the people; preserve the rich heritage of our composite culture; protect and improve the natural environment; develop the scientific temper and spirit of inquiry; safeguard public property and strive towards excellence in all spheres of individual and collective activity. These Duties are not enforceable by the courts. Therefore, their function is normative. However, it is likely that in deciding other cases the Courts may find some of these Duties relevant. Perhaps when deciding cases involving Fundamental Rights, the Courts may take into account the fact whether the parties invoking them have been guilty of violating the Fundamental Duties. From the Health point of view, only the Duty to protect and improve the natural environment seems to be relevant.

CENTRE – STATE RELATIONS

This aspect must be considered as the most crucial aspect in any discussion of the political economy of health, since the different public authorities- the Union Central government and the State governments, derive their powers and functions from the constitutional provisions defining and regulating these relations.

First and foremost, we must focus on the distribution of powers as listed in the constitution. There are three list- Union, State and Concurrent. Subjects

listed in List I (Union) are the exclusive concern of the Union Government, those listed in List II (State) are the exclusive concern of the State Government and those in List III (Concurrent) come under the joint jurisdiction of both the Union and State Governments. However, if there is a conflict between the union and the State in the exercise of powers under List III, the stand of the Union must prevail. Further, the "residual" powers, that is those not specifically figuring in any of the three lists automatically belong to the Union.

Of the 97 items mentioned in the Union List, only item 84 has some relevance to health domain. It refers to duties of exercise on medicinal preparations containing alcohol or opium, Indian hemp and other narcotic drugs. Item 6 in the State List assigns unambiguously "Public health, sanitation, hospitals and dispensaries" to the State jurisdiction. Thus, there is no question that constitutionally health is an exclusive concern of the States. But possessing jurisdiction over items is not the same thing as possessing the financial and political power to make good that jurisdiction in practice. In fact, the crux of the issue is just this: inadequacy of resources on the part of the States to carry out effectively their policy commitments and programmatic commitments in the domain of health. Just as the States depend on the Union for various types of grants and loans to

implement its health policies and programmes, the local rural and urban governments seem to be no less dependent on the State Governments for the resources necessary to carry out their health responsibilities. This has led to a policy formation - policy implementation gap, that makes the functioning of specific public authorities or governmental systems/subsystems in the domain of the health problematic, if not chaotic and unrealistic. Naturally, the union governments which fund health programmes will find it difficult to resist the temptation to impose its will on the State governments against their will. Sometimes this has led to what may be called political-bureaucratic subterfuge by which the States manipulate the funds radiating from the union to divert them away from channels originally tied to such funds. The same phenomenon might be occurring on a smaller scale in the case of the relations between the State governments and the local governments below. This has led to the growing complaint that the autonomy of the States is being eroded and its constitutional powers curbed due to the financial clout of the Union through its control over the extra-constitutional Planning Commission. It is difficult to see how this situation can be remedied without some basic changes in the constitutional system—either towards a more realistic legalization of the present system towards a more unitary model or

by drastically curtailing the financial power of the Union towards a more federal model. No rigid structuring in either of these directions may be feasible or even desirable. Even the US federal systems, upheld as the most federal of all existing federal systems, has found it necessary to move towards greater centralization. The American author Griffith (as cited in God shall, Government in the United States, p 114, see D.D.Basu, Introduction to the Constitution of India Prentice-Hall, New Delhi, 1991, 13th edition, pp 49-64), has stated, "... Here is an attack on federalism, so subtle that it is scarcely realized... Control of economic life and of these social services (Viz, unemployment, old-age, maternity and child welfare) were the two major functions of a State and local governments. The first has largely passed into national hands; the second seems to be passing. If these both go, what we shall have left of State autonomy will be hollow shell, a symbol..."

The American example should stimulate us to be less complaining of the erosion of State autonomy in the Indian system and make us less romantic about the possibility of a problem-free polity: In fact, a survey of the working of world's leading federal systems shows that it is of the essence of federal system to demonstrate periodical swings between concentration of powers and resources at its two ends- the federating unit and the federation. Ultimately it is more a matter of political management as well as developmental energies than of any simplistic constitutional repairing. Yet some minor constitutional adjustments may be suggested. Firstly, the political frictions between the Union and the States in the domain of health may be made more manageable if the subject of health is shifted to the concurrent List. Secondly, the financial structure may be politically and constitutionally re-shaped to enhance, no matter how marginally, the financial powers and resources of the States.

