

**DEVELOPING A COMPREHENSIVE AND INCLUSIVE IDEA OF
THE RIGHT TO HEALTH*****Saheb Chowdhury¹****1. Introduction/Backdrop**

Health as a Right has been long neglected or at the most been relegated to the status of a secondary right. Mere mention it also raises heckles among certain cliques. It has sometimes received utmost neglect or has been subjected to immense criticism. The criticism comes from different sections. Some complain that it is a vague and incoherent concept. Some others complain that calling health a right is like asking for a right to be healthy; and hence they say that such a right loses all its logical validity because there cannot be a right to be healthy. Another section has criticized that realization of right to health would put enormous stress on the limited resources available to us and also that it will put an unnecessary and undeserved burden on one particular section of the society, without any fault of their own, for the benefit of another section of that society. What is apparent here is that the idea of health as a right has received a lot of resistance. As a consequence it has not been able to receive the impetus needed to grow into a full-fledged and mature right. Thus, in the light of the above predicament an attempt has been made to bring health within the rights' discourse.

2. Bringing health into Right's discourse

One of the biggest challenges and a tough obstacle that the issue of health has faced is that of receiving very scant attention within the fraternity of rights' discourse. There has been an intellectual void when it comes to bringing health within the realm of right. This further worsened due to the criticism advanced by the liberals, as mentioned earlier, that making health a right would put an undeserved burden on the national exchequer and ultimately on those who legitimately earn their living. It has also been criticized by arguing that there cannot be a Right to health, but there could be health care services provided by the State, which is more at par with libertarian developmental model. But these criticisms fail to acknowledge that health care is but one aspect of the entire domain of the right to health. Right to health is not a resource oriented discourse as the term "health care" would confine it to; it is more of a philosophical inquiry into opening up of a broader and deeper understanding of it. It is not the end but the beginning of a much bigger and complex

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development, and such development cannot be restricted to the bureaucratic limits and functions of the government. It requires a continuous discussion and deliberation by the public. The right to health sets the stage where the realm of law, politics and policy making begins. Thus, the right to health discourse, as will be proved, is able to contribute in three important and interrelated ways: cognitive, archaeological and critical.²

As mentioned earlier, bringing health within rights' domain begins a discourse and dialogue within the field. It leads to an interdisciplinary approach to the understanding of the ideas of health. The cognitive gain that arises here is from coupling of law with diverse health knowledge.³ The definition of health cannot be developed unilaterally at the sleight of hands of some bureaucrats; rather it's a continuous developmental process which could be possible only by inputs from different disciplines and from the citizens who actually experience it in their life. Hence, it necessitates that even the people for whom decisions are actually made and on whom these decisions have an impact have a greater part to play in it. It should not be confined to policy makers' caprices only. It also necessitates that the idea of health is not only be confined to medicinal definitions and understandings, which mostly focuses on pathologizing, but also is related to other socio-cultural determinants underlying it. With the escape of health from the confines of the medicinal definition, it will get new socio-economic and cultural facets included into its realm, which would otherwise receive and attract no attention from those who only believe in mechanistic and symptomatic remedies.

Reflexivity is another advantage of the participation of the citizens into the health discourse when it is made in to a right. Since it is health of the people that is in question here, so it should be the people, who develop it through their participation and consent in it. With increasing participation it will lead to a continuous input of knowledge, experience and other new and innovative ideas into it, leading to better development of comprehensive but not exclusive definition of health. This approach is also able to respect individual freedom. Since, a real individual now becomes a party to a discourse that decides that individual's well-being; it is, therefore, able to respect his choice and freedom. This is very much parallel to and in tandem with Amartya Sen's idea of the "Capability Approach"⁴. This approach asserts the importance of freedom and attaches value to choices and opportunities for individuals to live the life they choose. The capability approach allow for the people to make choices in

² Global Health and Human Rights: Legal and Philosophical Perspectives
edited by John Harrington, Maria Stuttaford.

³ Ibid.

⁴ Sen's *Capability Approach*, Internet Encyclopedia of Philosophy, Accessed on September 27, 2014, <http://www.iep.utm.edu/sen-cap/>

accordance with their own conception of the idea of good. Now, in health rights, it is both at the individual level and also at the collective level, the people play an active role in the development of what their health rights are. Consequently, the idea of health care becomes less intrusive. Therefore, this approach respects human freedom and leads to a better development of the right to health by taking the repressive element out of it.

The next benefit of such an approach is the archaeological benefit it definitely produces. For instance, traditional medicines and other medicinal fields have been totally relegated and termed as sham by the mainstream medicinal practice. It is not denied that the practice of medicine needs to be regulated so that it doesn't become victim to the fraudulent and unscrupulous practices. However, it is an undeniable truth that traditional medicine has been subjected to utmost neglect and disapproval from the authorities. There could be plethora of reasons for that; for instance, the obvious presence of some vested interests and also maybe because of overwhelming dominance of the multinational corporations in this field of the mainstream medicinal practice who sponsor giant research and development (R&D) projects.

With this new participatory method, importance can also be given to the traditional and formerly suppressed methods, because in such instance, health would not only in the domain of the policy makers but also in the hands of the public who actually have the greatest stake in it. Therefore, it is quite apparent from above mentioned contentions that the right to health approach, in a way, is able to liberate us from the grip of conventional understanding of health and also consequently from the grip of strong market forces. It, thus, opens up avenues formerly inaccessible to us. We are able to escape from the concept of health which only focused on resources and its limitation and also focuses on medical pathologization. Now, resource becomes only a means to an end and not an end in itself. Health becomes the end here but not a grand-narrative understanding of it as "the end". The debates and deliberations to which it is opened up on conceptualization of it as right will therefore be able to develop and improve it even further by opening and developing new avenues.

2.1. Refutation of the criticism that Right to health is vague and incoherent

Vagueness and incoherence of Right to Health has come not from concept of health itself, rather it has come from inability of a certain coterie to understand it. Right to health is not only about resource and its allocation. Jennifer Ruger, while criticizing Daniels⁵, has said that it is not the resource that we are concerned about, rather it is health that is our subject matter. The resource oriented-ness has led to the myopic criticism of the Right to Health. Health right is neither vague nor incoherent; rather it is a broad and developing concept. The interconnected relations of health with various other socio-economic and cultural factors and the omnipresence of the idea have challenged the mind of the most of its critics. So, calling health itself as vague and stopping the developmental discourse does not help but only shows an intellectual retirement. The problem is not that of an inherent imperfection of the right rather a weakness and insufficiency of our own understanding of it.

2.2. The misunderstanding of Right to health as Right to be healthy

The critics of right to health have also criticized it as the Right to be healthy, which is an impossible undertaking. Jennifer Ruger has again answered that right to health is not to be misunderstood as a right to be healthy but as a respect to the idea of health itself which is a comprehensive and interconnected idea. The above criticism of the Right to health is nothing but a libertarian head banging, because of their resource oriented and materialistic understanding of health. Before we even talk about being healthy, we need to know what the idea health itself is. This idea could vary from people to people and culture to culture. We are also aware of the idea that there are some connecting threads of universal ideas of health, but above this it also takes a form at our individual level. The above criticism fails to fathom this idea of health and understands health as the idea of distribution of medicines and medical care. For instance, our health is very much interlinked with the environment and the surroundings we live in. A resource oriented and medicinal definition would fail to take this into consideration, and this is just one such example.

⁵ Jennifer Prah Ruger, "Toward a Theory of Right to Health: Capability and Incompletely Theorized Agreements" Yale Journal of Law and the Humanities, 2006

3. The Neglect of Traditional/Alternative forms of Medicines

The traditional methods of treatment in India, such as Ayurveda, Unani, Siddha and Homeopathy; have been long sidelined since the arrival of mainstream allopathic treatment. This process has mainly started since the institution of this form of medicine by the colonial British regime here. Since then, because of certain factors like market domination and also because of its easy availability it has become primary method of treatment. Other method of treatment like Ayurveda, Unani and many other herbal methods of treatments that include the traditional knowledge preserved from eons and handed down to us from generations have been ignored and sometimes been relegated to the level of quackery without actually any serious attempt ever been made to understand them. With the State sponsored disapproval and relegation, people are left with no choice but to go ahead with the mainstream medicine. Here, it should not be misunderstood as a criticism of the effectiveness of the mainstream medicine. The question here is that of the making of other options unavailable and restoring primacy over certain mainstream medicinal practices. There are many chronic diseases that are much better treated by the traditional herbal medicines without any side-effects than with artificially made chemically manufactured medicines and also in many cases which are a total rip-off of the traditional knowledge itself by the Multinational Corporations who are trying to pass these off as their own creation by giving them some flashy names. In fact, even traditional ingredients are the base materials used in many other medicines. Traditional medicines also provide many other effective solutions to physical and mental health issues. These forms of medicine also make very less intrusion into our body and are also very effective. The relegation of these branches and imposition on the people of a single form of medicine has led to the fact that there has been a negligible development in these other fields of medicines. This has only led to limiting the choices and options available to the common people.

Health is a matter of very personal importance and choice, and an effective idea of health is possible only when the heterogeneity of health care system is recognized and people are allowed a free choice not only in the form of rhetoric, but also in the form of making these choices available. Moreover, making health a right would help in bringing out people's participation and with it more views will be inculcated. This will lead to opening up of more options to the people, and that might also include non-intrusive and unconventional form of healing processes, like yoga and naturopathy etc. Through this manner, people will get to choose that form of treatment as they want and are comfortable with. It would not be

imposition of one form of medicine but of making multiple options available to public. Thus our freedom in choosing what we think is best for us would be respected. It is important to keep in mind that agency of the people in determining who they are and the freedom itself are the biggest health determinant of all.

4. The De-medicalization of Health

Having brought the discourse of health within the realm of rights, it is hereby essential to mention how health, as Michel Foucault substantiates, has been *medicalized*. Health no longer remains in Individual's domain. It becomes a matter of State concern. However, State is concerned only to the extent of its instrumentality in changing the strength of the state. Health, now becomes, what is defined by the medical authorities and the state. The individual choice and freedom takes the back seat. The idea of health, which is defined by the medical fraternity and the State, is imposed on public without them having any say in it. Foucault tells us how every aspect of one's life is under such control and surveillance. One undergoes a constant process of screening, in every aspect of their lives. Foucault reflects on how, even, sexual orientations of homosexual persons are considered as deviant behaviors and are treated like disease. He says, "*Health has been transformed into an object of medical treatment.*"⁶ Today, even personal hygiene is something defined by such authorities. Health is now a concern of the state, so far as it is successful in producing workforce capable of contributing to the economic growth.⁷ Thus, it is reiterated, as stated earlier that health as a right is more of a concern of the poor and marginalized.

In present day times health has become a luxury affordable only by the rich. With increasing marketization, it is the medicine and other cosmetics companies which are making a killing by introducing products, as if personal health is nothing without them. Thus, what one notices is that health has become an increasingly *medicalized*, controlled and commoditized concept. Thus, the point emphasized and unfolding the above discussion is that, as we make health a right, it comes to the public domain. It becomes, in a way, a shift of power to the hands of the masses. The hierarchized pyramid of power dis-integrates and with increasing realization by the people, health itself becomes a power in the hands of the people. It is they, who decide what health is to them and what they consider as good for them. This inevitably brings a lot of other interconnected issues within, like that of clean drinking water that are being

⁶ *The Crisis of Medicine or the Crisis of Anti-medicine?*, Michel Foucault, Foucault studies, 2004.

⁷ Ibid

exploited by the corporates, environment pollution and exploitation by the corporates at the cost of the poor and the marginalized.

5. The primacy of the Right to health and the core health care issues

Now that we have brought health within the rights' discourse and also tried to answer its detractors, it is probably the right time to discuss why health should occupy the prime position in the rights' discourse. A right loses its meaning, if we are not able to enjoy it. It is of no use, if we have a right only on paper. Henry Shue says, "*Substance of a right is whatever the right is a right to.*"⁸ Now, for a body which is crippled with physical or mental ailments and infirmities, a right to life or liberty or any other right will cease to hold any meaning. It will be as if these rights don't even exist for such a person, and they could hardly be expected to exercise their right to freedom of expression (as it is necessary to criticize Peter Uvin's argument⁹) or for that matter any other rights. One of the many grounds on which Peter Uvin criticizes the human rights discourse is that these rights are made by smart and well-educated people sitting in the ivory towers, and that these fights have not been fought for by the masses¹⁰. What Uvin fails to understand here is the fact that a certain aspects of rights, such as health, do not necessarily need a fighting for from the masses all the time to begin with. Initiation of a discourse is what becomes necessary here which itself could be the trigger for the "fight" that Uvin talks about. As long as this purpose is served, it doesn't matter where it starts from. Moreover, who do we expect the impetus to come from, if not from well-intentioned educated persons? Does he actually expect people to be like disconnected islands? He also ignores the fact that absence of such rights has the most disastrous effect on the most marginalized and poorest sections of the society. In such case, Uvin's insistence on a sudden rise and fight from the masses does not help, but only supports the elite's hands off attitude. If my new born daughter is dying because of lack basic necessities needed for survival, I don't need any agreement or fighting for from the masses. It is something everyone similarly placed will feel. Preventing such premature mortality and morbidity are some of the basic core assurances that need to be guaranteed now. Such a social guarantee of core health against these clearly visible standard threats needs to be guaranteed here and now. If this basic right is not assured then every other rights loses utility.

⁸ Henry Shue, "*Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*" Page No. 13-34, Princeton University Press, 1996.

⁹ Peter Uvin, "*From the right to development to the rights-based approach: how 'human rights' entered development.*" Development in Practice, Volume 17, Issue 4-5, August 2007.

¹⁰ Ibid

Basic rights, says Shue¹¹, are “everyone’s minimum reasonable demand upon the rest of the humanity.” It is then ensuring these basic minimum core rights of health becomes a necessary claim upon the humanity.

In fact, what Shue argues in the name of Security and Subsistence is more closely associated with the entire concept of health than anything else. While talking about this, along with other factors, Shue talks about a minimal public health care. It is this factor along with other such social guarantees that becomes the cumulative idea of the right to health. The fact is, the security of a person would be non-existent if a basic minimum right to health is not guaranteed. On the other hand, what Shue calls¹² a “decent chance at a reasonably healthy and active life” won’t come from mere availability of food or medicine, but will also need the interplay of entire gamut of these cumulative factors. It is this broad idea, what the author thinks becomes a right to health. When this right to health is ensured, only then all other rights become relevant and realizable.

6. Health Rights as an Evolving Process

Health, as a concept, currently is in a state of stupor. The entire discourse of health has so far remained straitjacketed in the current medico-economic model. It has not been able to escape this grip and develop into its own inclusive and full-fledged model. Health has forever remained subject to criticism of the resource oriented minds, and therefore has been unable to develop into a discourse of its own. As we make health a right, there would be a paradigm shift in this direction. It will open up the door for multitude of ideas and views with regard to health. What happens is that, there starts a dialogic process, and it is through this dialogic process between heterogeneous and diverse views that the right is able to evolve further.

It would be pertinent here to mention the concept of deconstruction as developed by the post-modernist philosopher, Jacques Derrida. Deconstruction¹³ shows the importance of critical thinking and requests one to escape the grip of archetypes. It shows how taking into consideration of different and divergent perspectives helps one in understanding things better. It also further urges to keep an inventive eye open and to look for continuous critical thinking and understanding. Making Health a right and putting it into the rights discourse serves that purpose. Once we make it a right and start the process of popular participation, it helps in two

¹¹ Supra note8

¹² Ibid

¹³ Jacques Derrida: Deconstruction, Stanford Encyclopedia of Philosophy, Accessed on October 01, 2014, <http://plato.stanford.edu/entries/derrida/>

ways. Firstly, it escapes the grip of the fixed archetypical mold given to it by medico-economic concept of health. Secondly, as discussed earlier, such an approach takes into consideration the heterogeneity of views and ideas of health. This helps in taking into consideration the differing needs of people placed and situated differently, and also the multitude of socio-cultural factors that plays a critical role in it. Thus, the above development leads to the initiation of a deliberative process of the idea of health. This development also gives respect to the freedom of choice of people as health no longer remains just the idea of taking medicines or buying personal hygiene products sold in the market. Now, it comes to the public domain and with the infusion of knowledge from different streams and participants it becomes vibrant discourse. Health becomes a developmental process and no longer a stagnant and inactive archetypical concept.

7. Conclusion

It is said that the greatest wealth is health. This wealth is much more important than any other material wealth. The neglect of this essential part of life has ensured that it has not been able to develop into a comparative and inclusive discourse of its own. It has been evident and highlighted as how health has been subject to unjustified opposition from those who are obdurate enough to not even start the discussion and those who are in it but are not convinced enough themselves. We have also noticed that health had been denied the right's status not because it inherently lacks that quality, but due to the deep seated misunderstandings of its detractors. A tight control on health of the mainstream medicine and the corporate interests has also led to the development of a very narrow idea of health. Health has now become a much medicalized concept, which has led to hindrance in development of a comprehensive model of health. Therefore, bringing health within the right's discourse first helps in de-medicalization and de-corporatization of it and then further opens up a discussion, which takes into consideration the views and perspectives of all, who have a stake in it. Thus, when health becomes right, it doesn't mean that it takes a fixed and unchangeable form, but it becomes a developmental process, which reshapes and modifies with the development of our understanding of it. However, at the same time it is also necessary to keep in mind that the core health care is a part of this right which needs to be addressed and guaranteed immediately. Therefore, it would be appropriate to say that a right to health approach is able to respect both human freedom and dignity, and it is only when a human life has a dignity and freedom does it actually become a healthy life.