Annexure 1

WHAT ARE THE SOURCES OF LEGAL RECOGNITION OF HEALTH RIGHTS?

Health rights are legally recognized through the following legal systems and the legal instruments created within those systems:

1. International legal system
2. National law: Constitution; Central and State legislations/Acts, Judicial Rulings

Section 1 International/ regional legal systems:

International could be a treaty (also commonly called Convention or Covenant) which is binding on, countries that become signatories to it or resolutions and declarations by the General Assembly, which have the consensus of most countries and have a persuasive value. There are also international judicial decisions and customary international law (that is in practice but not written down.

The treaties which make the Right to Health obligatory are:

1. International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 12:

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

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

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

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

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

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

Also relevant are Article 7 (family related health rights of women and children) and Article 10 (safe and healthy working conditions) of the ICESCR.

General Comment 14: This law is elaborated in General Comment 14 , adopted in year 2000 as consisting of three inter-related and partially overlapping obligations:

(a) The obligation to *respect* which requires the governments to refrain from denying or interfering, directly or indirectly, with the enjoyment of the right to health by any individual or group mentioned hereunder;

(b) The obligation to *protect* which requires the governments to take measures that prevent third parties from interfering with the health rights mentioned herein; and

(c) The obligation to *fulfill* which requires the governments to facilitate, provide and promote the health rights mentioned herein, by adopting appropriate legislative, administrative, budgetary, judicial, promotional and other measures.

This General Comment is a detailed 10 page document which requires to be studied and complied with by state and central authorities.

The case for a law on Right to Healthcare emanates from the third obligation of the General Comment. For those who believe in federalism , it is important to have a state law rather than a national law, though there are national obligations to enable states to meet their obligations. The Clinical Establishments Act and laws against commercial determinants of ill health gains legal legitimacy from the obligation to protect and respecting the right to health.

2. Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), Article 12:

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.”

Also relevant are Article 10 (educational information to help to ensure the health and well-being of women and families), Article 11 (occupational safety of women and maternity

benefits) and Article 14 (health of rural women) of CEDAW.

3. Convention on the Rights of the Child (CRC), Article 24:

"1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries."

Also relevant are Article 17 (access to information aimed at the promotion of the child's well-being and physical and mental health), 23 (health of children with disabilities), Article 25 (periodic review of care, protection or treatment of physical or mental health of a child),

Article 32 (protection from occupational hazards and economic exploitation), and Article 39 (physical and psychological recovery and social reintegration of a child victim).

4. Convention on the Elimination of All Forms of Racial Discrimination (CERD) Article 5:

"In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: …

(iv) The right to public health, medical care, social security and social services;…"

5. Convention on Rights of Persons with Disabilities, Article 25:

"States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall: Provide persons with disabilities with the

a. same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

b. Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

c. Provide these health services as close as possible to people's own communities, including in rural areas;

d. Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

e. Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted

by national law, which shall be provided in a fair and reasonable manner;

f. Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability."

6. International Health Regulations 2005.

Obligations of being signatory and ratifying international law to which India is a party:

A signatory nation formally agrees, in principle, to the standards set by that treaty/ covenant/ convention. By ratification(accession) it formally confirms and agrees to 'implement' and bring into real practice, it's terms according to the series of obligations and enforcement mechanisms established therein. All conventions/treaties create a 'Committee' as a 'Treaty Monitoring Body' or an oversight body for ensuring enforcement by the ratifying nations. Countries that are members of a convention ('States Parties') are obligated to report on a periodic basis to its respective treaty monitoring body to provide information on their national compliance with the convention. For example, the reporting procedure of the CESCR (Committee under the International Convention for Economic, Social and Cultural Rights – ICESCR) requires States Parties to file an initial report within two years of the Covenant coming into force and thereafter every five years, or at any other time the Committee deems appropriate. Once a treaty monitoring body/ committee has considered a report submitted by a government and any additional information on treaty compliance brought before it also by non-governmental bodies of that country (called Shadow Report), and discussed the report with the representatives of the reporting government, it issues its 'Concluding Observations' for that country, recording the achievements of the reporting State in taking action to bring its laws, policies and practices in compliance with the obligations under the treaty. The Committee also records its concerns with lack of compliance with the treaty by that State.

To assist countries in fulfilling their obligations, treaty-monitoring bodies also develop a series of 'General Recommendations' or 'General Comments' explaining the content and meaning of duties that arise under treaty articles. For Right to Health it is General Comment 14.

A signatory country's obligation under the law require it to fill the gaps in its legal system so that all the standards in the treaty/ covenant/ convention are effectively in place and practice and are not breached in omission. This would mean reviewing all laws and policies of the country to bring them in line with the treaty/ covenant/ convention and amending or bringing in new laws as needed and taking measures against any action or practice that

contravenes it.

7. International Declarations with relevance to Health Rights:

The most important declarations are the Universal Declaration of Human Rights (1948) the Declaration of Alma Ata (1978), Declaration on the rights of mentally retarded persons (1971), Declaration on the Rights of Disabled Persons (1975), Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991), Declaration on the Elimination of Violence against Women (1993), Declaration on the Right to Development (Vienna Declaration and Programme of Action) (1993), Programme of Action the International Conference on Population and Development (ICPD, 1994, Cairo),International guidelines on HIV and human rights, 1997,Millennium Development Goals (MDGs 2000), Declaration of Commitment on HIV/AIDS, 'Global Crisis-Global Action' (2001). There are many others.

While declarations are not legally binding, they do form a commitment of the government and can be used to persuade governments. National Courts and executive can also use it frame or interpret laws.

Section 2. National/Domestic legal system for recognition of health rights in India:

There are three sources of legal recognition of health rights within India- the Constitution, Acts passed by legislatures of central or state government and judgments of Supreme Court and High Court, that have the same status as an Act.

A. Constitution:

The Constitution does not make healthcare a fundamental right. However, they are part of the Directive Principles. These are not enforceable by any court, but the principles are fundamental to governance and it was to be the duty of the State to apply these principles in making laws.The founders of the Constitution expected these to become legally enforced rights within 10 years of adoption of the Constitution, but till today, they remain more of a guiding principle.

All the relevant Directive Principles have relevance for Right to Health through the principle of social justice. For the Right to Healthcare the most relevant are:

- 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health,
- 48. Provision for just and humane conditions of work and maternity relief: The State shall make for securing just and humane conditions of work and for maternity relief,

- 49. provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement.

B. Central and State Acts:

There is no central or state right to health Act. However, there are many Indian laws covering selective aspects of right to health and health care. To list:

Epidemic Diseases Act, 1897; Drugs and Cosmetics Act, 1940; Drugs (Control) Act, 1950; Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954; Maternity Benefit Act, 1961, Registration of Births and Deaths Act, 1969; Medical Termination of Pregnancy Act, 1971; Water (Prevention and Control of Pollution) Act, 1974; Narcotic Drugs and Psychotropic Substances Act, 1985; Air (Prevention and Control of Pollution) Amendment Act, 1987; Mental Health Act, 1987; Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988; Transplantation of Human Organs Act 1994; Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994; National Environment Tribunal Act, 1995; Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999; Cigarettes and Other Tobacco Products Act, 2003, Food Safety and Standards Act, 2006, Clincial Establishments Act (2010), Rights of Persons with Disabilities Act, 2016, Mental Healthcare Act, 2017, National Medical Commissions Act 2019, National Commission for Allied Healthcare Professions Act, 2021, National Nursing and Midwifery Commission Bill, 2022, (List- not exhaustive)

In addition there are Public Health Acts in 6 states: Tamil Nadu (1939),Andhra Pradesh (1939), Madhya Pradesh(1948), Goa (1985) Uttar Pradesh(2020), and Hospital and Clinical Establishment Registration and Regulation Acts in different states; laws to deal with negligence like Consumer Protection Act also relate to healthcare.

C. Court Judgements:

Many Supreme Court Judgements that provide for a Right to Health and Healthcare. These are largely based on article 21 or article 14.

1. Article 21 of the Indian Constitution states:***" Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law."***Through several judgments Supreme Court has expanded the

fundamental right to life guaranteed under Article 21 of the Constitution into an overarching right under which several other positive rights are subsumed as necessary components of life. The Right to health care is one of these. Some landmark judgements in this regard are:

Francis Coralie v. Union Territory of Delhi (1981) I SCC 608: (AIR 1981 SC 746) that the right to life includes the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, free movement and commingling with fellow human begins.

Chameli Singh v. State of U.P. (1996) 2 SCC 549: "Right to life guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter… All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights or under the Constitution of India cannot be exercised without these basic human rights."

Paschim Banga Khet Mazdoor Samity and others v. State of West Bengal and another, 1996): "Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state. … Article 21 imposes an obligation on the State to safeguard the right to life of every person. … The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in a violation of his right to life guaranteed under Article 21."

Bandhua Mukti Morcha v. Union of India and others, 1982 concerning bonded workers, the Supreme Court gave orders interpreting Article 21 as mandating the right to medical facilities for the workers.

Other relevant rulings are:

- R**ight to health is a fundamental right** was held in CESC Ltd. vs. Subash Chandra Bose, (AIR 1992 SC 573, 585);
- **Everyone is entitled to adequate health care** was held in Mahendra Pratap Singh vs. Orissa State AIR 1997 Ori 37;
- **Health and health care of workers is an essential component of right to life** was held in CERC vs. Union of India, (1995) 3 SCC 42 and Kirloskar Brothers Ltd. vs. Employees' State Insurance Corporation, (1996) 2 SCC 682, and in State of Punjab and others v. Mohinder Singh Chawla and Ors 1997 (2) SCC 83;

- **Right to health care of government employees is integral to right to life** was held in State of Punjab vs. Mohinder Singh Chawla 1997 2 SCC 83;
- **Emergency health care as fundamental right to life** was held in Paschim Banga Khet Mazdoor Samiti vs. State of W.B. (1996) 4 SCC 37.

2. **Article 14 of the Indian constitution states that *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." This provides a special space for social justice to address health inequities.*** There is a duty of the state to ensure that deprived and marginalized sections also have an equitable access to quality health care. Judicial pronouncements from the Supreme Court as well as the High Courts of the country have left no doubt that it is not merely "formal" equality that the Constitution guarantees. Mere formal equality would mean that the society would simply reflect its extant hierarchy and order in the distribution of resources and would oblige the state to only be responsible for treating all persons in the same manner, based on objective standards. Social justice requires "substantive" equality which calls for affirmative action, positive discrimination when dealing with unequals. This makes it the government's responsibility to ensure that the systemic, socio-economic vulnerabilities, e.g., of women, children, rural populations; and historical conditions of disadvantaged classes of persons, e.g., scheduled classes and tribes have substantive access to health care and similar health outcomes. Therefore Article 14 must be interpreted to ensure access to healthcare even where due to problems of lack of information, affordability or social exclusions, marginalized sections are unable to access care. This principle also flows from Article 15 (right to non-discrimination), Article 17 (abolition of untouchability); Article 23 (prohibition of traffic in human beings and forced labour); and Article 24 (prohibition of employment of children in factories, etc.).

   Court rulings in this regard are many and often relate to special groups like those with mental illness or disability.

Justiciability of government and of private sector:

Any violation of a fundamental right, which can be attributed to the government's action or inaction, can be taken to the constitutional courts (Supreme Court and High Courts) through Writ Petitions under Article 32 and 226 of the Constitution respectively. However, the fundamental rights cannot be ordinarily invoked against a private person or body. This makes it possible to address denial of care by an public institution, but it makes it difficult to invoke this against a private provider.