

Public Hearings for the Right to Health: An analysis of different approaches

Public Hearings have emerged as an important mechanism for sharing violations of economic, social and cultural rights in India. The campaign on the Right to Information has pioneered the use of public hearings and now it is being increasingly applied to health related rights.

A series of regional public hearings organised by the National Human Rights Commission and the Jan Swasthya Abhiyan concluded with the National Public Hearing on the Right to Health Care on the 16th and 17th of December, 2004. One of the successes of this process was the adoption of a National Action Plan by the NHRC that suggests further action for realising the right to health care. The success of this series of public hearings, coming as it does on the heels of the earlier successes of the Right to Information campaign, highlight the importance of this mechanism in asserting and claiming social, economic and cultural rights which are otherwise non-justiciable.

Health in the context of human rights – Though many human rights experts claim that the division of human rights into civil-political on one side and social-economic-cultural on the other is an artificial one, the acknowledgement of this division is of great importance where the lives of the poor and marginalised groups are concerned. Civil and political rights are those human rights which not only enjoy legal protection, but also much greater recognition and visibility. Arbitrary detention, torture and extra-judicial executions are some instances where individual civil and political rights are applicable. Social, economic and cultural rights, on the other hand, do not enjoy specific legal protection. This is unfortunate, because most of the human rights which are necessary for the dignified survival of marginalised communities fall into this domain, including, among others, the right to health (Article 12 of the ICESCR). The right to health is also recognised and reinforced by sections in the CEDAW (Convention on the Elimination of All forms of Discrimination Against Women), CRC (Convention on the Rights of the Child), and ICERD (International Convention on the Elimination of All forms of Racial Discrimination), as well as regional human rights treaties. Despite much official recognition, these rights are not protected by law, and the international consensus is that the principle of progressive realisation should apply. In the case of India, the Constitution takes note of these rights in Part IV, or the Directive Principles of State Policy.

Although these rights are supposed to be fundamental in the governance of the country, and although it is the duty of the state to apply them while making law, they cannot be enforced in a court. Progressive realisation has proceeded at a very slow pace (if at all) and the Indian state often fails in its duties as described in the constitution. Thus the distinction between civil and political rights and economic, social and cultural rights is important because it reminds us of areas where commitments have been made but justice mechanisms are lacking, and that we still have a long way to go to before we can ensure a dignified life to all citizens of the country .

Neo-liberal globalisation is a well known threat to the lives of the economically vulnerable and often leads them to further destitution. Neo-liberal globalisation also champions the rights of individuals (and even that of corporate entities) to trade without any restrictions based upon the protection of states for their right to do so. However, neo-liberal economic reforms pay little or no heed to economic, social and cultural rights, including the right to health care. In the realm of public health, neo-liberal reforms are manifested in increased privatisation and fee-for-service policies which make it even more difficult for the poor to access health care services. While the National Action Plan adopted by the NHRC (after the Public Hearing on the Right to Healthcare) has many provisions and activities for realising the right to health care, given the realities of our country, this process will continue to remain an uphill task. The poor and marginalised will need to continually assert and demand that their rights and entitlements be respected, protected and fulfilled. If public hearings are emerging as one of the mechanisms through which this assertion may be made, it is necessary to examine the strengths and limitations of this process as well.

Public hearings as a mechanism for asserting and claiming human rights - The articulation of a human right is several steps away from either protecting or claiming a human right. The United Nations Conventions and Committees engage in a process of clarification and interpretation by preparing General Comments and General Recommendations. In the case of the right to health, or specifically “ The right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, this has been through the General Comment 14 of the ICESCR. While international health experts note that the right to health does receive legal protection through some regional human rights mechanisms, and that domestic mechanisms exist in some countries (Report of the Special Rapporteur on Right to Health 2003 E/CN.4/2003/58), specific international mechanisms to ensure and protect this right have not been developed. In the absence of such mechanisms there is a need to develop alternative methods for claiming and protecting this right, and public hearings can be seen as one such method.

State action for ensuring and protecting human rights includes the process of framing specific laws, developing monitoring mechanisms and ensuring justice. While this is often adequate for civil and political rights, for economic social and cultural rights governments need to institute special programmes for providing services – as in the case of health or education. In India, there are few constitutional protections for the right to health. Aside from interpretations of the right to life, there are some laws which relate to health, such as the National Maternal Benefit Act, Child Marriage Restraint Act, ESI Act, MTP Act, Consumer Protection Act, and others. Some sections of the Indian Penal Code, notably those relating to consent, homicide, negligence and hurt can be applied to the realm of irresponsible service provision. However, these mechanisms are grossly inadequate to protect the right to life of over one and quarter lakh women who die during pregnancy and childbirth, even though mother and child health have been areas of special attention for health programs since independence. Tuberculosis continues to affect over two million new people every year and kill approximately 500,000, even though it has been part of a separate national thrust for over 30 years. Many government hospitals and

health centres remain unoperational, without doctors or drugs, and the equipment and supplies lie rusting or rotting while the poor are forced to take recourse to potentially dangerous, unqualified practitioners. Tens of millions remain without safe drinking water and sanitation is a distant reality for an equal number of people. It is clear that the right to health has tremendous implications for the life and dignity of a large proportion of the citizens of India, even though it enjoys little protection.

Non-state and international interventions for protecting human rights include identification of rights violations, fact-finding of such cases, instituting monitoring mechanisms, the preparation of reports, in some cases setting up tribunals, as well as lobbying and advocacy to ensure redress and compensations to victims and punishment to perpetrators. Truth and reconciliation commissions have also emerged as mechanisms for addressing large-scale human rights violations which take place in repressive political regimes. These are usually instituted after a new regime has come to power and are meant to bring some form of closure to the humiliation faced by the repressed groups. In India, public interest litigation has emerged as a legal mechanism to expand the interpretation of existing law for the protection of human rights, where specific provisions do not exist. It is necessary to find a place for public hearings within this broad set of mechanisms.

Among the interventions mentioned, above public hearings can perhaps be compared to truth and reconciliation commissions, however there are some differences as well. Truth and reconciliation commissions (TRCs) have been constituted in a number of countries, though the one in South Africa is the most renowned. These are extra judicial commissions where survivors and perpetrators of an acknowledged event in which human rights violations took place are expected to provide testimonies. For the survivors it is a public acknowledgement of their experiences, and for the perpetrators it is an acknowledgement of their role in the violation of rights. It is expected to bring closure to the suffering and sense of violation of the survivors and simultaneously make the perpetrators publicly acknowledge their culpability. TRCs do not typically include punishment, but the public acknowledgement of the suffering of survivors helps those groups come to terms with their past and face their future with a new sense of purpose.

There are a number of differences between public hearings in the current Indian context and a TRC. First, the public hearings that are under consideration take place in more or less the same political and administrative setting that in which the human rights violation took place. Second, the perpetrators (who are administrative and governance systems) are also reluctant either to recognise their violations or assume culpability. Third, TRCs have usually been organised to address gross civil and political rights violations and not address social issues like livelihood, food, women's rights or health.

Public Hearings on the right to health care: Issues and Challenges - In India, as has already been mentioned, public hearings became popular mechanisms for communities to express their dissatisfaction and expose human rights violations as part of the Right to Information campaign. Public hearings were organised to expose the huge corruption that had taken place in spending development funds in Rajasthan and elsewhere. Subsequently the National Women's Commission and different state commissions have

started using hearings to address women's issues. There is one significant difference between these hearings, organised by statutory commissions and the ones organised by civil society campaigns. The women's commissions are para-judicial bodies of the state and are empowered to take action and give instruction to different agencies of the state. The hearings organised by the women's commissions include representatives of different government departments and instant justice is delivered by instructing these officials to redress the grievances of individual claims and complaints. In this regard these hearings do not represent the collective expression of a single claim, but are a collection of individual claims, most of which are of a similar nature. Public hearings organised by the Right to Information campaign, on the other hand, represent the collective expression of a single claim or violation. This distinction is important to understand in order to examine the use of public hearings in cases of the right to health.

As mentioned at the outset the notion of a *jan sunwai*, or public hearing, has been used by the Right to Information campaign as a mechanism of non-violent protest. However, it goes beyond mere protest by adding evidence and documentation to substantiate the common violations faced by the poor in a community and by arguing that development-related corruption and deprivation are in fact violations of the right to life. Apart from being a practical weapon for exposing corruption, these hearings also provide an opportunity for deprived communities to assert their citizenship rights in a democracy.¹

The violation of the right to health care affects a marginalised community uniformly inasmuch as the whole community is either deprived of health care services or has inefficient, callous and corrupt services. However, this lack of services has a much greater impact on those with a perceived health problem than on those without. In this regard, a public hearing can appear to be a set of grievances of individuals rather than an entire community's claim for health. This difference has a significant impact on how the claim is perceived and expressed. If the public hearing emerges as a platform to voice individual complaints, then the purpose of establishing a common community claim may be diluted.

The distinction between a "collection of individual grievances" and a "single collective claim" can be understood by considering public health in the context of a human-rights framework. Classically, human rights were applied only in the context of an individual's right to remain free and autonomous and to receive the support of the state in order to do so. It has even been argued that the concept of individual rights is applicable to the developed world of America and Western Europe but conflicts with the sense of traditional community identity that is prevalent in much of the developing world. Over the years, however, human rights scholars and practitioners have applied an individual rights concept to make claims for the rights of marginalised groups. Since most traditional communities are deeply hierarchical, they allege that the human rights of a marginalised group are made up of the individual and common claims of each member of the marginalised group, and in this way, the group can be seen as a collection of individuals. The right to health care can be understood within this framework. Thus

¹ Information on the Right to Information campaign was obtained from www.freedominfo.org and www.transparency.org

public hearings on the right to health ought to address individual violations but at the same time weave these individual testimonies into a more complete and unified expression of a community claim. The sense of unified community assertiveness is essential for the struggle to claim the right to make demands beyond the life of the public hearing. Quick fulfillment of individual claims may be detrimental to this process. Addressing individual 'cases' may also deflect attention from the systemic failures and inadequacies that lead to violations of rights in the first place.

Another issue that needs careful consideration during the public hearing is the role and presence of the perpetrator group (health service providers and managers). In the case of a TRC, the perpetrators obviously do not enjoy the same privileges that they did earlier and so are forced to come face-to-face with their abusive acts. But in public hearings, especially those organised by civil society movements, it can be difficult to ensure the presence of government parties, and even more difficult to make them accept culpability, even when they are present. In para-judicial public hearings (those organised by legally constituted commissions) where the presence of government agencies can be ensured, case by case orders for grievance redressal can be detrimental to the overall purpose of establishing a common community rights violation, for the reasons described above. The government parties can also challenge individual testimonies, seriously undermining the fragile self-esteem of vulnerable groups. And finally, individuals who share their testimonies may later be victimised by the agencies that are indicted. This can reduce the sense of assertion which had enabled the marginalised groups to come forward with their claim or violation in the first place.

All of this is not to argue that the redressal of individual rights violations or claims for compensation should not be expressed through public hearings. What perhaps needs to be addressed is how this demand is made and followed-up. This leads to the question of who takes the initiative for organising public hearings and what should be the essential follow-up after it has been organised. Public hearings are and should be seen as essentially political events of assertion of a claim and expression of a violation. They are significantly different from a public consultation or dialogue where individual's testimonies are presented so that common elements can be derived from the various stories and then the powers-that-be can decide on their course of action. The greater the distance between the community whose rights have been violated and the location of the hearing, the greater the chances that the public hearing will become an academic exercise rather than a political one, because distance determines who organises the event.

The ownership of the public hearing should ideally be with the community who is expressing its claim/violation. It should be a process initiated and controlled by the community. This precludes individual grievance redressal taking precedence over the expression of a collective claim. Even the individual claims for redressal and compensation can then be followed up through a collective process. When claims are settled, the victory would not simply belong to one individual but rather to the whole community. Similarly, as an assertion of its collective strength, the community can engage in other interventions such as filing cases in criminal or consumer courts, raising public interest litigation, or other forms of collective action. The role of an intermediary

organisation has to be seen in this context and should not supercede that of the community.

Conclusion – The imperatives of economic reforms often lead governments to abandon basic social sector reform. In this age of neo-liberal reforms, the Indian health sector seems to be condemned to die a natural, slow death. However, this is against the core interests of hundreds of millions of citizens in our country. It not only leads to poorer health outcomes at the individual level, it also stands against the fundamental tenets of the constitution. In such a situation, public hearings can become both a powerful mechanism for communities to demand health related rights and also a political tool to strengthen the process of participatory democracy. But they must be designed, carried out and followed up in such a way that it assists individual redressal and strengthen community processes at the same time.

In Medico Friend Circle Bulletin