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ETHICAL AND LEGAL REFLECTIONS ON STRIKE: Strikes by Nursing, Medical and Para-Medical Professionals in India

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*Liji Samuel**

[***Abstract:*** *Right to health is an essential human right which finds space in international and national documents and the core of the right to health is the undeniable duty entrusted upon the governments to provide and facilitate medical care to the needy. Though it is considered as a human right, many of the time it is violated by the medical strike. On the other hand, the strike is a recognized means to record their dissents, in all democratic systems. In India the Trade Unions Act, 1926 and the Industrial Disputes Act, 1947 deal with the right to labourers to form trade unions and the legality of strikes respectively. The Indian health care system is a complex network of public and private health care players. The laws applicable to private and public health care professionals and paramedical professionals are scattered over labour laws, service laws and service contracts. In the context of such diverging labour laws, an attempt has been made to analyse the ethical and legal aspects of the right to strike of medical and paramedical professionals.*]

I

Introduction

In India on 17 June 2019, there occurred a nationwide strike in consequence of the attack on doctors in Bihar.[1] For the same reason, at an earlier time, in 2017, doctors from Bombay declared a strike.[2] In the year 2012 nurses from corporate sector hospitals declared a strike on demand of hike in their basic salary and other benefits.[3] Resident doctors in Delhi went on strike five times during the period

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1 Special Correspondent, *All India doctors strike: medical services across public and private sector hospitals in Kerala affected*, THE HINDU (June 7, 2019, 11:45am IST), *available at:* https://www.thehindu.com/news/national/kerala/all-india-doctors-strike-medical-services-across-public-and-private-sector-hospitals-in-kerala-affected/article27971430.ece. (last visited on 15 June, 2019).

2 Vidhi Doshi, *Thousands of Mumbai doctors strike after assaults on hospital staff*, THE TRIBUNE (March 21, 2017, 3:54pm GMT), *available at:* https://www.theguardian.com/world/2017/mar/21/doctors-strike-mumbai-assaults-on-hospital-staff-india (last visited on 10 June., 2019).

3 Special Correspondent, *Nurses from Apollo, Fortis and Madras Medical Mission Hospitals went on strike for increase in minimum salary in 2012*, THE TIMES OF INDIA (March 9, 2012,

2006-2011. In Kerala, hospital nurses continued to strike for 115 days for minimum wages.[4] There is a dearth of actual data on a total number of strikes in private and public hospitals in India. In Kerala, there were five times doctors went on strike as per the official records during the period 2014-19.[5] Thus, it can be concluded that the strike among medical and paramedical professionals has become common in India. Though the issue remains unresolved, strikes by doctors and other medical and para-medical professionals are a common occurrence evidenced from the number of strikes reported from countries like Australia, the USA, Canada, the UK etc.[6] A multitude of factors contributes to medical strikes.

Strike, being a legally recognised weapon, plays a pivotal role in regulating industrial relations and labour welfare since time immemorial.[7] When there is no hope for meaningful and effective communication between the master and employees and when mistrust and disloyalty lead the dispute, strike becomes inevitable. Though strike is a legal weapon for employees across the globe, the legality and ethical dilemmas of the strike by professionals such as doctors are quite unsettled and the constitutional and legal wrangling over doctors' strike[8]is an oft-debated topic because in the contemporary context medical services are a profit-oriented business.

The Reasons for Strikes

There are numerous reasons which lead to strikes. Some of the common reasons have been discussed below:[9]

Low remuneration*:* Resident doctors work for long hours but do not receive deserving remuneration. Exploitation by senior doctors and management adds

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02:09am IST), *available at:* https://timesofindia.indiatimes.com/city/chennai/Nurses-promised-hike-end-strike/articleshow/12190787.cms. (last visited 15 July., 2019).

4 Mukesh Yadav, *Medico Legal Aspect of Strike by Doctors*, 2 IJHRMLP 2 (2016).

5 Information provided from the Directorate of Health service, State of Kerala under the Right to Information Act on 31.05.2019.

6 Ramesh P. Aacharya and Sibichan Varghese, *Medical Doctors' Strike: An Ethical Overview With Reference to The Indian Context*, 7 J.CLIN. RES. BIOETH 1 (2016).

7 In the reign of Ramses III in Pharaonic Egypt circa 1170 B.C., artisans working on the royal tomb in the Valley of Kings struck in protest against inadequate and overdue rations. The first strike in the recorded history of North America occurred in Jamestown, Virginia, in 1619, when Polish craftsmen arguably refused to carry out their work until they were enfranchised. The first strike in the United States probably took place in Philadelphia in 1786, when journeymen printers demanded a minimum wage of six dollars a week. Ronen Perry, *Strike-Out*,68 ALA. L. REV. 445 (2016).

8 Judicial decisions have declared that there is no constitutional or legal or moral right to strike in India especially for employees who are in Government sector.

9 *Supra* note 6.

fuel to the dissent sustained due to improper remuneration.[10] For this reason, junior or resident doctors are leading groups to strike all over the world including India.[11] The senior doctors in India who are in the public sector are also receiving a lower salary compared to their private-sector counterparts. Thus, the best brains are not attracted to the State health services and that results in unfilled vacancies in public hospitals.[12] A large number of professionals migrate to other countries which, in turn, affects the national interest.

The situation of nurses and para-medical staff who are working in private sector clinical establishments is miserable. The condition of the professionals working in the corporate sector is not different from those in governmental hospitals. Hence, nurses in different parts of India conducted strikes for minimum wages. The right to minimum wages is a basic human right and an undeniable statutory right under the statutory provisions existing in our country.[13]

Change in service conditions*:* The Central and State policies sometimes change the conditions of the service of doctors and para-medical professionals without offering a chance to be heard, which is a very essential and undeniable labour right of every labourer in a democratic society. The unplanned restructuring and rescheduling of staffs and service may hamper the existing norms in respect of hours of work, salary, holidays, rest hours, concessions and other benefits including bonus, provident fund etc. In 2018 doctors in Kerala went on strike against the decision of Health Ministry for extending Govt. doctors service to

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10 Bindu Shajan Perappadan, *When stressed doctors seek care for themselves*, THE HINDU(June 04, 2019, at 1), *available at:* https://www.pressreader.com/india/the-hindu/20190604/281934544439322 (last visited 23 Sep., 2020).

11 Ramesh P. Aacharya and Sibichan Varghese, Supra n.6

12 Deccan Chronicle, *Teaching Post Stay Vacant, cripple Government Medical Colleges in Kerala*, DECCAN CHRONICLE, (July 27, 2017 06:43am IST), *available at*: https://www.deccanchronicle.com/nation/current-affairs/270717/teacher-posts-stay-vacant-cripple-government-medical-colleges-in-kerala.html. (last visited on 23 Sep., 2020).

It is reported that around 1.5 lakh post are vacant in Health Centres functioning under Central and State Government. Atul Thakur, Central and State Government sit over 24 lakh vacancies amid debate over job drought, TIMES OF INDIA (05 August 2018), *available at*:https://timesofindia.indiatimes.com/india/central-and-state-governments-sit-over-24-lakh-vacancies-amid-debate-over-job-drought/articleshow/65274821.cms. (last visited on 23 Sep., 2020).

13 The Minimum Wages Act,1948 (Act No. 11 of 1948) and The Payment of Wages Act,1936 (Act No. 4 of 1936).

primary health centres, which have been renamed as family health centres under the Ardram Mission Plan.[14]

Institutional deficiencies and security at the workplace: Safety at the workplace has become a common demand of medical and para-medical professionals and it is high time to ensure the safety of employees in the workplace. The unavailability of a sufficient number of security staffs especially during night time in public hospitals may create a hostile situation in case of death of patients or in case of any other medical complications.[15] There is no central legislation for ensuring the safety of the medical workforce, though this was a long-standing demand of medical professionals across India. States like Kerala have enacted specific legislation for the protection of hospitals and doctors.[16] However, the reports show that attacks on doctors are not rare even in the State of Kerala.[17] The attack against women employees is an emerging issue. Though the Workplace Harassment Act came into existence in 2012, the internal complaint committees have not been constituted in the majority of the hospitals.

II

Right to Strike and Ethical Issues

In the medical profession, there is a set of shared ethical values and they relate to the saving of life, the healing of the sick, the well-being of the patients and the special responsibility of doctors to their patients.[18] It is evident that whenever the educated members of the society demand labour rights, it leads to an outbreak of severe criticisms within and outside the system. It is unjustifiable for a layman to think about the medical professionals engaging in strikes. Thus, there is an inherent incoherence in medical professionals' participation in strikes even if it is for the benefit of patients.

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14 Special correspondent, *Govt. Doctors Call off strike*, THE HINDU,(April 17, 2018 00:48am IST), *available at:* https://www.thehindu.com/news/national/kerala/govt-doctors-call-off-strike/ article23565303.ece (last visited on 18 Aug., 2019).

15 *Supra* note 6.

16 The Kerala Healthcare Service Persons and Healthcare Service Institutions (Prevention of Violence and Damage to Property) Act, 2012 (Act No. 14 of 2012).

17 Rajiv G., *Attack on Doctors, IMA seeks action*, TIMES OF INDIA, (February 14, 2018 10:02pm IST), *available at:* https://timesofindia.indiatimes.com/city/thiruvananthapuram/attacks-on-doctors-in-kerala-ima-seeks-action/articleshow/62920910.cms. (last visited on 19 Oct., 2019).

18 *Supra* note 6.

The central point of the medical profession is the alleviation of pain and suffering and they are the one capable of deciding as to the life and death of a patient.[19] Thus, anything done in contravention of the basic tenets of the profession would be against ethical values of the medical profession. The applicability of values of medical ethics is not confined to doctors or medical professionals but it applies to the entire health care system. It is quite certain that strike by medical professionals negatively affects the healthcare services including essential services like emergency care. However, the ethical values of medical care are dynamic and are subject to various modifications in accordance with the changing situations.[20]

The ethical dilemma associated with doctors' strike brings to the fore, two main issues. *Firstly*, the right to protest is considered as an essential democratic right of the labour class, to what extent medical professionals can resort to strike as a weapon to bring changes in the employer-employee relationship and *secondly*, to what extent the medical theories and principles justify infringing the patients' interest by a medical professional.

Medical Professional or Trade Man

The status of the medical profession as a profession remains unchallenged since medieval time. Originally, the word profession meant 'to profess' religious vows. Medicine was a profession along with the clergy because its members shared a common 'calling,' and the law was considered a profession through a similar educational background in the medieval university.[21] A 'self-conscious reflection on standards of conduct is one of the defining characteristics of a profession'.[22] The standards of conduct of medical professionals in the twenty-first century are guided by the changes in the health care system, scientific advancements, financing and management policies of the health care system etc.

In the twenty-first century knowledge means scientific knowledge and the medical profession is increasingly identified with technical expertise in understanding and analysing scientific data.[23] However, a person with technical expertise cannot replace professionals unless ethical values are adhered to while practising the knowledge.[24] Hence, though medical professionals have become technical experts, ethical principles play a pivotal role while they follow any treatment protocols.

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19 Margaret Stacey, *Medical Ethics and Medical Practice: A Social Science View*, 11 JME 14 (1985).

20 Change in the theory of paternalism and the modern medical codes of ethics give importance to autonomy of patient.

21 Allen R. Dyer, *Ethics, Advertising and The Definition of a Profession*, 11 JME 71 (1985).

22 *Id.*

23 *Id.*

24 *Id.*

It is further important to note that the structural adjustment policies adopted by many countries have led to transforming the very nature and purpose of the health care system. The health care system is no longer a service to humanity, as enshrined in the medical codes of ethics, but an institutionalised industrial sector. The fiscal restructuring across the globe including the developing countries made a clear division between the public and private health sector and the private sector and nowadays the private health care facilities cater to the health needs of a large section of the society.[25] In India due to the lack of a right-based approach in healthcare, the private sector medical establishments began to flourish during the 1990s and thus it eventually led to privatisation of the healthcare sector. Most importantly in India, hospitals are considered as an industry under the Industrial Disputes Act, 1947.[26] It shows a change in the administrative structure which is pointing towards the need of recognising medical profession as an industry rather than agents of charity. In India, during the 1970s it had been decided by the Supreme Court of India that hospitals can be brought under the purview of the definition of the industry under the Industrial Disputes Act.[27] On recognising medical establishments as an industry, the medical professionals are placed somewhere in between a profession and a trade. Hence, any discussion on the ethical basis of the strike by medical professionals ignoring the changes that have occurred in the field of medicine, technology, health administration, the role of State in health provisioning and the doctor-patient relationship would be devoid of any merit. A change in the professional approach is evident from the birth of trade unions of medical professionals. The Indian Nurses Association established in 2011, a trade union to defend and protect various rights of nurses across the country. The United Nurses Association is a registered trade union for nurses in Kerala and the nurses united against the private hospital management for implementing the minimum wage order issued by the Government.

Ethical Dilemmas of Medical Professionals Right to Strike

Since medicine stands in an unchallenged position with respect to professionalism, a physician should be considered as a professional though there are attributes of a tradesman. The undiluted principles of trust, fidelity and confidentiality are the basic principles of the medical profession and that makes them different from a mere trade man.[28] This is evident from the ancient documents like Code of Hammurabi, Hippocratic Oath and it is encapsulated in the modern codes of medical ethics including the International Medical Associations Code of Medical

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25 The Global Health Watch 2005–2006*, 55* (2005).

26 The Industrial Disputes Act, 1947 (Act No. 14 of 1947).

27 *Infra* note 53.

28 *Supra* note 22.

Ethics.[29] Though the canons of medical ethics point out the basic duties and responsibilities of physicians, there are inherent conflicts within the ethical codes and there are unseen and undulated exceptions to the general rules.

Ethical Doctrines and Doctors' Strike*:* The modern ethical rules revolve around four core principles, beneficence, non-maleficence, autonomy and justice. The adherence to these ethical principles makes the profession different from a trade or an industry and the doctors or medical professionals stand on a high pedestal where patients trust the doctors in respect of their personal, physical and mental care. The principle of beneficence entrusts upon each medical professional to serve the best interest of the patient and it is the ultimate duty of each medical professional who takes Hippocratic Oath.[30] On the other hand, the maxim *primum non-noncere,* the principle of non-maleficence, reminds the medical community, their duty not to cause any harm to their patients. These virtues of the medical profession are well elaborated in *Charaka Samhita*, an authoritative text on Indian Traditional Medicine.[31] It emphasizes that the medical profession has to be motivated by '*bhuta-daya'*, compassion for living beings. It illustrates the duty of medical profession by stating that that physician shall not desert or injure his or her patient.[32] On a joint reading of these principles, beneficence and non-maleficence, it establishes the undeniable duty of the medical professionals towards their patients. Thus, any form of association or activity which endangers the interest of patient either physically or mentally conflicts with ethical doctrines. Thus, strikes in any form for any reason, whether it is for the patients' benefit or the medical community, is in the larger context, is violative of the ethical values enshrined under ethical codes.

Patient autonomy is another emerging realm of medical ethics. Whereas, the autonomy of medical professionals is not widely discussed in terms of their right to conduct a strike, though they have autonomy in admitting patients except in cases of emergency.[33] It would be inappropriate to extend the applicability of the principles of autonomy to empower medical professionals to hold a strike. However, the principle of justice has a wider connotation, which encompasses not only providing justice to the patients but should also extend to the medical community and they must also be allowed to enjoy the fruits of justice since it is a basic human right. A medical professional, be it a doctor or any other medical professional working without basic wages or infrastructural facilities and other support mechanism deserves their right to be protected by the State.

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29 Allen R. Dyer, *Id.*

30 Anita Bakshi, HIPPOCRATIC OATH OR HYPOCRISY 9 (2018).

31 Sourabh Paul and Vikas Bhatia, *Changing Doctor Patient Relationship: Changing Scenario in India*, 7 AJMS 1 (2016).

32 *Supra* note 6.

33 *Infra* note 38.

Theoretical Reflections on Strike

Justification for as strike, if not always, is often, a matter best judged on specific facts, circumstances, and consequences of a strike. The importance of circumstance and consequences in connection with the ethical ideals of medical professionals are well dealt with in deontological and utilitarian theories. According to Kant, man is the subject to moral law and he is responsible for his actions.[34] The theory of deontology judges every action on the basis of its moral correctness of the means and ways adopted or used for achieving the end result. In other words, the ends do not justify the means. Here strikes are considered as means in a democratic society to achieve certain ends.[35] Even though strikes are generally considered as a legally justified weapon in a democratic society, doctors' strike tends to be criticised as unethical because they use poor patients to get their demands accepted by the government or management.[36] On the contrary, the utilitarianism justifies actions if it promotes the greatest happiness for the greatest number. On applying the principles of utilitarianism, a strike conducted for the medical community will affect the interest of thousands of patients, which again is not considered as ethical for a doctor concerned.

Indian Code of Medical Ethics and the Right to Strike

The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, is an Indian version of medical code of ethics, which encapsulates the basic values which must be observed and followed by the medical practitioners in India. It declares that the prime object of the medical profession is to render service to humanity and any reward or other financial gain is a subordinate consideration.[37] It also mandates that the essential duty of medical professionals to provide emergency medical care and it under no circumstance be withdrawn though the medical professionals have the discretion not to offer other medical services.[38] It negates the chances of neglecting the patient due to any reason including strike and it also states that doctors should not withdraw from giving medical care without giving adequate notice to the patient and his family after undertaking a case.[39] Therefore, anything done contrary to the Regulations may attract disciplinary action and may lead to cancelling the licence of the concerned doctor/s.

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34 *Supra* note 6.

35 *Id.*

36 *Id.*

37 The Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002.

38 *Id.*

39 *Id.*

On analysing the Regulations in the context of the strike of medical professionals, it is evident that the strike of medical professionals, whether government or private sector, will infringe the values enshrined in the Code of Ethics 2002. Ironically, no action has taken against any of such striking doctors by the Indian Medial Councils though the Medical Councils are empowered to take disciplinary action against them.

Ethical Codes for Nursing and Paramedical Professionals

The International Code of Ethics for Nurses, states that it is an inherent duty of the nursing profession to respect human rights, including cultural rights, the right to life and choice, and dignity and to be treated with respect.[40] It also directs that the nurse at all times maintain standards of personal conduct which reflect well on the profession and enhance its image and public confidence.[41] Similarly, the Code of Ethics drafted by the Indian Council of Nurses,[42] states that nurses are committed to reciprocate the trust invested in the nursing profession by the society and are obliged to demonstrate the personal etiquettes in all dealings. Since they are part of the health care system, they shall always cooperate to meet the needs of people.[43] The nursing professionals are also liable to render service as per the laws existing in the country.

Unlike the medical and nursing professionals, no code of ethics has set for the para-medical professionals who are offering various services including diagnostic, laboratory services. Since they are part of the healthcare system, they are also responsible to observe the basic ethical values of the medical profession and human rights of people. Thus, if they go for strike, be it nurses or other paramedical staff, it will equally affect the rights of people to get medical care.

Impact of Strike on Health Care Sector

In India, the health care system is significantly divided and the private health care sector dominates in catering to the health care needs of more than seventy per cent of the population, whereas, the public sector's share in both inpatient and out-patient services are much less than the private sector and is approximately thirty

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40 The ICN Code of Ethics for Nurses, The International Council of Nurses, *available at:* https://www.icn.ch/sites/default/files/inline-files/2012_ICN_Codeofethicsfornurses_%20eng.pdf (last visited on 15 Aug., 2019).

41 *Id.*

42 The INC Code of Ethics for Nurses in India, *available at:* http://hmis.ap.nic.in/APNMC/pdfs/ethics.pdf. (last visited on 15 Aug., 2019).

43 *Id.*

per cent.[44] The divided health care system targets specific income groups, the governmental sector serves the economically poor sections of the society and the private sector provides medical care to the upper-middle and elite class. The out of pocket expenditure pattern coupled with lack of proper regulation and lack of robust public sector providers give wide space for the private sector players including the corporate hospitals to exploit the poor people who avail service from the private health care sector. Adding to this only fifteen per cent of the population is covered under health insurance.[45] The Government, both at the Central and the State level is not taking adequate steps to provide better public health provisioning and the Government health expenditure for more than six decades remained stagnated at one percent.[46] Thus, any strike in any form whether it is justified or unjustified, conducted by government medical professionals, usually doctors, will seriously affect the interest of public sector patients. The poor class people who are the beneficiaries of public sector health services will be compelled to use private sector services and in turn, making them starve or sell off their valuables or sometimes may lead to their death. In India, studies have not been conducted as to the actual impact of medical strikes as in the US, where trade unions and strikes are legal.

Unlike in the public sector, the number of strikes conducted by doctors is very less in the private sector in India may be due to higher pay and work security.[47] In contrast to the private sector doctors, nursing and para-medical staffs are paid very less than the minimum wage notified by state governments. The emergence of Nurses Association in Kerala and the number of strikes they conducted against the private managements vouch for the terrible situation existing in private sector medical establishments. Irrespective of the reasons for the medical strike, strike in the private sector will also hamper the interest of individual patients and in some cases; some percentage of patients will have to rely on the public sector for essential services where the public sector hospitals are already burdened with many other problems.

All medical strikes in most cases are against the Government or the management. However, the patients are the real victims of medical strikes, and it makes the strike unethical. However, it is to be noted that doctors and other medical and para-medical professionals are part of the labour system in India. The State is

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44 KPMG, *Report on Healthcare Access Initiatives*, (Aug., 2018), *available at:* https://www.indiaoppi.com/sites/default/files/PDF%20files/Report%20on%20healthcare%20access%20initiatives%20%28For%20web%29.pdf (last visited on 23 Aug., 2019).

45 Anamika Pandey *et al.*, *Trends in catastrophic health expenditure in India: 1993 to 2014*, BULLETIN OF THE WORLD HEALTH ORGANISATION (November 30, 2017), *available at*: https://www.who.int/bulletin/volumes/96/1/17-191759/en/ (last visited on 25 Jul., 2019).

46 *Id.*

47 *Supra* note 31 at 157.

liable to ensure their minimum wage and other basic conditions of service. And denial of such essential rights should also be considered whenever medical strikes are analysed or evaluated to determine its validity and justifiability. A mere denial of labour rights of medical professionals, in the changed scenario of medical industrialisation, is improper and unjustifiable. Thus, it is high time to put in place a more effective dispute resolution mechanism for addressing the issues of medical, nursing and para-medical staff both in Government and private sector. The total denial and disrespect of issues of the medical and the related workforce will disrupt the already damaged public healthcare system.

III

Right to Strike of Medical, Nursing Professionals and Para-medical Professionals in India

Since the right to strike is not a fundamental right, the statutory provisions regulate the industry or trade-related strikes. As in the case of any other industry in India, there exist a clear dichotomy of public and private health care system with different sets of labour regulations. The public and private health care establishments are well organised and the private health sector has emerged as an industry comparable with any other industrial establishment with a large network of health care providers ranging from individual practitioners to super speciality hospitals run by the corporate sector. Thus, the medical and para-medical professionals who form part of the health care industry are also eligible to enjoy the labour rights enshrined under various labour statutes in India. For that, there are two important issues to be considered. On the one hand, whether clinical establishments can be considered as an industry under the Industrial Disputes Act, 1947 and on the other hand, if so, do they have the same right as that of other industrial workers to form trade unions and to enjoy the collective bargaining power. Because, most of the time, medical professionals go for a medical strike only as a last resort and due to the lethargic attitude of Governments or the management. Their right to unite and pressurise the Government or the management is a *sine qua non* for speedy settlement of disputes.

Defining Industry and its Application in the Health Sector

The healthcare sector in India, especially the private sector, has grown and developed as one of the biggest industries in the world, which is accounts for eighty per cent of the healthcare market.[48] The healthcare industry in India stood

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[48] Namritha Unnikrishnan, *Healthcare*, *available at:* https://www.investindia.gov.in/sector/healthcare (last visited 22 Jul., 2019).

as the fourth largest employer in 2017 as the sector employed a total of 319,780 people.[49] Thus, it is true to state that it works as an industry in terms of commercial, industrial, and investment aspects on par with other industrial establishments. However, the applicability of labour legislation on the employer-employee relationship depends on the question of whether hospitals are industries under the Industrial Disputes Act, 1947.

S.2(j) of the Industrial Disputes Act, 1947 defines the industry, which was further elaborated and clarified by the Supreme Court in *Bangalore Water Supply* Case,[50] wherein the Supreme Court laid down the triple test[51] to determine the nature of establishment under the Industrial Disputes Act. Thus, on applying the triple test, any hospitals where there is a systematic activity, an employer-employee relationship, and if they work for the production of goods or services, can be considered as an industry, even if it is for a charitable purpose.

The issue surrounding the applicability of Industrial Disputes Act came to fore in *State of Bombay* v. *Hospital Mazdoor Sabha,*[52] wherein the Court emphatically stated that hospitals run by the State government to give medical relief to the citizens or for helping to impart medical education are industries within the meaning of S.2(j) of the Act. However, it was reversed in *Management of Safdarjung Hospital* v. *Kuldip Singh*[53] by stating that Charitable hospitals run by Government or even private associations cannot be included in the definition of the industry because they have not embarked upon economic activities analogous to trade or business. If hospitals, nursing homes or a dispensary is commercially run as a business, there may be elements of the industry. The Supreme Court followed the same ratio in *Dhanrajgiri Hospital* v. *Workmen*.[54] While deciding the nature and definition of the industry in *Bangalore Water Supply* Case, the Supreme Court reinforced the decision in *State of Bombay* v. *Hospital Mazdoor Sabha* and thereby overruled the other decisions. Hence, hospitals are considered as industries under the Industrial Disputes Act, though a different opinion emerged from the judiciary as to the wider interpretation given to the term industry in *Bangalore Water Supply* case.[55]

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49 *Id*.

50 *Bangalore Water Supply and Sewerage Board* v. *R. Rajappa*, A.I.R. 1978 S.C. 548.

51 The Triple Test has the following conditions – a. Systematic and organized activity; b. With the cooperation between Employers and employees; c. For the production and distribution of goods and services whether or not capital has been invested for this activity.

52 A.I.R. 1960 S.C. 610.

53 A.I.R. 1970 S.C. 1406.

54 A.I.R. 1975 S.C. 2032.

55 *Chief Conservator of Forests* v. *Jagannath Maruti Kondhare* A.I.R. 1996 S.C. 2898; *State of Gujarat* v. *Pratamsingh Narsinh Parmar* (2001) 9 S.C.C. 713; *State of U.P.* v. *Charan Singh* 2015 (4) S.C.J. 218.

The Amendment Bill proposed in 1982, excluded hospitals and dispensaries from the definition of Industry though there was an attempt to incorporate the definition proposed by the Supreme Court in *Bangalore Water Supply* case. However, the Amendment Act has not come into force yet. A modified version of the definition of the industry has been incorporated in the proposed Labour Code on Industrial Relations, 2019. The new Labour Code excludes only agricultural operations from the purview of the definition of industry. Thus, hospitals and other clinical establishments in the private sector are considered as industries even under the new Labour Code. However, the interpretation attributed to the Government Health Department and the hospitals under such departments still lacks clarity.

The wrangling over the nature of Government departments still hangs in the air. In *Chief Conservator of Forest* v. *Jagannath Maruti Kondhare*,[56] the Supreme Court on answering a question on the nature of Forest Department in light of the *Bangalore Water Supply* case, by reiterating the principles laid down in *Bangalore Supply* case, stated that only regal functions are exempted from the purview of the definition of industry and not welfare functions. Whereas in *State of Gujarat* v. *Pratamsingh Narsinh Parmar*[57] the Court deviated from its earlier position and opined that the forest department is not an industry. Due to inherent contradictions in these two judgements, in *State of U.P.* v. *Jai Bir Singh*,[58] a five-judge bench made an observation for revisiting the definition of the industry in lights of the societal changes and referred the case for the consideration of a nine-judge bench.

Freedom to form Associations or Unions

Since the right to form an association is a fundamental right under the Indian Constitution,[59] the medical and paramedical professionals can also form associations or unions subject to the laws in force in India. The Trade Unions Act, 1926 lays out the basic conditions for forming trade unions. Trade unions are considered as the backbone of industrial relations for the reason that it provides the space for the employers and employees to understand and discuss their disputed claims and to arrive at an amicable settlement. The employees in the medical field consist of a complex variety of medical and paramedical professionals and other classes of labourers. The medical and paramedical professionals are considered as professionals,[60] hence there will only be a little

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56 A.I.R. 1996 S.C. 2898.

57 (2001) 9 S.C.C. 713.

58 (2005) 5 S.C.C. 1. and *State of U.P.* v. *Jai Bir Singh*, (2017) 3 S.C.C. 311.

59 Art. 19(1)(a), The Constitution of India.

60 Professionals are trade men having an inherent responsibility to follow ethical values in their relations with patients and the doctor – patient relation is a fiduciary relation based on trust and confidentiality.

application of the Trade Unions Act, 1926 at the primary level. However, on a detailed analysis, it may find that there is a need to recognise the right of medical and paramedical professionals' to form trade unions, in the changed scenario of emerging health care market in India.

On the contrary, in countries like the U.S.A., the unionization among medical professionals is a well-accepted labour right, though there is an ethical dilemma of conflicting interest of doctors in respect of their labour rights and the rights of patients to receive treatment.[61] Whereas in India, most of the medical associations are registered under the Societies Registration Act, except the trade unions formed by nurses, which gives only legal validity for the existence of the medical associations as a legal entity with no corresponding rights as that of a trade union, though they act some time as trade unions. Many of the time the Government or the management will be very reluctant to address the issues raised by the medical associations mainly due to the reason of lack of bargaining power of medical associations and unions. Strikes become unavoidable in such situations of gross neglect or lack of proper understanding of the issues of employees in the health care sector. Thus, the medical associations or unions have to either go for a strike or challenge the actions of governments or managements before the court of law.

Medical and Para-medical Professionals' Right to Form Trade Unions in the Public and Private Sector

For detailed analysis, the right of medical, nursing and para-medical employees to form trade unions and associations needs to be looked into in different sides. Though they fall under the general category of medical and paramedical professionals, they work under different systems where diverse laws are applicable in respect of their conditions of service are concerned. The employees who are working in the public sector are considered as public servants of the country and are governed by Central or State Service Laws, whereas in the private sector the service conditions are regulated by independent service contracts between the management and the employees.

In *Tamil Nadu Non-Gazetted Officers Union* v. *Registrar,*[62] on a question of registering the Tamil Nadu Non-Gazetted Officers under S.5 of the Trade Unions Act, 1926, the Madras High Court, after analysing the definition of 'workmen' and 'trade union provided under the Trade Unions Act, and the Industrial Disputes Act held

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61 National Labour Relations Act, 1935 (U.S.A). The studies show that around 42000 physicians belong to a union and an additional 108,000 are eligible to join a union because of their employment status, as they work within a defined employer-employee relationship. Stephen L. Thompson & J. Warren Salmon, *Strikes by Physicians: A Historical Perspective Toward an Ethical Evolution,* 36 INT'L. J. OF HEALTH SERV. 332 (2006).

62 A.I.R. 1962 Mad. 234

that the employees will have the right to form trade unions if they work in an industry as defined under the Industrial disputes Act. The court differentiated the functions of the Government as the following:[63]

a. The core civil services integral to the regal functions of the Government are not industries and those employees cannot bring under the definition of workmen;
b. Those independent corporations which are quasi-Government agencies, or subsidised undertakings, which are purely industrial in character may fall under the definition of the industry though they function in the public sector;
c. The welfare, educational or ameliorative departments of Government might or might not be regarded as liable to exclusion; the employees in those departments, might or might not hence be regarded as "workmen" in an "industry";[64]
d. And it was also stated in concrete terms for employees who fall under Art. 310 and 311, the concept of collective bargaining is utterly inappropriate and foreign.[65]

On applying the dictum and the existing service rules and regulations, it may be submitted that medical and paramedical professionals working under the Public Health Services, are not entitled to form trade unions under the Trade Unions Act, 1926. However, they may form associations for the welfare of the employees. However, employees who fall outside the purview of service laws are free to form trade unions. In respect of the private sector doctors and paramedical employees, their service contracts determine their right to form unions. The right form an association or union is a fundamental right.[66] Thus, the right to form trade union or association should not be subservient to service contracts, though it is in conflict with ethical values. Since hospitals are considered as industries under the Industrial Disputes Act and are emerged as an industrial sector in all respect, private medical and para-medical professionals may form trade unions under the existing legal framework.

Right to Strike – Constitutional and Legal Position

The Constitutional conundrum of right to strike as a derivative right from right to associations or unions has already been explained by the Supreme Court in many cases, most importantly *T.K Rangarajan* v. *State of Tamil Nadu*. The fundamental

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63 *Id.* at para 12.

64 An appropriate legislation may lay down the conditions in respect of such departments. Most of the States have adopted the Public Servants, Conduct Rules. In Rule 76 of the Kerala Government Servants' Conduct Rules, 1960 recognise service associations, but not trade unions. And it also prohibits strikes.

65 *Supra* note 63 at para 13.

66 Art.19(1)(a), The Constitution of India. *See*, *All India Bank Employees' Association* v. *NI Tribunal* A.I.R. 1962 S.C. 171; *Damayanti* v. *UOI* A.I.R. 1971 S.C. 966.

right to association or union does not guarantee the right to collective bargaining or stage protest in the form of strike or bandh. The decision in *Rangarajan's* case negates the right to strike under the constitution or as a statutory right or even as a moral right. It is correctly pointed out by the High of Kerala in *Communist Party of India* v. *Bharat Kumar*[67] that –

> '…There cannot be any doubt that the fundamental rights of the people as a whole cannot be subservient to the claim of the fundamental right of an individual or only a section of the people. It is on the basis of this distinction that the High Court has rightly concluded that there cannot be any right to call or enforce a "bandh" which interferes with the exercise of the fundamental freedoms of other citizens, in addition to causing a national loss in many ways…'[68]

On analysing the judicial pronouncements in this context, there exist perplexities and ambiguities in respect of public and private health care professionals.

Right to Strike of Public Medical, Nursing and Para-medical Professionals

The conundrum of right to strike of public sector medical doctors has recently been decided by the Allahabad High Court.[69] The Court by reiterating the ratio of the Honourable Supreme Court in T.K Rangarajan's Case and many other judicial pronouncements stand in the same line, held that the strike conducted by the Government doctors was illegal. Along with it, the Court for the first time endeavoured to give directions to the State Government to ensure avenues to discuss and settle the issues of Government medical employees. The Court directed that –

i. The State Government shall create an institutional avenue for discussion and redressal of the grievance of the employees.
ii. The grievance redressal mechanism of the State Government shall be headed by a senior-most officer of the State Government, not below the rank of Principal Secretary.
iii. The State Government shall take disciplinary action as per the Service Rules against the employees, who have gone on strike pursuant to the strike call. The progress of the disciplinary action shall be intimated to the Court by an Affidavit filed on behalf of State within a period of one month from today.
iv. The places where the employees are proposing to go on strike or 'Dharnas' shall be video recorded and the actions, demonstrations of striking employees shall also be video recorded.
v. The attendance of the employees shall be made compulsory and it shall be attested on a daily basis by a senior officer of the concerned department.

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67 (1998) 1 S.C.C. 201.

68 *Id.*

69 *Rajeev Mishra* v. *Union of India,* Lnindord 2019 Luck. 270.

vi. The Chief Secretary shall ensure that compliance of these directions is monitored by the respective heads of departments.

As stated earlier, the working conditions of the public sector doctors and para-medical professionals are regulated through Service Rules of respective State Governments, wherein, the right to form associations is retained with no collective bargaining power, as protected under the Trade Unions Act, 1926. Thus, associations of medical and paramedical professionals are supposed to work for the welfare of the employees with no identical mechanism existing in India for other employees in the industrial sector to discuss and resolve various issues including security threats, unilateral change in conditions of services or even wage-related issues.

The interesting part is that in the public system, the para-medical professionals have satisfactory working conditions compared with the private sector medical professionals. Due to this reason, many of the time, doctors working public sector will be at the forefront of protests and strikes. Thus, it will be a hard task to discuss the justifiability of strikes among medical professionals in the public sector without considering the pathetic situation existing in this sector. India is the only country which is in the second position in terms of its population rate but spending around one percent of GDP on healthcare. The lowest health expenditure is reflected in all fields of healthcare management. It is more evident in respect of health infrastructure and availability of other facilities in Government hospitals. Only dedicated doctors, who are having a passion in mind for serving people will join public health service. It is true that strike or protest in any form is not a justifiable answer for the lethargic approach of the Government. But before criticising strike of medical professionals, one should understand and analyse the background of such strike. In most of the situation, the strike will be called for as a last resort. Apart from that, a medical strike may be classified into the following two types:

i. Patient-oriented strikes

The issue like hospital attack, attack on doctors or other staff, or a sudden change in service conditions, non- availability of infrastructure and facilities etc., are for protecting the interest of patients in the long run even if there is short term violation of rights of patients.

ii. For the beneficial interest of the medical community

The issues like an increase in salary and other allowance, the prohibition of private practice are some issue where one may find the personal interest of the medical community is involved.

Thus, it is necessary to distinguish the justified strike from the unjustified. Any strike in violation of the fundamental right to health is illegal even if it justified one, due to that reason the interest of association or groups is subject to the rights

of community interest. However, to reduce the harm caused to the general public and to take proper precautionary measure, it is necessary to have a law to regulate the strike of medical professionals if the strike is beneficial to the patients in the long run. In this line, the Delhi Medical Council issued a Guideline in the backdrop of doctors' strike at Safdarjung Hospital in 2010. The Guideline set out six criteria, as mentioned below, for determining whether the strike is reasonable or justifiable.[70]

i. Just and Right Intention
ii. Proportionality
iii. Reasonable hope of success
iv. Last resort
v. Legitimate authority

Thus, it is submitted that though hospitals are under the public utility services, and are considered as an essential public function, the professionals shall be given the space to raise their protest especially if it for the beneficial interest of the public. There is a need to distinguish just and unjust strike and to have legislative provisions to regulate such strikes. A complete prohibition will only worsen the employee-employer relationship. The inadvertent Government approach like the one recently happened in Bihar will cause more damage than expected.[71] Thus, a more democratic approach needs to be installed within the public healthcare system for maintaining the balance of interest and facilitate discussions on conditions of service and other labour issues.

Right to Strike of Private Medical, Nursing and Paramedical Professionals

Since the private sector employees both medical and paramedical are governed under the individual contract, they will not fall under the State Service Rules and hence they form part of the definition of the industry given under the Industrial Disputes Act and the employees who may be brought under the ambit of 'workmen' defined under the Act, may call for a strike, though hospitals are included in the public utility services under the Act after complying with the conditions for a valid and legal strike. For the following reasons given in sections 22 and 23 of The Industrial Disputes Act, a strike will become illegal –

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70 Mpho Selemogo, *Criteria for a just strike action by medical doctors*, 11(1) INDIAN J. OF MED. ETHICS, *available at:* https://ijme.in/articles/criteria-for-a-just-strike-action-by-medical-doctors/?galley=html (last visited 23 Jul., 2019).

71 Bindu Shajan Perappadan, *AIIMS Resident Doctors Issue Ultimatum to Mamata*, THE HINDU (June 15, 2019 04:26pm IST), *available at:* https://www.thehindu.com/news/national/aiims-resident-doctors-issue-ultimatum-to-mamata/article27949609.ece. (last visited 23 Jul., 2019).

a. Without giving notice of strike at least before six weeks of the strike,
b. Any strike within fourteen days of giving such notice,
c. A strike before the expiry of the date specified in any such notice,
d. During the pendency of proceedings before the conciliation officer and seven days after the conclusion of the proceedings,
e. During the pendency of proceedings before the Board of Conciliation and Seven days after the conclusion of such proceedings
f. During the pendency of proceedings before the Labour Court, Industrial Tribunal or National Tribunal and two months after the conclusion of proceedings
g. During the pendency of the arbitration proceedings and two months after the conclusion of proceedings
h. During any period in which a settlement or award is in operation

It is submitted that there is no fundamental right to strike and it is equally applicable to both public and private sector medical and para-medical professionals. However, in a compelling situation, where no other effective alternative measures are available, employees will be compelled to take such hard decisions. Over a period the private sector hospitals managements have been engaging thousands of nurses and para-medical professionals even without paying the minimum wages. Thus, the context of the strike in the public and private sector differs in accordance with the situation existing in these sectors. There may be further bifurcations if we compare the situations existing in different states in India. Thus, an outright prohibition of strike or protest without studying the underlying causes and stature of public and private health care system will not make any positive result.

IV

Government Control on Medical Strike

The State Governments have invoked the power under the essential service maintenance laws to curb the medical strike at various periods.[72] The Essential Service Maintenance Act, 1968 empowers the Central Governments by order[73] to prohibit strike in all forms in hospitals and dispensaries to protect and safeguard the public interest in respect of the essential service enlisted under section 2(1)(a)(x) of the Act. Under the Act strike means:

> '…cessation of work by a body of persons while employed in any essential service acting in combination or a concerted refusal or a refusal under a common

[72] Since the matter come under Entry 33 of the Concurrent List, most of the State Governments have enacted their own legislations.

[73] S.3, The Essential Service Maintenance Act, 1968 (Act No. 59 of 1968).

understanding of any number of persons who are or have been so employed to continue to work or to accept work assigned, and includes--

(i) refusal to work overtime where such work is necessary for the maintenance of any essential service;

(ii) any other conduct which is likely to result in, or results in, cessation or substantial retardation of work in any essential service.'[74]

The Act also authorises the relevant authorities to initiate disciplinary proceedings against employees who commence or take part or remain in an illegal strike and they may be terminated according to the service rules applicable to them.[75] More importantly, the police may arrest such employees without a warrant if they are suspected of any act prohibited under ESMA[76] and it prescribes a punishment of imprisonment for a period not exceeding six months for commencing or taking part or remaining in an illegal strike.[77]

Reforming the Health Care Industry

1. In the changing landscape of the health care industry, the workforce and their labour rights are scattered over a number of laws and service contracts. Thus, the Governments have to make a proper study of the scope and reach of public and private health care establishments.
2. In government hospitals, there is no mechanism to discuss and resolve issues relating to the conditions of service, lack of infrastructural facilities, workplace safety etc. Thus, it is high time to put in place an effective mechanism to encourage and facilitate dialogues between the professionals and the government.
3. The emergence of trade union activities shows the move towards the change in the professional approach of nurses and this may easily spread to other sections of the medical professionals and may cause more harm than expecting.
4. On analysis, the number of the strike is on the increasing rate. Thus, it is to be noted that strikes are just symptoms. The governments have to address the issue of the health care industry and must devise mechanisms to tackle the labour problems of the private and public sector separately.
5. The total denial of the right to dissent is undemocratic. The governments may use ESMA and may curb medical strikes. But it may lead to the mass resignation of public sector employees and in the present situation only those who are passionate about serving the people join the public sector.

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74 S.2(b), The Essential Service Maintenance Act, 1968 (Act No. 59 of 1968).

75 S.4, The Essential Service Maintenance Act, 1968 (Act No. 59 of 1968).

76 S.10, The Essential Service Maintenance Act, 1968 (Act No. 59 of 1968).

77 S.5, The Essential Service Maintenance Act, 1968 (Act No. 59 of 1968).

Thus, an unrealistic government approach will result only in the destruction of the public health system.

6. It is also necessary to understand that many of the strikes are for protecting the interest of patients in the long run. Thus, a proper demarcation of the justifiable and unjustifiable strike shall be adopted.

V

Conclusion

Healthcare industry has grown and diversified with a vast network of health care establishments and professionals, whereas the public sector lags even for the essentials. The labour rights of employees in these systems are fragmented and are governed under different laws. The medical and paramedical professionals working in the public sector are regulated under the respective state service rules, can form associations with no comparable right of collective bargaining. The service rules also prohibit employees from taking part in any strike or protest and it has been affirmed by various decisions. However, the lack of political vision in strengthening the public health care infrastructure and services leads to gross dissatisfaction among the professional community. As far as the private sector is concerned the doctor's community is satisfied with the service norms and salary and other allowances. However, the nurses and paramedical staff suffer a lot in terms of their work schedule and salary even in the state of Kerala, where the government implemented the minimum wage order. Even amid complete prohibition of strike under service rules and court orders, doctors go for strikes and protest throughout the county. Thus, a complete prohibition has become meaningless. A proper regulation protecting their democratic right to protest without affecting the patients' interest, especially the emergency medical care shall be envisaged. Many of the time it is seen that Government yield to the demands of medical associations, though the Governments are empowered to use ESMA. It proves that there is a real need to understand and study the service conditions of doctors and other employees. The Governments should show their political will in reforming the healthcare system by balancing the rights of patients and medical and para-medical professionals in India.