

Right to Health – An Unenumerated Right under Article 21 of the Constitution of India

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Abstract: The basic objective of any Constitution in the world is to protect the interests of its people. The Constitution of India guarantees various Fundamental Rights which are basic human Rights, Article 21 is one such Fundamental Right. On a plain reading of the same, it does not connote more than Right to Life and Personal Liberty. The Directive Principles of State Policy (DPSP) do speak about the public health. If it were to be included in the Part III of the Constitution, it would make the State accountable for implementation and also actionable by the people, which could result in financial ramifications on the state. To avoid this, the Constitutional framers deliberately placed it in DPSP and at the disposal of the government. Only if the government wills, it can implement the same and can evade it if it does not want to, under the guise of lack of funds. Thanks to the efforts of the all-pervading Judiciary which has accorded an extended dimension to Art 21. Today, any basic Right can be read into Art 21, Right to Health being one of them. This paper makes an effort to examine the growth of Right to health, its Constitutionality, the judicial recognition and the way forward.

Keywords: Health; India; Constitution; Doctors; SC.

INTRODUCTION

One of our Sanskrit Shloka says “व्यायामात् लभते स्वास्थ्यं दीर्घायुष्यं बलं सुखं। आरोग्यं परमं भाग्यं स्वास्थ्यं सर्वार्थसाधनम्॥” which means Health is the biggest wealth in one's life. It is the desire of every human being to lead one's life rid of any ailment or complaints with regard to health. Everyone, irrespective of caste, creed, gender, place of birth and ethnicity enjoy the Right to health, it being the most basic and essential asset. Right to health is an ancient phenomenon and may be traced back to the principles of common law under the Law of Torts.

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”¹. The Right to health and the Right to be healthy are two different aspects of the same coin. The individuals have a Right to health against the State but the Right to be healthy is well within the volition and the capacity of an individual and the State has no role to play in that. The State has the bounden duty to extend the Right to health to its citizenry, but an individual has the duty to keep oneself healthy in the given situation with the available resources. Health is a complex concept,

which includes both the mental health and the physical health. But, in this paper, the Researcher is restricting only to the physical health.

We can find the first mention of the Right to health in 1946, in the Constitution of World Health Organisation (WHO) “...the highest attainable standard of health as a fundamental right of every human being” and the same has been included in many Treaties and Declarations at the international level. The most imposing interpretation of this Right can be found in Article 12 of the International Covenant on Economic, Social and Cultural Rights which was subsequently ratified by 9 Member States, India being one of them, out of the 11 SEAR Member States². According to WHO, health is not merely the absence of illness or disease but is a state of complete physical, mental and social wellbeing. WHO also casts a legal obligation on all the States to guarantee “timely, acceptable and affordable health care of appropriate quality as well as to provide for the underlying determinants of health, such as safe and potable water, sanitation, food, housing, health-related information and its education and gender equality” to all its people. India, as a founder member of UN, has ratified numerous International Conventions securing individual's right to health care. To implement the same, plethora of committees have been set up at different times to look into various aspects of public health. These

committees have made numerous recommendations to alleviate & augment the health care system in India.

When we examine the Constitutionality of the Right to health in the Indian context, our Constitution does not make an express mention of the same. The Indian Constitution has not expressly recognised the Right to Health as a Fundamental Right under Part III of the Constitution, but we can find a multiple references to public health and on the role of the State in providing health care to its citizens.

But the courts have accorded an extended meaning and interpretation to Article 21 which speaks about 'Right to Life and Personal Liberty'. Right to health is one of the unenumerated Rights under Art 21. The decisions of the courts have proved that Art 21 is the conglomeration of different basic human rights which enable an individual to lead a comfortable life in a humane atmosphere. Article 23 indirectly supports the Right to health by prohibiting traffic in human beings and forced labour. Article 24, prohibits the employment of children below the age of fourteen years in any factory or mine or in any other hazardous employment which may expose the children to unhealthy conditions, thus protecting their health. But Part IV of the Constitution which deals with Directive Principles of State Policy (DPSP) have extensively dealt with this Right, though not as an individual's/personal Right but as a Public Right which is a corollary to the personal Right. But we are quite aware that whatever is included in DPSP is not actionable but hold only persuasive value and they are only the guidelines for the State to achieve a Welfare State. The Article 38³, Article 39(e)⁴, Article 41⁵, Article 42⁶, Article 47⁷ and Article 48A⁸ of the Indian Constitution directly and indirectly guides the State to ensure the Right to Health to its people. Besides DPSP, 11th and 12th Schedules to the Indian Constitution also deal with health related provisions. Under Art 243 G read with 11th Schedule (Entry 23), the Constitution requires the Panchayats and the Municipalities to strengthen the public health. Apart from other things, the State is duty bound to provide clean drinking water, adequate health care and sanitation which includes dispensaries, primary health care centres and hospitals, promotion of family and social welfare, etc.

JUDICIAL RECOGNITION OF THE RIGHT TO HEALTH

Though, the Right to Health has not been included in the Part III of the Indian Constitution, the judiciary through its interpretation of Article 21 at various instances has recognised it to be one of the basic human Rights. The judiciary, through its path breaking judgements, has widened the scope of Art 21 by including various basic human rights, Right to health being one of them. The effect of which, today Right to health can be read into Art 21 and the same has been construed to be an inseparable and inevitable part of Art 21. The efforts of the Apex Court in protecting the health of a common man are commendable. It has reiterated in several decisions that the term 'life' in Art 21 connotes not a mere survival or animal existence but a life with human dignity⁹, which includes better standard of life, Right to livelihood, hygienic conditions & the Right to leisure in the workplace. Right to health is an inescapable and inherent part of a dignified life of an individual. Art 21 cannot be read in isolation but ought to be read in consonance with the above-mentioned provisions under DPSP to achieve the Right to health to its full potential. In *Bandhua Mukti Morcha v. Union of India*¹⁰, the Supreme Court (SC) ruled that although the DPSP hold only persuasive value and are not binding obligations, yet they should be duly implemented by the State. The court delineated the conditions essential for the enjoyment of health and said that right to live with human dignity also involves right to 'protection of health'.

In *Vincent Panikurlangara v. Union of India*¹¹, the Court stated that "maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends, the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore is of high priority perhaps the one at the top". The SC while interpreting Art 47 has emphatically noted that public health needs to be protected for the betterment of the society. Further, it opined that in the welfare era, the primary duties of the State are to raise the level of nutrition and to improve the standard of living of the people. The horizon of Art 21 was further widened by the SC in '*Paschim Banga Khet Mazoor Samity v. State of*

West Bengal¹², and held that it is the responsibility of the Government to provide adequate medical aid to every person and to strive for the welfare of the public at large.

The scope and the jurisprudence of emergency medical care was enlarged in *Parmanand Katara v Union of India & others*¹³. This was a landmark judgement by the SC which mandated a doctor or a hospital be it private or public to provide immediate needy medical care to a victim of road accident. The doctors cannot escape from their duty, taking the lame excuses of medico legal case or asking the patient to be shifted to a government hospital. This judgement is one of the best outcomes of a Public Interest Litigation (PIL) filed by a public-spirited person based on a report in a newspaper daily. The report stated that a scooterist was knocked down by a speeding car, when the injured scooterist was taken to a nearby hospital, the doctors refused to treat him and they advised that the injured be taken to another hospital which was authorised to treat the medico legal cases, situated 20 kms away. The scooterist died on the way to the other hospital. In this case the issue was, whether the hordes of legal formalities should be followed before allowing treatment to the injured in the accident cases. The SC in its judgement held that Art 21 casts a duty on the State to preserve life. Doctors at the government hospital or otherwise, obligated to extend their services for protecting the lives. An equal responsibility has been cast on the police and the members of the public, who happens to notice any such incident. On the converse, this judgement protected the interests of the medical practitioners as well by ruling that they should not be unnecessarily harassed in the guise of interrogation or investigation and they should not be dragged to the police station unreasonably. In this case, the court urged that this decision be given adequate and wide publicity in the national media, the Doordarshan and the All India Radio as well as through the High Courts and other courts to create awareness among the public, warding off their misunderstanding of the responsibilities of the doctors in emergency cases. The obligation of the doctors being absolute, legal formalities or procedure which interferes with the discharge of the obligation cannot be sustained. Every doctor has the professional obligation to render his services with due expertise for protecting the life of a patient. In continuation of this decision, the SC, in *Burrabazar Fire Works Dealers Association and*

*Others v. Commissioner of Police, Calcutta*¹⁴, observed that Art 19 (1)(g)¹⁵ does not guarantee any freedom which is at the cost of the community's safety, health and peace. In principle, this decision connotes that Doctors have no choice of rejecting or electing to treat the needy/injured/diseased. In *CESC Ltd. v. Subash Chandra Bose*¹⁶, the SC considered the international instruments relating to health and resolved that right to health is a fundamental right. Further, observed that 'health is not merely absence of sicknesses but implies more than an absence of sicknesses. Adequate and timely health care facilities and medical care protect not only against sickness but also ensures stable manpower for economic development of the country.

Subsequently in '*Consumer Education and Research Centre v Union of India*¹⁷' it was held that a worker, both while he is in service and post retirement has a fundamental Right under Art 21 to health and vigour. In *Mahendra Pratap Singh v. State of Orissa*¹⁸, the court held "in a country like ours, it may not be possible to have sophisticated hospitals but definitely villagers within their limitations can aspire to have a Primary Health Centre. The government is required to assist people, get treatment and lead a healthy life. Thereby, there is an implication that the enforcing of the right to life is a duty of the state and that this duty covers the providing of right to primary health care". This decision further strengthened the obligation of the State to provide medical facilities to its people. In *State of Punjab v Mohinder Singh Chawla*¹⁹ and *State of Punjab & Ors v Ram Lubhaya Bagga*²⁰, it was reaffirmed that Right to life includes the Right to health and the State has the Constitutional obligation to provide its people with health services.

In *Jacob Puliyel v Union of India & Ors*²¹, most popularly known as the Covid-19 Vaccination case, A public interest litigation was filed before the Supreme Court of India, challenging adverse effects of emergency approval of vaccines in India, the need for transparency in publishing the data of the segregated clinical trial of vaccines, dearth of transparency in regulatory approvals, imperfect evaluation of Adverse Events Following Immunization and vaccine mandates in the absence of informed consent being unconstitutional. The petitioner contended that inter-alia coercive vaccination would amount to interfering with the

principle of informed choice of individuals, guaranteed under Art 21 of the Constitution of India. The Supreme Court dismissed the Writ Petition but re-established that personal autonomy should be respected and any mandate to the contrary, must be reasoned and proportional. The court re-emphasised the prevailing judicial position that any arbitrary breach into personal autonomy will be deemed unconstitutional which in effect meant that no individual can be coerced to get vaccinated as one has autonomy over one's body.

It is established by the above delineated long list of judgements that Right to health is an integral part of Fundamental Right of Right to Life guaranteed to every citizen under Art 21 of the Indian Constitution. The SC through successive judicial precedents, has reasonably stretched its interpretation of the Right to life to include Right to health even.

In September 2019, under the 15th Finance Commission, a High Level Group on the health sector was constituted. It recommended for the declaration of Right to health as a fundamental right and also recommended for shifting of the subject of health from the present State List to the Concurrent List. The first recommendation may strengthen people's access to health services but the latter recommendation may result in the constitutional conundrum on whether the centralisation of public health will be helpful in the context of Indian cooperative federalism²² and the same may lead to red tape, institutional constraints and excessive bureaucracy. Currently, the subject of public health and sanitation, hospitals and dispensaries are included in the State List of the VII Schedule of the Constitution, due to which the state enjoys constitutional directives to enact, adopt and enforce regulations relating to public health. A Niti Aayog Report in 2019, deplored the unequal public health systems in different states and opined that this is due to the fiscal constraints and the restricted technical expertise.

The studies have shown that the weak public health system in India is due to the absence of a statutory framework that can guarantee Fundamental Right to health. The difficulties and the anomalies that are encountered in the implementation of the Right to health can be done away with only with the assistance of an efficient and effective, transparent operational mechanism by the State. Transparency, Accountability and

Reliability in public administration is crucial for good governance and people's trust. The data about the patients and their medical condition should be carefully guarded/secured and kept out of the reach of anybody else including the stakeholders in medical field. We have witnessed that during the time of the pandemic COVID-19, big data analytics were used to track the patients and to trace their contacts through state sponsored applications like Arogya Setu which need to line up with the principle of personal data protection. Bulk of information about the patients was misused and they landed in the wrong hands thereby violating the Right to privacy of the infected. Any further use or dissemination of such information ought to be with the prior consent of the person. There are many reports of data fudging of Covid 19 cases in India, thus affecting the people's trust in the machinery of the State.

After a careful examination of all the international instruments, various provisions of the Indian Constitution, the relentless endeavour of the judiciary to embed the Right to health into Art 21 and the recommendations of the various committees, it is palpable that Right to life includes Right to health and hence the State through its institutions, are duty bound to provide health care facilities and services to all its citizens. The constitution not only obligates the State to discharge this obligation, but casts equal duties on the citizens to contribute their might for the promotion of health, mainly through protecting the environment as every individual is a Rights holder for a pollution free environment. This duty is heavily weighed as the most crucial obligation by the people towards the State and the entire mankind, transgressing the borders and the boundaries.

CONCLUSION

Smooth and fair co-ordination between the Centre and the States is the need of the hour. For boosting the public health system, decentralisation of the funds and the power to states is imperative. It is time that India declared the Right to health as a Fundamental Right using the principles of solidarity, proportionality and transparency. Constitutional provisions, legal precedents by the committed judiciary and the global commitments of India, have formed a solid foundation for the Fundamental Right to health in India. To be more

precise, a legislatively backed Right will afford better access to health which makes the Right legally binding and ensures accountability. Like in the case of Right to Education under Art 21A of the Constitution, I strongly recommend a constitutional amendment which provides a constitutional sanction to the Right to health which may be a dream come true for the major chunk of the population.

I also strongly advocate for the nationalisation of the health sector. Today health sector is one of the major booming sectors attracting huge investments. Our country is dotted with private hospitals, some of them ranked as the major high end corporate hospitals. The medical care at these hospitals is a far cry for a common man. According to the data of 2015-16, approximately 27.5% of the population live below the Poverty line in India which accounts for around 350 million people which also means approximately 1/3 of the population live below the poverty line. The private and the major corporate hospitals do not cater to the need of this vulnerable section of the society. Even for other sections of the society, the medical care in these hospitals not only digs a deep hole in the pocket but burns the pocket. Health sector being a primary and basic need of everyone, the state should take over these profiteering hospitals/ventures from the few monopolised private hands and nationalise and dedicate them for serving the common public. Only the state-owned hospitals can cater to the needs of even a last man in the society. Neither the Constitution nor the

nature distinguishes between the lives of a common man and an affluent one.

Every one's life is equally valued, if this is the case, how can the access to the basic human life be deprived and differentiated against the vulnerable section in these high-end hospitals. Economic affordability alone should not be the deciding factor to avail the medical facilities. If the hospitals touted to be the luxurious high end, provide medical aid to a common man, then I have no qualms. But, when the hard reality not being so, the health sector should be nationalised. The State should ensure that the charges/fees and the facilities in these hospitals are uniform throughout the country. As it is, medical tourism to India is on the rise owing to the prevalent advanced technologies in the health sector, the expertise of our medical fraternity and the reasonable cost of medical attention/ procedures. In case the health sector is nationalised, patients from other countries looking for medical treatment may visit the hospitals even in remote areas because cost of living in remote areas may be comparatively low but the facilities and the fees in the hospitals will be the same. This will in turn result in the development of all the regions which gives impetus to the overall development of the country besides affording a better health facility to our own people.

I may be questioned, when there is movement for privatisation, why am I advocating for nationalisation. I strongly contend that **in the present liberalised economy, only the means of production should be privatised and not the means of protection of the people.**

REFERENCES

- [1] Article 25.1 of Universal Declaration of Human Rights.
- [2] SEAR Member States- Bangladesh, Bhutan, Democratic People's Republic of Korea, India, Indonesia, Maldives, Myanmar, Nepal, Sri Lanka, Thailand and Timor- Leste.
- [3] To promote the welfare of its people.
- [4] That the health and strength of workers, men and women, and the tender age of children are not abused and that the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.
- [5] Directs the state to secure the right to work, education and public assistance in certain cases such as unemployment, old age, sickness and disablement.
- [6] Seeks to ensure humane work conditions and provide for maternity relief.
- [7] The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.
- [8] Ensures that State shall endeavour to protect and impose the pollution free environment for good health.
- [9] Francis Coralie Mullin vs The Administrator, Union Territory of Delhi AIR 1981 746.
- [10] AIR 1984 SC 812.
- [11] (1987) 2 SCC 165.

- [12] (1996) 4 SCC 37.
- [13] AIR 1989 S.C. 2039.
- [14] AIR 1998 Cal. 121.
- [15] Provides Right to practice any profession or to carry on any occupation, trade or business to all citizens subject to Art. 19 (6) which enumerates the nature of restriction that can be imposed by the state upon the above right of the citizens.
- [16] AIR 1992 SC 573.
- [17] (1995) 3 SCC 42.
- [18] AIR 1997 Ori 37.
- [19] AIR 1997 SC 1225.
- [20] (1998) 1 SCR 1120.
- [21] Writ Petition (Civil) No. 607 of 2021.
- [22] <https://www.orfonline.org/expert-speak/declaring-the-right-to-health-a-fundamental-right/> visited on 19/10/2023 at around 7.00pm.

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