

RIGHT TO HEALTH: A STUDY IN THE INDIAN PERSPECTIVE

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*Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The health of all people is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States*²....

I. Introduction

Health is vital for all human beings. It has been regarded as a fundamental human right. The Constitution of India regards the improvement of public health as among its primary duties. The Constitution of India provides for a welfare and socialist pattern of development. The Fundamental Rights enshrined in the Constitution are the civil and political rights and they are justiciable whereas the social and economic rights like health, education, livelihoods etc. are enshrined in the form of the Directive Principles of State Policy and are not justiciable. The latter comes under the domain of planned development, which the State steers through the Five Year plans and other development policy initiatives. The Five year Plans have been providing the framework within which the Centre and the States have developed their health services infrastructures and programmes³.

II. The Indian Constitution and the Right to Health

The right to life and liberty has its origin in natural law and is rooted in antiquity. Its first constitutional expression can be found in England in the *Magna Carta (AD 1215)*. Article 25(2) of the Universal Declaration of Human Rights, 1948 which assures everyone the right to a standard of living adequate for the health and well-being of himself and of his family, including medical care, sickness and disability coverage. This has been reflected in the International and municipal instruments. The Declaration of Human Rights which assures human sensitivity and moral responsibility of every state and that all human beings are born free and equal in dignity and

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² Preamble WHO Constitution

³ Dr. Lily Srivastava: Law and Medicine, second edition, Universal Law Publishing Company, New Delhi p 11

rights. It also assures that everyone has a right to life, liberty, in article 21 also incorporates the right to health in its fold. The article reads "No person shall be deprived of his life and personal liberty except through procedure established by law." Right to life as guaranteed by the Indian Constitution under Article 21 does not provide merely an animal existence to individuals but a right to live with human dignity.⁴ This right either to life or live with human dignity is contingently dependent upon a health of an individual. In other words, right to health is a prerequisite of right to live with human dignity.

The constitutional scheme of right to health is also reflected and extended to Part IV. Article 38 states that State to secure a social order for the promotion of the welfare of the people. Article 39(e) obligates the state to direct its policy towards securing the health and strength of workers, men and women *inter alia* shall not be abused whereas under Article 41, the State becomes duty bound to make effective provisions for public assistance in cases of unemployment, old age, sickness disablement, and in other cases of undeserved wants. Article 42 provides for conditions for just and humane conditions of work and maternity reliefs. Similarly as per Article 43, the State has to create a condition of work ensuring decent standards of life and Article 47 imposes a duty on the state to raise the level of nutrition and improve public health.

III. International Scenario on Right to Health

Following are the international laws, treaties and declarations, which India is a party to and which have a bearing on the right to health. Provisions in most of these also relate to the fundamental rights and directive principles of state policy as enshrined in the Indian Constitution.

Universal Declaration of Human Rights

"Everyone has a right to a standard of living adequate for...health for himself and his family, including food, clothing, housing, medical care and the right to security in the event of...sickness, disability...Motherhood and childhood are also entitled to special care and assistance....."⁵

Convention on the Elimination of All Forms of Discrimination Against Women

"State Parties shallensure to [women] ...access to specific educational information and advice on family

⁴ *Charles Shobraj v Suptd. Central Jail, Tihar*, AIR 1978 SC 1514

⁵ Article 25

planningState Parties shall eliminate discrimination against women inhealth care and women ...to ensure on a basis of equality of men, access to health care services, including those related to family planning; ensure ...appropriate services in connection with pregnancy ...State Parties shall ...ensure ...that [women in rural areas] ...have access to adequate health care facilities, including information counselling and services in family planning....."⁶

Convention on the Elimination of All Forms of Racial Discrimination

"State Parties undertake to ...eliminate racial discrimination ...and to guarantee the right of everyone , without distinction as to race , colour, or national or ethnic origin, to equality before law, ...the right to public health, medical care, social security and social services..."⁷

Convention on the Rights of the Child

"State Parties recognise the right of the child to the enjoyment of highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health..."⁸

Thus social security, social insurance, decent standard of living, and public health coupled with the policy instruments over the years, which in a sense constitutes the interpretation of these constitutional provisions, supported by international legal commitments, form the basis to develop right to health and healthcare in India. The only legal /constitutional principle missing is the principle of justiciability.

IV. Judicial Intervention in the Evolution of Right to Health

Vincent v Union of India⁹, which is concerned with the legal obligation of the State to prohibit the sale and use of banned drugs, the Supreme Court almost accepted the right to health as a fundamental right, in the following words: "A healthy body is the very foundation for all human activities." In a welfare state, therefore it is the obligation of the State to insure the creation and the sustaining of conditions congenial to good health.¹⁰

⁶ Articles 10, 12 and 14

⁷ Article 5

⁸ Article 24

⁹ (1987) 2 SCC 165

¹⁰ Dr. Dilip Ukey & S. R. Bhosle : Human Rights, Health Care and Curative Regimen- An ignored illness (Indian Bar Review vol. XXVII (2) 2000).

In *Paramananda Katara v Union of India*¹¹, the Indian Supreme Court shaped the right to health as a fundamental right under Article 21 of the Constitution. The instant case was filed under article 32 as a PIL and sought directions to be issued to the Union of India that every injured citizens brought for treatment should be immediately provided with medical aid and that assistance to preserve life and in case of breach of directions / death appropriate compensation should be paid. Responding to the petition of public interest the Apex Court dwelt upon the urgent need to lay down certain norms to consider right to health as a primary and important one. Ranganath Misra J. in his judgement referred to the Code of Medical Ethics prepared by the Medical Council (Clauses 10 and 13) as part of the affidavit filed by the Union of India. It states that professional ethics require every medical practitioner to treat injured for the sake of humanity to save his life. It is also expected that the formalities under the Code of Criminal Procedure, 1973, or any other law should not stand in the way of the medical practitioners attending injured persons.

IV.I. Public Health is State's Priority

In one of the earliest instances of public interest litigations – Municipal Council, *Ratlam v Vardichand and Others*¹², the municipal corporation was prosecuted by some citizens for not clearing up the garbage. The corporation took up the plea that it did not have money. While rejecting the plea, the Supreme Court through Justice Krishna Iyer observed: "The State will realize that Article 47 makes it a paramount principle of governance that steps are taken for the improvement of public health as amongst its primary duties."

IV.II. Right to Health is a fundamental Right

In *CESC Ltd. V Subhash Chandra Bose*¹³, The Supreme Court relied on the international instruments and concluded that right to health is a fundamental right. It went further and observed that health is not merely absence of sickness: "The term health implies more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development. Facilities of health and medical care generate devotion and dedication to give the workers' best physically as well as mentally, in productivity. It enables the worker to enjoy the fruit of his labour, to keep him physically fit and mentally alert for leading a successful economic, social and cultural life. The medical facilities are therefore part of social security and like gilt edged

¹¹ (1989) 4SCC286

¹² 1980 Cri LJ 1075

¹³ AIR 1992 SC 573, 585

security, it would yield immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness, etc"

IV.III. Health and Health Care of Workers is an essential component of right to life

In *CERC v Union of India*¹⁴, the Supreme Court was dealing with the rights of workers in asbestos mining industry. To begin with, the Court noted that the right to health and health care of a worker is a component of the fundamental right to life guaranteed under Article 21 of the Constitution of India. The Court observed:

Article 38(1) lays down the foundation for human rights and enjoins the State to promote the welfare of people by securing and protecting, as effectively as it may, a social order, in which justice, social, economic and political shall inform all the institutions of the national life. Article 46 directs the State to protect the poor from social injustice and all forms of exploitation. Article 39(e) directs that the policy of the State shall be to secure "the health and strength of workers". Article 42 mandates the State shall make provision, statutory or executive "to secure just and humane conditions of work". Article 43 directs the State shall "endeavour to secure to all workers, by suitable legislation or economic organisation or any other way to ensure decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers." Article 48-A enjoins the State to protect and improve the environment. As human resources are valuable national assets for peace, industrial or material production, national wealth, progress, social stability, decent standard of life of workers is an input. Article 25(2) of the UDHR ensures right to standard of adequate living for health and well-being of the individual including medical care, sickness and disability, Article 2(b) of the International Convention on Economic, Social and Cultural Rights (ICESCR) protects the right of worker to enjoy just and favourable conditions of work ensuring safe and healthy working conditions.

¹⁴ (1995) 3SCC 42

IV.IV. Environment Pollution is linked to Health and is a violation of right to life with dignity

In *T. Ramakrishna Rao v Hyderabad Development Authority*¹⁵, the Andhra Pradesh High court observed:

Protection of environment is not only the duty of the citizens but also the obligation of the State and its all organs including the Courts. The enjoyment of life and its attainment and fulfilment guaranteed by Article 21 of the Constitution embraces the protection and preservation of the nature's gift without which life cannot be enjoyed fruitfully. The slow poisoning of the atmosphere caused by the environment pollution should be regarded as amounting to violation of Article 21 of the Constitution of India.

It is therefore held by this Court speaking through P.A. Choudhury, J. in *T. Ramakrishna Rao v Hyderabad Development Authority* *T. Ramakrishna Rao v Hyderabad Development Authority*,¹⁶ the legitimate duty of the Courts as the enforcing organs of the constitutional objectives to forbid all actions of the State and the citizens from upsetting the ecological and environmental balance. In *Virendra Gaur v State of Haryana*¹⁷, the Supreme Court held that environment, ecological, air and water pollution, etc, should be regarded as amounting to violation of right to health guaranteed by Article 21 of the Constitution. It is right to state that hygienic environment is an integral part of the right to healthy life and it would not be possible to live with human dignity without a humane and healthy environment. In *Consumer Education and Research Centre v Union of India*,¹⁸ The Supreme Court held that right to health and medical care is a fundamental right under Article 21 read with Article 39(e), 41 and 42. In *Subhas Kumar V State of Bihar*¹⁹, the Supreme Court held that the right to pollution-free water and air is an enforceable fundamental right guaranteed under Article 21. Further in *M.C. Mehta v Union of India*²⁰, The Supreme Court imposed a positive duty obligation upon the State to take steps for ensuring dignity and for elimination of water and pollution. It is also relevant to notice that in *Unnikrishnan, J.P v State of A.P.*²¹, the maintenance and improvement of public health of public health is the duty

¹⁵ Writ Petition 36929/1998 *T. Ramakrishna Rao v Hyderabad Urban Development Authority* decided on 20.7.2001

¹⁶ AIR1987 AP171

¹⁷ 1995 (2) SCC 577

¹⁸ (1995) 3 SCC 42

¹⁹ AIR 1991SC 420

²⁰ (1987) 4SCC 463, AIR 1998 SC 1037

²¹ AIR 1993 SC 2178

of the State to fulfil its constitutional obligations on it under Article 21 of the Constitution.

In *Paschim Banga Khet Mazdoor Samity v State of West Bengal*²², the Supreme Court though primarily dealing with the issue of obligation of the State to provide emergency health care to patients made a general observation of significance:

"Providing adequate medical facilities is an essential part of the obligation undertaken by the State in a welfare state. The Government discharges this obligation by running hospitals and health centres. Article 21 imposes an obligation on the State to safeguard right to life of every person."

IV.V. Compensation Claims Against the State

Violation of Article 21 of the Constitution by the State will give rise to a claim under public law remedy. The State is also vicariously liable for acts of its agents or police or Government hospitals. The earlier notion was that the 'king could do no wrong' and the State could not be held liable for the wrongdoings of its servants. Thus while public servants could be prosecuted and sued for damages for negligence or dereliction of duty it was not possible for the State to be sued likewise. In the last 20 years this aspect has undergone change.

Developments in the last two decades

This doctrine has undergone major change in the last twenty years in two ways. First, the Supreme Court held that if there was a breach of fundamental rights then the High Courts and the Supreme Court were empowered to order the State to compensate the victim not in the realm of private law payment of compensation for violation of fundamental rights. Thus, whether the State was or not liable in torts for the actions of its servants it would still be liable if such actions amounted to violation of fundamental rights. Once, it was held that right to health and health care is a fundamental right, then a breach of such right by a State functionary would also make the State liable for payment of compensation.

Subsequently, of course the Courts have also held that the doctrine that State is not liable for the torts of its servants is no more applicable in the present times and the State is also liable in torts.

The cases cited below illustrate that medical negligence was considered a violation of individual's right to health.

²² (1996)4 SCC 37

In *State of Tripura v Amrita Bala Sen*²³, The Division Bench of the Guwahati High Court was concerned with a case where two persons who were admitted to a government hospital for cataract operation lost an eye each due to the operation. A Writ Petition was filed directly in the high court by these two persons claiming compensation from the State. The Division Bench found that the facts were quite clear and negligence of the doctors were apparent on the face of the record. The Court therefore directed each of these persons compensation of Rs 60,000 with interest. The State argued that the concerned individuals should be asked to file a civil suit in local courts (which would have been time consuming and also expensive) rather than approaching the High Courts directly. But the Court rejected the contention and held that when the facts were clear, there was no need for the high court in cases of state negligence to ask the complainants to go through long-winded legal proceedings and could itself direct compensation.

In *Marri Yadamma v State of Andhra Pradesh*²⁴ the deceased was an under trial who died of 'congestive cardiac failure'. The Court held that under trials have the right to adequate medical care. The petition was filed by his spouse alleging negligence on the part of the jail authorities and the jail doctor in not providing appropriate treatment on time and referring to a specialist to determine the root cause of the ailment.

In *Laxmi Mandal v Deen Dayal Harinagar and Hospital and others*²⁵, the Supreme Court reiterated that the right to health forming an inalienable component of right to life under Article 21 of the Constitution has been settled in two important decisions of the Supreme Court : *Paramananda Katara v Union of India*²⁶ and *Paschim Banga Khet Majdoor Samity v State of West Bengal*²⁷.

"The right to health is not to be understood as a right to be healthy. The right to health contains both freedom and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom and the right to be free from torture, non-consensual medical treatment and experimentation. By contrast the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."

*C. Ganesh v The Central Administrative Tribunal*²⁸, the Honourable Supreme Court observed:

²³ 2005 1 GLR 7

²⁴ AIR 2002 AP 164

²⁵ SC on 4th June 2010

²⁶ 1989 4SCC,289

²⁷ (1996) 4SCC 37

²⁸ SC 27th September, 2011

"...Right to Health is integral to the right to life. Government has a constitutional obligation to provide health facilities....The term health implies more than an absence of sickness. Facilities of health and medical care generate devotion and dedication to give the worker's best, physically as well as mentally, in productivity..... The medical facilities are therefore part of social security and like gilt edge security, it would yield immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness etc."

V. Conclusion

The right to health is fundamental, since it enables an individual to enjoy all the other rights- for example, water , sanitation, nutrition, housing, healthy accommodation, education, employment and information. The Fundamental right to health and health care has been recognised by a number of decisions of the Supreme Court but still there are a number of limitations in this regard. There is an urgent need to make Right to Health a fundamental right due to many reasons. Firstly, it will oblige the State to provide health care to all its citizens. Secondly, it will make denial of fundamental right an offence. Thirdly, the Government will be forced to spend more on health care. Fourthly, right to health when made a fundamental right, will be in concurrence with what s envisioned by WHO. Fifthly, making health a fundamental right will enhance the awareness of health among various stake holders of the society. Sixthly, it will empower the vulnerable and downtrodden section of population to access better health. Seventhly, Supreme Court will have a better vigilance over the health policies, actions and services. In totality making health a fundamental right will have arippling effect on various sectors, developmental indicators and growth prospects.

No doubt making right to health a fundamental right would boost our socio economic development however there is a need to implement region specific policy. Spending just 3% of the GDP uniformly would not improve the situation drastically. States like Kerala, Tamil Nadu and Maharashtra are fairing much better in health index whereas Bihar, Uttar Pradesh and West Bengal are far below national average, lacking most basic health infrastructure. So, special attention has to be given to regional needs.

Some significant benefits of Right to Health are assured universal free access to drugs and diagnostics in the Government run hospitals and availability, accessibility and improved quality of health services in such hospitals. It would impose obligation on the States to protect and fulfil right to health of every citizen. As we are striving for emerging as a developed nation and world power, improving human development is of utmost importance and health and education are the two most essential component

of Human Development Index. Health is the basic determinant of the capacity of a person. A healthy individual is more productive and can contribute more to the nation. Timely provision of healthcare and health education will ensure focus on preventive care rather than curative care. Right to Health should ensure provision of proper health care, with accountability mechanism and properly defined outcomes. But, as of now severe resource constraints inhibit us from making this right enforceable by the judiciary, even though we must strive to do so.

A bit delayed but bringing legislation for national health Policy will certainly prove a commendable step in the right direction. Making health a fundamental right will certainly assure its sincere implementation. And what is required is a timely review of the policy so that it does not take a decade again to consider one of the basic necessity of human existence. Justiciable nature of right will enforce strict compliance on the part of the public and private healthcare institutions to deliver better. Affordability of citizens to services will be better as the current universal health coverage inequalities are exposed and can be petitioned in courts of their exploitative nature and for better delivery. It will also improve the health services at the primary, community and sub health centres as people could claim their right. Accountability and responsibility of the institutions providing health services will be enhanced and irregular and irresponsible activities will reduce as the Apex court will be able to monitor their activities.

There are some cons also in making Right to Health a fundamental right. It will put unwarranted pressure on the Government Exchequer. With funds getting diverted to the health sector, there could be a rise in fiscal deficit which may call for inflations and unemployment. Without prior development of regulating agencies passing the bill for making it an act will prove erosion of public faith. Right to Health is a good step towards universal health facility access but, we need to set up proper institutional and structural infrastructures for this. Making Right to Health as a fundamental right may also lead to of litigation, thus increasing pendency of cases which would further hamper the judiciary's efficiency the excess burden.

Democracy continues if thinking continues. A perfect mind with conscious thinking is utmost required for a democracy. It is suffice to say that a healthy body is the place of healthy mind. Along with fulfilling the major millennium development goals India can improve the standard of health of its people by acknowledging the Right to Health as a fundamental right. To conclude it is useful to cite an observation of former Chief Justice K.G. Balakrishnan in his address at a National Seminar on human rights" the right to health cannot be conceived of as a traditional right enforceable against the State. Instead it has to be formulated and acknowledged as apposite right at a global level one which all of us have an interest in protecting and advancing."