

# RIGHT TO HEALTHCARE IN INDIA: A STUDY OF CONSTITUTIONAL GUIDELINES

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## **I. Introduction**

Right to healthcare is considered as a basic need of human beings as it is intrinsically connected with the concept of right to life. Without a good quality of health of the people, development of a nation cannot be achieved. Hence, health should be considered as a basic indicator of development or freedom. Recognition of right to health or healthcare (at least) as fundamental to human life, has been agitated since long at international level as well as in domestic legislations of a number of countries. However, the concept of right to healthcare is a much debated issue and hard to be structured within a defined peripheral limit. The idea of right to health care must be distinguished from right to health which is generally considered as an inclusive right and operates as a negative obligation on the state to restrain it from any kind of denial of health related issues of its subjects. Whereas, right to health care is a positive duty of the state to ensure access, opportunity and availability of health services at public expense. Therefore, the first right should be considered as the ultimate goal and the second as a means to achieve the same.

Right to healthcare has been recognized as a basic human right since long. The end of Second World War and establishment of the UNO witnessed the start of a journey towards realization of human rights. Since 1948, adoption of the UDHR, number of International human rights document vowed right to health or healthcare as fundamental to human life. The WHO Constitution adopted in 1948 declares right to

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health a fundamental right.<sup>2</sup> It also creates responsibility of the member states to ensure health for their subjects by adopting proper legislative and policy measures.<sup>3</sup> As a result till 2008, out of 186 member states of UN 135 (73%) states have adopted provisions for health in national Constitutions.<sup>4</sup> However, only a few countries have given health the status of fundamental right.<sup>5</sup> Unfortunately India does not belong to that group. India, despite being member of the WHO and signatory of a number of international instruments (e.g. ICESCR, Alma Ata Declaration etc), which have recognized the right, failed to established health as a fundamental right. Being a socialist country, as the preamble of Indian Constitution stands for after the 42<sup>nd</sup> amendment, it is the duty of the state to ensure social security of all subjects from cradle to grave.<sup>6</sup> Access to health for all is a key indicator of that. But the constant failure of the Government can be perceived by consulting the bulk of empirical data available on this subject. The policy regime for public health care has failed to attain the desired level of development. According to a recent study the percentage of population actually covered by the public health care services in India is reportedly a mere 30 per cent.<sup>7</sup> Therefore, it becomes necessary is to examine the question to what extent India has ensured right to health for its people. Even if the right to health cannot be ensured at a single stretch the

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<sup>2</sup> See preamble; WHO Constitution: Basic Documents, Forty-fifth edition, Supplement, October 2006; available at: [www.who.int.>governance>who\\_constitution](http://www.who.int.>governance>who_constitution), last visited on 12.01.2017

<sup>3</sup> Ibid;

<sup>4</sup> Perhudooff S. K., 'Health, Essential Medicines, Human Rights and National Constitutions'; at p. xvii; available at [www.who.int](http://www.who.int). last visited on 12.01.2017

<sup>5</sup> Ibid;

<sup>6</sup> The Supreme Court in D.S. Nakara v. Union of India AIR 1983, SC 130 case declared that the basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave.

<sup>7</sup> N. B. Sarojini & Others; Women's Right to Health; by National Human Rights Commission available at [nhrc.nic.in>Publications>Women](http://nhrc.nic.in>Publications>Women), last visited on 10.01.2017

Government should adopt proper measures to give right to primary healthcare the status of fundamental right.

The insertion of the right to free and compulsory education of all children up to 14 years has already evidenced a large scale progress in education. Therefore, surely the same can be done with respect to right to health care for the poor, at least as a positive mandate upon state. This can be a first step towards achieving highest attainable standard of health

Despite of the several decisions of the Supreme Court whereby right to healthcare has been recognized as a fundamental right flowing from Article 21, no action has been taken by the Government to include the same within the Constitution. Therefore, the paper proposes a brief study of right to healthcare in the Constitutional provisions and to examine the role of judiciary in recognizing the right with a hypothesis that an explicit provision will be helpful in achieving the desired standard of health for people and to find out what kind of provision would be proper for Indian Constitution. However, before entering into the further discussions it becomes necessary to understand the concept of right to healthcare and its difference with right to health.

## **II. Right To Healthcare: Understanding The Concept**

What is right to healthcare? It is indeed very hard to define the concept precisely. Often we mingle the concept of healthcare with health. However in reality these two are separate concepts. To understand the difference we should start with the meaning of the term health. The word health was derived from the old English word 'hoelth', which meant a state of being sound, and was generally used to infer a

soundness of the body.<sup>8</sup> The most commonly quoted definition of health is formalized by the World Health Organisation (WHO) as “a complete state of physical, mental and social well-being, and not merely the absence of disease or infirmity”.<sup>9</sup> Thus, from this definition we can consider right to health as an inclusive right which includes a wide range of factors helping to lead a healthy life. These factors or components can be called as ‘underlying determinants of health’ and include safe drinking water, adequate sanitation, safe food, adequate nutrition, healthy working conditions, health related education and obviously access, availability and opportunity to healthcare.<sup>10</sup>

We frequently associate right to health with access to healthcare. This may be partially correct but right to healthcare is merely a component of the broader right. Thus right to healthcare should be understood distinctly. In this regard we can consider the observation of Justice K.G. Balakrishnan. While addressing a National seminar on ‘Human right to Health’ he said: “ the traditional notion of healthcare has tended to be individual-centric and has focused on aspects such as access to medical treatment, medicines and procedures....healthcare at collective level was largely identified with statistical determinants such as life-expectancy, mortality rates and access to modern pharmaceuticals and procedures. It is evident that such a conception does not convey a wholesome picture of all aspects of the protection and promotion of

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<sup>8</sup> Dolfman, Michael L., ‘The Concept of Health: An Historic and Analytic Examination, *Journal of School Health*’, Published by American School Health Association, 1973, Vol. 43, at p. 491-497

<sup>9</sup> *Supra* note 2

<sup>10</sup> Fact Sheet No. 31 on The Right to Health; by Office of the UN High Commissioner for Human Rights; at p. 3 available at [www. Ohchr.org>publications>factsheets](http://www.Ohchr.org/publications/factsheets). Last visited on 12.01.2017

health in society.”<sup>11</sup> So, there is an obvious difference between healthcare at the individual as well as societal level.

Right to health is a guarantee of highest level of health of all promised by the state. However the reality is, state cannot secure the people’s right to be healthy, rather its duty should be limited to access and facilities of treatment. Hence, as observed by Justice Balakrishnan -- “good health cannot be ensured by a state, nor can states provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual’s health.”<sup>12</sup> Similarly Prof. Sen in his *Idea of Justice* said “the importance of having some kind of a guarantee of basic healthcare is primarily concerned with giving people the capability to enhance their state of health. If a person has the opportunity for socially supported healthcare but still decides, with full knowledge, not to make use of that opportunity, then it could be argued that the deprivation is not as much of a burning social concern as would be the failure to provide the person with the opportunity for healthcare.”<sup>13</sup>

So, we can interpret right to health as a right of enjoyment of a variety of facilities, goods, services and conditions important to realize the highest attainable standard of health. Access to health care is merely an indicator of this freedom.

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<sup>11</sup> See Justice Balakrishnan K.G., National seminar on the ‘Human right to health’ Organized by the Madhya Pradesh State Human Rights Commission (at Bhopal)-September 14, 2008 available at [www.supremecourtindia.nic.in](http://www.supremecourtindia.nic.in). last visited on 12.01.2017

<sup>12</sup> Ibid;

<sup>13</sup> Sen Amartya; ‘*Idea of Justice*’; at p. 238 by Penguin Books India Pvt. Ltd.; New Delhi, 2010

### **III. Health as an Indicator of Freedom**

Development must be seen as a process of expanding the real freedoms that people enjoy. In recent years the economic development of India achieved a consistently high index. However growth of GNP or of individual income should not be strictly construed as the only means to expanding the freedoms. Freedoms depend also on other determinants such as facilities for education and healthcare. As Prof. Sen observed – “development requires the removal of major sources of un-freedoms.... The un-freedom links closely to the lack of public facilities and social care, such as absence epidemiological programs, or of organized arrangements for healthcare.”<sup>14</sup> These un-freedoms can arise either through inadequate processes or through inadequate opportunities (e.g. capability to escape premature mortality or preventable morbidity) and it is in the later sense that denial of right to healthcare becomes a component of un-freedom. Claims of development or freedom are not justified until the basic rights of the people are not secured. India, although, in paper, has an excellent healthcare system but in reality the Government has failed to ensure freedom of access to health to its people.

### **IV. Right To Healthcare In Indian Constitutional Framework**

In Indian Constitution right to health or healthcare has not been explicitly recognized as a fundamental right. However, through judicial interpretations it has been given the status of a basic right. On the other hand, Part IV of the Constitution declares a number of directives to be achieved by the state in which provision for public health is expressly mentioned. Similarly the preamble to the Constitution which declares

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<sup>14</sup> Sen Amartya; ‘Development as Freedom’; p. 3-5, by Oxford University Press; 16<sup>th</sup> Ed. 2016,

the key objectives of the document assures social and economic justice to its citizens. Hence, although right to healthcare has not been specifically enshrined in the Indian Constitution, still the same can be interpreted from different provisions. In the following paragraphs an attempt is made to find out those relevant provisions.

#### **IV.I. Preamble**

Preamble to the Constitution which is generally considered as the key to open the mind of the makers refers to social, economic and political justice and also equality of status and of opportunity. The term social justice includes access to healthcare. Similarly equality of status and opportunity requires equality in access, availability and quality of treatment. Use of the word opportunity reminds the duty of the state to increase capability against detriments to freedoms.

#### **IV. II. Directive Principles of State Policy**

Part IV of the Constitution provides a number of directives to be achieved by the state which are intrinsically connected with healthcare issues. Article 38 in this regard declares that the state shall secure a social order for the promotion of welfare of the people. Without a guarantee for public health welfare of the people is impossible. Article 39 (e) proclaims that the state has to direct its policy towards securing that health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 39 (f) declares that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and maternal abandonment.

Article 41 deals with right to work and imposes a duty on the State to public assistance basically for those who are old, sick and disable. The provision implies the responsibility of state to ensure health in certain cases. Article 42 makes provision to protect the health of infant and mother by maternity benefit.

Article 47 proclaims duty of the State to raise the level of nutrition and the standard of living and to improve public health- 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. Further, State's duty includes prohibition of consumption of intoxicating drinking and drugs which are injurious to health. Thus, Article 47 makes improvement of public health a primary duty of State.

#### **IV. III. Health in Indian Federal setup**

The healthcare services are mainly divided under State list and Concurrent list in India. While some items such as public health and hospitals fall in the State list, others such as population control and family welfare, medical education, and quality control of drugs are included in the Concurrent list. The seventh schedule of the Indian Constitution mentions the specific responsibilities of different layer of Government in a federal framework towards the question of health. Such responsibilities are indicated under the Union List, State List and the Concurrent List. The constitution of India has made health care services largely a responsibility of the state governments, but has left enough space for the central government in matters of general policy and programs relating to health.<sup>15</sup>

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<sup>15</sup> Constitution of India, Schedule vii.

#### **IV.IV. Panchayats, Municipalities and Health**

The Directive Principles has now been translated into action through the 73<sup>rd</sup> and 74<sup>th</sup> Amendment Act 1992 whereby part IX and IXA of the constitution titled “The Panchayat” and “The Municipality” were inserted. Now, the local governance has significant implications in the health sector. As the legislature of a state is empowered under Article 243-O and 243-W to endow the Panchayats and Municipalities with necessary power and authority in relation to matters listed in the eleventh and twelfth Schedule respectively. A number of entries in these two schedules have direct relevance to health which includes drinking water, health and sanitation, hospitals, primary health centers, dispensaries, family welfare, women and children development, Social welfare including welfare of the handicapped and mentally retarded etc.

#### **IV.V. Right to Healthcare under Article 21**

Article 21 of the Indian Constitution provides for protection of life and personal liberty, so that no person shall be deprived of his life or personal liberty except according to procedure established by law. The Courts through application of judicial mind have amplified the scope of Article 21 to include a number of rights within it. Right to healthcare is also included within the long list of rights flowing from the term life.

The process of expanding the meaning of the term ‘life’ under Article 21 was started from the Maneka Gandhi case,<sup>16</sup> where the Apex Court gave a new dimension to Article 21 and held that the right to life is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. However, right to health was initially recognized by the Supreme Court in Francis Coralie case,<sup>17</sup>

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<sup>16</sup> Maneka Gandhi V. Union of India AIR 1978 SC 594

<sup>17</sup> Francis Coralie Mullin V. Union Territory of Delhi 1981(1) SCC 608.

where the Court said that right to live is not restricted to mere animal existence. The decision implied the inclusion of health rights of people in general. Followed by the Mullin case the Supreme Court in *Bandhu Mukti Morcha*<sup>18</sup> moved further to consider the essential determinants for enjoyment of health. It was argued that right to live with human dignity also involves right to 'protection of health'.

### **V. Recognising Right To Healthcare: Approach Of The Judiciary**

After the *Maneka Gandhi* case the process of elaborating meaning of the term life has never stopped. Rather the Courts started to apply the weapon of judicial activism to include a number of rights, like right to livelihood<sup>19</sup>, right to privacy<sup>20</sup>, right to speedy trial<sup>21</sup>, right to clean environment<sup>22</sup> and many more. Right to health has also been declared as an essential adjunct to right to life. The Supreme Court by expanding the meaning of Article 21 and by reading directives like Article 39(e), 42, 47 within its ambit declared that right to health flows from Article 21. In the following paragraphs we will discuss some important pronouncements regarding this issue.

In *Consumer Education and Research Centre v. Union of India*<sup>23</sup> the Supreme Court for the first time explicitly held that the right to health is an integral part of a meaningful right to life. Reading Article 21 with the relevant directive principles guaranteed in articles 39 (e), 41 and 43, the Supreme Court held that the right to health and medical care is a fundamental right and it makes the life of the workman meaningful and purposeful with the dignity of person.

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<sup>18</sup> *Bandhua Mukti Morcha etc Vs. Union of India and Ors.* AIR 1984 SC 802

<sup>19</sup> *Olga Tellis V. Bombay Municipal Corporation* AIR 1986 SC 180, (1985) 3 SCC 545

<sup>20</sup> *R. Rajagopal V. State of T.N.* (1994) 6 SCC 632

<sup>21</sup> *Hussainara Khatoon (No. 1) V. Home Secretary, State of Bihar* AIR 1979 SC 1360

<sup>22</sup> *Subhas Kumar V. State of Bihar* AIR 1991 SC 420

<sup>23</sup> (1995) 3 SCC 42

In *Kirloskar Brothers Ltd v. Employees' State Insurance Corpn.*<sup>24</sup> the Supreme Court, following the Consumer Education and research Center's case, held that 'right to health' is a fundamental right of the workmen. It was also observed that this right is not only available against the State and its instrumentalities but even against private industries to ensure to the workmen facilities and opportunities for health. The Court said that the right flows from Article 21 as well as 14 also.

In *Paschim Banga Khet Mazoor Samiti Vs State of West Bengal*<sup>25</sup> the Court argued that "The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21." Further, the Court ordered that Primary health care centers be equipped to deal with medical emergencies. It has also been held in this judgment that the lack of financial resources cannot be a reason for the State to shy away from its constitutional obligation.

In *Parmanada Katara V. Union of India*<sup>26</sup>, the Court held that it is the professional obligation of all doctors, whether government or private, to extend medical aid to the injured immediately to preserve life without waiting legal formalities to be complied with by the police under Cr.P.C. Article 21 of the Constitution casts the obligation of the state to preserve life. No law or State action can intervene to delay the discharge of this paramount obligation of the members of the medical profession.

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<sup>24</sup> (1996) 2 SCC 682

<sup>25</sup> (1996) 4 SCC 37

<sup>26</sup> AIR 1989 SC 2039

In *Vincent V. Union of India*<sup>27</sup> the Court held that a healthy body is the very foundation for all human activities. In a welfare state, therefore, it is the obligation of the state to ensure the creation and the sustaining of conditions congenial to good health.

In *CESE Ltd. V. Subhas Chandra Bose*<sup>28</sup> the Court observed that 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.

In *State of Punjab and Others v. Mohinder Singh*<sup>29</sup> the Court observed that “It is now a settled law that right to health is integral to right to life. Government has a constitutional obligation to provide health facilities.”

In *Mahendra Pratap Singh v. State of Orissa*<sup>30</sup>, a case pertaining to the failure of the government in opening a primary health care centre in a village, the court had 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 to get treatment and lead a healthy life. Primary concern should be the primary health centre and technical fetters cannot be introduced as subterfuges to cause hindrances in the establishment of health centre.” It also stated that, “great achievements and accomplishments in life are possible if one is permitted to lead an acceptably 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

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<sup>27</sup> AIR 1987 SC 994

<sup>28</sup> (1992) 1 SCC 461

<sup>29</sup> AIR 1997 SC 1225

<sup>30</sup> AIR 1997 Ori 37

care. This implies that the right to life includes the right to primary healthcare.

In *State of Punjab V. Ram Lubhaya Bagga*<sup>31</sup>, the Supreme Court observed that the right of one person correlates to a duty upon another, individual, employer, government or authority. Hence, the right of a citizen to live under art 21 casts an obligation on the state. It is therefore the duty of the state to secure health to its citizens as its primary duty. No doubt the government is rendering this obligation by opening government hospitals and health centers, but to be meaningful; those must be within the reach of the people, and of sufficient liquid quality.

In a recent case in *P. U. C. L. vs. State of W. B. & Ors*<sup>32</sup> the Court observed that right to food includes the right to Health and healthcare and it is not merely the right to receive food in terms of minimum calories, but, it includes the right to adequate food. The adequacy will then be measured by not only what is necessary for survival, but by a person's health or by his ability to pursue a normal active existence. Thus, right to food should be understood together with a range of other rights – access to health care, medical facilities, drinking water and sanitary facilities. Unfortunately, the Supreme Court has not yet laid down the inter-relationship between Right to Food and Right to Health<sup>33</sup>.

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<sup>31</sup> (1998) 4 SCC 117

<sup>32</sup> See Adv. Mihir Desai, 'Trends in Judicial Outcomes and Consequences for Health Care'; in Adv. Mihir Desai and Adv. Kamayani Bali Mahabal et.al (eds.); *Healthcare Case Law in India: A Reader*, 2007, Published By Centre for Enquiry into Health and Allied Themes; at p. 164

<sup>33</sup> *ibid*; at p. 165

## **VI. Conclusion**

It is a well known fact that the problem of health care is more acute in developing countries and India being one of the developing countries; where majority of population lives below poverty line has been facing the problem of healthcare since long. The causes of this problem can be easily ascertained as poverty, lack of awareness, lack of health education, low standard of life and hygiene sense etc. But apart from all these causes the main flaw has been the constant failure of the Government towards realization of the obligation of welfare state to ensure health for all. Thus the real problem can be identified as the constant failure of the state authorities to provide health services and facilities to the marginalized and the susceptible groups of the society. Further the socio-economic gap between people living in our country is huge. The rich section of the population which hardly forms a miniscule part of the total population can spend huge amounts to avail facilities of modern medical science. On the other hand, for the large section of poverty stricken population it always remains a distant dream. They always remain in a vulnerable position totally depending on the welfare initiatives of the state. A welfare state with socialistic ideas is duty bound to ensure social security. Therefore, it becomes necessary is to examine the question to what extent India has ensured right to health to its people generally.

However, it is evident that under the existing healthcare infrastructure of India the goal of achieving the highest attainable standard of health at a single stretch is impractical; rather efforts should be made to secure primary healthcare for the poor and vulnerable section of the population. To achieve this goal amendment to the Constitution ought to be considered. The question must be examined in the light of the recent amendment guaranteeing primary education for all children up to

14 years. The process that led up to the amendment must be looked at critically as well as how the implementation of it is currently taking place. Similarly, steps are required to be taken to adopt proper legislation. The union and the state governments besides formulating a health policy should enact a comprehensive health legislation to secure the rights of the patients<sup>34</sup>. Further there is a need to have special provisions for health services in villages where more than 75 percent of the population of the country resides. Furthermore, it is also necessary to formulate health insurance schemes at nominal rates within the reach of all sections of society. Policy initiatives also required to be reviewed to develop government infrastructure in rural India.

Countries like Rwanda and Thailand with lower level of GDPs than India, have already demonstrated that State-wide health coverage is possible for primary healthcare facilities. Rwanda has established a system of universal health coverage covering 7.8 million of its 11.8 million populations.<sup>35</sup> Now it is time for India to develop a system whereby the poor population of this country will be assured with a right to healthcare.

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<sup>34</sup> Verma S.K., 'Legal Framework for Health Care in India', at p. 17, By Lexis Nexis, 2002;

<sup>35</sup> Deepanshu Mohan; 'Why not a Right to Primary Health Care', Article published in The Hindu August 12, 2016.