



Judicial approach towards right to health in India

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Abstract

Everyone has the right to standard of living adequate for the health and well-being himself and of his family, including food, clothing, housing and medical care and necessary social services. So health is the important need of Human being. For country's development, firstly it is essential to take care of its people's health. As India is a part of United Nations so it has ratified many conventions securing health rights of the people. Supreme court of India has declare the right to health as a constitutional right taking reference of international law.

Keywords: People's Health, Disfigurement, prosperity, Right to health, constitutional right, ability and pollution free environment

Introduction

According to Salmond, "every right has a corresponding duty to be fulfilled and there can be no right without a parallel element of duty".

Mental and Physical Health is the instantly basis of human personality. Diseases and mishaps must have had their grip over humans ever as initially when they commenced. The disablement, disfigurement and loss of life caused due to illness has alarmed human race. Right to health refers to the most attainable levels of health that every human being is entitled to. Health regarded as the basic and fundamental human right by the international community under international human rights law. with mixed to all the other human rights, the right to health creates an obligation upon the states to ensure that the right to health is respected, protected and fulfilled, and is duly entitled to all its citizens [1].

The legal responsibility of the State agencies to take care of the Individual's right to health in a welfare state. Every sovereign state has plenary power to do all things which promote the health, peace, morals, education and good order of the people and tend to increase the wealth and prosperity of the State.

In some of these countries, constitutional rights were included as part of the transition to democracy and an attempt to address huge inequities within society. Here the scale of health inequities suggests that courts need to be bolder in their interpretation of health care rights. We conclude that in adjudicating health rights, courts should scrutinize decision-making through the lens of health equity and equality to better achieve the inherent values of health human rights.

Historical Background

The past 20 years has seen a surge of global interest in the right to health, a social right recognized in the post-World War II international human rights order that lay largely dormant for decades. Renewed recognition of the right to health and related litigation has more recently given rise to

literature exploring the impact, intended and unintended, of this phenomena: who litigates under the right to health, who benefits, and how does health rights litigation affect the overall equity of health systems [2].

The origination of the right to health dates as back as 1946 when the first international organisation, World Health Organisation (WHO) came into existence to formulate health terms as human right [3]. And even prior to the coming of World Health Organisation, there were several countries that have been in the phase of granting of health as a fundamental right. The movement owes its existence to the industrial revolutions also wherein the workers treated as commodity and the employers paid no heed to the insanitary conditions of working areas. Subsequently, the demand for health grew to the extent that it came to be treated as one of the important aspect of the fundamental and basic human rights that any human being having his/her existence on earth is entitled to [4].

Meaning and Nature of Health

Health has been defined to mean a state of absolute mental, physical and social well-being; and therefore is not only restricted to merely absence of diseases. The definition has been further simplified to include ability to lead economically as well as socially productive life. This led to the expansion of the dimensions and scope of right to health which has multiple effects on the duty and responsibility of the health professionals along with their relationship with the society at large.

Position under International Laws

The International organisation working towards the highest attainment of right to health is the World Health Organisation. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966 resolved to undertake health measure and the same was adopted by UNO in 1976. Article 12 of the covenant recognizes the right

¹ Aart Hendriks, the Right to Health in National and International Jurisprudence, European Journal of Health Law 5 (1998).

² S. Gloppen, "Litigation as a strategy to hold governments accountable for implementing the right to health," *Health and Human Rights*, p.21 (2008).

³ Deepika Prasad, Jurisprudence-relationship between rights and duties, Legal Crystal Blog (March 9, 2013)

⁴ Ibid.

of everyone to the enjoyment of the highest attainable standard of physical and mental health. The state parties agreed to achieve the full realization of this right. It was agreed to take measure for the reduction of the still-birth and check infant mortality so that healthy development of the child can be made possible. Appropriate steps are made for the improvement of all aspects of environmental and industrial hygiene. It was resolved to take action for prevention, treatment and control of epidemic, endemic, occupational, and other diseases. The state parties shall create conditions which would assure to all medical services and medical attention in the event of sickness. Similarly, the convention on the elimination of all forms of discrimination against women ensures access of food health and education for women. The convention on the Rights of the Child provides overall development of child and health protection adolescent. International Convention on the Elimination of all forms of Racial Discrimination also give special attention on protection and advancement of health. In this regard, a number of regional treaties and instrument have been adopted to improve the working and living conditions of people and their families with a specific standard for health and dignity. The WHO from time to time issuing guiding framework for domestic policies. Article 3 (1) of the regulation provides that, "the international health regulations shall be implemented with full respect for the dignity, human rights, and fundamental freedoms of persons." The international communities have given prime importance to health and health care. Article 25 of the Universal Declaration of Human Rights States:

(i) Everyone has the right to a standard of living 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.

(ii) Motherhood and childhood are entitled to special care and assistances ^[5].

The Constitutin of India on Right to Health

The Constitution incorporates provisions guaranteeing everyone's right to the highest attainable standard of physical and mental health. Article 21 of the Constitution guarantees protection of life and personal liberty to every citizen. The Supreme Court has held that the right to live with human dignity, enshrined in Article 21, derives from the directive principles of state policy and therefore includes protection of health ^[6]. Further, it has also been held that the right to health is integral to the right to life and the government has a constitutional obligation to provide health facilities. Article 39 (e) directs the state for the 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 evocation unsuited to their age or strength. Article 39 (f) provides 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 material abandonment.

However, the framers and the founding fathers of the constitution had really farfetched vision and thus, had imposed the duty on state in the nature of Directive Principles of State Policy under Part IV of the Constitution wherein it is the responsibility of the state to ensure social and economic justice to its citizens. Therefore, a general inference is that Part IV of the Constitution directly or indirectly relates to the public policy in terms of health ^[7].

Article 38 of the Constitution lays down the responsibility of the state to secure social order for the in promotion of the welfare of public health.

Article 39 clause (e) pertains to the protection of health of the workers.

Article 41 relates to providing public assistance by the state in special circumstances such as sickness, disability, old age etc.

Article 42 protects the health of the infant and the mothers, i.e. in a way, it pertains to maternity benefit.

Article 47 imposes a primary duty of the state in improvement of public health, in securing of justice, providing humane conditions of work for the workers, extension of benefits pertaining to sickness, disability, old age and maternity benefits. In addition to this, the state is under an obligation to prohibit the consumption of liquor in the interest of the public good.

Article 48A states the duty of the state towards providing of a good and healthy pollution free environment.

However, these Directive Principles of State Policy hold merely persuasive value and are non-justiciable, i.e. they are not enforceable in the court of law ^[8].

Under Article 51 (A), it become the fundamental duties of every citizens to protect and improve the natural environment including forest, lakes, rivers, and wild life and to have compassion for living creatures. It will foster a good condition for better health of the people. Under seventh schedule, the states empowered to make legislation in different aspects, which will provide better health care and protection. The entries 6, 8, 17, and 51 of the state list provide that the state may make law for betterment of public health, sanitation, water supply, etc. The states are empowered to regulate production, sale, purchase, and possession of alcoholic substance and liquors. The state may make law to establish and regulate hospital, dispensaries, and medical institutions for the health care. Similarly, the entries 18, 19, 20-A of concurrent list empowers central government and state to make law to stop adulteration of foods, food stuffs, and other goods not congenial for health.

Article 243 (g) empowers panchayats to deal with health and sanitary measure. It becomes the responsibility of panchayats to improve the health condition. The panchayats may establish and manage hospitals and dispensaries for the better health and family welfare. Under Article 243 (w), municipalities are empowered to make safety provisions for sanitation and health protection of the public. The municipality under obligations to supply water for domestic, industrial, and commercial purposes.

Role Played by Judiciary

Justice versus R. Krishna lyre, one of the leading exponent

⁵ Article 25 of Universal Declaration of Human Rights, 1948.

⁶ Bandhua Mukti Morcha v. Union of India (AIR 1984 SC 802).

⁷ <http://www.legalserviceindia.com/legal/article-450-health-as-a-part-of-fundamental-right-under-article-21-a-pursuit-by-india.html> (visited on June 21, 2019)

⁸ Ibid.

and authority on Human Rights in Municipal Council, Ratlam Case observed that the State will realize that Article 47 makes it a paramount principle of governance that the steps are taken for the improvement of public health as among its primary duties. Right to health and medical care is a fundamental right under Article 21 read with Article 39 (e), 41 and 43.

State of Punjab v. Ram Lubhaya Bagga^[9], the Court said that it has time and again emphasized to the government and other authorities for focusing and giving priority to the health of its citizens, as it (health) not only makes one's life meaningful and improves one's efficacy, but in true, it gives optimum output.

The judiciary has not only recognized the right to health as a basic component of the right to life, it has also in some cases, issued directions to the government or other appropriate authorities to take step towards fulfilling its obligation of protecting human life and promoting public health. In Rakesh Chandra v. State of Bihar^[10], a letter by two citizens of Patna regarding the conditions at a mental hospital near Ranchi was treated as a 'Public Interest Litigation' and was admitted under Article 32. On the visit of the Chief Judicial Magistrate, it was found that there was acute shortage of water, improper sanitation, unhygienic environment, non-availability of light, less number of beds, no doors in wards, improper bedding clothes and diet for the inmates, no account of stock of medicines etc. Despite orders by the Court, defects were not being remedied. The Court was of the view that it was difficult for the Court to monitor the management of the hospital and a committee of management should be appointed with full powers to look after all aspects of the hospital and constituted the committee.

In Common Cause v. Union of India^[11], a petition was filed by means of public interest litigation in which the petitioners highlighted serious deficiencies and shortcomings in matter of collection, storage and supply of blood through the various blood centers operating in the country. From the report of M/S AF Ferguson and Co., which was entrusted by the Ministry of Health, Govt, of India with the study of blood banks, it was found that there were a number of deficiencies such as no medical checkup of blood sellers (who included alcoholics and drug addicts), unhygienic conditions of the location of blood banks storage of blood, non-availability of trained personnel in blood-banks etc. In this case, the Court appointed a committee to examine the matters and give certain directions such as for the setting up of a National Council of Blood transfusion and state councils, the activities of which would cover the entire range of services related to the operation and requirements of blood banks. This included launching of effective motivation programs through utilization of all media for stimulating voluntary blood donations, launching programs for blood donations in education institutions, among the labour industry and trade, training of personal in relation to all operations of blood collection; storage and transport, quality control and archiving system, cross matching of blood between donors and recipients etc. It directed

the National Council to set up an institute for research in the

collection, processing and storage, distribution and transfusion of whole human blood and components of human blood and also directed the Council to undertake training programmes for training of technical personnel etc. The Court has not only recognized the importance of maintenance of hygienic conditions within hospitals, it has also recognized that cleanliness had to be maintained in the hospital surroundings and upheld the removal of certain risks from the hospital premises as they posed health hazards.

In 1995, the Hon'ble Supreme Court of India held that those who are indulged into the profession of medical are in charge of public health and have an inherent obligation to protect the same so that those who are innocent can be protected and the guilty be punished^[12]. In Devindar Singh Shergil vs. State of Punjab^[13], dealt with a retired government employee. The Appellant, a retired government official, who had approached the Postgraduate Institute of medical Sciences (PGI), Chandigarh for kidney treatment, was declined admission as no accommodation was available. Due to malignant growth of kidney, the Appellant immediately left for UK and got himself treated. Later he filed his claim for reimbursement of the entire amount but the Medical Board sanctioned an amount that would have been incurred if the Appellant was treated at PGI, which equalled to Rs. 20,000. The Supreme Court dealt with the issue "as to why the petitioner should not be reimbursed for medical expenses to the extent of the expenditure which may have been involved for his treatment/ operation if carried out in any of the recognized institutions/hospitals in India". Since the AIIMS was one such recognized hospital under the State Policy, the Supreme Court held that the Appellant was entitled to reimbursement at the AIIMS rate and further, as an admitted fact, if the Appellant would have been treated in India he would have been entitled to reimbursement of expenses on medical consumable, pharmaceutical items, therefore, he would also be entitled to reimbursement of such expenditure. The Respondent State was directed to pay Rs.22, 000 as per AIIMS rates for surgery and Rs.73, 000/- for expenditure incurred on medicines.

K.P. Singh vs. Union of India^[14], was a case filed by retired government employees against the procedural difficulties in the Central Government Health Scheme (CGHS) for pensioners to receiving timely treatment and reimbursement of expenditure incurred on such treatment. The Petitioners grievances were:

For the purpose of reimbursement of claims relating to medicine that were outside the CGHS formulary, CGHS beneficiaries other than retired government employees and freedom fighters could procure such medicines directly from a registered chemist and claim reimbursement on the strength of a filled-in pro forma of the service head of their respective ministry, department or office. While in case of retired beneficiaries under the Scheme, such medicines had to be indented by the CGHS dispensary concerned. The indentation process was tedious and time consuming and so, medicines could not be taken in time. Secondly, a beneficiary of the Scheme would receive reimbursement only at a rate approved by the CGHS however, such rates

⁹ AIR 1998 SC 1703, 1706

¹⁰ AIR 1989 SC 348.

¹¹ AIR 1996 SC 929.

¹² Parmanand Katra v. Union of India, AIR 1989 SC 2039

¹³ (1998) 8 SCC 552

¹⁴ (2001) 10 SCC 167

were not updated from time to time. Further, rates of CGHS did not consider that in some towns or cities, like that of the petitioner, there were no government hospitals therefore, retired employees had no option but to receive treatment at private hospitals that were expensive causing a heavy burden on their meager pockets. *D.K. Basu vs. State of West Bengal* ^[15], is a landmark case on the rights of arrestees. The Supreme Court prescribed a number of guidelines to be mandatorily followed by arrested persons. Two of these directions pertained to health. The Court observed:

The arrestee should, where he so requests, be also examined at the time of his arrests and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection memo" must be signed both by the arrestee and police officer effecting the arrest and its copy provided to the arrestee. The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union territory, Director, Health Services shall prepare such a panel for all Tehsils and Districts as well. The Workmen of State Pencil Manufacturing Industries of Madhya Pradesh ^[16], case concerning the death of workers at young age in the State pencil manufacturing industries, due to the accumulation of soot in their lungs, was one of the first health related public interest litigation to be filed in the Supreme Court. The Court required the State to ensure installation of safety measures in the concerned factories, failing that it could close down the same. The increasing role of the Court from the recognition of right to health at the first level and then to managerial role could be understood by the gradual development from the *Parmanad* case to *Dr. Chandra Prakash* case ^[17]. The Supreme Court has also brought occupational health hazards to workers within the coverage of Article 21. The right to health and medical care to protect the health and vigour of a worker

while in service or post retirement has been held to be fundamental right under Article 21 read with the Directive Principles contained in Articles 39(e), 41, 43 and 47 and all fundamental human rights to make the life of workers meaningful and purposeful, with dignity of person ^[18]. In *Murali S. Deora v. Union of India* ^[19], the Supreme Court recognizing Right to Health under Article 21 of the Constitution held that smoking is injurious to health and banned smoking at public places In *State of Punjab & Ottiers v. Mohinder Singh Chawla* ^[20], a Government official was reimbursed the expenses incurred on his treatment.

In *Ram Lubhaya* case, while examining the revolving around the issue of right to health under Article 21, 41 and 47 of the Constitution of India, the court observed that right of one correlates with the duty of another. Hence, the right entrusted under Article 21 imposes a parallel duty on the state which is further reinforced as under Article 47. Even though several schools and hospitals are set up by the government but the duty is not fulfilled until they can be in

reach of the general public. It is pertinent to note that the Hon'ble Court in this case regarded health to be a sacrosanct, sacred and valuable right.

Further, in *Paschim Banga Khet Mazdoor Samity* ^[21], case, the scope of Article 21 was further widened; herein the court held that it is the responsibility of the government to provide adequate medical aid to every person and to work in the welfare of the general public. Moreover, Article 21 imposes obligation on the state, the state is required to protect and safeguard right of every person.

In *Aimitra H Patel v. Union of India* ^[22], the matter was related to solid waste disposal in class 1 cities. The Supreme Court held the programme like 'Swachha Bangalore' involving separation of recyclable waste or non-bio-degradable waste as well as domestic hazardous waste at source by means of door to door collection by municipal workmen or through private contractors should be role model for other cities, particularly, Delhi. Further the Court directed NCTD to appoint Executive Magistrate under Section 20 and 21 of the Cr. P.C. (Criminal Procedure Code) to try offences relating to littering, nuisance, sanitation, and public health.

Conclusion

Health is a social, economic and political issue and above all a human right. Inequity and poverty are the root cause of ill health leading to malnutrition and starvation deaths in the marginalized sections of the society. The current health scenario favours the urban affluent class, which is only about 10 per cent of the total population. There is a need to remove regional imbalances. Declining health expenditures have adversely affected health outcomes worsening the health scenario. There is a need to restructure the existing health system. The highly private health system has deprived the masses of even primary health care leading to out-of-pocket expenditure, which they can ill afford. The National Health Policies did not achieve their targets thus creating a need for a comprehensive legislative framework. The existing health system needs to be restructured to usher equity and social justice. This can be achieved through the promulgation of a comprehensive legislative framework, which should create conditions conducive to restoring balance in the health sector. The legislation should be complemented by making the 'Right to Health Care' a fundamental right, which will be an enforceable right. The ultimate aim of Universal Access to Health Care could be achieved through the restructuring of health finance and the introduction of universal coverage of health care. In India, judiciary has played a major role in recognizing the right to health as a part of Article 21 of Chapter III which deals with the fundamental rights guaranteed under the Constitution of India. State has directed to provide the highest attainable health standards to its citizens towards the fulfillment of International standards.

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¹⁵ AIR 1997 SC 610

¹⁶ AIR 1987 SC 990.

¹⁷ *Dr Chandra Prakash v. Ministry of Health*, AIR 2002, Delhi, 188.

¹⁸ *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161

¹⁹ AIR 2002 SC 40.

²⁰ AIR 1997 SC 1225.

²¹ *Paschim Banga Khet Mazdoor Samity & Ors. v. State of West Bengal*, (1996) 4 SCC 37

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