

LAW AS AN INSTRUMENT FOR PROTECTION AND IMPROVEMENT OF HEALTH: ENDORSING RIGHT TO LIFE

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Abstract

Health, both mental and physical, is the very foundation of human personality. Good health is a basic requirement if the human race is to survive and progress further. Nevertheless, personal hygiene can to a large avert ordinary ailments; there are many issues, over which an individual can have no control, which cause health problems. In such area, the state agencies are better equipped to ward off these issues and to address and deal with the ailments in a more dogmatic, efficient and authoritative manner. Every sovereign state has plenary power as well as duty to take all the measures which promote the health and wellbeing of the people which eventually tend to increase the wealth and prosperity of the state. Maintenance and improvement of public health have to rank high as these are vital to the very survival of the community and on the betterment of these depends the building of the society which the Constitution makers envisaged. Health as a basic human right should be viewed in a holistic manner. Right to health though has not given as a fundamental right in the Constitution but the Constitution directs the state to take measures to improve the condition of health care of the people. In this research paper while dealing with the importance of crafting health as a human right I will be discussing international and national instruments providing for health care of the persons.

Introduction

The milieu in which all of us live is of enormous significance and health and the quality of life has an immense impact on it. Health may be defined as the level of functional efficiency of a living being; a general condition of human's mind and body both, usually meaning to be free from illness, injury or pain. Good health is coal-and-ice of all human rights. The drafters of the Constitution of India placed the topic of health in Part IV i.e., Directive Principles of State Policy which put an obligation on the State to provide comprehensive, inventive, preventive, promotional

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and rehabilitative health services and adequate nutrition to all the people of India. Historically, it is the endeavor of the Indian judiciary who provided health the status of right to life fundamental to all human beings under Article 21 of Part III of the Constitution and consequently entitlement to healthcare must be ensured by developing specific legislations, policies, programmes and services. The draft National Health Policy of 2015 recommends that the central government after due discussion shall enact a National Health Right Act for ensuring health as a fundamental right, whose denial will be justiciable. At the global level the International Covenant on Economic, Social and Cultural Rights (ICESCR) mandates right to health through Article 9 and Article 12.

Health and the Constitution of India

The sacred Constitution proclaims the aims and aspirations for *We the People of India*. The holy document besides outlining the Fundamental Rights, Directive Principles and Fundamental Duties of the citizens laid emphasis on the requirement of the integration of the social and economic rights with the political freedom. In this sense, the Constitution eminently indicates that the Indian state is a welfare state. Even though health, as a sector does not appear in many places of the Constitution, there are only indirect and tacit references to health of the people and the role the state has to play in the development of the health of the people.

Health and the Directive Principles of State Policy

Part IV of the Constitution endow with the Directive Principles of State Policy for the purpose of good governance. There are so many provisions in this part which place obligation on the state for social welfare and equality. Article 38 refers to the state requiring to secure a social order for the promotion of welfare of the people. Certain principles of policy to be followed by the state refer to the health and development of the people. For example, it is said that the state shall, in particular, direct its policy towards securing “that the citizens, men and women equally have the right to an adequate means of livelihood, that 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 the avocations unsuited to their age or strength: 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”. Article 41 states as

follows: “The state shall, within the limits of its economic capacity and development make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of un-deserved want.” The provision shows that, as far as possible the state should strive to assist the citizens by physical and financial provision in the situations of old age sickness and disablement. Hence, under this ‘mandate’ the state is required to provide the public health and medical care-preventives as well as curative and promotional services in the field of health.¹

Health and Fundamental Rights

Fundamental Rights that is given in Part III of the Constitution are enforceable through courts of law. Though health as a right has not been given expressly anywhere in the Constitution but because of judicial vision it is implied part of Article 21 guaranteeing life and personal liberty to all the persons within the territory of India. The Supreme Court has emphasized in *Vincent v. Union of India*² that a healthy body is the very foundation of all human activities. The Court has observed:

“.....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 of the top”.³

The recognition that the right to health is essential for human existence and is, therefore, an integral part of the Right to Life, is laid out clearly in *Consumer Education and Resource Centre v. Union of India*.⁴ It also held in the same judgment that humane working conditions and health services and medical care are an essential part of Article 21. Further in, *State of Punjab and Others v. Mohinder Singh*:⁵ “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.” Apart from recognizing the fundamental right to health as an integral part of the Right to Life, there is sufficient case law both from the Supreme and High Courts that lays down the obligation of the State to provide

¹ *Health and the Indian Constitution*, http://cmdr.ac.in/editor_v51/assets/Mono-7.pdf (last visited Aug. 1, 2016).

² *Vincent v. Union of India*, (1987) 2 S.C.C. 165.

³ M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 1249 (6th ed. 2010).

⁴ *Consumer Education and Resource Centre v. Union of India*, (1995) S.C. 636.

⁵ *State of Punjab and Others v. Mohinder Singh*, (1997) S.C. 1225.

medical health services. This has been explicitly held with regard to the provision of emergency medical treatment in *Parmanand Katara v. Union of India*.⁶ It was held that: “Every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life”. The issue of adequacy of medical health services was also addressed in *Paschim Baga Khet Mazoor Samiti v. State of West Bengal*.⁷ The question before the court was whether the non-availability of services in the government health centres amount to a violation of Article 21? It was held that that Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. 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. Therefore, the failure of a government run health centre to provide timely treatment is violative of a person’s right to life. Further, the Court ordered that Primary health care centres 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.

The Draft National Health Policy, 2015

The draft policy that was released on December 31, 2014 has noble intentions of providing universal and affordable healthcare. The policy cleared the challenges before the health care scheme and structure is:-

- Pathetic state of primary health care
- Insufficiency of trained human resources
- Uneven and fragmented approach to healthcare delivery

The chief attraction besides other things in the policy is its aim to make ‘health’ a fundamental right. Doing so would make denial of health “justiciable”—which basically means that you can sue the state if you are sick and unable to access healthcare. This idea of making health a fundamental right is not a new debate. It has been argued long back that the right to health is a natural corollary of the celebrated ‘right to life’ and, thus denying someone healthcare is like denying a living human being the right to live

⁶ *Parmanand Katara v. Union of India*, (1989) S.C. 2039.

⁷ *Paschim Baga Khet Mazoor Samiti v. State of West Bengal*, (1996) S.C. 2426.

out natural life span in a dignified manner. As the legal guardian responsible for the safety and security of all its citizens, it is the state's duty to protect its citizens from mortality and morbidity caused by disease and illness as well.⁸

Status of “Health” as a Right in International Law

The right to the highest attainable standard of health is a basic right acknowledged in International Human Rights Law. The right to health denotes that governments should generate conditions in which every person can be as healthy as possible. Such conditions range from ensuring availability of health services, healthy and safe working conditions, adequate housing and nutritious food.

The International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights widely considered as the central instrument of protection for the right to health, identifies “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. It is important to note that the Covenant gives both mental health, which has often been ignored, and physical health equal deliberation. Likewise International Covenant on Economic, Social and Cultural Rights Article 12 of ICESCR cast a duty on all the State Parties to take steps in the direction to achieve the full realization of this right and it will include all the necessary aspects. For example:

- The provision for the diminution of the stillbirth rate and of infant mortality and for the development of child in a healthy manner.
- To take all the necessary steps for the improvement of all the aspects of environmental and industrial hygiene.
- All the essential and crucial provisions for the prevention, treatment and control of epidemic, endemic, occupational and other diseases
- To create such type of conditions that would assure to all medical service and medical attention in the event of sickness.⁹

⁸ *Should India Make Health a Fundamental Right*, <http://www.livemint.com/Opinion/BzI9QijMRAv5MkiKqj0Y3M/Should-India-make-health-a-fundamental-right.html> (last visited on Aug. 2, 2016).

⁹ *The Right to Health*, <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> (last visited on Aug. 15, 2016).

International Convention on the Elimination of All Forms of Racial Discrimination, 1969

This international document of 1969 under Article 5 e (iv) declares the right to public health, medical care, social security and social services.

Convention on the Rights of the Child, 1989

The international manuscript providing for the rights of child recognizing the crucial importance of the early years of human life provides in Article 24. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) To diminish infant and child mortality;
- (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water;
- (d) To ensure appropriate pre-natal and post-natal health care for mothers;
- (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation;
- (f) To develop preventive health care, guidance for parents and family planning education and services.

State Parties shall also strive to abolish traditional practices that are prejudicial to the health of children and promote international cooperation to achieve progressively the full realization the right to health.¹⁰

¹⁰ *Convention on the Right of the Child*, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last visited on Aug. 13, 2016).

General Comment on the Right to Health, 2000

To clarify and operationalize the provisions related to health care, the UN Committee on Economic, Social and Cultural Rights, which monitors compliance with the ICESCR, adopted a General Comment on the Right to Health in 2000 which states that the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

According to the General Comment, the right to health contains four elements:

1. Availability: A sufficient quantity of functioning public health and health care facilities, goods and services, as well as programmes.
2. Accessibility: Health facilities, goods and services accessible to everyone. Accessibility has four overlapping dimensions:
 - non-discrimination
 - physical accessibility
 - economical accessibility
 - information accessibility
3. Acceptability: All health facilities, goods and services must be respectful of medical ethics and culturally appropriate as well as sensitive to gender and life-cycle requirements.
4. Quality: Health facilities, goods and services must be scientifically and medically appropriate and of good quality.

According to the General Comment, the right to health also has a "core content" referring to the minimum essential level of the right, key elements are:-

- essential primary health care
- minimum essential and nutritious food
- sanitation
- safe and potable water
- essential drugs.¹¹

¹¹ *The Right to Health*, <http://www.who.int/mediacentre/factsheets/fs323/en/> (last visited on Aug. 13, 2016).

WHO Response

As part of the current reform process, WHO has launched a new approach to promote and facilitate the mainstreaming of gender, equity and human rights, building upon the progress that has already been made on these areas at all three levels of the Organization. WHO has been actively strengthening its role in providing technical, intellectual and political leadership on the right to health. Overall, this entails:

- strengthening the capacity of WHO and its Member States to integrate a human rights-based approach to health;
- advancing the right to health in international law and international development processes;
- advocating for health-related human rights, including the right to health.¹²

Conclusion

The phrase “right to health” is not very conventional albeit the charter of the World Health Organization and a number of International Treaties speaking for Human Rights flash on the right to highest attainable standard of health, the cuneiform of the right to health emphasizes the link of health status to issues of dignity, non- discrimination, social justice and participation. The widely acceptable definition of health is that given by the WHO in the preamble of its constitution, according to World Health Organization, “Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease. More recently, the 2005 UNESCO Universal Declaration on Bioethics and Human Rights also states that “the enjoyment of the highest attainable standard of health” is a fundamental human right, and that “access to quality health care and essential medicines” is required “because health is essential to life itself and must be considered to be a social and human good.” But this debate of health as a matter of right draws the attention on the issues like structure, elements and functions of health systems of the country on which the state and all the stakeholders have to ponder over.



¹² *The Right to Health*, <http://www.who.int/mediacentre/factsheets/fs323/en/>, (last visited on Aug. 13, 2016).