The Concept of Right to Health: A Study of its Evolution, Constitutional Provisions and Judicial Perspective in India

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Abstract

In India, the concept of 'health' has been accorded prime importance at all stages of its historical development. In ancient period, utmost priority was given to hygiene and a clean environment which is key to health. Moreover, during that period, Ayurveda system of medicine flourished and great physicians like Charaka and Susruta rendered their great service to serve the ailing mankind. During the Mughal Rule, the Unani and Siddha medicine flourished and thereafter, during the British Rule the modern system of medical science was born. After independence, 'health' was included in the category of non-justiciable rights under the Directive Principles of State Policy which depended upon the will of the States for its implementation. But the Supreme Court of India realizing the importance of 'health' granted it the status of Fundamental Rights by bringing it within the ambit of 'Right to Life' under Article 21 through its landmark decisions. Since this right is not explicitly mentioned in the Constitution, there is lack of awareness resulting in the violation of this important right. Hence, in order to make the people more vigilant, there is a need to expressly incorporate the 'Right to Health' under Article 21 by constitutional amendment just like the Right to Education under Article 21A.

Keywords: Right, Health, Constitution, Life, Fundamental rights, Directive principles

Introduction

The concept of 'right to health' is a basic human right and has become the most burning and debated issue all over the world particularly after the outbreak of the COVID-19 pandemic. India is a democratic country which has flourished upon the idea of setting up a welfare state in the country by assuring various fundamental rights and freedoms to the people. The various fundamental rights are assured in Part III under Articles 12-35 of the Constitution of India. Although the right to health is not expressly mentioned in the Constitution of India, it has now

come to occupy the status of fundamental rights through the positive and activist role played by the Hon'ble judiciary of the country which has given a broad interpretation to Article 21 of the Constitution of India by delivering numerous landmark decisions thereby extending the purview of Article 21 (Pandey, 2015) to inculcate within its ambit 'right to health' which means right to life signifies much more than mere animal existence. The Hon'ble Supreme Court realized the importance of right to health as the basis of all fundamental rights because the various rights and freedoms guaranteed by the Constitution could be enjoyed fruitfully by the citizens only when they are healthy and are not devoid of sound thinking.

The framers of the Constitution of India also realized the importance of the concept of right to health but did not include it within the category of Fundamental Rights keeping in view the economic situation of the country just after independence. They incorporated various articles under the heading of Directive Principles of State Policy under Part IV of the Constitution of India but left it for implementation on the economic capacity of the States which indirectly meant that the citizens could not approach the judiciary for its enforcement on violation. Thus, it meant that they have incorporated these rights without remedies. It was in such a scenario that the Hon'ble Apex Court which is regarded as the guardian of the Constitution as well as the guardian of the rights and freedoms of the people came to the rescue and accorded the status of Fundamental Right to health.

Meaning of health

Right to health is one of the basic human rights recognized by various national as well as international covenants. When we refer to right to health, we usually mean easy accessibility to health care facilities without any discrimination as well as the development of hospital infrastructures for provision of health care facilities but right to health extends to a wide variety of other factors such as pure drinking water, sanitation, nutritious food, proper housing facilities, clean environment and healthy working conditions, health education as well as gender equality (Fact Sheet No.31, W.H.O.). Thus, right to health cannot be regarded as a single right but it is a cradle of several basic rights. The right to health also includes certain important but basic freedoms such as freedom from non-consensual medical treatment or medical research, forced sterilization as well as freedom from cruel, inhuman or degrading treatment or punishment (Fact Sheet No.31, W.H.O.). The preamble of the World Health Organization (WHO) defines health as, "a state of complete physical, mental and social well-being and not merely absence of disease or infirmity" (Preamble, W.H.O). The International Covenant on Economic, Social, and Cultural Rights (ICESCR) which was adopted by the United Nations General Assembly on 16th December, 1966 and came into force from 3rd January, 1976 is another significant instrument which accords utmost importance to right to health and defines it as, "enjoyment of the highest attainable, standard of physical and mental health" (ICESCR, 1966, Art.12). Health has also been accorded great importance in the Universal Declaration of Human Rights (UDHR) as, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in

the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (UDHR, 1948, Art.25).

Stages of development of right to health in India

The gradual development of health rights of the people at different stages of history in India can be understood by a deep study of the importance accorded to health at different periods as well as the quality of health care which existed in those periods. For the purpose of study, the stages of development of right to health can be divided into the following phases:-

1. Ancient period
2. Medieval period
3. British period
4. Post-independence period

1. Ancient period: Since time immemorial human beings were interested to be the master of their health and happiness and were always eager to exercise their authority and control over disease. In ancient times diseases were basically viewed with cosmological or anthropological perspective and medicines were based on magical and religious beliefs (Park, 2015, p.1). With the passage of time there was gradual advancement in the knowledge of man. The Indus Valley Civilization which is believed to have existed between 3300 to 1900 B.C. was one of the most advanced civilizations of the world and the archaeological excavations revealed the existence of planned townships, carefully planned sewage systems and marvelous engineering techniques which all indicated the importance, these ancient people attached towards their health and hygiene. There have been evidences of root canal treatment and the practice of taking high protein 'laddoos' in the ancient Harappan Civilization (Tewari, 2021). It is historically stated that the Aryan Invasion took place and the Vedic era started. Thus the Ayurveda system of medicine evolved which is believed to be based on the Vedas. Ayurveda is based on the "tridosha" theory of disease which is based on vata (wind), pitta (gall) and kapha (mucus) (Park, 2015, p. 2). This period also witnessed the rise of some of the greatest physicians such as Atreya, Charaka, Susruta and Vagabhatta (Park, 2015, p. 2) who offered their services for the protection of the health of the people and several public hospitals were established for the treatment of the public.

2. Medieval period: One of the important incidents of this period was the establishment of the Mughal Empire in India. During this period Unani-Tibb system of treatment came into practice in India. But during this phase, the traditional Ayurveda system received a set back because it lacked the patronage of the State which established its own Unani system of medicine in the country. This scenario prevailed in the health system of the country until the arrival of the British in the country.

3. The British period: During the British period, the medicinal system of India came into contact with the advanced science and technology of the West. Another medicinal system

which prevailed in the country during the British period was the Homeopathy system of medicine which was originated by Samuel Hahnemann. The credit for establishing the modern system of health care undoubtedly goes to the British. Until the period 1885 the British established almost 1250 hospitals and dispensaries which were mostly sponsored by the State. The British Government appointed several Commissions such as the Royal Commission in 1859 for suggesting measures for improving the health of the Army officials who were on duty in the country and which suggested measures like pure drinking water, sanitation and prevention of epidemics. The British also passed several health legislations such as the Vaccination Act, 1880, the Birth and Registration Act, 1883, the Epidemics Act, 1897 etc.

Several Commissions such as the Sokhey Committee and Bhore Committee were appointed to suggest improvement in the existing health scenario prevailing in the country. The Bhore Committee under the chairmanship of Joseph Bhore which submitted its report in 1948 made a number of important recommendations. The Bhore Committee recommended that necessity of making the health system of the country easily accessible to the common masses and no one should be denied the right to get treatment due to their inability to pay. The Bhore Committee also recommended the structure of the health care system in the form of primary health centres, secondary health centres and three-tier district health system (Module 1, 2013). The British Government established several medical colleges for imparting and enhancing the standard of medical education in the country and these were taken over by the Indian Government after independence in 1947.

4. Post-independence period: Several Committees for health were also appointed in the post-independence period such as Mudaliar Committee (1961), Chaddah Committee (1965), Mukherjee Committee (1963), Jungalwalla Committee (1967), Kartar Singh Committee (1973), Shrivastava Committee (1974). These Committees made important recommendations for the improvement of existing health conditions in the country and issued several important guidelines for the same. After the dawn of Independence on 15th of August, 1947, the framers of the Constitution had the noble vision of establishing a welfare state based on the pillars of social, economic and political justice. Although health was not guaranteed as a Fundamental Right it was attached utmost importance. The non-justiciable Directive Principles of State Policy incorporated in Part IV of the Constitution of India contained several articles such as Articles 38,39 (e) (f),42, 47, 48A (Khandekar et.al., 2012 p. 160). Article 38 of the Constitution of India provides that the State shall strive to establish a social order to promote the welfare of the people and undoubtedly there can be no welfare without protection of health. Article 39(e) of the Constitution of India provides that the State shall adopt a policy whereby it can secure and protect the health and strength of workers as well as children. The Constitution also casts a duty upon the States to provide opportunities so that the children of the nation can develop in a healthy manner under Article 39 (f). The Constitution also casts responsibility on the States to provide good working conditions and maternity relief under Article 42 as well as to raise the level of nutrition, improvement of public health and prohibitions of intoxicating liquor except for medicinal purposes under Article 47. Moreover,

the State is also under a constitutional obligation for the protection of environment under Article 48 A of the Constitution of India and it is a well-accepted universal fact that environment protection has a direct impact on the health of the people.

Five year plans and health

In the year 1950, the concept of Five Year Plans was introduced for the all round development of the country in which health sector found a very important place. The main objectives of Five Year Plans in India were development, modernization, self-reliant economy, and the establishment of an equitable society (Indian Economy, p.18) in which health care was an important aspect. ***The First Five Year Plan (1951-56)*** focused on control and prevention of various communicable diseases, family planning, research, water supply, hygiene and sanitation and the establishment of Public Health Centres in the country (Afroz, n.d., p. 5). These aspects were given more importance in the ***Second Five Year Plan (1956-61).*** Along with these aspects' family planning was also an important area of focus in the ***Third Five Year Plan (1961-66).*** The ***Fourth Five Year Plan*** which existed from 1969-74 focused on preventive health services and control of various diseases like Tuberculosis, leprosy, malaria and the eradication of small pox. The ***Fifth Five Year Plan (1974-79)*** introduced various health schemes like Minimum Needs Program which led to the integration of family planning, nutrition and immunization. In 1975, Integrated Child Development Scheme (ICDS), in 1971 the Multipurpose Workers Scheme and in 1977 Community Health Guide were also launched during the Fifth Five Year Plan. The declaration of National Emergency in the country in 1975 and the change in the Government at the Centre also effected the focus of Five Year Plans and there was a shift from family planning to infrastructure building in the ***Sixth Five Year Plan (1980-85)*** (Afroz, n.d., p. 5). During this period, India participated at the International Conference on Public Health which was held at Alma Atta, Kazakhstan and also became a signatory to Alma Atta Declaration which had the goal of providing Health for All by 2000 AD (Afroz, n.d., p. 5). In order to fulfil this vision, the First 'National Health Policy' was introduced in the year 1983. Decentralized planning in the health sector as well as Community participation in health planning was the major emphasis in the ***Seventh Five Year Plan (1985-90)***. Several important health legislations were passed during the period of the ***Eight Five Year Plan (1992-97)*** such as Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992, Prenatal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994 and the Transplantation of Human Organs Act, 1995. During this Plan new measures like user fee, privatization of Government run institutions and Public Private Participation were introduced which led to high cost in the health sector thus rendering health facilities inaccessible to the common people (Afroz, n.d., p. 5) . ***The Ninth Five Year Plan (1997-2002***) laid emphasis on decentralization of health services and focused on the participation of Panchayati Raj Institutions, Auxiliary Nurse Midwife, Multipurpose Worker, Anganwadi Workers in the implementation of the Reproductive and Child Health Program launched in the year 1997 which was a comprehensive program to combat, reduce and control the mortality rate of mothers, infants and children. During this period the National

Family Health Surver-2 was also carried out. ***The Tenth Five Year Plan (2002-2007)*** focused on improving the standard of health by reducing the gaps in the implementation of various programs. During this Plan period the 'National Rural Health Mission' was launched in 2005 and major attention was paid to the reduction of Infant Mortality Rate (IMR) and Maternal Mortality Rate (MMR). The Eleventh Five Year Plan (2007-2012) focused on clean water supply and sanitation both in the Urban and Rural Areas. During this period the 'National Urban Health Mission was introduced which was integrated with the 'National Rural Health Mission' and formed the 'National Health Mission'. The Twelfth Five Year Plan (2012-2017) accessibility of health services to both urban and rural masses with special focus on women and other vulnerable groups, community participation in health as well as maternal and child health. This Plan Period also witnessed the introduction of the "National Health Policy" in the year 2017. The Planning Commission has now been replaced by the NITI Aayog (National Institution for Transforming India) which is now bestowed with the responsibility for evolving policies for all round development of the country including health sector.

Health schemes and insurances

In addition to all these provisions to ensure right to health to the people of the nation, the Government of India as well as the various State Governments of the country to ensure the right to health to the people in a more fruitful way, has introduced various health schemes and insurances. Some such health schemes and health insurances implemented in various States of India are as follows:

1. Pradhan Mantri Jan ArogyaYojna (PMJAY)
2. Aam Admi BimaYojna (AABY)
3. Rashtriya Swasthiya BimaYojna (RSBY)
4. Employees State Insurance Scheme (ESIS)
5. Central Government Health Scheme (CGHS)
6. Universal Health Insurance Scheme (UHIS)
7. Awas Health Insurance Scheme
8. Bhamashah Swasthya BimaYojna
9. Chief Minister's Comprehensive Health Insurance Scheme (CMCHIS)
10. Karunya Arogya Suraksha Paddhati (KASP)
11. Mahatma Jyotiba Phule Jan ArogyaYojna Scheme (MJPJAY)
12. Mukhyamantri AmrutamYojna (MAY)
13. Pradhan Mantri Suraksha BimaYojana (PMSBY)

Role of Indian judiciary and right to health

Inspite of various provisions made by the framers of the Indian Constitution to ensure right to good health to the people of the country under Part IV of the Constitution, the implementation of these provisions depended on the mercy and will of the States and since these provisions were non-justiciable, the citizens had no remedy against the States through the judiciary for the implementation of these provisions. The Hon'ble Supreme Court of India

realised the importance of the right to health for the survival of the largest democracy in the world which is dependent upon the vigilant behaviour of the citizens. It is an undeniable truth that the citizens can behave responsibly towards their nation only if they are mentally and physically healthy.

The Hon'ble Supreme Court of India gave a wider interpretation to Right to life under Article 21 of the Constitution of India and included within its ambit right to health thus endowing the status of Fundamental Rights to right to health. In (**Bandhua Mukti Morcha v. Union of India, 1984)** the Hon'ble Supreme Court held that right to health is an integral part of right to life under Article 21 which itself is derived from the Directive Principles of State Policy.

In (**Consumer Education and Resource Centre v. Union of India**, 1995) the Apex Court ruled that 'Right to Life' under Article 21 includes within its scope the protection of health and strength of the workers which is essential for making the life of the workmen purposive and dignified. The Court in this case cast responsibility on the stakeholders whether it be the Union/State/industry, be it public to private to ensure all steps to protect the health and leisure of the workmen both during employment as well as after retirement and the Court issued guidelines for the same. The decision in this case was reiterated by the hon'ble court in (**Kirloskar Brothers Ltd v. Employees State Insurance Corporation, 1996)** and held that right to health is an important fundamental right under Article 21.

In (**State of Punjab and Ors v. Mohinder Singh Chawala, 1997)** the Supreme Court held that 'right to health' is an inherent part of 'right to life' and Government is obliged under the constitution to ensure right to health of the nation.

In (**Parmananda Katara v. Union of India, 1989)** the Apex Court of India held that all medical professionals whether Government or Private are duty bound to extend immediate medical aid to accidental cases in order to preserve human life without waiting for the fulfillment of procedural formalities by the Police authorities.

In (**Common Cause v. Union of India and Ors**, **1996)** the Supreme Judiciary issued guidelines for the functioning of blood banks and held that it is very essential to ensure that the blood which is available in the Blood Banks must be healthy and free from infection.

In (**State of Karnataka v. Manjanna**, **2001)**the Supreme Court observed that in many cases particularly in the rural areas, the doctors in the government hospitals refuse to examine and provide medical aid to the rape-victims unless the police referred the case which results in unusual delay and the loss of evidence.

Thus, it is evident that the Hon'ble Supreme Court has played a very positive and active role in making the right to health accessible to the common masses by adorning it with the status of Fundamental Rights under Article 21 of the Constitution. But still there is a long way to go to bring health and health care facilities within the reach of the common masses. The people need to be made aware of this basic right just like other fundamental rights. Thus, incorporation of this right as a part of Article 21 by Constitutional amendment will make the people more vigilant as well as it will also make the government more committed towards this basic right of the people.

Pros and Cons of the need to expressly include 'Right to Health' under article 21 by constitutional amendment.

Arguments in favour:

The following arguments are advanced in favour of inclusion of 'Right to Health' under Article 21 by constitutional amendment:-

1. Inclusion of 'Right to Health' in the category of Fundamental Rights by constitutional amendment will provide access to health care facilities to the people of India without any discrimination. This will enable disadvantaged and marginalized sections of the society like women, children, Dalits, minority communities etc. to have access to health care facilities.

2. This will create more awareness among the people regarding the right to health like other Fundamental Rights incorporated in Part III of the Constitution of India.

3. Increased awareness of the people will reduce instances of violation of the right to health and in case of violation people will be aware and can file writ petition under Article 32 or 226 of the Constitution of India.

4. In order to fulfill India's commitment to Millennium Development Goals (MDGs) particularly to "reduce child mortality (Goal 4, MDG), improve Maternal Health (Goal 5, MDG) and combating HIV/AIDS, Malaria and other diseases (Goal 6, MDG)," there is an urgent need to make health a Fundamental Right.

5. This will reduce out of pocket expenditure burden on health by the poor masses and make health facilities affordable, accessible, timely available and of good quality.

6. This will create more Governmental accountability to protect the health of the people and the Government will be complied by Constitutional mandate to provide more and more better health care facilities. This will lead to better prevention, control and management of various epidemics and the recent pandemic like COVID-19, and people will not face problems like shortage of beds, life-saving drugs, ventilators etc.

7. This will also make the Government more committed towards environment protection and hygiene because it has direct impact on human health.

8. In order to make health facilities available to the people of the nation as a Fundamental Right, the Government will have to appoint sufficient number of medical professionals, doctors and nurses. This will automatically make the health sector more efficient and of good quality.

Challenges:

The following challenges may be experienced in the inclusion of Right to Health as a fundamental Right by Constitutional Amendment:-

1. Lack of sufficient number of doctors, medical and para-medical staffs will definitely pose a great problem to the Government in implementing health as a Fundamental Right.

2. Lack of infrastructure like hospitals, shortage of sophisticated diagnostic equipment and machines, ambulances etc. is another grave challenge which the Government has to face in implementing Health as a Fundamental Right.

3. The Government will have to increase expenditure in the health sector and may be faced with financial burden and crisis. At present Government expenditure on health is very low. As per the NITI Aayog member (Health) V. K. Paul, the Government spending on health is only 1.5% of India's Gross Domestic Product(GDP) which is very low and needs to rectified and increased to about 3% of GDP.(The Hindu, 2020)

4. Incorporation of health as a Fundamental Right by Constitutional amendment will also make it justiciable which will lead to increased litigations and more burden on the judiciary.

But the benefit of inclusion of right to health as a Fundamental Right is definitely very high because the creation of a progressive and powerful nation with a strong economy definitely depends on the healthy human resources. India is regarded as the world's largest democracy and it is an undeniable fact that the success of a democracy depends on the responsible behaviour of its citizens. The citizens can behave responsibly as well as work hard only when they are healthy both physically and mentally. Thus, inclusion of 'Right to Health' as a Fundamental Right by constitutional amendment will definitely be a milestone in the progress and prosperity of India.

Conclusions and suggestions

Right to Health is undoubtedly a basic and integral human right of every human being. Right to health has now assumed paramount importance after the outbreak of the COVID-19 pandemic. In spite of all Government initiatives, there are many incidents where the people are denied of their health rights. In many cases the people themselves are not vigilant about their right to health and the remedies available against their violation. Although the Hon'ble Supreme Court has recognized 'right to health' as a fundamental right, it would be more fruitful if it is made a part of the Article 21 by Constitutional Amendment just like the 'right to education' under Article 21A which was inserted by the Eighty Sixth Constitution Amendment Act, 2002. The incorporation of Article 21A clearly specified that right to education is a fundamental right and it also prescribed the parameters within which the State would provide this right to the citizens of India i.e., the State would provide free and compulsory education to all children in the age group six to fourteen years. Thus, incorporation of 'Right to health' by constitutional amendment and specifying the parameters within which State will provide this right, will definitely make the people more vigilant about their right and the remedy available in the form of writ petition under Articles 32 or 226 of the Constitution of India in case of violation. This would also make the Government machineries more committed towards the protection of this basic and most important human right. It is an undeniable fact that the other rights can be enjoyed fruitfully only if the citizens are healthy both physically and mentally. Thus, it is indispensable to take all steps to ensure 'right to health' of the people for the progress and prosperity of the nation.

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