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THE NEED TO ESTABLISH RIGHT TO HEALTH AS A FUNDAMANTAL RIGHT AN ANALYSIS IN INDIAN REFRENCES



Sangeeta Rachiyata

INTRODUCTION

The state in such areas are better equipped to prevent the causes and deal with the ailments in a more regulatory, effective and authoritative manner. The legal responsibility of the state to take care of the individuals health and ensure their physical and mental wellbeing will therefore be critical 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 its own wealth and prosperity. Maintenance and improvement of public health have to rank high as these are indispensable for the very physical existence of the community and on the betterment of these depends the building of the society which the founding fathers envisaged.

Constitutional Provisions

The obligation of the State to ensure the creation and the sustaining of conditions congenial to good health is cast by the

ABSTRACT

Health is wealth This line is true from ancient Age to present time Health is the foundation of existence of human beings. The disablement, disfigurement and loss of life caused due to illness has haunted human race. The human race can survive and progress only by Protection of good health. Though personal hygiene can to a large extent ward off ordinary ailment, there are many factors over which an individual does not have any control, which cause health problems.

KEYWORDS : Establish Right ,Fundamantal Right , good health.

Short Profile

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constitutional directives contained in Articles 39 (e) (f), 42 and 47 in Part IV of the Constitution of India. The State has to direct its policy towards securing that health and strength of workers so that men and women , and children in tender age are not abused and they are not forced by economic compulsions to enter avocations unsuitable for their age or strength and 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. The State is required to make provision for just and humane conditions of work and for maternity benefit. It is the primary duty of the State to Endeavour for the raising of the level of nutrition and standard of living of its people and improvement of public health and to bring about prohibition of the consumption, except for medicinal purposes of intoxicating drinks and of drugs which are

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injurious to health. Protection and improvement of environment is also made one of the cardinal duties of the State. Under item 6 of the State Legislature is empowered to make laws with respect to public health and sanitation, hospitals and dispensaries. Both the Union of India and the states have been vested with the power to legislate in the matters of social security and social insurance, medical professions, and prevention of the extension from one state to another of infections or contagious diseases or pests affecting man, animals or plants, by virtue of entries 23, 26 and 29 respectively contained in the concurrent List of the Seventh schedule.

Article 21 of the Constitution guarantees protection of life and personal liberty by providing that no person shall be deprived of his life or personal liberty except according to the procedure established by law. This right is available to citizens as well as foreigners. As a result of liberal interpretation of the words 'life' and 'liberty', Article 21 has now come to be invoked almost as a residuary right. Public interest petitions have been filed on this provision for providing special treatment to children in jail against health hazards due to pollution, harmful drugs, redressed against failure to provide immediate medical aid to injured persons, against starvation deaths, against inhuman conditions in after-care home and on scores of other aspects which make life meaningful and not merely a vegetative existence. The Supreme Court has held that the right to live with human dignity enshrined in Article 21 derives its life and breath from the Directive Principles of State Policy particularly Articles 39 (e) & (f), 41 and 42 and would therefore include protection of health as envisaged in the directives. The expanded meaning of right to life is wholly justified, for, without health of a person being protected and his well being looked after, it would be impossible for him to enjoy other fundamental rights such as right to freedom of speech and expression, to move freely throughout the territory of India, to

practice any profession or carrying on any trade, occupation or business, to form associations, guaranteed by Article 19 in a positive manner. Without a guarantee of health and well-being most of these freedoms can not be exercised fully. To make other rights meaningful and effective, right to health is the basis underlying the constitutional guarantees. All that the courts have done is to provide redress by a meaningful and just interpretation to the right to life and commanding enforcement of the duties of a welfare State. The Court itself being an organ of the State, is bound to promote the right to health.

Article 21 of the Constitution casts an obligation on the State to safeguard the right to life of every person, preservation of human life being of paramount importance. The Supreme Court has held that whether the patient be an innocent person or be a criminal liable to punishment under the law, it is the obligation of those who are in charge of the health of the community to protect and safeguard their lives. A doctor at the government hospital positioned to meet this State obligation is, therefore duty bound to extend medical assistance for preserving life. Every doctor whether at government hospital or otherwise, has a professional obligation to discharge his services with due expertise and care for protecting life. It has been held that this obligation is total, absolute and paramount, and laws of procedure, whether in statutes or otherwise, which would interfere with the discharge of this obligation can not be sustained and must therefore give way. A doctor does not contravene the law of the land by proceeding to treat the injured victim on his appearance before him either by himself or being carried by others.

In a welfare state like India, the primary duty of the government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the government in a

welfare State. The government discharges this obligation by running hospitals and health centres for the betterment of its citizens. The government hospitals run by the state and medical officers engaged 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 the injured victim's right to life guaranteed by Article 21.

Judicial Approach

The term 'State' has been defined under Article 12 of the Constitution of India and it also includes the local authorities like municipalities and village Panchayats. These bodies are the constitutionally recognized bodies of local governance in India and also deal with health and are bound to implement the fundamental rights. Article 242 of the Constitution of India provides that the legislature of a State may by law endow the municipalities with such powers and authority as may be necessary to enable them to function as institutions of self government and provide with respect to the performance of functions and implementation of schemes as may be entrusted to them including those in relation to the matters listed in the 12th Schedule to the Constitution which include at item 6. "public health, sanitation conservancy and solid waste management". Similar provision is made for the Panchayats under Article 243-G read with the 11th Schedule (item 23) of the Constitution. Various municipal laws prescribe duties of such local authorities in the sphere of public health and sanitation which include establishment and maintenance of dispensaries, expansion which include establishment and maintenance of dispensaries, expansion of health services, regulating or abating offensive or dangerous trades or practices, providing safe and sufficient supply of water public vaccination, cleaning public places and removing noxious substances, disposal of night soil and rubbish, providing

special medical aid and accommodation for he sick in the time of dangerous diseases, taking measures to prevent the outbreak of diseases, etc. Therefore, whenever there is failure of these statutory obligations of the local authorities, the citizens can approach the High Court and Supreme Court under Article 226 and 32 respectively for seeking a writ of mandamus to get the duties enforced.

There is however, a significant difference between local government authorities and the state health authorities, the latter having enormous powers to make available financial resources and make key appointments. Healthy alliances between the two types of authorities are crucial if health is to be effectively promoted. The judiciary in India has played a decisive role in realization of the right to health by recognizing the right as a part of the fundamental right to life and issuing suitable directions to the State authorities for he discharge of their duties. The courts have recognised that maintenance of health is a most imperative constitutional goal whose realization requires interaction of many social and economic social and economic factors.

The importance of health promotion at the workplace is increasingly recognized particularly in larger organizations. Workplace health promotion reduces absenteeism and can lead to gain in productivity. The Supreme Court surveyed in CESC case various functions of the State to protect safety and health of the workmen and emphasised the need to provide medical care to the workmen and emphasised the need to provide medical care to the workmen to prevent disease and to improve general standards of health consistent with human dignity and right to personality. It was held that medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development. Facilities of health and medical care generate devotion and dedication among the workers to give their best physically as well as mentally in

productivity. It was held that the medical facilities are, therefore, part of social security and like gilt-edged security, it would yield immediate returns to the employer in the form of increased production and would reduce absenteeism. Just and favorable conditions of work imply ensuring safe and healthy working conditions to the workmen. The periodic medical treatment invigorates the health of workmen. The periodic medical treatment invigorates the health of workmen and harnesses their energy resources. Prevention of occupational disabilities enables them to render efficient service which is a valuable asset for greater productivity to the employer and production to the State. Medical facilities, therefore, is a fundamental right to protect his health. It was held that health insurance, while in service or after retirement was fundamental right and even private industries are enjoined to provide health insurance to workmen.

The expression 'life' as held by the Supreme Court does not connote mere animal existence or continued drudgery through life but has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in workplace and leisure. Continued treatment while in service or after retirement is considered to be a moral, legal and constitutional concomitant duty of the employer and the State, right to health and medical care is a fundamental right under Article 21 read with Articles 39 (c), 41 and 53 of the Constitution to make the life of workman meaningful, held the Supreme Court in Consumer Education & Research Centre v. Union of India. The Court directed that the workers who suffered from asbestosis - an occupational health hazard, should be paid compensation by the concerned establishments. All the asbestos industries were directed to maintain and keep maintaining health record of every worker up to a minimum period of 40 years from the beginning of the employment of 15 years after retirement or cessation of employment whichever is later, to adopt the Membrane Filter test to detect

asbestos fibre, and to compulsorily insure health coverage to every worker. The Union and the state governments were directed to review the standards of permissible exposure limit value of fibre/cc is tune with the international standards reducing the permissible content.

Appropriate directions have been given by the courts to the inmates of protective and remand homes for women for women and children for providing suitable human conditions in the homes and for providing appropriate machinery for effective safeguard of their interests.

There was a reluctance on the part of the doctors to treat medico-legal cases until clearance was given by the police authorities. There was also an instinct to avoid attending legal proceedings due to the inconvenience involved. A scooter was knocked down by a speeding car. Seeing the profusely bleeding scooter a person who was on the road picked him up and took him to the nearest hospital, the doctors refused to attend on the injured and told the man that he should take the patient to a different hospital located 20 kms away, which was authorised to handle medico legal cases. The Samaritan, without losing time, carried the victim to the other hospital, but before he could reach there, the victim succumbed to his injuries. The Court held that every doctor has a professional obligation to treat the injured victim and extend his services with due expertise for protecting life and the doctor does not contravene the law by proceeding to treat the injured victim. The Court directed the government to give wide publicity to its decision to ensure that every doctor wherever he be in the territory of India should forthwith be aware of this position.

Noting that even patients who had been cured were kept as inmates for prologed periods, it was held that hospital is not a place where cured people should be allowed to stay. it was found necessary that there should be a rehabilitation centre for those who after getting

cured are not in a position to return to their families or on their own seek useful employment. Thus, a rehabilitation programme was also treated as a part of health care.

The problems of the ophthalmic health status of the Indian citizens is also a matter of grave concern. The very large number of cases of visual impairment in the country needs the purposeful involvement of voluntary social organizations so as to provide an augmented, broad-based, participatory medicare for the general improvement of the tone of ophthalmic health in the country. The Government of India has evolved a comprehensive policy and programme for control of blindness which amongst other things, envisaged a programme for the promotion of eye care through 'eye camps' organised by social and voluntary organizations and to provide financial assistance. Since the right to health has been recognised as a fundamental right in India through judicial interpretation, the patient has a right to be treated with a reasonable degree of care, skill and knowledge. A mistake by a would have committed is nothing short of negligence. But the law recognizes the dangers which are inherent in surgical operations, where the operation is a race against time, the court will make greater allowance taking into account the 'risk-benefit' test.

In *Dr. B.L. Joshi v. Dr. T.B. Godbole*, the Supreme Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. He owes a duty of care to the patient in deciding whether to undertake the case and what treatment to give. A breach of such duty gives a right of action to the patient for negligence of the doctor.

Medical practitioners do not enjoy any immunity from an action in tort, and they can be sued on the ground that they have failed to exercise proper skill and care. The Supreme Court has held that the fact that they are governed by

the Indian Medical Council Act and are subject to the disciplinary control of the Medical Council is no solace to a person who has suffered due to their negligence and the right of such person to seek redressed is not affected. Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medical and surgical was held to fall within the ambit of 'service' as defined in Section 2(1) (o) of the Consumer Protection Act, 1986.

While transfusion of blood can save life of a needy patient, it can take away life if contaminated. In Part XII-B of the Drugs and Cosmetic Rules, 1945 provisions are made to regulate blood collection and storage by prescribing the equipment and supplies required for a blood bank.

In *Common Cause v. Union of India* serious deficiencies and shortcomings in the matter of collection, storage and supply of blood through various blood banks were highlighted before the Supreme Court and directions were sought to the Union of India and State to take steps for obviating the malpractices, malfunctioning and inadequacies of the blood banks. The Supreme Court constituted a Committee to examine the draft schemes suggested by the petitioner and the Union of India. The Committee made a report proposing an action plan. Keeping in view the report of the Court Committee, the report of the Experts Committee set up by the Indian Red Cross Society and the programme that was being implemented by the National Aids Control Organisation, the Court held that the government should take suitable action as per the immediate implementation and long term implementation plans suggested by the Court Committee and gave the following directions:

1. The Union of India should take steps to establish a representative body to be known as

National Council of Blood Transfusion as a registered society to be funded by the Government of India with empowerment to raise its own funds from trade, industry and individuals.

2.The state governments should establish state councils in consultation with the National Council and they should be funded by the Government of India and the state government, with empowerment to raise its own funds.

3.The programmes and activities of the National and State Councils shall cover the entire range of services related to the operation and requirements of blood donations;

(a)launching of effective motivating campaigns for stimulating voluntary blood donations;

(b)launching programmes of blood donations in educational institutions, among the labour, industry and trade establishments and organizations of various services including civic bodies;

(c)Training of personnel in relation to all operations of blood collection-storage and utilisation, separation of blood-groups, proper labeling, proper transport, quality control and archiving system, cross-matching of blood, separation and storage of blood components and all the basic essentials of the operations of blood banking.

4.The National Council should undertake training programmes, establish institutions for research in collection, processing, storage, distribution and transfusion of human blood and its components.

5.The national Council should take steps for starting special Post-Graduate Courses in medical colleges in blood collection, storage and transfusion etc.

6.Donations to the National and State Council may be made tax free by the Government of India.

7.The government should ensure that the blood banks operating in the country are duly licensed in a year.

8.Professional donor system should be

eliminated in two years by the governments.

With the onward march of science and complexities of living processes, hitherto unknown diseases are notified. new and emerging diseases combined with the rapid spread of pathogens resistant to antibiotics and of disease carrying insects resistant to insecticides are daunting challenges to human health. The gap between the ability of microbes to mutate into drug-resistant strains and man's ability to counter them is widening fast. To meet resistant strains and man's ability to counter them is widening fast. To meet the new challenges new drugs have to be found. The Central Government, under section 26A of the Drugs and Cosmetics Act, 1940 is empowered to prohibit in public interest, manufacture, sale or distribution of any drug which prohibit in public interest, manufacture, sale or distribution of any drug which is likely to involve any risk to human beings or animals or it does not have the therapeutic value claimed.

In *Vincent Panikulangara v. Union of India*, directions were sought from the Supreme Court for banning import, manufacture, sale and distribution of the drugs which were recommended for banning by the Drugs. Consultative Committee and for cancellation of all the licenses authorizing such drugs

Taking note of the fact that the WHO on the basis of expert advice, was of the view that human ailments can be treated effectively with 285 basic drugs, the Supreme Court observed that the Central Government on the basis of expert advice can indeed adopt an approved national policy and prescribe an adequate number of formulations which would on the whole meet the requirement of the people at large. While laying down guidelines, injurious drugs must be totally eliminated from the market, and great care in this regard has to be taken. Drugs as are found necessary should be manufactured in abundance and their availability to satisfy every demand should be ensured. The State's obligations to enforce

production of qualitative drugs and elimination of adulterated ones from the market must take within its sweep an obligation to make useful drugs available at a reasonable price so as to be within the reach of a common man, which would involve regulating the prices. It may be that on account of the cost of a particular medicine of improved quality it will have to sell at a higher price, but, for every illness medicine. It was held that this is an obligation on the State in view of the Fundamental Directives Principles of State Policy enshrined in Part IV of the Constitution. The Supreme Court directed the Central Government to examine the objections raised in the petition against the drugs or refer them to the Consultative Committee for examination and take a decision within six months.

One disturbing trend noticed by the Court was that there was no adequate response from the bodies like Medical Council of India, the Indian Medical Association and the Drugs Council despite notices by the Court. It was held that these bodies are not litigants and do not have a choice of keeping away from the court like private parties in ordinary litigations opting to go to experts. It was observed that when the Court invited them to come forward and place their views on the relevant aspects, an attitude of callous indifference could not be appreciated.

In *Sheela Barse v. Union of India*, the Supreme Court held that the nation's children are a supremely important asset. Their nature and solicitude are our responsibility. Children's programmes should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with skills and motivations needed by the society.

CONCLUSION

In view of the aforesaid discussion, it is submitted that right to health is the most valuable right for a human being and it should be protected by the State at any rate. If the citizens of

any nation are healthy then the nation is itself healthy because the nation is known by the contribution of its citizens. Although right to health has been recognised as a fundamental right by the Supreme Court under Article 21 of the Constitution, but its enforcement is still very poor. In India, millions of people are living below poverty line and they have no means to avail the costly medical services. Due to the impact of globalization, the medicines are also becoming costly. The health care should be given top priority by the government and it should be positively recognised as a part of national development. Health as a basic human right should be viewed holistically and its positive aspect, that is, well being, should be acknowledged which would lead to achievement of a socially and economically productive life. The right to equality encompasses within itself the right of a poor patient to get adequate treatment and medicines from the State irrespective of their costs. The citizens have a right to quality health care, treatment and medication regardless of race, religion, social status and ability to pay. The duties of the State and municipal authorities can be enforced through the Courts whenever a breach occurs. It is in the enforcement of these obligations of the State and local authorities that the courts can play an effective role in safeguarding the rights of the citizens to prevent and cure diseases. The standards of cleanliness and hygiene in public hospitals leave greatly to be desired, the maintenance of sterile aseptic conditions in hospitals to prevent cross-infections should be ordinary routine and minimal incidents of maintenance of hospitals. Parity of the drugs and medicines intended for man-use would have to be ensured by prior tests and inspection. However, "owing to a general air of cynical irreverence towards values that has, unfortunately developed and to the mood of complacency with the continuing deterioration of standards, the very concept of standards and the imperatives of their

observations tend to be impaired", laments the Supreme Court. This is reality that Indian Judiciary System has performed very well for the promotion of right to health in India but until and unless the executive and the legislature take it seriously and positively, the mission will not be complete. So, the health should be given top priority by the Government of India and state governments.

1. Article 39 (e) of the Constitution of India.
2. Article 39 (f) of the Constitution of India.
3. Article 42 of the Constitution of India.
4. Article 47 of the Constitution of India.
5. Article 18 A of the Constitution of India.
6. Parmanand Katara (Pt.) v. Union of India, (1995) 3 SCC 248.
7. AIR 1995 SC 922.
8. Upendra baxi v. State U.P., (1983) 2 SCC 308.
9. Parmanad Katara (Pt.) v. Union of India, (1995) 3 SCC 248.
10. AIR 1969 SC 128.
11. Indian Medical Association v. V.P. Shantha & Others, (1995) III CPR 412 (SC).
12. (1996) 4 SCC 33.
13. AIR 1987 SC 990.
14. (1993) 4 SCC 204.



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