History Research Journal

ISSN:0976-5425

VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

Right To Health: Constitutional Measures And Protections In India

Neeru Mittal

Assistant Professor, School of Law, Lovely Professional University, Jalandhar.

Email-neeru.18499@lpu.co.in/neerumwalia87@gmail.com

Abstract

Human rights are the most globalized political value of our times. Human existence cannot be imagined without assurance of copious health care services. 'We the people of India' when these words were being written in the Constituent Assembly by those very 'We the people' who represented all the Indians for times to come, could never have imagined that the people of India will have to fight for even their basic needs like primary health in the so called Socialist, Sovereign, Republic and Democratic State even after seventy years of the enactment of the Constitution. Development of a nation depends upon the quality of health care facilities provided to the masses. Effective exercise of constitutional rights as well as human rights de facto requires availability of health care facilities. Existence of a human being depends upon the type of health he/she has. Level of health care services in India is degrading day by day. Prior to independence availability of these depends of social, economic and political grounds and more or less they were at the mercy of royal rulers. Post-independence real struggle in ensuring inclusive health care and in expanding the set-up of health services has been observed. Though time and again corrective actions are being taken by the government, but they are not sufficient as per the demands of masses. As quality of life depends upon the type of health facilities hence Government is duty bound to protect the same. The founding fathers of Indian Constitution correctly introduced "Directive Principles of State Policy" with an objective to safeguard the health of public as it is the most valuable requirement for happiness and joy. To conceptualize the concept of welfare state it is mandatory for the state to implement these duties to protect these pious rights. Further this right falls in the ambit of the right to life and personal liberty because life will be worthless if standard and adequate health care services are not ensured. Focus of this research will be on those very constitutional promises and their implications and reflections in the policy matters.

Introduction

In modern era every state has its own constitution and India is not an exception. The basic objective behind having a constitution is that it provides in written manner the tasks to be performed by the various organs of the government. It outlines the basic structure according to which liaison between state and its citizens will be monitored. To further this preamble of the Indian constitution talks about rights of the citizens, outlines duties and the manner in which state can protect these rights. There has been a shift of responsibility in pre to post independence era as in the former era peoples were at the mercy of the either of kings/princely rulers/Britishers but now government has to ensure basic health care services to all its citizens for achieving the concept of welfare state i.e after attaining independence sincere efforts has been made in providing extensive health care and in improving framework of health services but much lead has not been attained in comparison with the standards set by the developed nations as contemporary health care system does not suits the

ISSN:0976-5425
VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

needs of masses. As pledged by the government implementation of the health care policies was not sufficient to make a significant impact on the status of health care delivery system.[i] It is a matter of great concern that the access to primary health is still a mirage for large part of the population.[ii] Apart from constitutional aims and aspirations availability of primary health is very significant from the angle of right to development even in Indian scenario.

Right to health under Constitutional Law

The post independence era in India is the era of constitutionalism and as it was observed earlier also, that in the very constitution list of promises were made to 'we the people of India', but it has to be kept in mind that when India being a nascent democracy was busy in framing it's constitution, even at that time it was considered as one of the important and responsible member of the international community. Moreover, the founding fathers were having exposure of the working of the best constitutions of world before them. It is an established fact that they tried to assimilate best provisions in our constitution from all over the world. Hence, one can find reflection of not only of various constitutions but also of the various other important human rights documents accepted and adopted by the world community.

However, it has been observed that why and how India could not achieve those promised goals and why it failed. Why like other promises it only remained at the stage of fiction and is not implemented. And it is in this environment it has to be measured that where India stands today regarding ensuring the "availability, accessibility, acceptability and quality in terms of state's responsibility to protect, respect and fulfil the right to health is concerned."[iii] It has also to be examined that "whether Indian constitution recognize the fundamental right to health and health care?" If so, "what is the domain and scope of the right to health care?" "Does the state is under obligation to make available these facilities?" "Does this duty extend in providing free aid, checkups and cheap or sponsored medical care? Whether this obligation has to be shared by the private health care sector also?"[iv]

Indian constitution promises for a collective pattern of development based on the idea of welfare state whereby two categories of rights viz a viz "civil and political rights" has been provided as "fundamental rights" and "social and economic rights like health, education and livelihoods etc. are promised as DPSP's". Rights specified under second category are covered under the sphere of planned development by way of five year plans and other development policy initiatives.[v] Right to health has been covered indirectly in constitution.

The Supreme Court in C.E.R.C. v. Union of India[vi], held that along with post retirement benefits workers have this right while in service also.

In another landmark case relating to medical health Mr.X.vs Hospital Z [vii], the question which arises before the court was whether a doctor can disclose about the health conditions of patient to his would be wife that his fiancee is HIV +ve or whether he can claim it as his right to privacy and it should not be disclosed to anyone without his permission . The court said that the lady who is going to marry that person has the right to know. In this instance right to privacy was given primacy over right to health.

If one examines the Indian Constitution there are ample of direct provisions upholding the promises to provide the people of India with right to health care. Articles 41[viii], 42[ix] and 47[x] of the Directive Principles in Constitution

ISSN:0976-5425
VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

lays down the foundation to evolve right to health and healthcare. Above mentioned articles are basically aiming at "*social security, social insurance, standard of living, and public health coupled with the policy statements , which in a sense constitutes the interpretation of these Constitutional provisions, and supported by international legal commitments, form the basis to develop right to health and health care in India.*" However, one can notice that since these rights falls in the part IV of the Constitution of India, therefore, principal of justifiability is not applicable here. However, it is emphasized that in the context of healthcare there is a greater urgency to make it enforceable because it is directly related to life and death. It is also pertinent to mention here that the above mentioned social security is available to a non significant number of the working population. Here one can argue that this can be made more inclusive rather universal in nature meaning thereby that such security can be extended even to the common people. Limiting this privilege to a limited amount of population does not only reflect the discrimination and inequity which violates the principle of non-discrimination, but goes against the idea of equality contained in Article 14 of the Constitution.[xi]

Therefore, to make right to health a more universal right is one of the biggest challenge. As it was noted previously also that the provisions related to health care generally falls in part IV[xii] of the Constitution and this scheme of the Constitution makes it a non -justiciable right however, it should be noted that the real intention of the framers of the Constitution was that these principle should be fundamental in the governance of the country moreover not making it justiciable in the court of law never meant that it should not be implemented.

According to WHO right based approach to health services requires that "*health services must be provided without ant discrimination on the grounds of race, age, culture or any other status. Non-discrimination and equality required states to take steps to eradicate discriminatory laws, practice or policies for achieving the agenda for sustainable development and universal health coverage*."[xiii]

Judicial Intervention: Activism and Innovations

Courts are barred from taking into account and put into effect individual health rights claims; at the most it can give some non binding guidelines. Judiciary is not required to mention these guidelines in written form, but needs an innovative approach and liberal interpretation.[xiv] It took almost more than two decades to Indian judiciary to come out of its Positivism shell. However, one can witness a visible shift in judicial approach from positivism to sociological approach with some initial interruptions and unwillingness. With this new found approach in early 1970s India observed a defining moment in human rights litigation with the Fundamental Rights Case[xv] "bringing a new era of sociological jurisprudence following the recognition by the Court that DPSP must be treated at par with fundamental rights. At this very moment concept of locus standi regarding the enforcement of fundamental right, were diluted to encourage public interest litigation." Suddenly there was a huge change in Indian legal system as writ petitions can be submitted on a postcard.[xvi] The Supreme Court mainly use article 21 as tool for bringing parity among civil rights and their economic and social counterparts by liberally interpreting the meaning of right to life. The right to

ISSN:0976-5425
VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

health was one of the first branches of liberal interpretation of Article 21 of the Constitution.[xvii]

Indian judiciary is known for its judicial activism and innovation[xviii] and in fact, last few decades country has witnessed so many social, political and economic changes initiated and led by the judiciary and especially the Supreme Court. Many land mark judgments of the courts which have played major role in determining the scope of right to health has been pronounced.

Through its decisions courts have concluded that financial crunch cannot be pleaded while ensuring basic medical facilities otherwise it would amount to denial of right to health.[xix] The Supreme Court observed as follows:[xx]

> "*The Constitution envisages the establishment of a welfare state at the federal level as well as at the state level. In a welfare state 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 running hospitals and health centres which provide medical care to the person seeking to avail those facilities. 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."*

It was further suggested in the same case to provide for the following facilities[xxi] such as:

- Primary health care centres should ensure suitable facilities where immediate treatment can be provided to patient;
- To ensure that patient need not run to the cities for better treatment which requires up gradation of facilities in hospitals ;
- To meet the growing needs facilities for specialist treatment should be provided. Centralized communication system should be developed to check the availability of the bed in case of emergency.
- Adequately equipped ambulance should be made available for quick transportation of the patient.

However it was recognised by the courts that usually states won't have abundance of resources to spend on its various projects and the same holds good in case of making provisions for medical facilities.[xxii] Environment degradation

ISSN:0976-5425
VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

and its important effect on the public health has been a big issue and at numerous occasions courts have highlighted this concern through its decisions. For instance consideration over issues like automobile or vehicular pollution.[xxiii] Statutory bodies like municipal corporations were directed to perform and clean garbage despite their plea for financial inability.[xxiv]

The term health denotes more than an absence of sickness. Economic development depends upon the quality of medical care and health facilities which are being availed by the citizens of that country.[xxv] The Supreme Court held that "right to health and medical care is a fundamental right under Article 21 read with Article 39(e), 41 and 43."[xxvi] It further held that "right to pollution-free water and air is an enforceable fundamental right guaranteed under Article 21,[xxvii] and was also concluded that right to health is a part of the right to life guaranteed by Article 21 of the Constitution."[xxviii]

The Judiciary has also ensured that even various authorities under definition of State especially those which come within the executive branch of it like various ministries and departments of government should be sensitive to matter related to right to health and duty bound to adhere the guidelines passed by the judicial wing at different time periods. In one of the case filed against railways court ordered that to provide instant and free medical care in each of the train medical compartment accompanied by competent doctor must be attached as passengers also have the right to health.[xxix]Yet in another land mark case[xxx] the Supreme Court passed the mandatory guidelines to be followed by authorities while making any arrest covering some guidelines pertaining to health of arrested person. It was held that at the time of arrest person must be provided with required medical care and the same should be recorded and failure to do so will amount to violation right to life. "Inspection memo" must be signed both by the arrestee and the police officer making the arrest and a copy to be arranged for arrestee and during custody be examined after every 48 hours by specialist doctor. This activism and innovation on the part of judiciary have asserted citizens to get better facilities from State hospitals; even Prisoners have been ensured the same.

Moreover, State is duty bound to implement this basic human right within its financial capability and this very rider make this an abstract idea rather than being a concrete right. At this stage there are many questions which are still unanswered. What is the scope and extent of free treatment which can be demanded from the state? Does costly drugs and procedures should be made available free of charge? Should it cover complicated surgeries? Nevertheless, it has been observed earlier also that although the Courts have been recognizing it as a fundamental right, but with the rider of the financial capacity of the State these issues are going to be crucial in coming years and will become more prominent in the wake of state's withdrawal from the health sector. Moreover this behaviour of the state is being continuously questioned by common citizens in the form of the people's movements and till recently the voices which remained unheard has come in the fore front against the process of privatisation and commercialization of the health care which is considered as one of the important factor derogating the right to the health of the citizens. The above mentioned

ISSN:0976-5425
VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

decisions of courts would be a launching pad and valuable tool for all those who want to make this right more universal and inclusive in nature.[xxxi]

Does privatization of health sector leads to declination of right to health?

In contemporary era privatization of health sector has been a debatable issue as it will lead to exclusion of marginal section of society from the reach of medical facilities. As it is already known, right to health in India is neither universal nor it is all inclusive one; therefore it creates limited entitlements in favour of its citizens. Private sector occupies an important place in the development paradigm adopted by the political leadership as 80% of total health care expenditure in India is on availing private health care facilities. Till the time central and state governments will not take appropriate efforts to reduce fiscal deficient rampant increase of private health care institutions cannot be curbed.[xxxii]

India has somewhere failed to provide to its masses basic health facilities which has lead to the mushrooming of private players which are looting the poor ones at their whims. Private pharmaceutical companies are being provided ample of subsidies. Further the glory of working in prestigious private hospitals has contributed in the decline in the health care facilities. This has left the health sector at the mercy of the private players. As development approach was never rights based so it resulted in limited aspect. Even five year development plans has not helped in improving the standards of this as very few shares are being spent for improving the standards.

Policies and Planning

The recent success story of the Indian economy at the macro level is not reflected at same the level in public health. The health indicators do not suggest that the success at the economic front in any way have been utilized in health sector at macro or micro level. Many a times it is suggested that it is the demand of the hour that public health policy needs to be given a new outlook with a paradigm shift to make it more effective and close to ground realities. This paradigm shift should reflected by the inclusion of wide range of stake holders in the framing of policy regarding the public health. Rather while framing any policy the very dangerous “Drawing Room Policy Syndrome” should be carefully avoided, from which most of policy has been traditionally suffering from. It is hoped that in times to come any policy must proceeded by an informed and rigorous public debate over it. The above mentioned process will bring them the larger acceptability by the different stake holders in the society.[xxxiii] It is in this background annual report to the people on health suggests some burning and thorny issues that need to be taken care of in short term, which are as follows:[xxxiv]

- Enhancement in public funding: it is important that the government should not shrug from its responsibility and there at least 2-3% of GDP should be spent on the health sector.
- Public- private partnership: for making health universally accessible partnership with private player is very crucial for proper utilization of human recourses. But at the same time proper regulation to this is also required.

ISSN:0976-5425
VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

- Other cause should not be ignored along with the core health sector other determinant factors are also need to be taken care of without which any public health policy can't be successful. Facilities like safe drinking water, pollution free environment are equally important issue.

- Skilled human resources for health: Despite of promoting India for one of the important destination for medical tourism the fact remains that there is lot to be done for developing skilled human resource at various front. Opening of new quality medical institutions etc is the need of the hour.

- Impact of technology and technology assessment: only universalisation of public health is not important but the access to that facility is equally important. the technological developments have contributed to improved quality outcomes and can do miracles in this regard in various ways for instance cutting the cost and also in several cases reduced the need for hospitalisation.

- Affordability of drugs: the access to life saving medicine should not be directly connected with the purchasing power with money. The deregulation of price is a big concern especially in patent regime. Something immediately need to be done in this regard so that innovation can be promoted but at the time access to life saving drugs can also ensured.

- Role for civil society organisations: Civil societies can play an important role becoming equal partners to government and private sector in facilitating the health care services to the vast population of this country. For the above mentioned purposes and targets one can have glance over the programs through which it is intended to be achieved during the Eleventh five year planning,[xxxv]

However it would be related to mention here that today on the pretext of development strategy the key social factor like health cannot be sidelined. Rather it should not turn out to be a political issue. Development strategy which ignores rights based approach will not help in attaining the desired result. In present scenario it appears that in the current neoliberal developmental agenda the right to health cannot be realized. It is also suggested that it should be included in the constitution like an independent fundamental right. Only judicial interpretation to right to life is not sufficient every time.[xxxvi] Under the original scheme of the constitution public health is basically with state government but at the same time it provides place for the centre's active role and to a large extent centre has played a major role in stream facing the public health in the country with central funding and planning. But the time has come where state should also own their responsibility enthusiastically.[xxxvii]

ISSN:0976-5425
VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

Conclusion

Peoples have a right to quality health care, treatment and medicine irrespective of race, religion, social status and capability to pay. Article 21 embeds in it the Right to health also as upheld by the judiciary. Theoretically it enjoys the same status under the international law as so many other civil and political right does enjoy the status of being a fundamental human right. However, practically it has not been given the same status or we can say that it is looking for its gratitude at the ground level. While it is understandable that it is a time taking process before it actually start enjoying the same status as other more-established human rights, but it is more important that it should be to ensured that the right to health receives extensive recognitions nationally and internationally.[xxxviii] In reality active role has been played by the judicial wing. Supreme Court is very strict in its approach when it comes to ensuring quality health care facilities or pollution free environment as recently after worse pollution conditions in Delhi they have said the four state governments to take effective and immediate steps to improve the worse conditions. Though constitution has embedded quality provisions on health care approach on centre and state governments in their effective implementation has to be changed.

---

[i] Amit Sen Gupta and Jan Swasthya Abhiyan, "From Primary Health Care to A Right to Health Movement: The Indian Experience" at 154 as *available at:* ist.citeseerx.psu.edu › viewdoc › download

last visited on 5.12.2019

[ii] Annual Report to The People on Health September 2010, (Ministry Of Health And Family Welfare Government Of India), *available at:* https://mohfw.gov.in/annual-report-department-health-and-family-welfare--2016-17 last visited on 5.12.2019.

[iii] Ravi Duggal, "Right to Health and Health Care- Theoretical Perspective *available at*: https://www.academia.edu/21084242/Review_of_Healthcare_In_India last visited on 5.12.2019.

[iv] Mihir Desai and Dipti Chand, "Fundamental Right to Health and Public Health Care" *available at* www.academia.edu › Health_Care_Case_Law_in_India

last visited on 06.12.19.

[v] *ibid*

[vi] C.E.R.C. v. Union of India AIR 1995 SC 922

[vii] Mr.X.vs Hospital Z AIR 2003 SC 664

[viii] Constitution of India, art. 41

[ix] Constitution of India, art. 42

[x] Constitution of India, art. 47.

[xi] *Supra* note 4

[xii] Constitution of India, art. 37

[xiii] Human rights and health, *available at:* http://www.who.int/news-room/fact-sheets/detail/human-rights-and-health , last visited on 6.12.2019.

[xiv] Iain Byrne, Making the Right to Health a Reality: Legal Strategies for Effective Implementation, (Commonwealth Law Conference, London, September 2005) as *available at:* http://www.escr-net.org/usr_doc/health_paper.doc last visited on 6.12.2019.

[xv] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

[xvi] S. Muralidhar, "Justiciability of Economic and Social Rights – The Indian Experience", in Circle of Rights (IHRP 2000) available at: shodhganga.inflibnet.ac.in › jspui › bitstream last visited on 6.12.2019

ISSN:0976-5425
VOL-5-ISSUE-5-SEPTEMBER-OCTOBER-2019

[xvii] Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 2 SCR 516 and Parmanand Katara v. Union of India (1989) 4 SCC 286
[xviii] Manoj Kumar Sinha, "Judicial Response to Tackle HIV/AIDS in India", in Indian Journal of International law, Vol. 49, No. 1, 53-87 at 53 (January-March 2009).
[xix] Paschim Banag Khet Samity v. State of West Bengal, (1996) 4 SCC 37.
[xx] *Ibid.*
[xxi] *Ibid*.
[xxii] Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42.
[xxiii] Mehta v. Union of India, (1999) 6 SCC 9.
[xxiv] Municipal Council, Ratlam v. Vardhichand & Ors, 1980 Cri LJ 1075.
[xxv] CESC Ltd. v. Subash Chandra Bose, AIR 1992 SC 573 at 585.
[xxvi] Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42.
[xxvii] Subhash Kumar v. State of Bihar, AIR 1991 SC 420.
[xxviii] Consumer Education and Research Centre and others v. Union of India and others, 1995 (3) SCC 42, see also, State of Punjab and others v. Mohinder Singh Chawla and others, 1997 (2) SCC 83.
[xxix] AIR 2005 RAJ 317.
[xxx] D.K. Basu v. State of West Bengal, AIR 1997 SC 610.
[xxxi] *Supra* note 5
[xxxii] Healthcare in India Emerging market report 2007 (by price wealth cooper house) *available at:* https://microinsurancenetwork.org/groups/health-care-india-emerging-market-report-2007 last visited on 6.12.2019
[xxxiii] *Supra* note 2
[xxxiv] *Supra* note 2
[xxxv]Eleventh planning commission report on RTH at 57-58, as *available at:* http://planningcommission.nic.inplansplanrelfiveyr11th11_v211v2_ch3.pdf as accessed on 6.12.2019.
[xxxvi] *Supra* note 4
[xxxvii] *Ibid.*
[xxxviii] Paul Hunt, "The UN Special Rapporteur on the Right to Health: Key Objectives, Themes, and Interventions, Health and Human Rights", Health and Human Rights, Vol. 7, No. 1 (2003), pp.1-27 at 4, *available at:* http://www.jstor.org/stable/4065415 as accessed on 6.12.2019.