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The Fundamental Right to Health - Article 21

Ruchika Jain[a]

[a]DES Shri Navalmal Firodia Law College, Pune, India

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The fundamental right to health has been declared as a part of the Right to Life under Article 21 of the Indian Constitution by the judiciary. It also finds its traces in the Directive Principles of State Policy. However, the absence of a legislative declaration does not do justice to the efforts taken by the executive at large. This essay is an attempt to highlight the problem of the fractured healthcare system and the non-efficiency of the policies and non-enforceable and non-justiciable rights under DPSPs. It also highlights the nexus between various fundamental rights and how justice can be provided viably if the Right to Health holds a place in Part 3 of the Indian Constitution. While doing so, a detailed analysis of current provisions, as well as the futurist benefits after such availability, have been penned down.

Keywords: *right to life, right to health, Constitution of india, dpsp, policy.*

INTRODUCTION

"The right to live with human dignity enshrined in Article 21[1] derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39[2] and Articles 41 and 42[3] and at the least, therefore, it must include protection of the health and strength of workers, men, and women, and the tender age of children against abuse,

[1] Constitution of India, 1950, art.21
[2] Constitution of India, 1950, art.39(e) and (f)
[3] Constitution of India, 1950, art.41 and art.42

opportunities, and facilities..."[4], Justice P. N. Bhagwati in the historic Bandhua Mukti Morcha decision of 1984, signifies judiciary's attempt to incorporate Right to Health under the ambit of Article 21. Notwithstanding the passage of four decades, marginalized populations, including children, women, and men, continue to die as a result of frail healthcare. Budgetary allocations for health have always been less than 2% of GDP which leads to misalignment between policy-making, prioritization, distribution, and use of resources.

After the Pandemic struck India, the vulnerabilities of our fractured healthcare system could no more be hidden. The absence of a statutory legal framework and no explicit mention of the constitutional Right to Health is a critical reason for weak public health. States with the most credible healthcare system like Kerala and Tamil Nadu were also unable to escape from the shackles of the Pandemic. Complaints concerning healthcare providers' negligence, maltreatment, dead bodies as hostages, and other issues have been reported to the National and State Human Rights Commissions(NHRC and SHRC) on several occasions. In September 2019, the 15th Finance Commission in a report by the High-Level Group on Health Sector recommended that the Right to Health be declared a Fundamental Right. The National Health Bill of 2009, the Right to Universal and Free Healthcare Bill of 2019, and the PM-JAY are a few of the legislative and executive initiatives taken in the past. Having witnessed the flaws in our healthcare system during the Pandemic, the time is now ripe to push forward the agenda of Fundamental Right to Health- ARTICLE 21B[5]

UNDERSTANDING OUR RIGHT TO HEALTH

The right-based approach given to the Right to Health by various Multinational Organisations and the Constitution makes it inseparable and indivisible from other Human Rights and in the vein of these rights, the Right to Health includes both- 'Freedom' to choose, control, and make decisions about one's own health and body; freedom from interference, torture, non-consensual medical treatments, etc. and 'Entitlements' to a national-level integrated healthcare system that provides for an opportunity to enjoy the highest attainable level of health to every individual based on the principles of natural laws.

[4] *Bandhua Mukti Morcha v Union of India* (1984) 4 SCC 161
[5] Constitution of India, 1950, art.21B

INTERNATIONAL PROVISIONS

According to the WHO report and guidelines[6], the Right to Health should include 'availability' of both, goods and services, 'accessibility' in terms of socio-economic access, physical access, and informational access, and 'acceptability', where goods and services are made available at subsided rates. The Sustainable Development Goals(SDGs) by United Nations recognize good health and well-being as important elements and goals of human life. The nations are entrusted with 13 targets with an objective of "leaving no one behind" and "Health for all" to achieve by the year 2030. The National Health Policy 2017 is a step to work toward this agenda. Not only is it a patient-centric policy but also encourages Make-in India drugs and devices. It also proposes increasing the healthcare expenditure to 2.5% of the GDP.

Article 25(1)[7] of the Universal Declaration of Human Rights(UDHR) states "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."[8] UDHR has greatly inspired the Indian Constitution's making. It is through UDHR that the Judiciary introduced the "theory of emanation" and diluted the "locus standi" rule to expand the scope and make Fundamental rights more meaningful.

Article 12(1)[9] of The United Nations International Covenant on Economic, Social, and Cultural Rights recognizes an individual right to the highest attainable standard of physical as well as mental health while Article 12(2)[10] provisions the steps to be taken by the States to ensure the same. When India ratified the convenient in 1979, it was observed that most of its provisions were already in line with the DPSPs of our constitution.

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[6] Dr Tedros Adhanom Ghebreyesus, 'Health is a fundamental human right' (*WHO*, 10 December 2017) <https://www.who.int/news-room/commentaries/detail/health-is-a-fundamental-human-right> accessed 24 June 2022

[7] Universal Declaration of Human Rights, 1948, art25(1)

[8] Universal Declaration of Human Rights, 1948, art.25

[9] United Nations International Covenant on Economic, Social, and Cultural Rights, 1976, art.12(1)

[10] United Nations International Covenant on Economic, Social, and Cultural Rights, 1976, art.12(2)

CONSTITUTIONAL PROVISONS

The Constituent Assembly, while making the Constitution had two opinions on the inclusion of protection of rights. The specially protected rights are "Fundamental Rights" and other legal rights. The States were entrusted by "moral duty" only, to provide for these legal rights. Unlike Fundamental Rights, these guidelines of these duties- "Directive Principles of State Policy" are neither enforceable nor justiciable. One may say that the Constitution does provide for the Right to Health under Chapter IV of the Constitution as below:

- Article 38[11]-promote the welfare of its people;
- Article 39(e)[12]-protection of citizen's health and strength from any abuse;
- Article 41[13]-providing public assistance in case of sickness, disability, and undeserved want, ensuring just and humane conditions of work;
- Article 47[14]-raising nutrition levels, improving the standard of living, and considering the improvement of public health as its primary duty.

It was believed that as and when the states are capable to provide, they'll work towards these duties entrusted to them. What we fail to realize is that a State's financial situation does not absolve it from having to act to realize one's Right to Health. Back then, the impediment for financial strain led on the Centre as well as the States may be acknowledged as an argument but Seventy-five years after Independence, supplemented with globalization and migration, the realization of the Right to Health for all and Universal Access to healthcare for citizens is now as viable as it is vital.

DIFFERENCE BETWEEN POLICY AND LEGISLATIVE ACT

A policy is only an objective, a goal set by the government that it wishes to achieve whereas **an act** is a law and has legal binding. DPSPs are a type of objective by the government. Failure to provide for the same gives no legal privilege to the suffering. But when the state fails to

[11] Constitution of India, 1950, art.38
[12] Constitution of India, 1950, art.39(e)
[13] Constitution of India, 1950, art.41
[14] Constitution of India, 1950, art.47

provide/violates a fundamental right, an individual is granted the privilege to get his right restored based on the provisions of the act. **The Ayushman Bharat Scheme** targets **"Universal Health Coverage"** as mentioned under the SDGs' 2030 Agenda. Similarly, the **National Blood Policy** aims at a well-organized "**Blood Transfusion System**". Having dedicated a law will complement governmental initiative.

A LEGISLATION THAT HAS IT ALL

Based on efforts of **Jan SwasthyaAbhiyan**, an Indian child of **International People's health Movements**, considering the proposed **National Health Bill 2009**, **The Right to Health and Healthcare Bill, 2021** prepared by OP JindalUniversityand recommendations of the Law Commission of India, Administrative Reforms Commission and various international organizations, need is discerned to legislate an act that declares Right to Health a fundamental right and which includes provisions, rules, regulations, guidelines to the legislature, executive, judiciary and institutional bodies like:

1. To protect the right to health, healthcare, and patients' rights; complemented by strengthening existing programs and developing new ones. The NHRC produced a **Patients' Rights Charter** in hopes of serving as a guide for the government in developing procedures to protect patients' rights and make them legally enforceable.
    a) Inclusion of all groups, notably marginalised populations who are denied treatment owing to sociocultural concerns. A study by Oxfam India shows that at least one-third of the Muslims, 20% of Dalits and Adivasi, 15% of OBCs, 22% of Schedules tribes, and 21% of Scheduled Castes, patients of HIV/AIDs, Leprosy, etc have felt discrimination by healthcare providers. Similar to **Article 15(5)[15] of the Indian Constitution**, there's a need to create positive discrimination, forbid negative discrimination, and establish entitlements, rights, and responsibilities of individuals. Alongside the judiciary's critical responsibility in protecting every individual against discrimination as stated in Articles 14, 15, 17, and 21[16].

[15] Constitution of India, 1950, art.15(5)
[16] Constitution of India, 1950, art.14, art.15, art.17, and art.21

b) Bringing mental health, government schemes relating to special needs, patient rights in rehabilitation centres and protection from unlawful drug trials, substance misuse action, surrogacy, prostitution, migrant workers, unborn child rights, and the right to seek treatment from the state government within its scope.

c) Ensuring humane conditions and protection from torture to undertrial prisoners[17], prisoners, refugees(ultra-vulnerable population)[18], and prisoners of war(POWs)[19] without discrimination.

d) A system/mechanism of financial collaboration between the Centre and the State as well as financial assistance and distribution between state, district, and local-level government in rural and urban areas.

e) An integrated health system flows hierarchically to provide primary(PHCs), secondary and tertiary healthcare goods and services at minimal costs. Increasing functions of a Medical Officer in each institute to report on performance to the appropriate government, keep track of beneficiaries with their explicit consent(for example, **NIKSHAY**keeps track of Tuberculosis patients), and establish a centralised digital system for data flow from one healthcare centre to another and establish **Single Window Concept** at each Centre.

f) The Oxfam study even revealed that 35% of women had to undergo examination by a male practitioner in absence of a female in the room. Hence increasing women's participation in PHCs, such as Auxiliary Nurse Midwife, ASHA workers to raise awareness about health and healthcare rights, encourage applications for various schemes and health cards, and provide medical and basic legal assistance.

[17] *Hussainara Khatoon v State of Bihar* (1979), AIR 1369
[18] UN Convention relating to the Status of Refugees, 1952, art.3, art.23, art.24, and art.33
[19] Convention(III) relative to the treatment of Prisoners of War, Geneva Convention, 1949

g) Regulating the unregulated private sector and sharing the financial burden with the state as a duty towards the profession. The **Public-Private Partnership Model** in Healthcare will further expedite providing the best healthcare, improve cooperation between the public and private institutions, reduce expenditure on advanced technology, maintain infrastructure and quality of goods and services, generate revenue, and improve transparency and efficiency.

h) The rights of healthcare providers- skilled and unskilled, and organisations against exploitation, discrimination, untouchability, working hours, remuneration, and equitable compensation, among other things.

i) As under **Section 304A[20], IPC**- negligence, breach of duty, and corruption-making denial of treatment in a medico-legal matter a punishable offence since after death, the status quo cannot be restored.

j) Set up **National and State Health Commissions and Tribunals** for grievance and conflict resolution processes, speedy investigation, speedy trials, and patient complaints cells. Appeal to lie to the respective High Court and Supreme Court.

HEALTH CARD

Problems like poverty, hunger, healthcare, and education are socio-economic aspects of society. For example, with **National Food Security Act 2013**, through the **Public Distribution System(PDS)**, the Government aimed to eliminate hunger and provide nutrition to at least 1.2 billion people(75% rural and 50% urban population). Classification of beneficiaries as Antodaya Anna Yojana and Priority Households, helps ration cards serve as identification while purchasing subsidised foodgrains. During the pandemic, PDS swiftly came to rescue more than 80 crore people between April to November 2020.

Similarly, **Health Card under Ayushman Bharat**who's regulation will be done by National Data Health Management Policy should not just serve as a data and track recorder but as an official document through which marginalised groups can purchase medical goods and avail of medical services at subsided rates at all levels; help the Government record and analyse the

[20] Indian Penal Code, 1860, s 304A

health of its citizens with consent and understanding force measures needed to cover the insufficiency. An enhanced system can be created with the digitalisation of data, the role of the Aadhar Card, and lessons learned from PDS. With Personal Data Protection Bill, 2019 discussing, the security of personal data and sensitive personal data and consent, the role of the Health Card makes more sense.

HEALTH- SUBJECT MATTER OF CONCURRENT LIST OR STATE LIST?

Similarly, to substantiate the standing, another example is the **Right to Education**. UntilRight to Education was made a fundamental right, it was enumerated in Article 45[21], DPSPs, and was a subject matter under the State List, 7th Schedule. States were free to work at will leading to lacked implementation. In 1976, it was shifted to the concurrent List and the National Policy on Education was formulated in 1986 but not implemented. In 2002[22], **Article 21A and51A(k)[23]** was added along with changes in Article 45. Finally, the Right to Education Act 2009 obliges states to ensure compulsory education encompassing not only enrolment in primary schools but also maintaining attendance and successful competition in elementary education. The financial responsibility is borne and shared by the central and state government.

Currently, health is a subject matter on the State List. With the constitutional amendment of adding Article 21B[24] and shifting it to the Concurrent List, Right to Health will get the required momentum needed to improve state initiative. While doing so, the autonomy of the states should not be jeopardized and over-centralization should be avoided. The Fundamental Right of Education alongside **reservation of 25% seats** in private schools for disadvantaged groups and weaker sections strengthened Schemes like Mid deal Meals, SarvaShikshaAbhiyan, BetiPadhaoBetiBachao Programme, etc. and vice versa. Ramifications of this? The primary school enrolment is now **over 95%.** Sanitation facilities increased female enrolments, 13% of the schools achieved full compliance with infrastructure, and more than **3.3 million Students secured admissions** in private schools by 2018-19. Further improvement is targeted to ensure

[21] Constitution of India, 1950, art.45
[22] *Mohini Jain and Unnikrishnan v State of Andra Pradesh* (1993), AIR 217
[23] Constitution of India, 1950, art.21 and art.51A (k)
[24] Constitution of India, 1950, art.21B

benchmark mandate, zero-tolerance for discrimination, quality+quantity, and minimal detention by local governments.

The above data support the recommended PPP Model. The private sector should be given an annual target for treating and providing goods and services to the beneficiaries of the system which is presently mentioned under PM-JAY but is not mandated albeit achievable. Article 21B and a comprehensive National Health Act will strengthen PM-JAY, increase beneficiaries, improve health and healthcare facilities, and guarantee actions that endeavour the accomplishment of given targets, failure of which will attract repercussions, thus working towards Agenda 2030.

INTERDEPENDENCE OF FUNDAMENTAL RIGHTS

Human rights are universal and inalienable. The Indian Constitution's rights-based approach recognizing certain universal human rights makes fundamental rights interdependent. The State is vested with the responsibility to protect, respect, and fulfill these fundamental rights. Violation of one automatically violates another, the golden triangle rule as stated in ***Maneka Gandhi v Union of India.***[25] Albeit the scope of Article 21 has been widened with each judicial pronouncement and many human rights have been included, an explicit mention of the Right to Health will help in ameliorating the principles of non-discrimination and equality. As of now, it only exists as a judicial pronouncement but a legislative action will stimulate the executive functions.

Further, enjoyment of these rights is related to groups of people. A Doctor's right to choose who to treat contrasts with a patient's right to get treated without discrimination. The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 under Section 2.1.1 states,

> "*Though a physician is not bound to treat each and every person asking for his services, he should not only be ever ready to respond to the calls of the sick and the injured but should be mindful of the high character of his mission and the responsibility he discharges in the course of his professional duties. In his treatment, he should never forget that the health and the lives of*

[25] Maneka Gandhi v Union of India (1978), AIR 597

> *those entrusted to his care depend on his skill and attention. A physician should endeavour to add to the comfort of the sick by making his visits at the hour indicated to the patients. A physician advising a patient to seek the service of another physician is acceptable, however, in case of emergency, a physician must treat the patient. No physician shall arbitrarily refuse treatment to a patient. However, for good reason, when a patient is suffering from an ailment which is not within the range of experience of the treating physician, the physician may refuse treatment and refer the patient to another physician."*[26]

The same was upheld in ***ParamanandKatara v Union of India***[27] where the Supreme Court held that preserving life is most important- the principle of the higher good. For example, the constant race between Article 21 and Article 22[28] –in order to safeguard the fundamental right to life of the public at large, abridging an individual's fundamental right to freedom becomes necessary. The right to privacy under Article 21 is associated with the Right to Health. Biometrics[29]and health records are a part of **Sensitive Personal Data** and should be protected vitally. Without one, the other cannot survive. In this light, under Article 21, Digital Information Security Act is an attempt to provide for the privacy of electronic health data.

Right to Health gives more meaning to the objective behind Article 23[30]- protection against human exploitation and Article 24[31]- children's right to health. While organ smuggling and human trafficking are controlled via Article 23, the Right to Health will ensure proper and robust treatments for victims. With the Right to Education as a fundamental right and the prohibition of children being employed in hazardous industries, the Right to Health will guarantee proper treatment that such industries impose on them. Thus, each fundamental right independently recognizes a dignified life. One set of rights cannot completely be exercised without the other.

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[26] Indian Medical Council(Professional Conduct, Etiquette and Ethics) Regulations, 2002
[27] *Paramanand Katara v Union of India* (1989), AIR 2039
[28] Constitution of India, 1950, art.21 and art.22
[29] *Justice K.S. Puttaswamy(Retd) v Union of India* (2018) Writ Petition(Civil) No. 34/2018
[30] Constitution of India, 1950, art.23
[31] Constitution of India, 1950, art.24

CRITICAL ANALYSIS - RIGHT TO HEALTH IN SOUTH AFRICA

South Africa and India have similarities in factors like population and diversity, distribution of race, class, sex, gender, etc affecting the demography, health, and health-related hazards, economy, geography, climate, history of colonisation, the process of making a constitution, common law countries and the common inspiration from Bill of Rights.

Section 27[32], Constitution of South Africa, 1996 recognises the Right to Healthcare as a justiciable Fundamental Right(***Soobramoney v Minister of Health***)[33]. Albeit recognized as a Fundamental Right, it faces many disruptions due to reasons like resource availability, supply chain mechanism, inequity among the masses, and many more. It mandates the government to follow the principle of **"Progressive Realisation"** in which the available resources are to be utilized in an optimum way and a solution-based approach to fill the socio-economic gap and grant resources without any discrimination. The horizontal applicability of the Bill of Rights with Non-State Actors(private sector) and its problems are similar to the Indian scenario. The private sector is hinged on affordability and accessibility. The poor and the marginalised groups are left with the over-burdened primary healthcare service providers who neither have the adequate expertise nor the resources. With progressive realisation, mending the fractured healthcare system into one integrated national system, these faults can be removed, suggests a report on Section 27, Constitution of South Africa.

The report seeks to improve the enforceability of Section 27 and include the private sector as a party to share the responsibility entrusted to the state to ensure dispensing of healthcare facilities. The South African Government has worked towards fulfilling the obligations stated in the Constitution by enacting various acts[34]. **The National Health Act 61 of 2003** provides a framework for a structured uniform health system within South Africa while taking into account the constitutional requirements relating to the right to have access to health care

[32] Constitution of South Africa, 1996, s 27
[33] *Soobramoney v Minister of Health* (1997) ZACC 17
[34] National Health Act, 2003; See also, National Health Insurance, Patients Right Charter, Medical Schemes Act, 1998; See also, Choice of Termination of Pregnancy Act, 1996; See also, Mental Health Care Act, 2002; See also, Medicine and Related Substance Control and Amendment Act, 1997, See also, Traditional Health Practitioner Act, 2007

services. Through this Act and its supporting policies, there has been significant development in the right to have access to health care services.

This fall in line with the Indian government's ambitious project of Ayushman Bharat. A policy is strengthened through an enactment. For example, the success of **MNREGS** in India is significant for the act and vice versa. The **Mahatma Gandhi National Rural Employment Act, 2013** mandates the State to ensure that the given targets under the scheme are being adhered to. In case of violation of any right as mentioned in the act, the individuals will have the right to approach the court to restore their right under Article 21 and related articles.

SOUTH AISA - A NEED

In 1920, after the Spanish Flu, governments all over the world started emphasizing and embracing the agenda of healthcare for all, socialized medicines and services free till delivery. Many countries set up Health Ministries and motivated the formation of WHO. For developing countries like India, rapid decision-making was difficult under colonial rule. In the mid-19th century, the cholera outbreak and the swine flu pandemic in 2009-10 further validates the need for public Healthcare. The Nipah Virus catastrophe in Kerala in 2018 could only be controlled because of the best Public Health facilities the state provides. South Asia is prone to natural calamities like cyclones, floods, tsunamis, and drought. With a high population, the number of people affected is also high. Back then, the impediment to financial strain led on the Centre as well as the States may be acknowledged as an argument but today, many of these targets are achievable.

CONCLUSION

Fundamental Rights promote Human Rights. Since Human Rights cannot be alienated, fundamental rights also cannot be alienated. The complementary nature of these rights makes them even more important. South African Constitution was affected in 1997, forty years after the Indian Constitution was adopted. It is high time that India, which inspired the making of the South African Constitution should think about and deliberate the inclusion of the Right to Health under Part III of the Constitution. The pandemic has given us the harsh realisation of our crumbling healthcare system and now is the right time to act upon it.