



## CHAPTER 3

# RIGHT TO MEDICAL CARE AND HEALTH

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*'Health cannot be a question of income; it is a fundamental human right' - Nelson Mandela*

### I. INTRODUCTION

Health is integral part of life without which no one can live a happy life. Medical care is important to keep that health hale and hearty. Health and medical care has been interpreted widely by Indian courts under Art. 21 as fundamental and 'Right to life' has given larger dimensions over past two decades. This interpretation created magnitude-covering health as overall of public, workers, women and children by laying down legislative framework. Emergence of medical care as a fundamental right. Health does not mean mere existence in this world but dignified and happy life. State is casted with responsibilities and liability to protect and preserve the health and medical care to be provided to the needy. Another dimension is first

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aid to patient without going into the procedural formalities to preserve the valuable life that is being injured in any emergency or accident. Procedure can wait, but the golden hour to get medical care in case of any kind of emergency or accident can be fatal to his/her life. To preserve his/her right under Indian Constitution provided in Part III as fundamental rights and Part IV as Directive Principles of State Policy (DPSP) as duties of State. Indian courts and legislature has incorporated international conventions to fulfill those obligations laid internationally to which we are signatory and parties.

Medical care and health is one of the central aspects of life. Without proper medical care and health, one cannot live a dignified life. Right to life is itself a fundamental human right recognised in laws. The concept of a right to health implies that fundamental principles of human rights-dignity, non-discrimination, participation, and justice-are relevant to issues of health care and health status<sup>1</sup>. Historically, a variety of rights-based terms have been used to refer to the right to health, (e.g., the right to treatment, the right to health, the right to medical care, the right to health care, the right to be healthy, or even the right to a decent minimum of health care), each derived from a different definition and a different legal or philosophical source<sup>2</sup>. Threats to the health of individuals whether in the form of transmissible disease, poor sanitation, inadequate drinking water, or lack of access to medical care, have been a social concern throughout human history<sup>3</sup>. Ability to access health care facility is a common need, irrespective of location, socioeconomic or sociodemographic characteristics; individuals undertake health activity alone, but more often with household or nonhousehold members<sup>4</sup>. Law, in the context of

1. Virginia A. Leary, 'The Right to Health in International Human Rights Law', *Health and Human Rights*, Vol. 1, No. 1 (Autumn, 1994), pp. 24-56
2. Orit Bershtling, Israel Doron, Perla Werner, and Adva Laish-Shamir (2016), 'The Right to Health in Old Age: Israeli Professionals' and Older Persons' Perspectives', *The International Journal of Aging and Human Development*, Vol. 83(4) 468-490. DOI: 10.1177/0091415016655167
3. John Tobin, 'The Right to Health in International Law', ISBN 978-0-19-960329-9. Oxford University Press 2012.
4. Arnab Jana, Noboru Harata, Takami Kiyoshi & Nobuaki Ohmori (2014) Exploring the Role of Social Interactions and Supports in Overcoming Accessibility Barriers While Undertaking Health Tours in India, *Social Work in Public Health*, 29:4, 350-367, DOI: 10.1080/19371918.2013.825895

healthcare, is regularly perceived as being adversarial, complex, and esoteric<sup>5</sup>. Right to life is overall protected under Art. 21 and can be enforced under Art. 226 and 32 if any violation. Currently, the "right to health" has been formally recognized by 56 national governments, in the form of constitutional or statutory provisions<sup>6</sup>. Backman and colleagues recently reviewed the status of the right to health in 194 countries and found that much work still needs to be done before this right can legitimately be considered "universal"<sup>7</sup>. The right to the "highest attainable standard of health," also known as "the right to health," is perceived today as being included in fundamental, universal human rights<sup>8</sup>.

People aspire to achieve health because of its importance to a satisfying life; communities promote the health of their neighbours for the mutual benefits of social interactions; and nations build health care and public health infrastructures to cultivate a decent and prosperous civilization<sup>9</sup>. The features of a healthcare system that is able to guarantee a comprehensive "right to highest level of attainable health" for the citizenry of a given nation-state may be complicated by a variety of social and political obstacles<sup>10</sup>. Understanding health as a human right creates a legal obligation on states to ensure access to timely, acceptable, and affordable health care of appropriate quality as well as to providing for the underlying determinants of health, such as safe and potable water, sanitation, food, housing, health-related information and education, and gender equality<sup>11</sup>. Right to health or the right to health care is recognized in at least 115 constitutions and at least six other constitutions set out duties in relation to health, such

5. Editorial, *Bridging the Divide between Law and Palliative Medicine*, 2020, Vol. 34(1) 3-4. <https://doi.org/10.1177/0269216319882287>
6. Kingston, L.N., Cohen, E.F. & Morley, C. P. Debate: Limitations on universality: the "right to health" and the necessity of legal nationality. *BMC Int Health Hum Rights* 10, 11 (2010). <https://doi.org/10.1186/1472-698X-10-11>
7. Ibid
8. Supra note 3
9. Lawrence Gostin, 'Legal foundations of public health law and its role in meeting future challenges', *Journal of Royal Institute of Public Health*, 2006) 120, 8-15. doi:10.1016/j.puhe.2006.07.006
10. Supra note 7
11. Available on <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health> accessed in August 2021

as the duty on the State to develop health services or to allocate a specific budget to them<sup>12</sup>. Being signatory to various Conventions and part of various UN Programmes, India had focused for the overall development of health of public by providing those services in health and Medical care. Right to health as a set of practices: juridical, economic, political and cultural that shape the flow of healthcare resources to particular persons and social groups<sup>13</sup>. The paper will be discussing International and National Medical care and health that are incorporated by India being part of International regime.

## II. RIGHT TO MEDICAL CARE AND HEALTH FROM INTERNATIONAL PERSPECTIVE

World Health Organisation (WHO) overseer body internationally, which look into health of people. Constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"<sup>14</sup>. It emphasizes on 'pursuing a rights-based approach, health policy, strategies and programmes should be designed explicitly to improve the enjoyment of all people to the right to health, with a focus on the furthest behind first'<sup>15</sup>. First section of this essay explains that the phrase "right to health" is used in the international human rights context to refer to (1) the more lengthy and detailed provisions relating to health in the WHO Constitution and in legally binding human rights treaties and (2) to emphasize the social and ethical aspects of health care and health status<sup>16</sup>. Enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition<sup>17</sup>. WHO has been actively

12. Available at <https://www.ohchr.org/documents/publications/factsheet31.pdf> accessed in August, 2021

13. Alejandro Cerón & Jessica Jerome (2019) Engaging with the Right to Health: Ethnographic Explorations of the Right to Health in Practice, *Medical Anthropology*, 38:6, 459-463, DOI: 10.1080/01459740.2019.1639173

14. Supra note 13

15. Supra note 12

16. Supra note 2

17. Available at [https://www.who.int/governance/eb/who\\_constitution\\_en.pdf](https://www.who.int/governance/eb/who_constitution_en.pdf) accessed in August, 2021

strengthening its role in providing technical, intellectual, and political leadership on the right to health including:

- strengthening the capacity of WHO and its Member States to integrate a human rights-based approach to health;
- advancing the right to health in international law and international development processes; and
- advocating for health-related human rights, including the right to health<sup>18</sup>.

India is Signatory to it and accepted it January 1948. Amendment were done to Constitution of WHO and accordingly India has accepted it from time to time like Art. 7 that dealt with financial obligation of parties voting privileges and services; Art. 24 dealing with signatory members to appoint to the Board a person who is technically qualified in field of health; Art. 25 dealing with election and duration i.e. three years from all signatory member parties from each regional organization every year; Art. 34 dealing with Director-General shall prepare and submit to Board financial statements and budget estimates of Organization<sup>19</sup>. Art. 55 dealt with 'Director-General shall prepare and submit to Boar budget estimates of Organization and Board shall consider and submit to the Health Assembly such budget estimates, together with any recommendations the Board may deem advisable<sup>20</sup>. WHO Model List, which contains a list of some thirty essential medicines intended to cover minimum medicine need for any basic health care system, and lists the most efficacious, safe and cost-effective medicines for priority conditions<sup>21</sup>.

Right to health and medical care is one of basic fundamental right of every person. In this direction WHO's Art. 2(o) and (p) is important dealing with medical aspects for the member states to comply emphasizing for -

- 'to promote improved standards of teaching and training in health, medical and related professions'; and

18. Supra note 12

19. Supra note 18

20. Ibid

21. Eibe Riedel, *The Right to Health under the ICESCR Existing Scope, New Challenges and How to Deal with It*, University of Texas Libraries, on 09 Jan 2020, <https://doi.org/10.1017/9781108676106.009>

- to study and report on, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view including, hospital services and social security<sup>22</sup>.

Right to health for all people means that everyone should have access to health services they need, when and where they need them, without suffering financial hardship<sup>23</sup>. We have a long way to go until everyone- no matter who they are, where they live, or how much money they have-has access to these basic human rights<sup>24</sup>. Nobody should be subjected to medical experimentation, forced medical examination, or given treatment without informed consent<sup>25</sup>. Right to life as per OHCHR contains 'freedoms'. Those freedoms include the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilization, and to be free from torture and other cruel, inhuman or degrading treatment or punishment<sup>26</sup>. WHO had strongly stressed for promoting idea of people-centric care that includes medical and health care, deeply embodied as fundamental human rights in practice. Office of UN's High Commissioner for Human Rights (OHCHR), right to health is NOT the same as right to be healthy<sup>27</sup>, as there is common misconception that its responsibility of State that has to guarantee good health. As, what is good health? It is totally influenced by various circumstances and factors in which a person lives that is out of control of States in certain situation, for example, standard of living, socio-economic factors, political condition, financial condition of country that provides them goods and services. WHO guideline on school health services helps to fill that gap, with a strong recommendation for implementation of comprehensive school health services; and this recommendation comes at a unique time in history,

22. Supra note 18

23. Available at <https://www.who.int/news-room/commentaries/detail/health-is-a-fundamental-human-right> accessed in August, 2021

24. Ibid

25. Ibid

26. Supra note 13

27. Ibid

when COVID-19 has put so sharply in the spotlight the vital link between health and education<sup>28</sup>.

International Covenant on Economic, Social and Cultural Rights (ICESCR) Art. 12 emphasizes on 'everyone has the right to the enjoyment of the highest attainable standard of physical and mental health'<sup>29</sup>. Article lists some of steps to be taken by States parties such as: the reduction of stillbirths and infant mortality; ensuring healthy development of children; improving environmental and industrial hygiene; prevention, treatment and control of diseases; and access to medical care for all<sup>30</sup>. Committee, in General Comment 14, furthermore, outlines essential and interrelated elements which States parties are to apply while fulfilling their obligations under Art. 12 and these elements are: availability; accessibility; acceptability; and quality<sup>31</sup>. 'Availability' signifies that functioning public health and healthcare facilities, goods, services and programmes have to be available in sufficient quantity within State<sup>32</sup>. Paragraph 18 identifies and precludes discrimination based on a variety of factors, including "civil, political, social or other status," which has intention or effect of nullifying or impairing the equal enjoyment or exercise of right to health<sup>33</sup>. Core components of right to health includes, measure should be taken for functioning of public health and healthcare facilities to neediest and not only this but government in that particular nation should provide goods and services with help of programmes and should be accessible to everyone. Goods and services provided should be safe that are medically fit and scientifically proven/tested. Further, effectively implement so that it reach to the needy who require them. Timely should be available without any delays, equitable without any kind of discrimination on any grounds whatsoever and efficiently provided without any waste.

28. Available at <https://unesdoc.unesco.org/ark:/48223/pf0000377947> accessed in August 2021

29. Available at <https://www.coe.int/en/web/compass/international-covenant-on-economic-social-and-cultural-rights> accessed in August, 2021

30. Available at [https://www.who.int/hhr/Economic\\_social\\_cultural.pdf](https://www.who.int/hhr/Economic_social_cultural.pdf) accessed in August 2021

31. Ibid

32. Ibid

33. Supra note 7

Universal Declaration of Human Rights (UDHR) under its Art. 25 emphasizes that 'Everyone has right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and right to security in event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'<sup>34</sup>. UDHR is guardian of fundamental human rights and set goals for having setup that can provide for standard of living that facilitate adequate health in which medical care and social services should be provided by State for those who cannot afford because of circumstances. UNESCO's under its 'Education for health and well-being', for people to lead healthy and productive lives, they need knowledge to prevent sickness and disease<sup>35</sup>. Organization is committed to strengthening links between education and health, reflecting growing international recognition that a more comprehensive approach to school health and coordinated action across sectors is needed<sup>36</sup>. Good health concerns the care of human body and everything that can be done to protect it from sickness and intoxication and enable access to care<sup>37</sup>. UNESCO plays a key role in assisting education, health and other relevant authorities in the development and implementation of Comprehensive sexuality education (CSE) programmes and materials<sup>38</sup>. In 2018, UNESCO, in collaboration with UN's Programme on HIV/AIDS (UNAIDS), UN's Development Programme (UNDP), UN's Population Fund (UNFPA), UN Women, and WHO, published a fully updated International Technical Guidance on Sexuality Education<sup>39</sup>. Political Declaration on HIV and AIDS: Ending Inequalities and Getting on Track to End AIDS by 2030, UN Member States committed to enhancing the potential of digital technologies to advance HIV responses and right to health consistent

34. Available at [https://www.un.org/en/udhrbook/pdf/udhr\\_booklet\\_en\\_web.pdf](https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf) accessed in August, 2021

35. Available at <https://en.unesco.org/themes/education-health-and-well-being> accessed in August 2021

36. Ibid

37. Available at <https://en.unesco.org/themes/education/sdgs/material/03> accessed in August 2021

38. Available at <https://en.unesco.org/themes/health-education/hiv-sexuality-education> accessed in August 2021

39. Ibid

with their human rights obligations<sup>40</sup>. Right to health and medical care is important agenda globally which is taken by UN under various programmes and organization that are working in this regard across world.

Women are one who need special medical care and health guide and in this direction internationally special rules framed for women. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 11(1)(f) provides that States Parties shall take all appropriate measures to eliminate discrimination against women in enjoyment of "right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction"<sup>41</sup>. Art. 12 (1) is vital importance for women dealing with 'States Parties shall take all appropriate measures to eliminate discrimination against women in field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning'<sup>42</sup>. ICESCR under art. 10 (2) provides for special protection should be accorded to mothers during a reasonable period before and after childbirth and during such period working mothers should be accorded paid leave or leave with adequate social security benefits<sup>43</sup>. However, serious questions remain about how right to health principles should be implemented, potential effects of such implementation, and whether governments can guarantee right to health through legal mechanisms<sup>44</sup>.

### III. RECENT EXPANSION AND INCLINATIONS IN RIGHT TO HEALTH AND MEDICAL CARE IN INDIA

Indian Constitution under Art. 21 has provided for right to life that is being given very wide interpretation by Indian court covering various facets of life. Life is not just mere existence like animal but living a dignified life. Right to life has been given wider perspective by

40. Available at <https://www.undp.org/publications/guidance-rights-based-and-ethical-use-digital-technologies-hiv-and-health-programmes> accessed in August 2021

41. Supra note 2

42. Available at <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article12> accessed in August, 2021

43. Supra note 13

44. Supra note 14

Courts, "Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality"<sup>45</sup>. Physical and mental health of the nation is determined largely by the manner in which it is shaped in early stages<sup>46</sup>. Right to live with human dignity with minimum sustenance and shelter and all those rights and aspects of life which would go to make a man's life complete and worth living, would form part of right to life<sup>47</sup>. To be sure, if the water is contaminated, air polluted, and if medication is in short supply, there will be particular individuals who suffer a deterioration in their health<sup>48</sup>. By giving an extended meaning to expression 'life' in Art. 21 this court has brought health hazards due to pollution within it and so also health hazards from use of harmful drugs<sup>49</sup>. Determining access to affordable basic health care is a major concern and needs to be addressed ungently in order to provide financial security to low-income section of society<sup>50</sup>. In India, majority of population stay in rural area and in remote villages does not have medical and hospital facilities that can give requisite medical care. Apart from ensuring adequate/appropriate training of doctors and other medical personnel, states parties have to provide a sufficient number of hospitals/ clinics and other health related facilities, subject to resources available<sup>51</sup>. At societal level, one's health capability involves external, contextual influences—social norms; social networks and social capital related to health outcomes; decisional power or latitude in familial and social contexts; group influences; material and social circumstances; economic, political, and social security; access to and utilization of health-related goods and services; and extent to which public health and health care

45. Aruna Ramchandra Shanbaug vs Union Of India & Ors on 7 March, 2011

46. J.K. Das, Investigation Techniques in Criminal Cases and The Right to Health in India, Asia-Pacific Journal on Human Rights and the Law (1) (2011) 56-80. DOI: 10.1163/138819011X12984550576475

47. Sahyadri Punarvasan Gaothan ... vs Pandharpur Municipal Council on 6 December, 2004

48. Roger Brownsword, Public Health, Private Right: Constitution and Common Law, Medical Law International, 2006, Vol. 7, pp. 201-218

49. Dr. Ashok vs Union Of India & Ors on 2 May, 1997 available at <https://indiankanoon.org/doc/305543/>

50. Available at <https://assets.kpmg/content/dam/kpmg/in/pdf/2016/09/AHPI-Healthcare-India.pdf> accessed in August 2021

51. Supra note 22

systems create an environment in which individuals can improve their health<sup>52</sup>. "Health systems" refer to level and quality of resources the health system provides and accessibility of health care and public health<sup>53</sup>.

Public health generally, and in any particular place, has limited resources: limited time, limited funds, and limited political capital<sup>54</sup>. In case of *Consumer Education & Research*<sup>55</sup>, court observed that, "right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes his livelihood. Therefore, it must be held that right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of Constitution and make the life of the workman meaningful and purposeful with dignity of person."<sup>56</sup> Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity, State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilized living while sharing according to the capacity, social and cultural heritage<sup>57</sup>. Therefore, it must be held that right to health and medical care is a fundamental right under Art. 21<sup>58</sup>. Art. 21 right to life also includes medical care and health of every individual that can be enforced in court of law invoking provisions under Art. 226 and 32. No law or state action can intervene to avoid or delay the discharge of the paramount obligation cast upon the members of the medical profession<sup>59</sup>.

52. Feldman CH, Darmstadt GL, Kumar V, Ruger JP. Women's political participation and health: a health capability study in rural India. J Health Polit Policy Law. 2015 Feb; 40(1):101-64. Doi: 10.1215/03616878-2854621.

53. Ibid

54. Scott Burris, JD (2018), Taking Opportunity Costs Seriously in Public Health Law, Public Health Reports, Vol. 133(6) 726-728. DOI: 10.1177/0033354918805741

55. *Consumer Education & Research... vs Union Of India & Others*, 1995 AIR 922, 1995 SCC (3) 42 available at <https://indiankanoon.org/doc/1657323/>

56. Ibid

57. Ibid

58. Ibid

59. Patil, Dr Amit. (2020). 13. Right to Health and Healthcare. Indian Journal of Applied Research. Volume-8, Issue-9, September-2018, PRINT ISSN No 2249-555X. Page 141-142.

In *Parmanand Katara*<sup>60</sup>, Art. 21-Obligation on State to preserve life—Every doctor has professional obligation to extend services to protect life—All Government hospitals/Medical institutions to provide immediate medical aid in all cases<sup>61</sup>. An affidavit was presented stating that, “The Medical Council of India therefore expects that all medical practitioners must attend to sick and injured immediately and it is duty of medical practitioners to make immediate and timely medical care available to every injured person whether he is injured in accident or otherwise”<sup>62</sup>. Further it was observed that, “every injured citizen brought for treatment should instantaneously be given medical aid to preserve life and thereafter procedural criminal law should be allowed to operate in order to avoid negligent death and in event of breach of such direction, apart from any action that may be taken to negligence, appropriate compensation should be admissible”<sup>63</sup>. Supreme Court (SC), in one of its landmark judgment in *Paschim Banga Khet Mazdoorsamity*<sup>64</sup>, observed that-

*“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 by 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”<sup>65</sup>.*

60. *Parmanand Katara v. Union of India* AIR 1989 SC 2039, available at <https://indiankanoon.org/doc/498126/>

61. Ibid

62. Ibid

63. Ibid

64. *Paschim Banga Khet Mazdoorsamity vs State of West Bengal & Anr.* 1996 SCC (4) 37

65. Ibid

Government cannot afford to stand as a helpless spectator witnessing injury to public health and the life of its workers and citizens<sup>66</sup>. In *Assn. of Medical Super speciality Aspirants*<sup>67</sup>, Court observed that, “State to secure health to its citizens as its primary duty. No doubt the Government is rendering this obligation by opening Government hospitals and health centers, but in order to make it meaningful, it has to be within reach of its people, as far as possible, to reduce queue of waiting lists, and it has to provide all facilities to employ best of talents and tone up its administration to give effective contribution, which is also duty of Government”<sup>68</sup>. Right to health is integral to right to life and government has a constitutional obligation to provide health facilities<sup>69</sup>. Fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality, which may endure for years to come and enhance the dignity of individual and the worth of the human person<sup>70</sup>.

In 2006, 201<sup>st</sup> Report on Emergency Medical Care to Victims of Accidents and during Emergency Medical Condition and Women Under Labour and in this report the Law Commission of India, took *suo moto* cognizance based on the observation given by SC in two landmark judgement i.e. ‘*Parmanand Katara*’ and ‘*Paschim Banga*’ case that dealt with hospital to treat injured and provide them emergency relief. The first few hours are known as ‘golden hours’ for such patients for if there is no emergency medical care coming soon after the accident or other emergency medical condition, life of the person may be lost forever or he may remain crippled and ill beyond repair for all time.<sup>71</sup> Main outcome variable was an ‘adverse event’, defined as ‘an unintended injury or complication which results in disability, death

66. *Sobha Gopinath vs State Of Kerala Represented By The* on 4 December, 2008

67. *In Assn. of Medical Super speciality Aspirants & Residents v. Union of India*, on 19 August, 2019, available at <https://indiankanoon.org/doc/199035715/>

68. *In Assn. of Medical Super speciality Aspirants & Residents v. Union of India*, on 19 August, 2019, available at <https://indiankanoon.org/doc/199035715/>

69. Ibid

70. Ibid

71. Available at <https://lawcommissionofindia.nic.in/reports/rep201.pdf> accessed in August 2021

or prolonged hospital stay and is caused by health care management<sup>72</sup>. Accidents where victims require emergency medical care are not confined to motor accidents, but emergencies may arise due to motor accidents, fire, floods, cyclone, earthquakes etc. or even sudden collapse of victims or emergent deliveries in pregnancy<sup>73</sup>. Law Commission recommended certain statutory duties on hospitals and medical practitioners, section in the proposed law to make it mandatory to direct medical assistance in accidents and emergencies precluding the hospitals or doctors from raising any objection on the following grounds:

- a. that it is a medico-legal case requiring information to be given to the police authorities, or
- b. that the person is not immediately in a position to make payment for screening and emergency medical treatment or that immediate payment should be made as a condition precedent for treatment, or
- c. that the person does not have medical insurance or is not a member of any medical scheme providing for medical reimbursement<sup>74</sup>.

Law Commission further, recommended that it shall be duty of every hospital and every medical practitioner to immediately attend on every person involved in an accident or who is purportedly in an emergency condition, when such a person has come or has been brought to hospital or to private medical practitioner and screen or transfer such person as stated in section 4 and when the screening reveals existence of an emergency medical condition, to stabilize or transfer such person as stated in section 5 and afford them, such medical treatment as may be urgently called for<sup>75</sup>. Next requirement is to make it mandatory for "screening" the person to find out whether the person requires emergency medical treatment in hospitals, i.e. treatment as an in-patient or whether he could be treated in outpatient department of hospital<sup>76</sup>. If a person is in an emergency medical

72. Alan Merry and Alexander McCall Smith, 'Errors, Medicine and The Law', ISBN 0-511-01630-1, Cambridge University Press, 2001.

73. *Supra* note 72

74. *Ibid*

75. *Ibid*

76. *Ibid*

condition, as revealed by screening, he must be given emergency medical treatment including stabilization and further treatment<sup>77</sup>. But, where necessary facilities for stabilization are not available with a hospital or medical practitioner, it is necessary to arrange for transfer to another hospital or medical practitioner, who or which, in opinion of transferring hospital or medical practitioner, can stabilize the person and provide further medical treatment<sup>78</sup>. For transfer, hospital or medical practitioner must call for an ambulance and it shall be duty of agencies running ambulances to provide ambulance without raising any objection that it should be paid first; if no ambulance is available, hospital or medical practitioner has to seek help of police to requisition any vehicle for transport; and transferring hospital or doctor must provide for medical facilities during transport<sup>79</sup>. It is necessary that hospital or medical practitioner maintain records<sup>80</sup>. Penalties for breach of duties by hospitals, medical practitioners, ambulances for transfer etc<sup>81</sup>. State Government may make rules for implementation of provisions of Act and that the rules will be published in State Gazette<sup>82</sup>. Recommendation given by Law Commission was forwarded to M/o Health and Family Welfare, which was later implemented. Palliative care community should therefore consider potential application of a human rights lens to issues such as healthcare financing, access to out-of-hours services, availability of palliative care for persons with an intellectual disability, advance care planning and decision-making and symptom management in pediatric palliative care<sup>83</sup>.

Right to life and health are correlated and integrated to each other. Life cannot be enjoyed without a good health, however, health facilities and healthcare has become very expensive. To avoid financial difficulty during medical treatment people do tend to take insurance policies to avoid those financial emergencies. Insurance policies that are provided by Insurance Companies that are governed by Insurance

77. *Ibid*

78. *Ibid*

79. *Ibid*

80. *Ibid*

81. *Ibid*

82. *Ibid*

83. *Supra* note 6



Act and Insurance Regulatory Development Authority. However, person suffering from illness is not provided facilities even if it is provided, with stricter terms, conditions, and high premium amount. Indian health and illness behaviours, patterns of utilization of care and intra family priorities for accessing medical care and health insurance should be welcomed as a force for a fairer healthcare system<sup>84</sup>. But its success should be judged on how well new products are developed with a cover beyond hospitalization, how fairly and inclusively the cover is offered and how far community rated premiums are established<sup>85</sup>. In *Dr. Shanthi Rengarajan*<sup>86</sup>, court concluded that- (i) Right to avail health insurance is an integral part of Right to Healthcare and Right to Health, as recognised in Art. 21; (ii) discrimination in health insurance against individuals based on their genetic disposition or genetic heritage, in the absence of appropriate genetic testing and laying down of intelligible differentia, is Unconstitutional; (iii) the broad exclusion of 'genetic disorders' is thus not merely a contractual issue between insurance company and insured but spills into broader canvas of Right to Health; Insurance companies are free to structure their contracts based on reasonable and intelligible factors which should not be arbitrary and in any case cannot be 'exclusionary'; and (iv) Exclusionary clause of 'genetic disorders', in insurance policy, is too broad, ambiguous and discriminatory- hence violative of Art. 14 of Constitution of India<sup>87</sup>.

Public health needs to be protected State and enforced by Courts wherein State fails to do so that is protectionism approach adopted by Indian judiciary. As Larry Gostin spells it out:

*"Public health ... historically has constrained rights of individuals and organizations to protect community interests in health. Whether through use of reporting requirements that affect privacy, mandatory testing or screening that affects autonomy, environmental standards that affect property, industrial regulation that affects economic freedom, or isolation*

84. Available at [https://niti.gov.in/planningcommission.gov.in/docs/reports/genrep/bkpap2020/26\\_bg2020.pdf](https://niti.gov.in/planningcommission.gov.in/docs/reports/genrep/bkpap2020/26_bg2020.pdf) accessed in August 2021

85. Ibid

86. *Dr. Shanthi Rengarajan vs The Oriental Insurance Company ...* on 9 March, 2018 available at <https://indiankanoon.org/doc/18080295/>

87. Ibid

*and quarantine that affect liberty, public health has not shied from controlling individuals and organizations for the aggregate good"*<sup>88</sup>.

Health outcomes are necessarily dependent on global dynamics, but there is also a role for state, which cannot be compromised, for State is only entity upon whom accountability and obligation can be fixed<sup>89</sup>. 'India, being a welfare and a developing country, which is predominantly occupied by people below poverty line, it has a constitutional duty to provide good health care to its citizens by giving them easy access to life saving drugs<sup>90</sup>. DPSP provides for States liability and duties for the public. Art. 38 duty is cast on State to secure a social order that would promote welfare of people and welfare of people cannot be achieved without providing medical care and health facilities. Lack of access to basic health necessities can, at best, preclude a minimally decent and autonomous life or, at worst, prove to be fatal for its victims<sup>91</sup>. In *Sh. Hardyal Singh*<sup>92</sup>, court observed that, "Facilities and opportunities, as enjoined in Article 38, should be provided to protect health of workman. Provision for medical test and treatment invigorates health of worker for higher production or efficient service. Continued treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of employer and State"<sup>93</sup>. Facilities for medical care and health against sickness ensures stable manpower for economic development and would generate devotion to duty and dedication to give workers 'best physically as well as mentally in production of goods or services'<sup>94</sup>.

Further, Art. 39 (e), provides that State should makes policies that can secure health of all including workers, men, women and children. In *State Of Punjab*<sup>95</sup>, Court observed that, 'Art. 39 (e) requires State to

88. Supra note 49

89. *Rajshree Chandra. The role of national laws in reconciling constitutional right to health with TRIPS obligations: an examination of the Glivec patent case in India* Huron University College. on 18 May 2020. <https://doi.org/10.1017/CBO9780511750786.018>

90. Ibid

91. Ibid

92. *Sh. Hardyal Singh vs Chief Secretary on 14 August, 2012* available at <https://indiankanoon.org/doc/78019988/>

93. Ibid

94. Ibid

95. *State Of Punjab And Ors vs Jagjit Singh And Ors on 26 October, 2016* available at <https://indiankanoon.org/doc/106416990/>

secure that health and strength of workers, men and women, and children of tender age are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength<sup>96</sup>. Further, court also emphasized on Art. 7 of ICESCR that stress on safe and health working conditions for workers. Art. 41<sup>97</sup> provides for right to work, education and assistance wherein State should within its limits and economic capacity should develop public assistance and education for old age, sickness and disablement. In *Regional Director*<sup>98</sup>, court referred Employees' State Insurance Act, 1948, that deals with workers and object of Act is to cover all aspects of employees. Act seeks to cover sickness for all employee's, maternity benefits to female workers, employment injuries during employment, certain industries there are occupational diseases associated with them are covered. Court observed that, "Act is a social security legislation. It is settled law that to prevent injustice or to promote justice and to effectuate the object and purpose of welfare legislation, broad interpretation should be given, even if it requires a departure from literal construction. The Court must seek light from loadstar Arts. 38 and 39 and the economic and social justice envisaged in the Preamble of the Constitution, which would enliven meaningful right to life of the worker under Art. 21. Article 39(e) enjoins the State to protect the health of the workers under Art.41 to secure sickness and disablement benefits and Art.43 accords decent standard of life"<sup>99</sup>.

In *K. Mani*<sup>100</sup>, court held that, 'it must be held that right to health and medical care is a fundamental right under Art 21 read with Arts 39 (c), 41 and 43 and make life of workman meaningful and purposeful with dignity of person. Right to life includes protection of health and strength of worker is a minimum requirement to enable a person to live with human dignity'<sup>101</sup>. Art. 42<sup>102</sup> wherein State is responsible for making provisions so that it can secure just and humane conditions for works in

96. Ibid

97. Art. 41 of Indian constitution

98. *Regional Director, E.S.I Corpn. ... vs Francis De Costa And Anr.* 1992 SCR (3) 23. Available at <https://indiankanoon.org/doc/1587160/>

99. Ibid

100. *K. Mani vs The Secretary To Government* on 26 February, 2007 available at <https://indiankanoon.org/doc/1551214/>

101. Ibid

102. Art. 42 of Indian Constitution

various sectors and maternity relief for female workers. Another importance provision dealing with right to health and right to life is Art. 47<sup>103</sup>. Art. 47, duty is casted on State to raise the nutritional level and raise standard of living and improve health of public. It will be State's primary duties wherein they can bring about prohibition and restrictions on consumptions of toxic drugs and substance that are harmful for health. Herein, exception is provided for the prohibition that is drugs and substance that are used for medical purposes. Art. 47, State is under a duty to take steps to improve public health, and to that end to prohibit consumption of intoxicating drinks<sup>104</sup>. State will realise that Art. 47 makes it a paramount principle of governance that steps are taken 'for the improvement of public health as amongst its primary duties'<sup>105</sup>. Arts. 41 and 47 in Chapter IV deal with education and public health; and they embody some of our national goals for fulfilling which public funds are being utilized by Government<sup>106</sup>. In *Govindaraj Hegde*<sup>107</sup>, court also considered Art.47 of Constitution of India that intoxicating drinks and drugs are injurious to health and impede raising of level of nutrition and standard of living of people and thus, upheld power of State to completely prohibit manufacture, sale, possession, distribution and consumption of potable liquor in the said judgment<sup>108</sup>.

Weak health systems and a lack of equitable access to affordable health services and information undermine states' ability to uphold right to highest attainable standard of health<sup>109</sup>. The SC had taken up issue of healthcare during time of pandemic on its own and also looked at instances where bodies of coronavirus casualties were not handled with dignity<sup>110</sup>. Due to unprecedented pandemic, everybody

103. Art. 47 of Indian Constitution

104. *Sheo Kumar vs State Of U.P. And Ors.* AIR 1978 All 386

105. *Municipal Council, Ratlam vs Shri Vardhichand & Ors.* 1980 AIR 1622

106. *Ajay Gambhir And Anr. vs Dean, Mahatma Gandhi Institute Of Medical Sciences Sevagram,* AIR 1986 Bom 26

107. *B Govindaraj Hegde. 53 Yrs vs State Of Karnataka - By Its Prl. ... on 22 July, 2016.* available at <https://indiankanoon.org/doc/193332058/>

108. Ibid

109. Helen Clark & Anna Gruending (2020): Invest in health and uphold rights to "build back better" after COVID-19, Sexual and Reproductive Health Matters, DOI:10.1080/26410397.2020.1781583

110. Available at <https://www.ndtv.com/india-news/supreme-court-says-its-a-world-war-against-covid-19-fundamental-right-to-health-includes-affordable-treatment-2340650> accessed in August, 2021

in world is suffering, one way or other. It is a world war against COVID-19 and therefore, there shall be Government Public Partnership to avoid world war against COVID-19<sup>111</sup>. UNDP and Federation of Indian Chambers of Commerce and Industry (FICCI) conducted a survey of 150 firms in formal sector to understand implications of new technologies for future of work and emerging challenges and opportunities for women<sup>112</sup>. Public health crises are usually highlighted during plea of crisis and pandemic that hits the country. COVID-19 disrupted access to sexual and reproductive health services for millions, particularly for pregnant women, lactating mothers and young women<sup>113</sup>. Pandemic also worsened existing gender equalities, led to an increase in gender-based violence and discrimination, besides creating several new barriers for already marginalized and vulnerable population groups<sup>114</sup>. UNFPA India is supporting three pillars of framework: Health First; Protecting People; and, Social Cohesion and Community Resilience to protect and ensure rights, choices and needs of people during pandemic<sup>115</sup>. Going forward, as world rethinks health and other systems in wake of pandemic, we have a chance to address inequalities, discrimination and exclusion COVID-19 has laid bare<sup>116</sup>. Failure of a government hospital to provide a patient timely medical treatment results in violation of patient's right to life<sup>117</sup>.

In *Ganta Jai Kumar*<sup>118</sup>, a writ petition was filed in form of PIL in Telangana High Court, to declare action of State of Telangana and other respondents in not permitting "private hospitals" and "diagnostic centers" which are equipped with necessary equipment and personnel and willing to conduct diagnostic tests for COVID-19 virus and to

111. Ibid

112. Available at [https://www.in.undp.org/content/india/en/home/library/womens\\_empowerment/Impact\\_of\\_COVID19\\_and\\_Industry\\_on\\_Future\\_of\\_Work\\_for\\_Women.html](https://www.in.undp.org/content/india/en/home/library/womens_empowerment/Impact_of_COVID19_and_Industry_on_Future_of_Work_for_Women.html) accessed in August, 2021

113. Available at <https://india.unfpa.org/en/covid-19-4> accessed in August 2021

114. Ibid

115. Ibid

116. Available at <https://india.unfpa.org/en/news/health-systems-we-build-back-after-covid-must-reach-everyone> accessed in August 2021

117. K. Mathiharan, 'The fundamental right to health care', *Issues in Medical Ethics* Vol XI No 4 October-December 2003.

118. *Ganta Jai Kumar vs State Of Telangana on 20 May, 2020*, available at <https://indiankanoon.org/doc/187546434/>

admit patients for isolation and treatment of COVID-19 virus as arbitrary, illegal and without power, if necessary by setting aside order of District Medical and Health Officer canceling permission granted earlier; and consequently direct respondents to permit private hospitals and diagnostic centers which are equipped with necessary equipment and personnel and willing to conduct diagnostic tests for COVID-19 virus and to admit patients for isolation and treatment of COVID-19 virus.<sup>119</sup> Court observed that, "every human being has a basic and natural born instinct to protect himself and his kith and kin from danger-be it from human, animal or one in nature of a disease, by utilizing all means available in his power; State cannot incapacitate him by restricting his choice particularly when it comes to a disease which affects his life/health or that of his kith and kin"<sup>120</sup>. Art. 21 was invoked that guarantees Fundamental Right to life and personal liberty which includes right of person to choose his own doctor and hospital as per his choice; that under the guise of taking steps to prevent spread of Pandemic, State cannot restrict liberty and freedom of a citizen to choose his own doctor and hospital and force him to take treatment from Government sources particularly in view of limited resources of Government<sup>121</sup>. The fact that an authority like ICMR, which is part of Government of India, Ministry of Health and Family Welfare has thought it fit to permit private laboratories to perform COVID-19 tests instead of a total prohibition shows that said procedure followed by ICMR comes clearly within principle of just, fair and reasonable procedure under Art.21<sup>122</sup>. Court found that, there is no power in Sec.2 of Epidemic Diseases Act, 1897 either to prevent private hospitals from testing suspected any victim of an epidemic such as COVID-19 patients or treating confirmed infected patients<sup>123</sup>. Further, in court's opinion, limiting testing centers arbitrarily jeopardizes health of such serious non COVID patients as well and exponentially increases risks of spread of disease in COVID positive cases that remain undetected for prolonged periods<sup>124</sup>. Court hold that

119. Ibid

120. Ibid

121. Ibid

122. Ibid

123. Ibid

124. Ibid

there is neither legal not logical basis for totally excluding private sector participation in either testing or for treatment/isolation of suspects/ confirmed COVID-19 patients<sup>125</sup>. Court held that order of District Medical and Health Officer canceling permission granted earlier is violative of Art.14 and Art.21 and also principles of natural justice (for not giving any reasons) and was set aside<sup>126</sup>. Strengthening accountability through formulating effective legal remedies at national level and through periodic reviews at international level are, therefore, critical to holding countries responsible for their commitment to promote health-related post-2015 development goals<sup>127</sup>. The fulfillment of rights to health and peace can only be achieved through collaborative efforts of health care providers and other civil society actors working for meaningful change<sup>128</sup>. To "build back better" from COVID-19, we need to put health on the top of global and national agendas, to prioritize universal health coverage (UHC) with an emphasis on reducing inequities and confronting discrimination, and to enshrine sexual and reproductive health and rights (SRHR) at centre of these efforts<sup>129</sup>.

#### IV. CONCLUSION

Health of public can be made better with public policy, people worker in the health care sector or healthcare professional who can play important role and help the public as a whole and right to life can be better and this can lead to fulfilment of right to health and medical care. Through the development in medical care and right to health has enshrined in Indian Constitutional provisions and courts have given them wider interpretation. State obligation and liability is their when it comes to right to health and medical care. Rural area health facilities need to be provided by the State so that they can enjoy the right to life. First aid is prerequisite in hospitals and procedure and formalities can wait and medical professionals are bound to treat patience first that

125. Ibid

126. Ibid

127. Grover A. The right to health in the post-2015 development paradigm. *Reprod Health Matters*. 2013 Nov; 21 (42):41-2. Doi: 10.1016/S0968-8080(13)42740-4. PMID: 24315061

128. Donna J. Perry, Christian Guillermet Fernández and David Fernández Puyana, 'The Right to Life in Peace: An Essential Condition for Realizing the Right to Health', *Health and Human Rights*, Vol. 17, No. 1 (June 2015), pp. 148-158

129. Supra note 110

obligation is laid down by law. Right to health is safeguarded and protected and also enforced by the citizens through themselves or by interested parties in larger interest of the society.