

# Right to Healthcare and State's Obligation: A Dilemma of Social Justice in a Welfare State

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Healthcare is not an absolute right under Indian constitution. It finds its place under the shell of right to health, which is again part of right to life. Health as a subject matter falls under state list and thus state gets authority to regulate over health and ultimately healthcare. The twist is health being a vast phenomenon part of it also falls under concurrent list, and besides this the preamble and directive principles of state policy talks of state's duty to protect individual right to healthcare. India being party to many of the international treaties It becomes state's liability to protect, respect and fulfill the basic right to healthcare of its citizens. State is a major player when it comes to providing healthcare. But, if we look at the Indian health index we realize the apathy of the system and of course the social determinants can be blamed considerably. But state can't deny its liability through constraints of resources but at the same time state can't guarantee an absolute right to healthcare. We need to think from the point of health jurisprudence and give a second thought to the process to achieve equilibrium when it comes to impart the obligation on the part of state and claiming an equitable and affordable access to healthcare. The paper discusses the contemporary challenges to healthcare as states duty, as a right and as consumer service in the context of present world and desired goals to be achieved through various international norms while imparting the social justice as enlighten under the Indian constitution and welfaristic state.

**Keywords:** State, Rights, Duties, Healthcare, Law.

## Introduction

Health is a basic need of an individual for to lead a prosperous life one-need s to be healthy first. Health has been regarded a prime concern for man since time immemorial which we could see through our mythologies giving many references of maintaining and protecting good health. Although good health is very much necessary, what underlines to maintain the same is easy access to healthcare including physical, mental etc. Since the evolution of the state, it is evident that rights and duties exists. We can see number of shifts in the nature of rights and duties simultaneously evolved with each phase and the development of various rights

<sup>1</sup> As quoted in, Right To Health Protection, Tom. H. Christoffel, Black Law journal, 183, (6), 1978.

<sup>2</sup> Bhushan patwardhan, Shailesh Deshpande, 'Idea of health and medicine in India, in Indetifying the elements of heritage development thinking in India', Development foundation Bangalore.

from natural to human to fundamental rights through various juristic writings and opinions. Along with rights, the nature of duties of the state towards its citizens, and duty of the individual towards other individuals and state have also undergone a makeshift. Thus right to health is no exception to it and have evolved over the time in phases. Over a hundred years ago Rudolf Virchow, physician and reformer wrote that; '*Medicine is a social science and politics is nothing but a medicine on large scale*'<sup>1</sup>. The poor health status is result of controllable factors as a matter of facts. And to improve the health index political will is equally important. Health closely relates to every aspect of life including food to finances efforts to assure good health and effective medical care must be broader in perspective. The concept of health has undergone so many changes from ancient to modern times. The concept has changed according to religious texts and scholarly works like Charak Samhita, Sushrut Samhita, Ayurveda in Hindu mythology. The ancient Indus valley civilization was also structured to protect public health and hygiene. In addition, the system could be said as much advance than even today's urban places. Besides these, even the four Vedas also mention about the medicines and duties of physicians. It is considered that, ancient Indian medicine system was so advanced that other countries have borrowed it from India<sup>2</sup>. In 21<sup>st</sup> century, we are witnessing effects of globalization and technology on each aspect of human life and also healthcare. With the changing nature of the right and to achieve healthcare for all it is very much obvious that the system has to prepare itself to face the challenges like providing easy equitable and affordable access to healthcare and ensure the goals set by international obligations to respect, protect and fulfill right to healthcare of individuals<sup>3</sup>. Under the constitution of India, the thread of social justice is woven from preamble<sup>4</sup> to schedules, which makes it mandatory for states to recognize these principles and act accordingly so that the maximum number of citizens can rip the fruits of the state action. However unlike other rights under the Indian constitution health is not a separate fundamental right and it is interpreted as a part of right to life and liberty under article 21. The same in the course of time and again has been expanded to include various facets like access to clean water, hygiene, sanitation, public health, medicines and ultimately healthcare. When we say health is a basic need of a human being, it obliges that health and healthcare concerns should be given maximum weitage, and thus it becomes necessary to look into the provisions for healthcare from different perspectives. In this paper the author has tried to explain the different perspectives of right to healthcare and the challenges to be mitigated with the help of law, order and policy.

<sup>3</sup> Article 12, International covenant of Social, Economic and Cultural Rights -

<sup>4</sup> The five fold principles of Preamble, '*Sovereign, Socialist, Secular, Democratic And Republic*'.

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## Healthcare as a Right

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The ancient traces of right to health and healthcare can be found in the work of Hippocrates, where there are guidelines for the physicians on how to advise the people to choose a healthy life, in this period the protection of health of powerful elites have been linked with state and power structure, it was only after the French revolution that better health was regarded as human right. In the 19th century, European states became the enforcers of public health laws and regulations, and the rise of a national public health service in Victorian Britain extended this state control to local government. Gradually recognition grew of the state's responsibility for the health of its citizens. This was followed by the rise of the classical European welfare state in the early 20<sup>th</sup> century<sup>5</sup>. Health as a human right does not mean the right to be healthy, nor does it assert an unlimited right to be treated for every medical condition. Rather the right to health may be seen as having two components: a right to health care and a right to healthy conditions. The rights based approach to health incorporates both a clinical, curative perspective focusing on healthcare and services, and a public health, preventive perspective focusing on the social determinants of health – including water, sanitation, nutrition, and health education.<sup>6</sup> The human right to health means that everyone has the right to highest attainable standard of physical and mental health, which includes access to all medical services, sanitation, adequate food, decent housing, healthy working conditions and a clean environment. The emergence of right to health and healthcare has to be traced back to human rights, and its existence can be derived from the principles of natural law that lies in the dignity and worth of human being. The WHO constitution, notably, marks the first formal demarcation of right to health in international law, adopted in 1946, recognizes that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being"<sup>7</sup>. The WHO Constitution defines health as a state of "complete physical, mental and social well-being, and not merely the absence of disease or infirmity, subsequently the Universal Declaration of Human Rights (UDHR), under article 25<sup>8</sup> recognized health has fundamental right. Later came the International Covenant on Economic, Social, Cultural Rights (ICESCR), in 1976 which is considered to be a foundation of right to health, along with Declaration of Alma-Ata, 1978. The other documents include CEADAW<sup>9</sup>, CRC<sup>10</sup>, and International Conventions on the Protection of the All Migrant Workers and Members of Their Families 1990

<sup>5</sup> Dorothy Porter, *Health Civilization And The State*, Rutledge, London, (1999)

<sup>6</sup> The right to health and basic services, w.courtland Robinson, 41, students Transnational Legal Policy, 207, (41) 2010

<sup>7</sup> Preamble to the Constitution of the World Health Organization, as published in World Health Organization, *Basic*

*Documents*, 41st ed, Geneva, 1996. The WHO Constitution was signed in 1946 and entered into force on 7 April 1948.

and recently The Conventions on the Rights of the Persons with Disabilities, 2006. As the human right to health "gives rise to entitlements and obligations, it demands effective mechanisms of accountability, health and legal advocate-experts are harnessing existing human rights instruments into rights-based approaches to health. The WHO also has recognized that promotion of the health and the protection and fulfillment of human rights are very much interlinked. India has construed health as a fundamental right, and health care, access is made a state's obligation. However different the provisions in different countries, the literature survey reveals that right to health and health care is not always codified in domestic law, and there is lot of scope for its effective implementation and adjudication.

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## Constitution of India and the Right to Health Care

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The Indian constitution eminently indicates that India is a welfare state. As said by Pt. Jawaharlal Nehru, "political freedom is only a means to an end, the end being a raising of the people to higher levels and hence, the general advance of humanity."<sup>11</sup> This philosophy is reflected in the Indian constitution through various schedules and provisions in different parts. Health as a separate sector does not found place under the constitution but many of the provisions have indirect and contentful reflections on health of the people and role of the state in the development and upliftment of the health of its citizens. Let us start from the preamble; it refers to justice social, economic and political and equality of status and of opportunity. The challenges to access to healthcare facilities can be well brought under the spectrum of social justice and the principle of equality in access to these facilities. The practice of medical profession and access to medical education can also be taken to refer to principle of equality of status and of opportunity. Taking the line forward the doctrine of equality can be well related to the health and healthcare services in terms of easy and equitable access to healthcare services<sup>12</sup>, employment in the state run medical institutions<sup>13</sup> and freedom of practice of medical profession<sup>14</sup>. Coming to the Directive Principles of state policy, we can see the doctrine of social justice prevailing through all the provisions. Though it is true that directive principles are not justiciable, and state can excuse itself under certain circumstances, but the contents under directive principles of state policy that indicates the concern and commitment of Indian constitution towards equality

<sup>8</sup> "Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing, and medical care and necessary social services

<sup>9</sup> The Convention On The Elimination Of All Forms Of Discrimination Against Women 1979

<sup>10</sup> Convention On The Rights Of The Child 1989

<sup>11</sup> I. p. Massey, 'Nehruvian Constitution Vision', 1991, pg 19

<sup>12</sup> Article 14 - Equality of law

<sup>13</sup> Article 16 - Non discrimination on the ground of caste, sex, religion, etc.

<sup>14</sup> Article 19 - Right of freedom of occupation

and social welfare do provide definite direction for the policymaking in the country. Article 38 - provides for liability of the state to secure a social order for promotion of the welfare of its citizens. Article 39 - certain principles of policies to be followed by state including that of health and work conditions of men and women and children of tender age to be protected from exploitation and facilitated to develop in healthy manner. Article 41- makes a reference that, state shall within the limits of its economic capacities and development make effective provisions for securing right to work, to education, and to public assistance in case of unemployment, old age, sickness and disablement and in other cases of undeserved wants. This principle underlines the states responsibility to provide the public health and medical care preventives as well as curative and promotional services in the field of health. Under article 42 - there is a reference to just and human conditions of work and maternity relief. Similarly, under article 47 - state is under a duty to raise the level of nutrition and the standard of living of its citizens and improvement of public health. This indeed is a clear cut articulation of parental duty of the state in protecting the health of its citizens according to the Constitution of India.

The thread can be taken to the federal set up under the Constitution under Article 246, in the 7<sup>th</sup> schedule gives three lists with specific areas of law making by the a parliament and state legislatures, namely the union list, state list and concurrent list. Under state list health has been made a primary responsibility of state to maintain Public health.<sup>15</sup> However, the centre list and the concurrent list also have entries relating to health, medical education and hospitals, drugs and food safety, etc. Though health did not find place in the fundamental rights, subsequently the theory of interrelated -ness between rights was articulated in Article 21, by the way of *Maneka Gandhi v. Union of India*<sup>16</sup>

### Judicial Trend

India opened doors to most of the social rights under Article 21, it has now come to be invoked almost as a residuary right. A positive thrust is given to the nature and content of this right by the Apex Court imposing a positive obligation upon the State to take effective steps for ensuring to the individual a better enjoyment of his life. The Supreme Court has held that the right to live with human dignity enshrined in Article 21 derives its life and breath from the directive principles of State policy particularly Article 39(e) & (f), 41 and 42 and would therefore include protection of health as envisaged in the directives. The instances of realization of health as fundamental right of an individual can be seen through, *CESC Ltd. vs. Subash Chandra Bose*<sup>17</sup>, which held that right to health is a fundamental human right to workmen., then in *MahendraPratap Singh vs. Orissa State*<sup>18</sup> it was stated that, People are entitled to adequate health

care, further in *CERC vs. Union of India*, it was elaborated that Health and Health Care of Workers is an essential component of right to life. In *State of Punjab vs. Mohinder Singh Chawla*<sup>19</sup> Right to Health Care of government employees is integral to right to life, In *Virender Gaur vs. State of Haryana*<sup>20</sup>, the Supreme Court held that environmental, ecological, air and water pollution, etc., should be regarded as amounting to violation of right to health guaranteed by Article 21 of the Constitution. There have been Number of cases through which different aspects of healthcare and access to healthcare have been regarded as fundamental under the umbrella of Article 21. The term 'right' has different connotations- what the law is, what it is likely to be, and what it should be. But health as a human right does not mean the right to be healthy nor does it asserts an unlimited right to be treated for every medical condition. The right based approach to health incorporates both curative perspective focusing on healthcare and healthcare services, and public health and preventive perspective focusing on the social determinants of the health like water, sanitation, nutrition and health education<sup>21</sup>.

### Healthcare as a State Liability

Within the framework of the Constitution of India, public health is a subject for the states to legislate. However, very few states in India have constructed public health legislations. At the national level, the archaic 112-year-old Epidemic Diseases Act, 1897 is an example of the nature of laws dealing with public health emergencies. The health as a right gives some entitlements one of which is access to healthcare and medicines. The state is thereby bound to provide an easy, equitable and affordable access to healthcare. there have been many theories of rights which caste this burden on the state to protect the right of healthcare of its citizens. To decide the liability of the state under the rule of law it is imperative to discuss the kind of obligation, is only a moral, ethical or legal obligation and how various theories of rights have established this obligation of the state in relation to right to healthcare.

### Libertarian and Economic Theories

An overview of the libertarian approach to health care provides a good framework for understanding the kind of claim socio-economic rights, such as the right to health care, make on society in general and governments in particular. By accepting only "negative" rights as true rights and rejecting claims of "positive" rights, libertarians are able to make quick cognitive work of claims to health care. In the words of K. Selick, the classical liberal understanding of positive and negative rights as follows:

Over the past four centuries, western liberal democracies have viewed rights primarily as protective mechanisms. A right is like an invisible wall keeping us safe from the interference of others.... The right to life, for

<sup>15</sup> Clause 6, of the state list, Article 246.

<sup>16</sup> AIR 1978 SC 597

<sup>17</sup> AIR 1992 SC 573,585

<sup>18</sup> AIR 1997 Ori 37

<sup>19</sup>1997 2 SCC 83

<sup>20</sup> 1995 (2) SCC 577,

<sup>21</sup> Ibid 1, at 197

example, simply meant the right not to have one's life taken away-the right not to be killed-by other. It did not mean the right to require others to give one the means of sustenance.<sup>22</sup> As per libertarian approach, negative rights require only non-interference from other people and the government. To say that positive rights exist implies a corresponding duty to actively support the right claimed. According to the libertarian view, such a claim in the autonomy to other human being is more properly characterized a privilege and not a right. Thus the libertarian approach separates negative rights (civil and political rights) and positive rights (economic and social rights) into separate camps based on the claims they make on the autonomy of other human beings, this distinction is highly artificial. Be that as it may, the claims of entitlement resulting from recognition of positive rights necessarily bring a claiming individual" into conflict with at least one other human being... in fact, positive right effectively give some people the right to violate the rights of other."<sup>23</sup>such a violation of other people's negative rights could be said to occur when a "right" to basic universal health care coverage means that the government must tax the rich in order to give the poor. According to one of the critics, all legitimate rights have one thing in common: they are rights to action, not to regards from other people. The American rights impose no obligations on other people, merely the negative obligation to leave you alone. The system guarantees you the chance to work for what you want-not to be given it without effort by somebody else. The right to life does not mean that your neighbors have to feed and clothe you; it means you have the right to earn your food and clothes yourself. You have no right to the actions or products of others except on terms to which they voluntarily agree. Nobody has the right to the services of any professional individual or group simple because he wants them and desperately needs them. such a right is not only illegitimate, but immoral<sup>24</sup> Thus a need does not create a right. No individual is entitled to the services or the fruits of another's labor without just compensation. Physicians should be free to offer their services free of government coercion." This kind of inflexible and impersonal dismissal of positive welfare rights has prompted some proponents of positive right to comment: The argument that health care is not a right but a service which must be paid for inevitably comes from those in society who are secure in the knowledge that they can afford to pay for this service and who are not troubled by the thought that there are others who are unable to do so. No doubts such persons will also insist that their treatment is conducted according to high standards. But, in supporting their important individual rights as patients, let us not forget those at the poorer end of society whom they are prepared to leave behind.<sup>25</sup> This criticism is not fully fair, as libertarianism

do not fully reject the impulse to aid destitute and the poor in the society. As per libertarians a voluntary charity, shall be an answer to the moral claims of the needy and not the government-enforced charity.

### The Egalitarian Approach

The egalitarians consider that treating health care as a human right means regarding the dignity of the individual and social justice as primary concerns. The rights based approach also consider health care as a public good because it its importance for life and dignity of the individual and not simply as a commodity to be allocated solely by market forces. This view also stresses the importance of non-discrimination in the allocation of health care and confers on the individual an entitlement to the right in question which should be protected through legislation or administrative measures. The concept of an entitlement, in short, is derived from the concept of a right. Finally, recognizing a right to health care focuses special attention on the needs of vulnerable groups: the poor, minorities, and children.<sup>26</sup> In terms of justice, the fortune of human beings rests on idea of "moral luck" emphasizes the reality that everyone is not born on the same plane. The need for the healthcare is a result of a natural lottery which applies to every one of us. Therefore, those of us who are wealthy and healthy enough are more fortunate in this aspect. Such luck cannot serve as a solid basis for a libertarian or economic claim that we are logically or morally entitled to ignore the needs of the unlucky. It follows that equality does not mean treating everyone the same regardless of their situation, but rather, requires that additional steps-positive steps, if you will be taken in to provide everyone with access to the same opportunities. If we recognize the fact that 'basic health is requisite for competing for social opportunities' we can go on to say that" a right to health care is implied by a fundamental nation of fairness; it 'makes sense' or is rational for society to provide such a service."<sup>27</sup> Under the constitution of India, the doctrine of equality<sup>28</sup> stretches from equal treatment for equals to include equal access to opportunity in various aspects required to lead a life with dignity<sup>29</sup>. Thus, Leary's connection to theories of R. Dworkin, who defines rights as "'trumps' which generally, but not unfailingly, will prevail over other societal considerations. They create a presumption of special protection" is very apt here. The special protection afforded rights in a democratic society enables the public to exert some kind of influence, beyond just voting in a new government, over how the current governments responds to those rights, or takes them seriously. It is not enough to classify health care as a common good but it is the nature of the claim and the extent to which state fulfils the same.

<sup>22</sup>K. Selick 'Rights and Wrongs In the Canadian Charter, in A.A. Peacock,(ed). *Rethinking the Constitution: Perspectives on Canadian Constitutional Reforms, Interpretation and Theory*, 103, 104, (OUP. 1996)

<sup>23</sup> *Id.* at 105

<sup>24</sup> Tamara Friesen, 'The Right to health Care', 9 *Health LJ*. 207 (2001), Available at' Heinonline, ( Last visitedon 25<sup>th</sup> Oct 2017)

<sup>25</sup> *Id.* At. 208

<sup>26</sup>V. LAERY, 'Defining the Right to Health Care', in, A.R. Chapman, *Health Care Reforms: A Human Rights Approach*, 97, (Washington.D.C.: Georgetown University Press, 1994)

<sup>27</sup> *Supra* note 9, at 210.

<sup>28</sup> See, Article 14 to 18 of the constitution of India

<sup>29</sup> As elaborated under Article 21 of the Constitution of India.

Besides libertarian and economic theories there are many other theories developed by modern jurists to suit the right to healthcare and state's liability, few of them are Goals theory, Interest theory and Theory of justice. These theories have been developed by foreign jurists as applicable to the position in other countries.

### The Conditional Social Rights

In Indian context we need to go deeper into three things 1) constitutional thread, 2) the socio-economic nature of the right to healthcare, 3) International obligations.

In scrutinizing these principles, a core puzzle lies at the heart of social rights adjudication. While normative debates consider what it means to have social right, courts may ultimately understand rights very differently. Their conceptualization of a social right often contrasts sharply with the theoretical framework within which constitutional lawyers presently operate. The debate on social rights is multifaceted, and one need hardly rehearse its central themes. It ranges from whether the vagueness of such rights renders their realization impossible to intricate analyses of institutional design, which may even require us to explore a new form of separation of powers. The theories of constitutionalizing social rights uniformly aim to arrive at a conclusion to consider social rights as systematic rights. Under this theory once a right is constitutionalized, the nature of the right is not conditional upon state action and state action will often determine whether the right has been violated and the sort of remedy that courts may be able to provide. An individualized remedy is provided for violation which is focused on 'minimum core' standards of right. Another form of adjudicating social rights is to adopt a 'reasonableness' standard which is less common to rights based approach. Both of these forms adjudicates systemic social rights. Therefore, one either has a right to a certain minimum socio-economic standard, or to state action that undertakes reasonable measures to achieve that standard.

However neither of these are guaranteed, and it is noteworthy to focus on an approach that has been adopted by the Indian Supreme court which can be termed as the 'conditional social rights approach'. It exhibits rare private law adjudication.<sup>30</sup> the conditional social rights approach focuses on their implementation rather than focusing on the inherent nature of measures undertaken by the state.

The distinction between a systemic social right and a conditional social right is the celebrated India case *Olga Tellis*,<sup>31</sup> which dealt with the rights of slum and pavement dwellers-homeless persons residing on public property. The Court found that the right to life would include the right to livelihood. If such a right was not

recognized the, the Court argued, "the easiest way of depriving person of his right to life would be to deprive him of his means of livelihood to the point of abrogation." however, it was not an absolute right. The approach adopted in *Olga Tellis* appears to bring to mind the familiar distinction between respecting, protecting, and fulfilling social rights. The importance of socio-economic guarantees have been emphasized by the court in the conditional social rights model, but once we move beyond the rhetoric, it can be seen that the court does not protect any systemic social right, be it weak or strong<sup>32</sup>. The conditional social rights model is further exhibited by two important cases in which the Supreme Court recognized a right to education: *Mohini Jain*<sup>33</sup> and *Unni Krishana*.<sup>34</sup> Though these cases related to right to education, the conditional social rights approach is well perceived through these decisions, An important feature of the conditional social rights model is that the court does not ask the state to take any additional action but existence of a violation is conditional upon state action. A violation can only occur when the state undertakes an obligation but does not fulfill it. Thus the violation will only occur when a scheme has been initiated but is not being appropriately implemented. Like the approach is adopted in matters of right to health, however the cases of right to health are of more complex nature. In *Vincent Panikulangara vs. Union of India*<sup>35</sup>, the court stipulated by citing Article 25 of UDHR and Article 21, : 'a healthy body is a very foundation for all the human activities, in a welfare state, therefore, it is the obligation of the state to ensure the creation and the sustaining conditions congenial to good health.' 'The Court travelled considerable distance to emphasize the importance of public health and its place within the Indian Constitution.<sup>36</sup> yet it did not examine whether the petitioner's claim would constitute a violation of the right to health. It refused to review the matter, observing its incapacity to frame the nation's drug policy. This approach seems to articulate Lon L. Fuller's classic claim that courts lack the institutional ability to adjudicate Polycentric issues<sup>37</sup> social rights approach is conceptually distinct from the non-justiciability approach. Had the court adopted the former approach. It would have, at the very least, investigated the legal regulations in operation. The *Vincent Panikulangara's* non-justiciability approach was short-lived. Soon in *Rakesh Chandra Narayan*,<sup>38</sup> the Supreme Court adopted a much stronger form of judicial review. A letter written to the Chief Justice of India brought to light conditions in a hospital for the mentality challenged in the state of Bihar. The letter was admitted as a public interest litigation petition. And the Court ordered the Chief Judicial Magistrate of Ranchi to investigate the matter. The Magistrate's report painted a disturbing picture: the hospital was under-staffed, water shortage was acute, the toilets were not in

<sup>30</sup> Madhav Khosla, 'Making Social Rights Conditional - Lessons from India' 8 *IJCL* 739-765 (2010)

<sup>31</sup> *Olga tellis v. Bombay Municipal Corporation*, (1985) 3 S.C.C 545

<sup>32</sup> *Id.* at 747-48

<sup>33</sup> *Mohini Jain v. State of Karnataka* (1992) 3 S.C.C. 666

<sup>34</sup> *Unni Krishnan v. State of A.P.* (1993) IS.C.C 645

<sup>35</sup> AIR 1987 SC 990: 995. p. 995.

<sup>36</sup> *Id.* at 173-174

<sup>37</sup> As quoted in *Supra* note 30 at 752

<sup>38</sup> *Rakesh Chandra Narayan v. STATE of Bihar* AIR 1989 SC 348

working condition. Lights and fans needed repairing. There was no supply of sheets and pillows. Doctors were unavailable and hardly visited the hospital, medicines were not stocked, and the like, the report suggested that the hospital was, in the Court's words, "a shade worse than Oliver Twist's Orphanage... a medieval torture-house."<sup>39</sup> Upon considering the report the Court had, in an earlier interim order, directed the state to improve matters. However, despite the issuance of directions, there had been no change. The Court concluded that the state of Bihar had failed in its obligation "to perform its duties by running the hospital in a perfect standard and serving the patients in an appropriate way."<sup>40</sup> Consequently, it constituted a "committee of Management to look after all aspects of the institution." It developed guidelines on how committee members would be appointed, the nature of their tasks and responsibilities, and instructed the Committee to provide updates on its progress.

In *Rakesh Chandra Narayan*, there was no scrutiny of the state's efforts to construct hospitals or its budgetary allocation towards health care. All the decision suggests is, that once the state decides to spend a certain amount on healthcare or build a particular hospital. It has a constitutional duty to fulfil that obligation. A distinction must therefore be recognized: the difficulty in *Rakesh Chandra Narayan* was not that the state had built only few hospitals for the mentally challenged, but that it did not maintain those it chose to build. Yet again this exhibits the conditional social rights model. We must pay greater attention to the right being enforced in *Rakesh Chandra Narayan*. The right—that there should be some baseline maintenance standard for hospitals is uncontroversial it is likely to be guaranteed in most democratic societies, irrespective of whether they constitutionalize social rights typically such cases arise when the executive fails to perform a statutory duty under a health-related legislation

It was further taken through the *CERC v. Union of India*<sup>41</sup>, This case too confirms the conditional social rights thesis because the primary motivating factor for the courts remedy was the inadequate statutory framework in operation. The court reasoned that, if the law aimed at addressing health hazards during employment, then they must be sufficiently addressed. In the process of time. In the case *Bandhua Mukti Morcha*<sup>42</sup>, the supreme court actually interpreted Article 21, to include Right to health. And thus furthering the responsibility to protect this right. The *Vincent Panikulangara* was taken further through *Parmanand Katarav. Union of India*.<sup>43</sup>, which held, no medical authority could refuse immediate medical attention to a patient in need. In *PaschimBangal Khet Mazdoor Samiti v. State of West Bengal*<sup>44</sup>, the circumstances resulted in the individualized remedy of compensation being granted and court directed the states to undertake

measures to ensure the provision of minimal primary health facilities. In, *Gian kaur v. The State of Punjab*, court defined life as life with dignity, and expressed that, it is difficult to imagine life with dignity when basic healthcare is refused.

Thus derived from right to life, it was expected that the scope of the right to health would be restricted to life saving emergency care, but this case of *State of Punjab v. Mohinder Singh Chawla*<sup>45</sup>, has broadly extended this right. In recent times besides these cases protection to right to healthcare is also recognized for rape victims, pollution control, working conditions of workers, mentally ill persons etc. so it can be said as healthcare as a matter of right in India has developed under the shed of state's obligation to maintain and protect Public health under DPSP and fundamental rights.

The Indian experience call on us to be sensitive to another key distinction social action, one between systemic and conditional social rights. While it is widely believed that the Indian Supreme Court adjudicates social rights, a study of Indian constitutional practice reveals that the Supreme Court does not typically enforce any systemic social right the existence of a right is conditional upon the nature of state action undertaken. Thereby exhibiting a private law model of public law adjudication. Thus, the role of state is very crucial and the conditional social rights approach underlines it in a firm and clear manner. As right to health has been defined as 'the right to highest attainable standards of health'<sup>46</sup>. Under the general comment 14 of ICESCR, the ECOSOC<sup>47</sup> committee stated that, right to health requires **Availability, Accessibility, Acceptability and Quality** with regard to healthcare as well as preconditions to health. It interprets the right as inclusive of timely and appropriate healthcare an also extends to underlying determinants of health, such as access to safe and potable water, adequate sanitation, adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health related education and information, including on sexual and reproductive health. Health is thus influenced by varied factors. The state's intervention in providing healthcare even at a minimal level is conducted through healthcare services, if it lacks the private service providers are to be trusted and it will thus violate the principle of equality in providing right to healthcare, and for minimal protection approach we have to rationalize a theoretical basis for enforcement of right to health care. The state is already heavily involved in healthcare through entitlement programs and direct payments to providers, government run hospitals and clinics, licensure of health care personnel and provider institutions, tax exemptions, health insurance, regulations, etc. thus, to make right to healthcare a

<sup>39</sup> *Id.* at 351

<sup>40</sup> *Id.* at 354

<sup>41</sup> *Consumer Education Research Centre v. Union of India*, (1995) 3 S.C.C 42

<sup>42</sup> AIR 1984 SC802

<sup>43</sup> AIR 1989 SC 2039

<sup>44</sup> AIR 1996 SC 2426

<sup>45</sup> AIR 1996SC 946

<sup>46</sup> Article 12, International Covenant On Economic, Social And Cultural Rights, 1972 (ICESCR)

<sup>47</sup> Committee For Economic, Social And Cultural Rights

reality the suggested mechanism should be expansion of this existing role of state in health.

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### Achieving Social Justice and Access to Healthcare for All

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From the above discussions it is very clear that the development of the healthcare as a right has a concurrent relation with that of the state's liability to provide healthcare access to all equally. Now the question comes when the extent of liability has to be fixed, and to our fate there are no any clear guidelines onto this. What is being followed is on the basis of rulings of apex court. Wherein it has settled that providing primary healthcare services is mandatory and state should take measures for the same. But what about the other treatments and diagnosis services. Indian healthcare sector is complex one. The private sector is well equipped with all the kinds of facilities and medical treatments with latest inventions but their affordability and accessibility is a huge hurdle. Secondly, the rural parts of India are totally dependent on the government sector for the health needs, however a single glance at the same can give us a good review of how pathetic is the situation and even a primary first aid can't be available at times of need at many places, so forget about the advance treatments and medicines. It is appreciable that the state has been much successful at providing quality healthcare to masses at large to a vast number of people through a large number of secondary and tertiary healthcare centers, but all of them are situated in urban places mostly and the urban as well as peripheral rural population is dependent on the same, hence again the quality and accessibility becomes an issue. Major public health concerns like proper hygiene, sanitation, clean water supply are still to be combated in our country, the state resources are inadequate obviously but at the same time unawareness amongst people about the effects of lack of hygiene, poor sanitation and unwillingness of the local authorities towards the same are making it more and more conflicting. That causes many hazards during seasonal epidemic outbreaks and other contagious infection spreads of diseases which can be easily restricted. These are the incidences where both state and Individuals interests are conflicting and yes the burden is not only on the state rather it should not be. The duties of the citizens should be well defined and they be made accountable to state for violation of the same at the same time state should try to upkeep with its liability or duty towards providing healthy and hygienic atmosphere to its citizens. Now the bigger conflict is in the range of provisions under the constitution where state and central government both have access over the subject of healthcare in different aspects and somehow there is an overlapping of jurisdiction on the same<sup>48</sup>. Like, the subject of public health, provisions of healthcare facilities find their place in state list whereas, other concurrent issues such as hospitals are under union list and the medical profession finds its place in Concurrent list, so there is overlapping of jurisdiction resulting into multiple regulations for different states leading to no uniform system of

healthcare services. Even after 67 years of independence India is not able to streamline healthcare services in one uniform code and mechanism which is responsible for poor health statistics of India, lately there has been an attempt in the form of Clinical Establishments Act, 2010 by central government to regulate the quality of healthcare services, but it is not a wholesome act, and yet left to the state's will to enforce. Along with there are several factors which have remained either unaddressed or poorly addressed they are, complexity of regulations, multiple regulators, lack of comprehensive legislation and , poor participation by public sector, maximum reliance on private hospitals, competition , accreditation etc. These factors are leading to many unethical practices ranging from medical malpractices to uncontrolled treatment prices affecting the common man's economy and right to healthcare severely. In the given context it is challenge to achieve for healthcare for all, how it can be achieved, what is the obligation of healthcare providers, to what extent they are obliged to fulfill the responsibility, what are the legal issues and challenges and what should be the role of law in protecting the right to healthcare of individuals and to provide for easy and adequate access to healthcare with quality healthcare services. If we look through the lens of social justice, the central mission is to engage in systematic action to assure access to health to ensure the conditions for improved health for all members of the population and to overcome the hurdles in access to social justice. Social justice demands more than fair distribution of resources. health hazards threaten the entire population, but the poor and disabled are more vulnerable. If the needs of the vulnerable groups are neglected it will lead to eroding public trust and undermining social cohesion. social justice calls for policies and law making and implementing for preservation of human dignity and the showing of equal respect for the interest of all the members of the community. These are the values of public health law. Embodied in the form of duties of the government. To achieve the goals of public health under the rule of law it requires sound legal foundation. The Indian constitution has reiterated the values of social justice under different provisions and the active efforts by judiciary have contributed valuable to further the goal of social justice.

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### Conclusion

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To conclude with, globally, improvement of health status has been recognized as a social good, which is necessary for the development of a country. The Ministry of Health and Family Welfare, Government of India, formulates the National Health Policies keeping in view, the national commitments to attain the goal health for all. Yet, we seem to be lacking in our efforts, as can be evidenced by the increasing reliance of our population on private health sector, contrary to our declared intent of health care as a State responsibility. This issue was further complicated with the advent of judicial activism on citizen's right to health care. Preservation of public health through enforcement and enactment of appropriate laws is one of the most important goals of

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<sup>48</sup> Article 246, Constitution of India.

governments. In the past few decades, a number of health schemes have been introduced in our country, such as Central Government Health Scheme, Employees State Insurance Scheme, National Rural Health Mission, etc. The Ministry of Health and Family Welfare, Government of India has proposed drafting this much needed law (The National Health Bill, 2009) for consideration by Parliament<sup>49</sup>. Its high time India has to make a constitutional right to health care. A comprehensive legislation applicable to all uniformly and which can address the needs of healthcare if brought in time can actually give the right to health and healthcare a wholesome meaning. The state's liability to protect and provide healthcare is something, which cannot be achieved without a proper mechanism, legal framework, resources and adequate economic provisions. One of the most basic of human rights is right to good health care. In recent years we have come to understand that health care is not merely a technical problem for medical specialists, it is a vital concern for all who help shape the economic, social, and political process of our communities and nations.<sup>50</sup> Thus the benevolent principles of social justice and equality can be a reality which is dreamt by the makers of Constitution for India to be a welfare state...only when the state fulfills its liability in true sense by according due respect, protection to right to healthcare.

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<sup>49</sup> S. Hazarika, Et.Al , Public Health Law In India: A Framework For Its Application As A Tool For Social Change,22 (4) NMJI, (2009)

<sup>50</sup> Statement By President Jimmy Carter, Nov11, 1977, As Quoted In 7 The Nation's Health 9 (1977)