

THE RIGHT TO HEALTH: A FUNDAMENTAL HURDLE

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INTRODUCTION:

“It Is Health Is Real Wealth And Not Pieces Of Gold And Silver” - Mahatma Gandhi.

Health is that asset which is the key to overall development for an individual as human being, to exercise all the rights and freedoms, to obey all the duties, to fulfill all the obligations and finally to build a developed nation. As the Darwinian theory of evolution emphasizes the idea of the “Survival of the Fittest”; in the evolution of the lives on earth, it cannot be denied in the today’s evolving and dynamic world too. Therefore, in such a third world country like India, where the economy, polity, literacy etc., are not in a higher strata, as that of the developed countries, I think, Health is a prime concern or root cause for it, which in turn parasitic on poverty.

IMPORTANCE AND RELEVANCY OF THE STUDY:

In a democratic country, however, individuals have an inherent right to health, as an individual’s health has direct link to the concept of Human Right. Without a well health, the full realization of Human Right is a myth. Moreover, Right to health is a concern for universal justice in today’s world by one way or another. International Instruments are many to guarantee the Right to health. Rather, the truth is that the Right to health has its roots in the International Human Rights laws, namely, the UDHR, ICESCR, etc. Recognition of Health as Human Rights, at the International level, paved the way for its attainment at the national platform too. The Preamble of the Constitution of the WHO; provided the first documentary recognition of the right to health, which guaranteed the highest attainable standard of health as Human Right¹.

¹ AVANISH KUMAR, HUMAN RIGHT TO HEALTH,(Satyam Law International, New Delhi, 1st ed. 2007)

The Art. 25 of the UDHR, and Art. 12 of the ICESCR; have triggered the recognition of right to health one step forward.

Later on, “Alma_Ata Conference” was called, which resulted into a declaration setting out the challenges for the WHO, which call for the better use of World’s resources and co-operation of the entire world community towards attaining the peace, disarmament and socio-economic development for better health of the people.² The world health declaration, adopted in May 1978, provided the framework for the development of future policy for health for all in the 21st century.³ All these initiatives have triggered this acceleration of health jurisprudence in a global platform. Health is a core element of International Human Rights Laws and it is, therefore, very much important to have an effective application and implication of Right to Health at the domestic level, at first, to attain such International goal or agenda at the global level.

Health is not just absence of disease, but a state of welfare on the whole. In 1986, WHO further clarified that health⁴ is: “A resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities.” Therefore, without Health or Right to Health, it makes no sense to Right to Life. More recently, health is defined as the ability of a body to adapt to new threats and infirmities, as modern science has dramatically increased human awareness of diseases and how they work in last few decades.⁵ In this regard, It is, therefore, important to have health education. As per the WHO’s definition health education involves people individually or collectively in the adoption of and practice of patterns of behavior necessary for the preservation and enjoyment of normal and sound health. Therefore, it is very important from this point of view also to make a study of the status of Right to health to throw a light upon it, so that the loophole (If any), can be wasted away.

However, regarding the concept of health, there is no static or unique definition, it is multi and dynamic in nature, the enjoyment of which should be part of the rightful heritage of every human being without distinction of race, religion, political belief, economic or social condition. Health is, therefore, a multidimensional facet. As per the WHO, it means the state of overall

² AVANISH KUMAR, HUMAN RIGHT TO HEALTH,(Satyam Law International, New Delhi, 1st ed. 2007)

³ Id.

⁴ Id.

⁵ <https://www.medicalnewstoday.com>articles150999.php> , visited on 7-9-2018

wellbeing; physical, mental, social. So health is not the outer appearance, it includes the inner incentives too. Hence, the right to health is not only the absence of disease, it has various components inherent in it: Right of existence, Right against torture, right to human dignity, right to entitlement, right to health care, Right to physical and mental wellbeing, right to access to health facilities, right to medical treatment, right of access to drugs, right to non-discrimination, right to privacy, right to social interaction, and so on⁶. On the other hand, illiteracy, poverty, ignorance, various immorals and sometimes various morals, population explosion, environmental degradation, advancement of science and technology and sometimes non-advancement too, globalization, urge for developing more and more by the rich section of people, etc. are the various detriments in the path of the attainment of Right to health. It has, therefore, occupied the prime importance in the field of research. As it is not anyone's cup of tea, to remove all the detriments and to attain the right to health in a day or two, it is rather the herculean task in a third world country like India, and to be more specific in Assam, which occupied the highest level in the maternal mortality rate, mal nutrition, water borne diseases, infant mortality rate and a which remains towards the bottom of health index indication in every year.

As the world is of dynamic nature, the emergence of new ideas to cope with the changing needs is obvious. In such dynamism, a strong perspicacity in matters related to health need prime consideration.

The framers of Constitution of India, have appreciably could foresee the very needs of dynamism and placed under the Part III of the Constitution, the wide provision of 'Right to Life', under Art. 21, for all individuals, which is the pillar, cemented by the 'Right to Health' itself, residing within the bricks of various other correlated rights, without which the pillar will be of no sense, rather no pillar at all. In short, Health is inherent in the attainment of all other rights.

The Hon'ble S.C. has played a crucial role in this regard and the new ambit of PIL and Locus Standi are the fuels of such journey. Under Articles 38, 39, 42, 43, 46, 47, 48A positively imposed upon the State the obligation of promoting and protecting the Right to Health, which finally is made justifiable together with Article 21, by the Custodian of the Constitution of

⁶ AVANISH KUMAR, HUMAN RIGHT TO HEALTH, (Satyam Law International, New Delhi, 1st ed. 2007)

India in its various judgments.⁷ The SC emphasizes more on the Right to Health of both Women and Child, and gives various guidelines towards the welfare of women and children.⁸ In accordance with such guidelines and various Judgments of the Hon'ble Supreme Court, the Government of India has evolved various policies towards the attainment of the Right to Health as one of the Fundamental Rights. Articles 243-G and 243W of the Constitution empowers the local Governments to enact and implement various schemes for the maintenance and protection of Public health.⁹ Again, IPC, CR.P.C by its various provisions ensures the protection of the health of the people. Besides these the Government of India has enacted a many legislations to ensure the effective implementation of the machinery of attaining Right to Health. To name a few: the Consumer Protection Act, 1986, the Drugs and Cosmetics Act, 1940 etc. This is now guaranteed that Doctors are under the statutory obligation of rendering good service without a single element of negligence.¹⁰ In 1986, Indian Government has passed the Environment Protection Act; in which an ample provisions for health protection are provided. Various labour laws in India have also dealt with the measures for the protection of health. The Government of India has adopted a good number of policies and schemes as well in this regard, to name a few, the Integrated Child Development Services Programme, the National Health Policy, the National Population Policy, the National Nutrition Policy, National Mental Health Programme, the Reproductive and Child Health Programme , the National Rural Health Mission ¹¹etc . Hence, it seems that India has a very well policy , and a bulk of legislations on paper in the black and white letters; towards the attainment of the 'Right to Health' as one of the 'Fundamental Rights'.

1.2. AIMS AND OBJECTIVES OF THE STUDY:

The main objectives of this study are:

1. To make an analysis of the status of the Right to Health in India,

⁷ M P JAIN, INDIAN CONSTITUTIONAL LAW, Pp.1050-1234, (LexisNexis^(R), 8th ed. 2018)

⁸ Available at http://shoudhganga.inflibnet.ac.in/bitstream/10603/60032/11/11_chapter%205 visited on 10-11-2018

⁹ P.M. BAKSHI, COMMENTARY ON THE CONSTITUTION OF INDIA, Enlarged Edition, New Delhi, Universal Law Publishing Co. Pvt. Ltd., 2014,

¹⁰ Indian Medical Association v. V.P. Santha, AIR 1995 SCC 651

¹¹ N. B. SAROJINI & OTHERS, WOMEN'S RIGHT TO HEALTH, (National Human Rights Commission, Faridkot House , Copernicus Marg , New Delhi ,India. 1st ed. 2006)

2. To observe whether the 'Right to Health' has attained the status of the Fundamental right in its true sense in India, with special reference to Assam
3. To find out possible measures and make suggestion in promoting Right to Health, particularly in Assam.

1.3. REVIEW OF LITERATURE:

- M P JAIN , INDIAN CONSTITUTIONAL LAW, 8TH EDITION , LEXISNEXIS , 2018

This book contains the detailed and elaborate provisions of the Constitution of India. This is not simply a book, rather this is the Author's dedication to the Motherland. This book comprises all the latest developments in the area of Constitutional Law. This book is very much useful in understanding the present scenario of Indian democracy. It contains all the significant Judicial decisions , case –laws , various interpretations of judiciary etc. ; which has made a significant turning point in Constitutional Law. The expanding horizons of the Fundamental Rights are elaborately provided. This book is very useful for legal researchers , as it provides a handful of concepts and ideas for legal researchers. This helps in formulating a research question too, through its various analysis of cases and reasoned decisions. All the Constitutional Amendments are provided here along with cases leading to such Amendments. Article 21 is shaped very beautifully with all the inherent Rights. From the pre-Maneka Gandhi to till the post – Maneka Gandhi's era in regards of various Fundamental Rights are well placed in it. The DPSP and its inter-connection with Article 21 and various Schedule are elaborately mentioned. The PIL regime can be well understood without a single misconception. And last but not the least, the Status of The Right to Health is clearly placed along with its various ingredients. A legal research cannot be started , without having a look in its various provisions , at all.

- H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, (Universal Law Publishing Co. Pvt. Ltd., New Delhi-India. 4th Edition)

This book contains a bundle of cases and their analysis in a very critical way. Here the Author lays more emphasis on the character of the Judges, the presence of Judicial minds, the behavior of the Judges, etc., which, in the point of view of the Author have direct impact on any Judicial

pronouncement. Again, the Author makes a critical analysis of various Judgments and also draws conclusions from the same. This approach in turn, helps the readers of the book in understanding various Constitutional provisions, extending horizons etc. This book contains a wonderful interlinking of various provisions of the Constitution of India, for instance, the relationship between Article 14, 19, and 21; Articles 19, 20, 21, 22; and so on. This Book is, therefore, very much helpful in understanding the underlying concepts of various provisions of the Constitution along with the intention of the framers of the Constitution of India.

- V N SHUKLA, CONSTITUTION OF INDIA , (Eastern Book Company, 12th ed. 2013)

The Author of this Book , opines here that though Part III , Part IV , and Part IV-A; are separate units; but together concretise the lofty goals of Justice, Liberty, Equality, Fraternity, and the “Dignity of Individual” set out in the Preamble. “As per the dominant theories of Human Rights these three Parts are classified respectively as: negative obligations of the State not to interfere with the liberty of the individuals ; positive obligations of the State to take steps for the welfare of the individual; and the duties of individual to society and fellow individuals”, the Author mentions , and that they are complementary of each other. Together they constitute the Human Rights regime, roughly including the Civil and Political Rights and Social and Economic Rights respectively, as per the Author of this Book. “Without one rights in the other are not only incomplete but also unattainable”, The Author asserts, and explains various case laws and Judgments to make such propositions more authentic. This Book is indispensable in doing any study of Constitutional Law, as it draws a very clear picture of role of the Constitution and the Custodian of the Constitution in the realization of Human Dignity and Human Rights in India.

- P. M. BAKSHI, COMMENTARY ON THE CONSTITUTION OF INDIA – Enlarged Edition, Universal Law Publishing Company Pvt. Ltd., 2014, New Delhi.

This is not simply a Book, but a exhaustive case law based Commentary on the Constitution of India. Its importance is appreciable for Constitutional Law students, interalia. It contains the all the provisions of the Constitution of India with a handful of explanations and illustrations .The author here brings the present situation in front regarding various rights. This Book also provides a critical analysis and evaluation of various Judgments in the present scenario.

Moreover, it provides a researcher a handful of knowledge which will further be helpful for finding loopholes and to formulate research questions.

- 1 ARVIND P. DATAR, COMMENTARY ON THE CONSTITUTION OF INDIA, (LexisNexis. 2nd ed. Reprint 2010)

It contains a detailed analysis of various cases to establish a close relationship between the various provisions of the Constitution of India. It contains a detailed comments on the various provisions starting from Article 1 to Article 212 . The extended horizons are also put very well. Such work of the Author is very helpful to compare various provisions and status of various Rights in today's World.

- N. SUDARSHAN, RIGHT TO PUBLIC HEALTH AND IMPACT OF PATENTS, (The Icfai University Press, 52, Nagarjuna Hills, Punjagutta, Hyderabad, India. 1st ed. 2008)

This book lays emphasis upon the formulation of a universal right to health, health care or health protection. It contains a detailed analysis of the role of International Law and of International Stakeholders in Public Health. The editor emphasizes more on the rethinking of health law and responsibility in this regard. The contemporary as well as the present scenario regarding the access to medicines, impact of TRIPS etc. on the Developing Nations towards an open source solution is well established here. It is, therefore, right to say that a researcher, must have to have a look in this Book, in doing a legal research focusing on life, or health, or development; what so ever.

- AVANISH KUMAR, HUMAN RIGHT TO HEALTH, (Satyam Law International, New Delhi 1st Edition, 2007)

This is a very appreciable work regarding the Status of the Right to Health. Besides introduction and conclusion, this book is divided into eight chapters, each chapter elaborately dealing with the concept and importance of Health as one of the Human Rights. The book contains exhaustive provisions of development of human rights beginning from the initiatives of the World Health Organization to the World Health Declaration, role of various International Institutions , organizations in development of health, the issues of linkage between the health and human rights, various components of the right to health, ethical dimension of health,

scenario of different kinds of responsibilities in promoting right to health ,health education and its importance in the right to health regime, Indian approach towards the right to health; various policies; judicial response; Constitutional prospectus, and finally a critical evaluation. It is worth mentioning that here the Author excellently draws the picture of health care trends in India along with a full dedication in the field of knowledge

1.4 STATEMENT OF PROBLEM AND EVALUATION

In a country, like India, the golden goals of people of India is to achieve Justice: social, economic, political, to make it as an excellence of polity, education , development and thereby to achieve the overall wellbeing of the people and finally to make India a Welfare State, Indian Government has taken a big hand towards the attainment of such goals. But it is since its very inception that India has been lacking development almost in all spheres of life. The poor health conditions of the people of the various parts of the country, has become the hurdle of the attainment of robust life with full of human dignity. Indian Parliament has made various legislations for attaining Right to Health as one of the Fundamental Rights. But, it is unfortunate that despite of having such a vast number of statutes and policies, India, and specially Assam, is at the very poor level of development both in regards of physical as well as economical. Development and Health are interlinked and one cannot be achieved without the other. Particularly, Assam is towards the bottom of the Health Index Number, (according the estimation of Health Index No. of NITI AAYOG, 2017). As Assam is mainly an agricultural land, where most of the people's livelihood depends on the agriculture, which has been considered as one of the backward part of India since antiquity, where poverty; illiteracy; superstitions; etc. are at the peak, where lack of awareness and ignorance of people is at the heights, there it is a urgent need to improve and achieve the Right to Health, as an indicator of development. Assam is currently witnessing rapid ecological changes, the soil has overcrowded on account of human migration; urbanization, and thereby causing environmental degradation. The Rehabilitation and Resettlement policies of Government of India, also have impact on the right to health of the people of Assam. Particularly, massive occurrence of flood causes a lot of sufferings in these regard. Recently, the National AIDS Control Organization (NACO) said, "India had an estimated 21.40 lakhs people living with HIV in 2017, with slightly more than two-fifths being women".

The poor Health is, therefore, the most serious tyranny, in a Third World Country like India, which needs the strong weapon to be tackled with, otherwise hardly any right can be enjoyed; any development can be taken place . Therefore, in this study, it is being tried to analyze such a tyranny, its extent, and also the various measures; so that such a tyranny can be ousted effectively.

1.5 SCOPE AND LIMITATIONS OF THE STUDY

This research paper limits its study to examine and make a critical analysis of the Status of the Right to Health, its constitutionality, its enforceability etc. in the context of India. This study limits its scope to the Periphery of India, and not beyond that, as no comparative analysis to that of the other Country is done here. Due to the shortage of time, no empirical study is done here. In this study a special reference is given to the analysis of the Assam Health Act, 2013.

1.6 RESEARCH QUESTIONS:

In this research paper, the following are the Research Questions;

1. Does the Right to Health attain the status of a Fundamental Right in India in its true sense ;
2. Is the Right to Health enforceable in the Courts of Law ;
3. Are the people of Assam effectively enjoying their Right to Health ;
4. Is there any need for a Constitutional Amendment , for the attainment of the Right to Health in its fullest form .

1.7 RESEARCH METHODOLOGY

Here, it is planned to employ a purely Doctrinal Research Methodology in this Research. For this purpose , various Books on Constitutional Law ; Books relating to Health , Human Rights, various bare Acts, various articles on Newspapers , journals ;various source of internets : Manupatra , SCC Online , etc.; and various case laws of SC and HCs are being used as tools for the collection , observation and analysis of data for this research study.

2. INTERNATIONAL MEASURES FOR REALIZATION OF THE RIGHT TO HEALTH:

International instruments are many for respecting, protecting, and fulfilling the right to health, with cooperation and coordination of the world community. As it is impossible for a Government of a particular Country to meet the needs of the people by providing full protection of health to all, due to non-availability of resources and many other restraints. Therefore, it is very much essential to have cooperation of the all Countries to achieve this end. Health is not just absence of disease, but a state of overall wellbeing. As WHO ,in 1948 defines Health as a state of complete physical, mental, and social wellbeing and not merely the absence of disease or infirmity¹². In 1986, WHO further clarified that health¹³ is: “A resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities.” Therefore, without Health or Right to Health, it makes no sense to Right to Life. More recently, researchers have defined health as the ability of a body to adapt to new threats and infirmities, as modern science has dramatically increased human awareness of diseases and how they work in last few decades.¹⁴

In the field of International health jurisprudence, the WHO is the first to be mentioned. The various goals, and recommendations affirmed by it are of utmost importance towards the attainment of the right to health, namely,

- The Constitution of it affirms that the enjoyment of health in its fullest form is one of the basic human rights of all the people,
- It provides that the health of all people is at the core of attainment of peace and security, and therefore the cooperative efforts to attain it must be done,
- If the right to health is achieved by one State, then it will be valuable to others too,
- If all the country cannot equally develop the measures for the protection of health, then it will become a threat for the world as a whole,

¹² N.B.SAROJINI & OTHERS, WOMEN’S RIGHT TO HEALTH, (National Human Rights Commission, Faridkot house, Copernicus marg, New Delhi, India. 1st Edition, 2006)

¹³ AVANISH KUMAR, HUMAN RIGHT TO HEALTH, (Satyam Law International, New Delhi. 1st Edition, 2006)

¹⁴ Available at <https://www.medicalnewstoday.com>articles150999.php>

- Health education, knowledge, informed opinion, and active cooperation etc. are of utmost importance in order to achieve the right to health,
- It emphasizes that the respective Governments are responsible for protecting and improving the health of the people by adopting various measures as per the need.
- Art. 2 of it, specify various functions of the Organization as to take all necessary actions so as to achieve these objectives.

Then again the provisions of ICESCR vehemently triggered the recognition of the Right to health in the International platform. These also emphasizes the importance and needs of securing good the health in all aspects, namely,

- Art. 7 of it endeavors that each member should ensure the safety and healthy working conditions to everyone;
- Art. 11(1) of it endeavors that every member should take adequate measures for improving the standard of living of the people and continuous efforts for improving living conditions.
- Art. 12(1) provides for the recognition by all the members of the enjoyment of the physical and mental health to its fullest form.
- Art. 12(2) provides for the various measures to be taken by the States for realization of such right, namely, the reduction of the stillbirth rate and infant mortality rate, healthy development of child, development of the all aspects of the environment, prevention and control of diseases, and adequate medical assistance etc.

Then the recommendations of the “AGENDA 21,” are very much important in the field of recognizing the Right. The important provisions accelerating the enjoyment of the right to health are basically provided in the Chapter 6 of it. A glimpse of the provisions are as follows:

- Para 1 assures that the primary health needs of the world’s population must be given the primary importance so as to achieve the primary goal of sustainable development.
- Para 12 provides for the major goals of the Agenda as to eliminate various diseases, reduce the number of deaths of children etc.

The next important international measure protecting health is the “HABITAT AGENDA”. The provisions under this are, namely,

- Para 36 of it provides that health and excellence of life are at the core of human development and settlement, and therefore good-health through-out the life-span of every individual is of utmost importance.
- Para 128 provides that taking of measures for prevention of detriments of health and diseases is also equally important to that of medical care and all. Therefore, both preventive and curative approach must be taken.

The CAIRO PROGRAM is another wonderful step in this regard, as it provides that:

- Principle 8 of the program, ensures that everyone has the right to the full enjoyment of health, and therefore the States should take all necessary steps to attain the same.

Then there is the OTTAWA Charter. It was adopted in 1986, as a measure for health promotion.

It recognizes the following as promoter of the health of the people:

- It endeavors to secure fullest health prospective, by controlling the various detriments in its path, by the people themselves.
- To achieve this end, the cooperation among the Governments, public, NGO's, and all the parts of the society is must.
- It emphasizes on adopting the healthy public policy, creating supportive environment, strengthening group actions and recognizing health.

The recent development in the International forum in promoting and recognizing Health protection is the "JAKARTA DECLARATION". It is 21st century's development regime in the field of promoting right to health internationally. This declaration aims at promoting health of the people by adopting a new approach, by enhancing the public-private cooperation, more social responsibility, more comprehensive health policies, health education and the adoption of measures suitable to the needs of each and every locality and region.

3. RIGHT TO HEALTH REGIME UNDER THE CONSTITUTION OF INDIA:

The concept Right to health is rooted in the Indian Constitution. The preamble itself carries the very concepts having indirect bearing on the health. The Constitution of India aims at making

India as socialist democratic Nation, which would mean that health as a necessary human resource is a social responsibility, therefore the State should protect and prop up it, so that the welfare of the people could be achieved. These objectives are tried to achieve by giving various fundamental rights and also imposing duties upon the citizens and the State. For instance, Art. 21 provides for the protection of life and personal liberty. Again Art. 24 provides for the protection from exploitation and bonded labour; and thereby protecting the health of the children. Moreover, there are Directive Principles of State Policy in our Constitution, which provides for the protection of health. Art. 39(e) of the Constitution directs the State to protect the health and strength of the workers and of children. Art. 47 provides for the raising of level of nutrition and improvement of public health. It directs the State to endeavor to bring about the prohibition of the consumption of intoxicating drinks and drugs etc. which are injurious to health, except for medical purposes. Art. 41 directs the State to make effective provisions for securing the right to work, education, public assistance etc. in case of unemployment, old age, sickness and disablement. Under Art. 42 there is provision for just and human condition of work and maternity relief. Art.48A directs the State to endeavor to protect and promote pollution free environment for ensuring good health. The seventh schedule of the Constitution mentions several distinct responsibilities for the different layers of govt. towards the question of health, under the three lists. 11th schedule and 12th schedule also contains some other provisions related to health, as subjects Panchayats and Municipalities respectively, namely the drinking water, health and sanitation, family welfare, women and child development, social welfare etc.

3.1 RIGHT TO HEALTH AND ROLE OF THE INDIAN JUDICIARY:

The early 1970's is the turning point in HR litigation with the famous Keshavananda Bharti's case¹⁵ ushering in the period of progressive jurisprudence, followed by the relaxation of the traditional rule of locus standi and promotion of access to justice through PIL. There were tremendous developments occurred towards the 1980's by the establishment of consumer courts and the growth of PIL, which encourages litigations. Now, it has become easier and speedier to sue doctors for medical negligence. The Indian judiciary has made commendable

¹⁵ Keshavananda Bharti v. State of Kerala, AIR 1973 SC

work towards the attainment of the right to health and health care as one of the fundamental rights.

In the case of *Municipal Council, Ratlam*,¹⁶ the municipal corporation was prosecuted for not clearing up the garbage. The plea of the corporation here was that they didn't have the money. But the SC rejected such contentions and held that it is the paramount duty of the State to take all necessary steps for the improvement of public health, and therefore the municipal council was also duty bound to take necessary steps in this regard.

In the case of *CESC Ltd. v. Subash Chandra Bose*,¹⁷ it has been declared by the SC that the right to health is a fundamental right. The court clearly observed that the term health means not merely the absence of diseases, but a complete set of physical, mental, spiritual, and social wellbeing. Here it has been further held that the maintenance of health is an imperative constitutional goal, which can be realized only by the interaction of various social and economic factors.

Again adequate health care is also equally important for attaining the right to health. In a number of its decision the judiciary has interpreted the right to health from this perspective. In *Mahendra Pratap Singh v. State of Orissa*,¹⁸ the Court observed that the great achievements and triumph in life are possible only if one has healthy life at first. Therefore the attainment of right to health is must to have all other rights.

In *Consumer Education and Research Centre v. UOI*¹⁹, the Court explicitly held that the right to health is an integral part of right to life under Art. 21. In this case the right to health care or medical care has been brought under the ambit of right to life. Here State is under obligation to ensure the creation of conditions necessary for good health including basic curative and preventive health services and assurance of healthy living and working conditions. However, till date most significant right to health decision has been the case of *Paschim Banga Khet Mazdoor Samiti and Others v. State of West Bengal and Another*²⁰. In this case the Court observed that right to life includes the right to health and emergency Medical care is part of it.

¹⁶ *Municipal Council Ratlam v. Vardhichand & Ors.*, 1980 CrL LJ 1075

¹⁷ AIR 1992 SC 573,585

¹⁸ AIR 1997 Ori 37

¹⁹ AIR 1995 SC 636

²⁰ (1996) 4 SCC 37

In the case of *Vincent v. UOI*²¹, it has been held that the right to improvement of public health is also one of the fundamental right of the people.

In the case of *Kirloskar Brothers Ltd. v. Employees' State Insurance Corpn*²², the Apex Court held that right to health is a fundamental right and it is available against both the State and its instrumentalities.

In *Occupational Health and Safety Association v. UOI*²³, the SC strictly observed that, the right to health is a fundamental right, and therefore, the State has an obligation to provide at least minimum conditions for its attainment.

In the case of *Murli S. Deora v. UOI*,²⁴ the SC has ordered for banning of smoking in public places, so as to ensure the protection of right to health.

Thus, the Judiciary through its plethora of judgments has recognized the right to health as one of the fundamental right, as inherent under Art. 21.

4. RIGHT TO HEALTH AND THE ASSAM HEALTH ACT, 2013

Health is a subject of the State list under the Constitution of India. Therefore, the respective States are under an obligation to ensure the protection of health of the people of their respective States. The world health declaration, adopted in May 1998, provided the framework for the development of future policy for health for all in the 21st century. The Government of India has adopted a vast number of policies for the improvement of health of the people of India. But, it is unfortunate that despite of having such a vast number of statutes and policies, India, and specially Assam, is at the very poor level of development both in regards of physical as well as economical. Particularly, Assam is towards the bottom of the Health Index Number, (according the estimation of Health Index No. of NITI AAYOG, 2017). Assam is currently witnessing rapid ecological changes, the soil has overcrowded on account of human migration ; urbanization, and thereby causing environmental degradation. The Rehabilitation and Resettlement policies of Government of India, also have impact on the right to health of the people of Assam. Particularly, massive occurrence of flood causes a lot of sufferings in these

²¹ (1987) 2 SCC 165

²² (1996)2SCC 682

²³ AIR 1997 SC 1225

²⁴ AIR 2002 SC40

regard. Recently, the National AIDS Control Organization (NACO) said , “India had an estimated 21.40 lakhs people living with HIV in 2017 , with slightly more than two-fifths being women”. Basically, in Assam many people die every year on account of cancer. The North-East region, and specially Assam has turned into the stock-house of oral Cancer, and reasons are many. The oral cancer is easily detectable than others, as said by the physicians and researchers. But as per a survey conducted in 2011, the people in Assam come to know of it at the last stage. It clearly reveals that the people in Assam are still not properly conscious of the disease called cancer. The overall cancer mortality rates have increased since 2007, particularly in Assam.²⁵ In the field of Cancer, the most essential thing is the awareness, which the people lack.

As Assam is mainly an agricultural land, where most of the people’s livelihood depends on the agriculture, which has been considered as one of the backward part of India since antiquity, where poverty; illiteracy; superstitions ; etc. are at the peak ,where people are dying due to endemic diseases ; lack of proper hygiene , where lack of awareness and ignorance of people is at the heights, there it is a urgent need to improve the health of the people and to prevent and protect from such an emerging disease, that is cancer.

In this regard, Assam had taken astonishing step by enacting the “Assam Health(Prohibition of, manufacturing, Advertisement, trade, storage, distribution, sale and consumption of zarda, gutkha, pan masala etc. containing tobacco and/or nicotine) Act”, 2013. The main aim behind the passing of such a legislation was to curb the menace of cancer to a larger extent. The Act aimed at improving the public health, by preventing the incidence of cancer. Again it also aimed at lowering the addictions among the people of the State. Under Sec. 4 of this Act, manufacture, advertisement, storage, sale, consumption of smokeless and chweing tobacco products containing nicotine etc. were strictly prohibited. Under Sec. 5 it was made non-bailable offence to violate the provisions of Sec. 4. Under Sec. 6 the quantum of punishment had been provided for those who would commit such offence for a maximum of 7 years imprisonment and fine upto 5 lakhs rupees. Under Sec. 7, power to entre, investigate in any place and grasp such prohibited products, if found, was given to the authority in this behalf under this Act. Regarding the procedure to be followed under this Act, for investigation,

²⁵ Jagannath Dev Sharma, *Cancer Statistics in Kamrup Urban District: Incidence and Mortality in 2007-2011*, 53,4, INDIAN JOURNAL OF CANCER, , p. 600-606, 2016

amputation etc., the ordinary criminal law procedure was instructed. Under this Sec. it was also provided that the offender can be punished, even after the order of confiscation by the Court. For the cognizance and the trial procedure of the offences under this Act, it was provided that the provisions of Code of Criminal Procedure regarding trial would be applicable. Under Sec. 10 of the Act, there was provision for the awareness program too. It provided for the creation of a fund by the Government for the purpose of awareness against the use of tobacco among the public. It was also provided under the same Sec. that the amount of fine awarded by the Court and any amount received by it by amputation etc. under this Act, should be deposited in that fund. So by analyzing all the provisions, it can be inferred that, it started a very stringent era for improving the health of the people by curbing the menace of the oral cancer to a greater extent, which no State has ever achieved.

The law came into effect in February 2014. It was a big initiative by the State of Assam, towards the prevention of oral cancer. The VHAA has appreciated such an initiative of the State and requested for proper implementation of the Act. But, it is very unfortunate that, the Gauhati HC has quashed the Act of 2013, by saying that it is beyond the legislative power of the State Legislature. In the case of *Dharampal Satyapal Ltd. and Ors. v. St. of Assam*²⁶, the HC has struck down the said Act, as unconstitutional and void. The petitioners raised the petition on the grounds that, Assam Legislature lacked competence to enact such law, as the Parliament had already enacted the COTPA, to regulate the use of tobacco. Again the Tobacco industry is under the union list, and therefore as per Art. 246(1), State Legislature is not competent to pass such law. The HC considering these contentions has struck down such a health protective legislation on 27th Oct. 2017; and till date no such measure has been initiated to curb the menace of oral cancer, which is basically caused by the chewing tobaccos.

5. SUGGESTIONS:

Health is inherent in the attainment of all other rights. But, to attain a goal in such a diversified country like India, where a large section of people are below the poverty line; a massive exploitation of poor class by the rich is prevalence; where the Maternal Mortality rate is very high and keeps on increasing; where increase of infants mortality rate is spontaneous due to poor nutrition; nutritional anemia is accelerating day by day; poor sanitation or no sanitation

²⁶ W.P.(C) No. 1824/2014

etc. are massive; and most importantly ignorance is at peak, there the menace of oral cancer is witnessing a unprecedented growth day by day. So a very strong and express provision of law is very much essential. In India, and particularly in Assam the mortality rate due to cancer is very high. Taking into account of all these facts, the State legislature of Assam had enacted the Assam Health Act, 2013. Again, As per the recommendations of the International instruments too, there is equal need for taking preventive measures along with the protective ones for attaining the Right to health. The aforesaid Act was a very good preventive legislation. There is a famous saying that prevention is better than cure. Again, this Act also contained provisions for spreading health awareness amongst the people. So from all the sides the Act was a very outstanding legislation for preserving right to health by saving people from the menace of Oral cancer and Addictions towards tobacco. So this Act had an equal impact on the social and mental health too. Therefore, it is suggested that measures should be taken to implement the Right to Health in its true sense in the State, so that in future no such a protective legislation can be struck down, only on the interest of trade or in the name central Supremacy or inconsistency. Therefore, stringent steps should be taken so as to ensure the right to health as a fundamental right. For this purpose, if requires, any constitutional amendment should be made, to incorporate, the right to health as a fundamental right in a separate Art., so that every possible measures can be taken for the protection of right to health.

5.1 CONCLUSION

In a democratic country, however, individuals have an inherent right to health, as an individual's health has direct link to the concept of Human Right. Without a well health, the other rights too, can not be achieved. Moreover, Right to health is a concern for universal justice in today's world by one way or another. International Instruments are many to guarantee the Right to health. Rather, the truth is that the Right to health has its roots in the International Human Rights laws. In this regard , there is the most important facet is the "awareness"; and the awareness flows from knowledge, education, sincerity, sensitivity etc.; which are vehemently dependent upon the so called _ "Health Education". It is, therefore , important to know that what the health education is, who provides the health education and so on. In short, health education is the fact of spreading the knowledge of behaviour, discipline, the way of

thought by changing attitudes and withering away of all misconceptions etc. Health education underlines the philosophy of improving the status of life, lifestyle, behavioral strategies etc., which in turn emphasizes the enhancement of quality of life. Health education begins with the interest of people in improving their standard of living, maintenance of diet, development of inquisitiveness towards their rights and duties, initiatives towards democratic learning process, inclination of behavioral approaches towards values and goals etc. Health and Development is so interlinked that, one cannot be achieved in derogation of the other. In a country like India, where the ultimate goal is to become a welfare State by securing justice: social, economic and political, the Right to Health is the key for such attainment, as a sound health only can participate in the social activities, can take sound policies, can fulfill all obligations as well as responsibilities in its fullest form, and this only helps the society to step forward towards development in its true sense. Besides the tremendous advancement of science and technology, why the people of India are lagging behind specially in the Health Index, is a serious matter of concern. On paper, India has an excellent provision for the attainment of Right to Health and Health Care. But in reality, it is yet to be done; it is the hurdle which is to be jumped over...

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