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**BIDDING FOR A FUNDAMENTAL RIGHT TO HEALTH:
COMPARING THE BEST PRACTICES AROUND THE WORLD**

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ABSTRACT

This paper would be trying to talk about the right to health as an issue and would be discussing every possible outcome and what recourse can be taken to improve the healthcare system in India while focusing on the issue of universal healthcare. In the later part, it discusses various steps taken up by many countries around the world to make the right to health an important focal area in their constitution and day-to-day work. By the end, it discusses the advantages of the right to health, if we really need the right to health as a fundamental right, suggestions, and concludes the topic with some latest developments and the way ahead.

The motive of the author behind writing this issue is to shed some light on the lesser-focused issue of the right to health and why it holds paramount importance in the life of any individual. At the end of this paper, the authors tend to incite a thought process regarding this never-ending debate by igniting the fire of varied thoughts in the reader's head.

Keywords: Constitution, India, Right to Health, Healthcare, Fundamental right

SCOPE OF PROBLEM

The issue of the right to health as a separate fundamental right came into the picture when private member Manoj Kumar Jha presented a private member bill in the parliament. The right to health has been mentioned in some places in the constitution and even in some cases laws, but it is not in effect yet.

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The paper here wishes to discuss the problem, and with the example of many nations, it defines why the right to health should be a fundamental right. If the problem of the right to health is being sorted out, it will factor out many other impounding problems and will hugely impact the productivity of our nation in a very positive manner. The paper here focuses on shedding light on the issue of making the right to health a fundamental right and what benefits it would do to the masses at large.

INTRODUCTION “What is Health?”

The word health refers to a state of complete emotional and physical well-being. The World Health Organization (WHO) defines it as *“Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.”*²

WHO refined it in 1986, *“A resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources and physical capacities.”*³

This indicates that health is a resource to support a person's role in larger society rather than being a goal in and of itself. Health was described by experts publishing in The Lancet in 2009 as the body's capacity to adjust to new dangers and ailments.

The definition is based on the idea that modern science has made substantial advances in understanding diseases over the past few decades by learning how they function, coming up with new treatments to slow them down, and admitting that pathology may never completely disappear.

WHAT IS UNIVERSAL HEALTH CARE?

According to World Health Organization, *“Universal health coverage means that all people have access to the health services they need, when and where they need them, without financial hardship. It includes the full range of essential health services, from health promotion to prevention, treatment, rehabilitation, and palliative care.”*⁴

² Constitution of the World Health Organization, WORLD HEALTH ORGANIZATION, <https://www.who.int/about/governance/constitution>

³D. Nutbeam, *Health promotion glossary*, 13 Health Promotion International 349–364 (1998).

⁴Universal Health Coverage, World Health Organization, <https://www.who.int/health-topics/universal-health-coverage>
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World Bank defines it as, “*Universal health coverage (UHC) is about ensuring that people have access to the health care they need without suffering financial hardship. It is key to achieving the World Bank Group’s (WBG) twin goals of ending extreme poverty and increasing equity and shared prosperity. As such, it is the driving force behind all of the WBG’s health and nutrition investments.*”⁵

WHAT IS THE RIGHT TO HEALTH?

According to World Medical Association, “*The right to health was first articulated in the WHO Constitution (1946) which states that: “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being”.*⁶

“*The 1948 Universal Declaration of Human Rights mentioned health as part of the right to an adequate standard of living (article 25). It was again recognized as a human right in 1966 in the International Covenant on Economic, Social, and Cultural Rights*”⁷

World Health Organization on ‘2017 Human rights day’ defined the Right to health as, “*The right to health for all people means that everyone should have access to the health services they need, when and where they need them, without suffering financial hardship. No one should get sick and die just because they are poor, or because they cannot access the health services they need.*”⁸

Our paper would majorly be focusing on why this right to health should be a fundamental right under the Indian constitution and why is it so important for us to bring this change, which in turn can make quality healthcare available to all regardless of their socioeconomic standing.

CHALLENGES TO THE INDIAN HEALTH-CARE SYSTEM

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⁵Universal Health Coverage, World Bank, <https://www.worldbank.org/en/topic/universalhealthcoverage>

⁶WMA - The World Medical Association-right to health, The World Medical Association, <https://www.wma.net/what-we-do/human-rights/right-to-health/#:~:text=It%20was%20again%20recognised%20as,of%20physical%20and%20mental%20health.>

⁷Health Systems and the right to health: An assessment of 194 countries, 35 Child: Care, Health and Development 431–432 (2009).

⁸Health is a fundamental human right, World Health Organization, <https://cutt.ly/J1Lj7Wr>

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Numerous problems haunt the Indian Healthcare system, we need to understand this aspect too, some of such problems are discussed as follows.

- **Lack of Primary Healthcare Services.:** The present public primary health care system in the nation is quite limited in its scope, Only services linked to pregnancy care, restricted childcare, and specific services related to national health programs are offered, even in locations where there is a well- functioning public primary healthcare centre.
- **Inadequacy of government funds:** In India, public expenditure on health has historically been modest (around 1.3% of GDP). India's whole out-of-pocket spending amounts to about 2.3%of GDP, according to the OECD.
- **Sub-optimal Public Health System:**The public health system in India works at a very sub-optimal level where it is not well equipped to deal with many diseases which haunt the Indian medical landscape.
- **Lack of enough doctors and medical staff.-** For many years, India has struggled with a lack of health professionals. While the WHO recommended a ratio of one doctor for every 1,000 people, the Ministry of Health and Family Welfare informed the Parliament in 2019 that the country only had one doctor for every 1,457 people. In India, there were 1.7 nurses for every 1,000 people, compared to the three nurses needed for every 1,000 people.
- **Lack of available infrastructure. -** India had one bed for every 2,239 people, which is much less than the three beds per 1,000 people suggested by the WHO. - According to rural health statistics, the number of primary health centres (PHCs) and Sub Centres (SC) operating without doctors would rise to 21.83 per cent in 2021 from 17.49 per cent in 2005. In 2005, there were fewer than half of the Community Health Centres (CHCs) without a specialized physician.

The above were some of the problems which daunt the Indian Health care system and which act as a challenge to the flourishing of the Health care system and is acting as a barrier to making health a separate fundamental right.

CONSTITUTIONAL & JUDICIAL STANDPOINT ON HEALTH

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The fundamental right to health is not expressly guaranteed by the Indian Constitution. However, the Constitution makes numerous allusions to public health and the state's function in providing for individuals' medical needs.

The right to health is supported by the Directive Principles of State Policy found in Part IV of the Indian Constitution. In accordance with Article 39(E)⁹, the State is required to protect the health of its employees. In accordance with Articles 42,¹⁰ and 47¹¹, the State is also required to ensure equitable and humane working conditions and maternity leave. Additionally, under Article 243g of the Constitution, the Panchayats and Municipalities are given the authority to improve public health in addition to the State (read with 11th Schedule, Entry 23).

In *Bandhua Mukti Morcha v. Union of India & Ors*¹², and *Consumer Education and Resource Centre v. Union of India*¹³ the Supreme Court of India construed the right to health under Article 21, which ensures the right to life, despite the Constitution's lack of an explicit acknowledgement of the right to health or healthcare. The Supreme Court reiterated in *State of Punjab & Ors v. Mohinder Singh Chawla*¹⁴ that the right to health is essential to the right to life and that the government has a constitutional duty to care for that right. The court continued to support the State's obligation to sustain health services in the *State of Punjab & Ors v. Ram Lubhaya Bagga*.¹⁵

The Supreme Court ruled in *State of Punjab and Others v. Mohinder Singh Chawala*¹⁶, 1997, that the "right to health" is an essential component of the "right to life" and that the government is required under the constitution to protect the nation's right to health.

The Apex Court of India ruled in *Parmananda Katara v. Union of India*¹⁷, 1989, that all medical practitioners, public or private, have a duty to provide immediate medical care in cases of an accident to maintain human life without having to wait for the Police authorities' completion of the necessary paperwork.

⁹India Const. art. 39

¹⁰India Const. art. 42

¹¹India Const. art. 47

¹²*Bandhua Mukti Morcha v. Union of India & Ors.*, (1984) 3 SCC 161.

¹³*Consumer Education and Resource Centre v. Union of India.*, 1995 SCC (3) 42.

¹⁴ *State of Punjab & Ors v. Mohinder Singh Chawla.*, AIR1997SC 1225.

¹⁵*State of Punjab & Ors v. Ram Lubhaya Bagga.*, (1998) 4 SCC 117.

¹⁶ *Id.* at 6.

¹⁷*Parmananda Katara v. Union of India.*, 1989 AIR 2039.

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In *Common Cause v. Union of India and Ors*¹⁸ in 1996, the Supreme Court held that it is crucial to guarantee that the blood accessible in blood banks must be healthy and free from infection.

The Supreme Court in the *State of Karnataka v. Manjanna*¹⁹, 2001, held that government hospital doctors frequently refuse to evaluate and treat rape victims until the police refer the case, which causes an unusually long wait and the destruction of evidence.

Thus, it is clear that by elevating the right to health to the rank of a Fundamental Right, the Hon. Supreme Court has played a very constructive and active role in ensuring that it is available to the general public.

The 15th Finance Commission's High-Level Group on the Health Sector recommended in September 2019 that the right to health be recognised as a fundamental right. Additionally, it proposed moving the topic of health from the State List to the Concurrent List. If adopted, the suggestion to designate the right to health as a basic right will increase people's access. The constitutional question of whether the centralization of public health will be beneficial in the context of Indian cooperative federalism will be raised by the latter recommendation to move health to the Concurrent List. Public health and sanitation, hospitals, and dispensaries are currently covered under the State List of the 7th Schedule of the Indian Constitution, giving state governments the legal authority to create, enact, and enforce public health rules.

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The Directive Principles of State Policy are a strong call from the Constitution to the State to guarantee a reasonable level of living. India is obligated to improve and offer sufficient public services and a basic standard of universal health care as a state party to international law treaties and conventions to which it is a party. India's constitutional protections, legal precedents, and international commitments provide a strong foundation for a fundamental right to health.

¹⁸Common Cause v. Union of India and Ors.,1996 SCC (4) 33.

¹⁹State of Karnataka v. Manjanna., 2000 SC (CrI.) 1031.

²⁰ Dr Randeep Guleria,A Report of High-Level Group on the Health Sector (2019)

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For India to have access to adequate healthcare, a constitutional amendment should be introduced along the lines of the 93rd Amendment to the Constitution, which gave the right to education constitutional protection.

COMPARATIVE ANALYSIS

Here, in the section on the comparative analysis, we will be discussing various countries (and unions) that have the right to health in their constitution and statutes, which might act as a foundation to understand why the presence of the right to health is an issue of paramount importance.

Japan

All persons shall have the right to maintain the minimum standards of wholesome and cultured living, according to Article 25 of the Japanese Constitution.

Japan spent US\$361.1 billion, or US\$2,842 per person, on healthcare in 2021. It amounted to 11.2% of the gross domestic product (whereas India spent less than 3%). The OECD data also reveals that Japan spent 10.9% of its GDP on healthcare overall, which is 2% more than the OECD average. Regardless of the employment position, place of residence, or age, all Japanese nationals are required to enrol in the health insurance program.

Italy

The Republic of Italy defines health as a fundamental human right and guarantees that those who require it will receive free medical care out of a sense of shared concern. No one may be compelled to receive a specific medical treatment unless it is specifically permitted by law.

According to Section 32 of the Italian Constitution, everyone has the right to health, which is also in everyone's best interests as a society. The non-discriminatory collection of tasks, undertakings, and services intended to advance, safeguard, and restore the physical and mental health of the entire society is defined by the national health service law.

It is financed by corporate and value-added tax revenue that the federal government gathers and gives to the regional governments, which are in response to managing healthcare, for distribution to their citizens. Prescription medications, home care, hospice care, specialized

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maternity care, and speciality care are additional statutory advantages. Patients are required to pay for some outpatient drugs, speciality visits, and therapies. Cost-sharing is not required for those with HIV, pregnant women, those with other chronic conditions, children under the age of 18, or the elderly living in lower-income houses. Private health insurance has a very limited impact on the Italian healthcare system because the government handles practically everything.

European Union

Article 11 of the European Social Charter addresses the right to health. The Parties concur to adopt the following activities, either alone or in collaboration with public or private organizations, to enable the effective exercise of the right to health protection:

1. to "remove, as far as is reasonably practicable, the cause of disease;"
2. "provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;" and
3. "Prevent, as far as reasonably practicable, epidemic, endemic, and other diseases as well as accidents."

"Everyone has the right to the highest attainable standard of physical and mental health," according to Article 12 of the International Covenant on Economic, Social, and Cultural Rights

four actions the state must take to foster circumstances that allow individuals to live healthy lives. These focus on, among other things enhancing environmental cleanliness, preventive healthcare, and the averting of occupational disorders."

For the States Parties to the present Covenant to fully fulfil this right, they must adopt the following actions: "The decrease of the stillbirth rate, infant mortality, and for the healthy development of the child;

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- the eradication of endemic and other illnesses, as well as their prevention, treatment, and control;
- The establishment of circumstances that would guarantee all medical services and attention in the event of illness.

Because of this, Article 12 of the ICESCR acknowledges that a wide range of socioeconomic factors, such as food, drinking water, shelter, safe and healthy working conditions, and a healthy environment, are essential factors in determining health.

Finland

According to the Finnish Constitution, the government is obligated to make sure that everyone has access to enough social, medical, and health services. The municipal governments are in charge of organizing and funding healthcare. Since Finland dedicates 9.2% of its GDP—more than the global average—to health, it offers universal healthcare to all of its citizens as well as to foreign employees.

South Korea

Articles 35 and 36 of the South Korean Constitution from 1948 protect the essential rights to healthcare. "The State should defend the health of all people," the Constitution's Article 36(3) states. Due to the constitutional right to health, South Korea has made a sincere effort to uphold the obligation to provide all of its residents with the greatest possible level of physical and mental health, achieving results that serve as a model for other low- to middle-income, industrializing governments.

In 2015, the Organization for Economic Cooperation and Development (OECD) ranked South Korea as one of the top countries for healthcare access, with 95–100% of its population having access.

South Africa

Section 27(1)(a) of its constitution states that everyone has the right to access health care, including reproductive health care. Additionally, no one may be denied access to emergency medical treatment in accordance with clause 27(3). According to section 28(1)(c), children

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are entitled to "basic health care services," and according to section 35(2)(e), prisoners and convicts are entitled to "adequate medical treatment" at the state's expense.

No one may be refused access to emergency medical treatment or healthcare services, including reproductive healthcare services, in accordance with Section 27 of the Constitution. Women who are pregnant or breastfeeding have the right to medical treatment, as do pregnant women who are eligible for abortion services under the Choice of Termination of Pregnancy Act 92 of 1996. The rights of all children to get essential healthcare are strengthened by the particular protections for children's rights provided in Section 28 of the Constitution.

In the above-given examples, it was clearly visible that these nations are giving special attention to the right to health which clearly is impacting them positively and they are able to grow in a more efficient manner.

WHY DO WE NEED HEALTH AS A FUNDAMENTAL RIGHT?

“Access to health for humans is a right, not a luxury, under natural laws and natural rights. Every citizen should have access to high-quality medical services good health benefits everyone: the individual, the community, and the country as a whole. Human productivity is affected by health. The healthier a person is, the more capable he is. Improving health encourages the acquisition of information, the growth of learning abilities, and the development of creativity.”²¹

By declaring health as a fundamental right the entire healthcare system will be strengthened. transparency, inclusion, and accountability will be ensured along with the empowerment of the healthcare system, doctors, physicians, and patients.

Furthermore, it will pave the path for specific special laws relating to healthcare which would foster enormous confidence and positivity among residents. As it is the state's responsibility to ensure the safety and security of its citizens, it should be its responsibility to safeguard its population against disease-causing mortalities and illness. The citizens would be empowered to hold the state liable for fulfilling its obligation toward its citizens.

²¹Verulava, T., 2021. Access To Healthcare as A Fundamental Right or Privilege?. *Siriraj Medical Journal*,73(10), pp.721- 726.

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The Right to Education was also a part of the right to life before the eighty-sixth constitutional amendment made it a fundamental right in itself which resulted in an enrolment rate of over 90% in primary schools a number that seemed impossible a few years before and made it compulsory

for the state to provide free and compulsory education although there are a few questions on the quality of education.

Making health a fundamental right will make the government liable and responsible for providing citizens with good healthcare. "It is past time for India to make the right to health a fundamental right in India. Strong health legislation will aid in the development of social resilience in the face of future pandemics and emergencies affecting public health.

Human rights commitments must not be neglected. It is therefore vital that the right to health be applied in accordance with the principles of transparency, proportionality, and solidarity. The COVID-19 experience has also proven the importance of a decentralized polycentric reaction; as a result, India's cooperative federalism must be strengthened."²²

ADVANTAGES OF HAVING HEALTH AS A FUNDAMENTAL RIGHT?

The following points would shed some light on the advantages which can be brought in if the Right to Health is included as a separate fundamental right through a constitutional amendment.

Advantages of including the Right to Health

1. The inclusion of the "Right to Health" in the list of Fundamental Rights by the constitutional amendment will give all Indians access to medical services without hindrance. This will give underprivileged and underrepresented groups the society wants minorities, women, children, Dalits, and other groups to have access to healthcare facilities.
2. This will raise public awareness of the right to health, which is one of the Fundamental Rights included in Part III of the Indian Constitution.

²²Sirohi N, 'Declaring The Right To Health A Fundamental Right' [2022] Observation research foundation
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3. People will be less likely to remain silent in the event of a violation of their right to health as a result of increased public knowledge, and in the event that they do, they will be informed enough to file a writ petition in accordance with Articles 32 or 226 of the Indian Constitution.
4. Making health a Fundamental Right is urgently required in order to achieve India's commitment to the Millennium Development Goals (MDGs), notably to "reduce infant mortality (Goal 4, MDG), enhance maternal health (Goal 5, MDG), and battle HIV/AIDS, Malaria, and other illnesses (Goal 6, MDG)."
5. This in turn, will dwindle the expenditure burden on health by the poorer section of society and would make health facilities affordable, available and accessible to every section of the society irrespective of their socioeconomic status.
6. The government will be held more accountable for safeguarding the public's health, and it will be required under the Constitution to provide ever-better medical facilities. People won't have issues like a lack of beds, life-saving medications, ventilators, etc., as a result, and numerous diseases, like the current pandemic known as COVID-19, will be better prevented, controlled, and managed. Which in turn will start acting more responsibly and will increase the efficiency of the Indian Healthcare system.
7. The government will need to employ an adequate number of medical experts, including physicians and nurses, in order to provide health services to the people of the country as a Fundamental Right. By doing this, the health industry will become more effective and will also increase the employment scenario in the sub-continent.

SUGGESTIONS

Keeping all these mentioned factors in mind, we have tried to make some suggestions regarding the issue in discussion.

1. It would be more beneficial if it were included in a constitutional amendment, similar to how the "right to education" was added to Article 21A by the Eighty-Sixth Constitution Amendment Act of 2002.
2. We can shift the topic of health from the state list given in the 7th schedule, to the concurrent list, because if we want to make it a Pan-India concept, we need to bring in the role of the centre into the picture.

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3. We can take the example of other nations as a model of working, and we can modify it to fit the Indian environment, keeping in mind our own set of problems.
4. We can take help from foreign health professionals we can, collaborate with other nations on a governmental level, and can bring in technology/methodology for our use.
5. *“In addition to statutory recognition, the right to health in India will need to be implemented within the framework of principles of solidarity, proportionality, and transparency that are central to international human rights and health law,” as proposed by Professor of Health Law Katharina Ó Cathoir.*

CONCLUSION AND LATEST DEVELOPMENT

Unquestionably, everyone has the basic and inalienable right to health. Following the COVID-19 epidemic, the right to health has come to take on the status of being of the utmost significance. Despite all government attempts, there are numerous instances where people's rights to health care are violated. The people themselves are frequently negligent regarding their right to health and the possible defences against its infringement. Despite the Hon'ble Supreme Court's recognition of the "right to health" as a basic fundamental right.

Thus, including the "Right to Health" in a constitutional amendment and defining the conditions under which the State shall provide this right will undoubtedly increase public awareness of their rights and the writ petition remedy available under Articles 32 or 226 of the Indian Constitution in the event of a violation. Additionally, this would increase the commitment of the government apparatus to safeguarding this fundamental and crucial human right. It is an irrefutable reality that only citizens who are in good bodily and mental health are able to exercise their other rights effectively. Therefore, for the development and prosperity of the country, it is essential to take all necessary measures to guarantee the "right to health" of the populace.

As we saw from the data presented from across the globe, the right to health plays a major role in the growth of that nation, and we can also implement it on similar lines. And on the lines of the latest development, we can see that there was a private member bill presented in the parliament by RJD member Manoj Kumar Jha, and there were numerous supreme court judgments focusing on bringing the right to health under the ambit of already present DPSPs

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and Fundamental rights, and with regards to the bill presented in the parliament, the deliberation is still going on.

Other than that, our government started schemes like Aayushman Bharat, Aarogya Setu, and NHS to bring primary health care within the reach of the populace; one way or another government trying to bring health an undeniable part of our lives and pushing factors like socioeconomic disparity out of the picture.

At last, India should formally recognise the fundamental nature of the right to health. A society that is more resilient to pandemics and other public health emergencies will benefit from strong health legislation. Emergency situations cannot be handled at the expense of human rights commitments. So it is crucial that the principles of transparency, proportionality, and solidarity be used to execute the right to health. The COVID-19 experience has also shown how crucial a decentralized/polycentric reaction is; as a result, India's cooperative federalism needs to be enhanced.

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