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“Dharma is to protect the Needy”

Research Article on

RIGHT TO OXYGEN AS A FUNDAMENTAL RIGHT

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ABSTRACT

It is hard to imagine how much harder it would have been for the people who died in the 9/11 attacks if they had failed to receive oxygen and were not revived. Some have already coined the phrase "post-Covid-19." And why wouldn't they? Even if the worst is yet to come for most of us, especially those in places of the world where health care systems have been decimated by years of organized neglect.

There were no hospital beds, no respirators, no mass testing, no masks or disinfectants, and no plans in place to confine people who were affected. Article 21 of the Constitution of India gets violated if people die due to lack of oxygen. Since oxygen is such an important part of the treatment, Covid requests that it be readily available. Meanwhile, there is a nationwide outcry that there is a shortage of oxygen in the country.

It is not just the right of every member of humanity, but of all life, from a universal standpoint. As a result, it must be seen as a fundamental right to exist. As a result, it can't be taken away, eluding all sovereignty and symbolizing the sovereign concept par excellence.

The following paper talks and emphasizes on the need to make oxygen a fundamental right, the prevalent case laws which highlight the importance of life and right to healthcare, prevalent laws, followed by suggestions and conclusions for the same.

For humans, oxygen is far more important than anything else. It is the basic survival kit. It is the ruling government's moral responsibility to ensure that citizens have access to oxygen by making it a fundamental right.

INTRODUCTION

The country is currently going through an unprecedented crisis. It is extremely painful to watch our people die in line for oxygen. This problem has been dubbed a "national emergency" by the Supreme Court. Is it possible to declare an emergency in such a situation where people are dying as a result of a lack of oxygen?¹

¹ Legal Services India, Right to Oxygen as fundamental right under article 21, (6th June 2021, 7:00 pm)
<http://www.legalserviceindia.com/legal/article-5776-right-to-oxygen-as-a-fundamental-right-under-article-21.html>

Two cases occurred before the COVID-19 outbreak, highlighting the flaws in India's healthcare system. During an encephalitis outbreak in Gorakhpur, Uttar Pradesh, in 2017, nearly 60 children perished due to a lack of oxygen cylinders. A similar occurrence occurred in Muzaffarpur in 2019.²

Part IV of the Indian Constitution (Directive Principles of State Policy) mandates healthcare, yet it is unenforceable. The Indian Supreme Court has decided that the right to healthcare is a part of the Fundamental Rights in several cases, including Rakesh Chandra Narayan v. State of Bihar (1988) and Paschim Banga Khet Mazdoorsamity v. State of West Bengal & Anr (1996).

As a result, healthcare has become a partially justiciable right within the confines of Supreme Court rulings. Despite this, the right has yet to be codified in law. In 2019, the Indian National Congress party suggested enacting health-care-rights legislation, but nothing came of it.

NEED TO MAKE RIGHT TO OXYGEN AS A FUNDAMENTAL RIGHT

A few years back, we would have never thought even in our wildest dreams, that lifesaving oxygen which has been given to us by nature as a gift could become precious and rare to find for all of us.

This pandemic notoriously called Covid-19 has snatched even the basic right to breathe. People are running pillar to post in search of oxygen and ultimately their efforts are proving a wild goose chase.

What actually Fundamental right is and who is responsible for providing this right to the citizens of a nation? Is it the State government or the Government ruling at the center? Fundamental rights are the basic and minimum requirements which should be provided by a nation to its people. The Constitution of India under Article 21 has awarded the Right to Life to the Indian citizens but what will happen when people will lose their lives itself. In this situation, fundamental rights have no meaning.

²East Asia Forum, Establishing a legal right to healthcare (7th June 2021, 7:00 pm)
<https://www.eastasiaforum.org/2020/06/26/establishing-a-legal-right-to-healthcare-in-india/>

Many cases can be cited where Right to Education, Right to Electricity and Right to pollution free water has been considered as part of Article 21, then why the Right to Oxygen should not be there in the list.

The Supreme Court in *Mohini Jain v. State of Karnataka* (AIR 1992 SC 1858) ruled the Right to Education as a Fundamental right. Similarly, in the case of *Vellore Citizens Welfare Forum v. Union of India* (AIR 1996 SC 2715),³ The Supreme Court ordered that the tanneries should be closed with immediate effect as they were discharging toxic chemicals in the nearby river which was hazardous and dangerous for the health of the citizens.

These above-mentioned cases prove the importance of life and Right to Life. The need of oxygen is much more important than anything for human beings. It is the moral responsibility of the ruling government to fulfill this need of oxygen for the citizens by making it a Fundamental right.

Fundamental rights of a citizen enable him/her to survive and the government is held responsible to provide the minimum basic requirements of the people but unfortunately this national emergency like situation proved that the government is least bothered about this crisis.

We recently have seen how children and young people died due to the huge scarcity of this life saving gas called oxygen. Keeping aside the elderly people, the youth who are the future of India were grasping for their survival.

In this 21st century, where India is claiming itself as one of the superpowers and as one of the biggest economies, it has failed to fulfill the basic rights of the citizens.

Needless to say, hundreds and thousands of families lost their earning members due to the unavailability of oxygen. Now, the question arises what our government is looking for? Why the Right to Oxygen is not yet included in Fundamental rights.

OTHER PREVALENT LAWS

The Indian Supreme Court has taken suo-motu notice of the poor health conditions at the National Capital's state-run hospitals on June 11, 2020. (Delhi). In two lengthy rulings dated June 12th and June 19th, the Supreme Court declared that the right to health is a basic right guaranteed by the Indian constitution. The Court did take an interventionist role, but it was

limited to issuing directions based on commitments made by the State in affidavits presented to the Court.

The conditional rights model is one of the rights-based approaches that India is implementing. In this case, a right depends on the existence of a "basic social minimum" in the form of a legislative or executive policy or legislation. The law will be justiciable through legislation, which would mean that the legislation would provide the criteria for determining whether or not a person has the right to medical care.

Citizens could then go to the courts and have their right to healthcare enforced based on these parameters. This would help protect citizens' healthcare rights, initiate governmental obligations, and inflict consequences on the wrongdoers - and, hopefully, result in a better and improved standard of healthcare. The bill also allows the judiciary to rule on connected issues without fear of being accused of judicial overreach.

The precedent of the "right to education" gives credibility to the claim. The right to education, like the right to health care, was enshrined in Part IV of the Indian Constitution as a guiding principle of state policy. unjustifiable right.

The COVID-19 pandemic, as well as past health crises, show the necessity for legislation that makes healthcare a justiciable right. At the state level, the Assam Public Health Act 2010 (Assam Act) aims to achieve this. The Assam Act establishes a broad range of rights that can be decided by the courts. This provision imposes obligations on the state, requiring the Department of Health and Family Welfare — as well as other agencies — to actively participate in ensuring access to food, safe drinking water, sanitation, and pollution management.⁴

CURRENT SITUATION OF OXYGEN IN OUR COUNTRY

It is a matter of shame and a cause for concern for the Government of India and the State governments when their citizens die premature deaths due to the huge dearth of oxygen. How can we digest this bitter fact that one of the strongest countries and biggest democracy of the world couldn't provide oxygen to its citizens?

The prevailing situation in India is not hidden and the world knows about it. During the last 2 months, it was a chaotic situation across the country right from North to South and East to West, everybody was begging for oxygen even the hospitals were facing inadequate supply

⁴East Asia Forum, Establishing a legal right to healthcare in India
<https://www.eastasiaforum.org/2020/06/26/establishing-a-legal-right-to-healthcare-in-india/>

of oxygen which also led to around 524 deaths in the country.⁵ They had no idea at all where and when this life saving gas oxygen was available. There were huge and unending queues in front of healthcare centers and even outside Oxygen factories just to get oxygen.

It seemed that the entire system collapsed, as it always happens the anti-social elements exploited the situation by hoarding Oxygen Concentrators and Oxygen Cylinders in order to sell them at much higher profits. Unfortunately, there was nobody to protect these already disturbed citizens from these vultures. Government officials didn't come to their rescue. Common masses were completely confused, they were ready to pay any amount for this life saving gas so that they can protect the lives of their near and dear ones.

Some of the major reasons which led to this chaotic situation were the nonfunctional or in-efficient oxygen plants, lack of resources and improper coordination between the various state governments.

On April 15, 2021, the Government of India announced that Oxygen consumption is only 54% of the daily production capacity, and the announcement continued to refer to the official production capacity and how an excess supply of oxygen is available in the country and the government is taking adequate steps to ensure proper supply in all parts of the country but the reality on ground level was completely different. The manufacturing of oxygen is allowed as it is a drug under the Drugs and Cosmetics Act of 1940.⁶

In April 2020 last year, the Comptroller General of Drugs of India issued an order renewing the concession (within 24 hours) of a license to manufacture pharmaceutical oxygen, Section 3(b)(i) of the Act would classify oxygen as a substance useful for diagnosis which can be used to treat, relieve or prevent disease or to improve the health of people. Article 26B of the Act also empowers the government in the event that it believes that a drug is essential to meet the requirements of an epidemic-related emergency or natural disasters by notice in the Official Gazette can regulate or restrict the manufacturing, sale or distribution of this medicinal product.

But even in these bad times many responsible citizens, gurudwaras and NGOs came forward as a ray of hope and worked together so that oxygen can be arranged. There were many

⁵ Indian Express <https://www.newindianexpress.com/nation/2021/may/19/india-reported-512-oxygen-related-deaths-during-second-wave-of-covid-open-data-tracker-2304596.html> (last visited 01/06/2021)

⁶ Lexology <https://www.lexology.com/library/detail.aspx?g=7cadafc5-0e86-4245-bdf6-94bcbe5a0254> (last visited 01/06/2021)

Gurdwaras who started Oxygen Langars where free oxygen was distributed. Many NGOs contacted their nearby oxygen factories and convinced them to provide oxygen cylinders for free or at minimal cost so that the precious life of the people can be saved.

But truly speaking, should we blame the government completely for this crisis or are the people themselves responsible for this? The huge population of our country, the illiteracy of citizens and their unawareness made the situation worse. The smaller European countries, some of them even smaller than many states of India, controlled this critical situation easily because they had to cover a small population and they had adequate resources. On the contrary, the huge population of India made it a strenuous task for the government and the situation went out of control.

SUGGESTIONS

The central government is attempting to obtain additional cryogenic container trucks on its own, and Indian Railways has already begun operating special trains to transport cryogenic trucks from one state to another in order to save time and money.

Even the Defense Research and Development Organization (DRDO) is supplying hospitals with Onboard Oxygen Generators, which are used to create oxygen in the indigenously constructed fighter aircraft "Tejas."

It is vital to enact laws that protect the right to health, that hold multiple government agencies accountable for compliance with basic health rights, and create a mechanism for the judiciary to punish human rights violations without compromising the separation of powers.

The demand for right to healthcare legislation stems from poor healthcare and a lack of legal protections. However, because of the separation of powers between the legislative, executive, and judiciary, the judiciary is limited to merely maintaining current laws. The judiciary is unable to rule on issues that have not been properly legislated by parliament. Any ruling based on fictitious rights would be judicial overreach.

CONCLUSION

Before concluding this burning topic and the most relevant one in this prevailing situation, we have no hesitation in saying that the Right to Oxygen needs to be included in the Fundamental rights so that helpless citizens wouldn't have to run here and there in search of this life saving elixir called Oxygen.

Although, the Government of India along with the State governments has taken several steps to cope up with the demand like setting up of new oxygen factories, dividing quotas of oxygen supply for states and situations has improved but still we are expecting a better future.

Although the government appears to be making every effort to make any arrangements that may be required in the midst of this crisis, the large business houses from India, as well as assistance from other countries, seems to be a glimmer of hope.

To further improve the situation, we suggest development of a robust supply chain mechanism from the production plants to all the way to the hospitals or wherever the supply is required which will help in eradication of these anti-social elements and will prevent them from taking advantage of the loopholes, also real-time monitoring of the usage of oxygen needs to be done so that whenever there's a shortage in a hospital or medical center, it can be supplied there. We will have to take strict steps and work within a proper planning structure. Especially in these times, when doctors are warning us about the third-wave of the coronavirus which as claimed will be much more dangerous.

