

3.RIGHT TO OXYGEN AS A FUNDAMENTAL RIGHT UNDER ARTICLE 21

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ABSTRACT

No resource has proven more valuable or in limited supply as medicinal oxygen as the second phase of the Covid-19 pandemic threatens to crush India's healthcare system. The right to life is perhaps the most essential right under any legal system in the world and under Article 21 of the Indian constitution, the right to life is granted. While interpreting Article 21, the judicial system of India grants a number of rights that make life feasible or meaningful. The court also develops a definition of dignified life and interprets article 21 in a way that encompasses all of the necessary requirements that make life sustainable. From a jurisprudential and international perspective, the right to health development as a fundamental right can be traced, and both have imposed an affirmative duty on the state to preserve, maintain, and fulfil public health. Unfortunately, a second wave of Covid 19 has hit India, resulting in a huge number of deaths due to a lack of necessary medical treatment, such as life-saving drugs and hospital beds. The lack of oxygen causes a large number of deaths throughout the country, including in the capital; so, the question arises as to whether the right to oxygen is a fundamental right or not. This article examined judicial creativity of courts to broaden the extent of the right to life. It includes meaning and scope of right to life and evaluates whether right to oxygen is covered as a fundamental right under article 21 of the constitution of India.

Keywords: right to oxygen, right to life, covid-19, constitution, right to health

1.Introduction

The nation today is going through a period of extraordinary change. It's depressing to witness people die. Numbers of People who are standing in queue for oxygen and are dying due to lack of it are increasing day by day. As I write this article, in total there are 29973457

positive cases and 389268 deaths due to corona virus¹ and this figure does not correspond with the funeral houses due to everything you see at the cremation home or dead bodies flowing in the Ganga River tells us conflicting stories.

In the early nineties, NCERT chemistry books described oxygen as a “chemical element with the symbol O, atomic number 8, and atomic weight 16 that resides in the environment as O₂, and is vital for the existence of all living creatures on Earth.” The importance of oxygen for all life forms, especially in medical settings, is a key point. This statement appears to be contradicted by the current oxygen shortage.²

We, the people of India, had solemnly vowed in November 1949 to ensure the individual dignity of all citizens. We complemented our constitution by putting those undying words of article 21 of the constitution of India. Article 21 of the constitution of India states that “No person shall be deprived of his life or personal liberty except according to procedure established by law”³. Everybody has the right to life and personal liberty under Article 21. The right to life encompasses more than just the prohibition of killing someone; it also has a broader connotation. In a series of rulings, the Supreme Court ruled that “To live with human dignity and freedom from exploitation is to have a right to life.” Article 21, i.e. the Right to Life, considers health to be a Fundamental Right. When dealing with the case of Ratlam Municipality in 1980⁴, the Hon’ble Supreme Court decided that the right to health is guaranteed as a Fundamental Right under the Indian Constitution.

Notwithstanding that the Constitution guarantees citizens' rights, it also creates an obligation on the part of the state to ensure that each person receives these rights. But, in the current health services context, this right of the people has not been taken seriously by Government agencies. Raising the level of nutrition and living standards of its citizens, as well as improving public health, are among the State's primary responsibilities.⁵

1) Meaning and scope of article 21 i.e. right to life

¹ <https://www.mygov.in/covid-19>

² Arjun Krishnamoorthy, *"Ins and outs of laws on oxygen and right to life"*, IBLJ, 25 May 2021 <https://law.asia/ins-outs-laws-oxygen-right-life/>

³ Article 21 of the constitution of India, 1950

⁴ Municipal Council, Ratlam v. Shri Vardhichand & Others, 1980 AIR 1622, 1981 SCR (1) 97

⁵ Article 47 of the constitution of India, 1950

The essence of the fundamental right is the right to life. The right to life guaranteed to every individual is ensured by Articles 21 of Indian Constitution and Article 3 of the Universal Declaration of Human Rights. It signifies that every person has the right to life and personal freedom regardless of origin the right to life was viewed as a fundamental natural right by every system in the globe. Other essential rights are meaningless without the right to life. Life, however, comprises all the vital things of life that make life meaningful and complete.

Life is not just about existing; it's about living well. The Supreme Court quoted and held in the case of *Kharak Singh v. State of Uttar Pradesh*⁶ "In this usage, the term "life" refers not simply to animal existence. The resilience against its deprivation extends to all of the limbs of life."

In *Francis Coralie v. Union Territory of Delhi*⁷, the Court stated: "The right to live includes the right to live with dignity and all that goes hand in hand with that, namely, the basic necessities of life, such as adequate nutrition, clothing and shelter, and read-read and speak in a variety of forms, move and mix freely, and blend with fellow human beings and must include the most fundamental needs of life, as well as the right to perform duties and activities that are the minimal level manifestation of human soul."

The Apex court ruled that the "right to life" comprised the right to a healthy existence and to enjoy all human capabilities under its primary condition, in the landmark ruling *Sunil Batra v. Delhi Administration*⁸. The right to safeguard a person's tradition, culture, heritage and everything that offer significance to one's existence would even be included. It encompasses the right to live in peace, to rest and health in peace.⁹

"Right to live is a basic right under Art 21 of the Constitution, and it encompasses the right to enjoyment of pollution-free water and air for full enjoyment of life," the court stated in the case of *Subhas Kumar v. State of Bihar*¹⁰. If something endangers or affects that quality of

⁶ *Kharak Singh v. State of Uttar Pradesh* AIR 1963 SC 1295

⁷ *Francis Coralie v. Union Territory of Delhi* 1981 AIR 746, 1981 SCR (2) 516

⁸ *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675

⁹ Riya Jain, "Article 21 of the Constitution of India – Right to Life and Personal Liberty" November 13, 2015 <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>

¹⁰ *Subhas Kumar v. State of Bihar* 1991 AIR 420, 1991 SCR (1)

life in violation of the law, a citizen has the right to invoke Art.32 of the Constitution to have the contamination of water or air that may be harmful to the quality of life removed¹¹.”

2).Right to Health and Life in the Absence of Oxygen

The Supreme Court has stated unequivocally in *Parmananda Katara v. Union of India*¹² that the preservation of life is of primary significance. ‘When life is lost, natural order of things cannot be restored,’ the Supreme Court stated. It was declared that all doctors, whether government or private, have a professional responsibility to provide medical help to the injured as soon as possible in order to save their lives without having to comply with legal formalities imposed by the police.¹³

In the *Re-Ramlila Maidan Incident* case¹⁴, the Supreme Court ruled that the right to breathe is a subset of the right to life in 2012. In the case of people suffering from grave illnesses, access to medical oxygen is a vital aspect of the right to breathe.

Human life depends on oxygen. It is, after all, life itself. It is inhaled by humans. It is the fuel essential for the bodily system to function properly. Our bodies can reconstruct themselves with the help of oxygen. It cleanses the blood and boosts the immune system's defences.¹⁵

Medicinal oxygen offers artificially ventilated patients with life support, cardiovascular stability and boosts the amount of oxygen available in the case of heart and respiratory collapse. The government's major obligation and the necessity to survive patients really lies with increasing oxygen requirements due to the pandemic COVID-19, the manufacture and delivery of medical oxygen without logical problems. Medical oxygen must be reachable and affordable as a life-saving therapy and critical medicine in emergency situations. Pandemic has opened up the chance to close the oxygen gap, the biggest in the world.¹⁶

¹¹ Riya Jain, “*Article 21 of the Constitution of India – Right to Life and Personal Liberty*” November 13, 2015 <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-andpersonal-liberty/>

¹² *Parmananda Katara v. Union of India* AIR (1989) 2039, (1989) SCR (3) 997

¹³ *Supra note 9*

¹⁴ *Ramlila maidan incident vs. home secretary union of india & ors* [In Re (2012) 5 SCC 1]

¹⁵ Pauly Muricken, “*Oxygen Supply and Free Vaccine : A Right, not a Bounty*”, *Indian currents*, 03 May 2021 <https://www.indiancurrents.org/article-oxygen-supply-and-free-vaccine--a-right-not-a-bounty-pauly-muricken-386.php>

¹⁶ *Ibid*

The State is obligated to preserve life under Article 21 of the Constitution. It is the responsibility of those in charge of the community's health, whether the patient is an innocent person or a criminal subject to societal penalty, to maintain life so that the innocent can be protected and the guilty can be punished¹⁷. Death as a result of negligence is not considered a legal punishment under social rules.... Every doctor, whether working in a government hospital or not, has a professional obligation to extend his or her services with due expertise in order to protect lives.

In yet another matter, *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*¹⁸ [xlix], a person with serious brain injuries sustained in a train crash was denied treatment at multiple institutions on the grounds that they lacked sufficient equipment and infrastructure.

In this decision, the Supreme Court expanded on the right to emergency care, stating that a government hospital's failing to give timely medical attention to an individual in need of such care constitutes a breach of the individual's right to life as guaranteed by Article 21.

The right to oxygen is indeed a fundamental right and, under Article 21 of the Indian Constitution, it is safeguarded because without oxygen, life would be impossible.¹⁹

It recognized the lack of financial resources to carry out such a right, but held that the Government must provide for the means necessary to carry out the people's right to receive emergency health treatment.²⁰

Allahabad High Court²¹ in *Suo Moto* case In paragraph 15 of the order, the Court held that 'We painfully notice that the loss of Covid patients simply for not providing oxygen to hospitals is a criminal offense and not less than genocide of those who are tasked with ensuring that liquid medical oxygen is continually procured and supplied. How can we allow

¹⁷ *Supra note 9*

¹⁸ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* 1996 AIR SC 2426 1996 4 SCC 37

¹⁹ Saif Ali Khan, "Fundamental Right To Oxygen And Life: A Judicial Obligation In Second Wave Of Covid 19 Pandemic", *Supremo Amicus*, Volume 24, 2021

²⁰ <http://blog.medicallaw.in/supreme-court-of-india-on-emergency-healthcare/>

²¹ PUBLIC INTEREST LITIGATION (PIL) No. - 574 of 2020

our people to perish in this manner when science has progressed to the point that heart transplants and brain surgery are now possible?”²²

3).Right to oxygen

The Judiciary serves as a crucial guardian for fundamental rights, and during the Second Phase of Covid 19, when the country was experiencing oxygen shortages, the various High Courts and the Supreme Court of India played a significant role in making sure that fundamental rights were not violated. As a result, when hearing the plea of various Delhi hospitals for emergency oxygen delivery, the Delhi High Court decided to fulfil their constitutional duties. “Beg, borrow, steal,” the court noted, but “provide oxygen to help people breathe”²³

Recently various High courts and Supreme Court of India passed many orders inferring that right to oxygen is a part of right to life under article 21 of the Constitution of India.

On May 5, 2021, an Allahabad high court²⁴ division bench led by Justices Siddhartha Varma and Ajit Kumar declared that fatalities of COVID-19 patients caused by a lack of oxygen in health care facilities are "a criminal act and not less than genocide by those who've been assigned with ensuring continuous manufacturing and supply chain of liquid clinical oxygen."

According to the Economic Times, the Delhi High Court has also cautioned that anyone who attempts to impede the transmission of oxygen will be hanged.

Patna High Court²⁵ while hearing the different petition for covid mismanagement said that: any death due to lack of medical facility including testing is in violation of right to life under article 21. The high court issued following directions to the state government

²² Rajesh Pandey, "Deaths due to oxygen shortage no less than genocide: HC", TNN May 5, 2021

²³ Nupur Thapliyal, "Beg, Borrow Or Steal Oxygen, Otherwise We Might Lose Thousands of Lives for Lack of Oxygen :Delhi High Court To Centre" live law, 21 April 2021
<https://www.livewlaw.in/top-stories/beg-borrow-or-steal-oxygen-delhi-high-court-to-centre-might-lose-thousands-of-lives-172916>

²⁴ Asad Rehman, "Covid deaths due to oxygen shortage no less than genocide: Allahabad High Court ", May 5, 2021

<https://indianexpress.com/article/india/covid-deaths-due-to-oxygen-shortage-no-less-than-genocide-allahabad-high-court-7302269/>

²⁵ Civil Writ Jurisdiction Case No.353 of 2021

- The government hospitals and other doctors employed in these institutions are bound to give medical assistance to any person in need. Even on the part of private hospitals, failure to preserve human life and provide medical treatment to a person who is in need for such treatment will be considered as violation of article 21 of the constitution.
- The public representatives must take all necessary steps to ensure the implementation of government policies.
- To increase the supply of oxygen within four days.

The Goa bench of the Bombay High Court²⁶ said on Wednesday that any death caused by a lack of oxygen would be a violation of Article 21 of the Constitution, which guarantees the right to life.

“We do not want to see any narrative in the papers that that several people perished yesterday owing to a shortage of oxygen,” the High Court remarked, slamming the state administration. Let's concentrate on tonight and make sure nobody dies. It is a breach of the rights under article 21 of the Constitution of India if any Covid-19 positive patient dies from a shortage of oxygen. Every state owes it to its citizens to safeguard their lives.”²⁷

The court, on the other hand, ordered the Goa authorities to enact all necessary measures to ensure a continuous oxygen supply. Courts around the country have been keeping an eye on the situation and pressing state governments to maintain a steady supply of oxygen.

It is the state's responsibility to ensure that the average man does not suffer as a result of the lack of oxygen and life-saving drugs like Remdesivir. The government is failing miserably to ensure that treatment is available to the underprivileged and desperate, particularly in semi urban and rural areas, hence breaching people' right to life as guaranteed in Article 21 of the Indian Constitution²⁸.

²⁶ Sonakshi Datta “Death due to lack of oxygen- violation of Article 21”: Bombay High Court (Goa Bench), GC, 14/05/2021

<https://goachronicle.com/death-due-to-lack-of-oxygen-violation-of-article-21-bombay-high-court-go-bench/>

²⁷ Nupur Thapliyal & Sparsh Upadhyay “Today Is The 'Test Night', Ensure No One Dies Due To Lack Of Oxygen As It Is Violation Of Article 21” 12 May 2021

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²⁸ Vikas Pandey, “Covid-19 in India: Patients struggle at home as hospitals choke”, BBC, 26 april 2021

4. Conclusion

The judicial system has an essential part to play in trying to maintain that fundamental rights are not violated, particularly when the nation is experiencing a health crisis and citizens are dying as a result of a lack of basic medical aid such as life-saving medicine or a shortage of beds in hospitals that are not receiving adequate oxygen, which is the most primary requirement for human ability to survive. However, the state had a legislative responsibility to protect a person's life since this state's exist only to protect life and property, and the death of a corona virus patient due to lack of oxygen is a serious violation of basic rights.. The constitutional court is the caretaker of the fundamental right for the discharge of the legal duty. At least nine high courts and Supreme Court had taken suo Moto action to carry out the constitutional obligation and directed the centre and state government to supply oxygen.

As a result of the court orders, home ministry ordered that there will be no restrictions on inter-state oxygen delivery and that provision of oxygen for industrial purposes is illegal, there has been a near-war over oxygen cylinders among state governments and between center and the States. It is both a symbol of an already-existing crisis in Indian society and a new blow to the federal accord. And there's no denying that the Centre must shoulder a greater part of the burden.

At such a point when patients and their family members are miserable for hospital wards, medications, and oxygen, the Centre must act as a non biased administrator, revealing an appropriate distribution and unclogging legislative and technical blockages to make sure that medical equipment are distributed fairly and on time. But this has not happened yet since the state underestimated the severity of the situation and the necessity for oxygen. India has the ability to manufacture over 7,000 metric tonnes of medicinal oxygen, according to industry experts, but there are not sufficient cylinders or tankers to stockpile and distribute it. India also lacks adequate cryogenic tankers to assure that medical oxygen is transported by road 24 hours a day, seven days a week. There are also issues with wasting and leaks in the hospital's oxygen pipelines. These challenges have been disregarded by previous governments, and this government is no exception. When addressing the state's responsibilities, we must not forget our own constitutional responsibilities as citizens. Our responsibility is to keep others safe by

<https://www.bbc.com/news/world-asia-india-56882167>

wearing a mask, maintaining physical distance, and adhering to the government's standards. We must follow the government' rules and instructions. Someone who does not require hospitalization should not intrude on the seats, which should be allocated to the less fortunate. This is the period when generous donations are given for the improvement of health services, and we have filled the coffers of religious institutions. Please contribute back to society since it really needs you right now.

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