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Equality of Opportunity and Access to Health Care during Covid-19 Pandemic

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ABSTRACT

Access to health care is of paramount importance especially during a public health emergency. Covid 19 has made every country realize the need for a robust and agile healthcare system that adapt to the changing situations in a time sensitive manner. During this outbreak, we witnessed that the pace of containment is equally important to effective medical help. Every individual is entitled to an equal opportunity to benefit from any public health care system. Equality of opportunity in health care must necessarily account for both disparities between individuals having access to health treatments and those who have not. Access to health care is often compromised with poor services, deficient resources, lack of effective policies and legislations. Indian judiciary has recognised right to health as an unavoidable part of right to life under Article 21. State has constitutional obligation to ensure non-discrimination and provide for a decent minimum of healthcare to all its citizens especially for the most vulnerable populations such as children, older persons and those living with chronic conditions. States need to achieve the optical balance between fighting the Covid 19 pandemic and the maintenance of essential health services. There is also a need to check on as to how effective the health laws in India are in managing pandemics. This paper analyses to what extent equality of opportunity is been followed in public health care system and it also analyses the need for a more comprehensive legislation regarding access to public health.

The COVID-19 pandemic has taken its control on the health care systems all over the world. Corona outbreak was declared as a pandemic by the World Health Organization.[3] India being a developing country is enduring a humanitarian crisis. It imposed drastic restrictions on freedom of people's movement with complete lockdown that predominantly affected the day-to-day life of the people, and their livelihoods. Lockdowns during pandemic have health, social and economic consequences. Covid-19 brings into keen focus the right to health as a fundamental right in India. Being mentioned in international human rights standards, and

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undoubtedly an essential part of Article 21, it is now at the center of debate in more ways than one. Though absolute equality remains a distant dream for Indians we can see that the COVID-19 pandemic is a great leveler. COVID-19 has affected everyone, irrespective of their social or economic status. It has also magnified several inequalities.

In India health is a subject that is mentioned in the state list. Though the central government partake a significant part in establishing health care infrastructure, states are given the power for determining their priorities for health care financing and provide services to the population. Every human being has a right to enjoy the highest attainable standard of health for living a life with dignity[4]. Everyone irrespective of their social or economic status, should have access to the health care they need. Everyone's right to enjoy the highest attainable standard of physical and mental health is recognized as a human right by the International Covenant on Economic, Social, and Cultural Rights.[5] For realizing this right, the states shall prevent, treat and control epidemics and other diseases and create conditions which would assure all medical service in the event of sickness. India is a signatory to the Covenant yet the Indian Constitution doesn't unequivocally perceive the right to health in the Fundamental rights part. A closer look at the Constitution of India will render to the conclusion that the Right to health was not incorporated as a fundamental right directly. However, the framers of the Constitution imposed the duty on State in the nature of Directive Principles of State Policy under Part IV of the Constitution by which it is the duty of the State to ensure social and economic justice to its citizens. However, these Directive Principles of State Policy hold merely persuasive value and are non-justiciable.[6]

Supreme Court of India has generously recognized the right to health as an integral part of the fundamental right to life. It was held that the government has a constitutional obligation to provide medical facilities.[7] Emergency medical aid is recognized as a right under the right to life.[8]Timely medical treatment in government hospitals is also recognized by the court.[9]The Supreme Court has reiterated the right to health while deciding public interest litigation in matters relating to blood banks,[10]health hazards in the asbestos industry,[11] HIV patients,[12]

[4] Vpmthane.org. 2020. Available at: <http://vpmthane.org/law/Vidhidnya_2014.pdf [Accessed 20 Nov 2020].
[5] Art 12, ICESCR
[6] See Article38,39,41,42,47,48A of DPSP
[7] State of Punjab v Mohinder Singh Chawla, AIR 1997 SC 1225
[8] Paramananda Katara v UOI, AIR 1989 SC 2039
[9] Paschim Benga Khet Mazdoor Samity v State of W B , AIR 1996 SC 2426
[10] Common Cause v UOI, AIR 1996 SC 929
[11] CERC v UOI, (1995) 3 SCC 42
[12] Mr X v Hospital Z, 1998 (8) SCC 296 16

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passive smoking[13], and hazardous drugs[14].

In Mohd Ahmed (Minor) v. Union of Indiai, while upholding the 'Right to Health', the High Court of Delhi held that: "Disease is a natural catastrophe that fells its victims unpredictably. Health is a fundamental human right, which has as its prerequisites social justice and equality. It should be accessible to all. Health care access is the ability to obtain health care services such as prevention, diagnosis, treatment and management of diseases, illness, disorders, and other health-impacting conditions." It's an accepted principle that health care for all is a concomitant of the human right to health. In Mohd Ahmed (Minor) v. Union of India Justice Manmohan recognises that "obligations under Art 21 are considered core and non-derogable irrespective of resource constraints." Thus it is the States core obligation to fulfill individuals' 'Right to Health'.[15]

The access to health care is concerned with the opportunity to obtain health care when it is wanted or needed[16]. Indian Constitution guarantees equality of opportunity for people to enjoy the highest attainable level of health. Peter Westen observed that opportunity is a three-way relationship between a person, some obstacles, and the desired goal[17]. However, a person has such an opportunity if she has a chance of achieving that goal without insurmountable obstacles that make it impossible to secure the goal[18]. Social stigmas and prejudices often become reasons for evading treatment and its removal is necessary for ensuring equal access to medical treatments and health care services and ultimately combating this outbreak.[19]

In Thomas' case[20], "Equality of opportunity is not simply a matter of legal equality. Its existence depends, not merely on the absence of disabilities, but on the presence of abilities. It obtains in so far as, and only in so far as, each member of a community, whatever his birth or occupation or social position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence." It was also held that the Government has an affirmative duty to eliminate inequalities and to provide

[13] Murli Deora v UOI, AIR 2002 SC 40 17
[14] Vincent Panigulangara v UOI, AIR 1987 SC 990
[15]https://www.universal-rights.org/by-invitation/realizing-the-right-to-health-must-be-the-foundation-of-the-covid-19-response/ assessed on 18 November.
[16] Edeq.stanford.edu. 2020. *An Introduction To Equality Of Opportunity | Equality Of Opportunity And Education*. [online] Available at: https://edeq.stanford.edu/sections/equality-opportunity-introduction [Accessed 18 November 2020].
[17] ibid
[18] ibid
[19] See also 2020. [online] Available at: <https://www.jstor.org/stable/26749764> [Accessed 20 November 2020].
[20]State of Kerala v. N.M Thomas (1976) 2 SCC 310

opportunities for the exercise of human rights and claims. [21]In Indira Sawhney's case[22], Sawant J concurring with the majority observed that to bring about equality between the unequal, it was necessary to adopt positive measures to abolish inequality. The equalizing measures would have to use the same tools by which inequality was 4 introduced and perpetuated. Otherwise, equalization will not be of unequal. These equalization measures would be validated by Article 14 which guarantees equality before the law. Unfortunately, denial of equal opportunity is rearing its ugly head in this crisis of Covid -19. In fighting with this pandemic which is created by the outbreak of the corona virus, we can see that the Indian government has failed to provide equal opportunity in accessing health care to its citizens.[23]

As the COVID-19 in India was growing in alarming rate, the Government continued to rely on the 123-year-old **Epidemic Diseases Act,** to bring some control over the situation. There are a lot of omissions in the Act like the term "epidemic" itself has not been defined in the entire Act leading to an inherent lack of clarity as to what all situations the Act can play a role. The Act also states that the Government may invoke its provisions whenever it is satisfied that ordinarily laws will not suffice. Again the situations where government can apply ordinary laws are not mentioned.

The need for amending the age old Act led to the passing of **Epidemic Diseases Act (Amendment) Ordinance, 2020.** Ordinance made violence towards health care workers punishable. While it is definitely a step in the right direction, this move is far from sufficient. What is needed is that the Government must reframe the laws in terms with the international health regulations issued by the World Health Organization, which clearly outlines the obligations of the Government and the steps required to be taken by them to handle the situation[24].

The Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill of 2017 was introduced which lays down a definition for 'Epidemic' and provides various other health measures. The Bill is more comprehensive and contained effective means to tackle Covid 19 pandemic. Yet, it was never brought into law by the Parliament.

In India, the emergency examines the conditions for the marginalized and generally helpless in society. The emergency is uncovering how certain groups are ridiculously influenced. Indeed,

[21] ibid
[22] Indira Sawhney v. Union of India, (1992) Supp 3 SCC 215
[23] ibid
[24] Aman Saraf, A CRITICAL ANALYSIS OF INDIA'S EPIDEMIC DISEASES ACT, 1897, https://www.jurist.org/commentary/2020/11/aman-saraf-india-epidemic/ accessed on 17-02-2021

even the containment measures themselves disproportionately affect the most unfortunate populaces who cannot work from home and live at subsistence levels. In the awake of COVID 19, the World Health Organization has advised everyone to maintain *social distance* and *wash hands with soap*. In India, a Janta Curfew (‘*Voluntary Self Isolation*’) was imposed on March 20, 2020 followed by a nationwide lock down on March 24. In addition government also enforced ‘Social Distancing’ and directed citizens to undertake various measures such as ‘Work from Home’, ‘Avoid Mass Gatherings’ etc. Different states also applied Section 144 of the Criminal Procedure Code to strictly enforce norms of ‘*Social Distancing’*. All these measures have been undertaken to suppress the spread of the virus and to protect people from the disease[25]. On one side there are reports of these preventive measures being followed effectively, there are also reports that not all in the society are equally placed to take its advantage and to protect themselves from this virus. There are certain groups like impoverished people, vulnerable people etc. requires access to free health care, essential and Covid-19 specific treatment and care and yet lacks adequate access to both. State’s limit individual freedoms as to assure that such limitations are reasonable, proportionate, non-discriminatory, and grounded in law, it is crucial to consider the population level interests in infectious disease prevention and the impact of the disease, and give special attention to the disproportionate risks faced by marginalised and disadvantaged populations[26].

The Bombay High Court while pronouncing a verdict over a bunch of Public Interest Litigations filed by several individuals and institutions seeking various reliefs for COVID and non-COVID patients, and frontline workers in the State of Rajasthan, said that “the pandemic has revealed that despite our constitutional guarantees, a society that provides equal opportunities to all remains a "distant dream"… "The pandemic and the resultant lockdown have destabilised the Indian economy, while wrecking the 'haves' and the 'have not’s' alike...It has shown how pitiable the conditions of migrant workers in India are... And as things stand now, one can hardly think of a fair and just society any time in the near future,"[27]

Racial, ethnic, and religious minorities, regularly consigned to lower socioeconomic status and subjected to entrenched discrimination, have been delivered especially helpless by these

[25] Covid-19 and Systemic Inequalities in India *https://vidhilegalpolicy.in/blog/covid-19-and-systemic-inequalities-in-india/* assessed on 14 Nov

[26]https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31255-1THE RIGHT TO HEALTH MUST GUIDE RESPONSES TO COVID-19 assessed on 20 Nov

[27]https://www.deccanherald.com/national/coronavirus-pandemic-showed-equal-opportunity-remains-distant-dream-hc-849040.html accessed on 14 Nov

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variables to higher paces of contamination and mortality, to brutal therapy by law authorization with regards to crisis measures, and to unequal access to adequate medical care.[28]

The pandemic has been generally wrecking for the lives, health, and well-being of older persons, individuals with basic ailments, and those with lower financial status – a classification that tracks intimately with minority status in many nations. Older people have confronted higher contamination and death rates, while simultaneously being exposed to age segregation in medical care and emergency choices, disregard and domestic abuse at home, isolation without access to essential services, greater exposure and helpless therapy in care foundations.

Migrants and displaced people are especially helpless against shame, xenophobia, scorn discourse, and related narrow mindedness. Migrants over the world face loss of occupations, discrimination, and trouble getting back to home nations because of border closures. Thousands have been pushed back or expelled to hazardous conditions since the emergency started. Migrants and displaced people live in packed conditions with restricted admittance to disinfection and medical services and are especially powerless against contamination. Migrants, stateless, refugees might be excluded from social security estimates embraced to address the effect of COVID-19.

Undocumented migrants may not seek health care because they fear for being detained or deported. Migrants returning home may face stigma as a supposed COVID-19 carrier. The indigenous people and indigenous elders, who face, poor access to health care and other essential services, are exacerbated by the pandemic.

The circumstance of people with disabilities particularly those with basic ailments or in establishment are especially grave. It could be more enthusiastically for people with handicaps to find a way to ensure themselves. They may confront trouble getting to fundamental necessities, food, and medical support. The coherence of help all through the emergency must be ensured.

Detainees, prisoners, and those denied their freedom, the two grown-ups, and youngsters, are profoundly powerless against the fast spread of the virus. The pandemic is intensifying pressures in packed prisons, with mass escapes and mobs detailed. Resort to non-custodial authorizes and release of selected categories of prisoners is needed. Decreasing numbers in pretrial confinement, those kept for a minor or political offense, close to the furthest limit of

[28] Nations, U., 2020. *We Are All In This Together: Human Rights and COVID-19 Response And Recovery | United Nations*. [online] United Nations Available at: https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and [Accessed 20 November 2020].

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their sentences, or confined unlawfully ought to be assisted. Individuals who cannot be released must have sufficient health care.

The emergency is compounding troubles for LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex people) individuals, a considerable lot of whom face discrimination and shame when looking for medical care and are more powerless against viciousness and other denials of basic freedoms. People living with HIV may have reduced access to life-saving antiretroviral medications. Individuals living with HIV may have decreased admittance to life-sparing antiretroviral drug people, who use drugs may lose access to harm reduction programs, including needles and syringes.

The Indian Government's advisory strictly disallows marking any network or territory for the spread of Coronavirus to diminish separation, in any case, its real adherence remains questionable. Further, the right to health can be satisfied by giving an adequate number of hospitals and other health-related facilities with due respect to" equitable distribution" all through the nation[29]. Another measure towards the facilitation of proper health is the provision of correct and accurate information on health-related issues and available health services[30].

Equality and non-discrimination are core human rights available to all and this pandemic shows clearly why inequality and discriminatory practices are unacceptable and ultimately hurt everyone. We can't stand to give up anybody in battling the pandemic. The Covid can taint and murder the youthful, just as the old, the rich, poor people, or those with a hidden medical issue. It doesn't regard race, shading, sex, language, religion, sexual direction or sex personality, political or other feelings, public, ethnic or social cause, property, incapacity, birth, or some other status. The infection doesn't separate; and discrimination must have no bearing in our reaction to the danger it presents. Unfair practices prohibit individuals from the assurance against the infection that States are looking to give to their populaces. Coronavirus is making a vicious cycle whereby elevated levels of inequalities fuel its spread, which thus extends inequalities. Proof as of now shows how long-standing disparities and inconsistent hidden determinants of health are leaving specific people and gatherings particularly affected by the infection – both in loss of lives and jobs.

The Covid-19 pandemic, which resulted in a global lock down, is a crisis as never before. This pandemic time is undoubtedly exacerbated by human rights failures, yet the right to health can provide for a framework for assuring that the COVID-19 response serves to realise the right

[29] Committee on Economic Social Cultural Rights (CESCR), General Comment No. 14, para. 36
[30] CESCR General Comment No. 14, para. 12

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for highest attainable standard of physical and mental health for all. States should guarantee that everybody is shielded from this infection and its effect. This may require uncommon measures and insurance for specific gatherings most in danger or lopsidedly affected. The reaction to the emergency needs to consider, various converging types of discrimination and inequalities, including unavoidable health care disparity. However, we need additionally to focus on forestalling them persevering when the emergency is finished.

All world nations must utilise this tragic moment of COVID-19 pandemic to think about their public health infrastructure and about the systemic solutions, which guarantee the core components of the right to health and thus making our economies more resilient to the face of public health emergencies. COVID-19 is a reminder, not only of the global connectedness of the pandemic, but also of the need for a solution in coordination and cooperation with all the world nations. As policymakers realise that this pandemic will only truly end with the development of an effective vaccine, looking beyond the immediate response, nations must recognize their obligations under the right to health, thus bringing the world together to assure the highest attainable standard of health for all.

The State is trying best to set up health and medical facilities as well as trying to ensure that the facilities reach to the common people. In few cases there is some negligence on part of medical professionals in providing adequate facilities to the public. We need to understand that all these protective methods cannot be achieved in a single day. Certainly, there is lack of funds, but to overcome this hurdle; the State has been trying to work best in collusion with private sectors also through Private Public Partnership. Also there is a drastic need to amend the **Epidemic Diseases Act** in terms with the provisions of **The Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill of 2017** to suit the needs and technological advancements of a modern India.

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