



**FUNDAMENTAL RIGHT TO OXYGEN
AND LIFE: A JUDICIAL OBLIGATION
IN SECOND WAVE OF COVID 19
PANDEMIC**

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Abstract

Right to life is the most important right under any legal system of the world and Indian constitution guaranteed right to life under article 21 of the constitution of India which guarantee right to life and personal liberty. Indian judiciary while interpretation of article 21 provides number of rights which make life possible or complete court further provides a concept of dignified life and interpreted the article 21 and gives wider interpretation which includes all the essential requirement which makes life possible. However, Second wave of covid 19 hits India and large number of loss of life. and number of covid patient died due to want of essential medical aid including life savings medicine, Beds in Hospital. non supply of oxygen leads to number of deaths all over the country as well as national capital, Hence, It is the constitutional court take sou motu cognizance of non-supply of oxygen and emergency medical aid and direct the centre and state for the same. this paper critically analysis the judicial creativity in order to wider the scope of right to life and further paper also deal the judicial activism in second wave of covid 19.

Key words: Right to life, Constitution, Oxygen. Judiciary

Introduction

Right to life and person liberty is the basic and natural and human right article 21 of Indian constitution provides that:” No person shall be deprived of his right to life or personal liberty except according to procedure established by law”. However, Supreme court in Menka Gandhi case held that procedure must be just, fair and reasonable, and must be *due process of law*. *Right to life is fundamental for the existence of human being. right to life includes all those aspect of life without that life is not possible or incomplete, therefore article 21 of the constitution is the most interpreted article in the constitution. Justice chamleswar in puttaswar case popularly known as privacy case observed that silences of the constitution must also be read. Indian judiciary play’s a creative role while interpretation of article 21 of the constitution.so many right growths under the article 21. therefore, right to life includes, Health, livelihood, speedy trail, right to shelter, right to clean environment, water, Air, medical care, right to privacy etc, are the part of right to life under article 21 of the constitution. However, Second wave of covid 19 pandemic Delhi High Court observed that you said wave but it is tsunami which hits country in very drastic manner large number of people loss their life due to the second wave. However with the rising number of cases crisis of oxygen in the country and state is failing to supply oxygen that result number of covid patient died due to not getting oxygen for breath, for the discharging the constitutional obligation different high court of the country take sou motu cognizance for the death and direct center and state government for uninterrupted supply of oxygen and supreme court also take sou moto case for the protection of life especially those life which is loss by not*



getting oxygen because oxygen is most basic requirement of human survival. Constitutional court is the guardian and custodian of the fundamental right and right to life is the first and foremost important right other rights are depending on the right to life. Hence right to health contain that attainable level of health that every person being is entitled which includes oxygen for the survival¹.

Meaning and Scope of Right to life

Right to life is the heart of the fundamental Right. Article 21 of constitution of India and article 3 of Universal Declaration of human right guarantee the Right to life which is available to every person. it means every person irrespective of their nationality has right to life and personal liberty. every system of the world considered right to life as a basic natural right. Without right to life other fundamental right has no meaning. However, life includes all those essential of life which makes life meaningful and complete. *Justice Krishna Iyer* say that article 21 is the procedural *magna carta* which is protective of life and liberty². while using the most golden interpretation of *Justice field* in case of **Munn v Illinois**³. Supreme court of India in case of **Kharak Singh v State of Uttar Pradesh**⁴ observed that *life does not means mere animal existence of man but extent to protection of every limb of the body through which soul communicates with outer world*⁵. However while upholding *Menka Gandhi* case and *kharak Singh* case. Supreme court in case of **Francis Coralie v. Union**

Territory of Delhi⁶, court held that “*The right to live includes the right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings and must include the right to basic necessities the basic necessities of life and also the right to carry on functions and activities as constitute the bare minimum expression of human self*”⁷.”

State has constitutional obligation to save the life, Therefore, Human life is not possible without right to life After going through the above landmark judgement it is clear that right to life under article 21 includes dignified life However, non-supplying of oxygen which lead to the number of deaths of covid patient is violation of right to life because oxygen is the most basic requirement of human life. However, in current situation we are far away from the dignity because we are not able to save life if life is not protected dignity has no business. as we know that reason of state existence was to protect right to life and property of the person they can't escape from their constitutional obligation.

In land mark judgment **Sunil Batra v. Delhi Administration**⁸ the Supreme Court by approving the above cases held that the “right to life” included the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions. It would even

¹ <http://www.legalserviceindia.com/legal/article-450health-as-a-part-of-fundamental-right-under-article-21a-pursuit-by-india.html>

² <http://legalserviceindia.com/legal/article-349-right-to-life-nd-personal-liberty-an-overview.html>

³ USA, 1877

⁴ AIR 1963 SC 1295

⁵ AIR 1963 SC 1295,

⁶ 1981 AIR 746, 1981 SCR(2) 516

⁷ <https://www.lawctopus.com/academike/article-21>

⁸ AIR 1978 SC 1675



include the right to protection of a person's tradition, culture, heritage and all that gives meaning to a man's life. It includes the right to live in peace, to sleep in peace and the right to repose and health⁹.

In the case of *Subhas Kumar v. State of Bihar*¹⁰, the court held that pollution free water and air is comes under the ambit of right to life under article 21 of the constitution and observed that:

“Right to live is a fundamental right under Art 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art.32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life¹¹.”

Right to Health and life without oxygen

In the case of *Paschim Janga Khet Mazdoor Samity v State of Bengal*¹². Supreme court held that, Right to health and Emergency Medical aid is the part of the right to life under Article 21. Therefore, right to oxygen is the fundamental right and, It is protected under Article 21 of the constitution of India Because life is not possible without the oxygen. However, In the case of *M K Sharma v Bharat Electronic and State of Punjab v. M.S. Chawla*¹³, court held that right to life guaranteed under Article 21 includes right to health and medical care¹⁴.

In the case of *Consumer Education and Research Centre v. Union of India*¹⁵.the Supreme Court observed that:

“Social justice which is a device to ensure life to be meaningful and livable with human dignity requires the State to provide to workmen facilities and opportunities to reach at least minimum standard of health, economic security and civilized living. However, in the case of Bandhua Mukti Morcha v. Union of India¹⁶ Court held that It is the fundamental right of each and every person in this country... to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief¹⁷.”

“These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action

⁹ <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>

¹⁰ 1991 AIR 420, 1991 SCR (1)

¹¹ <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>

¹² 1996 AIR SC 2426 1996 4 SCC 37

¹³ AIR 1997 SC 1225

¹⁴ MP. Jain, Indian Constitutional Law, Wadhwa, 5th Ed. (2003), p. 1315

¹⁵ AIR (1995) 922, (1995) SCC (3) 42

¹⁶ 1984 AIR 802, 1984 SCR (2)

¹⁷ <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>



which will deprive a person of the enjoyment of these basic essentials¹⁸.

However, In the case of Olga Tellis v. Bombay Municipal Corporation¹⁹, commonly known as the “Pavement Dwellers Case” and court held that right to livelihood is the basic requirement because no life is possible without livelihood, Therefore, the court, observed that

“The sweep of the right to life conferred by Art.21 is wide and far-reaching. It does not mean, merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of death sentence, except according to procedure established by law. That is but one aspect if the right to life. An equally important facet of the right to life is the right to livelihood because no person can live without the means of livelihood.”

“If the livelihood is part of right to life. Therefore, the oxygen that is most basic requirement to survival of human life is not the part of right to life there is no doubt that oxygen is the first place among all in life

However, In the case of **Parmananda Katara v. Union of India²⁰**, Supreme court observed that protection of life is most important facet court further stated that once person life is lost status quo cannot be restored²¹. Number of people loss their life due to non-supply of oxygen is the gross violation of right to life and state is not able to protect the same. Further, the Supreme Court further developed the right to

emergency treatment and went on to state that the failure on the part of the Government hospital to provide timely medical treatment to a person in need of such treatment results in the violation of his right to life guaranteed under Article 21. It acknowledged the limitation of financial resources to give effect to such a right but maintained that it was necessary for the State to provide for the resources to give effect to the entitlement of the people of receiving emergency medical treatment²².

In Sou motu case **Allahabad High Court²³** In Para 15 of the order Court stated that “We are at pain in observing that death of Covid patients just for non supplying of oxygen to the hospitals is a criminal act and not less than a genocide by those who have been entrusted the task to ensure continuous procurement and supply chain of the liquid medical oxygen. How can we let our people die in this way when science is so advanced that even heart transplantation and brain surgery are taking place these days”.

Right to Life and Oxygen

In the case of **Katar Singh v State of Punjab²⁴** court held that Right to speedy trial is part of right to life and liberty²⁵. However, in the case of A.R.Antulay v.R.S. Nayak Supreme court laid down guideline for speedy trial and upheld the *katar singh* case and observed that :Speedy trial is the part of fundamental right. However, the brutal second wave of the covid 19 hit India, there has been almost a war over oxygen cylinders

¹⁸ <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>

¹⁹ AIR 1986 SC 180

²⁰ AIR (1989) 2039, (1989) SCR (3) 997

²¹ <https://www.lawctopus.com/academike/article-21>

²² *ibid*

²³ PUBLIC INTEREST LITIGATION (PIL) No. - 574 of 2020

²⁴ 1994 SCC (3) 569, JT 1994 (2) 423,1994, SCALE 1

²⁵ <https://ipc498a.wordpress.com//2007/04/10/right-to-speedy-trial-is-a-fundamental-right-sc/>



among states, and between states and the Centre and **Delhi High** court also warned it will hang any person who tries to obstruct the supply of oxygen²⁶. Hence if the speedy trail is the part of right to life under article 21 of the Constitution, then how can speedy supply of oxygen is not part of the article 21.

Constitutional court has an important watchdog of the fundamental right and during the Second wave of covid 19 in which country is facing oxygen crises the Different High court and Supreme court of India play a important role to in ensuring that fundamental rights are not denied number of covid patient died due to non-supply of oxygen. Therefore, in order to discharge their constitution obligation **Delhi High court** while hearing the petition of different hospital of Delhi for emergency supply of oxygen. court observed that “beg, borrow, steal” But provide oxygen to help citizens to breathe²⁷.

However, **Karnataka High Court**, Directed to centre to supply of oxygen to the state court observed that, *In these circumstances, we have no option but to issue a mandatory direction to the Government of India to again consider representation made by the state government, on April 30. We direct the state government to immediately submit a*

*representation to the Government of India, with a projected estimate of oxygen for next one week. Representation shall be considered by the Government of India, within four days. Till representation is considered, we direct the Government of India to increase the cap on supply of oxygen to the state to upto 1200 MT per day, with immediate effect said divisional bench²⁸,” Central government challenge the High court order which direct the supply of 1200MT per day. Supreme Court decline to interfere with High court order and **Justice Chandrachud** observed that “*High court order is extraordinarily and calibrated exercise of judicial power and also observed that we have been chief justice. Judges are also human. The judges have seen deaths at Kalburgi and other places please understand the human aspect²⁹”.**

Patna High Court while hearing the different petition for covid mismanagement observed that: We have all failed. All of us feel ashamed for what we have done. Don’t make a joke of the proceedings. We cannot wait. We cannot play with the lives of the people, you may. It is an observation on us also that we have failed. This has happened only because we depended on the state officials and false assurances given by state official³⁰**Gujrat High court** taken Suo motu cognizance on the covid-19 situation in Gujarat, the court said it was refraining from giving any direction or suggestion to the

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https://economictimes.indiatimes.com/news/india/if-anyone-obstructs-oxygen-supply-we-will-hang-him-delhi-hc/articleshow/82228562.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

²⁷<https://www.hindustantimes.com//editorials/oxygen-beg-borrow-steal.html>

²⁸ [https://www.ndtv.com/karnataka-news/Coronavirus: Karnataka High Court Tells Centre To Increase Daily Oxygen Supply Of State \(ndtv.com\)](https://www.ndtv.com/karnataka-news/Coronavirus: Karnataka High Court Tells Centre To Increase Daily Oxygen Supply Of State (ndtv.com))

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<https://www.barandbench.com/news/litigation/supreme-court-refuses-interfere-karnataka-high-court-oxygen-allocation-order>

³⁰ <https://www.hindustantimes.com/cities/patna-news/we-feel-ashamed-high-court-rebukes-bihar-government-on-handling-covid-crisis-101620125657210.html>



government in this regard. *"It is for the state to take appropriate steps keeping in mind the welfare of the public at large. If such actions are not taken, preventing people to get together or from moving from one place to another unless and until it is inevitable, the (infection) chain would not be broken and the public at large would be the sufferer,"*³¹ **Delhi High Court** While hearing a batch of petitions on non-supply of sufficient oxygen to Delhi, and court observed that :the medical infrastructure of the capital has been totally exposed and "put to test the court further said that the health infrastructure is indeed in shambles and that. The counsel must not behave like *an ostrich with its head in the sand*. the bench said that while the petitioner did indeed have the right to life guaranteed under Art.21 of the Constitution, merely because he had approach while thousands of others couldn't, he couldn't be given any preferential treatment over the others³². further Delhi High Court in the case of **Max Bupa Health Insurance Co Ltd v Government of NCT**³³ Held that Medical insurance and health insurance services are essential services during covid 19 pandemic, the employees of the Petitioner company, who are dealing with medical and health insurance services, ought to be permitted to move freely between hospitals and their own offices, in order to expedite the processing of medical insurance claims³⁴. However, **Telangana High Court** directed centre to ensure that if 430MT Oxygen has been allocated to this State out of which a particular quantity is supposed to be supplied

from neighbouring State and the same is not being supplied, then immediate measure be taken to make good the deficiency by allocating more from any other³⁵ And **Madras High Court** While hearing the case Chief Justice Banerjee direct the authorities to do whatever is required to ensure that the State oxygen needs are taken care of.

"we read that Sterlite is not going to produce Oxygen until after a week critical patients cannot survive minutes without oxygen. Please take care of it Please do whatever is within your power to see that somehow oxygen supply is augmented... It is critical and requires the attention of the highest officers so that lives are not lost for want of oxygen," **the Chief Justice told the ASG.Court** However observed that *"no directions may be issued but only an appeal may be made so that there is somewhat of an equitable distribution of available resources. No court of a State or a State can demand all the facilities to exclusion of others but there has to be an equitable distribution depending on production capacity in the particular State and the position should not be altered to the detriment of a particular State since Tamil Nadu has a production capacity of 400 MT per day. That with some additional supply may suffice for its need. "It is hoped that all stakeholders would put their heads together to ensure the proper supply of the facilities and amenities, particularly oxygen at the earliest"*³⁶. However, **Jharkhand High Court**³⁷ observed that: People Dying Due To

³¹ <https://thewire.in/law/gujarat-high-court>.

³² <https://www.livelaw.in/news-updates/delhi-high-court-oxygen-shortage-covid-19-delhi-government-173740>

³³ W.P.(C) 5179/2021

³⁴ <https://www.barandbench.com>

³⁵ <https://livelaw.in/news-updates/telangana-high-court-issues-directions-to-ramp-up-testing-prevent-congregations-provide-tele-consultation-covid-19-173643>

³⁶ <https://www.barandbench.com>

³⁷ W.P. (C) No.01 of 2021



Oxygen Paucity": Jharkhand High Court Raps Government and Warns Officials Of contempt³⁸.

Supreme court allows to Reopening of **Vedanta' Sterlite** plant in Tamil Nadu to produce oxygen for medical use court Also clarified that the plant is opening for oxygen production for medical uses. Company will not use this order for other production. While staying the contempt proceeding initiated by Delhi high court Supreme Court asked the Centre's plans on how 700 MT will be supplied to Delhi. The court has asked the Centre to submit its plans for Delhi by 10:30 am on Thursday.

Justice Chandrachud said, "The Centre's effort now has to be to comply. Putting officers in jail or hauling them up for contempt is not going to get oxygen to Delhi."

Solicitor General (SG) Tushar Mehta, appearing for the Centre, said it is unfortunate that the Delhi High Court had initiated contempt proceedings when the Centre, its officers are doing their best to tackle the oxygen crisis.

Justice Chandrachud said, "Based on the current situation of Delhi, the situation is terrible. What can be done about the contempt that you have come against? You need to tell us what you have done on May 3-5." To this, the Centre replied, "On May 3, we

supplied 433 MT to Delhi. On May 4, we supplied 585 MT³⁹."

We want 700 MT Oxygen to be supplied to Delhi on daily basis and we mean business. It has to be supplied and we don't want to be coercive. Our order will take time to be uploaded by 3 pm. But you proceed and arrange the oxygen," said Justice DY Chandrachud⁴⁰. Don't make us go firm, court added. *"You have to supply 700 MT oxygen every day till we further order⁴¹.*

Supreme Court sets up National Task Force to streamline oxygen allocation, ensure availability of essential drug, medicines. *The top court stated that an effective and transparent mechanism is needed to be set up within the Union Government for the purpose of allocating medical oxygen to all States and Union Territories* The Supreme Court has set up a twelve-member National Task Force to facilitate and public health response to COVID-19 based on scientific and specialised.

The Constitutional court of the country play's a great role while discharging their constitutional duty to protect the fundamental right of the people and they are working very boldly in the pandemic. Where everything is close but our constitutional courts are working which is very helpful in protection of right to life Therefore, at least nine High court direct centre and state government to supply oxygen to the breath of the citizen. When state is failing to protect the life of the

³⁸ <https://www.livelaw.in/news-updates/jharkhand-high-court-raps-govt-warns-officials-of-contempt-people-dying-due-to-oxygen-paucity-173589>

³⁹ <https://www.indiatoday.in/india/story/supreme-court-asks-centre-for-plans-to-supply-oxygen-to-delhi-1799082-2021-05-05>

[COVID-19] "We want 700 MT Oxygen supplied to Delhi on a daily basis and we mean business:" Supreme Court (barandbench.com)⁴⁰

⁴¹ <https://www.barandbench.com>



person because it is the state who has constitutional duty to protect the life, However, court take cognizance of number of death of covid patient due to non-supply of oxygen and try to protect the fundamental right which is guaranteed by the constitution of India under article 21 of the Indian constitution.

Conclusion

Judiciary has an important watchdog role to play in ensuring that fundamental rights are not denied especially when country is under health emergency where people are dying due to not getting basic medical aid like life savings medicine, crises of beds in hospital not getting proper oxygen which is most basic requirement for the survival of human being, However state was under constitutional obligation to protect the life of the person because existence of state was only for the protection of life and property but death of the covid patient by non -supply of oxygen is gross violation of fundamental right and constitutional court is the guardian of fundamental right for the discharging the constitutional obligation at least nine high courts and supreme court of India take suo moto cognizance for the saving of life and direct the centre and state government to supply of oxygen and order to make national plan. Therefore after the direction of court home ministry order that there will be no restriction on inter-state supply of oxygen and also order that supply of oxygen for industrial is prohibited, there has been almost a war over oxygen cylinders among states, and between states and the Centre. This is both a symbol of an existing crisis in Indian federalism, as well as a further blow to the federal compact. And there is little doubt that the Centre has to take a larger share of the responsibility. At a time when patients and

their families are desperately looking for hospital beds, medicines and oxygen, the Centre should play the role of an unbiased administrator, unveil a proper distribution pattern, and unclog the legal and administrative bottlenecks to ensure fair and timely distribution of medical supplies. But that hasn't happened so far because it failed to anticipate the scale of the crisis and need for oxygen Industry experts say India has the capacity to produce more than 7,000 metric tonnes of medical oxygen, but the problem is there are not enough cylinders and tankers to store and transport it. India also does not have enough cryogenic tankers to ensure 24x7 road transport of medical oxygen. There are also the problems of wastage and leakages in hospital pipelines that supply oxygen. Successive governments have overlooked these issues, this government also took its eye.
