CHAPTER 4
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A) INTRODUCTION

Right to health is an issue of fundamental importance in the Indian society. The responsibility to protect, respect and fulfill the right to health lies not only with the medical profession but also with public functionaries such as administrators and judges.\(^\text{487}\) The traditional notion of healthcare has now tended to be individual centric and has focused on aspects such as access to medical treatment, medicines and procedures. The field of professional ethics in the medical profession has accordingly dealt with doctor patient relationship and the expansion of facilities for curative treatment. In such a context health care at collective level was largely identified with statistical determinants such as life expectancy, mortality rates and access to modern pharmaceuticals and procedures. It is evident that such conception does not convey a wholesome picture of all aspects of the protection and promotion of health in society. There is an obvious intersection between health care at the individual as well as societal level and the provision of nutrition, clothing and shelter. Also the term health has an inter-relationship with aspects such as the provision of a clean living environment, protections against hazardous working conditions, education about disease prevention and social security measures in respect of disability, unemployment, sickness and injury.\(^\text{488}\) More than half a century’s experience of waiting for the policy route to assure respect, protection and fulfillment for healthcare is now behind us. The right to healthcare is primarily a claim to an entitlement, a positive right, not a protective fence.\(^\text{489}\)

As entitlements rights are contrasted with privileges, group ideals, societal obligations, or acts of charity, and once legislated they become claims justified by the


\(^{488}\) Ibid., p.2.

laws of the state. The emphasis thus needs to shift from ‘respect’ and ‘protect’ to focus more on ‘fulfill’. For the right to be effective optimal resources that are needed to fulfill the core obligations have to be made available and utilized effectively. Further, using a human rights approach also implies that the entitlement is universal. This means there is no exclusion from the provisions made to assure healthcare on any grounds whether purchasing power, employment status, residence, religion, caste, gender, disability, and any other basis of discrimination.490

**B) RIGHT TO HEALTH AND THE CONSTITUTION OF INDIA**

The Preamble to the Constitution highlights some of the core values and principles that guide the Constitution of India. Although the preamble is not regarded as a part of the Constitution and is not enforceable in a court of law, the Constitution is interpreted in the light of the preamble and in a majority of decisions the Supreme Court of India has held that the objectives of justice, liberty, equality and fraternity stated in the preamble constitute the basic structure of the Constitution. The Preamble directs the state to initiate measures to establish justice, equality, ensure dignity, etc. which have a direct bearing on people’s health.491

When right to healthcare is seen within the constitutional framework it is clear that the constitution of India does not provide for right to health in any way. Right to health has been evident in India through the various case laws decided by the Indian judiciary from time to time. Human rights in the Indian Constitution are divided into two separate parts. Part III of the constitution houses the ‘Fundamental Rights’, which include the right to life, the right to equality, the right to free speech and expression, the right to freedom of movement, the right to freedom of religion, which in conventional human rights language may be termed as civil and political rights. Part IV of the constitution contains the Directive Principles of State Policy (DPSPs), which include all the social, economic and cultural rights, such as the right to

490 K.G. Balakrishnan, note 1, p. 2.
education, the right to livelihood, the right to health and housing etc. and this forms
the economic, social and cultural rights. At the time of formation of the Indian
constitution right to health was placed under the directive principles of state policy
because direct enforcement of the right to health was found difficult by the makers of
the constitution.

Initially the Supreme Court of India enforced right to health among the people
through various public interest litigations which came before the Indian judiciary.
With the passage of time the judiciary found that right to life under article 21 is
incomplete without right to live with human dignity which includes various other
rights like the right to education, the right to livelihood, the right to health and
housing etc. thus right to health became a part of fundamental rights and was
incorporated under article 21 of the Indian constitution. The provisions under which
right to health is defined under the Constitution of India are:

Article 21 of the Indian constitution deals with Protection of Life and Personal
Liberty. It lays down that no person shall be deprived of his life or personal liberty
except according to procedure established by law. The object of this fundamental
right under Article 21 is to prevent encroachment upon personal liberty and
deprivation of life except according to procedure established by law. Right to Life
means the right to lead meaningful, complete and dignified life. It does not have
restricted meaning. It is something more than surviving or animal existence. It has a
much wider meaning which includes right to live with human dignity. Right to life is
fundamental to our very existence without which we cannot live as human being and
includes all those aspects of life which go to make a man's life meaningful, complete
and worth living.

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

net.org/usr_doc/kothari_article2.ocd> Last visited on 23rd December 2010.

legalserviceindia.com/articles/art222.htm> last visited on 5th January 2011.
protection of the health and, opportunities and facilities for children to develop in a healthy manner, just and humane conditions of work etc. 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\textsuperscript{494} to take any action which will deprive a person of the enjoyment of these basic essentials.

According to Article 47 of the Indian constitution the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, the state shall prohibit the consumption of intoxicating drinks and drugs which are injurious to health except for medical purposes. It is, however, not enforceable in a court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring this basic essential which go to make up a life of human dignity but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21.\textsuperscript{495}

The Supreme Court has in various judicial pronouncements enshrined the right to health as envisaged under the Indian constitution. Some of the initial judicial pronouncements are related to public interest litigation. Compared to some of the other social rights, the Right to Health has been articulated and recognized as an integral part of the right to life only from the mid-nineties by the Indian Supreme Court. The recognition of the right to health has emerged out of a gamut of different petitions and public interest litigations in the Supreme Court, ranging from PILs concerning workers health hazards to petitions filed by individual seeking rights of


\textsuperscript{495} Abhay, “Judicial Interpretation of Article 21 of the Indian Constitution”, note 8.
emergency medical care and HIV issues and to PILs for banning smoking in public spaces.496

1. Public Interest Litigation complains

It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by the Supreme Court, 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 the 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 as humane conditions of work and maternity relief. 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 has the right to take any action which will deprive a person of the enjoyment of these basic essentials”. This was very well established by the Supreme Court in the famous case of Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi & Ors.497

In another case of Akhil Bharatiya Soshit Karmachari Sangh vs. Union of India498 Supreme Court has pointed out that, "the Fundamental Rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to courts. So they are made justifiable. However, it is also evident that notwithstanding their great importance, the Directive Principles cannot in the very nature of things be enforced in a Court of Law, but it does not mean that Directive Principles are less important than Fundamental Rights or that they are not binding on the various organs of the State.” In a series of pronouncements during the recent years this Court has culled out from the provisions of Part IV of the Constitution these several obligations

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of the State and called upon it to effectuate them in order that the resultant pictured by
the Constitution Fathers may become a reality. The maintenance and improvement of
public health have to rank high as these are indispensable to the very physical
existence of the community and on the betterment of these depends the building of the
society of which the Constitution makers envisaged. Attending to public health,
therefore, is of high priority—perhaps the one at the top.

In 1987 a very important decision of the Supreme Court came out in public
interest in the case of Vincent Panikurlangara vs. Union of India & Ors\(^{499}\), in this
case it was held that in a welfare State, it is the obligation of the State to ensure the
creation and maintaining of conditions congenial to good health. The right to enjoy
life as a serene experience, in quality far more than animal existence is thus
recognized. Personal autonomy, free from intrusion and appropriation is, thus a
constitutional reality. The right to live in peace, to sleep in peace and the right to
repose and health are part of the right to live. We recognize every man's home to be
his castle, which cannot be invaded by toxic fumes, or tormenting sounds. This
principle expressed through law and culture, consistent with nature's ground rules for
existence, has been recognized in Section 133(1)(b). "The conduct of any trade or
occupation, or keeping of any goods or merchandise, injurious to health or physical
comfort of community", could be regulated, or prohibited under the section. In this
case the petitioner was an advocate by profession and he moved to the Supreme Court
in public interest seeking directions banning import, manufacture, sale and
distribution of such drugs which have been banned in Western countries or
recommended to be banned by the Drugs Consultative Committee under the Drugs
and Cosmetics Act, 1940. The petitioner has also sought directions, (i) for
cancellation of licenses authorizing import, manufacture, sale and distribution of such
drugs; (ii) for Constitution of a high powered Authority to go into the hazards suffered
by people of the country on account of such drugs being in circulation and suggest
remedial measures including award of compensation.

\(^{499}\) 1987 AIR (SC) 990.
In the case of *CESC Ltd. vs. Subash Chandra Bose*\(^{500}\), The Supreme Court relied on international instruments and concluded that right to health is a fundamental right. It went further and observed that health is not merely absence of sickness, “The term health implies more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development. Facilities of health and medical care generate devotion and dedication to give the workers’ best, physically as well as mentally, in productivity. It enables the worker to enjoy the fruit of his labour, to keep him physically fit and mentally alert for leading a successful economic, social and cultural life. The medical facilities are, therefore, part of social security and like gilt edged security, it would yield immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness, etc. Health is thus a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. In the light of Articles 22 to 25 of the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and in the light of socio-economic justice assured in our Constitution, right to health is a fundamental human right to workmen. The maintenance of health is a most imperative constitutional goal whose realization requires interaction by many social and economic factors.”

It was in 1995 in the case of *Consumer Education and Research Centre vs. Union of India*\(^{501}\), that the Supreme Court for the first time explicitly held that ‘the right to health is an integral fact of a meaningful right to life.’ This case was concerning the occupational health hazards faced by workers in the asbestos industry. Reading Article 21 with the relevant directive principles guaranteed in articles 39 (e), 41 and 43, the Supreme Court held that the right to health and medical care is a fundamental right and it makes the life of the workman meaningful and purposeful with the dignity of person. This recognition established a framework for addressing health concerns within the area of public interest litigation and in a series of subsequent cases, the Court held that it is the obligation of the State not only to provide emergency medical services but also to ensure the creation of conditions

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\(^{500}\) 1992 AIR (SC) 573, 585.

necessary for good health, including provisions for basic curative and preventive health services and the assurance of healthy living and working conditions.

Very significantly, while adjudicating on the social right to health, the Supreme Court has specifically considered the issue of availability of resources, and has rejected the argument that social rights are non-enforceable due to shortage of resources. This was discussed in the popular case of *Paschim Banga Khet Mazdoor Samity & Ors vs State of West Bengal & Ano*502 where the Court addressed the issue of adequacy and availability of emergency medical treatment. In this case, Hakim Sheikh, a member of the Paschim Banga Khet Mazdoor Samity, fell off a train and suffered serious head injuries. He was brought to a number of State hospitals, including both primary health centers and specialist clinics, for treatment of his injuries. Seven state hospitals were unable to provide emergency treatment for his injuries because of a lack of bed space and trauma and neurological services. He was finally taken to a private hospital where he received his treatment. Feeling aggrieved by the callous and insensitive attitude of the government hospitals in Calcutta in providing emergency treatment the petitioner filed this petition in the Supreme Court and sought compensation. The issue presented to the Court was whether the lack of adequate medical facilities for emergency treatment constituted a denial of the fundamental right to life under Article 21.

It was held that Article 21 of the Constitution casts an obligation on the State to take every measure to preserve life. The Court found that it is the primary duty of a welfare State to ensure that medical facilities are adequate and available to provide treatment. Due to the violation of the right to life of the petitioner, compensation was awarded to him. In this case, the Supreme Court recognized that financial resources are needed for providing these facilities, but Justice S C Agarwal held: ‘… But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. The Court recognized that substantial expenditure was needed to ensure that medical facilities were adequate. However, it held that a state could not avoid this constitutional obligation on account

of financial constraints. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life.’ So, therefore, not only did Justice Agarwal reiterate that the state has to strive towards enforcement and guaranteeing of social rights irrespective of financial constraints, but also the important issue that the need for resources arises also in the matter of enforcement of civil/political rights.

The Court, in Paschim Banga also required the state to ensure that primary health centres are equipped to provide immediate stabilizing treatment for serious injuries and emergencies. In addition, the Court ordered the state to increase the number of specialist and regional clinics around the country available to treat serious injuries and to create a centralized communication system among state hospitals so that patients could be transported immediately to the facilities where space is available. The courts have not only looked at the issue of emergency medical treatment as part of the right to health, but have also addressed the importance of providing preventive health services to the Indian population. In addition the courts have observed that a healthy body is the very foundation for all human activities and that measure should be taken to ensure that health is preserved.

In *Mahendra Pratap Singh vs. Orissa State*, the petitioner was an ex-Sarpanch of Pachhikote Gram Panchayat. He approached the court for issuance of appropriate writ commanding the opposite parties to take effective measures to run Primary Health Centre at Pachhikote within Korei block in the district of Jaipur by providing all amenities and facilities for proper running of the said health centre. The judgment stated that the Gram Panchayat was agreeable to offer of the gram panchayat building for running of the health centre. If the building was still available, the same could be utilized for the purpose of running of the PHC, till the new building was completed. The Government either diverts the staff from Korei or make suitable arrangement for running of the PHC in the building of Pachhikote Gram Panchayat.

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503 1997 AIR (Ori) 37.
Necessary arrangement would be made within a period of three months from that day. This is perhaps the only judgement commending the right to health for a general population.

Another public interest litigation case which can be cited here is *Murli Deora vs Union of India and Ors*\(^{504}\), popularly known as the public smoking case in which the Supreme Court prohibited smoking in public places in the entire country on the grounds that smoking is injurious to health of passive smokers and issued directions to the Union of India, State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in all public places such as auditoriums, hospital buildings, health institutions, educational institutions, libraries, courts, public offices and public conveyances, including railways. In another interesting PIL, the Supreme Court, taking into consideration the increasing pollution levels in New Delhi due to diesel emissions, and that such exposure to toxic air would violate the right to life and health of the citizens, directed all private non-commercial vehicles to conform to Euro-II norms within a specified time period.

In the case of *Naz Foundation vs Government of NCT of Delhi and Others*\(^{505}\), The writ petition was filed by Naz Foundation, a Non-Governmental Organization (NGO) as a Public Interest Litigation to challenge the constitutional validity of Section 377 of the Indian Penal Code, 1860 (IPC), which criminally penalizes what is described as "unnatural offences", to the extent that it violates article 21 of the Indian constitution. It was submitted that Section 377 acts as a serious impediment to successful public health interventions. According to NACO, those in the High Risk Group are mostly reluctant to reveal same-sex behavior due to fear of law enforcement agencies, keeping a large section invisible and unreachable and thereby pushing the cases of infection underground making it very difficult for the public health workers to even access them. The situation is aggravated by the strong tendencies created within the community who deny MSM (men who have sex with men) behavior itself. Since many MSM are married or have sex with women, their female sexual partners are consequently also at risk for HIV/infection. The NACO

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\(^{504}\) 2001, 8 SCC 765.

viewed it imperative that the MSM and gay community have the ability to be safely visible through which HIV/AIDS prevention may be successfully conducted. Clearly, the main impediment is that the sexual practices of the MSM and gay community are hidden because they are subject to criminal sanction. The court declared in its decision on 2nd July 2009 that Section 377 IPC criminalizes consensual sexual acts of adults in private, so far as it is violative of Articles 21, of the Constitution of India.\textsuperscript{506}

In all the above judgments, we see the Supreme Court carving out a Right to Health from the various judicial pronouncements which came before the court and thus incorporated this right within Article 21 of the Indian Constitution. The scope of the right has also been very broad encompassing several different aspects of health care and services. With the recognition that both the Preamble of the Constitution and the fundamental right to life in Article 21 emphasize the value of human dignity, the Supreme Court began to address the importance of health as a fundamental right to Indian citizens. In the Directive Principles in Part IV of the Constitution, Article 47 declares that the ‘state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. In addition to Article 47, the right to health also has its genesis in Articles 38 (social order to promote the welfare of the people), 39(e) (health of workers, men, women and children must be protected against abuse), 41(right to public assistance in certain cases, including sickness and disability), and 48A (the state’s duty to protect the environment) of the Directive Principles. In a series of cases dealing with the substantive content of the right to life the Court has found that the right to live with human dignity includes the right to good health.

It is worth mentioning that Supreme Court of India has not left any area concerning right to health as untouched. It has awarded its view on each and every field from workers right to health tot HIV Aids and health hazards caused due to environmental pollution and also the recent issues which have arisen in due course of time in the modern world like homosexuality and euthanasia.

\textsuperscript{506} Ibid.
2. Workers Right to Health

The right to health to a worker is an integral facet of meaningful right to life to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes his livelihood. Compelling economic necessity to work in an industry exposed to health hazards due to indigence to bread winning to him and his dependents should not beat the cost of the health and vigour of the workman. Facilities and opportunities, as enjoined in Article 38, should be provided to protect the health of the workman. Provision for medical test and treatment invigorates the health of the worker for higher production or efficient service. Continued treatment, while in service or after retirement, is a moral, legal and constitutional concomitant duty of the employer and the State. Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker is a minimum requirement to enable a person to live with human dignity. The State, be it Union or State Government or an industry, public or private, is enjoined to take all such action which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness.  

In the famous case of People's Union for Democratic Rights vs. Union of India also the SC had held that the State was under a constitutional obligation to see that there was no violation of the fundamental right of any person, particularly when he belongs to the weaker section of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. The Central Government is, therefore, bound to ensure the observance of various social welfare, and labour laws enacted by Parliament for the purpose of securing to the workmen a


life of basic human dignity in compliance with the Directive Principles of State Policy. The Supreme Court also issued various directions to the State and Central Governments and some of the important directions concerning health are the following:

a) The Central Government and the state Government will immediately ensure that the factory owners should supply pure drinking water to the workmen.

b) The Central Government and the state Government will immediately direct the factory owners to start obtaining drinking water from any unpolluted source or sources of supply and to transport it by tankers to the work site with sufficient frequency so as to be able to keep the vessels filled up for supply of clean drinking water to the workmen.

c) The Central Government and the State Government will ensure that conservancy facilities in the form of latrines and urinals in accordance with the provisions of the law are provided.

d) The Central Government and the State Government will take steps to immediately ensure that appropriate and adequate medical and first aid facilities as required by the provisions of the law are provided to the workmen.

In Rajangam, Secretary, Dist. Beedi Worker’s Union vs. State of Tamil Nadu\(^{509}\) the issue concerning conditions of work of employees in Beedi manufacturing and allied industries was raised. A large number of children are employed in this work. The Supreme Court observed that tobacco manufacturing is indeed health hazardous. Child labour in this trade should therefore be prohibited as far as possible and employment of child labour should be stopped either immediately or in a phased manner to be decided by the State Governments but within a period not exceeding three years from now. The Court was of the view that provisions of Child Labour (Prohibition & Regulation) Act, 1986 should be strictly implemented. The Court further stated that the Beedi Workers Welfare Cess Act, 1976 and the Beedi Workers Welfare Fund Act, 1976 which contain beneficial provisions should be

\(^{509}\) 1993 AIR (SC) 401.
implemented in the true spirit and since they are legislations of the Central Government, the machinery of the Central Government should be made operational in the area. In view of the health hazard involved in the manufacturing process, the Court ordered that every worker including children, if employed, should be insured for a minimum amount of Rs 50,000 and the premium should be paid by the employer and the incidence should not be passed on to the workman.

Another memorable decision was taken by the Supreme Court in *Bandhua Mukti Morcha vs. Union of India & Ors*\(^5\) where a PIL was filed against the employment of children below 14 years of age in the carpet industry in Uttar Pradesh. The petitioner sought directions for the total prohibition on employment of children below 14 years of age and directions to the Respondents to give them facilities like education, health, sanitation, nutritious food, etc. It was also contended that the employment of children in any industry or in a hazardous industry violated Article 24 of the Constitution of India.\(^5\) The Court held that the imperatives of Directive Principles of State Policy, read with the Preamble, Article 21, 23\(^5\) and 24 of the Constitution enjoins upon the State to ensure socio-economic justice to the child and their empowerment, full growth of their personality— socially, educationally and culturally— with a right to leisure and opportunity for development of the spirit of reform, inquiry, humanism and scientific temper to improve excellence- individually and collectively. In specific, the State has the responsibility to formulate policy to protect children of tender age from abuse (Art.39e), to provide opportunities and facilities for their development in a healthy manner and in conditions of freedom and dignity and protect their childhood and youth against exploitation and moral and material abandonment (Art.39f ); free and compulsory primary education for all children (Art. 45); and prohibit employment of the children below the age of 14 in any factory or mine or any hazardous employment (Art.24).

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\(^{510}\) 1997 RD-SC 208.

\(^{511}\) Article 24 of the constitution of India says that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

\(^{512}\) Article 21 and 23 of the constitution of India are about traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
In *State of Punjab vs. Mohinder Singh Chawla*, Right to Health Care of government employees was held as an integral to right to life. The respondent had heart ailment which required replacement of two valves in the heart. Since the facility of the treatment was not available in the State Hospitals of Punjab, permission was given by the Director, with the approval of the Medical Board, to get the treatment outside the State. The respondent was sent for and had treatment in the AIIMS at New Delhi. The respondent submitted this medical bill on September 21, 1994 for reimbursement. While granting reimbursement for the actual expenses incurred in the sum of Rs.1, 29,000/-, the appellants rejected his bill for room rent paid to the hospital as inadmissible. The respondent filed writ petition stating that when he had undergone the treatment in the hospital as an inpatient, the payment of the room rent is an integral part of the expenses for treatment and, therefore, he is entitled to the reimbursement of the room rent paid. The Division Bench directed payment of the said amount.

In another case of *Mangesh Salodkar vs. Monsanto Chemicals of India Ltd.*, the issue concerning the conditions of work at the plants run by the company Monsanto Ltd was discussed. The company manufactured pesticides and it was alleged that a particular worker suffered from brain hemorrhage because of the work environment. He survived but suffered major illnesses. He was paid Rs. 3 lakh by the company towards medical expenses but he filed a petition in the high court. The court initially appointed a Commission headed by a retired judge of the high court. The Commission in turn summoned documents from the Factory Inspectorate and asked experts to look into the conditions of work at the factory. Some of the workers were also medically examined. The court held that the workers had a fundamental right to health at their work place. In addition it also observed that this case demonstrates the absence of updated medical records results in a virtual denial of access to justice. In the absence of information, factory workers and all those who espouse the cause of workers cannot realistically attempt to redress the systemic failure on the part of the regulated industry to maintain regulatory standards. The impact of these rulings

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513 1997, 2 SCC 8, 1997AIR (SC) 1225.
514 Writ Petition No. 2820 of 2003 decided by the Bombay High Court on 13th July, 2006.
necessitates a legal rehabilitation and crystallizations of the existing laws. The health of the workers can only be protected by extending the protective legislation to cover all the workers under a unified occupational health and safety law.

3. Environment Pollution and Health

Environment pollution has direct impact on health. The relation between the two was very well understood by the Supreme Court in its various judicial pronouncements. One of the most important rulings of the Supreme Court where the effect of environment pollution on health was discussed and the state authorities were made responsible for that was Municipal Council Ratlam vs. Vardichand and Ors. This is a crucial and one of the important cases on environmental issues because for the first time the Supreme Court prescribed that in matters concerning public health financial inability was no ground for State authorities not to carry out their duties. The apex court held that a responsible Municipal Council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage system – not pompous and attractive, but in working condition and sufficient to meet the needs of the people – cannot be evaded if the municipality is to justify its existence.

This was a case related to Ratlam which is a town in Madhya Pradesh. The town had the Ratlam Municipal Council, as its local self-governing body. Sanitation in Ratlam was pathetic as the drains overflowed. The municipality was oblivious to its obligation towards human wellbeing and was directly guilty of breach of duty and, of public nuisance and active neglect. The sub Divisional Magistrate, Ratlam, was moved to take action under Section 133 CrPC to abate the nuisance by ordering the municipality to construct drains to wash the filth and stop the stench. The magistrate

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515 1980 AIR (SC) 1622.
made the direction sought and scared by the prospect of prosecution under Section 188 IPC, for violation of the order under Section 133 CrPC, the municipality rushed from court to court till; it reached the Apex Court as the last refuge of lost causes.

The Sessions Court held the order as unjustified but the High Court of Madhya Pradesh upheld the order of the Divisional Magistrate, Ratlam. The Municipal Council, Ratlam argued that though it was their statutory obligation to build proper drains, there was financial inability. The Court held, the plea of the municipality that notwithstanding the public nuisance financial inability validly exonerates it from statutory liability had no juridical basis. The criminal procedure code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision. Likewise, Section 123 of the Act has no saving clause when the municipal council is penniless. Otherwise, a profligate statutory body or pachydermic governmental agency may legally defy duties under the law by urging in self-defence a self-created bankruptcy or perverted expenditure budget. The Supreme Court also held that it was not just a matter of the health of a private individual; but the health, safety and convenience of the public at large was at stake.

The Supreme Court while passing the judgment in this matter directed the Ratlam Municipal Council to take immediate action, within its statutory powers, to stop the effluents from the Alcohol Plant flowing into the street. The Court observed that the State Government also shall take action to stop the pollution and the sub-Divisional Magistrate will also use his power under Section 133 CrPC, to abate the nuisance so caused. Industries cannot make profit at the expense of public health. The SC asked the Municipal Council to construct within six months a sufficient number of public latrines for use by men and women separately, provide water supply and scavenging service morning and evening so as to ensure sanitation. The Health Officer of the Municipality was asked to furnish a report, at the end of the six-monthly term, that the work has been completed.
The SC also directed the State Government to give special instructions to the Malaria Eradication Wing to stop mosquito breeding in Ward 12. The sub Divisional Magistrate was desired to issue directions to the officer concerned to file a report before him to the effect that the work has been done in reasonable time. The municipality was asked not merely to construct the drains but also fill up cesspools and other pits of filth and use its sanitary staff to keep the place free from accumulations of filth. The Court also held that the State should be guided by the paramount principle of Art. 47 of the Constitution of India which states that improvement of public health should be one of the primary duties of the state.

Another important case is The Rural Litigation & Entitlement Kendra (RLEK) v. Union of India. This was the first case of its kind in India involving issues relating to environment and ecological balance. The petitioner RLEK pleaded for closing down of large number of leases of lime-stone quarries which were polluting the environment, causing ecological imbalance and hazard to the health of not only human being but also of all inanimate and animate things. On the other hand, the respondents including both the State and lime-stone quarry units argued that closing down of lime-stone quarries would throw out the owners out of business in which they have invested large sums of money and expended considerable time and effort. In this case the Court ordered for the closing down of lime-stone quarries and observed: "the consequence of this order made by us would be that the lessees of lime-stone quarries which have been directed to be closed down permanently under this order, would be thrown out of business in which they have invested large sums of money and expended considerable time and effort. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without

516 1985 AIR (SC) 652.
an avoidable hazard of them and to their cattle, homes and agricultural land and under affectation of air, water and environment.\textsuperscript{517}

One of the earliest cases where the activities of tanneries were brought to the attention of the Supreme Court was \textit{M.C. Mehta v. Union of India} (Kanpur Tanneries’ matter).\textsuperscript{518} This case was a public interest litigation presented before a Division Bench of the Supreme Court. The petitioner M.C. Mehta, who was an active social worker had filed this petition inter alia for the issue of a writ/order/direction in the nature of mandamus to the respondents restraining them from letting out the trade effluents into River Ganga until the time they put up necessary treatment plants for treating the trade effluents in order to arrest the pollution of water on the said river. It was the complaint of the petitioner that neither the Government nor the people were giving adequate attention to stop the pollution of River Ganga. It was therefore sought that steps should be taken for the purpose of protecting the cleanliness of the stream in River Ganga. It was contended that the trade effluent includes any liquid, gaseous or solid substance, which is discharged from any premises used for carrying on any trade or industry, other than domestic sewage discharged from tanneries was ten times noxious when compared with the domestic sewage water which flows into the river from any urban area on its banks and was thus a major source of pollution of River Ganga. There was not much dispute on the question that the discharge of the trade effluents from these tanneries into River Ganga had been causing considerable damage to the life of the people who used the water of River Ganga and also to the aquatic life in the river. However, the tanneries of Kanpur had presented that due to lack of physical facilities, technical knowhow and funds; it had not been possible for most of them to install adequate treatment facilities. It was pleaded on behalf of a few tanneries that if some time was given to them to establish the pre-treatment plants they would install them.\textsuperscript{519}

\textsuperscript{517} Geet Anjoy Sahu, “Environmental Governance and Role of Judiciary In India” 2007, available at \texttt{<http://www.isec.ac.in/Environmental\_20governance\_20and\_20role\_20of\_20judiciary\_20in\_20India.pdf> } last visited on 8\textsuperscript{th} January 2011.
\textsuperscript{519} Ibid.
In his judgment Venkataramiah, J., held that the State was under a constitutional duty to protect and improve the environment.\textsuperscript{520} In the opinion of the Court, it was a fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife. This meant that no person could knowingly cause or permit any poisonous, noxious or polluting matter to enter, directly or indirectly, into any stream; or, knowingly cause or permit to enter into any stream any other matter which may tend, either directly or in combination with similar matters to impose an obstruction on the proper flow of the water of the stream.\textsuperscript{521}

Finally, it was said that just like an industry which cannot pay minimum wages to its workers, cannot be allowed to exist, a tannery which cannot set up a primary treatment plant couldn’t be permitted to continue to be in existence. This is because the adverse effects on the public at large which are likely to ensue by the pollution of the Ganga would be immense and would outweigh any inconvenience that may be caused to the management and the labour employed by it on account of closure of the tanneries. Thus, the financial capacity of the tanneries was to be considered as irrelevant while requiring them to establish primary treatment plants. It was, therefore, directed that those tanneries, which had failed to take the minimum steps required for the primary treatment of industrial effluent were to be closed down, and though such closure of tanneries could bring unemployment, loss of revenue, etc. life, health and ecology were held to have greater importance to the people.\textsuperscript{522}

\textit{Indian Council for Enviro-Legal Action vs. Union of India (The Bichhri Case)}\textsuperscript{523}, the Court observed, that 'Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The SC held that the polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they

\textsuperscript{520} Article 48-A of the Constitution of India.
\textsuperscript{521} Section 2(a) of the Environment (Protection) Act, 1986.
\textsuperscript{522} Ibid.
\textsuperscript{523} 1996 AIR(SC) 1446, (1996) 3 SCC 212.
are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas. The SC held that the precautionary principle and the polluter pays principle are part of the environmental law of the country. The ‘polluter pays’ principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation.

In *M.C. Mehta v. Union of India and Ors* the issue of hot mix plants; which were treated as hazardous industries were closed with effect from 1997 in pursuance of an order of the Supreme Court was discussed. The Airport Authority of India at the Indira Gandhi International Airport, New Delhi filed an application for permission to install hot mix plants in the vicinity of the airport for a period of one year for resurfacing of the runways for the safe landing and take off of air crafts and for smooth handling of aircraft traffic. The application also stated that the resurfacing of the runways was last done in the year 1990-91, while surfacing of the secondary runway was carried out in 1993. It was further stated that due to the constant use of these runways by the ever increasing traffic both domestic and international racks have developed runways due to which certain runways were showing sign of distress, all of which required immediate resurfacing. Owing to an extra ordinary exceptional and special circumstance it was prayed before the court to permit the setting up a hot mix plant. The Airport Authority also set out a set of undertakings inform of an affidavit to be followed by them.

The important undertakings were; (1) the hot mix plants shall be at least two kilometers away from populace and residential areas; (2) the hot mix plants shall be fitted with pollution control devices of international standard and shall meet all the requirement prescribed by the Central Pollution Control Board; (3) the hot mix plants shall be used only for the purpose of preparing premix material for resurfacing of


*525* Ibid.

runways and no for other purpose. The petitioner placed several documents containing the bad effect of installation of hot mix plants in these areas. The court after going through the submission made by the petitioner and applicant ordered for installation of hot mix plant in the I.G. Airport. The reasoning given by the court was resurfacing of Air Port Runways is a work of national importance and the Air Port Authority of India has already called for global tenders for the job in question in which one of the eligibility criteria is that the firm must possess an adequate capacity environment friendly hot mix plant; electronically computerized paver finisher pneumatic and conventional rollers and tools and tackles.527

The orders of judiciary in the environment cases have made a difference to the environmental law scenario in the country and also in providing clean environment. In this ‘development’ era where ‘Special Economic Zones’ are, cropping up across the country it is important for the judiciary to play an proactive role in safeguarding the environment and also looking at the health aspects of the people living in this country.528

4. Medical Care and Right to Health

Every injured citizen brought for treatment should be instantaneously given medical aid to preserve life and thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death. A petition was filed by a human rights activist seeking directions against the Union of India in *Permanand Katara vs Union of India.*529 The Petition also demanded that in the event of breach of such direction, apart from any action that may be taken for negligence, appropriate compensation should be admissible. Significantly, in this case the Supreme Court observed that every doctor whether in a government establishment or a private individual had the duty to extend immediate medical treatment in consonance with his

529 AIR 1989 SC 2039.
skills to save life because Preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, it cannot be restored as resurrection is beyond the capacity of man.

The Supreme Court made an important observation in the case of *Poonam Verma vs. Ashwin Patel*\(^{530}\), where a person who does not have the knowledge of a particular system of medicine but practices in that system is a quack and a mere pretender to medical knowledge or skill. The Court went on to observe that no person can practice a system of medicine unless he is registered either under the Central Indian Medical Register or the State Register to practice that system of medicine; and only such persons as are eligible for registration and possess recognized degrees as specified under the concerned Central and State Act may so practice. The mere fact that during the course of study some aspects of other systems of medicine were studied does not qualify such practitioners to indulge in the other systems.

In this case, a registered homoeopathy doctor prescribed allopathic medicines to Poonam Verma’s husband. His defence was that he had received instructions in modern system of medicine (allopathy), and after the completion of his course, he had worked as Chief Medical Officer at a well-known allopathic clinic. The Supreme Court observed that a registered homoeopathic practitioner could only practice homoeopathy. Further the Court opined that…physiology and anatomy is common in all systems of Medicines and the students belonging to different systems may be taught physiology and anatomy together, but so far as the study of drugs is concerned, the pharmacology of all systems is entirely different. Therefore, merely because the anatomy and physiology are similar does not entitle a person who has studied one system of medicine to treat patients under another system. The Court held that the doctor was registered only to practice homoeopathy. He was under a statutory duty not to enter other systems of medicine. He trespassed into a prohibited field and was liable to be prosecuted under Section 15(3) of the Indian Medical Council Act, 1956. His conduct also amounted to an actionable negligence for any injury caused to his patients in prescribing allopathic drugs.

\(^{530}\) \(1996\) 4 SCC 33.
Another Petition was filed against the decision of the Indian Medicine Central Council constituted under the Indian Medical Central Council Act, 1970 denying recognition to the degree in Indian medicine awarded by Hindi Sahitya Sammelan after 1967 in the case of Delhi Pradesh Registered Medical Practitioners vs. Director of Health, Delhi Admin. Services. The Institution in question in this case was very old and reputed, and on the basis of degrees awarded by it, large number of practitioners in the discipline of Ayurveda had been registered in various States including Delhi and has been successfully practicing in the discipline of Ayurveda. In the absence of proper medical facilities available to a large number of poorer sections of society, the ban on practitioners who were providing medical services to the needy and poor people was wholly unjustified. The Supreme Court, however, refused to review the decision of the Indian Medical Central Council merely on the basis of the above submission as fell within the realm of policy decision of constitutional functionaries who had the requisite knowledge and expertise to take such decisions. Thus, the degrees were not recognized. The courts have by and large left it to the expert bodies such as Medical Councils to decide as to which qualifications should be recognized and which should not be.

In Pravat Kumar Mukerjee vs. Ruby General Hospital, the National Consumer Commission was concerned with the case of a young student whose motorcycle was dashed by a bus in Calcutta. He was brought to the Respondent hospital but the treatment was not continued as Rs.15,000 demanded by the hospital were not immediately paid. The boy died. The National Commission held that though a doctor is not bound to treat each and every patient, but in emergencies the doctor is bound to treat the patient and could not insist on delaying treatment until the fees were paid. The Petitioner was awarded a compensation of Rs. 10 lakh. The court clearly held that no legal procedures can take priority over providing life-saving treatment for the patient. If such procedures are required by the law, then that law must be amended.

531 (1997)11 SCC 68.
532 Original Petition No. 90 of 2002 decided by the National Commission on 25.4.2005.
533 In civil law, the liability of doctor arises when there is a duty of care, a breach of such duty and consequential injury. The duty is not absolute, which implies that a doctor need not treat all those who approach him. He has the right to refuse. He is liable for harm caused only to those whom he undertakes to treat.
Another case which curtailed criminal proceedings against medical negligence to incidents of gross negligence is *Dr. Suresh Gupta vs. Govt. of Delhi*\(^{534}\). It was held that a medical practitioner cannot be held punishable for every mishap or death during medical treatment. No criminal liability should be attached where a patient’s death results from error of judgment or an accident. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.\(^{535}\) The degree of medical negligence must be such that it shows complete apathy for the life and safety of the patient as to amount to a crime against the state. The issue has been more elaborately dealt with in the case of Jacob Mathew discussed above. In Suresh Gupta’s case, the patient died while he was being operated for nasal deformity, a minor operation without much complexity. The medical experts of the prosecution testified that the cause of death was due to the failure of the Appellant to introduce a cuffed endotracheal tube of proper size to prevent aspiration of blood from the wound in the respiratory passage. The Supreme Court held that even if it was assumed that the Appellant was negligent, he would not be criminally liable as the alleged act was not grossly negligent. At the most he was liable in tort for damages but not for imprisonment under the criminal law. The Court expressed concern that if the liability of doctors were unreasonably extended to criminal liability thereby exposing them to the risk of landing themselves in prison for alleged criminal negligence then the repercussion would be that the doctors would be worried about their own safety rather than administering treatment to the best of their ability. The Court felt that this would adversely affect the society at large and shake the mutual confidence between the doctor and the patient.

*Jacob Mathew vs. State of Punjab*\(^{536}\) is another case of medical negligence. The standard of care, when assessing the practice as adopted is judged in the light of the knowledge available at the time (of the incident), and not at the date of trial. When the charge of negligence arises out of a failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used. In this decision the Supreme Court

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\(^{534}\) 2004, 6 SCC 422.

\(^{535}\) 2004, 6 SCC 429, para 2

\(^{536}\) 2005, 6 SCC 1.
also observed that for inferring negligence on the part of a professional, including a doctor, additional considerations apply. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. Finally, while dealing with negligence the Supreme Court made the following observations: A professional may be held liable for negligence when a) He was not possessed of the requisite skill which he professed to have possessed; [and/or] b) He did not exercise, with reasonable competence in the given case, the skill, which he did possess. The standard to be applied for judging whether the person charged has been negligent or not would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices.

Another case which focused on an inalienable survival right that form part of the right to life: the right to health which would include the right to access and receive a minimum standard of treatment and care in public health facilities was *Laxmi Mandal vs Deen Dayal Harinagar Hospital and Others*. Petition was brought on behalf of a women who died after repeatedly being denied adequate maternal healthcare; Failure to implement state-sponsored schemes aimed at reducing infant and maternal mortality; Birth Status; Right to Health, including reproductive health; Right to Food/Nutrition; Directive Principles; Domestic Application of International Law. Supreme Court has emphasized the importance of the effective implementation of the right to food, and the right to reproductive health of the mother and the right to health of the infant child. The judgment includes the enforcement of the reproductive rights of the mother and the right to nutrition and medical care of the newly born child and continuously thereafter till the age of about six years. The right to food is seen as integral to the right to life and right to health.

537 W.P. (C) 8853 of 2008.
After going through these cases, it can be said that cases of medical negligence are rising rapidly especially in the consumer courts. However getting fellow doctors to testify even in cases which are self-evident is a very difficult task. With the recent decisions of the Supreme Court in matters concerning criminal negligence, it is going to be even more difficult for doctors to be prosecuted under the criminal law. Though no such reliable standard has emerged by which a physician can avoid liability with certainty, there are precautions that a physician can take to ensure that the information provided to the patient falls within the ambit of informed consent. In India, this duty has to be fulfilled with even more care due to level of illiteracy, and poor medical awareness amongst the population even among the urban educated classes. It is the duty of the doctor to explain the method of treatment and the risks involved in a language and manner that the patient can understand. Merely paying lip service to the law does not absolve the doctor of his duties in this regard. The very fact that the patient visits doctor establishes a relationship in which doctor has the duty of disclosure. As in cases of negligence, no uniform standard can emerge, as a practice of medicine is extremely case specific. Doctors are trusted to exercise this discretion in the interest of the patient under the exception for therapeutic privilege. The standard of what constitutes informed consent itself being so ambiguous it is even more abstract in the light of such an exception.538

5. Mental Disability and Right to Health

Since the bio-centric approach to disability equates disability with disease, abnormality and danger, the law and practice in the area of health grounded on this approach generally aim towards prevention of disability and conditions in which treatment to cure disability is to be administered. Mental Health Act of India is a classic example of this approach but a positive aspect of this enactment is that it promotes dignity, autonomy, and respect of individual receiving treatment in line with constitutional provisions.539 For example, Article 47 of the Constitution inter alia

538 Mihir Desai and Dipti Chand, “Healthcare Case Law in India”, note 21.
prohibits ‘consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.’ Drawing from this provision of the Constitution, the Mental Health Act, 1987 in Section 81 stipulates that:

1) “No mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty

2) No mentally ill person under treatment shall be used for purposes of research, unless-

   (i) such research is of direct benefit to him for purposes of diagnosis or treatment,
   or

   (ii) such person, being a voluntary patient, has given his consent in writing or where such person (whether or not a voluntary patient) is incompetent, by reason of minority or otherwise, to give valid consent, the guardian or other person competent to give consent on his behalf, has given his consent in writing, for such research.”

It is a well-known fact that mental health institutions in India continue to rely on Electro-convulsive therapy (ECT), which is banned in most countries\textsuperscript{540}.

In \textit{Dr. Upendra Baxi vs. State of Uttar Pradesh}\textsuperscript{541} The Supreme Court was called upon to enforce the human rights of the occupants of State Protective Homes for women. The Court ordered a medical panel to examine the inmates at the Agra Home and submit the report. The Report showed that 33 out of 50 inmates had varying degrees of mental disability and had not been examined at the time of admission to the Home. Despite this the Superintendent had released 14 of them without determining their mental state and with no money to cover even their train fare to their home towns. The Court recommended that psychiatric treatment be provided to the mentally ill inmates, for which the record of the time and place of the treatment should be maintained.

\textsuperscript{540} “Chapter 6- Specific Social and Cultural rights and their Relevance to Persons with Disabilities”, Ibid.

\textsuperscript{541} (1983) 2 SCC 308.
In another case *B.R Kapoor vs Union of India*\(^{542}\) the Supreme Court recommended that the hospital management be taken over by Union of India from the Delhi Administration. The NHRC is mandated under Section 12 of the Protection of Human Rights Act, 1993 to visit Government run mental hospitals and study the living conditions of the inmates and make recommendations thereon. The most notable intervention of the NHRC in mental health has been a project on Quality Assurance in Mental Health launched in 1997 to analyze the conditions generally prevailing in Government run mental hospitals in various parts of the country with reference to infrastructure, patient care, admission, discharge and appeal procedure, rehabilitation facilities, client satisfaction and morale of the staff. The project report ‘Quality Assurance in Mental Health’, with comprehensive recommendations was circulated by the Commission to the Health Secretaries of all the States and Union Territories. The National Health Policy, 2002 of the Government of India also draws from the jurisprudence and guidelines established by the NHRC. The policy recognizes that mental health disorders are actually much more prevalent than is apparent on the surface and mental health institutions are woefully deficient in physical infrastructure and trained manpower. The Government envisages a network of decentralized mental health services for ameliorating the more common categories of disorders.

In *S.P. Sathe vs State of Maharashtra*\(^{543}\), the Bombay High Court regulated the prescription of indiscriminate electric shocks to mentally ill persons. The directions included that reports be made whenever electric shocks were given by a prison psychiatrist. A writ petition in the High Court of Bombay at Panaji challenged the practice of administering ECT without anesthesia at the Institute of Psychiatry and Human Behaviour (IPHB), Panaji, Goa. The petition was filed on the basis of a complaint from a patient’s relative recently committed to the IPHB for treatment. Patients at the IPHB were administered ECT without anesthesia because no anesthetist was available and the machine was non-functional and in disrepair. The IPHB administered a minimum of 200 procedures a month, with staff members holding the patient down during the procedure.

\(^{542}\) Writ Petition (Cri) No 1777-1778 of 1983.

\(^{543}\) Writ Petition No 1537 of 1984, Bombay.
The practice was barbaric, inhuman and hence in violation of Article 21 of the Constitution; in Violation of Section 81 (Chapter VIII) of the Mental Health Act, 1987, providing that no mentally ill person be subjected during treatment to indignity or cruelty. Without anesthesia it could lead to patient discomfort, fractures of the spine and long bones, and dislocations particularly of the jaw. The ECT was also being administered without the patients’ informed consent. The petitioner filed the petition on behalf of patients and their relatives, since patients were in no position to approach the court, and relatives were reluctant to come forward, given the stigma attached to mental illness.

In the case of Sheela Barse vs. Union of India\textsuperscript{544}, the court dealt with children who were kept in jails across the country for ‘safe custody’ as allegedly they are physically and mentally retarded. Court observed that there are a few matters which need our urgent directions. It seems that there are a number of children who are mentally or physically handicapped and there are also children who are abandoned or destitute and who have no one of take care of them. They are lodged in various jails in different states. The State Governments must take care of these mentally or physically handicapped children and remove them to a Home where they can be properly looked after and so far as the mentally handicapped children are concerned, they can be given proper medical treatment and physically handicapped children may be given not only medical treatment but also vocational training to enable them to earn their livelihood. Those children who are abandoned or lost and are presently kept in jails must also be removed by the State Governments to appropriate places where they can be looked after and rehabilitated.

Again in Rakesh Chandra Narayan vs State of Bihar\textsuperscript{545} the Supreme Court found the conditions in the Ranchi Mental Hospital to be shocking and inhuman and therefore appointed a committee to ensure proper functioning and management of funds. The Court also gave directions for the mental health institutions to be modeled on the lines of NIMHANS at Bangalore. The court observed that in a welfare State it is the obligation of the State to provide medical attention to every citizen. The State


\textsuperscript{545} Writ Petition ( C) No 339 of 1986.
has to realize its obligation and the Government of the day has got to perform its duties by running the hospital in a perfect standard and serving the patients in an appropriate way.

In conclusion, one can say that the State’s concern for creating conditions in which persons can lead their lives free from disability and its life-long implications are very well provided through the legal and administrative initiatives. But the issue of the enjoyment of right to health without discrimination by the already disabled people has yet to be addressed by the lawmakers, the courts and the executive. Although sufficient guidance is available from the monitoring bodies of the international conventions and the Standard Rules in particular, the need at the moment is their creative use and application.

6. HIV and the Right to Health

This is a social right to health which has been very well articulated to persons suffering with HIV/AIDS, due to the large levels of discrimination faced by them. The denial of services vis-à-vis care and support represents one of the most immediate and pressing concerns of people living with HIV/AIDS. The courts have protected people with HIV/AIDS against discrimination in employment and services, but the issue of the right to health of persons with HIV is a new and emerging area of adjudication. A recent Full Bench decision of the Andhra Pradesh High Court views AIDS as a public health issue and one that needs to be articulated in terms of the constitutional guarantee to the right to life, making employers and health providers accountable for any negligence, omission or failure to conform to procedure.

One of the first litigations on the issue of HIV/AIDS in India is Lucy D’ Souza vs. State of Goa in which S. 53(1) (vii) of the Goa Public Health Act, 1987, empowered the government to isolate a person suffering with AIDS, was challenged. The Act did not specify a particular period of isolation or where it should take place, but that isolation was acceptable for such person, and at such institution or ward as

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547 Ibid.
548 AIR 1990 Bom 355.
may be prescribed. Thus wide powers were given to the government to take away the liberty of the individual on grounds that a person was suffering from AIDS. Apart from the violation of the rights guaranteed under the Constitution of India, the petition raised four basic issues regarding this provision:

1. Provision for isolation is based on wrong scientific material and foundation;

2. Object sought to be achieved by isolation is nullified by the provision;

3. Discretion to isolate is unguided and uncontrolled; and

4. The provision for isolation is procedurally unjust in the absence of the right of hearing.

While dealing with the aspects (1) and (2) the court was of the opinion that, isolation was an invasion of the personal liberty of a person and it may also lead to ostracization. The court also held that a balance has to be drawn between the right of the individual and society at large. In a situation of conflict between the right of a private individual and the society at large the latter should prevail over the former. It was also considered that the isolation might lead to people not coming forward and going underground if they are suffering from HIV/AIDS. Thus they will not be able to take proper treatment. Regarding the contention that the discretion of isolation was unguided and uncontrolled, the court held that the government was within its powers to make provisions for controlling the spread of AIDS. It also stated that proper rules had been formulated by the government in this regard. In the matter of notice and hearing prior to the action of isolation the court held that there were many provisions and actions where compliance with this principle of natural justice not possible. The court was also of the opinion that the condition of prior hearing and notice would frustrate the provision of isolation. Such a hearing could be given after the isolation.

A writ petition was filed in *M. Vijaya vs Chairman And Managing Director, Singareni Collieries Co., Ltd., Hyd. And Others*\(^{549}\) on the basis of a letter written by one Suit. Masaraboina Vijaya wife of Ailaiah, a resident of Indira nagar, Regional Hospital Area, Godavarikhani, Karimnagar District, addressed to the Hon'ble Chief

Justice of this Court alleging that she was infected with dreadful disease of AIDS (Acquired Immune Deficiency Syndrome) on account of the negligence on the part of the authorities of Maternity and Family Welfare Hospital, Godavarikhani, a hospital under the control of Singareni Collieries Company Ltd., (SCCL), in conducting relevant precautionary blood tests before transfusion of blood of her brother (donor) into her body when she was operated for hysterectomy (Chronic Cervicitis) on 30-1-1998 at the hospital. She prayed for an enquiry into matter and to take action against those responsible for causing the infectious disease and for a direction to the SCCL to provide sufficient financial assistance. Vijaya, whose husband was an employee of the company for the past 17 years, underwent a hysterectomy at the company's hospital in January 1998, for which her brother donated blood. Fifteen days later, she fell sick and was advised further tests, which revealed that she was HIV positive. Her husband tested negative, while her brother tested positive. In its counter affidavit, the hospital not only disclosed facts about the widespread prevalence of HIV/AIDS in the collieries but also admitted that it had not tested the blood of the donor before accepting it. This, the court said, was negligence on the part of doctors and could not be condoned. The Court awarded compensation as a public law remedy in addition to and apart from the private law remedy for tortuous damages. The court directed Singareni Collieries to pay Rs. one Lakh towards medical costs, in addition to the special or general claims for damages that the petitioner might make.

Another case which brought the issue of privacy before the courts is Mr. X vs. Hospital Z.550 This petition dealt with two issues; firstly, right to privacy of a patient, specially an HIV/AIDS patient and secondly, the right of an individual to be safeguarded from any threat to her health. The Petitioner was tested positive for HIV by the Respondent hospital, which acted upon the discovery and informed Petitioner’s fiancée about this condition because of which the marriage was called off and his community ostracized him. Thus, this petition was filed claiming that there was a breach of privacy and confidentiality by the hospital and the doctor. The Supreme Court observed that the relationship between doctor and patient was that of trust. No information acquired during course of treatment should be divulged without the prior

permission of the patient. In case of HIV/AIDS patients, confidentiality is paramount because of repercussions of disclosure. Nevertheless, an HIV infected person has a right to lead a normal life but not at the cost of others. In the instant case the right of health of Petitioner’s fiancée was pitched against his right to privacy. Supreme Court held that when two rights collide the one that promotes morality and public interest should be upheld. Further, to condemn a person to death by transmitting AIDS not only violates his/her right to life but is also punishable under provisions of Indian Penal Code under Sections 269 and 270. These statutory provisions impose a duty upon the person not to marry as marriage would have the effect of spreading the infection, which obviously is dangerous to life of the woman whom he marries. Therefore the hospital’s act was to protect the life of another person therefore, they could not be held liable for consequences of their act.

7. Drugs and Public Health

The constitutionality of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 was challenged before the Supreme Court on the ground that it violates the freedom to speech and expression under Article 19(1) (a) in the famous case of *Hamdard Dawakhana vs. Union of India.* The Supreme Court upheld the Constitutionality of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 and to begin with held that though it was true that advertisements were protected under Article 19(1)(a) concerning freedom of expression, commercial advertisements were not so protected. The Court further held the advertisements prohibited by S.3 of the Act relate to commerce or trade and not to propagation of ideas, and advertising of prohibited drugs and commodities of which the sale in not in public interest, cannot be speech within the meaning of freedom of speech and would not fall within Art. 19(1) (a). As the main purpose and true intent and aim, object and scope of the Act is to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines have

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551 1960 AIR 554, 1960 SCR (2) 671.
been prohibited, it cannot be said that this is an abridgement of the Petitioner’s right to free speech.

The Public Interest Law Service Society, Cochin, filed a petition in the Supreme Court asking directions for banning import, manufacture, sale and distribution of such drugs as had been recommended for banning by Drugs Consultative Committee set up by the Government and also asked for the cancellation of licenses granted in respect of these drugs in Vincent Panikulangara vs. Union of India. The Society also asked for the setting up of a high powered committee to go into the hazards suffered by people due to these drugs and for the award of compensation to such persons. The Supreme Court has held that the Courts were not the appropriate forum to decide about such issues that require expert opinions. The Court however expressed a hope that the Central Government would have the issues concerning banning of specific drugs referred to a special committee and deal with it expeditiously. Though Vincent’s petition did not yield the desired result, there was pressure on and in the government to ban more irrational and hazardous drugs.

Again there was a case dealing with a ban on spurious drugs known as S.R. Pvt. Ltd vs. Prem Gupta, Drug Controller (India) New Delhi. The petition challenged the order of Central Government under S. 26-A of the Drugs and Cosmetics Act, 1940 which banned the manufacture and sale of fixed dose combination steroids. Section 26-A of the Act empowers the Central Government to prohibit in public interest the manufacture, sale or distribution of any drug if it is satisfied that the use of such drug is likely to involve any risk to human beings or it does not have the therapeutic value claimed or purported to be claimed in it. The Act provides for the constitution of ‘Drugs Technical Advisory Board’ to advice Central and State Government on any matter tending to secure uniformity throughout the country in the administration of the Act. The Board is to comprise of persons with expertise in drugs along with representatives from Central and State Government. The ban on fixed dose combinations of steroids was imposed after consultation with the Technical Advisory Board. The issue before the high court was whether the Central

\[552\] (1987) 2 SCC 16.
\[553\] AIR 1993 P&H 28.
Government had acted arbitrarily or the opinion tendered by the Board was arbitrary and without substance. The court held that the advice tendered by the Board consisting of experts, who have special knowledge and experience in respect of different kinds of drugs, and the opinion formed after due exchange of views in itself ensures that the opinion given by the Board has a rational basis and suffices for Central Government to issue notification in exercise of its power under S.26-A of the Act. The court held that when such a high powered body consisting of experts arrives at such a decision after due consideration and exchange of views, we have to presume that the advice tendered is good in the absence of any basis to characterize it as arbitrary. In this case there is no material or basis to discard the opinion formed and the advice tendered by the Board. Therefore, as the Central Government has exercised its power under S. 26A of the Act on the advice tendered by the board, we are unable to agree that the impugned notification is illegal, arbitrary or violation of Articles 14 and 19(g) of the Constitution. The court therefore concluded that it would not ordinarily interfere with a decision taken by the State acting on the recommendation of an expert body to prohibit a particular drug or combination.

In the long list of cases we also find a case where the Central Government, in exercise of its powers under Section 33EE of the drugs and the cosmetics Act 1940, banned in public interest the manufacture and sale of all ayurvedic drugs licensed as toothpaste/toothpowders containing tobacco. In Laxmikant vs. Union of India\textsuperscript{554} the Appellant contended that they used only 4 per cent of tobacco and there was no conclusive evidence to show that such a minute quantity could pose a threat to health, and that even the members of the Advisory Board under the Act held divergent views on it. Such ban was arbitrary and violated their right to carry on trade. The Supreme Court held that the Central Government in consultation with the Ayurvedic, Siddha and Unani Drugs Technical Advisory Board, an Expert Body constituted under Section 33D of the Act, had arrived at a conclusion that tobacco contained carcinogenic elements, and therefore, its use should be banned in toothpastes. A similar view was expressed at an international conference held at AIIMS, New Delhi in collaboration with WHO. Hence, the Court held that even though the ban offends

\textsuperscript{554} (1997) 4 SCC 73.
the right to carry on trade, it is justified in public interest and falls under Article 19(6) of the Constitution being a reasonable restriction on the right to carry on trade or business.

8. Women’s Right to Health

Any form of discrimination, be it gender or practice of untouchability, has severe implications for health, preventing or limiting access to basic needs and opportunities that impact health and access to health care. For example, women are traditionally responsible for fetching water. Depending on the distance of the source of water, the location, the woman’s age, caste, health status and various other conditions at home impact her access to water, which in turn affects her health and the health of others in her family. Right to Protection of Life and Personal Liberty (Article 21) ensures that no person shall be deprived of his / her life or personal liberty, except according to the procedure established by law. While the provision of health services is essential to ensure good health\(^{555}\) pregnancy, childbirth and the post-partum period are one of the riskiest stages of a woman’s life. Every year over 1, 30,000 Indian women lose their lives in pregnancy and childbirth. The right to life can be extended to include the health rights of mothers to go safely through pregnancy and childbirth. However, this right has not been explicitly guaranteed, though the Indian Constitution does make reference to maternity related benefits for the women\(^{556}\).

In *Shree Shakti Sanghathana vs Union of India*\(^{557}\) women’s activist battled in the court and took to the streets protesting the introduction into the population control programme of Net-en, manufactured by Schering AG, Germany marketed by German remedies and Depo Provera manufactured by Upjohn Company, USA and marketed by Max Pharma, India. Their argument was based on Article 21, or the right of a woman to a life with dignity: Net-en trials are being conducted without the


\(^{557}\) WP © No. 680 of 9196 decided on August 24, 2000.
informed consent of participants. They have violated the ICMR’s own stated criteria of ethics and also transgressed the Helsinki Declaration on Human Experiment to which India is a signatory. After 14 years of a prolonged legal confrontation, the activists wrested from the government an undertaking that Depo-Provera would not be allowed for ‘mass use ’ in the family planning programme and that Net- En would be introduced “only where adequate facilities for follow up and counseling are available”.

In Ramakant Rai and Health Watch Up and Bihar vs. Union of India petitioners contended that the respondents have totally failed and neglected to implement the Ministry of Health and Welfare’s Guidelines on Standards of Female Sterilization (the Sterilization Guidelines), which were enacted in October 1999. The petition invoked international source of law, emphasizing “India ratifies many conventions that promote reproductive rights” with special focus on women, health services and discrimination against women. Highlighting the salient features of the Alma Alta Declaration, CEDAW, the ICPD Programme of Action, and the Beijing Platform for Action, the petition framed its arguments based on the rights framework established through these international documents. The petition relied upon domestic law, too, arguing that the respondents have “failed to realize” the constitutional right to health, which is a part of the right to life enshrined in Articles 14, 15, 21, and 47 of the Constitution of India. In addition, the petition cited domestic case law in which the Supreme Court established the right to health, held the government vicariously liable for medical negligence, and recognized a right to compensation stemming from governmental negligence. The Court directed the central government to establish uniform standards on various issues—including norms for compensation, formatting of statistics, uniform checklists, consent forms, and an insurance policy—within four weeks. In the interim, the Court instructed all states to follow the compensation norms of the State of Andhra Pradesh. In response to the PIL, the central government has issued a National Family Planning Insurance Scheme to award monetary compensation to women and their families in cases of complications, pregnancy, or

558 W.P (C) No. 209 of 2003.
death after sterilization procedures in either government or accredited private health facilities.\textsuperscript{559}


The national human rights Commission’s efforts in the area of public health and human rights were guided by the realization that the right to life with human dignity, enshrined in the Constitution, must result in strengthening of measures to ensure that the people of this country, and particularly those belonging to economically disadvantaged sections of the society, have access to better and more comprehensive health facilities\textsuperscript{560}. To strengthen its own understanding of the issues involved and to promote the view that the right to an adequate level of health care was essential to a life with dignity, that the commission in 1998 constituted a core advisory group on health, headed by its chairperson. This group was constituted to prepare a plan of action for systematic improvements in the health delivery systems of the country and to advise and assist the commission on issues relating to health as a human right.\textsuperscript{561}

\textit{Smt. Bihalavati, Case} is the case of medical negligence which came before the commission when Shri Sant Ram, Secretary of Janadhikar, an NGO approached the National Human Rights Commission with a newspaper report which stated that Smt. Bihalavati, wife of Ram Prakash was taken to the District Hospital, Siddharth Nagar for delivery and though she was experiencing acute labour pain, she was not admitted by the staff nurse as her husband had failed to pay Rs.250/- as demanded by the latter. At around 1 p.m. when her condition became very serious, a General Duty Medical Officer examined her and referred her to Gorakhpur but before she could be taken to Gorakhpur, she expired. It had been alleged that Smt. Bihalavati, wife of Ram Prakash died due to negligence and carelessness on the part of doctors of the District Hospital, Siddharth Nagar. The Commission directed the Uttar Pradesh government to

\textsuperscript{559} W.P (C) No 209 of 2003.
pay a sum of Rs.50, 000/- by way of interim relief to the next of kin of Smt. Bihalavatī.

In *Smt. Ram Kumari, Uttar Pradesh* the complainant reported to the Commission stating that her late husband, Shri Krishan Kumar, died in a road accident when his truck collided with a tree and caught fire thereafter. The police prepared an inquiry report and sent the burnt body of her husband for post-mortem to Rai Bareilly. A team of three doctors performed the autopsy of the dead body on 17 May 1998 but were unable to give an opinion on the cause and time of death and, therefore, sought the opinion of the State Medico-Legal Expert. The opinion was delayed by six months, as a result of which the complainant was made to rush from Allahabad to Rai Bareilly to plead with the authorities to hand over the remains of her husband’s dead body for performing the last rites. The complainant sought the Commission’s assistance in getting the dead body released early. In response to a notice issued by the Commission, the Special Secretary (Medical), Government of Uttar Pradesh, by his letter dated 28 December 1998 admitted the delay in the submission of papers to the Medico-Legal Expert. From the reports, the Commission noted that the bodily remains of the deceased were handed over to the complainant nine months after the death; this had resulted in mental agony to her and forced her to rush to Rai Bareilly to contact the authorities. The Commission held that this avoidable delay was directly attributable to the gross negligence of the State authorities at different levels. In the circumstances, the Commission recommended the payment of interim compensation of Rs.10, 000/- to the complainant by the Government of Uttar Pradesh within two months.

In the case of BHEL the commission took suo moto cognizance of a news item in the Sunday Observer in September 1996 captioned ‘Death in the Air’ and called for a report from the government of Madhya Pradesh. The report indicated that there were 134 slate factories which were set up in Mandsaur District of Madhya Pradesh. A majority of the workers employed in these factories had been affected by...

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564 Case No. 109/01, Order dt.19/05/04.
the inhalation of silicon dust. The government had taken steps to provide medical facilities and ensure that all these workers were covered under the Employees State Insurance (ESI) scheme. There was a mobile van in operation to provide medical facilities to the workers. They were even provided with pensions on the declaration that the disease affected the worker, which was an occupational hazard. The district administration had advised owners of these factories to install BHEL machinery to minimize dust particles. However, many of the owners of these factories were unable to meet the cost of the sophisticated machinery. This resulted in the spread of silicosis dust and affected the workers’ health. The labour inspectors had visited the factories and prosecuted those who were not applying the minimum standards laid down.

In November 2003, the commission approved a proposal received from the Jan Swasthya Abhiyan (Peoples’ Health Movement—a network of 1000 NGOs working in the health sector) to hold public hearings on Right to Health Care in five regions of the country followed by one at the national level in New Delhi. Subsequently, the western region hearing was held at Bhopal, Chennai, Lucknow, Ranchi and Guwahati. During these public hearings, selected cases or instances, wherein individuals or groups who have suffered denial of right to health care and have not received mandated health care from a public and private health facilities were presented. The commission brought victims, NGOs and concerned authorities on the same platform, which helped in the resolution of individual problems, identification of systemic problems and forging of partnerships. Over 1000 victims from marginalized sections presented their testimonies. The Commission and the concerned authorities are redressing their complaints. Systemic improvements in health care have been suggested to all concerned authorities. The active participation of NGOs and state governments has contributed considerably to the success of this programme.\(^{565}\)

10. Miscellaneous Issues

In State of Madhya Pradesh through *CBI vs Warren Anderson and others*\(^{566}\), the health consequences of the Bhopal gas tragedy were taken into consideration. The Bhopal disaster (also referred to as the Bhopal gas tragedy) is the world's worst industrial catastrophe. It occurred on the night of December 2–3, 1984 at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, Madhya Pradesh, India. A leak of methyl isocyanate gas and other chemicals from the plant resulted in the exposure of hundreds of thousands of people. Estimates vary on the death toll. The official immediate death toll was 2,259 and the government of Madhya Pradesh has confirmed a total of 3,787 deaths related to the gas release. Other government agencies estimate 15,000 deaths. Others estimate that 3,000 died within weeks and that another 8,000 have since died from gas-related diseases. A government affidavit in 2006 stated the leak caused 558,125 injuries including 38,478 temporary partial and approximately 3,900 severely and permanently disabling injuries\(^{567}\).

A quarter century after the world's worst industrial disaster killed over 15,000 people, a Bhopal court convicted former Union Carbide India, Chairman Keshub Mahindra and seven others in the Bhopal gas tragedy case and awarded them a maximum of two years imprisonment on June 7, 2010. However, 89-year-old Warren Anderson, the then Chairman of Union Carbide Corporation, who lives in the United States, appeared to have gone scot-free as he is still an absconder and did not subject himself to the trial. There was no word about him in the judgment delivered by Chief Judicial Magistrate Mohan P Tiwari 23 years after the trial commenced\(^{568}\).

In *P. Rathinam vs Union of India*\(^{569}\) the Supreme Court held that Section 309 of the Indian Penal Code that penalizes suicide is unconstitutional and it struck down this provision. The Court held that the right to life guaranteed by Article 21 of the Constitution includes within it ‘right not to live’ and thus the right to commit suicide is part and parcel of the fundamental right to live. However, in *Smt.GianKaur vs State*...
Supreme Court overruled the previous decision and upheld the validity of Section 309 thereby again reviving the position under which attempt to commit suicide is treated as a crime. The Court held that ‘right to life’ did not include right to die. This was especially so if the natural course of life was being terminated. However, in matters concerning persons who were suffering from vegetative state or were terminally ill the Court observed that such a case since a person could no more be said to be living with human dignity, the taking away of life could be considered legal.

In *C.A. Thomas Master vs Union of India* the Petitioner was an 80 year old man. He was well settled in life. He was living with his family which was treating him well. He did not suffer from any significant illnesses. He approached the Court saying that he had lived his life to the full and now wanted to die and donate his organs while they were still functioning. He needed the Court’s permission to go ahead with his plans. The Petitioner did not challenge the Constitutional validity of the provisions penalizing suicide. But he made a distinction between suicides, which he said were committed by dissatisfied persons and the actions of a person like him who was happy and wanted to put an end to his life. His prayer was that the Government should set up voluntary death clinics for such persons. The main argument of the Petitioner concerned the difference between suicide as understood generally and the right to voluntarily put an end to one’s life. The Court, however, held that there was no distinction between suicide and voluntarily putting an end to one’s life. Suicide meant the voluntary putting an end to one’s life and in the eyes of law the causes why such a decision was taken by a person were wholly irrelevant.

In *Re T (Adult Refusal of Medical Treatment) Case* the Court held that patients have a right to refuse treatment even if, as a result, the patient would die. Giving such a patient treatment may even amount to the doctor committing trespass on his body. In another case of euthanasia *Re B (Adult Refusal of Medical Treatment) Case* the Court was concerned with a patient who was competent, conscious but

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571 2000 CRLJ 3729.
was paralyzed and on a ventilator for a number of years. She wanted the ventilator to be switched off but the doctors refused. She approached the Court and the Court allowed the ventilator to be switched off. The Court relied upon a judgement on the issue delivered by the House of Lords in *Airedale National Health Service vs. Bland* case.\(^{574}\) In this case a person named Bland suffered from major injuries and was in coma for three years. His doctors and relatives approached the Court for permission to switch off life support. The Court held that switching off the support system was in the nature of an omission rather than a positive act. By withdrawing the support system Bland was being returned to the position he was in when he first entered the hospital. The Court then held that the doctor’s duty was to provide a patient with a treatment which was in his best interests. Continued treatment may not harm Bland but would not even benefit him and so was not in his best interests. The Court held that switching off the life support system in such cases did not amount to an offence. However, the Court did make a distinction between active and passive treatment. It observed that it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be. To act is to cross the Rubicon which runs between- on the one hand the care of the living patient and on the other hand euthanasia- actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law.

In *Balbir Singh vs Authorisation Committee*\(^{575}\) the Delhi High Court was concerned with a case of liver transplantation between two brothers. Due to the delays by the Authorization Committee by the time the case came up in court the patient was dead. But the court felt it the issue was important and thus went into the rival contentions. To begin with, it held that when transplantation is between near relatives there was no need to approach the Authorization Committee. This was needed only when an outsider was involved.

Live organ donation issue was also discussed in *S. Malligamma vs State of Karnataka*.\(^{576}\) Live organ donations are permitted either in cases of near relatives or

\(^{574}\) 1993 AC 789.

\(^{575}\) AIR 2004 DEL 413.

\(^{576}\) ILR 2005 KAR 1557.
when it is done out of love and affection. This is to prevent widespread sale of
kidneys by poor persons. Whether there exists a relationship of love and affection has
to be decided by the Authorization Committee. It was a case of kidney donation
where the donors and donees were not related. They were not from the locality or
place of origin and they were not from the same caste. The authorization Committee
and the Single Judge of the high court rejected the application as there was no proof
of any nature that the transplantation arose out of any love and affection between the
parties, which is the legal requirement. The Division Bench, however, in effect
allowed the transplantation by holding that if there was no proof of coercion such
transplantation has to be allowed. This is clearly contrary to the mandate of the law
which is not based on absence of coercion but a positive relationship of love and
affection.

In *Ramamurthy vs State of Karnataka*\(^{577}\) the Supreme Court stated that Society
has an obligation towards prisoner's health for two reasons: firstly, the prisoners do
not enjoy the access to medical expertise that free citizens have. Their incarceration
places limitations on such access, choice of physician, modes of taking second
opinion, and access to any specialist. Secondly, because of the conditions of their
incarceration, inmates are exposed to more health hazards than free citizens. Prisoners
therefore, suffer from a double handicap.

The Supreme Court observed in *Chameli Singh vs State of UP*\(^{578}\) that in any
organized society right to live as human being is not insured by meeting animal need
of man. It is secured when he is assured of all the facilities to develop himself and is
free from restrictions which enable his growth. All human rights are designed to
achieve this object. Right to live granted by any civilized society implies that right to
food, water, decent environment, education, medical care and shelter. These are the
basic human rights known to any civilized society.

The Court has been satisfied with giving certain directions so as to see that people do
not die for the want of food. The Right to Food includes the Right to Health and
Health-care and it is not merely the right to receive food in terms of minimum

\(^{577}\) (1997) 2 SCC 642.
\(^{578}\) AIR 1996, SC 1051.
calories, but, it includes the Right to Adequate Food. The adequacy will then be measured by not only what is necessary for survival, but by a person’s health or by his ability to pursue a normal active existence. The concept of adequate food for the maintenance of health, not only requires a minimum calorific intake but also a certain balance of nutrients. The Right to Food should be understood together with a range of other rights – access to health care, medical facilities, drinking water and sanitary facilities. Unfortunately, the Supreme Court has not yet laid down the inter-relationship between Right to Food and Right to Health.

C) HEALTH ADJUDICATION AND ITS SCOPE

In trying to unpack a constitutional right to health, what would the core elements be? At a minimum would be the government’s responsibility to include relief for the poor confronting health challenges and without the resources to overcome them. It would also include as the courts have stated in the cases above, an effective public health care system providing HIV treatment, access to basic primary health care, hospitals etc. A constitutionally recognized right to health can only be fulfilled through rational planning, which in turn is dependent on accurate and regular information gathering and timely statistics on health needs from the government, which are often unavailable. This may lead to the charges that the right to health is no more than a rhetorical one. However, jurisprudence reveals that courts and lawyers are not completely incapable of working with and pronouncing on the social right to health.\textsuperscript{579}

The movement of judicial view from the early discussions on health to the late nineties clearly shows that the right to health and access to medical treatment has become part of Article 21. A corollary of this development is that while so long the negative language of Article 21 was supposed to impose upon the State only the negative duty not to interfere with the life or liberty of an individual without the sanction of law, judges have now imposed a positive obligation upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity.\textsuperscript{580} In

\textsuperscript{580} Ibid.
Paschim Banga\textsuperscript{581}, the State has been placed, despite financial constraints, under an obligation to provide better-equipped hospitals with modernized medical technological facilities. The substantive recognition of the right to health as essential to living with human dignity has thus allowed the judiciary to directly address human suffering by guaranteeing the social entitlements and conditions necessary for good health.\textsuperscript{582}

D) CONCLUSION

The above judicial pronouncements by the Indian judiciary suggest a potential role for a creative and sensitive judiciary to enforce constitutional social rights. The deep analysis of the litigations reaching the Supreme Court described above, have given rise to the Court articulating and recognizing the specific right to health. This is done mainly due to the kind of petitions brought before the court, the campaigns behind these petitions and the arguments of constitutional social rights that were raised before the court. These judgments show that the Supreme Court has refashioned its institutional role to readily enforce social rights and even impose positive obligations on the State. There has been some concern about the legitimacy and accountability of such overt judicial activism but the Court, however, continues to justify its interventions by asserting that it is temporarily filling the void created by the lack of strong executive and legislature branches.

The constitutional and human rights interpretation is a dynamic process that involves the creativity and commitment of individuals to the underlying values of society. The Indian experiment also vividly demonstrates that language can be given widely different meanings depending on the goal to be reached. It proves as Shah (1999) argues that ‘the Constitution is what we say it is.’ In addition, the Supreme Court has shown that judges have the enormous potential to effect change in society when they so desire. Therefore, despite being non-justiciable in the Constitution, the social rights in the Directive Principles have nevertheless been made enforceable and have been treated as justiciable by the Supreme Court. However, as we see in the

\textsuperscript{581} Paschim Banga Khet Mazdoor Samity and Ors., vs. State of West Bengal, 1996(4) SCC 37.
\textsuperscript{582} Jayna Kothari, “Social Rights and the Constitution”, note 6.
above discussion, the implementation of judicial orders still remains a big issue. Therefore the last decade, along with some insensitive court orders and non-implementation of social rights legislation, has also seen some very innovative directions given by the Supreme Court and creative monitoring and ground level implementation of remedies. We can see that a positive response has been received more often in situations where public interest litigations were backed by strong civil society movements and campaigns at the ground level, to push the slow and lethargic administration of the state into action.\(^{583}\)

For many who subscribe to the ‘generational approach to human rights protection – that civil and political rights are on a higher rung than the social, economic and cultural rights by virtue of being enforceable, if the above mentioned examples of the Indian experience are any indication, their enforceability is clearly fundamental. In several cases the Supreme Court has rejected the notion of non-enforceability of social rights. There is no reason therefore, why social rights such as the right to food, health, education, housing, livelihood and others cannot be made subject to judicial determination. The Indian experiment proves that societies can indeed choose to make social rights justiciable and develop appropriate methods for their implementation and enforcement.\(^{584}\)

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