



## **Chapter VI**

# **Judicial Activism in Protection of Right to Health**

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6.1	Introduction	241
6.2	Protection of Right to health during Emergency	243
6.3	Workers right to health	249
6.4	HIV patients and their rights	259
6.5	Prisoners' right to health	263
6.6	Violation of right to health in Protective home/ mental hospitals	267
6.7	Children's' right to health	271
6.8	Increasing Pollution level and the right to health	275
6.9	Ban on public Smoking to protect right to health	279
6.10	Shortage of Food and right to health	281
6.11	Medical negligence cases	283
6.12	Unqualified medical practitioners and risk to public health	289
6.13	Effect of Drugs and Medicines on health	296
6.14	Neglect of duty by the public authorities	298
6.15	Conclusion	300

## **6.1 Introduction**

Article 21 of the Constitution guarantees protection of life and personal liberty by providing that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law'<sup>1</sup>. As a result of liberal interpretation of the words 'life' and 'liberty', Article 21 has now come to be invoked almost as a residuary right. Public interest petitions have been founded on this provision for providing special treatment to children in jail; against health hazards due to pollution; against health hazards from harmful drugs; for redress against failure to provide immediate medical aid to injured persons; against starvation deaths; against inhuman conditions in after-care home and on scores of other aspects which make life meaningful and not a mere vegetative existence. The Supreme Court has imposed a positive obligation upon the State to take effective steps for ensuring to the individual a better enjoyment of his life.

Till the 1970s by and large the courts had interpreted 'life' literally i.e. right to exist. It was in late 1970s onwards that an expanded meaning started to be given to the word 'life'. Over the years it has come to be accepted that life does not only mean animal existence but the life of a dignified human being with all its concomitant attributes. This would include a healthy environment and effective health care facilities.

Until the early 1980s judicial response to health related issues in India was essentially centered on cases of medical negligence. Even these cases were few and far between.

To begin with, the right to health as a fundamental right grew as an offshoot of the environmental litigation. Right to decent and pollution free

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<sup>1</sup>See Chapter V 5.2

environment was recognized and from that followed the right to public health and health care.

There were two developments in the 1980s, which led to a marked increase in health related litigation. First was the establishment of Consumer Courts that made it cheaper and speedier to sue doctors for medical negligence. Second, the growth of public interest litigation and one of its off shoots being recognition of health and health care as a fundamental right.

Thus the expanded meaning of right to life is wholly justified, for, without health of a person being protected and his well being looked after, it would be impossible for him to enjoy other fundamental rights such as rights to freedom of speech and expression, to move freely throughout the territory of India, to practice any profession or carrying on any trade, occupation or business, to form associations. The Supreme Court is very well aware that without a guarantee of health and well being most of these freedoms cannot be exercised fully. To make other rights meaningful and effective, right to a healthy life is the basis underlying the constitutional guarantees. Hence 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 emergency medical care and HIV issues and to PILs for banning smoking in public places. In all these judgments, the Supreme Court has carved out a Right to Health within Article 21. Different decisions of Supreme Court and various High courts of India are discussed under the following heads by the researcher:

## **6.2 Protection of Right to health during Emergency**

Emergency medical care is a very important aspect of human health. The courts have very well interpreted Article 21 to include right to health in cases of emergency.

Parmanand Katara v. Union of India<sup>2</sup> is the first of the case dealing with emergency medical care. A case which was filed by a human right activist seeking directions against Union of India that every injured citizen brought for treatment should be instantaneously given medical aid to preserve life and thereafter the procedural criminal law should be allowed. It was widely observed that when accident victims or victims of crimes are brought to hospitals; doctors refuse to touch them till the police formalities are completed. Some doctors do not treat them even after this for fear of having to attend courts. The Supreme Court, held that -

There is no legal impediment for a medical professional when he is called upon or requested to attend to an injured person needing his medical assistance immediately. The effort to save the person should be the top priority not only of the medical professional but even of the police or any other citizen who happens to be connected with the matter or who happens to notice an incident or a situation. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid delay and discharge of the paramount obligation upon the members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with discharge of this obligation cannot be sustained and must, therefore, give way.....”

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<sup>2</sup>AIR 1989 SC 2039

It was also observed by OZA, J. that Medical profession is a respectable profession. Doctor is looked upon by common man as the only hope when a person hanging between life and death but they avoid their duty to help a person when he is facing death when they know that it is a medico-legal case.

The court expressed that there are some misunderstandings about the law of procedure and the police regulations and the priorities in such situations. The court from the affidavits made it clear that there is no legal impediment for a medical professional when he is called upon or requested to attend to an injured person needing his medical assistance immediately. There is also no doubt that the effort to save the person should be the top priority not only of the medical professional but even of the police or any other citizen who happens to be connected with the matter or who happens to notice such an incident or a situation. But on behalf of the medical profession there is one more apprehension which sometimes prevents a medical professional in spite of his desire to help the person, as he apprehends that he will be a witness and may have to face the police interrogation which needs going to police station repeatedly and waiting; further he has to be a witness in a court of law where he apprehends that he may have to go for number of days and may have to wait for a long time and may have to face sometimes unnecessary long cross-examination which are at times humiliating for a man in the medical profession. This apprehension prevents a medical professional who is not entrusted with the duty of handling medico-legal cases to do the needful, he always tries to avoid and even if approached directs the person concerned to go to a State hospital and particularly to the person who is in charge of the medico-legal cases. So it is the duty of all in medical professions that apart from all these apprehensions they should not prevent them from discharging their duty to save a human life and to do all that is necessary, at the same time the police, the

members of the legal profession and our law courts and everyone concerned should also keep in mind that a man in the medical profession should not be unnecessarily harassed for purposes of interrogation or for and other formalities and should not be dragged during investigation at the police station and it should be avoided as far as possible.

It was also directed to the Court not to summon a medical professional to give evidence unless the evidence is necessary and even if he is summoned, attempt should be made to see that the men in this profession are not made to wait and waste time unnecessarily.

The court further directed that when the case is so clear than unnecessary harassment of the members of the medical profession should be avoided so that the apprehension that the men in the medical profession have which prevents them from discharging their duty to a suffering person who needs their assistance utmost, is removed and a citizen needing the assistance of a man in the medical profession receives it.

Further the Court directed that whenever on such occasions a man in medical profession is approached and if he finds that whatever assistance he could give is not sufficient really to save the life of the person but some better assistance is necessary it is also the duty of the man in the medical profession so approached to render all the help which he could and also see that the person reaches the proper expert as early as possible.

Another case filed for providing emergency medical care was that of *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*<sup>3</sup>, where

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<sup>3</sup>AIR 1996 SC 2426

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 run hospitals, including both primary health centres 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 and due to the violation of the right to life of the petitioner, compensation was awarded to him. The Supreme Court observed that providing adequate medical facilities is an essential part of the obligation undertaken by the State in a welfare state. And the failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.

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.

We find that 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.

During the pendency of the case, the State Government appointed an enquiry committee to investigate the matter. The State Government adopted various recommendations made by the Enquiry Committee. Apart from the recommendation of Enquiry Committee, Supreme Court made certain additional directions in respect of serious medical cases:

1. Adequate facilities be provided at the Primary Health Centres where the patient can be given basic treatment and his condition stabilized.
2. Hospitals at the district and Sub-divisional level should be upgraded so that serious cases can be treated there.
3. Facilities for giving specialist treatment should be increased and having regard to the growing need, it must be made available at the district and sub-divisional level hospitals.
4. In order to ensure availability of bed in an emergency at State level hospitals, there should be a centralized communication system so that the patient can be sent immediately to the hospital where bed is available in respect of the treatment, which is required.

5. Proper arrangement of ambulance should be made for transport of a patient from the primary health centre to the district hospital or sub-divisional hospital to the State hospital.

6. Ambulance should be adequately provided with necessary equipment and medical personnel.

Supreme Court observed that though for implementation of the above directions financial resources would be required but at the same time it cannot be ignored that it is the constitutional obligation of State to provide adequate medical services to the people. Regarding financial constraints the Court referred *Khatri II v. State Of Bihar*<sup>4</sup> and observed: "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. These observations will 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. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view." The Court held that it was necessary that a time-bound plan for providing these services should be chalked out keeping the above in mind.

It is to be noted that though the responsibility of the State and government hospitals is well provided by a radical interpretation of the Constitution, there is no definite corresponding legal duty imposed on private hospitals and practitioners to treat emergency cases.

These cases show that the State is duty bound to provide emergency medical aid but in fact it has at a very great extent failed in doing so.

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<sup>4</sup>(1981)1 SCC 623, AIR 1981 SC 1068

This was apparent from the public interest litigation which was filed in the year 2002 in the case of Dr. Chander Prakash v. The Ministry of Health<sup>5</sup>. The petitioner as a surgeon experienced the difficulties, hurdles and obstacles including inefficient and inadequate medical services being faced by the victims of road accidents. He pointed out various defects in the system by writing a letter to the Chief Justice, which was treated a writ petition. The petitioner made various suggestions so that the State may be able to provide timely medical aid to the people. He prayed the Court to issue guidelines. But the Court referred to the above two discussed cases, wherein comprehensive guidelines had been already issued and the state is made duty bound to provide medical facilities in emergency cases. The court also referred Article 141 and said that the law laid down by the Supreme Court is binding on all the Courts and the guidelines laid in the above two cases be strictly followed.

The Court in dismay expressed that in spite of the above two decisions of the Apex Court there is not much improvement in the system and directed the copies of the two judgments to be circulated to all concerned govt. and private hospitals and dispensaries and medical units.

### **6.3 Workers right to health**

The overall development of the country and the economy is based on workers who out of a very small earning contribute a lot for the progress of the nation. Though their role is tremendous but the reality is that they are often exploited in a number of ways and denied with basic human needs. Consequently they face human rights violation in every phase of their life. The Supreme Court was well aware of this fact and so has protected the rights of workmen by giving judicial decisions. Health being an indispensable human right has also been protected by judicial activism.

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<sup>5</sup>AIR 2002 Del 188

In the case of *C.E.S.C. Ltd. v. Subhash Chandra*<sup>6</sup> the Supreme Court placed reliance on international instruments and declared that right to health is a fundamental right. It went further and observed that health is not merely absence of sickness and observed:

“...In the light of Arts. 22 to 25 of the Universal Declaration of Human Rights, International Convention 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.”

The Supreme Court further held that right to social security is a fundamental right. It was further observed that right to live with human dignity at least with minimum substance and shelter and all those rights and aspects of life which would go to make a man's life complete and worth living and would form a part of right to life.

In 1995 in *Consumer Education and Research Centre v. Union of India*<sup>7</sup>, the Supreme Court for the first time explicitly held that ‘the right to health . . . is an integral fact of meaningful right to life.’ This case was concerning the occupational health hazards faced by workers in the asbestos industry<sup>8</sup>.

This PIL sought seven directions from the Court to help workers in asbestos industry from occupational health hazards. The petitioners prayed that

- All industries be directed to keep health records of each workmen
- To direct all industries to adopt “ the membrane filter test”

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<sup>6</sup>(1992) 1 SCC 441

<sup>7</sup> (1995) 3 SCC 42

<sup>8</sup> Also see *M/s Cosmopolitan Hospitals & anor v. Smt Vasantha P Nair & ors.* (1992) CCPJ 302. Where the court again reiterated the Constitutional right to health of an employee to health and medical aid.



- To insure all employees
- To determine the standard of permissible exposure limit
- Cover workmen under Factories Act, 1948
- Re-examination of workmen suffering from asbestosis.

The Court observed that right to health to a worker is an integral facet of meaningful right to life to have not only meaningful existence but also robust health and vigor without which worker would lead life of misery. Lack of health denudes livelihood. Compelling economic necessity to work in an industry exposed to health hazards due to indigence of bread winning to him and his dependants should not be at the cost of the health and vigor of the workman. Facilities and opportunities as enjoined in Article 38 should be provided to protect the health of the workman. Continued treatment, while in service and after retirement is a moral, legal and constitutional concomitant duty of the employer and the State. Therefore it must be held that right to health and medical care is a fundamental right. Right to life includes protection of health and strength of the workers and it is a minimum requirement to enable a person to live with human dignity. The State is enjoined to take all such action which will promote health, strength and vigor of the workmen during the period of employment and after his retirement. This recognition established a framework for addressing health concerns within the rubric 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 necessary for good health, including provisions for basic curative and preventive health services and the assurance of healthy living and working conditions.

Similarly, in *State of Punjab v. Mohinder Singh Chawla*<sup>9</sup>, dealing with rights of Government employees to health care, the Supreme Court observed:

“It is now settled law that right to health is an integral to right to life. Government has Constitutional obligation to provide the health facilities. If the Government servant has suffered an ailment, which requires treatment at a specialized, approved hospital and on reference whereat the Government servant had undergone such treatment therein, it is but the duty of the State to bear the expenditure incurred by the Government servant. Expenditure, thus, incurred requires to be reimbursed by the State to the employee.”

In *Kirloskar Brothers Ltd. v. Employees' State Insurance Corporation*<sup>10</sup>, the Supreme Court held that right to health and medical care is a fundamental right under Article 21 read with Article 39(e), 41 and 43. The Court while dealing with the health insurance of the employees held that the expression 'life' assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities and opportunities to eliminate sickness and physical disability of the workmen. It further observed that health of the workman enables him to enjoy the fruits of his labour, to keep him physically fit and human right to protect his health. Hence providing health insurance, while in service or after retirement was held to be a fundamental right and even private industries were enjoined to provide health insurance to the workmen.

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<sup>9</sup>1997 (2) SCC 83

<sup>10</sup> AIR 1996 SC 3261

In the case of *State of Punjab v. Ram Lubhaya Bagga*<sup>11</sup> the respondent claimed the reimbursement of the expenses incurred in a private hospital for the treatment of heart attack.

The appellants took the stand that as per new policy dated 13th February, 1995 the reimbursement of the medical expenses incurred in any private hospital is only admissible, if for such ailment, treatment is not available in any government hospital, and for this no objection certificate is obtained from the Civil Surgeon or Director of Health Services as the case may be.

So the respondents challenged this stand and the new policy of the appellant which has come into force on 13.2.95 as the same being violative of Article 21 of the Constitution of India. It is argued by the respondents that right to life is one of the most sacred fundamental rights given to its citizen. Since right to life is protected under this Article 21 hence refusing to pay the amount spent to save one's life amounts to the curtailment of such right, hence violative of Article 21. In earlier decisions this Court has said that the right to live does not mean mere survival or animal existence but includes the right to live with human dignity. In other words, man's life should be meaningful, worth living. Pith and substance of life is the health, which is the nucleus of all activities of life including that of an employee or other viz. the physical, social, spiritual or any conceivable human activities. If this is denied, it is said everything crumbles.

The court observed when we speak about a right; it correlates to a duty upon another, individual, employer, Government or authority. In other words, the right of one is an obligation of another. Hence the right of a

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<sup>11</sup> AIR 1998 SC 1703.

citizen to live under Article 21 casts obligation on the State. This obligation is further reinforced under Article 47; it is for the State to secure health to its citizen as its primary duty. No doubt Government is rendering this obligation by opening Government hospitals and health centers, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities for which an employee looks for at another hospital. Its up-keep; maintenance and cleanliness have to be beyond aspersion. To employ the best of talents and tone up its administration to give effective contribution. Also bring in awareness in welfare of hospital staff for their dedicated service, give them periodical, medico-ethical and service oriented training, not only at the entry point but also during the whole tenure of their service. Since it is one of the most sacrosanct and valuable rights of a citizen and equally sacrosanct sacred obligation of the State, every citizen of this welfare State looks towards the State for it to perform its this obligation with top priority including by way of allocation of sufficient funds. This in turn will not only secure the right of its citizen to the best of their satisfaction but in turn will benefit the State in achieving its social, political and economical goal.

The court held that the State can neither urge nor say that it has no obligation to provide medical facility. If that were so it would be ex facie violative of Article 21. Under the new policy, medical facility continues to be given and now an employee is given free choice to get treatment in any private hospital in India but the amount of payment towards reimbursement is regulated. The court held that the respondent is entitled to be paid the difference amount of what is paid and what is the rate admissible in Escorts then.

In *Air India Statutory Corporation. V. United Labour Union*<sup>12</sup> the court while dealing with the case of labourers defined the concept of Social Justice under Article 38 of the Constitution. The court said that Social Justice, equality and dignity of person are corner-stones of social democracy. The concept of "social justice" which the Constitution of India engrafted consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of society but is an essential part of complex social change to relieve the poor to ward off distress and to make their life livable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation and Constitutional goal. Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity. The State should provide facility and opportunities to enable them to reach at least minimum standard of health, economic security and civilized living while sharing according to their capacity, social and cultural heritage.

However in the case of *Confederation of Ex-Servicemen Association v. Union of India*,<sup>13</sup> the Supreme Court observed that right to medical aid as a fundamental right is guaranteed to all citizens including ex-servicemen under Article 21 of the Constitution but full and free medical facilities to ex-servicemen and their families is provided only to in-service

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<sup>12</sup> AIR 1997 SC 645

<sup>13</sup> AIR 2006 SC 2945

employees and not to retired employees. This classification was considered by the Court as legal, valid and reasonable classification. The Court held that the fundamental right of ex-servicemen does not get violated when they do not get free and full medical aid.

It is also relevant to notice as per the judgment of the Supreme Court in *Vincent Panikurlangara v. Union of India*<sup>14</sup>, "In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health."

But having recognized that right to health and health care is a fundamental right what follows? Fundamental rights are generally available only against the State. They prescribe the obligations of the State. In a poverty-ridden country like India, does it mean that the State must provide free medical health care facilities to all? In a situation where there is increasing privatization of health care systems, where the annual budget for health is reducing, where the cost of health education and health services is growing exponentially this seems very unlikely. No Court has yet said that the State is bound to provide free medical care to all the citizens.

In *Municipal Corporation of Delhi v. Female workers*<sup>15</sup> the Female workers, engaged by the Municipal Corporation of Delhi, raised a demand for grant of maternity leave which was made available only to regular female workers but was denied to them on the ground that their services were not regularised and, therefore, they were not entitled to any maternity leave. The Court in this case held that the workmen or, for that matter, those employed on muster roll for carrying on these activities would, therefore, be "workmen" and the dispute between them and the Corporation would have to be tackled as an industrial dispute in

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<sup>14</sup> AIR 1987 SC 990, (1987) 2 SCC 165

<sup>15</sup> (2000)3SCC 224; AIR 2000 SC 1274

the light of various statutory provisions of the Industrial Law, one of which is the Maternity Benefit Act, 1961. Hence they are eligible for getting Maternity Benefit under the said Act.

In *Praveen Rashtrapal v. Chief Officer, Kadi Municipality*<sup>16</sup>, a public interest petition was filed for the sewerage workers as the conditions of service was posing danger to their health and sometimes resulting into fatality. The averments made in the petition were that the city of Ahmedabad and other major cities of the State have sewerage network for the disposal of domestic as well as industrial effluents, the night-soil, manure, solid waste and also the storm water. As a result of industrial effluents containing obnoxious chemical substances, there is always a possibility of such effluent creating poisonous gas in the drainage. These gases are so poisonous that they can lose consciousness of a person and its continued exposure could be fatal.

Sewerage workers as citizens of India are entitled to enjoy fundamental right as provided in the Constitution of India. The employer has to take adequate care of the safety and well being of his employee. An employee should not be exposed to perform duties which are dangerous in nature and likely to adversely affect his health and life. The employer is bound to provide the employees with all the safety measures and if he is not able to make such provision, he has to refrain from asking such employee to discharge these dangerous duties. These provisions are all provided under the Factories Act, though the Bombay Provincial Municipal Corporation Act and the Gujarat Municipalities Act do not have specific provisions, but Article 21 of the Constitution is always there to protect the employees of local civic bodies and also the contractors whose services are hired by the civic body. The right to life includes right

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<sup>16</sup> 2006(2) GLH 786

to live with human dignity, right to have protection against hazards of the employment, right to health, right to medical treatment and right to have adequate compensation for the injuries suffered during the course of discharge of duty etc. Thus Article 21 as a residuary right has taken into its sweep the health hazards and hazard to life posed on account of various reasons such as harmful drugs, discharge of dangerous duties, unhealthy and polluted environment etc. The health and strength of the workers is integral facet of right to life. Denial thereof, denudes the workman of the finer facets of life violating Article 21 of the Constitution of India.

The Court issued several directions protecting the right to health of workers. The directions are as follows:

1. A manhole should be properly checked before a worker enters to see that he is not likely to be affected by the poisonous gases. He should be provided with all safety equipments such as oxygen mask, helmet, goggles, gumboots, air blower, safety belt, torch etc.
2. If it is found that there is possibility of any kind of accident or presence of poisonous gas, the worker should not be allowed to go inside the manhole. If the higher authority insists upon worker entering the manhole, such order should be given in writing and in case of any accident the responsibility would lie on the concerned officer as well as civic body exposing them to civil liability and criminal prosecution.
3. Before the commencement of the cleaning operation, the officers on the spot should compulsorily do the sampling of the water as gas and if it is found that either of them is likely to adversely affect the health of the worker he should not be allowed to enter the manhole.
4. Workers should be given a small pocket book containing information relating to manhole work and the contact numbers of the emergency.

5. The workers should be given training on the issues relating to health and safety.
6. Safety committees should be formed to supervise the safety aspects and the preventive measures which are to be taken.
7. Every civic body should compulsorily have the periodical medical checkup of the manhole workers. If his health is adversely affected then he should be immediately transferred to some other department.
8. The civic bodies shall provide basic facilities and amenities including decent and comfortable accommodation for their better living, education of their family members and to give them decent and dignified life.
9. Workers should be compulsorily insured and the civic bodies should pay the premium.

The above safety measures as well as service benefits should be made available over and above the benefits which are legally permissible to them under various Statutes and Government beneficial schemes.

#### **6.4 HIV patients and their rights**

Persons suffering from HIV/AIDS have to face large levels of discrimination. These people are often denied with care and support and so their rights get violated. The courts have protected people with HIV/AIDS against discrimination in employment and services. The patients suffering from this dreadful disease deserve full sympathy. They are entitled to all respect as human beings. Their society cannot, and should not be avoided, which otherwise, would have bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them as has been laid down in some

American decisions<sup>17</sup>. The issue of the right to health of persons with HIV is a new and emerging area of adjudication.

The Andhra Pradesh High Court has in the case of *M Vijaya vs. Chairman, Singareni Collieries Hyderabad*<sup>18</sup>, observed 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. In this case 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. Thus, the Court said that 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.

*Mr. X v. Hospital Z*<sup>19</sup> is a very famous case where the Court in order to protect public health violated right of privacy of one Mr. X. In this case the patient who is the appellant was tested HIV+ and had proposed for marriage and the proposal had been accepted. The proposed marriage

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<sup>17</sup> *School Board of Nassau Country, Florida v. Airline* (1987)107 S.Ct. 1123; *Shuttleworth v. Broward City* 639 F. Supp 654; *Raytheon v. Fair Employment and Housing Commission, Estate of Chadbourne* (1989) 261 Cal. Reporter 197

<sup>18</sup> 2001(5)ALD 522 (LB)

<sup>19</sup> AIR 1999 SC 495

carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the appellant suffered. The doctor made the disclosure of the status of the patient. And so the appellant approached the National Consumer Disputes Redressal Commission for damages against the Doctor on the ground that the information which was required to be kept secret under Medical ethics was disclosed illegally. The Commission dismissed the petition on the ground that the appellant may seek remedy in the Civil Court. The court held that the Hippocratic Oath as such is not enforceable in a court of law as it has no statutory force. Medical information about a person is protected by the Code of Professional Conduct made by the Indian Medical Council Act. The court also referred the English Law which permitted such disclosure in very limited circumstances where the public interest so required. One of the circumstances wherein public interest overrides the duty of confidentiality is immediate or future (but not a past and remote) health risk to others. Hence the Code of Medical Ethics also carved out an exception to the rule of confidentiality and permitted the disclosure in the above circumstance.

The court observed that by such disclosure would not violate appellants right of Privacy as the lady with whom the appellant was likely to be married was saved in time by such disclosure.

The court further observed that Mental and physical health is of prime importance in a marriage, and one of the objects of the marriage is the procreation of equally healthy children.

The court also emphasized Sections 269 and 270 of the Indian Penal Code and said that if any person suffering from dreadful disease like AIDS knowingly marries a woman and thereby transmits infection to that

woman, he would be guilty of the above offences. These statutory provisions thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence.

The court stressed on the point that whenever there is clash of two fundamental rights as in the instant case appellant's right to privacy and his fiancée's right to lead a healthy life, the RIGHT which would advance the public morality or public interest, would alone be enforced through the process of law.

Smt. Lucy R. D'Souza vs. State of Goa<sup>20</sup> and others is the cases which dealt with isolation of AIDS patients in accordance with the Goa, Daman and Diu Public Health Act, 1987. Section 53(1)(vii) of the Goa, Daman and Diu Public Health Act, 1985 (the Act) empowers the State Government to isolate persons found to be positive for Acquired Immune Deficiency Syndrome (AIDS), for such period and on such conditions as may be considered necessary and in such Institutions or wards thereof as may be prescribed. This kind of isolation was challenged as violating Articles 14, 19(1) (d) and 21 of the Constitution of India. The court held that the isolation of the patients has a scientific basis and it is one of the proper measures for the prevention of the AIDS – Hence, it was held that the above Act is reasonable and not violative of the above mentioned Article of the Constitution. The court clarified that in a conflict between right of an individual and the public interest, the former must yield to the latter. It was adjudged that the discretion to isolate the Acquired Immuno Deficiency Syndrome (AIDS) patients was not unguided or uncontrolled under Section 53(1) (vii) of the Goa, Daman and Diu Public

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<sup>20</sup> AIR 1990 Bombay 355

Health Act, 1985 as the legislative policy behind it is to prevent the spread of AIDS in the public interest

The Court also observed that isolation, undoubtedly, has several serious consequences and an invasion upon the liberty of a person. It can affect a person very adversely in many matters including economic. It can also lead to social ostracization. But in matters like his individual rights has to be balanced the public interest. In fact liberty of an individual and public health are not opposed to each other but are well in accord. Even if there is a conflict between the right of an individual and public interest, the former must yield to the latter. That apart, isolation is not merely in the interest of the society. But such power has to be very cautiously exercised, field of exercise being very limited.

### **6.5 Prisoners' right to health**

Prisoners and under trials are definitely denied some of the fundamental rights like freedom of movement, right to choose a profession etc. but that does not mean that they loose all kinds of fundamental rights. Right to life is very much a part of a prisoners' or under trials' right when they are behind the bars. There were many cases reported wherein these prisoners were denied basic fundamental rights like right to health, food, clean drinking water, sanitation etc. cases relating to prisoners' right in relation to health are discussed.

In the case of Hussainara Khatoon V and VI v/s State of Bihar<sup>21</sup>, the Supreme Court ensured different rights of undertrial prisoners. The case went on for quite some time and the Supreme Court passed six orders at different times and numbered it Hussainara Khatoon I, II .....VI. This PIL was based on the news report published in the Indian express reporting

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<sup>21</sup>AIR 1979 SC 1819

several under trails, including women and children in the prisons of Bihar waiting for their trials for years. The rights which the Supreme Court guaranteed against the State of Bihar were right of speedy trial, right to free legal and medical aid. Relying on the data provided from Bihar Government regarding the pending cases and the ratio of judges and prisoners, the Apex Court also considered the situation of persons of unsound mind. The Court taking into consideration the plight of persons who are mentally unhealthy held that persons with unsound mind should not be kept in ordinary jails along with other undertrial prisoners.

In *Marri Yadamma v. State of Andhra Pradesh*<sup>22</sup>, the deceased was an under trial who died of 'congestive cardiac failure'. The petition was filed by his spouse alleging negligence on part of the jail authorities and jail doctor in not providing appropriate treatment on time or referring to a specialist to determine the root cause of the ailment. The High Court in this case observed that the condition of the deceased at the time of his death was such that could have developed over a period of time and not immediately. Thus, it was abundantly clear that no care or caution was taken by the Respondents to get the deceased examined by a Surgeon or a specialist, even though he was complaining of ailments very often. The Court stated that on arrest a prisoner merely loses his right to free movement. His all other rights including right to medical treatment remains intact and it cannot be violated. The jail authorities had infringed fundamental right of the deceased therefore the State was liable to compensate his widow as a public law remedy for an amount of Rs.2 lakh.

*Anil Yadav vs. State of Bihar*<sup>23</sup> is a very pathetic case from Bihar, which came to the notice of the Supreme Court when a letter was considered as

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<sup>22</sup> 2003ACJ1087, 2001(6)ALD821

<sup>23</sup> (1981)1 SCC 622

a writ petition. About 20 undertrial prisoners were tortured by the police during the investigation; their eyes were pierced and were made blinded. The Court ordered to give them medical aid and rehabilitation facilities at the expense of the Bihar government. Hence the Court through its judicial activism provided immediate relief to the sufferers by taking quick steps to trace the guilty policemen.

Just after the case of Anil Yadav vs. State of Bihar<sup>24</sup>, similar relief was sought in the case of Khatri (I) v/s. State of Bihar <sup>25</sup> wherein some prisoners were tortured by the police during the investigation and their eyes were pierced with spikes and acid and made them totally blind. The Court ordered to provide them medical aid and rehabilitation facilities at the expense of Bihar Government. In this case also due to police torture some 17 undertrial prisoners were blinded and the court passed several directions to ensure medical treatment and legal aid to the victims.

Again in the case of Sunil Batra II vs. Delhi administration<sup>26</sup>, guaranteeing the rights of prisoners, the Court laid emphasis that a prisoner does not lose all his rights when he is taken into custody or put in jail. In this case a letter was written to the Supreme Court by a life convict, in which he alleged that the head warden had inflicted injuries in order to extract money from his relatives. The Supreme Court considering the letter as a writ petition held that though a prisoner may be deprived of his right to movement but all other freedoms belong to him which includes right to health.

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<sup>24</sup> (1981)1 SCC 622

<sup>25</sup> (1981)1 SCC 623, AIR 1981 SC 1068

<sup>26</sup> AIR 1980 SC 1579

Veena Sethi vs. State of Bihar<sup>27</sup> is a high watermark case wherein there was an illegal detention of prisoners who were in jail for two or three decades. Sixteen prisoners were insane and so the Court took cognizance in the matter to release them and give medical treatment. The Court in its judgment remarked: "there must be an adequate number of institutions for looking after the mentally sick prisoners and that the practice of sending lunatics or persons of unsound mind to jail for safe custody is not at all a healthy or desirable practice, because jail is hardly a place for treating those who are mentally sick. the Court, therefore, directed the jail superintendent to have such mental patients examined by some psychiatrist once every six months and submit a report to the district judge and if as a result of such examination, it is found at any stage that the prisoner concerned has become sane, the district judge will immediately order his release from the jail and the State Government will provide him the necessary funds for meeting the expenses of his journey to his native place as also for his maintenance for a period of one week. The Court refrained from judicially interfering with the cases where the prisoners of unsound mind were sentenced for different offences and their sentence of imprisonment is yet to expire. But in respect of such prisoners also, the Court directed that half-yearly reports about their mental conditions must be submitted to the State Government.

D.K.Basu V. State of West Bengal<sup>28</sup> , while dealing with custodial violence laid down certain procedure to be followed in all cases of arrest and detention as preventive steps. One such direction given by the court was in relation to health of arrestee, which read as "the arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by director, health services of the concerned state or

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<sup>27</sup> (1982)2 SCC 583

<sup>28</sup> (1997) 1 SCC 416

Union Territories. The director, health services, should prepare such a panel for all tehsils and districts as well.

### **6.6 Violation of right to health in Protective home/ mental hospitals**

In case of Indian Council of Legal Aid & Advice vs. Union of India and others<sup>29</sup> the Supreme Court directed to have compulsorily periodic medical examination and treatment of Blind Schools inmates. Further the Court directed to draw a scheme for such inmates and issued notices to health Secretaries of all the States

In Re: Death of 25 Chained Inmates in Asylum Fire in Tamil Nadu with Saarthak Registered Society and Anr. v. Union of India,<sup>30</sup> the Court had taken suo moto action on the basis of a news item published in all leading dailies about a gruesome tragedy in which more than 25 mentally challenged patients housed in a mental asylum at Ervadi in Ramanathanpuram district were charred to death because the patients could not escape the blaze as they had been chained to poles or beds. It was submitted to the Court that the Mental Health Act, 1987 was not at all implemented by the concerned authorities and there was a failure on the part of Central/State Governments to implement the 1987 Act.

The Court held that the provisions of the Act were not been implemented and so the court issued several directions so as to implement the said Act in full vigor. The guidelines were specifically relating to licensing and de-licensing of all registered or unregistered bodies by whatsoever name called.

The Court directed the Chief Secretary or Additional Chief Secretary to be the nodal agency in the implementation of Mental Health Act, 1987; The

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<sup>29</sup> 2003 SCCL.COM 122

<sup>30</sup> AIR 2002 SC 979

Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995 and The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

The Central and State Government were directed to undertake a comprehensive awareness campaign with a special rural focus to educate people as to provisions of law relating to mental health, rights of mentally challenged persons, the fact that chaining of mentally challenged persons is illegal and that mental patients should be sent to doctors and not to religious places such as Temples and Dargahs.

In continuation of the order in the above case the Supreme Court<sup>31</sup> once again after a gap of few months issued directions as to the establishment and maintenance of psychiatric hospitals and mental hospitals. It directed the Union of India

- To frame a policy and initiate steps for establishment of at least one Central Government Mental Health Hospital in each state (as provided u/s 5 of the Mental Health Act and at least one state government run hospital in each State.
- To constitute a committee to give recommendations on the issue of care of mentally challenged persons who have no immediate relatives or who have been abandoned by relatives.
- To frame norms for the NGO working in the field of mental health and to ensure that the services rendered by them are supervised by qualified/trained persons.
- To provide the patients with free legal aid for making application under the Act as they are unaware of their rights and the procedure.

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<sup>31</sup> Saarthak Registered Society and Anr. Vs. Union of India AIR 2002 SC 3693

- Patients and their guardians be informed about their rights
- A board of visitors is formed by the State Government to visit every State and private institution at least once in a month.
- A scheme for rehabilitation process be made for patients getting discharged not having backing or support.

Upendra Baxi vs. State of U.P.<sup>32</sup> is a case where a letter was written by a doctor about the inhuman conditions prevailing in the Agra Home and was turned into a petition by the court. The court in this case asked a panel of doctors to visit the home and check the state of health of the women lodged there. It was found that 50 of them were suffering from TB, many others from mental retardation, disorders and serious contagious diseases. The court asked the superintendent of the home to whether the inmates were ever medically examined and any treatment given. The court asked the authorities to provide sufficient number of latrines and bathrooms, draw up a scheme for vocational training and rehabilitation, and reconstitute the board of visitors whose term had expired long ago. There were many minor girls who were kept in the company of hardened prostitute who have been rescued from brothels and also women suffering from diseases. They were ordered to be kept separately. These and several other orders were passed to continuously monitor the progress of the implementation of the court directions.

In B.R.Kapoor vs. Union of India<sup>33</sup> the case related to the abominable conditions in the Shahdara mental hospital run by Delhi Administration. There were no basic amenities, medical care or separation of criminal lunatics and others. The Court very actively at first appointed an expert committee of four psychiatrists to visit and ascertain the conditions there. The committee submitted a three-volume report on all aspects

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<sup>32</sup> (1983) 2 SCC 308

<sup>33</sup> (1989) 3 SCC 387

confirming most allegation made in the petition, it suggested 35 remedial steps regarding admission to the hospital, treatment and discharge of patients, constitution of board of visitors, sanitary conditions, food and kitchen, staffing pattern, ill-treatment of patients by staff, attempts to commit suicide, deaths in the hospital and availability of emergency medical care. The Court asked the Delhi Administration to rectify the defects pointed out, but it was "very slow" in responding to the matter and took three years to file its reply to the court. So the Court recommended to the Central Government to take over the hospital from the Delhi Administration in view of the fact that it is in the capital.

Rakesh Chandra Narayan vs. State of Bihar<sup>34</sup> is also a case relating to the pathetic conditions at the Ranchi mental hospital in Bihar and the State Government's neglect towards it. Two citizens of Patna wrote a letter to the Chief Justice of India regarding mental hospital which was run by the Bihar Health Department with financial aid from West Bengal and Orissa. There was acute water shortage. Toilets were not in order, fans were not working, there was no light, and many patients had no clothes to wear and were sanctioned food worth Rs. 3 a day per head. There was no account for medicines. Medical equipment did not work. Taking into consideration the state of affairs the court asked the health secretary to put forth a definite scheme for improving the conditions. The court passed several directions like to raise the food allowance to Rs. 10 per head, ordered immediate water supply, restoration of sanitary facilities, provision of mattresses and blankets, appointment of psychiatrists and scrapping of ceiling for cost of medicines.

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<sup>34</sup> AIR 1989 SC 348

Supreme Court Legal Aid Committee v. State of M.P.<sup>35</sup> deals with the similar problem as in the case of Rakesh Narayan. This case dealt with the Ranchi Asylum highlighting the abominable conditions there. The Court directed the constitution of an autonomous body of management for the hospitals, instead of them being administered by health departments. For this purpose the Mental Hospital Rules were overhauled and the recommendations of the Dayal Report were incorporated. The respective State Government was given a short deadline for promulgating order to implement the rules.

The court had earlier dealt with the conditions in the mental hospital at Mankundu in Hoogly district in West Bengal. The PIL arose from a letter sent to the court on the basis of a press report with a photograph showing a mentally ill patient being chained in the hospital. It was found that the patients were not treated with medicines. They were merely chained to a nearby pillar or door frame till they became well. The government undertook to the court that the practice would be discontinued and medical treatment would be given. The court deprecated the appointment of a sub-divisional officer to be in charge of the hospital. The government was asked to replace him with a suitable person and attend to several other deficiencies pointed out by the report of the committee. The court rejected the "defense" of the government that similar conditions prevailed in other mental hospitals in the state too.

### **6.7 Childrens' right to health**

R.D. Upadhyay v. State of A.P.<sup>36</sup> is a case dealing with the fundamental rights of children living in jail with prisoner mother. A writ petition was filed before the Supreme Court highlighting upon the inadequate

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<sup>35</sup> 1994 Supp. (3) SCC pp. 478; Aman Hingorani v. UOI; Chandan Banik v. State of West Bengal. 1994 Supp (3) SCC 601

<sup>36</sup> AIR 2006 SC 1946

arrangement of children pertaining to education, medical care and overall development of children. The Prison Management Bill, 1998 was studied which provides for various rights and duties of prisoners like right to live with human dignity, adequate diet, health and medical care, clean hygienic living conditions and proper clothing etc. The court clarified that the rights of children of women prisoners living in jail are broader than these all rights, since the children are not prisoners as such but are merely victims of unfortunate circumstances. The court in this case issued various guidelines for the children. Guidelines pertaining to the health and development of the child as issued by the court are mainly focused as follows:

- Not to treat a child as an under-trial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.
- A woman prisoner who is found or suspected to be pregnant should be provided with adequate pre-natal and post-natal medical care.
- The fact that the child is born in prison should not be recorded in the birth certificate.
- Adequate clothing suitable to the climate be provided to the children.
- Nutritional and dietary needs of the children be taken care for proper development of his physical and mental health.
- Clean drinking water be provided to the children.
- Regular examination of children by a Medical Office be done to monitor the physical growth and for timely vaccination.
- Children should not be placed in crowded barracks amidst women convicts, undertrials as it is certainly harmful for the development of their personality.

The court ordered to give priority to cases of women prisoners who are staying with their children in jails.

In *People's Union for Civil Liberties v. Union of India*<sup>37</sup> the Supreme Court, directed the Centre to fully implement the Integrated Child Development Services (ICDS) scheme by 2008. It also directed the Centre to ensure that, by 2008, 14 lakh anganwadis should be set up. The orders were in response to a public interest litigation filed in 2001 by the People's Union for Civil Liberties (PUCL) seeking directions to the Centre and State Governments to implement the ICDS properly and fully.

During the hearing in 2004, the Supreme Court had expressed its dismay at the poor implementation of the ICDS. The Supreme Court emphasized the importance of anganwadi centres and observed that these anganwadi centres are run under the Integrated Child Development Scheme (ICDS) which aims to improve the nutritional and health status of pre-school children, pregnant women and nursing mothers through a package of services including supplementary nutrition, pre-school education, immunisation, health check-up, referral services and nutrition and health education. More than 500,000 anganwadi centres have been established in India but the working of these centres were not satisfactory. By this decision an important step in the implementation of the concept of health and universal literacy as a fundamental right of all citizens in India has been taken by judicial activism. The court observed that Right to health has been declared to be a fundamental right in CERC Case. The Court reinterpreted Article 21 of the Constitution and reinforced "right to life" as a fundamental right, side-stepping the issue whether the Directive Principles of State Policy are legally enforceable.

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<sup>37</sup> Manu/SC/8803/2006

M.C.Mehta vs. State of Tamil Nadu <sup>38</sup> is a case which relates to match factories of Sivakasi town in Tamil nadu where children were made to work for long hours in dangerous conditions and were denied basic fundamental rights. The judges stated that employment of children in such dangerous work should not be permitted. Article 39(f) and Article 45 of the Constitution mandates that children should be protected from exploitation and they should be given free and compulsory education till 14 years. The court stated that children should be employed only in the process of packing away from the place of production, to avoid exposure to accident. Special facilities for improving the quality of life of the children should be provided like education, recreation and socialization. The government was also directed to provide recreation and medical facilities to the children and also to consider the question of basic diet.

Bandhua Mukti Morcha V. UOI <sup>39</sup> is the case dealt with child labour found in hazardous sectors like slate pencil mines, diamonds cutting, silk, brocades to circus industry. The court asked the employers who employed children to pay compensation to the tune of Rs. 20000 for every child employed. The inspectors appointed under Child Labour Act were directed to collect the compensation and to deposit them in the Child Labour Rehabilitation cum Welfare fund. The fund generated to be used for rehabilitating the children.

Mrs. Rathi V.UOI<sup>40</sup> is a case wherein public interest litigation was filed praying to provide separate schools with vocational training, hostels with regular medical checkup facilities, etc. in every district of Uttar Pradesh for the children of lepers. The petitioner pointed out that the lepers of three leprosy homes in Allahabad were not getting any assistance from

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<sup>38</sup> AIR 1991 SC 417

<sup>39</sup> AIR 1997 SC 2218

<sup>40</sup> AIR 1998 ALL 331

the Government except the medicines which too is at the free will of hospital authorities. Hence considering the relief claimed by the petitioner just and in accordance with Article 21 of the Constitution which has been interpreted by the Supreme Court to mean that every citizen is entitled to a life of dignity the court ordered to provide all facilities including medical facilities to the children of lepers.

### **6.8 Increasing Pollution level and the right to health**

Rural Litigation and Entitlement Kendra, Dehradun vs. State of Uttar Pradesh<sup>41</sup> is a case which is specifically relating to the lime stone quarries of Mussoorie Hills and the health of the people living in Himalayan Valley. The petitioner averred that dams, quarries, factories, tourism projects threaten the villages and suburbs and the health of the people living there. The petitioner Rural Litigation Kendra filed a writ petition alleged that the lime stone quarries were destroying the flora and fauna of the Himalayan Valley and therefore their continued operation was a threat to the lives of the people there. Air and water are polluted and causes health hazards and therefore their fundamental right under Article 19 and 21 were violated.

The Court in this case appointed several committees to verify the allegations contained in the petition. One of such committees, the Bhargav Committee visited the area and divided the quarries into three categories. One category of quarries was so hazardous that they had to be shut down. The Court ordered their closure permanently. The other two categories of quarries were less harmful and so another committee was appointed which recommended some corrective measures. The Court pointed out that the present laws like The Mines Act, 1952 or the Metalliferous Mines Regulations 1961 were not implemented properly.

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<sup>41</sup> AIR 1985 SC 652; (1985)2 SCC 431

The main question in this case was whether for social safety and for creating hazardless environment for the people to live in, mining in the area be permitted or stopped. Hence the court considering the health of the people gave directions regarding the erring mines.

A.P. Pollution Control Board-II vs. Prof. M.V. Nayudu (Retd.) & ors.<sup>42</sup> is a case relating to environment pollution. In this case State of A.P. was directed to identify polluting industries located within 10 k.m. radius of Osman Sagar and Himayaat Sagar lakes which catered to the needs of over 50 lakhs people, in Hyderabad and Secunderabad, and to take action in consultation with the A.P. Pollution Control Board to prevent pollution to the drinking water in the reservoirs. The Supreme Court held that Article 21 of the Constitution includes right to healthy environment.

In M.C. Mehta Vs. Union of India and others<sup>43</sup> the Supreme court issued Directions to the Delhi Government about all Industrial Units that have come up in Residential/non-conforming areas in Delhi on or after 1st August, 1990 shall be closed down and stop operating as per the schedule. The Central Government was directed to finalize the list of permissible household industries within a period of three months. The court further held that the Delhi Government may announce a policy within six weeks giving such incentives as it may deem fit and proper to those industrial units which came to be established after 1st August, 1990 and may close down on their own before the expiry of the time fixed in this order clarifying further that the non-announcement of incentives by the Government shall not, however, delay the closure process etc. etc.

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<sup>42</sup> 2000 SCCL.COM 686

<sup>43</sup> 2004 SCCL.COM 550

Another interesting PIL, *M.C.Mehta vs. Union of India*<sup>44</sup> 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 to 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.

Apart from these decision relating to pollution the petitioner Mr. M.C.Mehta, a social activist has filed a number of cases<sup>45</sup> in the Supreme Court in relation to Ganga Water Pollution, closure of hazardous units etc.

In *Virender Gaur v. State of Haryana*<sup>46</sup>, the Supreme Court held that environmental, ecological, air and water pollution, etc., should be regarded as amounting to violation of right to health guaranteed by Article 21 of the Constitution.

In *Santosh Kumar Gupta v. Secretary*<sup>47</sup> a public interest litigation was filed because of the pollution of the air in the city of Gwalior on account of plying of a large number of motor vehicles using unauthorized kerosene oil and diesel causing health hazards to the inhabitants.

The court taking into consideration health hazards due to the pollution of the atmosphere by smoke, emitted by the vehicles issued directions to measure the pollution level by different instruments and thereby strictly complying to Section 20 of the Air Pollution Act which deals with the power of State board to give instructions for ensuring standards for omission from automobiles.

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<sup>44</sup>(1999)6 SCC 9

<sup>45</sup> AIR 2001 SC 1544; AIR 2001 SC 1848; 2003(4) SCALE 88

<sup>46</sup> 1995 (2) SCC 577,

<sup>47</sup> AIR 1998 MP 43

The court said that the human life is more important than the traffic and vehicles and so the law and the rules framed in respect to ensure environment cleanliness should be strictly followed.

B.L.Wadehra v. Union of India <sup>48</sup> the case dealt with right to live in clean environment. As clean environment is very important for health of citizens the court gave several directions to all the civic authorities in the country. The directions were relating to distribution of polythene bags and door to door collection of garbage for disposal, installation of incinerators in all major hospitals and nursing homes, inspection by the Central Pollution Control Board to verify the collection and proper disposal of garbage, education of people on civic duties through TV, building of compost plants and expert study of alternative garbage disposal system and solid waste disposal.

In Sanjay Phophalia V. Rajasthan<sup>49</sup>, a writ petition was filed praying to take custody of the animals roaming in public roads and places. It was stated that no appropriate steps have been taken by the respondents restraining the roaming of number of animals on the roads, hospitals, railway station, and High Court premises and in the city. The petitioner said that this not only creates hindrance in the public transport but also has created a havoc amongst the public as the roaming dogs, pigs, oxes, cows, camels, buffaloes, donkeys etc. are dangerous to the people and children. Numerous incidents and accidents were taken place regarding the biting and assaulting by the aforesaid animals for which the public at large has to suffer. Hence common man was deprived of his right to life guaranteed under Article 21 of the Constitution of India. The court relied upon Municipal Council, Ratlam v. Vardhichand<sup>50</sup>, wherein it was

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<sup>48</sup> (1996 2 SCC 594)

<sup>49</sup> AIR 1998 RAJ 96

<sup>50</sup> AIR 1980 SC 1622

observed 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.. The court also relied on the case of L.K. Koolwal v. State of Rajasthan<sup>51</sup> wherein it was observed that 'it is primary, mandatory and obligatory duty of Municipality to keep city clean and to remove insanitation, nuisance etc. Hence emphasizing the duty of the Municipality the Court very well intended to protect right to health.

In Law Society of India vs. Fertilizers and Chemical Travancore Ltd<sup>52</sup> the court dealing with hazardous industries held that right to life includes right to environment adequate for human health and well-being. Hence while running hazardous industries using highly advanced technology; it is imperative that human safety be given prime importance. Environment which is adequate for human health is included in right to life.

### **6.9 Ban on public Smoking to protect right to health**

The adverse effects of passive smoking have been very well observed by the Supreme Courts in various cases. The courts have time and again prohibited smoking in public places so as to look after the health of non-smokers.

In Murli Deora v Union of India and Others<sup>53</sup>, which was a public interest litigation, 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,

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<sup>51</sup> AIR 1988 Raj 2

<sup>52</sup> AIR 1994 KER 308

<sup>53</sup> AIR 2002 S.C. 40

hospital buildings, health institutions, educational institutions, libraries, courts, public offices and public conveyances, including railways. The court referred to (The) Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975 which provides that "smoking of cigarettes is a harmful habit and in course of time it can lead to grave health hazard. Researches carried out in various parts of the world have confirmed that there is relationship between smoking of cigarettes and lung cancer, chronic bronchitis; cancer of bladder, prostate, mouth pharynx and oesophagus; peptic ulcer etc. are also reported to be among the ill-effects of cigarette smoking."

K. Ramakrishnan vs. State of Kerala<sup>54</sup> is a similar case relating to the public health issue and the dangers of passive smoking. Because non-smokers involuntarily inhale the smoke of nearby smokers, which is more harmful to him than to the actual smoker as he inhales more toxins. The court held dealing with the public health issue held that smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or other wise in public places like educational institutions, hospitals, shops, restaurants, commercial establishments, bars, factories, cinema theatres, bus stops and stations, railway stations and compartments is illegal, unconstitutional or violative of Article 21. Maintenance of health and environment falls within the purview of Article 21 of the Constitution as it adversely affect the life of the citizens by slow and insidious poisoning thereby reducing the very life span itself. The court observed that smokers dig not only their own graves prematurely but also pose a serious threat to the lives of lakhs of innocent non smokers who get themselves exposed to Environmental tobacco smoke (ETS) thereby violating their right to life guaranteed under Article 21 of the Constitution. A healthy body is the very foundation for

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<sup>54</sup> AIR 1999 Kerala 385

all human activities. In a welfare state it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health.

The High Court in this regard issued several directions to the various authorities like District Collector, Director General of Police etc to look into the matter and attract criminal proceeding against those who are found smoking in public places.

### **6.10 Shortage of Food and right to health**

While the Indian Supreme Court has reiterated in several of its decisions that the Right to Life guaranteed in Article 21 of the Constitution in its true meaning includes the basic right to food, clothing and shelter<sup>55</sup> it is indeed surprising that the justifiability of the specific Right to Food as an integral right under Art 21 had never been articulated or enforced until 2001! Prior to the big Right to Food petition filed by PUCL in 2001, the only other case concerning specifically the right to food, went up to the Supreme Court in 1989 was the case of Kishen Pattnayak vs. State of Orissa<sup>56</sup>. In this petition, the petitioner wrote a letter to the Supreme Court bringing to the court's notice the extreme poverty of the people of Kalahandi in Orissa where hundreds were dying due to starvation and where several people were forced to sell their children. The letter prayed that the State Government should be directed to take immediate steps in order to ameliorate this miserable condition of the people of Kalahandi. This was the first case specifically taking up the issue of starvation and lack of food. In this judgment, the Supreme Court took a very pro-government approach and gave directions to take macro level measures to address the starvation problem such as implementing irrigation projects in the State so as to reduce the drought in the region, measures

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<sup>55</sup> Chameli Singh v. State of UP 1996(2) SCC 549; Paschim Banga Khet Mazdoor Samity v. State of West Bengal 1996(4) SCC 37.

<sup>56</sup> AIR 1989 SC 677

to ensure fair selling price of paddy and appointing of a Natural Calamities Committee. None of these measures actually directly affected the immediate needs of the petitioner – i.e. to prevent people from dying of hunger. More importantly, the Supreme Court did not recognize the specific Right to Food within this context of starvation.

Again in the State of Orissa there was a massive drought in 2001. Due to the drought, lack of access to food grains and poverty people were starving in large numbers. While the poor were starving in the drought hit villages, the Central Government had excess food grains in its storehouses, which were not being disbursed and were rotting! The agitation in the country over lack of access to food grains in the drought hit states took rapid momentum after shocking incidents of people in some of the poorest districts of Orissa dying due to starvation. Slowly, the agitation over access to food became a full-fledged Right to Food campaign in the country. As part of this campaign, a public interest litigation was filed by the People's Union for Civil Liberties (PUCL)<sup>57</sup> in April 2001 in the Supreme Court for enforcement of the Right to Food of the thousands of families that were starving in the drought struck States of Orissa, Rajasthan, Chhatisgarh, Gujarat and Maharashtra, and where several had died due to starvation.

As relief measures, the petition demanded many things, the immediate release of food stocks for drought relief, provision of work for every able-bodied person and the increase in quota of food grains under the Public Distribution Scheme (PDS) for every person. This was the very first time that a distinct right to food was being articulated as encompassed within Article 21 and was sought to be enforced in the Supreme Court.

The Supreme Court expressed serious concern about the increasing number of starvation deaths and food insecurity despite overflowing food

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<sup>57</sup> Peoples Union for Civil Liberties v. Union of India W.P (Civil) No. 196/2001

in FCI storehouses across the country. In its several hearings, the Court directed all State Governments to ensure that all Public Distribution Shops are kept open with regular supplies and stated that it is the prime responsibility of the government to prevent hunger and starvation. On 23 July, 2001, recognizing the right to food, the court said:

The Supreme Court, thus recognized a distinct Right to Food under the Constitution under Article 21 and also sought to broaden the scope of the right to not only encompass the right to be free from starvation, but to also include distribution and access to food and the right to be free from mal-nutrition, especially of women, children and the aged

The Court, again in an unprecedented interim order on 28 November 2001<sup>58</sup>, directed all the State Governments and the Union of India to effectively enforce eight different centrally sponsored food schemes to the poor. These food security Schemes were declared as entitlements (rights) of the poor, and the Court also laid down very specific time limits for the implementation of these schemes with the responsibility on the States to submit compliance affidavits to the court. These included the Antyodaya Anna Yojna, the National Old-Age Pension Scheme, the Integrated Child Development Services (ICDS) programme, the National Mid-day Meals Programme (NMMP), the Annapurna scheme and several employment schemes providing food for work. Of the eight schemes, the most significant was the Mid-day Meal Scheme and the direction of the Court to all State Governments to provide cooked mid-day meals in all government schools by January 2002.

### **6.11 Medical negligence cases**

In order to decide medical negligence, the courts have to see that what standard of care has been applied by the medical practitioners. The test given in an English case on medical negligence is applied and accepted

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<sup>58</sup>Unreported interim order dated 28<sup>th</sup> Nov.2001

by the House of Lords in many cases<sup>59</sup> and the Indian Courts have in many cases applied the same test in order to decide medical negligence. The case is *Bolam v. Friern Hospital Management Committee*<sup>60</sup>. Mc. Nair, J said:-

“But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a clapham omnibus, because he has got this special skill. The test is the standard of ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular article.”

In *Indian Medical Association v. V P Santha*<sup>61</sup> a common question arose whether and, if so, in what circumstances, a medical practitioner can be regarded as rendering service under Section 2(1)(o) of the Consumer Protection Act, 1986. The court discussed at length various decisions of High Courts, National Commission, Supreme Court and various landmark foreign cases and finally came certain conclusions that

(1) Service rendered to a patient by a medical practitioner, by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1)(o) of the Act.

(2) Service rendered free of charge by a medical practitioner attached to a hospital/Nursing home or a medical officer employed in a hospital/Nursing home or at a non- Government hospital/nursing home

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<sup>59</sup> *Whitehouse v. Jordan* (1981) 1 All ER 267; *Maynard v. West Midlands Regional Health Authority* (1985) 1 All ER 635; *Sidaway*

<sup>60</sup> (1980) 1 All ER 650 at 658, quoted in 1996 SC 550 at 565

<sup>61</sup> (1995) SCC 651

or at a Government hospital/health center/dispensary, where such services are rendered free of charge to everybody, would not be "service" as defined in Section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(3) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by the persons availing such services falls within the purview of the expression 'service' as defined in Section 2(1)(o) of the Act.

(4) Service rendered at a non-Government hospital/Nursing home, Government hospital/health center/dispensary where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in Section 2(1)(o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be "service" and the recipient a "consumer" under the Act.

(5) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care or is an employee/dependent receiving the expenses of medical treatment from the employer would fall within the ambit of 'service' as defined in Section 2(1)(o) of the Act.

With this decision the medical profession has been considered to be a service under the Consumer Protection Act, 1986 and hence the following Medical Rights flows from this decision:

1. RIGHT TO MEDICAL RECORDS which includes right to case papers, clinical notes and diagnostic reports, all medical records that pile up in hospitals. "All medical records made in the course of treatment rightfully and legally belong to patients," If refused, patients can demand their records in writing and hospitals are bound by law to produce copies within 72 hours.
2. RIGHT TO INFORMED CONSENT wherein it is obligatory for doctors to inform patients and seek their permission before introducing or altering treatment," Patients should rightfully know alternative treatment options or cheaper alternatives. They also have the right to demand a second opinion.
3. RIGHT TO EMERGENCY CARE wherein the hospitals have to first treat injured person brought to their doorstep and only then can they demand money or complete police formalities.

Jacob Mathew V. Punjab <sup>62</sup> is a landmark case in which the Supreme Court while dealing with the case of medical negligence laid down certain principles and guidelines in order to decide the case of medical negligence. The Supreme Court was also very sympathetic towards the medical practitioners who face an emergency. The court observed that a medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by action with negligence or by omitting to do an act. The court further laid down that for an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross. The court in absence of any kind of guidelines from the Central and the State Government laid down the following guidelines so as to govern the prosecution of Doctors in future in cases of criminal rashness or criminal negligence.

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<sup>62</sup>AIR 2005 SC 3180; 2005(3) GLR 2126

“A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent Doctor to support the charge of rashness or negligence on the part of the accused Doctor. The investigating officer should, before proceeding against the Doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a Doctor in Government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the case of Bolam<sup>63</sup>, test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner, unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.”

In *A.S.Mittal vs. State of U.P.*<sup>64</sup> the Lions Club at Khurja in U.P. organized, as part of its social service programme, an eye camp for the citizens. The club invited a team of eye surgeons from Rajasthan to offer their services. They operated upon the eyes of 108 patients, 88 of them for cataract, which was considered to be low-risk surgery. Though the intention was laudable, the programme proved a “disastrous medical misadventure” for the patients. 84 patients lost their eyesight and so two social activists filed a public interest petition and the Supreme Court issued notices to U.P. government, the medical officers, the Lions club, the Central Government and the Indian Medical Council.

The Supreme Court considered only two questions: (a) whether the guidelines issued by the Central Government prescribing norms and

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<sup>63</sup> Discussed in detail

<sup>64</sup> AIR 1989 SC 1570; (1989)3 SCC 223

conditions for the conduct of eye camps are sufficiently comprehensive? And (b) what relief, monetary or otherwise, should be afforded to the victims? Regarding the guidelines the court noted that the Central Government had revised the guidelines in the wake of the Khurja Catastrophe and with a few modification, they would be satisfactory.

Regarding compensation, it was argued for the petitioners that the State must be held liable as the eye camp was held "pursuant to and under the authority of the government." The court however rejected the doctrine of vicarious liability of the state as the present petition had limited scope. The State Government had submitted that it was not taking an adversary posture but is participating in the litigation in the spirit of exploring relief to the victims. The Court stated that the facts have to be established by the criminal court.

But on humanitarian grounds the Court directed the State Government to pay to each victim Rs. 12500 in addition to Rs. 5000 already paid. The amount was not compensation but was on humanitarian ground. Though the judgment is not having a legally binding effect but may have force in similar circumstances.

In another case of negligence in tort against surgeon the Supreme Court in *Laxman Balakrishna Joshi v. Trimbak Godbole*<sup>65</sup> has held :

"the duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives right to action for negligence to the patient. The practitioner must bring to his task a reasonable degree of care. Neither the very

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<sup>65</sup> AIR 1969 SC 128

highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law require. The doctor no doubt has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in case of emergency”

### **6.12 Unqualified medical practitioners and risk to public health**

D.K.Joshi V. UP <sup>66</sup> is the case wherein the appellant filed a writ petition before the High Court of Allahabad in public interest praying for writ of mandamus directing the respondents to initiate action against persons who are unqualified and unregistered but carrying on medical profession unauthorisedly in the district of Agra, Uttar Pradesh. The Court issued directions for the entire State of U.P. and directed the all District Magistrates, Chief Medical Officer of the state to identify all unqualified/unregistered medical practitioner and to initiate actions against these persons immediately. They were also directed to monitor all legal proceedings initiated against these persons. The court directed the Secretary, Health and Family Welfare Department to give due publicity of the names of such medical practitioners so that people do not approach such persons for medical treatment.

In Rajesh Kumar Srivastava V. A.P. Verma<sup>67</sup> the proceedings in this contempt petition were initiated, to enforce and to monitor the orders passed by Hon'ble Supreme Court in D. K. Joshi v. State of U.P.<sup>68</sup>, by which the Supreme Court had taken notice of the distressing situation of public health in the State of U.P. and inaction of the State Government to stop the menace of the unqualified and unregistered medical practitioners proliferating all over the State.

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<sup>66</sup>2000(5) SCC 80

<sup>67</sup> AIR 2005 ALL 175

<sup>68</sup> (2000) 5 SCC 80

Sri Rajesh Kumar Srivastava, a Public Spirited Citizen and a Reporter of National Daily (Rashtriya Sahara) approached the Court wherein the proceedings of about 20,000 unregistered medical practitioners were initiated. These medical practitioners were identified and criminal prosecutions had been started against them. During the course of proceedings the Court has issued orders for registration of all the qualified and authorised medical practitioners in the State with the Chief Medical Officers of the concerned Districts and has passed several orders in the last two years for identifying and to stop the unauthorised medical practitioners. Directions were also issued to improve the public health facilities with special emphasis to health care system in rural areas as the surveys and reports demonstrated that wherever the public health system has failed the quacks have proliferated.

The Court was called upon to consider and decide whether 'Faith Healing' practiced by the unqualified and unregistered persons with no fixed identity and qualifications at all at a public place after charging consideration amounts to unauthorised medical practice (quackery) and whether such practice is permissible under our Constitutional and Legislative scheme.

An organization known as 'Lal Mahendra Shiva Shakti Sewa Sansthan, Kotwa Kot, Allahabad' was holding weekly congregation which was attended by thousands of disease afflicted persons. Each prospective patient was required to obtain a card on a charge of Rs. 30/-. On the back of the card, it is proclaimed that the society has remedies for all kinds of diseases except Leprosy. The persons are required to continuously chant 'Om Namoh Shivai' and this treatment is required to continue for at least 15 weeks. The patient is advised to walk on a machine every day and to give up all kinds of intoxication.

Sri Ajay Pratap Singh proclaimed himself to be a doctor and the persons attending the congregation as patients. He used a loud speaker which runs throughout the day creating deafening noise. The court was called upon to decide the question whether the 'Faith Healing' amounts to unauthorized medical practice i.e. quackery and is permissible under our Constitutional and legislative scheme, and whether such a practice is violative of the right to health guaranteed to the citizens of the Country.

The court observed that in our country there are different legislations for different systems of medicines. The scheme of these Acts is to regulate the medical practice in various disciplines. Where a branch of medicine is neither established nor has proved its methods in curing and healing the persons professing such medicine are not authorized to practice such branch of medicines in public. There is a common feeling with where medicines are not prescribed or where no particular form of treatment is preached or practiced, such practice or form to cure ailments is not required to be regulated, and that there cannot be any law which may restrict such persons from using these methods and practices, and that every person has a right to cure himself, which the person may decide for himself. It is also commonly believed that faith in the Almighty by whatever name or form of belief is the cure to all ailments, and that no law can stop the persons, who have fundamental right to choose, practice and profess the religion in adopting such methods.

The Court in this case was not concerned to decide whether a person has right to choose any form and method for himself and to have any belief or faith in curing his ailments. The question to be considered is whether the persons professing such form and method which include 'Faith Healing' can practice and preach such forms or methods for curing ailments, in a public place after charging a fees or taking consideration for such practices.

The court decided that the fundamental right to profess practice and propagate religion, guaranteed under Article 25 of Constitution of India is subject to public order, morality and health. Where health of the citizens is involved the right of such practice to profess, practice and propagate religion gets controlled and is subservient to the powers of the State to regulate such practice. No person has a right to make a claim of curing the ailments and to improve health on the basis of his right to freedom of religion. Every form and method of curing and healing must have established procedures, which must be proved by known and accepted methods, and verified and approved by experts in the field of medicines. It is only when a particular form, method or pathy is accepted by the experts in the field of medicine that it can be permitted to be practiced in public. The right to health included in Article 21 of Constitution of India does not come in conflict or overlap with the right to propagate and profess religion. These two are separate and distinct rights. Where the right to health is regulated by validly enacted legislation the right to cure the ailment through religious practices including 'Faith Healing', cannot be claimed as a fundamental right.

The Court, therefore, found that the propagation, practice and profession of 'Faith Healing' in public on charging consideration is violative to the Constitutional and Legislative scheme, and that such 'Faith Healing' based on a person's faith in the religious practices, in public for consideration is not permitted and is violative of the legislations detailed as above.

In Poonam Verma Vs Ashwin Patel<sup>69</sup>, the Supreme Court held: "A person who does not have knowledge of a particular system of medicine but practices in that system is a quack and a mere pretender to medical knowledge or skill, or to put it differently, a charlatan." In the above

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<sup>69</sup>AIR 1996 SC 2111

landmark judgment the Supreme Court held that a homoeopathic practitioner could not practice 'Modern Scientific System of Medicine' and therefore could not prescribe allopathic medicines.

But the controversy started when a tricky problem came before the court in the case of Dr. Mukhtiar Chand Vs. The State of Punjab & Ors<sup>70</sup>. This case overruled the decision of Dr. A.K. Sabhapathy vs. State of Kerala and others<sup>71</sup>, the facts of which were similar to the present case. A Government notification was issued in the State of Punjab proclaiming ayurvedic and Unani medical practitioners to be 'practitioners of modern scientific system of medicine'. A tricky problem that thus came up was - Could these Ayurvedic and Unani medical practitioners prescribe allopathic drugs in spite of the Apex Court directives? Another issue that also came up before the Court was whether medical practitioners could store and sell drugs? This matter went right up, once again, to the Supreme Court which settled the issue much after the Poonam Verma case.

One Dr Sarwan Singh Dardi who was a medical practitioner, registered with the Board of Ayurveda and Unani System of Medicines, Punjab was practicing modern system of medicines. He was served with an order of the District Drugs Inspector, Hoshiarpur, prohibiting him from keeping in his possession allopathic drugs for administration to patients. A general direction was further issued to the local chemists not to issue allopathic drugs to patients on the prescription of Dr Sarwan Singh Dardi.

This action of the drug inspector was questioned by Dr Dardi in the Punjab and Haryana High Court. Dr Dardi relied upon a Notification issued by the State of Punjab which declared all Vaidis and Hakims who

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<sup>70</sup> AIR1999SC468,

<sup>71</sup> AIR1992SC1310

were registered under non-allopathic Medical Councils to be practitioners of Modern System of Medicine for purposes of the Drugs Act. He thus submitted that he was entitled to store and dispense allopathic drugs.

The Division Bench of the Punjab and Haryana High Court held that the said Notification was ultra-vires the provisions of sub clause (iii) of clause (ee) of Rule 2 of the Drugs Rules and also contrary to the provisions of Indian Medical Council Act, 1956 and accordingly dismissed the writ petition. Dr Sarwan Singh Dardi filed an appeal along with Special Leave in the Supreme Court.

The Supreme Court observed that the right to practice any profession or to carry on any occupation trade or business is no doubt a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India. But that right is subject to any law relating to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation or trade or - business enacted under Clause 6 of Article 19. The regulatory measures on the exercise of this right both with regard to standard of professional qualifications and professional conduct have been applied keeping in view not only the right of the medical practitioners but also the right to life and proper health care of persons who need medical care and treatment. There can, therefore, be no compromise on the professional standards of medical practitioners. With regard to ensuring professional standards required to practice allopathic medicine the Indian Medical Council Act of 1956 was passed which deals also with reconstitution of the Medical Council of India and maintenance of an Indian Medical Register. Thus, for the first time an Indian Medical Register for the whole of India came to be maintained from 1956. In the 1956 Act Section 2(f) defines "medicine" to mean 'modern scientific medicine' in all its branches and includes surgery and obstetrics, but does not include veterinary medicine and surgery and the expression

'recognised medical qualification' is defined in Section 2(h) to mean any of the medical qualifications included in the Schedules to the Act

Thus the Apex Court was of the opinion that Government was empowered to come out with a Notification permitting non-allopaths to practice modern scientific medicine and thus the order of the High Court was struck down. The Supreme Court further opined that for purposes of Rule 2 what was required was not the qualification in modern scientific system of medicine but a declaration by a State Government that a person was practicing modern scientific system and that he was registered in a medical register of the State (other than a register for registration of Homoeopathic practitioners). A notification could be found defective only if those requirements were not satisfied.

The Supreme Court further concluded that the said circular and the notification issued by the said State Governments declaring the categories of Vaidis and Hakims who were practicing modern system of medicine and were registered in the State Medical Registers, as valid in law.

Therefore as things stand today all registered medical practitioners can store reasonable quantities of drugs and also sell the same without any licenses and the drugs inspectors can take no action against them. All non- allopathic practitioners who are covered by any Government Notification which classifies their practice as practice under the modern scientific system of medicine can deal with allopathic drugs. The drug inspectors also cannot issue directives to the chemists and the druggist not to honor allopathic prescriptions written by such practitioners.

### **6.13 Effect of Drugs and Medicines on health**

In *Common Cause V. UOI*<sup>72</sup> the petitioner organization highlighted the serious deficiencies in the matter of collection, storage and supply of blood through the various blood centres. It asked the court to direct the Central and State Governments to ensure that proper and time-bound steps are initiated for stopping the malpractices, malfunctioning and inadequacies of blood banks. Blood is treated as drug under the Drugs and Cosmetics Act and rules under it. In 1990, a study of blood banks was conducted by a management consultancy firm at the instance of the Central Government. It found serious deficiencies like unlicensed blood banks, flourishing blood trade with poor people like unemployed, rickshaw pullers, drug addicts and alcoholics, no medical check up was done on the blood sellers. No tests were conducted for the quality of blood and upto 85 per cent of blood collected weren't screened for AIDS. Storage facilities were also found to be unsatisfactory and unhygienic.

The court in this case directed the establishment of a National Council of Blood Transfusion as well as State Councils to look after licensing of blood banks and elimination of professional donors within two years. It also directed the government to strengthen the machinery under the Drugs law to enforce the law. The drug inspectors were directed to inspect the banks periodically.

It is also relevant to note the judgment of the Supreme Court in *Vincent Panikurlangara v. Union of India*<sup>73</sup>, wherein the court observed that "In a welfare State, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health."

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<sup>72</sup> (1996) 1 SCC 753

<sup>73</sup> AIR 1987 SC 990 ; (1987) 2 SCC 165

In this case a public interest litigation was filed by Mr. Vincent Panikulangara, a lawyer for seeking a ban on the import, manufacture, sale and distribution of drugs which have been recommended for banning by the Drugs Consultative Committee. He sought cancellation of all licenses authorizing import, manufacture, sale and distribution of drugs. He asked for the setting up of a committee to study the hazards suffered by the people on account of such drugs. The petitioner alleged that the drug industry in this country was dominated by multi-national corporations, which make huge profits as the Indian Government exercises very little control over them. Those drugs banned in the western countries are freely circulated in India.

The Supreme Court agreed that the issues raised in the petition were of vital importance to the citizens. But it said: "Having regard to the magnitude, complexity and technical nature of the enquiry involved in the matter and keeping in view the far reaching implication of the total ban on certain medicines, we must at the outset clearly indicate that a judicial proceeding of the nature initiated is not an appropriate one for determining such matters." The technical aspects which arise for consideration in a matter of this type cannot be effectively handled by the court. It also involved the question of policy. It is for the government to take a decision, keeping the best interest of citizens in view. No final say in regard to such aspects come under the purview of the court.

The court passed some general observations about the duty of welfare state to maintain the health of its citizens, and asked the government to broad base the existing institutions which watch over public health.

The court also remarked that in public interest litigation, statutory bodies should not be reluctant to come forward and assist the court. They have a duty to join the proceedings. Referring to many bodies which failed to appear in the court, the court said "an attitude of callous indifference cannot be appreciated."

### **6.14 Neglect of duty by the public authorities**

Niyamakendran V. Corporation Of Kochi<sup>74</sup> is a case relating the menace of mosquitoes in the city of Kochi. The court referring Ratlam Municipality v. Vardhichand<sup>75</sup>, pointed out that a responsible local body constituted for the purpose of preserving public health cannot run away from its duty by pleading financial inability. The court was of the firm opinion that it should step in and find out ways and means to bale out the Corporation out of its present precarious position in order to protect the health of the citizens which has been declared by the Apex Court as a part of fundamental right to life and liberty of every person. The court reminded the public authorities that health and well being of the people is imperatively implicit in the right to life guaranteed under Article 21 of the Constitution.

The court called upon institutions, establishments and organisations who were impleaded as respondents to come forward and make generous, practical and humanist contributions to the "Mosquito Control Programme" the proceeds of which was to be utilised for spraying chemicals, purchase of pesticides, machines, etc., etc

In Mahendra Pratap Singh v. State of Orissa <sup>76</sup> a writ petition was filed on behalf of public to the gram panchayat of Pacchikote to run primary health centers providing all amenities and facilities for proper running of the said health centre. The court in its verdict said, "Life is a glorious gift from god. It is the perfection of nature, a master-piece of creation. Human being is the epitome of the infinite prowess of the divine designer. Great achievements and accomplishments in life are possible if one is permitted to lead an acceptably healthy life. Health is life's grace and

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<sup>74</sup> AIR 1997 KER 152

<sup>75</sup> AIR 1980 SC 1622

<sup>76</sup> AIR 1997 Orissa 37

efforts are tube made to sustain the same. In a country like ours, it may not be possible to have sophisticated hospitals but definitely villagers of this country with in their limitations can aspire to have a primary health centre. The government is required to assist people, and its Endeavour should be to see that the people get treatment and lead a healthy life. Healthy society is a collective gain and no government should make any effort to smother it. Primary concern should be the primary health centre and technical fetters cannot be introduced as subterfuges to cause hindrances in the establishments of health centers.

In *Ambala Urban Estate Welfare Society v. Haryana Urban Development Authority* <sup>77</sup> the court ordered the Urban Development authority who had sold plots with a promise that the purchasers would be provided with all modern facilities. The authority failed to provide basic facilities like proper roads, sewerage, community buildings, parks and hygienic conditions. The court held that all these are basic for the life and health of the residents of the locality. The authority was directed to provide basic amenities like drainage, sewerage, adequate potable water and parks so as to protect right to life as guaranteed under the constitution.

*Suo Motu v. Ahmedabad Municipal Corporation*<sup>78</sup> is a case wherein the Gujarat High Court had taken the action suo motu. The court observed that the city of Ahmedabad is growing by leaps and bounds and because of this the areas on its periphery are fraught with many problems pertaining to public health, hygiene and sanitation. The civic bodies including the A.M.C. were found hopelessly lacking in solving these problems due to various reasons. In monsoon the situation gets worsened as the undisposed garbage gets soaked in the water causing grave problem to public health. Over and above large number of

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<sup>77</sup> AIR 1994 P & H 288

<sup>78</sup> 2006(2) GLR 1129

industrial houses discharge their effluent in totally unregulated manner which poses a grave danger not only to the human health but even to the domestic animals. All these chaotic conditions cause various dangerous diseases. Taking the cognizance of the matter suo moto the court issued notices to various civic bodies and appointed a committee to look into the matter and report. The court observed that under Article 21 of the Constitution of India the right to life is guaranteed in any civilized society. Article 21 with the expansion of its scope has now imposed a positive obligation upon the State to take steps for ensuring to the individual a better enjoyment of his life and dignity. Such obligations include maintenance and improvement of public health, elimination of water and air pollution and providing hygienic conditions, within the area under them. Like the State, every civic authority is clothed with power and equipped with means to ensure the citizens better enjoyment of life and dignity and if it fails to provide them, it would violate Article 21. The court while pointing out the failure of the civic authorities for discharging their functions gave several directions to hospitals run by the management administered by the Government, semi-government or local civil bodies, civic bodies, railway department, police department, A.U.D.A, education department and the Government to protect the fundamental rights of the citizens.

### **6.15 Conclusion**

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. In



*Paschim Banga*, the State has been placed, despite financial constraints, under an obligation to provide better-equipped hospitals with modernised 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.

Hence the above narrative judgments suggests a potential role for a creative and sensitive judiciary to enforce constitutional social rights. The analysis of the litigations reaching the Supreme Court as described above, have given rise to the Court articulating and recognising the specific rights to food, education and health.. 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 judicial activism shows that constitutional and human rights interpretation is a dynamic process that involves the creativity and commitment of individuals to the underlying values of society. 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, the sad part is that the implementation of judicial orders still remains a big issue.