

## JUDICIAL CONTRIBUTION IN ADVANCEMENT OF SOCIO-ECONOMIC RIGHT IN INDIA AND SOUTH AFRICA WITH SPECIAL REFERENCE TO RIGHT TO HEALTH

By Sayashi Saha<sup>119</sup>

### INTRODUCTION

Constitution of a country provides for the basic rule of governance for Legislature, Judiciary and Executive. It contains all the rights which is available to its citizen, and also makes it clear that the particular right is enforceable or not. However enforceability of a particular right is a vague term. It is because even if a particular Right is made explicitly unenforceable it can be enforced in the colour of other enforceable Rights.

Since the inception of Universal Declaration of Human Right<sup>120</sup> there is a kind of ‘a jaundiced eye’ toward the Socio-economic Rights and Civil Political Rights are given priority over socio-economic Rights. This trend continued even after the inception of International Covenant on Civil Political Right, 1966 (ICCPR)<sup>121</sup> and International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR)<sup>122</sup>. These two Covenants have different mechanism, while the ICCPR makes it necessary to enforce the Civil Political Rights and give effective remedy while infringed<sup>123</sup>; the enforcement Economic Social and Cultural Rights can be resisted on the basis of the financial capacity of the particular developing country<sup>124</sup>. Thus it subordinates the category of

<sup>119</sup> LL M student, WBNUJS, Kolkata

<sup>120</sup> G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>121</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>122</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>123</sup> ‘.....the competent authorities shall enforce such remedies when granted’ (Article 3)

<sup>124</sup> ‘Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.’ (Article 2)

socio-economic rights.<sup>125</sup>This situation was because of many orthodox beliefs such as; the enforcement of socio-economic right was pricey as it is a positive right and socio-economic rights has a poly-centric nature so it cannot be easy to justify by Judiciary.<sup>126</sup> However, all these folklore slowly changed with time.<sup>127</sup> Now enforcement of socio-economic right in national level is possible by three ways: first by including enforceable socio-economic right, second by extensive reading of civil political right and third by enacting particular domestic legislation.<sup>128</sup>The judiciary of a country generally uses ‘reasonable approach’ in first type and ‘minimum core approach’ in second kind.<sup>129</sup>

The ‘reasonable approach’ is the one where a state is obliged to take reasonable actions to make sure that a particular socio-economic right is gradually realized.<sup>130</sup>In all such situation court decides on the facts of a particular case<sup>131</sup>and see to it that, whether the particular state against whom infringement complaint made has reasonably complied with the constitutional obligation or not.<sup>132</sup> The availability of resource is one the prime factor in deciding all such cases<sup>133</sup>. While ‘minimum core approach’ means the judiciary will allow minimum legal contents of undetermined claims of socio-economic right in Constitutional text.<sup>134</sup>It reflects a minimalistic right strategy, which implies ‘*maximum gain by minimizing goals*’.<sup>135</sup>

<sup>125</sup> Danie Brand and C. H Heyns, Socio-Economic Rights In South Africa, 2 (2005).

<sup>126</sup> IliasTrispiotis, Socio-Economic Rights: Legally Enforceable or Just Aspirational? 1OPT,1-3(2010), [http://www.ucl.ac.uk/opticon1826/archive/issue8/articles/Article\\_Laws\\_-\\_Ilias\\_\\_Social\\_equality\\_\\_Publish\\_.pdf](http://www.ucl.ac.uk/opticon1826/archive/issue8/articles/Article_Laws_-_Ilias__Social_equality__Publish_.pdf).

<sup>127</sup> Id.,

<sup>128</sup> Kristey Sheila Mc Lean, Constitutional Deference, Court Socio-Economic Right in South Africa, 7,8 (2009)

<sup>129</sup> Joe Choudhury, Judicial Adherence To A Minimum Core Approach To Socio-Economic Rights,Scholarship.law.cornell.edu, (2011),[http://scholarship.law.cornell.edu/lps\\_clacp/27//](http://scholarship.law.cornell.edu/lps_clacp/27//).

<sup>130</sup> Kristey Sheila Mc Lean, Supra at 18

<sup>131</sup> Government of Republic of South Africa v Grootboom, 2001 (1) SA 46 (CC) para. 2 (S. Afr.)

<sup>132</sup> Id

<sup>133</sup> Grootboom Supra at para 46.

<sup>134</sup> Katharine G. Young, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, 33 YALE J. INT'L L. 113, 113 (2008), [http://www.yale.edu/yjil/PDFs/vol\\_33/Young%20Final.pdf](http://www.yale.edu/yjil/PDFs/vol_33/Young%20Final.pdf)

<sup>135</sup>Id., at 114

This paper is divided in four parts. First part of the paper has given a brief introduction on the status prevailing in International regime. Second part has focused on the Constitutional Arrangement of Socio-economic Right in South Africa and India. Third part has highlighted various cases relating to Right to Health in South Africa and India and in the last part author has focus on the difference in approach of South Africa and India in regard to giving protection to the right to health to its citizen.

### CONSTITUTIONAL ARRANGEMENT OF SOCIO-ECONOMIC RIGHTS- SOUTH AFRICA & INDIA

Constitution of South Africa is the classic example of the first type of enforcement at national level. It particularly describes three categories of rights namely Basic Rights; these rights are basically unqualified rights and not subjected to any internal limitations or restrictions such as '*reasonableness, available resources and progressive realization*'.<sup>136</sup> Qualified Rights; these rights are basically qualified rights with internal limitation such as availability of resource and reasonableness etc. It specifies positive duty of state to take reasonable step in the way of progressive realization of the ushered goal as documented in Constitution.<sup>137</sup> There are two other rights which are also a part of constitutional arrangement of South Africa. These rights are the right to property and the right to fair labour practice. These rights are internationally acknowledged socio-economic rights.<sup>138</sup>

As the focus of the paper is on the issue of Right to Health, so it is necessary to give an overview on same. The Constitution of South Africa contains three sections which enumerates the concept of Right to Health<sup>139</sup>. Section 27 of the Constitution of South Africa provides for that every person has a right to access to health care services and reproductive health.<sup>140</sup> And no person shall be

---

<sup>136</sup> Brand & Heyns Supra., at 4

<sup>137</sup> Id., at 3

<sup>138</sup> Id.

<sup>139</sup> Right to Health, SOUTH AFRICAN HUMAN RIGHT COMMISSION, 95, [http://www.sahrc.org.za/home/21/files/Reports/4th\\_esr\\_chap\\_4.pdf](http://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_4.pdf)

<sup>140</sup> S. A. CONST., § 27(1)

denied emergency medical treatment<sup>141</sup>. Again 28(1) (c) provides for "basic health care services" for children<sup>142</sup> and section 35(2) (e) enumerates prisoner's and detainees right to get adequate medical treatment on the expense of state.<sup>143</sup>

Along with these explicit provisions there are other provisions which also include the concept of health under its expanded periphery, they are rights to equality<sup>144</sup>, human dignity<sup>145</sup>, life<sup>146</sup>, housing<sup>147</sup>, and food, water and social security<sup>148</sup>. However the Bills of Rights as contained in constitution of South Africa are subjected to limitation of Section 36 of same.<sup>149</sup>

In India, Constitution do no confirms enforceable socio-economic right to its citizen.<sup>150</sup> The Constitutional Arrangement of India is divided in two groups one is enforceable rights and another is non-enforceable rights. Part III of Constitution contains Fundamental Rights, they are enforceable rights and Part IV contains Directive Principle of State Policy, they are unenforceable rights. However right to health is not directly given in Part III, but India Judiciary has interpreted Right to Life in order to give protection to Right to Health.<sup>151</sup> Directive Principle of State Policy contains a number of provisions which delineate the concept of health but all these are unenforceable.<sup>152</sup>

---

<sup>141</sup> Id., at § 3

<sup>142</sup> Id., at art ., §28( 1) (c)

<sup>143</sup> Id., § 35(2) (e)

<sup>144</sup> Id., § 9

<sup>145</sup> Id., § 10

<sup>146</sup> Id., § 11

<sup>147</sup> Id., § 26

<sup>148</sup> Id., § 27

<sup>149</sup> See. Id., § 36

<sup>150</sup> INDIAN CONST.,art. 37

<sup>151</sup>JusticiabilityOf ESC Rights - The Indian Experience, Human Right Resource Centre ,<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>. (Last visited Mar 25, 2016).

<sup>152</sup> INDIAN CONST.,art. 39 ( e), 42 and 47

## ROLE OF JUDICIARY IN ADVANCEMENT OF SOCIO-ECONOMIC RIGHTS

The Judiciary of a developing country plays a pivotal role in enforcement of Socio-economic rights (so as in India and South Africa). In South Africa the most effectual foundation to oblige the executive wing to perform their responsibility is Constitutional Court of South Africa. The Constitutional Court is the supreme authority to deal with constitutional matter. It has the power under section 39 to take consideration of any International law and law of other countries while deciding a case.<sup>153</sup> The Constitutional Court has judged the requirement of state to take actions to meet its constitutional responsibilities and subjected them under the measuring unit of reasonableness.<sup>154</sup> The Constitutional Maker of the South Africa has adopted direct approach in order to safeguard socio-economic rights.<sup>155</sup> That means the constitution place obligation on the government of the country to implement these rights and at the same time if they are not implemented then its citizen can move to court of law for remedy.<sup>156</sup> Constitutional Court of South Africa had decided, the initial issue relating to the justifiability of socio-economic right in *First Certification Judgement case (Ex Parte Chairperson of the constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996)*<sup>157</sup>

In this case the integration of socio-economic rights in the constitution of South Africa (1996) was confronted on different grounds prime among them are: first they are globally un-enforceable, second the observance of same as enforceable right may violate the doctrine of separation and third is its justifiability.<sup>158</sup> In this case it was argued that, although the Principle II does not include socio-economic rights but its insertion was not explicitly prohibited. Thus in this case court observed that “*it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of*

---

<sup>153</sup> Roger Phillips, South Africa’s Right to Health Care: International and Constitutional Duties in Relation to the HIV/AIDS Epidemic Human Rights Brief 11, no. 2, 9-12, 11 (2004)

<sup>154</sup> Id.

<sup>155</sup> Jonathan Berger, Litigating for Social Justice in Post-Apartheid South Africa: Focus on Health and Education, in *Counting Social Justice: Judicial Enforcement of Social and Economic Rights in The Developing World* 37 (Varun Gauri & Daniel M. Brinks 1 ed. 2008).

<sup>156</sup> Brand & Heyns, *Supra* at 4

<sup>157</sup> 1996 (4) SA 744 (CC).

<sup>158</sup> Mc Lean, *Supra* at 119-120

rights that it results in a breach of the separation of powers.” “The third objection was responded by the court that socio-economic rights judgments may have budgetary implications would not constitute a bar to their justifiability”<sup>159</sup>. This case turned out to be the stepping stone for South Africa in new jurisprudence of enforceable Socio-economic right.

This paper will be particularly focusing on various milestone cases where constitutional court illuminates the constitutional prerequisite of right to health.

In *Van Bijon V. Minister of Correctional Services*<sup>160</sup> (first reported decision awarded by the court); in this case applicant and his inmates at jail were suffering from HIV/AIDS. They filed this case at Cape High Court in order to seek adequate medical treatment at state expense from appropriate authority for the patients who all have achieved the indicative phase of the disease and whose CD4 reckoning less than 500/ml.<sup>161</sup> They were entitled to receive appropriate antiretroviral (ARV) medication at the expense of the state.<sup>162</sup> In this case respondent argued that prisoners were entitled to equal treatment at the provincial state hospitals like other people and the hospital will determine the policy for proper medication.<sup>163</sup> The policy of the hospital was:

- i) The application of AZT antiretroviral at those hospitals was limited.
- ii) The HIV patients whose CD4 count of less than 200/ml that means whose condition had developed to full-scale AIDS was given AZT treatment that to on own expense
- iii) The patient whose CD4 count of more than 50/ml that person is given medication at state expense.<sup>164</sup>

---

<sup>159</sup> Id at 120

<sup>160</sup> 1997 (4) SA 441 ( C), 997 (6) BCLR 789 (C)

<sup>161</sup> Id., at Para 4

<sup>162</sup> Id., at Para 8

<sup>163</sup> Id.,at Para 24

<sup>164</sup> Id.,at Para 25

This case revolve round two major issues: first one is the acceptability of the prisoner to get anti-viral therapy. Second, whether the applicant were entitled to the therapy at state expense.<sup>165</sup>

In this case Court held that firstly court cannot decide the fact where doctors had the sole authority to decide whom to give medication.<sup>166</sup> On the second issue court held that, the prisoner has a constitutional right of getting medical treatment. Prison authority cannot deny giving medical treatment on any ground. At the same time Court also confirms the fact that budgetary constraints are not irrelevant in the situation.<sup>167</sup> What constitute 'adequate medical treatment' cannot be determined in vacuity. So it was held by the court that the 'adequate' in this context means what the state can meet the expense of. Thus in this case less expensive treatment was afforded to the prisoner.<sup>168</sup>

*Soobramoney v. Minister of Health, KwaZulu-Natal*<sup>169</sup> This case was first sited before the Natal High Court where applicant made an application stating that he required constant dialysis treatment<sup>170</sup> but the criteria for getting treatment was very strict.<sup>171</sup> The applicant could not satisfy the requirement and his application was rejected by the High Court<sup>172</sup>. The applicant then proposed to Constitutional Court challenging the denial. The applicant based his claim on constitutional sections 27(1),(2). And also referred some of the Indian cases<sup>173</sup> and argued that:

*“In India the Supreme Court has developed jurisprudence around the right to life so as to impose positive obligations on the state in respect of the basic needs of its inhabitants. ....Unlike the Indian*

---

<sup>165</sup> Id.,at Para 31

<sup>166</sup> Id.,at Para 33

<sup>167</sup> Id.,at Para 48

<sup>168</sup> Id.,at Para 49

<sup>169</sup> [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696

<sup>170</sup> 1998 1 SA 430 (D) Id., at Para 1

<sup>171</sup> See Id at Para 2, 3 due to the shortage of resources the hospitals follow a set policy in regard to the use of the dialysis resources.

<sup>172</sup> See Id at Para 5

<sup>173</sup> Such as Paschim Banga Khet Mazdoor Samity and others v State of West Bengal and another (1996) AIR SC 2426 see Id at Para 18, 20

*Constitution ours deals specifically in the bill of rights with certain positive obligations imposed on the state....it is our duty to apply the obligations as formulated in the Constitution.....*<sup>174</sup> Court declined the case on following grounds: First, right to dignity was rejected because it cannot be entertained. Second, the applicant's condition does not constitute emergency medical treatment.<sup>175</sup> The court delivered judgment of the case on the basis of

First, the positive obligation of the state arises only when the guideline given by the state was fulfilled.<sup>176</sup> Second, the state in this respect complied with all restriction in section 27(2) of the constitution<sup>177</sup> Thus it can be said that

*“the negative nature of the right not to be refused emergency medical treatment in section 27(3) of the constitution. The nature of the state's obligation to realize socio-economic right more generally, through an elaborate test of reasonableness.”*<sup>178</sup>

That means unlike negative right, ‘if it is possible and available, subjected to budgetary constraint’ then only state has compulsion to make available emergency medical treatment to ailing person (even if such denial may result in death). Thus the Appeal was not entertained and the applicant died after two week<sup>179</sup>. This case illustrated in South African context that right to access to health care service in South Africa was not available to every person.<sup>180</sup>

In *Treatment Action Campaign v. Minister of Health (No. 1)*<sup>181</sup> Applicants files an application requiring the Minister of Health and the members of the executive council for health (respondent)

---

<sup>174</sup> See Id at Para 15

<sup>175</sup> Mc Lean, Supra at 121

<sup>176</sup> See Id at Para 24,25

<sup>177</sup> See Id at Para 36

<sup>178</sup> Para 539 of 1998 1 SA 765 (CC)

<sup>179</sup> Berger, Supra at 54

<sup>180</sup> Id at 54

<sup>181</sup> *Treatment Action Campaign v. Minister of Health (No. 1)*, 4 BCLR 356 (2001).



make Nevirapine<sup>182</sup> available to pregnant women with HIV in Public health centers. At the same time to generate and put into practice an effectual national program to avert or limit the mother to child transmission (MTCT) of HIV, also a prerequisite of voluntary counseling and testing (VCT) and, where proper, Nevirapine, or other suitable medicine, as well as formula milk for feeding.<sup>183</sup> In this case respondents had made Nevirapine available for the prevention of MTCT at a limited number of pilot sites in order to test its implementation. It is because of limited budget and limited human resource available.<sup>184</sup>

In this case two issues came before court, first, whether the steps taken by the state with regard to the prevention of mother-to-child HIV transmission by establishing 18 pilot sites leading to completion of the objectives lay down in section 27(2) of the South African Constitution within resource available. However High Court held that steps taken by the state to give the public access to a MTCT prevention program were unreasonable.<sup>185</sup>

*Minister of Health and Others v Treatment Action Campaign and Others (No 1)*<sup>186</sup> in this case the Constitutional Court of South Africa was requested to decide, whether Government was needed to give effect to the order of the High Court, given in the preceding case<sup>187</sup> where it was directed by the court to compulsorily make available to all the mother and their children the medicine nevirapine and other public health facilities. The appellant i.e. Government requested to decide on the decision of High Court.<sup>188</sup>

---

<sup>182</sup> A drug, which is used for the prevention of mother to womb transmission of HIV at the time of birth Nevirapine was a drug administered to an HIV+ mother during labor or to the infant within 72 hours after birth to reduce the risk of intra partum transmission.

<sup>183</sup> Global Health Rights, Treatment action campaign v. Minister of health (no. 1) 3 (2001), <http://www.globalhealthrights.org/africa/treatment-action-campaign-v-minister-of-health-no-1/>.

<sup>184</sup> Id

<sup>185</sup> Geoff Budlender, South African court rules on the state's obligation to prevent mother-to-child transmission of HIV, UNIV OF WESTERN CAPE <http://www.saflii.org/za/journals/LDD/2001/2.pdf>

<sup>186</sup> (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)

<sup>187</sup> 4 BCLR 356 (2001)

<sup>188</sup> (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002) at para 2

In this case key issues revolve round, the appealability of interim orders of High Court: this question was raised before court. In this respect court held that interim order are appealable and can also be dismissed.<sup>189</sup> Thus court, in the interest of justice did not warrant granting of leave to appeal wanted by the government.<sup>190</sup>

*Minister of Health v Treatment Action Campaign (No 2)*<sup>191</sup> this case basically (as already mentioned) deals with National Public Health Program, which deals the MTCT of HIV. The aim of this programme is to ensure that the child born of HIV positive mother remains free from transmission of HIV/AIDS. The scheme of the programme was to give, medicine of nevirapine at definite pilot sites but none of them was public health institute. The program also does not set the time span, within which such facility will be available. On this note Treatment Action Campaign (TAC) filed a complaint in the High Court challenging the government's program and claimed that the precincts violated sections 27<sup>192</sup> and 28<sup>193</sup> of the Constitution.<sup>194</sup> Taking all these aspects into consideration High Court ordered the Government to develop a widespread countryside program and to make nevirapine accessible in public health centers, if needed. Against this order Government filed Appeal<sup>195</sup>.

In this case, the key issues on which Court decided, they were (not necessarily in sequence):

First, whether the Government's program was on the track with the constitutional obligation 'to provide access to health services' for HIV-positive mothers and their newborn litters.<sup>196</sup>

---

<sup>189</sup> Id., at Para 5,6 & 7

<sup>190</sup> See Id., at Para 21

<sup>191</sup> [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033

<sup>192</sup> these sections guarantee the right of everyone to have access to public health care services

<sup>193</sup> the right of children to be afforded special protection

<sup>194</sup> See Id., at Para 2

<sup>195</sup> See Id., at Para 9

<sup>196</sup> Id.,

Second, whether there was a "minimum core" of the rights which is necessary to be provided on urgent basis.<sup>197</sup>

Third, whether it was reasonable for the Government to exclude access to free nevirapine from public hospitals and clinics where testing and counseling services were available.<sup>198</sup>

Fourth, Court also decided the enforceability of the socio-economic right.<sup>199</sup>

Fifth, the whether it was reasonable for the Government to exclude access to free nevirapine from public hospitals and clinics.<sup>200</sup> The reasonableness of restricting Government program to certain pilot sites was also needed to be decided by the court.<sup>201</sup>

All above mentioned issues were decided by the court. On the first issue court holds that state has failed to implement the obligations as given in the constitution.<sup>202</sup> On the second issue Court refuse to give effect to "minimum core." Rather, it holds that sections 27(1) and (2) must be read in combination and all that may be probable of the state was that it has taken reasonable steps to progressive realization of right.<sup>203</sup> Court also held, it is difficult to decide minimum requirement for individual.<sup>204</sup> On third issue Court held that, concern issue is unwarranted or hypothetical.<sup>205</sup> On the fourth issue Court held that the socio-economic rights are enforceable.<sup>206</sup> On fifth issue court held it was rational for the Government to gather evidence regarding the efficiency of the program

---

<sup>197</sup> See Id., at Para 26

<sup>198</sup> See Id., at Para 50

<sup>199</sup> See Id., at Para 23

<sup>200</sup> See Id., at Para 44

<sup>201</sup> See Id., at Para 83

<sup>202</sup> See Id., at Para 9 "Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so"

<sup>203</sup> See Id., at Para 29

<sup>204</sup> See Id., at Para 37

<sup>205</sup> See Id., at Para 60

<sup>206</sup> See Id., at Para 24 "On both occasions it was recognised that the state is under a constitutional duty to comply with the positive obligations imposed on it by sections 26 and 27 of the Constitution.7 It was stressed, however, that the obligations are subject to the qualifications expressed in sections 26(2) and 27(2)" See Id., at Para 23

and to inspect confrontation and effectiveness linked with nevirapine but it was not rational for the Government to linger in anticipation of the best probable program, which was yet too developed before increasing it to the national level. Refusing women and children right to use the drug in the meantime is unreasonable. Under such situation, Court held that, the Government must take out the limitations that restricted nevirapine from being made available at public hospitals and clinics. In pursuance of section 27(2), read with section 27(1)(a), such action of Government is untenable<sup>207</sup>. The Court also illustrated that mothers and children were dependent upon the Government for health services.

lastly, the Court additionally held that sections 27(1) and (2) of the Constitution required the government to plan and apply, within its available resources, a complete and synchronized program to progressively realize the right of pregnant women and their newborn children to access health services to combat mother-to-child transmission of HIV.<sup>208</sup> It is enviable that, the medicine must be made accessible without delay to those who urgently need it.<sup>209</sup>

In all the above cases the Court has given decision which needed prompt implication of program and policies.<sup>210</sup> Thought in all the above cases the Court rejected the very concept of minimum core, but indirectly given effect to it. Constitutional Court obliged the executive limb to take action in implement constitutional right to health care. However in spite of the fact that South Africa has one of the maximum HIV pervasiveness<sup>211</sup> executive limbs has been averse to provide drugs to fight with HIV/AIDS.<sup>212</sup>

In the words of Tushnet , socio-economic right can be acknowledged in Constitution in three way first, by expressly enumerating them as unenforceable as it present in India, second by making them enforceable but court to find a violation only when the legislature drastically departs from

---

<sup>207</sup> See Id., at Para 25

<sup>208</sup> See Id., at Para 41

<sup>209</sup> See Id., at Para 40

<sup>210</sup> Roger Phillips Supra at 11

<sup>211</sup> an estimated 4.7 million people living with HIV/AIDS

<sup>212</sup> Roger Phillips Supra at 12

the constitutional requirement as it is there in South Africa<sup>213</sup>. Third by making the socio-economic right enforceable at par with civil political rights are enforced<sup>214</sup>. Many scholars were of view that it was better choice to put the un-enforceable socio-economic right in constitution rather than enforceable socio-economic right.<sup>215</sup> I think one of the reasons behind such belief was the rich Constitutional jurisprudence of India.

In India the constitutional arrangement (as stated), is different from that of South Africa. Right to Health in India is not counted in enforceable fundamental right but as unenforceable Directive Principle of State Policy. However this status of Right to Health does not affect its enforcement against state at all. This juncture is because of the active role of Judiciary. Once the former Prime Minister said that, compelling the actions of the authorities via power of mandamus is one of the strongest power vested to the judiciary and the successful examples of such power can be seen in India<sup>216</sup>. The liberalization of the rule of locus-standi and simplified appeal process has turned out to be the stepping stone for the introduction of Public interest litigation where by a person in a good faith can move to Court where a Fundamental Right has been violated. Even if a petition made in a piece of paper, High court and Supreme Court, where there is genuine necessity can entertain the same<sup>217</sup>.

To discuss the compendium of Health Jurisprudence in India, the case needed special mention is *Maneka Gandhi V. Union of India*,<sup>218</sup> this case revolve round the issue of right to travel abroad as a part of right of life and personal liberty. This case turns out to be the foundation stone for the

---

<sup>213</sup> It was evident from the series of cases in South Africa, where court used 'reasonable approach' to decide.

<sup>214</sup> Shylashri Shankar & Pratap Bhanu Meheta, Courts and Socioeconomic Right in India, in *Counting Social Justice: Judicial Enforcement of Social and Economic Rights in The Developing World* 147 (Varun Gauri & Daniel M. Brinks 1 ed. 2008).

<sup>215</sup> Id.

<sup>216</sup> Indian Express, Line dividing activism and over-reach is a thin one: PM's caution to bench, 2007, April 8 <http://archive.indianexpress.com/news/line-dividing-activism-and-overreach-is-a-thin-one-pm-s-caution-to-bench/27888/>.

<sup>217</sup> Hon. Justice Brian J Preston, A précis of Justice Krishna Iyer's contribution to the environmental jurisprudence of the Supreme Court of India, 1 (2015), [http://www.lec.justice.nsw.gov.au/agdbasev7wr/\\_assets/lec/m4203011721754/prestoncj%20krishna%20iyer%](http://www.lec.justice.nsw.gov.au/agdbasev7wr/_assets/lec/m4203011721754/prestoncj%20krishna%20iyer%20)

<sup>218</sup> *Maneka Gandhi V. Union of India*, AIR 597 (1978), 2 SCR 621 (1978).

successive development of the jurisprudence in the line of ‘protection of life and liberty’<sup>219</sup>. In this case Court taken notice of the famous case *Cooper v. Wardsworth Board of Works*<sup>220</sup> where Byles, J. stated “... although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature”<sup>221</sup>

Thus court has given protection to a Positive socio-economic right by interpreting a negative Civil Political Right. Like in algebra there is rule i.e. *two minus makes a plus*, here in India also judiciary followed a kind of same canon where court use the negative right (no one shall be denied of their right to life and personal liberty<sup>222</sup>) and interpret same against the wrongful denial/ omission of the state to provide socio-economic right to people which mean a negative action of the government and give effect to the positive right (socio economic right) which is positive in nature.<sup>223</sup> Thus on the same note, ample cases were decided by Indian Judiciary. However the focus of the paper is on various judgments given on the health issues. Author is of opinion that the very basis of the prevailing right to health in India is explicit consideration of ‘minimum core’ approach by judiciary.<sup>224</sup> In series of cases Judiciary has taken consideration that, ‘*healthy body is the very foundation of all human activity*’<sup>225</sup>

In *Bandhua Mukti Morcha v UOI and others*<sup>226</sup>, petitioner wrote a letter to the Hon'ble Bhagwati, J. stating the situation of different bonded labours who were working in inhuman condition at stone quarries in Faridabad of Haryana. The Court in this case taken notice of the famous Francis Mullen’s Case where it was held that the right to live with human dignity also incorporates Directive Principles of State Policy, predominantly ‘*protection of the health and strength of*

---

<sup>219</sup> INDIAN CONST., art 21

<sup>220</sup> 143 ER 414(1863) at 420

<sup>221</sup> Maneka Gandhi V. Union of India, AIR 597 (1978), 2 SCR 621 (1978) at Para 770

<sup>222</sup> INDIA CONST. Art. 21.

<sup>223</sup> Sayashi Saha, “Judicial Contribution as to the Socio-Economic Right in India and South Africa”, 32 (Nov., 3 2014) (unpublished manuscript) (assignment submitted in the partial fulfillment of the requirement for degree of LLM, at WBNUJS)

<sup>224</sup> See., Maneka Gandhi V. Union of India, AIR 597 (1978), 2 SCR 621 (1978) at p. 696,726

<sup>225</sup> Ramkrishnan v. State of Kerala, AIR 385 ker. (1999) at p. 398

<sup>226</sup> AIR 802(1984), SCR (2) 67 (1984) (Here bandhua means bonded labourer)

workers' and others. "There are the minimum requirements which must exist in order to enable a person to live with minimum dignity"<sup>227</sup> thus state cannot take any action which resists a person from enjoying these rights.

In *Municipal Council Ratlam v. Vardhichand*,<sup>228</sup> petitioner file a complaint against the local Municipal body that they have failed to perform their duty of keeping the environment free from pollution is one of the essence of Right to Health.<sup>229</sup> In this case the plea of the state Municipality, of deficiency of adequate resource was rejected.<sup>230</sup> The Court further observed that, "*The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice*"<sup>231</sup>

Thus unlike many cases of South Africa, Indian Judiciary rejected the very alibi of poor finance in way of getting justice.

In *Pt. Parmanand Katara v. Union of India & Ors*<sup>232</sup> a human right activist file a writ petition on the basis of a news article where a person who was knock down by a car and when he was taken to a nearby hospital they rejected to admit him and told them to take the person to other hospital away from that place. In the way to hospital the person died.<sup>233</sup> Here Supreme Court held that, every doctor being employed in public or private institute has a paramount duty to treat a patient even if said person is criminal. No law or state action can impede or delay him from doing so.<sup>234</sup>

---

<sup>227</sup> Id at p. 69

<sup>228</sup> 1 SCR 97(1981)

<sup>229</sup> Id. at p. 101

<sup>230</sup> Id., at p. 110 "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."

<sup>231</sup> Id at p. 99

<sup>232</sup> 3 SCR 997 (1989)

<sup>233</sup> Id at p. 997

<sup>234</sup> Id at p. 998

*In Paschim Banga Khet Mazdoor Samity ... v. State of West Bengal & Anr*<sup>235</sup> an agricultural labourer fell from train and had a severe injury. He was taken to six Government hospitals consecutively but all of them refused to admit him on the ground of insufficient medical services and non availability of empty bed.<sup>236</sup> At last he was admitted to a private hospital, where the cost of treatment was high. In this case petitioner filed a writ petition asking for relief under Article 21 as his constitutional right has been violated.<sup>237</sup> While the writ petition was pending, the State Government appointed an Enquiry Committee to investigate the incident and make recommendations accordingly for similar incidents in the future.<sup>238</sup> In this case Supreme Court held that right to health is a fundamental<sup>239</sup> right and asked the Government of West Bengal to pay him compensation<sup>240</sup> for the loss suffered. It directed the government to formulate a blue print for primary health care with particular reference to treatment of patients during an emergency<sup>241</sup>.

This case was also referred in the *Soobramoney v. Minister of Health, KwaZulu-Natal*<sup>242</sup>, where the petitioner needed to get immediate dialysis treatment, however the argument of the petitioner was rejected on the ground that the situation of petitioner does not constitute emergency.<sup>243</sup>

*Mohd. Ahmed (Minor) v. Union of India & Ors*<sup>244</sup> is marked as the highest available step taken by the judiciary toward the curtailing economic injustice and inequality of status in respect of health

---

<sup>235</sup> 4 SCC 37 (1996)

<sup>236</sup> Id., at Para 2

<sup>237</sup> Id., at Para 3

<sup>238</sup> Id., at Para 6

<sup>239</sup> Id., at Para 4

<sup>240</sup> “amount of such compensation at Rs.25,000/- . A sum of Rs.15,000/- was directed to be paid to Hakim Seikh as interim compensation under the orders of this Court dated April 22, 1994” Id., at Para 9

<sup>241</sup> Id., at Para 6,7

<sup>242</sup> [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696

<sup>243</sup> “A person who suffers a sudden catastrophe which calls for immediate medical attention, such as the injured person in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.” See Id at para. 20 and also 21

<sup>244</sup> W.P.(C) 7279/2013



right.<sup>245</sup> In this case the petitioner who is a seven year old boy suffering from a extraordinary disease, named '*Gaucher Disease*<sup>246</sup>', which may result in death if not treated. The only treatment of it is the '*Enzyme Replacement Therapy*'. Such treatment is very costly<sup>247</sup> and also needed lifelong. However for a rickshaw puller to afford such treatment is impossible.<sup>248</sup> The issue which came before court was whether free treatment should be given to the said child who is suffering from a uncommon disease and the cost of whose treatment was unexpectedly high and even if the said treatment given on regular basis there is least chance that the said child may lead a normal life.<sup>249</sup>

This case as already stated has moved a step further in the way of giving protection to the right to health of a citizen, who is suffering from a fatal disease and whose cost of treatment is high. In this case following arguments are put forward by the respondent

First, giving medical facilities to the patient whose cost of treatment is very high may affect the budget of a developing country like India.

Secondly it was also argued that state has an equal obligation for every citizen.<sup>250</sup>

These arguments are however, tenable in South Africa<sup>251</sup> but in this case, Court observed that "*Indian Supreme Court has developed a jurisprudence around the right to life so as to impose positive obligations on the government in respect of the basic needs of its inhabitants*"<sup>252</sup> Court

---

<sup>245</sup> See para 1 where MANMOHAN, J referred to the quotation of Martin Luther King Junior, "of all forms of inequality, injustice in health care is the most shocking and inhumane" made clear the intension of Court.

<sup>246</sup> It is a Lysosomal Storage Disorder, where in the body cannot process fat resulting in accumulation of fat around vital organs of the body and which may result in death. Id., at Para. 2

<sup>247</sup> About 6 to 7 lakhs a month.

<sup>248</sup> Id., at Para 3

<sup>249</sup> Id., at Para 1

<sup>250</sup> "the right to health in a developing country like India could not be so stretched so as to mean to provide free health facilities to a terminally ill patient while other citizens were not even provided basic health care. She stated that the State had an equal obligation towards all citizens and it had to use its limited resources so as to provide the maximum benefit to the maximum number of people" Id., at Para 22

<sup>251</sup> See T. Soobramoney vs. Minister of Health (Kwazulu-Natal)

<sup>252</sup> W.P.(C) 7279/2013, see Para 44

also take note that, the structure of India is different from that of South Africa<sup>253</sup> as it has developed a progressive and liberal frame work.<sup>254</sup> Apart from the structural difference it has also marked that, though it is difficult to define *minimum core* but there are certain obligations such as health which cannot be *derogated*.<sup>255</sup> Thus court held to give free treatment to petitioner at AIIMS<sup>256</sup>.

## CONCLUSION

It is pretty clear from above discussion that, Indian Judiciary in respect of giving protection to ‘Right to Health’; is much more liberal than South Africa. And with the recent decision of Delhi High Court this credence become more appropriate. It has not only structuralized ‘Right to Health’ in ‘minimum core’ requirement but also made it clear that, in case of core requirement budgetary implication of state won’t be tenable<sup>257</sup>. However where it comes to South Africa, in *Minister of Health v Treatment Action Campaign (No 2)*<sup>258</sup> it has rejected to take account of ‘minimum core’ as it is difficult to define<sup>259</sup> also it has taken budgetary impediment as one of the reason for not providing health care facilities.<sup>260</sup> The supporter of unenforceable socio-economic right, like Tustnet, is of view that in short run only enforceable rights are good but in the long run unenforceable rights are better. Enforceable rights would force the courts to adopt strong remedies that could spark political opposition and may result in non-compliance.<sup>261</sup> Apart from this,

---

<sup>253</sup> Id., Para 42

<sup>254</sup> Id., Para 43

<sup>255</sup> “This minimum core is not easy to define, but includes at least the minimum decencies of life consistent with human dignity” see Id., Para 67

<sup>256</sup> As health is a State subject, the present petition is disposed of with a direction to the Government of NCT of Delhi, to discharge its constitutional obligation and provide the petitioner with enzyme replacement therapy at AIIMS free of charge as and when he requires it. see Id., Para 89

<sup>257</sup> Although obligations under Article 21 are generally understood to be progressively realizable depending on maximum available resources, yet certain obligations are considered core and non-derogable irrespective of resource constraints. Providing access to essential medicines at affordable prices is one such core obligation. see Id., Para 87 also see Para 86,88

<sup>258</sup> [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033

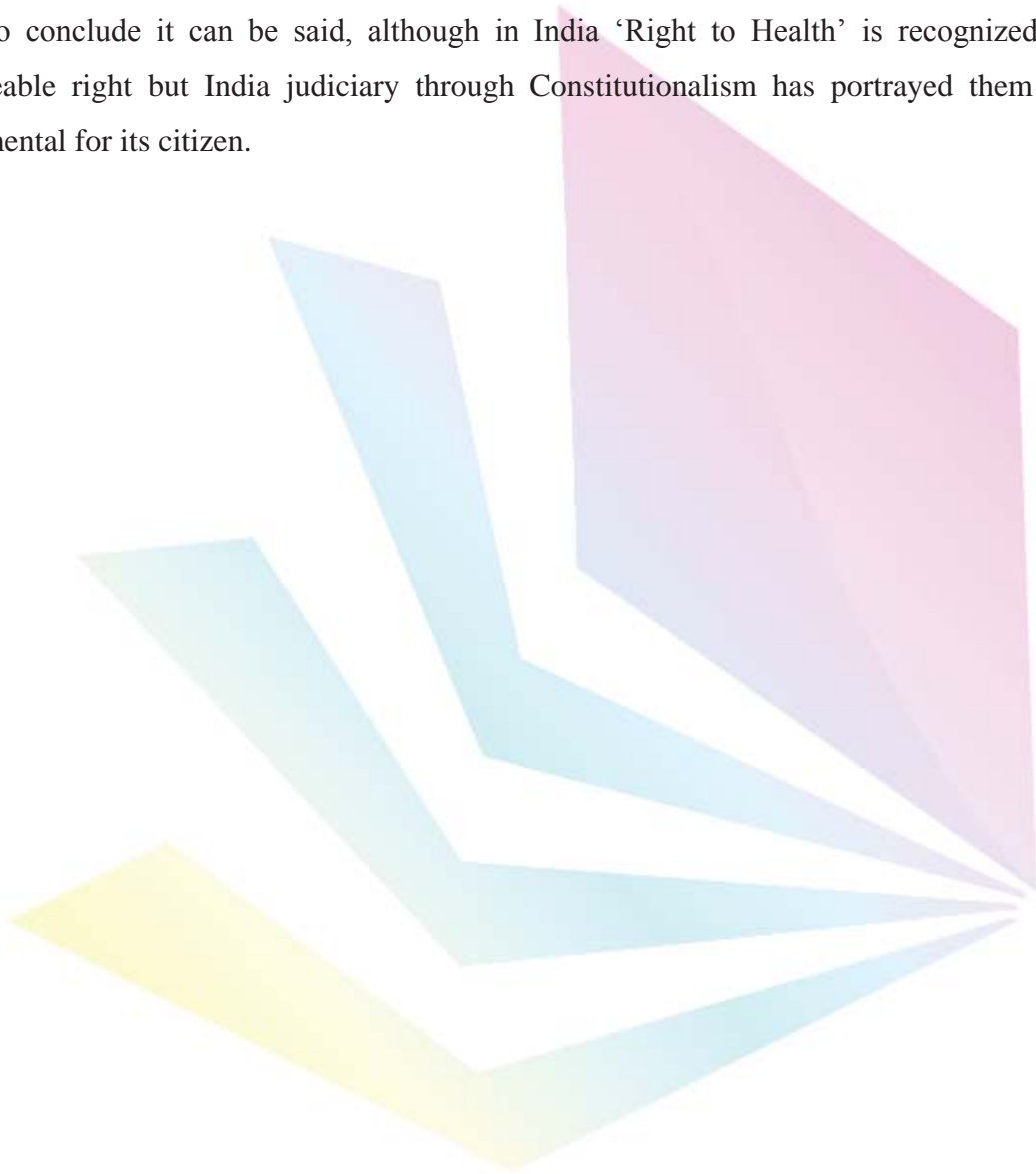
<sup>259</sup> Id., at Para 28

<sup>260</sup> “This means that the budgetary constraints referred to in the affidavits are no longer an impediment.” See Id., at Para 120

<sup>261</sup> Shankar & Meheta, supra at 147

Judiciary by applying ‘reasonable approach’ has unnecessarily limited the scope of application of socio-economic right in progressive realization of state, especially in the case where infringement enforceable socio-economic right took place<sup>262</sup>

Thus to conclude it can be said, although in India ‘Right to Health’ is recognized as non-enforceable right but India judiciary through Constitutionalism has portrayed them as most fundamental for its citizen.



---

<sup>262</sup>,Varun Gauri & Daniel M. Brinks, Introduction: The Element of Liberalisation and the Triangular shape of social and Economic Right 30 (Varun Gauri & Daniel M. Brinks 1 ed. 2008).