RIGHT TO HEALTH- CONSTITUTIONAL PERSPECTIVE OF INDIA AND SOUTH AFRICA

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INTRODUCTION

The basis of human personality is formed by mental and physical health. Ever since diseases and other such mishaps came into existence, they have controlled human life with a strong grip. Currently, the human race stands alarmed at the sheer amount of disablement, disfigurement and loss of life caused due to illness. Agony is caused by multiple sources, which are both external and internal, ranging from natures' wrath to lack of proper hygiene. Preservation of good health is a necessary for the survival of the human race.

Many factors, over which an individual can have no control, cause health problems; such that personal hygiene cannot prevent.

In such cases, state agencies – in a regulatory, effective and authoritative manner – are well equipped to prevent the causes and deal with the ailments. State action to ensure phyical and mental well being of the people, therefore, measures an individual's right to health in a welfare state. Every sovereign state has plenary power to do all things which promote the health, peace, morals, education and good order of the people and tend to increase the wealth and prosperity of the State. The building of such society invisioned by our Constitution makers, hence, is highly dependent on the maintenance and improvement of public health.

The violation of certain socio-economic rights – due to a marked shift in the world's politican and socio-economical scenario – are now looked after by constitutional courts created by nation states. Socio-economic rights are related to both the social and economic rights of the common people as well as the State, including the right to health. Although the decision as to whether a country's Constitution should make provisions for social and economic rights is a political one, the task of interpreting and enforcing such rights is undoubtedly judicial in nature.[1]

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[1] Goldstone, Richard J, 'A South African Perspective on Social and Economic Rights', *Human Rights Brief*, Vol. 13, No. 2, 2006, pp. 4 - 7

Health is fundamental to the physical and mental well-being and is a necessary condition for the exercise of other human rights[2] such as an adequate standard of living. The South African Constitution provides the right to health care in three sections. These provide for access to health care services including reproductive health and emergency services; basic health care for children, and medical services for detained persons and prisoners.[3] Universal access is provided for in section 27(1) (a) which states that "Everyone has the right to have access to health care services, including reproductive health care..." Section 27(1) (b) provides for the State to "take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right." As per the Limburg Principles, progressive realisation does not imply that the State can defer indefinitely, efforts for the full realisation of the right. On the contrary, state parties are to "move as expeditiously as possible towards the full realisation of the right" and are required to take immediate steps to provide minimum core entitlements.[4] Section 27(3) states that no one can be denied emergency medical treatment. Section 28(1) (c) provides for "basic health care services" for children, while Section 35(2) (e) provides for "adequate medical treatment" for detainees and prisoners at the State's expense.

[2] *General Comment No.14 (2000) The Right to the Highest Attainable Standard of Health,* (Article 12 of the International Covenant of Economic, Social and Cultural Rights). UN Committee on Economic, Social and Cultural Rights, 2000, para 1.

[3] Sections 27 (1) (a), (b) &(c); Section 28 (1) (c) and Section 35 (2) (e**)** of the Constitution of the Republic of South Africa, Act 108 of 1996.

[4] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Para 21.

SOUTH AFRICA'S CONSTITUTIONAL RIGHT TO HEALTH CARE

Van Biljon and others v. *Minister of Correctional Services and others*[5] is a case related to prisoners' right to health. The issue in the case was related to "the provision of getting medical treatment at the expense of state" under Section 35(2)(e) of the Constitution of South Africa[6].

In this case, Van Biljon, a prisoner, and other inmates of prison were diagnosed and found to be HIV positive. They sought a declaration from the Cape High Court to grant them the right to adequate medical treatment of such prisoners that had reached the symptomatic stage of the disease and whose CD4 counts were less than 500/ml. Medicine and apposite anti-viral treatment at the State's expense was also sought.

The respondents argued that prisoners had equal rights as other persons being treated at provincial state hospitals; further, that the treatment to be given was decided by policy of the provincial hospitals, including prisoners as they arguably had equal rights. The policy was that the use of the AZT antiretroviral at those hospitals was limited. Prescription of those drugs at state expense was: (i) Limited to only AZT monotherapy; (ii) The HIV patients who are considered for AZT treatment are essentially those with a CD4 count of less than 200/ml and whose condition had developed to full-blown AIDS; and (iii) In order to qualify for AZT at state expense, the patient in question had to have a CD4 count of more than 50/ml.[7]

Thus, the two major issues involved in this case are: (i) Whether HIV positive patients above stated were entitled to have anti-viral therapy prescribed for them on medical grounds? and (ii)Whether the same was to be at state expense?[8]

On the first issues, drawing from findings of American Court, J. Brand held that it was not inside of the limit of the courts to direct doctors in the matter of when and on what grounds if they draw up remedies. On the second issue, the Court concurred with the candidates that prisoners were qualified for restorative treatment to the detriment of the State as revered under Section 35(2) (e) of the Constitution. Segment additionally gives such that detainees in states of confinement are qualified for live with human nobility including the

[5] 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C).

[6] Constitution of South Africa Act 108 of 1996.

[7] *Ibid.*

[8] *Ibid.*

procurement of restorative treatment to the detriment of the state. Yet, the courts need to choose the issue that whether prisoners were qualified for the cost of medicinal consideration which is not accessible to persons outside jail. So in such manner, the Court held that "standard of medical care of prisoners could not be determined according to the standard afforded to persons outside prison... as the state kept prisoners in conditions where they were more vulnerable to opportunistic infections than HIV positive patients outside". In this way, sufficient therapeutic treatment should be given to them so they can show signs of improvement invulnerable framework than the on that the state gave to HIV patients outside. Along these lines, when the reality can be built up that, 'anything not as much as a specific type of therapeutic treatment would not be sufficient', the detainee would get the established right to get restorative treatment. Be that as it may, such right will be subjected to money related conditions or budgetary requirements. What is 'sufficient therapeutic treatment' can't be resolved without fundamental data. Subsequently "adequate" in such manner is what is admissible by the state's financial capacity[9].

So for this situation imperative focuses in view of which the Court chose the issue are: to start with, the Court dismisses the very contention that sufficient restorative treatment can be likened with treatment that is accessible to a typical individual. Also, second, that authority can't set up the way that they are not able to give the required treatment[10].

The first case that the South African Constitutional Court heard on social and economic rights was the worst possible beginning. In *Soobramoney* v. *Minister of Health*, an Indian South African living in the city of Durban had an ischemic heart, a failed liver, and a life expectation of approximately 18 months.[11] Soobramoney's condition obliged that he get treatment in any event once per week. He went to an open government hospital for dialysis, however was denied treatment in light of the fact that the hospital just had procurements for 78 patients in any given week. In this way, the hospital offered need to patients who were in line to get transplants, who required just fleeting treatment, and who might make a full recuperation. As such, giving Soobramoney dialysis treatment would have kept another

[9] *Ibid.*

[10] Jonathan Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: Focus on Health and Education', in Varun Gauri and Daniel M. Brinks (eds), *Counting Social Justice: Judicial Enforcement of Social and Economic Rights in The Developing World*, (Cambrige University Press, 2010), at p.54

[11] *Soobramoney* v. *Minister of Health* [KwaZulu-Natal], 1997 (12) BCLR 1696 (CC) (S. Afr.).

patient from accepting the long haul advantages of treatment. At the point when hospital authorities reluctantly disclosed to him that the treatment was not accessible, Soobramoney conveyed a critical application to the High Court at Durban, which requested the government to furnish him with the dialysis treatment. The government direly appealed, and the Constitutional Court heard the appeal.

The Constitutional Court held that it could not order the dialysis treatment. First, the Court rejected Soobramoney's argument that this was emergency treatment, which is an absolute right under the South African Constitution and not, like other forms of health care, something to which the government must only provide reasonable access.[12] The Court said emergency treatment is the kind of treatment that an individual gets in injury and emergency wards taking after a genuine mischance. Soobramoney's circumstance, as grave as it might have been, did not require such a level of consideration. Second, the Court collectively held that it couldn't arrange the hospital to buy more dialysis machines. The monetary allowance had been painstakingly drafted in the state hospitals, and more machines would have implied less cash for pharmaceuticals, which would have changed the hospital's budgetary determinations. In the judges' meeting room, it was noticed that requesting more dialysis machines would open the way to circumstances where people could request non-emergency treatments that would cost hospitals critical measure of cash.

The Court held that it couldn't meddle and advise the government how to stock its medical supplies. Maybe, the Court said that it could just meddle in circumstances where there was an unlawful infringement of fairness; for instance, if the need rundown arranged by the doctors offered inclination to people of a specific race. Tragically, national TV slots took their cameras to Soobramoney's home the day the assessment descended dismissing the case for dialysis treatment. He was sitting with his wife and three kids, and they got some information about the choice of denying him the dialysis treatment. Before he could even start to reply, then again, he had a stroke and passed on inside of 60 minutes. The Court was reprimanded by a significant part of the media for adequately sentencing Soobramoney to death.

Perhaps the most dramatic case in the Constitutional Court's history thus far has been *Minister of Health* v. *Treatment Action Campaign*.[13] This specific case included the supply of

[12] Constitution of the Republic of South Africa, Sec.s 27(1) & 27(3).

[13] *Minister of Health* v. *Treatment Action Campaign* 2002 (5) SA 721 (CC) (S.Afr.).

a medication called Nevirapine to pregnant women. The medication has been exceptionally effective in halting the transmission of the HIV infection from HIV-positive moms to their infant kids. It is modest and effectively administered; the mother needs to have one little dosage amid work and the kid a little measurements during childbirth. Be that as it may, the South African government has a conflicted and in a few ways silly way to deal with HIV/AIDS. Some senior ministers, and even President Thabo Mbeki at one stage, denied that the HIV infection is the reason for AIDS. Thusly, just two test stations in two medical offices were situated up inside of the nation, viably denying Nevirapine to 90 percent of South Africa's pregnant women.

The government contended that the utilization of Nevirapine would oblige moms to comprehend that they couldn't bosom food to keep the exchange of the HIV infection to their kids. The government fought that there was no utilization in taking a medication and potentially building up imperviousness to it if a mother was then going to bosom sustain her youngster. The Court reacted, on the other hand, that people could be prepared to teach hopeful moms about these dangers. At last, the government protested in light of the fact that women who did not bosom food would need clean water for recipe, which was not accessible in a few zones. The Court held that this was not an adequate ground to deny the medication, but instead motivation to supply clean water. On the off chance that no clean water was accessible, the mother would not be encouraged to take the medication.

Subsequently, the government was requested to supply the medication to each hospital in South Africa. In its choice, the Court depended on the privilege to medical treatment as well as equity: Nevirapine couldn't be supplied to a few moms and not others. The government, to its awesome credit in this and different situations where the Court had ruled against it, had immediately executed the requests of the Constitutional Court.

Since 1994 there have been several court cases which have served to add to the normative content of the right to health care. These have thrown light on the concepts of “available resources” and “reasonable measures” in terms of Section 27 (1) (b) of the Constitution. In the *Soobramoney* case[14] the Constitutional Court opined that the scarcity of resources available to the State was a constraint to the enjoyment of the right by the

[14] *Supra* note .6

appellants, given the socio-historical context of South Africa. In the *Grootboom* case,[15] the Constitutional Court defined the parameters of what constitutes "reasonable measures". In addition to these, it concluded that measures that do not include meeting the needs of the most vulnerable groups in society, were unreasonable. Furthermore, it was stated that implementation plans that failed to be "reasonable" would not meet the State's obligations in term of Section 7(2) of the Constitution.

LEGISLATIVE MEASURES IN SOUTH AFRICA

Certain segments of the National Health Laboratory Services Act, Act 37 of 2000 came into operation in 2001. The Act accommodates the foundation of a juristic individual to be known as the National Health Laboratory Service. The Act has acquainted a critical change with the way laboratory administrations are given in people in general area. It makes another administration, as a self-ruling body, uniting the staff and resources of the South African Institute for Medical Research (SAIMR), the National Institute for Virology, the National Center for Occupational Health, the criminological science labs possessed by the State (except for those worked by the police and military) and all common wellbeing labs. A national laboratory service regulates and standardises services.[16]

Since March 2000 two draft bills were tabled before Parliament for discussion providing a broad framework of the government's strategy on health- The National Health Act (2003) and the Mental Health Act(2002).

The National Health Act (2003)

The National Health Act is national framework legislation for the conveyance of social insurance by making closer collaboration between the three circles of government. It is intended to enhance access to medicinal services offices, enhance nature of consideration by building limit of wellbeing experts. In the introduction, it is expressed that the proposed law is according to Section 27(1) of the Constitution, which accommodates everybody to have entry to human services administrations, including conceptive rights. The target of the national framework legislation is to build up a national wellbeing framework which includes

[15] *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2000 (11) BCLR 1169 (CC).

[16] *South African Year Book 2001/02*. Pretoria, Government Communication and Information System, 2001, p. 329.

open, private and non-governmental suppliers of wellbeing administrations; gives the number of inhabitants in the Republic with the best conceivable wellbeing administrations that accessible assets can bear the cost of and to set out the rights and obligations of both social insurance suppliers and clients.

Section 7 of the Act gives that the Minister or the important Member of Executive Council in charge of wellbeing, may endorse that a private or general wellbeing foundation should not deny any individual looking for emergency medical treatment if such a foundation is open and ready to give such administrations. "Emergency treatment" is characterized in the Act as "treatment which is needed to treat a life-threatening but reversible deterioration in person's health status and it continues to be emergency treatment until the condition of the person has stabilised or has been reversed to a particular extent."

The Mental Health Care Act 2002

The primary reason for the Act is to direct, incorporate, co-ordinate access to mental social insurance, treatment and restoration benefits on a non-prejudicial premise. It additionally proposes to coordinate mental wellbeing into Primary Health Care. Different territories of center are the advancement of group, region and provincial mental wellbeing administrations; de-systematization from psychiatric hospitals through the improvement of group bolster administrations (gathering homes; day programs; restoration gatherings and home based consideration).

The Act entitles mental social insurance clients to legal representation and to be educated of his/her rights. It further gives, that a detainee, who after an examination by jail authorities, is considered mentally unfit may be exchanged to a mental wellbeing foundation on suggestion of a wellbeing expert. He or she may be discharged after the expiry of the term of detainment.

INDIAN CONSTITUTIONAL PERSPECTIVE

Right to health is not included directly as a fundamental right in the Indian Constitution. The preamble to the Constitution of India, *inter alia*, seeks to secure for all its citizens justice-social and economic. The Constitution makers imposed the duty on the state

to ensure social and economic justice specifically through Part IV of the Indian Constitution which enshrines Directive Principles of State Policy. If we see those provisions, then we find that some provisions are either directly or indirectly related with public health.

Articles 42 and 47 are the most significant provisions to be discussed here.

Article 42

Provision for just and humane conditions of work and maternity relief- The State shall make provision for securing just and humane conditions of work and for maternity relief.

Article 47

Duty of the State to raise the level of nutrition and the standard of living and to improve public health- The State shall regard the raising the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health.[17]

The above articles act as rules that the State must seek after towards accomplishing certain standards of living for its subjects. Along these lines it additionally demonstrate obviously the understanding that nourishment, states of work and maternity advantage are fundamental to wellbeing.

Despite the fact that the Directive Principles of State Policy cited above are a convincing contention for the right to wellbeing, this single-handedly is not an assurance. There must be an unmistakably characterized right to wellbeing so people can have this right upheld and infringement can be changed.

The Indian legal has translated the right to wellbeing from numerous points of view. Most altogether, through open interest suits and in addition prosecutions emerging out of cases that people have made against the State as for wellbeing administrations. Subsequently, there are considerable case laws in India, which demonstrate the array of issues that are identified with wellbeing.

[17] Part IV, Constitution of India was adopted on 26 November 1949.

The fundamental right to life, as expressed in Article 21 of the Indian Constitution, assurances to the individual her/his life and individual freedom. Such right to life is just allowed to be taken away on the off chance that it is done so as per a method built up by law. The Supreme Court has broadly deciphered this fundamental right and has included in Article 21, the right to live with poise and "all the necessities of life such as adequate nutrition, clothing…." It has also held that act which affects the dignity of an individual will also violate her/his right to life.[18]

In India, the theory of the inter-relatedness between rights was famously articulated in the *Maneka Gandhi*[19] decision. This became the basis for the subsequent expansion of the understanding of the 'protection of life and liberty' under Article 21 of the Constitution of India. The Supreme Court of India further went on to adopt an approach of harmonization between fundamental rights and directive principles in several cases.

With regard to health, a prominent decision was delivered in *Parmanand Katara* v. *Union of India*.[20] In this case, the Court was stood up to with a circumstance where hospitals were declining to concede mischance casualties and were guiding them to particular hospitals assigned to concede 'medico-legal cases'. The Court decided that while the medical authorities were allowed to attract up managerial standards to handle cases taking into account practical contemplations, no medical authority could decline prompt medical thoughtfulness regarding a patient in need.

The Court relied on various medical sources to conclude that such a refusal amounted to a violation of universally accepted notions of medical ethics. It observed that such measures violated the 'protection of life and liberty' guaranteed under Article 21 and hence created a right to emergency medical treatment.[21]

Another significant decision which strengthened the recognition of the 'right to health' is *Indian Medical Association* v. *V.P. Shantha*.[22] In this case, it was decided that the

[18] *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi* 1981 (1) SCC 608.

[19] AIR 1978 SC 597.

[20] AIR 1989 SC 2039.

[21] Arun Thiruvengadam, 'The global dialogue among Courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective' in C. Raj Kumar & K. Chockalingam (eds.), *Human Rights, Justice and Constitutional Empowerment* (New Delhi: Oxford University Press, 2007) p. 283.

[22] AIR 1996 SC 550.

procurement of a medical service (whether diagnosis or treatment) consequently for financial thought added up to a "service" with the end goal of the Consumer Protection Act, 1986. The result of the same was that medical practitioners could be held liable under the Act for lack in service notwithstanding carelessness. This decision has gone far towards securing the hobbies of patients. Be that as it may, medical services offered free of expense were thought to be past the domain of the said Act.

With regard to the access and availability of medical facilities, the leading decision of the Supreme Court is *Paschim Banga Khet Mazdoor Samiti* v. *State of West Bengal*.[23] The facts that led to the case were that a train mishap casualty was moved in the opposite direction of various government-run hospitals in Calcutta, on the ground that they didn't have satisfactory offices to treat him. The said mischance casualty was at last treated in a private hospital yet the deferral in treatment had bothered his wounds. The Court understood that such circumstances routinely happened everywhere throughout the nation by virtue of lacking essential wellbeing offices.

The Court issued notification to all State governments and guided them to attempt measures to guarantee the procurement of negligible essential wellbeing offices. At the point when defied with the contention that the same was impractical because of money related limitations and constrained work force, the Court announced that absence of assets couldn't be refered to as a reason for non-execution of a constitutionally mandated commitment. The Court set up a specialist committee to explore the matter and embraced the last report of the said committee.

This report contained a seven-point plan tending to a few issues, for example, the updating of offices everywhere throughout the nation and the foundation of a concentrated interchanges framework amongst hospitals to guarantee the sufficiency and brief accessibility of emergency vehicle gear and faculty. A few analysts have contended that by perceiving a governmental commitment to give medical offices, the Court has made a justiciable 'right to health'.

In India the concept of Right to health is dynamic in nature. It is not restricted to the pragmatic concept of right to health and emergency medical treatment only but has a broader meaning. In fact, right to health also includes other related rights like in *CECS* v. *Subhash*

[23] AIR 1996 SC 2426.

Chandra Bose and other[24], the minority judges were of the view that the term health includes "...more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development."[25] In *Vincent Panikurlangara* v. *Union of India*[26] it had been said that the healthy body is the foundation of all human activities. Again in *Consumer Education and Research Centre* v. *Union of India*,[27] it was enumerated by the Court 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. The facts of the case were relating to the work-related health hazards faced by workers in the asbestos industry. The Court in its judgment emphasized on the fact that right to life under Article 21 includes right to health and medical care, and therefore, they are essential for the life of worker to become meaningful and purposeful with dignity of person. The Court went on to hold that the state here includes an industry, both Private and Public,[28] and it has a duty to promote health, strength, and vigour of a worker during the course of his employment and to provide him adequate facility of leisure after the course of employment. Health of the worker helps him to enjoy the fruits of his labour. Providing medical facilities to worker will protect his right to health making his life meaningful and purposeful. In order to complement this decision, the Court has laid down some guidelines, which are mandatory for all the industries[29] and private persons to follow. Along with the guidelines the Court also added that the Central and the state Governments, shall review the position after every 10 years. The Court also directed the authorities in this regard to consider the inclusion of other small scale industries who are engaged in the production of asbestos and its subsidiary products to protect those workmen working in these industries from health hazards.[30]

[24] 1992 AIR 573, 1991 SCR Supl. (2) 267.

[25] *Ibid.*

[26] AIR 1987 SC 990.

[27] (1995) 3 SCC 42.

[28] Constitution of India,. Art. 12.

[29] That time there were 74 asbestos industries.

[30] (1995) 3 SCC 42.

Municipal Council Ratlam v. *Vardhichand*[31] is a case which fundamentally managed the issue in regards to the disappointment of duty of the state and municipality to give a pollution free environment which is a piece of public health. The candidate, who was an occupant of Ratlam, documented a protestation that the municipality had neglected to keep the release of rank liquids from the close-by Alcohol plant into the channels and to give clean offices on the streets. The Supreme Court guided the municipality to take after the statutory obligations as gave in Article 47 of the Constitution and to prevent the effluents from the alcohol plants to be released into thedrain, and to give sterile offices on the streets. It further focused on, that Article 47, makes it the principal duty of the state or municipality to make moves to advance pollution free environment and to enhance the public health. The Court watched that: "where order Principles have discovered statutory expression in do's and don'ts, the court will not sit idle to let the municipality to become statutory mockery".

[31]1980 AIR 1622, 1981 SCR (1) 97.

CONCLUSION

To conclude it can be said that Right to health is one of the indispensable human rights and should not be compromised with on any ground. Although right to health is one of the socio-economic rights, it cannot be subjected to secondary importance. For the enjoyment of the first generation rights[32], ensuring right to health is imperative. As it is rightly observed by the Supreme Court in *Vincent Panikurlangara* case, 'healthy body is the very foundation of all human activity'[33]. Therefore, this right should not be restricted in any situation.

In this paper, I have discussed the situation of two different countries, India and South Africa, and the attitude of the judiciary towards the protection of right to health of their citizens. Whereas in South Africa Constitutional right to health is an enforceable right, in India it is expressively unenforceable. But judiciary while enforcing this right in South Africa has been somewhat reluctant and has imposed reasonable restriction on the same regarding the availability of the resources, but in India, the judiciary has adopted a totally different approach as has been evident in many leading cases. The judicial verdicts in India advocate the principle that "The law will relentlessly be enforced and plea of poor finance will not be alibi when people in the misery cry for justice". This shows that the protection of right to health in India is much stronger than in South Africa. Apart from this, a recent development in the right to health jurisprudence in India is the draft National Health Policy, 2015 prepared by the Union Ministry of Health and Family Welfare. This draft has suggested making health a fundamental right, similar to education, and the key proposal suggests making denial of health an offence.[34] So to sum up, it can be said that right to health should not stay in the pages of socio-economic right and given secondary importance but should be given fundamental practical significance as tried in the Indian Context.

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[32] Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", *UNESCO Courier* 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

[33] *Vincent Panikurlangara* v. *Union of India* AIR 1987 SC 990.

[34] The Hindu, 'Centre moots health as a fundamental right, 2015', available at <http://www.thehindu.com/news/national/centre-moots-health-as-a-fundamental-right/article6742882.ece> Last visited, 2 April 2015.