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Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India

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Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India

TABLE OF CONTENTS

I.	INTRODUCTION	436
II.	THE MODERN HUMAN RIGHTS MOVEMENT	437
	A. <i>The Ability to Live With Human Dignity</i>	438
	B. <i>The Potential of Social Rights</i>	440
III.	CURRENT STATUS OF SOCIAL RIGHTS	442
	A. <i>Legal Obligations of Social Rights</i>	443
	B. <i>The Marginalization of Social Rights</i>	445
	1. Textual Indefiniteness	446
	2. Substantive Content of Social Rights	447
	3. The Problem of Non-justiciability	448
	C. <i>Guaranteeing Social Human Rights</i>	450
IV.	AN EXAMINATION OF THE SOCIAL RIGHT TO HEALTH.....	451
	A. <i>The Importance of Health to Human Rights</i>	451
	B. <i>Sources of the Right to Health</i>	453
	C. <i>The Challenge of the Right to Health for States</i>	454
	1. The International Definition of the Right to Health	454
	2. The Relevance of Rights Discourse to Health Issues	455
	D. <i>Defining the Right to Health</i>	456
	1. The Empowerment Definition of the Right to Health	457
	2. State Duties With Respect to the Right to Health	459
	3. The Duty to Respect, Protect, and Fulfill the Right to Health.....	459
	4. Implications of Empowerment on the Right to Health.....	460
V.	THE INDIAN EXPERIMENT: LITIGATION OF THE RIGHT TO HEALTH.....	461
	A. <i>Bases of Activism</i>	463
	1. The Indian Constitution	463
	2. The Indian Supreme Court.....	465

B.	<i>Social Conditions on the Indian Subcontinent</i>	466
C.	<i>The Response: Public Interest Litigation</i>	467
D.	<i>Procedural Developments</i>	468
	1. The Expansion of Locus Standi.....	469
	2. Epistolary Jurisdiction	471
	3. Fact-finding Commissions	471
	4. Innovative Judicial Remedies	471
E.	<i>The Recognition of the Goal of Empowerment</i>	473
F.	<i>Substantive Protection of the Right to Health</i>	474
	1. The Substance of Public Interest Litigation	474
	2. The Fundamental Right to Life	475
	3. Moving Towards the Recognition of the Right to Health.....	476
	4. The Importance of Access to Preventive and Curative Health Services	477
	5. The Assurance of Living Conditions Necessary for Health	481
	6. Protection of the Environment.....	482
VI.	CONCLUSION.....	485

"If we believe men have any personal rights at all as human beings, they have an absolute right to such a measure of good health as society, and society alone is able to give them."

Aristotle¹

I. INTRODUCTION

The reality that one fifth of the world's population is forced to live at subsistence levels, facing constant starvation, malnourishment, and poor health is one of the greatest human rights offenses in the modern world.² These types of social conditions are concentrated mostly in the developing world, where society is characterized by low economic and infrastructure

1. Walter P. von Wartburg, *A Right to Health? Aspects of a Constitutional Law and Administrative Practice*, in *THE RIGHT TO HEALTH AS A HUMAN RIGHT* 112, 112 (René-Jean Dupuy ed. 1979) (prepared as part of the Hague Workshop, July 27-29, 1978).

2. See Neil Stammers, *A Critique of Social Approaches to Human Rights*, 17 *HUM. RTS. Q.* 488, 493 (1995) (quoting R. J. VINCENT, *HUMAN RIGHTS AND INTERNATIONAL RELATIONS* 2 (1986)).

development, crushing poverty, and uncompromising political structures. The human rights movement has begun to recognize that these conditions are the result of a massive deprivation of social human rights. Such deprivations result in the systematic disempowerment of individuals in their ability to gain control over their social environments and become capable members of society.

This Note argues that the recognition of the social right to health offers a step forward in empowering individuals to gain control over their social environments in the developing world. Part II discusses the potential of social human rights to alleviate suffering in the developing world. Social human rights recognize that the state must provide individuals with the basic social conditions necessary to live with human dignity. Part III explores the legal obligations of social rights and their current status in human rights jurisprudence. It also discusses the most pressing challenges facing implementation of social rights at the national level. Part IV explores the contours of the social human right to health and its ability to empower individuals. Even though the right to health presents some of the most difficult conceptual and practical problems associated with social human rights, providing for the conditions necessary for good health is essential in allowing individuals to live with human dignity.

The final section addresses India's experiment with litigating social rights, such as the right to health, and its potential use for the developing world. The Indian judiciary has developed a legal mechanism that can help make social empowerment a reality for Indian citizens. Through public interest litigation, India has been able to provide the majority of Indian citizens, who are poor or socially disadvantaged, with the ability to gain control over and improve their social environments. The judiciary has provided individuals with the procedural ability to guarantee social rights and entitlements in court, and has also provided substantive recognition to the right to health as a legally recognizable entitlement. The Indian "experiment" demonstrates that with creativity and commitment, social rights can be made justiciable and used to alleviate human suffering in the developing world.

II. THE MODERN HUMAN RIGHTS MOVEMENT

The tremendous social and economic changes sweeping through the developing world have rapidly transformed developing societies. Current economic development programs have had a devastating impact on vulnerable members of the population with

millions of people living in abject poverty.³ Structural adjustment programs have required governments to shift expenditures away from social programs to more productive sectors.⁴ The focus of these programs has been massive industrial development and macro-economic production instead of providing basic social services to the population.⁵ According to the World Bank, states are required to provide only the minimum level of social services to the poor.⁶ National governments have not begun to address these social deprivations on a systematic level, which has left the poor to face unbearable living conditions. The world is now confronted with ever-increasing popular demands for the protection of basic human rights, greater economic justice, and political freedom.⁷

A. *The Ability to Live With Human Dignity*

The new demand for social and economic justice has led to a normative shift within the human rights movement.⁸ The traditional role of human rights has been to protect the civil and political rights of individuals.⁹ Initially, these rights imposed negative duties on the state to refrain from interfering with

3. See Alicia Ely Yamin, *Reflections on Defining, Understanding, and Measuring Poverty in Terms of Violations of Economic and Social Rights Under International Law*, 4 GEO. J. ON FIGHTING POVERTY 273, 280 (1997) [hereinafter Yamin, *Reflections*].

4. See Allyn Lise Taylor, *Making the World Health Organization Work: A Legal Framework for Universal Access to the Conditions for Health*, 18 AM. J.L. & MED. 301, 324 (1992).

5. See Yamin, *Reflections*, *supra* note 3, at 278. The World Bank has expressed one view that appears to indicate that social spending is a strictly utilitarian measure instead of an independent government obligation to its citizens. See *id.* This method evaluates social services strictly in terms of output in worker productivity. See *id.*

6. See *id.* According to the World Bank's 1990 World Development Report, "[p]rimary health care, family planning, nutrition, and primary education" should be provided to the poor. *Id.* (quoting WORLD BANK, WORLD DEVELOPMENT REPORT 1990 3 (1990)). The World Bank regarded these social services as human capital investments that will enable the poor to become productive workers. See *id.*

7. See Burns H. Weston, *Human Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY, ISSUES AND ACTIONS 14, 29 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992) [hereinafter HUMAN RIGHTS, ISSUES].

8. See *id.*

9. See *id.* at 15-16. Civil and political rights are often characterized as first generation rights deriving from the seventeenth and eighteenth century rights theories. See *id.* at 18. These rights are featured in almost every state constitution and dominate international conventions today. See *id.* at 19.

certain individual freedoms.¹⁰ The world community, however, has been forced to search for a deeper understanding of the meaning of human rights for individuals and societies around the world.¹¹ The modern focus of human rights has begun to shift towards the empowerment of individuals through the provision of social and economic resources necessary to live with human dignity.¹²

A fundamental tenet of the human rights movement is that every human being possesses an inherent dignity by virtue of being human.¹³ The primary purpose of the human rights movement has been to guarantee that individuals live with basic dignity.¹⁴ The concept of living with "human dignity" has many components, and includes political liberty, freedom of thought and expression, economic subsistence, cultural freedom, and the provision of social services.¹⁵

The duty of the state in guaranteeing human rights is to ensure that the individual is provided with the resources necessary to live a life of dignity.¹⁶ These "resources" may include the guarantee of economic, social, cultural, civil, and political rights which that the individual to flourish in her political, economic, and social environment.¹⁷ States should be assessed on whether existing societal structures or direct state actions interfere with the individual's right to live with basic human

10. For example, some states guarantee individuals the right to life and liberty which includes prohibitions against arbitrary arrest, detention, and torture. See U.S. CONST. amend. I-X for protections of civil and political liberties.

11. See *International Human Rights: Overviews*, in HUMAN RIGHTS, ISSUES, *supra* note 7, at 2.

12. See Alicia Ely Yamin, *Defining Questions: Situating Issues of Power in the Formulation of a Right to Health under International Law*, 18 HUM. RTS. Q. 398, 401 (1996) [hereinafter Yamin, *Defining Questions*].

13. See Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848 (1983), *reprinted in* HUMAN RIGHTS LAW 101, 101 (International Library of Essays in Law and Legal Theory Area No. 27, Philip Alston ed., 1996).

14. See Richard Pierre Chaude & Burns H. Weston, *Preface to HUMAN RIGHTS, ISSUES*, *supra* note 7, at xi, xii (asserting that the goal of human rights work is to build a world community respectful of human dignity).

15. For example, former Secretary of State Cyrus R. Vance defined human rights to include "the right to be free from government violation of the integrity of the person, . . . the right to fulfillment of such vital needs as food, shelter, health care, and education . . . [and] the right to enjoy civil and political liberties." Weston, *supra* note 7, at 21.

16. See Yamin, *Reflections*, *supra* note 3, at 281.

17. "[T]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. . . ." See International Covenant on Economics, Social and Cultural Rights, *adopted* Dec. 16, 1966, pmbl., 993 U.N.T.S. 3, 5 (entered into force January 3, 1976) [hereinafter ICESCR].

dignity. Some examples of productive social environments include societies where people have access to resources for good physical and mental health, sufficient food, basic education services, and an adequate livelihood.¹⁸ The guarantee of these social "goods" is a necessary precondition of the enjoyment of all human rights and allows individuals to fully participate in all other areas of their lives.¹⁹

B. *The Potential of Social Rights*

Faced with endemic poverty, the developing world has been unable to provide individuals with these types of social goods. Furthermore, developing countries have hierarchical power structures which are often hostile to the needs and concerns of ordinary people. In response, human rights advocates have begun to demand the legal recognition of social human rights as enforceable guarantees against the state. Through the use of social human rights, international and national communities can directly address individual suffering and the systematic disempowerment of individuals by guaranteeing the right to an essential level of social services. More importantly, social rights can be used to penetrate social and economic power structures to determine whether the structures act as a barrier to personal empowerment.²⁰ Social rights are also important tools because they can challenge the national power structures,²¹ and help ensure that weaker populations have the opportunity to change their current situation through a judicial, legislative, or political process.²²

18. *See id.* arts. 6-15, 993 U.N.T.S. at 6-9.

19. For example, people must be literate and have some economic security and the ability to fully exercise civil and political rights. *See* Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUSTL. Y.B. INT'L L. 1, 29 (1994), reprinted in HUMAN RIGHTS LAW, *supra* note 13, 219, 247. Furthermore, economic prosperity and literacy without freedom of expression do not allow for the full development of the human personality. *See id.* Realistically, both sets of right are equal and indivisible. *See id.*

20. *Cf.* Yamin, *Defining Questions*, *supra* note 12, at 406, 430, 438 (demonstrating that the patriarchal social structures, socioeconomic inequality, and entrenched power dynamics can operate to systematically deny persons their social right to health). *See generally* Stammers, *supra* note 2, at 502 (explaining that human rights can be systematically threatened and violated by decisions taken by economic actors).

21. *Cf.* Stammers, *supra* note 2, at 499 (discussing the social democratic understanding of human rights which believes that human rights place limits on power and act as challenges to existing power relationships).

22. *Cf.* Yamin, *Defining Questions*, *supra* note 12, at 437 (explaining that the unmasking alignments of power that limit control over right to health is the

Countries must recognize the validity and legitimacy of social rights as human rights in order for these rights to be meaningful. Even though the international community has consistently acknowledged the importance of human rights, the guarantee of any right remains the primary responsibility of states who must translate the right into a cognizable reality.²³ The legitimacy of social human rights stems from the belief that the definition of a human right is controlled by society.²⁴ In fact, the propositions sustaining and validating human rights are created by people living in particular historical, social, and economic environments.²⁵ This view of human rights recognizes that people live in vastly different societies and require certain social and economic guarantees beyond rhetorical political affirmations for survival.²⁶

The definition and enjoyment of a human right is directly related to an individual's socioeconomic and political circumstances. The contours of a human right are best understood in particular social contexts and power structures.²⁷ For instance, human rights are often required to protect vulnerable individuals from the mercy of others such as private actors, the state, or social and economic institutions.²⁸

By providing guarantees for social rights, the weak, poor, and disempowered will be given the opportunity to participate meaningfully in society.²⁹ The legal recognition of social human rights signifies the beginning of an alliance of the victims of economic development programs who have been too weak to fight against the powerful social, economic, and political forces working

first step towards redressing power imbalances through judicial, legislative, political, and educational means).

23. See Stammers, *supra* note 2, at 495 (quoting JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 1, 266, 269 (1989)).

24. See *id.* at 492.

25. See *id.* This understanding of human rights stands in stark contrast to the traditional view. Traditionally, human rights were viewed as timeless, universal principles based on abstract theories of state and individual interactions. See *id.*

26. See *id.* at 493.

27. See *id.* at 491-92.

28. See Audrey R. Chapman, A "Violations Approach" for Monitoring the *International Covenant on Economic, Social and Cultural Rights*, 18 *HUM. RTS. Q.* 23, 37 (1996). See also Stammers, *supra* note 2, at 491.

29. Cf. Yamin, *Defining Questions*, *supra* note 12, at 406, 430 (explaining that people can be rendered voiceless by traditional power structures in their societies). For example, the disempowering effect of poverty and economic deprivation leads to the diminution of the ability to live with human dignity and the marginalization of the health problems of the poor. See *id.* at 428. The argument I am making is that if people are given the means to gain control over their social environments, they will be able to exercise choice and participate in society.

against them.³⁰ The focus of the human rights movement on the guarantee and implementation of social rights at the national level offers a radical agenda for social change and alleviation of misery for the developing world.³¹ Due to its potential impact, a greater understanding of the obligations and implications of social rights is necessary.

III. CURRENT STATUS OF SOCIAL RIGHTS

Presently, social rights occupy a controversial and tenuous position in human rights jurisprudence and the world community.³² The modern recognition of human rights is found in the Universal Declaration of Human Rights (UDHR).³³ The UDHR was part of the post-war commitment to peace, development, and human dignity.³⁴ The UDHR was based on the acknowledgement that human beings possess an inherent dignity that is inviolable.³⁵ The UDHR was quite comprehensive and sought to guarantee civil and political freedoms as well as provide welfare guarantees. The UDHR did not make any distinctions between civil and political rights and social and economic rights in terms of their legitimacy.³⁶ With respect to social rights, the UDHR guaranteed individuals the right to a standard of living adequate for the health and well-being of themselves and their family, including provisions for food, clothing, housing, medical care, and other social services.³⁷ It also stated that vulnerable members of societies, such as mothers and children, may require

30. See Chapman, *supra* note 28, at 37 (discussing that recognition of the victim's basic rights is, in essence, taking the victim's side in their fight against injustice (quoting HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 33 (1980)).

31. See generally Yamin, *Reflections*, *supra* note 3, at 302 (discussing the potential use of economic and social rights to combat poverty).

32. See PAUL HUNT, *RECLAIMING SOCIAL RIGHTS: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* at xvii (1996).

33. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations without dissent on December 10, 1948. Weston, *supra* note 7, at 25.

34. See Universal Declaration of Human Rights, pmbl., G.A. Res. 217A, U.N. Doc. A/810, at 71-72 (1948) [hereinafter UDHR].

35. See *id.* pmbl., at 71. For example, the Preamble states that the UDHR is designed to reaffirm faith in the dignity and worth of the human person. See *id.* pmbl. at 72. Furthermore, Article 1 declares that all human beings are born free and equal in dignity. See *id.* art. 1, at 72.

36. Cf. "[N]one of the international human rights instruments currently in force or proposed say anything whatsoever about the legitimacy or rank-ordering of the rights they address . . ." Weston, *supra* note 7, at 21.

37. See UDHR, *supra* note 34, art. 25, para. 1, at 76.

additional health services.³⁸ The UDHR, however, did not create legally binding obligations on state parties.³⁹ However, it is viewed as the foundation of international human rights standards and has enormous normative significance.⁴⁰ For example, national courts have often used the provisions in the UDHR to measure state compliance with human rights obligations under the U.N. Charter.⁴¹

A. Legal Obligations of Social Rights

The legal status of social rights as human rights was established in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴² The UDHR, ICESCR and the International Covenant on Civil and Political Rights (ICCPR) form the International Bill of Rights.⁴³ These ICESCR and ICCPR impose binding obligations on state parties.⁴⁴ The ICESCR is the most comprehensive protection of social rights existing in international law today. The ICESCR requires state parties to take steps toward the progressive achievement of the full realization of rights embodied in the covenant.⁴⁵ The ICESCR requires states to use all appropriate means to guarantee the rights, subject only to a state's available resources.⁴⁶

There has been considerable debate about the precise nature and scope of the guarantees in the ICESCR.⁴⁷ The requirement that states work towards the progressive realization of rights imposes an "obligation of result" on state parties to ensure that

38. See *id.* art. 25, para. 2.

39. See Weston, *supra* note 7, at 25. The UDHR is not a treaty, and was meant only to proclaim a "common standard of achievement for all peoples and all nations." *Id.* (quoting UDHR, *supra* note 34, pmb1. at 72).

40. See *id.*

41. See *id.*

42. See generally ICESCR, *supra* note 17, 993 U.N.T.S. 3.

43. See Hunt, *supra* note 32, at 11.

44. See *id.*

45. See, e.g., ICESCR, *supra* note 17, art. 2, para. 1, 993 U.N.T.S. at 5 (stating that "[e]ach State Party . . . undertakes to take steps, . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant. . ."). See *id.*

46. Article 2(1) also specifically mentions that states should endeavor to use international assistance, and the adoption of legislation to take economic and technical steps to guarantee the rights embodied in the covenant. See *id.*

47. See, e.g., Chapman, *supra* note 28, at 23 (finding that the current standard assessment used to measure compliance with ICESCR obligations is inexact and difficult to monitor); Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing the Economic, Social, and Cultural Rights*, 16 HUM. RTS. Q. 693, 694 (1994) (discussing the ambiguity found in the ICESCR's use of "maximum available resources" and the lack of definition surrounding the obligations).

the rights will be guaranteed.⁴⁸ The Covenant does not prescribe specific methods of enforcement for states to utilize to secure the rights.⁴⁹ In a General Comment from the Committee on Economic, Social, and Cultural Rights, the exact nature of the obligations required under Article 2 was examined. The Comment explained that states have an obligation to ensure the satisfaction of at least the minimum level of each right listed in the ICESCR.⁵⁰ It also stated that the ICESCR was violated whenever there was a significant deprivation of a protected right. For example, "a [s]tate party in which any significant number of individuals is deprived . . . of essential primary health care . . . is, prima facie, failing to discharge its obligations under the Covenant."⁵¹ However, the Committee did not define the substantive content of the rights, and even recognized that the exact content of each right still depends heavily on the resource levels within each country.⁵²

The Limburg Principles, adopted by the United Nations in 1987, provided further clarification of the obligations under the ICESCR.⁵³ The Limburg Principles recognized that social rights could be guaranteed in a wide variety of political settings with no single method towards their full realization.⁵⁴ The Principles expanded the requirements of the ICESCR by requiring states to use legislative, administrative, economic, social, and educational means to fulfill covenant obligations.⁵⁵ Moreover, states are responsible for securing the widest possible enjoyment of the

48. An obligation of result requires a state to achieve a particular result through a course of conduct whose direction is left to the discretion of the state. See MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 107 (1995).

49. See Asbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, in *HUMAN RIGHTS, ISSUES*, supra note 7, at 158, 159.

50. See *The Nature of States Parties Obligations*, General Comment No. 3, U.N. ESCOR, 5th Sess., Supp. No. 3, at 83, U.N. Doc. E/1991/23, reprinted in CRAVEN, supra note 48, at 373, 375.

51. *Id.* at para. 10, in CRAVEN, supra note 48, at 375.

52. *See id.*

53. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 43rd Sess., Annex, Provisional Agenda Items 8 and 18, U.N. Doc. E/CN4/1987/17, reprinted in 9 HUMAN RIGHTS Q. 122 [hereinafter *Limburg Principles*].

54. *Id.* at para. 6, 9 HUMAN RIGHTS Q. at 124.

55. *Id.* at paras. 17-18, 9 HUMAN RIGHTS Q. at 125. Previously, the ICESCR had merely stated that states should use legislative measures to guarantee social rights. ICESCR, supra note 17, art. 2, para. 1, 993 U.N.T.S. at 5.

rights⁵⁶ with particular concern for vulnerable members of the population.⁵⁷

B. *The Marginalization of Social Rights*

In reality, social human rights have been marginalized at the international level and remain unrecognized nationally. Social rights have been treated as moral imperatives rather than valid legal claims against state parties. Despite the rhetorical affirmation that the two sets of rights have equal force, civil and political rights have been treated as more significant and worthy of international protection than social rights.⁵⁸ As a result, social rights remain underdeveloped and neglected by human rights advocates as enforceable human rights. In a statement to the 1993 World Conference on Human Rights, the Committee on Economic, Social, and Cultural Rights stated that:

The shocking reality, against the background of which this challenge must be seen, is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action.⁵⁹

The Committee also stated that the fact that one fifth of the world population is afflicted by poverty, hunger, disease, illiteracy, and insecurity is sufficient evidence that economic, social, and cultural rights are being denied on a massive scale at the national level without any international acknowledgement.⁶⁰ The magnitude, severity, and constancy of these violations have provoked attitudes of complacency and resignation in nations, lending support to the erroneous belief that social rights do not carry the same force as civil and political rights.⁶¹

56. See *General Comment 3*, *supra* note 50, at para. 11, in CRAVEN, *supra* note 47, at 376 (finding that even when the available resources of a state are demonstrably inadequate, the state must still strive to ensure the widest possible enjoyment of rights and protect vulnerable members of the population).

57. *Limburg Principles*, *supra* note 53, at art. 14, 9 HUM. RTS. Q. at 124-25 (noting that special attention should be given to improve the standard of living of the poor and other disadvantaged groups).

58. Cf. Chapman, *supra* note 28, at 26-27 (explaining that international community has consistently treated civil and political rights as more significant while consistently neglecting economic and cultural rights).

59. Chapman, *supra* note 28, at 37 (quoting Committee on Economic, Social and Cultural Rights, Statement to the World Conference on Human Rights, U.N. ESCOR, Supp. No. 2, Annex 3, at para. 5, U.N. Doc. E/1993/22 (1993)).

60. Yamin, *Reflections*, *supra* note 3, at 304 n.40 (citing Statement to the World Conference on Human Rights, *supra* note 58).

61. See *id.* at 280, 340 n.40.

In fact, the international community has refused to recognize that such social problems are the massive deprivation of social rights and violations of international law. The muted response and tacit acceptance of social deprivations has been characterized as “inhumane, distorted and incompatible with international standards,” and ultimately self-defeating.⁶² Moreover, social rights have been viewed as impracticable for enforcement through traditional legal methods since the ratification of the ICESCR. The following three issues are the primary challenges currently facing the implementation of social rights: textual indefiniteness, the substantive content of social rights, and non-justiciability.

1. Textual Indefiniteness

First, the ICESCR apparently requires states to adopt a “do the best you can” approach to implementing social rights.⁶³ From a legal perspective, the obligations under the ICESCR do not require immediate implementation or level of commitment by states to guarantee the rights as required under the ICCPR.⁶⁴ In addition, the legal recognition of social rights as valid guarantees remains contingent on state discretion instead of assuming an independent existence.⁶⁵

Moreover, the actual guarantees listed in the ICESCR are vague, open-ended,⁶⁶ and based on highly general principles.⁶⁷

62. *Id.* at 304, n. 40 (quoting Statement to the World Conference on Human Rights, *supra* note 58).

63. For example, states are not required to immediately guarantee the rights in the ICESCR, but rather may implement them gradually depending upon the availability of resources. CRAVEN, *supra* note 48, at 106. In addition, resource restraints can be used to justify the lack of implementation of the rights. *Cf.* Robertson, *supra* note 46, at 694 (finding that the words “maximum” and “available” provide states with wiggle room for implementation of the rights in the covenant).

64. See Yamin, *Reflections*, *supra* note 3, at 294 (explaining that economic, social, and cultural rights are framed as hortatory rights always contingent upon a state’s available resources).

65. See Steven D. Jamar, *The International Human Right to Health*, 22 S.U. L. REV. 1, 23 (1994).

66. See CRAVEN, *supra* note 48, at 353 (asserting that Covenant provisions are excessively broad and general). For example, Article 6 recognizes that everyone has a right to work and earn a living as he chooses. See ICESCR, *supra* note 17, art. 6, para. 1, 993 U.N.T.S. at 6. It goes on to say that the state should attempt to provide vocational training and develop employment policies. See *id.* art. 6, para. 2, 993 U.N.T.S. at 6. However, there is no specific course of conduct prescribed to achieve these goals. Rather, these provisions constitute goals for the state to achieve as opposed to actions the state must take. See Taylor, *supra* note 4, at 327 (discussing article 12 of the ICESCR and the Covenant’s ambiguity in telling states how to achieve the goals it sets forth).

Beyond these general agreements, there has been little further attempt at refining and understanding the scope and content of the rights, and the duties of states.⁶⁸ The ICESCR and subsequent comments have not provided guidance on the implementation of social rights at the national level by developing standards, working definitions,⁶⁹ or examples of successful programs which can be used to guarantee the rights. Vague affirmations have not been sufficient in stimulating political commitment and action to promote social rights.⁷⁰

2. Substantive Content of Social Rights

Currently, there is no international consensus on the normative meaning of social rights. Moreover, at the national level there has been no impetus for the recognition of social rights as human rights and political priorities.⁷¹ In addition, the problematic nature of social rights stems from their substantive content as social welfare guarantees against the state.⁷² Social rights frequently have been characterized as claims for social equality and distributive justice.⁷³ Social rights are considered positive rights requiring state intervention, the mobilization of resources, and expenditures for their fulfillment.⁷⁴ The implementation of social rights will require states to become actively involved in resource allocation decisions to ensure that individuals receive their entitlements. To some extent, every human right, even the most privileged civil or political right, requires state intervention and expenditures for realization of the

67. The broad language and general ideological rhetoric used in the ICESCR are characteristic of human rights instruments, and reflect the high politics of the international system where states usually agree to uphold a set of indeterminate norms. See Taylor, *supra* note 4, at 328.

68. Taylor, *supra* note 4, at 327-28 (discussing specifically the social right to health).

69. See CRAVEN, *supra* note 48, at 356 (finding that the Committee on Economic, Social, and Cultural Rights has not yet explained what it understands to be the minimum core content of the rights, provided in-depth analysis of the rights, or stated whether obligations under the ICESCR will be judged on a national or international standard).

70. See *id.* at 327 (discussing the dynamics of the international state system based primarily on state sovereignty).

71. The recognition of social rights at the national level has been impeded for various reasons. For example, the prevalence of debt and recession has decreased domestic spending and reduced development aid. See Robertson, *supra* note 47, at 694.

72. See Eide, *supra* note 49, at 158.

73. See Weston, *supra* note 7, at 19. Social rights have also been viewed as second-generation rights. See *id.*

74. See HUNT, *supra* note 32, at 54.

right.⁷⁵ An analysis of various national cases dealing with civil and political rights reveals that states are required to provide the resources necessary to guarantee these rights.⁷⁶ For example, a United States district court has stated that “[i]nadequate resources can never be an adequate justification for the state’s depriving any person of his constitutional rights.”⁷⁷ The Eighth Circuit Court of Appeals also found that, “[h]umane considerations and constitutional requirements are not, . . . , to be measured or limited by dollar considerations. . . .”⁷⁸ Therefore, U.S. courts clearly recognize that civil and political rights are not cost free and cannot be violated for fiscal reasons.⁷⁹

3. The Problem of Non-justiciability

The third problem facing social rights is that courts commonly regard them as non-justiciable. Most human rights cannot be enforced through the traditional justice system and are not necessarily designed for individual enforcement through the courts.⁸⁰ This reality does not mean that these rights are not human rights. Social rights often involve policy and resource allocation decisions which are considered to be outside the legitimate realm of the courts.⁸¹ The judicial system also may not possess the institutional competence necessary to address the policy demands involved in the adjudication of social rights.⁸² A

75. For example, the protection of common civil and political rights requires significant state expenditure. The prohibition against torture and inhumane detention requires states to provide adequate places of detention and training programs for police officers. In order to ensure that individuals have a fair trial, states build court houses, pay judges and prosecutors, and provide legal assistance to the impoverished. *See id.* at 57.

76. *See, e.g., id.* (discussing *R. v. Askov* [1990] 2 SCR 1199). In this case, the Canadian Supreme Court held that the length of legal proceedings, which comprised a total of 34 months with 23 months of institutional delay, was a violation of the Canadian Constitution. *See id.* The state government was required to spend over U.S. \$28 million to improve court resources and appoint more judges to address the unusual delay involved in legal proceedings. *See id.*

77. *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971). This case dealt with the living conditions of people awaiting trial in a country jail. *See id.* at 1184. The court held that the state must provide the resources required to detain persons awaiting trial in accordance with minimum constitutional standards. *See id.* at 1194.

78. *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (discussing the contours of the Eighth Amendment and disbelieving the state’s argument that it was too poor to provide other means of prisoner regulation).

79. *See HUNT, supra* note 32, at 56-57.

80. *See Eide, supra* note 49, at 159-60.

81. *See HUNT, supra* note 32, at 25.

82. *See id.* at 64-65. Arguments have been made that implementation of social rights is a political matter better left to legislators. *See id.*

common argument is that the judiciary lacks the necessary expertise and political accountability involved in making government decisions about the prioritization of resources.⁸³ The aforementioned conceptions of the judicial function embody the traditional perception that judges merely interpret law instead of making law.⁸⁴ In reality, judges are expected to make law and weigh public policy considerations in every decision.⁸⁵ “[J]udges are up to their necks in policy, as they have been all through history.”⁸⁶ The failure to implement social rights is more a problem of political priorities than allocational difficulties. For instance, national political elites have little incentive to transfer existing resources from their urban political constituencies to the poor who have neither political power nor economic clout.⁸⁷

The issues that are considered justiciable vary over time⁸⁸ and depend on whether the public wants the court to become involved in adjudication of a particular issue.⁸⁹ A society can determine which issues it considers amenable to adjudication and can then design appropriate standards and institutions for their enforcement.⁹⁰ For adjudication of social rights, judges can review state action or inaction to determine whether government policies interfere with social rights or deprive individuals of the conditions necessary to realize their social rights. Judges should be invested with the power to review, discard, or demand policy decisions based on whether the state is meeting its social rights obligations.⁹¹ This power lies within accepted judicial boundaries so long as the judiciary reserves the actual policy decisionmaking to the Executive and Legislative branches and does not attempt to substitute its own recommendations.⁹²

83. See *id.*

84. See *id.* at 65.

85. See *id.* at 65-66 (discussing the views of Sir Robin Cooke, former President of New Zealand's Court of Appeals, and Sir Ivor Richardson, the current President).

86. *Id.* at 66 (quoting HWR WADE, *CONSTITUTIONAL FUNDAMENTALS* 78 (1989)).

87. See Taylor, *supra* note 4, at 325.

88. See HUNT, *supra* note 32, at 26 (quoting Scott & Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 12 (1992)).

89. The question of whether a court has jurisdiction to consider an issue depends on the nature of the issue and the constitutional role and function of courts in a particular society. See CRAVEN, *supra* note 47, at 28. The role of courts varies among states and can involve adjudication of certain economic and social rights. See *id.*

90. See Hunt, *supra* note 32, at 26.

91. See *id.* at 67.

92. See *id.*

C. *Guaranteeing Social Human Rights*

In order to give respect to the principles embodied in international human rights and the founding principles of the UDHR, social rights need to be treated as enforceable human rights obligations.⁹³ International human rights conventions have consistently affirmed that civil, political, economic, social, and cultural rights are interrelated and interdependent.⁹⁴ All of these rights are essential for the procurement of human dignity, and the full realization of civil and political rights cannot be obtained without the full enjoyment of social, economic, and cultural rights.⁹⁵ The Economic and Social Committee, which is responsible for overseeing the implementation of the Covenant, has had to remind states that the realization of social rights cannot be achieved indirectly through the fulfillment of civil and political rights.⁹⁶ Rather, social rights require their own development and specific implementation directives that aim to ensure the respect of economic, social, and cultural rights.⁹⁷

Social rights should be regarded as essential for human dignity, without which life and other human rights could not be enjoyed.⁹⁸ Some developing countries have already provided social welfare guarantees to their citizens in their Constitutions.⁹⁹ By constitutionally guaranteeing social rights, developing nations can further enhance the substantive content of these rights and formulate enforcement mechanisms.

93. See *id.* at 1.

94. See *Limburg Principles*, *supra* note 53, at para. 3, 9 HUM. RTS. Q. at 123. The Proclamation of Tehran also states that all human rights and fundamental freedoms are indivisible and that the full realization of civil and political rights without enjoyment of economic, social and cultural rights is impossible. F. Michael Willis, Note, *Economic Development, Environmental Protection, and the Right to Health*, 9 GEO. INT'L ENVTL. L. REV. 195, 214 (1996) (quoting Proclamation of Tehran Conference, May 13, 1968).

95. See Willis, *supra* note 94, at 214 (quoting Proclamation of Tehran Conference, May 13, 1968).

96. See Chapman, *supra* note 28, at 27.

97. See *id.* at 28.

98. See Yamin, *Reflections*, *supra* note 3, at 273.

99. For example, in the United States, legislation guarantees U.S. citizens the right to clean air, clean water, a safe environment, safe food, and social security. See Jamar, *supra* note 65, at 58. In the developing world, many constitutions provide explicit protection of social rights. For example, the Constitution of Brazil identifies education, health, work, and protection of motherhood as social rights. BRAZ. CONST. tit. II (Fundamental Rights and Guarantees), ch. II, art. 6 (Social Rights).

IV. AN EXAMINATION OF THE SOCIAL RIGHT TO HEALTH

An analysis of the social "right to health" captures some of the legal pitfalls within social human rights discourse and explores the potential for individual empowerment.¹⁰⁰ The concept of health as a human right strikes many as strange, and challenges our very understanding of human rights.¹⁰¹ From a theoretical perspective, an examination of the right to health provides an understanding of how certain social rights can be used to empower the poor and vulnerable. In addition, the implementation of the right to health will be very useful for developing countries faced with intractable power structures, oppressive social systems, and grinding poverty, each of which has adversely affected their citizens' health.

A. *The Importance of Health to Human Rights*

Health is universally recognized as essential to the human condition.¹⁰² It has often been said that, "If you don't have your health, you don't have anything." An individual's health is directly related to the enjoyment of all other human rights, and is a precondition of full participation in social, political, and economic life.¹⁰³ Yet, in terms of resource allocation and political priority, health has not been treated as an essential, valuable investment.¹⁰⁴

The primary structural cause of poor health is the endemic poverty found in many developing nations.¹⁰⁵ A principal factor contributing to poor health is the fact that health services are one of the most under-funded areas of national financing.¹⁰⁶

100. See Hunt, *supra* note 32, at 107.

101. See Jamar, *supra* note 65, at 5.

102. See Yamin, *Defining Questions*, *supra* note 12, at 407.

103. See Taylor, *supra* note 4, at 311.

104. See *Defining the Right to Adequate Health*, in ECONOMIC AND SOCIAL RIGHTS AND THE RIGHT TO HEALTH 17, 17 (1995) (remarks of Jonathan Mann) (Economic and Social Rights and the Right to Health Conference held in Sept. 1993, at Harvard Law School). Cf. Commentators have argued that people and professionals treat health problems as individual tragedies rather than systemic problems that can be remedied through greater resources and political commitment. See *id.* Thus, the value of public health has not been recognized as essential. See *id.*

105. See Taylor, *supra* note 4, at 305. For example, in the developing world, one billion people live below the poverty line and 34,000 children die each day from malnutrition and disease. See Willis, *supra* note 94, at 205.

106. See Taylor, *supra* note 4, at 305 (citing a World Bank Report from 1987).

Globally, government spending on health has averaged less than ten dollars per year per person.¹⁰⁷ Most developing countries also have inequitable and inefficient health systems that do not serve the needs of the majority of the population.¹⁰⁸ For example, many developing countries have spent their resources on high technology and hospital-based services that primarily provide access to health care for the privileged who can afford such services.¹⁰⁹ The developing countries have not heavily invested in the infrastructural development necessary for basic good health,¹¹⁰ nor provided comprehensive primary health care services for the majority of the population who cannot afford advanced medical care.¹¹¹ Social services, such as primary health care, are not appealing investments for domestic political elites "because it takes a long time to show results and because the benefits are not easily calculated" into political gain.¹¹² Consequently, millions of people die each year from diseases and treatable conditions¹¹³ that could be prevented by shifting resources to the primary health care sector for use in early detection.¹¹⁴

The extent of suffering caused by ill health makes the prospect of guaranteeing a human right to health compelling. Health should be regarded as a human right because it is central to human dignity and inextricably linked with human development and the social empowerment of individuals. A

107. See *id.* (citing a World Health Organization Report on Health and Economics from 1989).

108. See *id.* at 307.

109. See *id.*

110. The high rate of disease and death is directly related to the lack of resources available to protecting health conditions. In the developing world, 1.5 billion people have no access to health services and 1.75 billion have no access to safe water. See Willis, *supra* note 94, at 205.

111. See Taylor, *supra* note 4, at 307.

112. *Id.* at 325.

113. For example, seventeen million people die each year from infectious and parasitic diseases. See Willis, *supra* note 94, at 205.

114. See Taylor, *supra* note 4, at 305. Some cost-effective examples of this proposition include providing antibiotics for early diagnosis of pneumonia. See *id.* This medicine costs less than one dollar but could save the majority of four million young children who die from the disease each year. See *id.* The polio problem in India presents another dimension to the problem of people dying from preventable conditions. After investing \$250 million and engaging in a concerted massive international effort, polio has not been eradicated in India. See Charles W. Henderson, *Polio Apathy Cripples Eradication Program*, HEALTH LETTER ON THE CDC, Dec. 7, 1998, available in LEXIS, News Library, CURNWS File. National coverage levels hover around seventy-three percent, but eradication requires one hundred percent coverage across the nation. See *id.* The program failures are attributed to government apathy, complacency, inability to reach the rural poor, and a lack of faith in immunization programs by urban populations. See *id.*

healthy life depends on many social, economic, political, and cultural factors that the state should guarantee. These factors include: providing people with adequate sanitation, clean air and water, and an adequate livelihood; prohibiting discrimination; and providing people with a mechanism for social change.

B. Sources of the Right to Health

The importance of health and its interdependence with other human rights has been recognized on the international level. The sources of the right to health are varied, ranging from the Charter of the United Nations to individual state constitutions. The United Nations Charter pledges its members to work towards the "solution of international . . . health, and related problems."¹¹⁵ The UDHR also includes a provision relating to the protection of health. It states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."¹¹⁶ In addition, the UDHR states that vulnerable health populations, such as pregnant women and children, are entitled to special protection.¹¹⁷ The Constitution of the World Health Organization, (hereinafter WHO), recognizes that the "enjoyment of the highest attainable standard of health" is a fundamental right of every human being.¹¹⁸ The most explicit guarantee of the right to health, however, is found in Article 12(1) of the ICESCR.¹¹⁹ It states that:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.¹²⁰

In addition, Article 12(2) delineates specific goals to be achieved that are related to the right to health. These include provisions for the healthy development of the child, improvement of environmental and industrial hygiene, prevention and treatment

115. U.N. CHARTER art. 55, § b. The United Nations Charter commits member states to promote solutions to health problems, but does not declare an international human right to health. However, the mention of the importance of health status in the founding documents of the United Nations indicates the fundamental, deep-rooted nature of the right. See Jamar, *supra* note 64, at 20.

116. UDHR, *supra* note 34, art. 25.

117. See *id.*

118. Constitution of the World Health Organization, *opened for signature* July 22, 1946, 14 U.N.T.S. 185, 186 [hereinafter WHO Constitution].

119. Along with this guarantee, the ICESCR requires states to provide rights on a non-discriminatory basis based on the ideals of universality and equality. See ICESCR, *supra* note 17, art. 2, para. 2, art. 3, 993 U.N.T.S. at 5.

120. *Id.* art. 12, para. 1, 993 U.N.T.S. at 8.

of disease, reduction of the infant mortality rate, and the creation of accessible medical services for the sick.¹²¹ These guarantees are the most comprehensive protection of the right to health found on the international level.¹²²

At the national level, some constitutions also have sections dedicated to the right to health.¹²³ For example, India has guaranteed various social rights in its Constitution under a special section entitled Directive Principles of State Policy.¹²⁴ The principal function of these provisions is largely a symbolic affirmation of the benevolent intentions of the government.¹²⁵ By placing social protections within a constitution, the state reaffirms its commitment to the people that protection of their health is an important public policy.¹²⁶ The constitutional provision alone, however, is usually insufficient to ensure entitlement to the right to health. The right still needs to be developed by statutes and specific entitlements.¹²⁷ A state's formal recognition of social rights strengthens the ability of individuals to enforce social entitlements against the state by providing a legal foothold to challenge deprivations of the right.¹²⁸

C. *The Challenge of the Right to Health for States*

1. The International Definition of the Right to Health

To summarize, the right to health represents an international legal obligation of states to promote and protect the health of their

121. See *id.* art. 12, para. 2, 993 U.N.T.S. at 8.

122. The ICCPR does not include specific provisions relating to health. However, the provision dealing with the right to life is often used when discussing the right to health, since health is a precondition of enjoying the right to life. In addition, the rights embodied within the ICCPR can be seen as measures aimed to protect against government measures that are deleterious to health. See Jamar, *supra* note 65, at 28.

123. See BRAZ. CONST. tit. VIII (the Social Order), ch. II (Social Welfare), § II (Health). The Brazilian Constitution declares that health is a right of all citizens, to be guaranteed by the state through social and economic policies. *Id.* art. 96.

124. See INDIA CONST. pt. IV (Directive Principles of State Policy). India provides protection for the right to an adequate livelihood, health, and education. See INDIA CONST. art. 39(a), 39(e), 41, 47.

125. See Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 25, 35 (1994).

126. See *id.*

127. See *id.* (quoting Ruth Roemer, THE RIGHT TO HEALTH IN THE AMERICAS 20 (Pan-American Health Organization, Scientific Publication No. 509, 1989).

128. Cf. *id.* (quoting Roemer, *supra* note 127, at 20, who explains that setting forth the right to health care in a constitution informs the citizens that protection of their health is part of the basic law of the land).

populations. The international sources of the right to health reflect theoretical assertions about the position of health in society.¹²⁹ Health is defined as an ideal human condition and an important social and political good. The provision of medical treatment, the ready availability of health care, and public health are issues of national concern.¹³⁰ The current definitions of the right to health, however, do not provide detail on actual state obligations.¹³¹ Beyond the general affirmations expressed in international treaties, there has been no attempt to define the precise content of the right to health nor to develop proper enforcement standards for its implementation.¹³²

The lack of precision surrounding the right to health may be a result of the nature of the guarantee itself, as a reflection of an ideal human condition, or because of the variability of circumstances under which it must be implemented.¹³³ According to the ICESCR, the implementation of the right to health is to be achieved progressively in each country, contingent upon a state's available resources.¹³⁴ The development of uniform standards is almost impossible due to the varying levels of resources available within each country.¹³⁵ Moreover, implementation of the right involves resource allocation and policy decisions that are based on social, political, and economic priorities in a country.¹³⁶ Therefore, implementation of the right remains dependent on national conditions and resources and rests mainly with state actors.¹³⁷

2. The Relevance of Rights Discourse to Health Issues

The application of human rights rhetoric to the guarantee of health may be incompatible with our current understanding of the meaning of "human right."¹³⁸ States are hesitant to label

129. See Jamar, *supra* note 65, at 13.

130. See *id.* at 3.

131. Taylor, *supra* note 4, at 327.

132. See *id.* at 327-28.

133. See Jamar, *supra* note 65, at 52.

134. The right to health is recognized in Article 12 of the ICESCR. The state is subject to the obligation for progressive achievement of rights imposed by Article 2(1) of the ICESCR. See ICESCR, *supra* note 17, at art. 2, para. 12, 993 U.N.T.S. at 58, 8.

135. For example, in one country, anti-diarrheal initiatives may be required for effective health protection whereas in other countries clean water may be more important. See Jamar, *supra* note 65, at 52. This variability occurs both between and within states. See *id.*

136. See *id.*

137. See Taylor, *supra* note 4, at 311.

138. The development of a "right" begins in the consciousness as some type of moral claim. See *Applying Rights Rhetoric to Economic and Social Claims*, in

health as a human right because of the serious consequences that flow from such a label.¹³⁹ By describing health as a human right, states must commit to take action to alleviate health problems that cause suffering.¹⁴⁰ At a minimum, states become obligated to provide the resources necessary for the realization of the right. For instance, to guarantee the right to health a state must provide the material resources necessary for the fulfillment of both individual and universal entitlements to health.¹⁴¹

Arguments have been made that developing nations do not possess the financial resources necessary to provide for the right to health.¹⁴² However, the label "human right" institutionalizes protection of the right in the power structure. Thus, regardless of economic ability, some minimum level of security of the right is expected of national governments.¹⁴³ The Limburg Principles obligate states to ensure respect for minimum subsistence rights regardless of the level of economic development, which would naturally include health measures.¹⁴⁴

D. Defining the Right to Health

There has been considerable debate about the ability to guarantee and enforce the right to health. The meaning of any type of human right, whether found in international treaties or national constitutions, is rarely self-evident.¹⁴⁵ The contours and full implications of a human right often are developed incrementally through practice and judicial or administrative interpretation.¹⁴⁶ In order for the right to health to have an

ECONOMIC AND SOCIAL RIGHTS AND THE RIGHT TO HEALTH, *supra* note 104, at 1, 16 (remarks of Henry Steiner) [hereinafter *Applying Rights Rhetoric*]. Through gradual development, the right becomes something eternal, ideal, and inviolable. *See id.*

139. *Cf.* CRAVEN, *supra* note 48, at 353 (discussing international organizations' resolute refusal to deal with these issues in terms of rights).

140. *See* Leary, *supra* note 125, at 36.

141. *See Applying Rights Rhetoric*, *supra* note 138, at 2 (remarks of Martha Minow).

142. *See* Robertson, *supra* note 47, at 694 (explaining that attempts to secure economic, social, and cultural rights have been met with state arguments of financial impossibility).

143. *See* Yamin, *Defining Questions*, *supra* note 12, at 403.

144. *Limburg Principles*, *supra* note 53, at para. 25, 9 HUM. RTS. Q. at 126. Even countries where resources are demonstrably inadequate or countries in severe financial crisis are required to ensure respect for economic, social, and cultural rights. *See General Comment, No. 3*, *supra* note 50, at para. 10, 11, 12, in CRAVEN, *supra* note 48, at 375-76. The ICESCR requires effective use of all resources available. *Limburg Principles*, *supra* note 53, at para. 23, 9 HUM. RTS. Q. at 126.

145. *See* Leary, *supra* note 125, at 26.

146. *See id.* at 27.

impact on the resolution of social problems facing developing countries, it must be given a practical and workable definition by human rights advocates that is recognizable under the law.

1. The Empowerment Definition of the Right to Health

The WHO has declared that health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."¹⁴⁷ This definition recognizes the physical, mental, and social dimensions necessary for the attainment of well-being and good health.¹⁴⁸ The most useful definition of the right to health for developing countries, however, involves framing the right in terms of gaining control over their own health through empowerment.¹⁴⁹ A right to health based on empowerment means that, within his social environment, an individual has the right to gain control over and improve his health.¹⁵⁰ Commentators have suggested that the substantive content of the right to health should include environmental protection, health education, therapeutic services, sanitation, and curative services such as health care.¹⁵¹

An evaluation of the contours of the right to health also involves an understanding of the type of conditions that allow individuals to gain control over their health. In this sense, it is important to look beyond the treatment of ill health and disease prevention to the structural causes of poor health, which are often responsible for an individual's lack of control over his health status and an unequal distribution of health and disease among the population.¹⁵² It is also necessary to examine institutions to determine whether the function of their power is contributing to the deprivation of an individual's right to health.¹⁵³ Therefore, an

147. WHO Constitution, *supra* note 118, at 186.

148. See Jonathan M. Mann et al., *Health and Human Rights*, 1 HEALTH & HUM. RTS. 7, 9 (1994).

149. See Yamin, *Defining Questions*, *supra* note 12, at 400.

150. This construction of the right to health mirrors the WHO definition of health promotion found in the WHO's Ottawa Charter for Health Promotion. See *id.* at 415.

151. See Leary, *supra* note 125, at 31.

152. For example, it is easy to treat a rat bite wound with medicine. Yet, the health problem is not resolved when the person must return to a rat infested building. This begs the question of whether the appropriate issue for medical concern should be the actual rat bite, the rat infestation in the building, the neglect of the building by an absentee landlord, or the condition of widespread poverty in the country. See Yamin, *Defining Questions*, *supra* note 12, at 410 (quoting Donald Light, *Comparative Models of "Health Care" Systems*, in THE SOCIOLOGY OF HEALTH AND ILLNESS 457 (Peter Conrad & Rochelle Kern eds., 4th ed. 1994)).

153. See *id.* at 407.

empowerment analysis of a right to health reveals the various dimensions—civil, political, economic, and cultural—that are involved in guaranteeing the right to health.¹⁵⁴ Thus, human rights and public health activists can begin to examine political and social structures to determine whether they impact the definition, production, and distribution of disease in countries.¹⁵⁵

Individuals are prevented from realizing their right to health for various reasons. These reasons include limited access to welfare services, low socioeconomic status, poor infrastructure development, unsanitary living conditions, socio-cultural barriers, widespread discrimination against women and minorities, and inequitable power structures.¹⁵⁶ Gender, economic, and political inequality and societal discrimination can result in serious barriers to individuals attempting to gain control over their health.¹⁵⁷ The following examples demonstrate how vulnerable populations can be prevented from gaining control over their health. First, the health interests of women and minorities, because of social positions, have not been recognized as health problems in some societies.¹⁵⁸ This non-recognition has led to the neglect of medical services required to help these individuals gain control over their health. A second example involves monogamous married women in Africa who are being infected with AIDS through their husbands.¹⁵⁹ These women cannot prevent infection from their husbands because they cannot refuse intercourse with their husbands or control their husband's sexual conduct.¹⁶⁰ The ability of these women to gain control over their own health is intimately connected to their societal position, the prevalence of discrimination against women, unequal property rights, and the institution of marriage in this particular society.¹⁶¹

The realization of the right to health recognizes that "health is a most important world-wide social goal whose realization requires the action of many other social and economic sectors in

154. *See id.* at 405.

155. *See id.* at 400.

156. *See Mann et al., supra* note 148, at 15.

157. An interesting example of how societal discrimination can affect individual control over health is the treatment of AIDS in the United States where gays face social stigma which have hampered effective treatment. *See Yamin, Defining Questions, supra* note 12, at 429 & nn.113-14.

158. *See id.* at 428.

159. *See id.*

160. *See id.* The refusal of sexual intercourse with their husbands may result in physical harm, social ostracization, and economic destitution for these women. *See id.*

161. *See id.*

addition to the health sector.¹⁶² The realization of the right occurs when individuals are provided with the means to identify and realize aspirations, satisfy needs, and cope with their environment.¹⁶³ This understanding of the right to health encompasses protection for individual well-being and the broader societal conditions relating to health.¹⁶⁴

2. State Duties With Respect to the Right to Health

In general, a human right implies that states have a reciprocal duty to guarantee the right. If the right to health is to be effective as a legal right, then states must be able to determine when conditions infringe on an individual's ability to control her health. The legal right to health must be sufficiently narrow to allow competent bodies, such as the judiciary, the ability to provide redress for violations. The ideal enforcement mechanism would allow institutions to evaluate state compliance with delineated obligations. However, state duties with respect to affirmative rights remain obscure since states must provide both the material resources and the societal and economic conditions necessary to ensure the rights.

It is more practical to have individuals approach the court to enforce their rights when violations are present. States are obligated to provide preventive measures necessary to ensure good health as part of their responsibility for health promotion.¹⁶⁵ At a minimum, individuals also have the right to demand health protection from the state.¹⁶⁶ Health protection includes the right to health care and the right to healthy conditions.¹⁶⁷

3. The Duty to Respect, Protect, and Fulfill the Right to Health

States have multi-layered obligations with respect to the right to health. These are the duty to respect, the duty to protect, and the duty to fulfill guarantees to the right to health.¹⁶⁸ The duty to respect the right of health requires the state or state actors to refrain from direct violations of the right to health.¹⁶⁹ For

162. Declaration of Alma-Ata, *Health for All*, Series No. 1 (Geneva: World Health Organization, Sept. 12, 1978).

163. See Mann et al., *supra* note 148, at 9.

164. See *id.*

165. Health promotion is defined as "the process of enabling people to increase control over, and to improve, their health." *Id.*

166. See *id.*

167. See *id.* at 8. Health protection also includes medical care once disease has occurred. See *id.* at 12.

168. See HUNT, *supra* note 32, at 31.

169. See *id.* at 130-31.

example, the state cannot take action which would directly injure health, and may require the state to prohibit torture and cruel punishment.¹⁷⁰ In addition, this obligation may require the state to protect against the destruction of access to clean water or food for vulnerable populations.¹⁷¹ The second state obligation, the duty to protect, requires the state to protect people from acts of third parties that may destroy their standard of health.¹⁷² Under the duty to protect, the state may be required to take measures to preserve clean air and water, eliminate environmental pollution, reduce toxic substances, and prohibit the marketing of dangerous products.¹⁷³ The final obligation, the duty to fulfill, requires states to assist people in attaining the highest achieving standard of health.¹⁷⁴

The right to health, therefore, will require states to provide individuals with access to the goods and services that support the development of their health. Some examples include the existence of an economic system that will provide them with basic sustenance, the development of primary health care centers for disease prevention, and access to an adequate livelihood that will let them purchase social services.¹⁷⁵ By providing these types of measures, the state can develop the conditions that will be conducive to both good health and individual empowerment.

4. Implications of Empowerment on the Right to Health

The application of the human rights rhetoric to health problems is a powerful tool for advancing well-being.¹⁷⁶ The recognition that health is a human right demonstrates that health has a special importance to the life and survival of individuals.¹⁷⁷ Health begins to be viewed as a desirable social good instead of as

170. See *id.* at 130 (quoting E/C12/1993 para. 8-10).

171. See *id.* (quoting E/C12/1993/Wp19, para. 8). More controversially, some academics argue that the duty to respect may require a duty to uphold or implement affirmative action measures designed to eliminate barriers of access. See *id.* (quoting CHAPMAN, EXPLORING A HUMAN RIGHTS APPROACH TO HEALTH CARE REFORM 28 (1993)).

172. See *id.* at 132 (quoting E/C12/1993/WP19 para. 9). State laws prohibiting murder and rape are examples of measures which fulfill a state's duty to protect people's health from other people. See *id.*

173. See *id.* (quoting CHAPMAN, *supra* note 170, at 28).

174. See *id.* (quoting E/C12/1993/Wp19 para. 10). Examples include the implementation of feasible vaccination programs, the adoption of primary health care as a preventive health measure, and access to curative medical services. See *id.* at 132-33 (quoting E/C12/1993/WP19 para. 10, Leary, *supra* note 124, at 45).

175. See Jamar, *supra* note 65, at 21.

176. See Mann et al., *supra* note 148, at 8.

177. See Leary, *supra* note 125, at 36.

an economic drain on resources or a medical problem.¹⁷⁸ The control over one's health is an essential building block of human dignity, and an important element of allowing individuals to determine what the meaning of their lives will be.¹⁷⁹ Human rights such as the right to health also empower people to take control over their lives by equalizing the societal playing field so that each individual is given a fair share and opportunity to participate in civil society.

The rhetoric of rights has important psychological consequences for socially and economically disadvantaged groups, or other vulnerable populations required out of necessity to rely on governments for the satisfaction of their basic needs.¹⁸⁰ The use of social rights establishes a framework for the allocation of resources guaranteeing certain entitlements to the poor.¹⁸¹ The right to health is translated into an immutable guarantee against the state that it cannot take away even when governments change.¹⁸² Compelling health needs, such as clean drinking water, become a matter of right rather than an act of political beneficence and do not depend on the efficacy or will of particular governments.¹⁸³ The effect of empowerment in human rights discourse and the developing world can be tremendous. A vision based on empowerment allows people to redraw the boundaries of their social environment and live with personal dignity.

V. THE INDIAN EXPERIMENT: LITIGATION OF THE RIGHT TO HEALTH

The debate surrounding the implementation of the human right to health is fresh and full of possibility for the developing world.¹⁸⁴ In fact, India has been able to create a legal mechanism

178. See Jamar, *supra* note 65, at 36.

179. Cf. Yamin, *Defining Questions*, *supra* note 12, at 432 (explaining that a right to health must include control of one's health increase for individuals to have the capacity to make decisions about their lives).

180. The language of rights says to an individual, "You have the right to be who you are, and it is OK to be different." See *Applying Rights Rhetoric*, *supra* note 138, at 13 (remarks of Albie Sachs).

181. See *id.* This framework for the allocation of resources is very empowering for the poor. See *id.*

182. See *id.* at 13. "[U]nder a rights regime, the state puts the emphasis on the people, on the poor and oppressed and their claim to the minimal decencies of citizenship in the modern world." *Id.* at 12.

183. See *id.* at 13.

184. This situation in the developing world is different than the situation in the developed world where the debate on the right to health is often centered around the right to health care. See generally Leary, *supra* note 125, at 30-31 (discussing various attempts at recognizing a specific right to health care in the United States).

whereby the right to health can be protected and enforced. Through public interest litigation,¹⁸⁵ the Indian Supreme Court has allowed individual citizens to approach the Court directly for protection of their constitutional human rights. More importantly, the Indian Supreme Court has expanded its constitutional interpretation of the fundamental right to life to include the right to have good health.¹⁸⁶ The Court has required states to provide citizens with basic health services and social conditions essential for the enjoyment of health.¹⁸⁷ These procedural and substantive innovations are efforts aimed at empowering individuals to gain control over and improve their social existence.¹⁸⁸ The Indian legal system is one of the few state systems in the world to have subjected social rights to this type of judicial scrutiny. By creating a mechanism for guaranteeing social rights through litigation, India has opened the door towards the full realization of social rights for Indian citizens who have been historically deprived of basic human needs.¹⁸⁹

185. The Indian concept of public interest litigation is substantially different from the Western understanding of litigation taken on behalf of the public. In the United States, public litigation entails considerable resource investment and interest group involvement which is not applicable to the social and economic situation in India and other developing countries. See P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, Address at Columbia University School of Law (Oct. 3, 1984), in 23 COLUM. J. TRANSNAT'L 561, 569 (1985).

186. See Binod Kumar Roy, *Role of Judiciary in the Present Day Context*, 85 A.I.R.J. 17, 18 (1998). India regards the right to life as a fundamental right, and also regards certain aspects of health as important public policy. See INDIA CONST. pt. III (Fundamental Rights), art. 21, pt. IV (Directive Principles of State Policy), art. 47.

187. In one case, *C.E.S.C. Limited v. Subhash Chandra Bose*, the Court held that the right to health is a fundamental right of workers. A.I.R. 1992 S.C. 572, 585. Furthermore, the maintenance of health requires the interaction of many social and economic factors including the provision of safe and healthy working and living conditions, and medical treatment. See *id.*

188. See *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802, 815, where the Court explained that it was necessary to abandon the traditional approach to the judicial process in order to "forge new tools . . . for [the] purpose of making fundamental rights meaningful for the large masses of people." See generally G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L.Q. 66, 70 (1991) (recognizing that the innovation of procedural requirements was necessary for the realization of substantive rights central to human dignity for large sections of the population).

189. See HUNT, *supra* note 32, at 153-54.

A. Bases of Activism

1. The Indian Constitution

In order to understand the dynamics of the public interest litigation movement and its impact on litigation of the right to health, a brief understanding of the Indian Constitution and Supreme Court is required.

The Indian legal system's ability to guarantee the right to health is rooted in the Indian Constitution and the creative initiative of Supreme Court justices. Since independence, India has been committed to providing for the social welfare of its citizens.¹⁹⁰ The framers of the Indian Constitution recognized that strong states were based on political, economic, and social equality.¹⁹¹ Prominent Indian leaders realized that human rights were interdependent, and that "[p]olitical democracy cannot last unless there lies at the base of it social democracy."¹⁹² They recognized that social rights were essential for a participative democracy, since political liberty is meaningless when an individual does not have access to basic necessities.¹⁹³

190. India achieved independence from the British on August 15, 1947, through a peaceful revolution. The Constituent Assembly, composed of elected Indian leaders, met to develop the Indian constitution from 1946-1950. The mission of the Constituent Assembly's was quite broad and ranged from deciding India's democratic and governmental structure, providing for adult suffrage, and developing social guarantees for the Indian people. See generally A. Kuppuswamy, *Framing of the Constitution and Dr. B.R. Ambedkar's Role*, in INDIAN CONSTITUTION AND POLITY 1, 1-13 (R.V.R. Chandrasekhara Rao & V.S. Prasad eds., 1991) (discussing the activities of the Constituent Assembly and the Drafting Committee) [hereinafter POLITY].

191. See V.R. Krishna Iyer, *Public Interest Litigation and Constitutional Justice in Action*, in POLITY, *supra* note 190, at 74, 76 (quoting Dr. B.R. Ambedkar, Speech on the Constituent Assembly (Nov. 25, 1949), in CONSTITUENT ASSEMBLY DEBATES 972-81). Dr. Ambedkar, chairman of the drafting committee of the Indian Constitution, described what the future of India would be if the Indian state did not provide for social, economic, and political equality. He believed that India would be plagued by a series of untenable contradictions if all three bases of equality were not protected. See *id.* On the social plane, Indian society would be based on graded inequality and the inhumane degradation of lower castes. See *id.* On the economic plane, there would be great disparity between individuals with immense wealth and the masses that lived in abject poverty. See *id.* He believed that to provide only for political liberty in the constitution would lead to an explosion of these contradictions at a later date. See *id.* at 77.

192. *Id.*

193. Mamta Srivastava, *The Development of the Concept of Social Justice Through the Supreme Court: A Special Reference to Justice V.R. Krishna Iyer*, 1 S.C.J. 35, 36 (1992).

As a result of this awareness, the central feature of the Indian Constitution is the state's commitment to the welfare of the Indian people and the attainment of social justice. The Preamble states "We the People of India, having solemnly resolved . . . to secure to all its citizens: justice, social, economic and political . . . assuring the dignity of the individual. . . ."194 The Constitution guarantees protection for a wide spectrum of human needs encompassing social, economic, and political rights.¹⁹⁵

These protections are found in two separate sections of the Constitution: Fundamental Rights and the Directive Principles of State Policy.¹⁹⁶ The Fundamental Rights section¹⁹⁷ guarantees protection for individual rights,¹⁹⁸ such as the most commonly recognized civil and political rights,¹⁹⁹ as well as certain economic and cultural rights.²⁰⁰ These rights are enforceable in a court of law.²⁰¹ The Directive Principles of State Policy Section, however, describes how the state should attempt to fulfill its constitutional mandate to create a social and economic order based on justice.²⁰² This section describes the socioeconomic structure envisioned by framers of the Indian Constitution, and recognizes that the state must provide certain social and economic conditions to the Indian people to guarantee social justice and individual dignity.²⁰³ The items described under the Principles

194. INDIA CONST. pmbi.

195. See INDIA CONST. arts. 14, 19, 39, 47. The framers of the Constitution struggled to balance elements of Western constitutionalism like the creation of three separate branches of government and quasi-independent government structures, with India's aspirations for a benevolent, socialist state. See R.V.R. Chandrasekhara Rao & V.S. Prasad, *Introduction*, to POLITY, *supra* note 190, at xiv-xv.

196. INDIA CONST. pt. III (Fundamental Rights), pt. IV (Directive Principles of State Policy).

197. The Fundamental Rights section was designed to protect individuals against arbitrary state interference and foster the ideals of political democracy. See O. Chinnappa Reddy, *Forty Years of the Constitution: A Lawyer's View*, in POLITY, *supra* note 190, at 14, 16.

198. See INDIA CONST., pt. III (Fundamental Rights).

199. For example, some fundamental rights guaranteed under this section are the freedom of speech, freedom of expression, freedom of assembly, and the freedom of occupation. See *id.* art. 19. In addition, Article 14 and 21 guarantee the right to life, liberty, and equality before the law. See *id.* arts. 14, 21.

200. Some of the fundamental rights guaranteed include the right to maintain a distinct language and the right to freely profess religion. See *id.* arts. 25(1), 29(1).

201. "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights . . . is guaranteed." *Id.* art. 32.

202. Article 38 in this section requires the state to strive to secure an order based on social, economic, and political justice that promotes the welfare of the Indian people. See *id.* art. 38.

203. See *id.* pt. IV (Directive Principles of State Policy). For example, the state should strive to secure the citizens an adequate livelihood, equal pay for

are an interesting parallel to the social and economic rights enumerated under the ICESCR.²⁰⁴ The state interest in the enjoyment of health is given recognition under Article 47 in this section, which states that the improvement of public health should be regarded as one of the state's fundamental duties.²⁰⁵

The Directive Principles are not enforceable in court.²⁰⁶ However, the Constitution declares that the Principles are fundamental to the governance of the country.²⁰⁷ Therefore, each branch of government must act to further the Principles, and use them to implement state policy as part of the state's commitment to the welfare of the Indian people.²⁰⁸ In fact, it is considered the constitutional duty of the Executive, Legislative, and Judicial branches to apply the Principles when making law for the country.²⁰⁹

2. The Indian Supreme Court

The Indian Supreme Court has original jurisdiction over cases concerning Fundamental Rights.²¹⁰ The Supreme Court is the final arbiter with respect to the protection of fundamental rights and is also invested with broad discretionary power for their enforcement. For example, Article 32 states that "[t]he Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari," for the enforcement of fundamental rights.²¹¹ The Court is also responsible for ensuring that the Executive and Legislative Branches are acting within the constitutional framework.²¹² The Court attempts to interpret the

men and women, education, human conditions at work, maternity relief, and a healthy life. *See id.* arts. 38, 41, 42, 45, 47.

204. Similarities include the right to work, the right to fair working conditions, and the right to equal pay between men and women. *Compare id.* art. 39(d), 41, 42 (providing the right to equal pay, workers unemployment assistance and humane working conditions), with ICESCR, *supra* note 17, arts. 6, 7, 993 U.N.T.S. at 6 (recognizing the right to work, to equal pay, to a decent standard of living, safe and healthy working conditions, and equal opportunity).

205. *See* INDIA CONST. art. 47.

206. *See id.* art. 37.

207. *Id.*

208. *See* Bhagwati, *supra* note 184, at 568.

209. *See* INDIA CONST. art. 37.

210. *See id.* art. 131.

211. *Id.* pt. III, art. 32(2).

212. *See* Janata Dal v. H.S. Chowdhary, A.I.R. 1993 S.C. 892, 909 (finding that the dominant objective of public interest litigation is to ensure observance of the provisions of the Constitution); *see also* Peiris, *supra* note 188, at 69 (describing that the rule of law in India requires that the exercise of power by any

Constitution to advance the underlying values of the state and strengthen the protection and substance of human rights.²¹³

The Court is aided in its interpretation of the Constitution and fundamental rights by the Directive Principles.²¹⁴ The Court is under a constitutional obligation to take cognizance of the Directive Principles and has used them to help determine the scope and meaning of entrenched fundamental rights and to evaluate governmental action.²¹⁵ The Court now routinely discusses the Directive Principles when examining many constitutional questions as part of its mission to ensure constitutional justice.²¹⁶ In fact, the Directive Principles have served "as useful beacon-lights to courts."²¹⁷ This section has rapidly become the most dynamic and creative part of the Indian Constitution, and has provided an essential foothold for judicial activists for the implementation of social rights such as the right to health.²¹⁸

B. *Social Conditions on the Indian Subcontinent*

The right to health, along with numerous other civil, political, social, and economic rights, is afforded protection under the Indian Constitution.²¹⁹ Despite these formal guarantees, India

organ of the state, including the Executive Branch and Legislature, has to be effected within constitutional constraints).

213. In understanding the role of the Constitution, the Court has explained that "[t]he Constitution makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order . . . every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution." *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1472, 1490.

214. See K.C. Markandan, *DIRECTIVE PRINCIPLES OF STATE POLICY IN THE INDIAN CONSTITUTION* 298 (1987).

215. See *id.* at 300.

216. In fact, articles under the directive policy section have now figured into over forty cases, therein giving the non-justiciable section a justiciable character. See *id.* This is a remarkable departure from past practice. Since the directive principles were non-justiciable, the three branches of government, especially the judiciary, treated the directive principles as subordinate to fundamental rights. See *id.* at 299. However, over the years and through activist litigation, the Court has realized that the Principles form a vital part of the constitutional scheme. See *id.* at 300.

217. *Id.* at 318 (quoting of Shri M.C. Setalvad, former Attorney General of India).

218. The former chief justice of the Indian Supreme Court, Justice Bhagwati, describes the Directive Principles as encapsulating the social and economic rights of the people and "hold[ing] out social justice as the central feature of the new constitutional order." See Bhagwati, *supra* note 185, at 568.

219. Specific discussion of the contours of the right to health are found in Article 47 of the Directive Principles section. See *INDIA CONST.* pt. IV (Directive Principles of Public Policy), art. 47.

continues to have the highest concentration of poverty in any country, with roughly three hundred million people living below the national poverty line in 1977.²²⁰ These people face malnutrition, disease, short life expectancy, and high rates of maternal mortality.²²¹ The majority of Indian citizens live in poverty, and are confronted with hierarchical, exploitative social structures where economic power is concentrated in the hands of the elite that uses its power to maintain social and economic domination over the poor.²²² Obviously, these conditions have had an adverse impact on individuals health. This type of acute suffering related to individual health and well-being in India parallels similar situations throughout the developing world where economic development programs have failed to distribute a proportionate share of economic and health benefits to the poor.²²³ However, the Indian people have neither the resources nor the acumen necessary to fight for change²²⁴ in the political arena, and are instead left with an insufferable living situation where they are denied the ability to live with human dignity.²²⁵

C. *The Response: Public Interest Litigation*

The Indian judiciary has not remained immune to the desperate cries of human suffering and pleas of justice by Indian citizens.²²⁶ The Indian judiciary recognized that the traditional system of litigation, which was highly individualistic and adversarial, was ill-suited to meet the collective claims of the underprivileged.²²⁷ The Indian Constitution has given the Court

220. See The World Bank Group, *Countries: India* (visited 3/16/99) <<http://www.worldbank.org/html/extdr/offrep/sas/in2.htm>>. This amounts to one-third of the country's population. See *id.*

221. See *id.* More than half of India's children are undernourished, which affects their physical and mental development. See *id.* India also accounts for almost twenty-five percent of the world's childbirth-related deaths. See *id.*

222. See Peiris, *supra* note 188, at 67.

223. See *id.*

224. See *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802, 830, where the Court found that some Indian citizens are totally ignorant of their rights and entitlements. This ignorance is somewhat responsible for the complete denial of their rights and benefits and leads to their exploitation. See *id.*

225. *People's Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1476, 1483 (discussing the reality that many poor, ignorant, and illiterate people are denied the ability to live with basic human dignity because they are unable to approach the courts for redress of their rights).

226. Justice Binod Kumar Roy has said that judges do not sit in ivory towers, nor can they take recourse to seclusion and refuse to act by ignoring the realities of citizens' sufferings. See Roy, *supra* note 186, at 20.

227. *Bandhua Mukti Morcha*, A.I.R. 1984 S.C. at 815. The Court discussed the necessity of disregarding traditional adversarial procedure to enforce fundamental rights. See *id.* It found that strict adherence to the adversarial

broad power to develop an appropriate method to enforce and protect fundamental rights.²²⁸ The Court has used this power to foster a public interest litigation system dedicated to help Indian citizens receive their constitutional rights.²²⁹ In public interest litigation, there is no adjudication of individual rights. This type of litigation was designed to fulfill the constitutional promise of social and economic order based on equality.²³⁰ Through such litigation, the Court has attempted to rebalance the distribution of legal resources, increase access to justice for the disadvantaged, and imbue formal legal guarantees with substantive and positive content.²³¹

D. Procedural Developments

Ironically, the Indian Supreme Court has been accused of obstructing necessary social reform in the past.²³² In the 1980s, however, the justices of the Supreme Court realized that, "[t]he majority of the people of our country are subjected to denial of access to justice and, overtaken by despair and helplessness, they continue to remain victims of an exploitative society. . . ."²³³ An estimated seventy percent of people living in rural areas were found to be illiterate and unaware of their legal rights.²³⁴ The judiciary realized that social and economic conditions in the country impeded access to the courts for the majority of the people.²³⁵ The justices recognized that the "law" must shake off

procedure may lead to injustice because the poor do not have the same economic ability to vigorously pursue litigation. *See id.*

228. *See* INDIA CONST. art. 32(2).

229. *See* People's Union for Democratic Rights, A.I.R. 1982 S.C. at 1476.

230. *See* Janata Dal v. H.S. Chowdhary, A.I.R. 1993 S.C. 892, 910.

231. *See* Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM J. COMP. L. 495, 497 (1989).

232. *See* Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 MERCER L. REV. 611, 613 (1993). The Court attempted to follow the traditional practices of their colonial rulers, the British, thus imposing British traditions on a country with a vastly different indigenous value system. *See id.* at 612-13. In fact, from 1950-1980, the Court struck down many attempts at social reform. *See id.*

233. Peiris, *supra* note 188, at 67 (quoting Bihar Legal Support Society v. Chief Justice of India, (1986) 4 S.C.C. 767, 768-69).

234. *See* Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L. J. 57, 63 (1994).

235. In fact, the vast majority of Indians are too poor to have feasible access to the Court. *See id.* For example, in 1979, legal fees averaged Rs. 3-5000 for an appearance at the Supreme Court, which was approximately \$170 at that time. With the average annual income approximately \$1200, it was unlikely that Indians would use their little money to pursue litigation. *See id.* Until the 1970s, therefore, the Supreme Court rarely heard cases dealing with fundamental rights.

the inhibiting legacy of colonial rule and become more people-oriented and concerned with the weaker sections of Indian society.²³⁶ However, in order to provide equal justice to all sections of society, new procedural and judicial innovations were required.²³⁷

The Court soon realized that any guarantee of substantive rights would be meaningless without a procedural mechanism to enforce constitutional rights.²³⁸ Article 32 vests the Court with extensive procedural discretion in determining the parameters of constitutional and fundamental rights litigation and the proper method for addressing the Court.²³⁹ The Court has refused to be constrained by traditional concepts of procedure, and expanded the interpretation given to Articles 32 and 145 to fashion new procedures designed to bring social justice within the reach of the common man.²⁴⁰

1. The Expansion of Locus Standi

The Court recognized that the majority of Indian citizens do not have the ability to approach the Court for protection of their fundamental rights.²⁴¹ Yet in a country where inequality and injustice are prevalent, the Court could not ignore the claims of the majority of the population, and still honor its function as a Court for all the citizens of India.²⁴² The justices found that the poor were unable to assert their rights effectively due to their position of social and economic disadvantage and the lack of material resources required to fight for their social and economic entitlements and combat exploitation.²⁴³ The Court, therefore, committed itself to providing the poor and disadvantaged

See id. However, with the advent of lower fees and the loosening of standing requirements, litigation of fundamental rights has become more accessible and promising.

236. *See* P. Sharma, *Case for Judicial Activism*, A.I.R.J. 193, 194 (1997).

237. *See* People's Union for Democratic Rights v. Union of India, A.I.R. 1982 S.C. 1476, 1482; S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149, 192.

238. *See* Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802, 814 (finding that procedural technicalities should not interfere with the enforcement of fundamental rights).

239. *See id.* at 814-15. The Court has the power to develop rules for proceedings for the enforcement of fundamental rights. *See id.*

240. *See* INDIA CONST., arts. 32(1), 145(1)(c).

241. *Cf.* Peiris, *supra* note 17, at 66 (quoting Chief Justice Bhagwati's opinion that the weaker sections of Indian society lack the capacity and material resources to assert their fundamental rights).

242. *See* Bhagwati, *supra* note 185, at 567.

243. Former Chief Justice Bhagwati was a vigorous defender of these sentiments and of the activist role of the judiciary in helping the poor. *See* Peiris, *supra* note 188, at 66.

preferential consideration in the courts with respect to fundamental rights litigation.²⁴⁴

The Court believed that in a country where access to justice is restricted by socioeconomic restraints, "it is necessary to . . . remove technical barriers against easy accessibility to [j]ustice and promote public interest litigation so that the large masses of people . . . may be able to realise and enjoy socio-economic rights granted to them. . . ."²⁴⁵ The result was an expansion of the definition of standing.²⁴⁶ The Court has stated that violations of the constitutional or legal rights of the public, who by reason of poverty or social or economic disadvantage are unable to approach the court directly, can be brought by any member of the public who is acting with a bona fide purpose.²⁴⁷ The Court has heard cases brought by social activists, public-minded lawyers, and investigative journalists who were acting to protect the public interest from state neglect.²⁴⁸

244. The Court justified this inequality in treatment by explaining that:

The concern shown [by the law] to the poor and the disadvantaged is much greater than that shown to the rich and well-to-do because the latter can, on account of their dominant social and economic position and large material resources, resist aggression on their rights where the poor and deprived just do not have the capacity or the will to resist and fight.

Peiris, *supra* note 185, at 66 (quoting Bihar Legal Support Society v. Chief Justice of India, (1986) 4 S.C.C. 767, 769).

245. S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149, 185.

246. The traditional rule of locus standi is that a person has standing to pursue a legal claim in court when that person has suffered a legal injury or has a sufficient interest in the proceedings, usually determined by financial or property interests. See Hunt, *supra* note 32, at 163-64. This would ensure that persons before the court had a sufficient interest at stake to prevent unnecessary litigation.

247. See *SP Gupta*, A.I.R. 1982 S.C. at 188. A rule allowing third parties to bring suit on behalf of others is also recognized in Western countries. For example, in the United States, other persons are allowed to bring suit on behalf of minors, mental incompetents, and prison inmates. See Susman, *supra* note 234, at 73

248. See, for example, the case of *Sheela Barse v. Secretary, Children Aid Society*, which was brought by a freelance journalist who was concerned about the living conditions in juvenile homes. A.I.R. 1987 S.C. 656, 657. In addition, the case that prohibited child labor was also brought by a public interest lawyer. See *M.C. Mehta v. State of Tamil Nadu*, (1996) 6 S.C.C. 756, 760. It is important to note that the Supreme Court does recognize that there is a possibility for abuse of these liberal standing rules. The Court has held that it should not allow its process to be used by busybodies or intervenors who have no public interest in the case except for personal gain. See *Janata Dal v. H.S. Chowdhary*, A.I.R. 1993 S.C. 893, 915. In these instances, the Court should dismiss the petition. See *infra* notes 319-20 and accompanying text.

2. Epistolary Jurisdiction

The Court also wanted to encourage actions on behalf of the poor by making the writ petition process cheaper and easier. In turn, the Court created "epistolary" jurisdiction which allows any person or organization to petition the court by simply writing a letter.²⁴⁹

3. Fact-finding Commissions

The Court also found that it was unrealistic to expect the public or civic-minded social activists to supply evidence and information necessary to adjudicate claims in the public interest.²⁵⁰ If it needs more evidence, the Court has the ability to appoint socio-legal commissions, composed of legal and technical experts, to gather facts and submit detailed reports on their findings and make recommendations.²⁵¹ The reports are made available to both parties and accepted as prima facie evidence by the court.²⁵²

4. Innovative Judicial Remedies

The Indian Supreme Court has also been able to fashion uniquely suited judicial remedies to provide compensation for a wide variety of violations of constitutional rights.²⁵³ The remedies usually contain detailed enforcement mechanisms.²⁵⁴ The remedies may also require the state to take affirmative action to provide substance to constitutional guarantees.²⁵⁵ At times, the

249. See Bhagwati, *supra* note 185, at 571.

250. See *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802, 816.

251. See Peiris, *supra* note 188, at 77-79. The Court has appointed a committee of experts to evaluate the conditions of limestone quarries and mining operations, to test milk and dairy products for radiation, and to evaluate the facilities available for members of an economically depressed community. See *id.* at 78.

252. See *id.* at 79. The Court provides the opportunity to persons prejudiced by the contents of the reports to challenge their findings, underlying assumptions, and general approach to the problem. See *id.*

253. See Cassels, *supra* note 231, at 505-06.

254. See *M.C. Mehta v. State of Tamil Nadu*, (1996) 6 S.C.C. 756, 771-73 (states required to complete survey of child labor within six months of ruling, create Child Labor Rehabilitation-cum-Welfare Fund, and provide education for children).

255. In the case of *Rakesh Chand Narain v. State of Bihar* the court ordered the state of Bihar to improve living conditions in mental hospital by increasing the amount of money to be spent on daily meals, removing the limit on the cost of

Court has even attempted to increase the impact of its judgments by treating particular cases as representative of other similarly situated classes, issuing orders that bind the entire class.²⁵⁶ These types of remedies, which often involve detailed administrative requirements, have raised concerns about the legitimacy of such overt judicial activism.²⁵⁷ The Court has justified judicial activism as necessary to remedy the deficiencies in the existing government, and to ensure that Indian citizens receive their constitutional entitlements even when the Executive Branch and Legislature refuse to act.²⁵⁸ The new role of the Court entails more than mere dispute resolution and interstitial law making; rather, it has emerged as a problem solver in nebulous areas.²⁵⁹

These procedural innovations have had an empowering effect on Indian citizens. By providing the poor with the means to address public injuries in a legal forum, the Court has shown that it is committed to the realization of social justice for the poor.²⁶⁰ On a more practical note, public interest litigation has had the beneficial effect of holding the government accountable for human suffering²⁶¹ and exposing the lawlessness of governmental bodies and actors.²⁶² Since the state will now be held responsible for its behavior, it is encouraged "to act with greater responsibility and care thereby improving the administration of justice."²⁶³

More importantly, the judiciary realized that it was essential for state stability that courts address violations of state duties and issue reprimands in order to maintain respect for the law and its ability to ensure justice. In addition, the use of the law to

drugs, providing patients with blankets and mattresses, improving sanitation, and supplying clean drinking water. See Peiris, *supra* note 188, at 76 (citing (1986) (Supp.) S.C.C. 576, 576-77).

256. See Cassels, *supra* note 231, at 500.

257. See Peiris, *supra* note 188, at 76-77.

258. See Roy, *supra* note 186, at 18-20.

259. See *id.* at 18.

260. Justice Bhagwati has stated that public interest litigation is "a highly effective weapon in the armoury [sic] of the law for dispensing social justice to the common man." Peiris, *supra* note 188, at 77 (quoting State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla (1985) 3 S.C.C. 169, 176).

261. See Cooper, *supra* note 232, at 628. See *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149, 190 (finding that not being able to hold the government responsible for public wrongs would be disastrous).

262. The Indian Supreme Court and other High Courts of the states have begun to explore the inner functioning of the Executive through public interest matters. Their inquiries have brought to light instances of corruption, bribery, financial scandals, and scams. See Sharma, *supra* note 236, at 193.

263. *S.P. Gupta*, A.I.R. 1982 S.C. at 190.

address social problems²⁶⁴ will help "remove disunity, and prevent frustration of the disadvantaged, deprived and denied social segments in the efficacy of the law . . . and . . . pave [the] way for social stability peace and order."²⁶⁵ The legal process sustains the faith of the people in the rule of law and democracy by making it possible for the common man to realize his constitutional rights under its rubric.²⁶⁶ Otherwise, the disempowered may use less peaceful methods to demand justice from the state.²⁶⁷

E. *The Recognition of the Goal of Empowerment*

In the 1980s, the Court recognized that the majority of Indian citizens were being disempowered by the systematic deprivation of their constitutional rights.²⁶⁸ In order to address these deprivations, the Court began to interpret the Constitution and its guarantees in the context of these social needs.²⁶⁹ In addition, the Court realized that constitutional rights needed to have recognizable substantive content to be meaningful to Indian citizens. In response, the Court has held that states must provide individuals with social and economic empowerment and socioeconomic justice as part of their constitutional duties.²⁷⁰ Moreover, the Court found that economic empowerment, social justice, and the dignity of the individual are fundamental rights

264. Justice Ramaswamy has found that "[l]aw is a social engineer" and that "[j]udicial statesmanship is required to help regain social order and stability." See *Gaurav Jain v. Union of India*, A.I.R. 1997 S.C. 3021, 3022.

265. *Id.*

266. *See id.*

267. *See S. P. Gupta*, A.I.R. 1982 S.C. at 191 (finding that it is essential that the rule of law wean people away from crime).

268. *See Peiris*, *supra* note 188, at 66-67.

269. *See Roy*, *supra* note 186, at 17.

270. The Court discussed the duty of empowerment in *Gaurav Jain v. Union of India*. A.I.R. 1997 S.C. 3021. This case concerned the rehabilitation of prostitutes and their children into mainstream Indian society. *See id.* at 3022. The court held that the state should provide these women and children with the opportunities to secure economic and social empowerment so that they can enjoy the fundamental rights given to them under the Constitution. *See id.* at 3023. The state was required to provide for the economic rehabilitation of these women through self-employment, training in weaving or knitting which would provide a regular income, vocational education, and other employment schemes. *See id.* at 3022. The state should also endeavor to provide these women with houses, medical treatment, and reading skills. *See id.* at 3022-23. The Court believed that these types of programs would help the women regain their lost respect and dignity and provide them with social and economic empowerment. *See id.* at 3022.

under the Constitution which the Court and the Government should positively ensure.²⁷¹

F. *Substantive Protection of the Right to Health*

The most innovative response by the judiciary in the empowerment of Indian citizens, however, comes from the substantive recognition of social rights as enforceable legal guarantees. The Court realized that fundamental rights, such as the right to life, are made meaningful only when a person is provided with the ability to live with human dignity.²⁷² This understanding led to the belief that the state must ensure that citizens are given every opportunity to gain control over and improve their social environments through the provision of essential social and economic services.²⁷³ The substantive recognition that individuals are entitled to live with dignity and that states are required to provide the proper social conditions has had great impact on the recognition of the right to health in India.

1. The Substance of Public Interest Litigation

A brief review of the purpose of public interest litigation provides further insight into understanding the dynamics of right to health litigation. The Court has justified its activism in public interest litigation by explaining that it is constitutionally required to stimulate the government and other public bodies to act to ensure that constitutional mandates are being fulfilled.²⁷⁴ This broad authority conferred supervisory powers on the Court to evaluate state action and to guarantee that constitutional values are given effect in every legal issue. The typical cases brought under public interest litigation involve a state or public authority

271. See *id.* at 3025. The Court held that states and the Court must work together to enforce the fundamental rights of the citizens and to protect them from exploitation through prostitution. See *id.* The Court also discussed empowerment in the context of tribal autonomy. In *Samatha v. State of Andhra Pradesh*, A.I.R. 1997 S.C. 3297, 3297, the Court addressed the rights of tribal people living in Andhra Pradesh. The Court held that the state should preserve tribal autonomy, and protect the tribe's culture and economic empowerment to ensure social, economic, and political justice for the preservation of peace and good government. See *id.* at 3302.

272. *Bandhua Mukti Morcha*, A.I.R. 1984 S.C. 802, 811.

273. See *Mohini Jain v. State of Karnataka*, 3 S.C.J. 152, 156 (1992).

274. The Court has been described as a sentinel keeping watch over the functions of other branches of the state to ensure that they are working in accordance with the Constitution. See M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 120 (4th ed. 1987).

causing a group of people legal injury.²⁷⁵ A state's failure to carry out an obligation to its citizens that results in an injury to the public also qualifies as public interest litigation.²⁷⁶ States are parties in public interest litigation so as to ensure that they provide tangible benefits to Indian citizens and translate the constitutional commitment to social justice into law.

2. The Fundamental Right to Life

More recently, the Court has developed its authority under public interest litigation to combat the exploitation and denial of disadvantaged groups of their social rights and constitutional entitlements.²⁷⁷ The Court has used the fundamental right to life provision in the Constitution to require the state to provide social services. Article 21 provides that, "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."²⁷⁸ The Court realized that the right to life is meaningless unless accompanied by the guarantee of certain social rights which make the opportunity to live life with dignity equally available. In *Frances Mullin v. Union Territory of Delhi*, the Court interpreted the right to life expansively.²⁷⁹ It held that the right to life "includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter. . . . Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live. . . ." ²⁸⁰ In a later case, the Court held that the right to live with human dignity derives its substance from the Directive Principles provided in the constitution.²⁸¹ More recently, Justice Ramaswamy and other state justices have explained that the right to life includes protection of more than the mere survival or animal existence.²⁸²

275. The complaint in a public interest action is about the content and conduct of government action in relation to the constitutional and statutory rights of segments of society. See *Janata Dal v. H.S. Chowdhary*, A.I.R. 1993 S.C. 892, 910.

276. See *S. P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149, 189-90.

277. See *Bhagwati*, *supra* note 185, at 569.

278. INDIA CONST. art. 21.

279. See *HUNT*, *supra* note 21, at 159 (citing *Frances Mullin v. Union Territory of Delhi* (1981) 2 S.C.R. 516. The issue presented in the case was whether detainees in police custody had the constitutional right to consult with a lawyer under Article 21. See *id.* The Court found that the right to life does indeed include furnishing legal counsel for detainees.

280. *Id.* (quoting *Frances Mullin*, (1981) 2 S.C.R. at 529).

281. See *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802, 811.

282. See *Puttappa Honnappa Talavar v. Deputy Commissioner*, A.I.R. 1998 Karn. 10, 11; see also *Samatha v. State of Andhra Pradesh*, A.I.R. 1997 S.C.

These justices have held that the right to life includes the right to live with human dignity, and the provision of minimum sustenance, shelter, and those other rights and aspects of life which make life meaningful and worth living.²⁸³

3. Moving Towards the Recognition of the Right to Health

With the recognition that both the Indian Constitution and the fundamental right to life emphasize human dignity, the Court began to address the importance of health to Indian citizens. In the Directive Principles section, Article 47 declares that the "[s]tate shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. . . ."²⁸⁴ Since directive principles are not enforceable in court, implementation of the guarantee has remained illusory.²⁸⁵ However, in a series of cases dealing with the substantive content of the right to life, the Court has found that the right to live with human dignity includes the right to good health.²⁸⁶ In *Consumer Education and Research Centre v. Union of India*, the Court explicitly held that "[t]he right to health . . . is an integral fact of [a] meaningful right to life."²⁸⁷ The Court held that the right to health and medical care is a fundamental right under Article 21.²⁸⁸

This recognition established a framework for addressing health concerns within the rubric of public interest litigation. In a series of subsequent cases, the Court held that it is the obligation of the state 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.²⁸⁹

3297, 3302 (discussing that the right to life includes social and economic empowerment).

283. See *Samatha*, A.I.R. 1997 S.C. at 3302.

284. INDIA CONST. art. 47.

285. *Bandhua Mukti Morcha*, A.I.R. 1984 S.C. at 812

286. See *id.* at 811, 812. The Court found that protection of health and opportunities for healthy development are among "the minimum requirements which must exist in order to enable a person to live with human dignity." *Id.* at 812. The constitutional courts have also interpreted the words "right to life" to mean the right to good health, and unpolluted air and water. See *Roy*, *supra* note 186, at 18.

287. See Sheeraz Latif Ahmad Khan, *Right to Health*, 2 S.C.J. 29, 30 (1995) (quoting A.I.R. 1995 S.C. 636). The case dealt with workers' rights to health and medical aid in the asbestos industries, and the necessity of caring for the health of workers in hazardous occupations. See *id.*

288. See *id.* at 31 (quoting *Consumer Education and Research Centre*, A.I.R. 1995 S.C. at 636).

289. See *infra* notes 239-356 and accompanying text.

4. The Importance of Access to Preventive and Curative Health Services

The Court has observed that a healthy body is the very foundation for all human activities and that measures should be taken to ensure that health is preserved.²⁹⁰ The preservation of life was held to be one of the paramount duties of the state. For example, in *Parmanand Katara v. Union of India*, the Court addressed the availability of access to curative health services.²⁹¹ The case concerned the availability of emergency medical treatment for a seriously injured man at a local hospital.²⁹² The hospital doctors refused to provide the man with emergency aid and sent him to another hospital twenty kilometers away.²⁹³ The injured man died en route to the other hospital.²⁹⁴ The issue presented to the Court was whether injured citizens have a constitutional right to instantaneous medical treatment for emergencies under Article 21.²⁹⁵ The Court held that Article 21 of the Constitution casts an obligation on the state to take every measure to preserve life.²⁹⁶ The Court found that it was essential to the preservation of life that doctors provide medical services to individuals in need.²⁹⁷ The Court required the state to remove legal impediments imposed on doctors and hospitals for providing emergency medical aid.²⁹⁸

In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, the Court again addressed the adequacy and availability of medical treatment for individuals in need of medical assistance.²⁹⁹ In this case, a man fell from a train and suffered serious head trauma.³⁰⁰ He was brought to a number of state hospitals, including both primary health centers and specialist

290. See *C.E.S.C. Limited v. Subhash Chandra Bose*, A.I.R. 1992 S.C. 573, 585. The case concerned the provision of health services to employees. See *id.* at 582. See also *Mahendra Pratap Singh v. State of Orissa*, 1997 A.I.R. Ori. 37, 39.

291. See *Parmanand Katara v. Union of India*, A.I.R. 1989 S.C. 2039.

292. See *id.* at 2040.

293. See *id.* The doctors wanted the patient to be taken to a different hospital that was authorized to handle these types of medico-legal cases. See *id.*

294. See *id.*

295. See *id.* at 2043.

296. See *id.*

297. See *id.*

298. See *id.* For example, before this case, doctors were required to follow several legal formalities related to accident victims before providing emergency assistance. See *id.* at 2041. These procedural formalities were aimed at preserving evidence. See *id.* However, they had the harmful effect of seriously delaying the provision of medical aid. See *id.*

299. See *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 3 S.C.J. 25, 29.

300. See *id.*

clinics, for treatment of his injuries.³⁰¹ Seven state hospitals were unable to provide emergency treatment for his injuries because of a lack of bed space and trauma and neurological services.³⁰² 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.³⁰³ 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.³⁰⁴ The Court required the state to ensure that primary health centers are equipped to provide immediate stabilizing treatment for serious injuries and emergencies.³⁰⁵ 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.³⁰⁶ The Court recognized that substantial expenditure was needed to ensure that medical facilities were adequate.³⁰⁷ However, it held that a state could not avoid this constitutional obligation on account of financial constraints.³⁰⁸

The Indian Supreme Court also addressed the quality and safety of the nation's blood banks.³⁰⁹ In a public interest litigation, the Court found that the current status of state and commercial blood banks posed a serious threat to health.³¹⁰ In fact, individuals were paid for their blood regardless of their health status.³¹¹ In addition, most state blood banks were not conducting tests on the blood for transmissible infections, and commercial blood banks were not ensuring that healthy

301. *See id.* at 29-30.

302. *See id.* The injured man was finally admitted to a private hospital for treatment of his injuries, and incurred substantial expenses. *See id.* at 33-34.

303. *See id.*

304. *See id.* at 33. The Court found that the state was liable for violating the man's right to life and awarded him 25,000 rupees as compensation. *See id.* at 33-34.

305. *See id.* at 37.

306. *See id.* Essentially, the Court added to the recommendations already provided to the Court by a state agency. *See id.*

307. *See id.*

308. *See id.*

309. *See Common Cause v. Union of India*, A.I.R. 1996 S.C. 929, 929.

310. *See id.* The Court found that contaminated blood can lead to death. *See id.* The Court held that it was essential to ensure that blood from blood banks is healthy and free from infections. *See id.*

311. For example, poor people and drug addicts were selling their blood, which was being used even when its quality was poor due to low hemoglobin counts or the presence of infections. *See id.* at 930.

individuals donated blood.³¹² In its ruling, the Supreme Court banned commercial blood banks and instituted a state licensing scheme for all blood banks.³¹³ The government was also required to enact legislation for regulating the collection, processing, storage, distribution, and transportation of blood, along with the overall quality of blood banks.³¹⁴

The court has also addressed the importance of providing preventive health services to the Indian population. In *Mahendra Pratap Singh v. State of Orissa*, the High Court of Orissa discussed the need for establishing primary health centers for the rural poor.³¹⁵ This case concerned the failure of a local government to take steps to immediately open a village primary health care center.³¹⁶ Individuals in the community petitioned the High Court of Orissa for a writ commanding the state government to take appropriate measures to open the health center.³¹⁷ The High Court began its judgement by re-emphasizing the central importance of health to a meaningful existence.³¹⁸ It stated that, "[g]reat achievements and accomplishments in life are possible if one is permitted to lead an acceptably healthy life."³¹⁹ The High Court held that the government is required to assist people in obtaining adequate preventive health services by establishing

312. See *id.* In fact, it is estimated that five percent of the seven million HIV infections in India have occurred through contaminated blood. Half of the annual collection of blood has come from professional blood sellers. See Charles W. Henderson, *Blood Safety in India Through Judicial and NGO Activism*, BLOOD WEEKLY, Sept. 7, 1998, available in LEXIS, News Library, CURNWS File [hereinafter Henderson, *Blood Safety in India*]; see also Sanjay Kumar, *Indian Supreme Court Demands Cleaner Blood Supply*, LANCET, Jan. 13, 1996, 114.

313. See *Common Cause*, A.I.R. 1996 S.C. at 935. The Court outlawed the use of professional donors as of January 1, 1998. See Charles W. Henderson, *Blood Donation Indian Blood Trade Thrives Despite Ban*, BLOOD WEEKLY, Apr. 27, 1998, available in LEXIS, News Library, CURNWS File [hereinafter Henderson, *Blood Donation*].

314. See *Common Cause*, A.I.R. 1996 S.C. at 933. The blood trade, however, is still thriving in India despite the Court's ruling. See Henderson, *Blood Donation*, *supra* note 313. Government health officials attribute this problem to the current shortage of blood and the lack of voluntary donation. See *id.* There are several superstitions surrounding the donation of blood that have made its collection from voluntary sources difficult. For example, some Indians believe that donating blood causes impotence and that receiving blood from a person of a different caste causes social contamination. See *id.* These social stigmas have hampered the effectiveness of the Court's judgment. See *id.*

315. *Mahendra Pratap Singh v. State of Orissa*, A.I.R. 1997 Ori. 37, 37.

316. See *id.* at 38.

317. See *id.* at 37. The individuals believed that state inaction was an attempt by the local government to deny the villagers access to a primary health care center. See *id.* The Court believed that technicalities and bureaucracy could not be used to justify state inaction. See *id.*

318. See *id.*

319. *Id.*

primary health centers throughout the country.³²⁰ The court ordered the government to open a primary health center in the village within three months of the ruling.³²¹

In *Prayag Vyapar Mandal v. State of Uttar Pradesh*, the Allahabad High Court also recognized the importance of providing pharmaceutical services to hospital patients.³²² In this case, the court held that providing patients with access to medicine at night and at reasonable prices was worthy of protection.³²³

The Indian Supreme Court has also begun to address the ramifications of AIDS on Indian society. The Court has already required blood banks to adopt screening methods designed to protect against the transmission of HIV through contaminated blood.³²⁴ More recently, the Court held that people with sexually transmitted diseases, such as HIV, can be punished for concealing this information from their spouses or fiancées.³²⁵ The Court found that these people were unjustly endangering the lives of their spouses by refusing to disclose their health status.³²⁶ The Court also found that a private hospital was justified in disclosing confidential information regarding a man's medical status to his fiancée.³²⁷ It held that the right to privacy is not absolute and can be waived in order to prevent crimes or to protect the health, rights, and freedom of other people.³²⁸ In that case, the Court held that "the woman's right to good health took

320. *See id.*

321. *See id.* at 40.

322. A.I.R. 1997 All. 1. The case concerned an individual petition to prohibit the construction of a pharmacy inside the hospital for the provision of medicine for in-patients. *See id.* at 2.

323. *See id.* at 5. It was found that the nearest pharmacy was not open twenty-four hours and charged exorbitant prices for medicines. *See id.* at 4. The Court, however, dismissed the petition because it believed that the case was brought for personal gain of the individual shopkeeper rather than the public interest. *See id.* at 5.

324. *See Henderson, Blood Donation, supra* note 313. After the first public interest litigation in 1989, four metro cities instituted HIV screening programs. *See Henderson, Blood Safety in India, supra* note 312. These programs were expanded in 1996 to cover 250 blood banks. *See id.*

325. *See Charles W. Henderson, India Persons Transmitting Sexual Diseases Can Be Punished, AIDS WEEKLY PLUS*, Nov. 30, 1998, available in LEXIS, News Library, CURNWS File [hereinafter Henderson, *India Persons*]. The Court found that people who conceal such information from their spouses can be punished with jail terms of several months. *See id.* The case was brought to the Court by a man who was suing a private hospital for telling his fiancée that he was HIV positive. *See id.* Apparently, the marriage was cancelled because of his condition and he was subsequently ostracized socially. *See id.*

326. *See id.*

327. *See id.*

328. *See id.*

precedence over the man's right to privacy."³²⁹ The Court also noted that society should not ostracize people infected with HIV or AIDS, and should treat them with dignity.³³⁰ Moreover, the Court has found that the government and private companies could not deny these people employment.³³¹

5. The Assurance of Living Conditions Necessary for Health

In *Bandhua Mukti Morcha v. Union of India*, the Court began to address the types of social conditions necessary for the enjoyment of health. The issue presented in the case was whether the workers at stone quarries were deprived of their right to life because of inhumane living and working conditions.³³² The Court explicitly stated that the right to live with human dignity also includes protection of the health of individuals.³³³ It also held that state actors must provide the basic conditions necessary for the enjoyment of health in order to guarantee the right to live with human dignity.³³⁴ The Court found that the state was required to provide workers with clean drinking water, sanitation facilities, and medical facilities to protect their health.³³⁵

The High Court of Madhya Pradesh also held that a fundamental obligation of municipalities was to ensure proper living conditions.³³⁶ The court found that the lack of sanitation and drainage facilities in the district was a health and safety risk

329. *See id.*

330. *See id.*

331. The High Court of Mumbai has also offered employment protection to people infected with HIV. *See* Maureen Bezuhly et al., *International Health Law*, 32 INT'L LAW. 539, 547 (1998). In *MX v. ZY*, the Mumbai court held that an employer is not allowed to condemn an HIV positive person to "certain economic death" by firing them from their jobs only because of their HIV status. *See id.* at 548 (quoting *MX v. ZY*, A.I.R. 1997 Bonn. 406). The case dealt with a man who was fired from part-time employment because he was found to be HIV positive after taking a company physical. *See id.* at 547. The company then instituted a new policy requiring HIV testing for pre- and post-recruiting. *See id.* at 547-48. The Court required the employer to reinstate the employee and pay him lost wages. *See id.* at 548. In addition, the Court allowed the man to litigate the case under a pseudonym to protect his privacy. *See id.*

332. *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802, 808.

333. *See id.* at 811.

334. *See id.* at 812.

335. *See id.* at 832-33. The Court also held that the state was obligated to take steps to prevent air pollution from the use of stone crushing machines. *See id.* at 831. It required the state to implement pollution prevention devices. *See id.*

336. *See Citizen & Inhabitants of Municipal Ward No. 15, Gwalior v. Municipal Corporation, Gwalior*, A.I.R. 1997 Mad. Pra. 33, 37.

to district occupants.³³⁷ The court held that the municipality must take steps to provide for the development of adequate drainage and sewer systems.³³⁸ The High Court of Karnataka has also held that the right to life includes access to clean drinking water.³³⁹

The High Court of Rajasthan has also addressed proper living conditions for Indian citizens. In *Sanjay Phophaliya v. State of Rajasthan*, the Court discussed the problem posed by stray animals living on the streets who were a nuisance to the public.³⁴⁰ The Court found that these animals interfered with public transportation, presented a health hazard to the public, and polluted the city.³⁴¹ The Court held that the uncontrolled presence of these stray animals on the streets of the city deprived Indian residents of their right to life under Article 21.³⁴²

6. Protection of the Environment

Constitutional courts have also found that the right to life includes the enjoyment of clean air and water.³⁴³ Courts have addressed numerous issues regarding pollution of the environment under public interest litigation.³⁴⁴ For example, in *Ratlam Municipality Council v. Vardi Chand*, the Court held that municipalities have an affirmative responsibility to maintain and protect the environment for the overall health of the public.³⁴⁵

337. See *id.* at 36. After an investigation, it was found that the municipal corporation had failed to maintain the roads, install sewage and drainage systems, and provide streetlights for the colony. See *id.* at 35.

338. See *id.* at 37. The Court required the municipal corporation to hold a general meeting with the occupants to discuss development of the colony and provide for a sanitation system within two months of the ruling. See *id.*

339. See *Puttappa Honnayya Talavar v. Deputy Commissioner*, A.I.R. 1998 Karn. 10, 11. The case concerned the right of individuals to dig underground borewells for water. See *id.* at 10-11.

340. 1998 A.I.R. Raj. 96.

341. See *id.* at 97.

342. See *id.* The state was required to adopt measures to control the presence of strays and a system of fines was instituted. See *id.* at 98.

343. See *Roy*, *supra* note 186, at 18.

344. For example, the High Court of Madhya Pradesh has recently held that the prevention of air pollution is of paramount state concern. See *Santosh Kumar Gupta v. Ministry of the Environment*, A.I.R. 1998 Mad. Pra. 43, 43. In *Santosh Kumar Gupta v. Ministry of the Environment*, the court found that cars and smoke were posing a health hazard to the occupants of the city. See *id.* at 43. The court required the city to reduce traffic and ensure implementation of emission standards. See *id.* at 45.

345. See *Khan*, *supra* note 287, at 32 (citing *Ratlam Municipality Council v. Vardi Chand*, A.I.R. 1980 S.C. 1622). The case concerned the public conditions of a locality which had open drains, pits of public excretion, and open mosquito

The Court found that "pollutants being discharged by big factories . . . [are] a challenge to the social justice component of the rule of law."³⁴⁶ The Court found that the preservation of public health, premised on the decency and dignity of individuals, was a non-negotiable facet of human rights requiring state action.³⁴⁷

In *M.C. Mehta v. Union of India*, the Court addressed the impact of environmental pollution on human health.³⁴⁸ The Mehta case held that water pollution and industrial hazards were violations of fundamental rights. More recently, courts have increased pressure against businesses polluting local waterways.³⁴⁹ Over the years, courts have closed businesses,³⁵⁰ ordered the construction of sewage treatment plants, and implemented other environmental protection measures in the public interest.³⁵¹

With public interest litigation, the Supreme Court has refashioned its institutional role to become the primary guarantor of social rights to the Indian people and "the last resort for the oppressed and bewildered."³⁵² There has been considerable concern about the legitimacy and accountability of such overt judicial activism in the world's largest democracy.³⁵³ The Court,

breeding, posing a public nuisance and a health threat. *See id.* (citing *Ratlam*, A.I.R. 1980 S.C. at 1622).

346. *Id.* at 33 (quoting *Ratlam*, A.I.R. 1980 S.C. at 1622).

347. *See id.* (quoting *Ratlam*, A.I.R. 1980 S.C. at 1622).

348. *See Cassels, supra* note 231, at 504 (citing A.I.R. 1987 S.C. 1086). The case dealt with the pollution of the Ganges river from the hazardous discharge of local businesses. *See id.* at 500 (citing *MC. Mehta*, A.I.R. 1987 S.C. at 1086). The Court found that the businesses were strictly liable for the harm and required them to compensate the victims. *See id.* at 504 (citing *M.C. Mehta*, A.I.R. 1987 S.C. at 1086).

349. In 1997, the Madras High Court shut down several cotton dyeing and bleaching plants that were polluting local waterways. *See Amy Louise Kazmin, Clean Up or Shut Down: India's Courts Get Tough with Industries that Pollute*, BUS. WK. 3552 (Industrial/Technology Edition), Nov. 10, 1997, at 66.

350. *See Michael Roberts, Supreme Court Extends Crackdown on Polluters*, CHEM. WK. Feb. 28, 1996, at 16. The courts have not hesitated to close down polluting industries despite the economic cost involved. *See id.* The court has allowed industries to reopen for business after adopting environmental protections. *See id.*

351. For example, in 1994, the Court required petroleum refineries to reduce the sulfur content in high-speed diesel by April 1999. *See Construction Contract Award For Planned \$65,000,000, HDS Unit, EXPORT SALES PROSPECTOR*, Apr. 1, 1998, available in LEXIS, News Library, CURNWS File. Sulfur was found to be an environmental hazard. As a result, Indian refineries instituted a clean up program. *See id.*

352. *See Cooper, supra* note 232, at 613.

353. The most common concern is that the judiciary is not suited to address social and economic conditions. *See Cassels, supra* note 231, at 513. Moreover, it does not bode well for the constitutional scheme and democracy that the judiciary has now become involved in making policy decisions which are

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.³⁵⁴ Former Justice Krishna Iyer has explained that public interest litigation is necessary because "in a society where freedoms suffer from atrophy, and activism is essential for participative public justice, some risks have to be taken and more opportunities opened for the public minded citizen to rely on the legal process."³⁵⁵

Above all, the Court remains committed to responding to the needs of the Indian people and providing constitutional justice. The Court has not hesitated in its unabashed criticism³⁵⁶ of the existing structures of Indian social and economic institutions, social priorities, and power imbalances. Despite political criticism of the judiciary, the public is very supportive of judicial activism, ranking the judiciary as the most trusted institution.³⁵⁷ One Indian citizen, on his way to plead his case in front of the Supreme Court with memorized passages from the Constitution as his only defense, passionately exclaimed that the Supreme Court would not deny him his rights.³⁵⁸ In fact, public interest litigation has become an accepted feature of the Indian legal system, and "[t]he judiciary . . . has emerged as the knight in shining armour," providing hope in the future for the majority of Indian people.³⁵⁹

usually reserved for the Legislature and Executive Branch. *See id.* The judiciary has been accused of "judicial socialism," rewriting the Constitution, and politicization. *See id.* at 512-13.

354. Judicial activism can be understood as part of an effort to retrieve public legitimacy from the people after the Emergency. *See id.* at 510-11. With public interest litigation, the Court has shown itself committed to gaining public support and legitimacy. *See id.* at 511. The Executive and Legislature, however, appear to be in the weakest position since independence. *See generally* Alka Lahori Handoo, *When Judges Play Role of Proxy Warriors and Neutral Referees*, NEW STRAITS TIMES (Malay.), Mar. 13, 1996, at 12.

355. *See* S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149, 194-95.

356. Justice Roy has written that the "judicial system must be strong enough to withstand bouts of political instability and ensure that the rule of law prevails." Roy, *supra* note 185, at 20.

357. Indian citizens regard the judiciary as the most responsive and accessible branch of government. *See* Jonathan Karp, *Appealing Activism*, FAR E. ECON. REV. Mar. 21, 1996, at 7, 17. Instead of writing their elected representatives when they have concerns, they write to the Supreme Court. *See id.*

358. *Id.*

359. M.R. Narayan Swamy, *Indian Politicians Run for Cover as Judiciary Takes Over*, Agence France Presse, Oct. 17, 1996, available in LEXIS, Intlaw Library, INTNWS File.

VI. CONCLUSION

With public interest litigation, the Indian Supreme Court has shown that it is committed to providing individuals with the ability to live with dignity and gain control over their social environment. The substantive recognition of the right to health as essential to living with human dignity has allowed the Indian judiciary to directly address human suffering by guaranteeing the social entitlements and conditions necessary for good health. As a result, public interest litigation has evolved into full-fledged human rights jurisprudence and established a mechanism by which social rights can be adjudicated.

The development of public interest litigation of social rights has had enormous psychological consequences. The Indian judiciary has managed to make the judicial system aware and responsive to the needs of the poor and disadvantaged, and it implicitly recognizes that these individuals are valuable members of Indian society worthy of protection. As a result, many Indian citizens now have faith in the rule of law and the court's ability to deliver social justice and respond to their needs.

Most importantly, the Indian response has opened up new avenues of exploration for the practical application and implementation of social human rights in the developing world. The Indian ability to guarantee the right to health presents many lessons for states and the international community. First, it 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. The Indian experiment also vividly demonstrates that language can be given widely different meanings depending on the goal to be reached.³⁶⁰ It proves that "the Constitution is what we say it is."³⁶¹ In addition, the Indian judiciary has shown that judges have the enormous potential to effect change in society when they so desire.³⁶² The Indian experiment proves that societies can indeed choose to make social rights justiciable and develop appropriate methods for their implementation and enforcement.

The illustration of India and its unique public interest litigation system demonstrates that law can be used as a mechanism for social change. Law can and should be used to

360. See Cooper, *supra* note 232, at 634.

361. *Id.* at 619 (quoting P.N. Bhanat, *Fundamental Rights in their Economic, Social, and Cultural Context*, in COMMONWEALTH SECRETARIA 57 (1988)).

362. See *id.* at 634.

change the material conditions of life, to influence traditional attitudes, to transform existing social patterns, and above all, to challenge boundaries. In the words of Jawaharlal Nehru, "[i]t means the ending of poverty and ignorance and disease and inequality of opportunity."³⁶³ Law can and should be used to enhance the lives of the poor and oppressed and finally be put into "the service of the millions who suffer."³⁶⁴

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363. *Jamie Cassels, Bitter Knowledge, Vibrant Action: Reflections of Law and Society in Modern India*, 1991 WIS. L. REV. 109, 113 n.12 (quoting Jawaharlal Nehru, *Trust with Destiny*, Speech on the Eve of Independence, Aug. 14, 1947, in 1 *Jawaharlal Nehru's Speeches* 25, 26 (1949)) (reviewing MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* (1989)).

364. *See id.* at 113.

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