RIGHT TO HEALTH AND PUBLIC HEALTH: A CONCEPTUAL OVERVIEW

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INTRODUCTION

Right to health has passed through different stages of evolution to reach the present state of recognition and justiciability as a fundamental right. Its development is traceable from jurisprudential and international perspectives and both have cast a positive obligation on the State to protect public health. Yet, the often raised question is what the 'State obligation' means, and what is its extent? This article is an attempt to analyse the nature and extent of State obligation in relation to public health.

In western jurisprudence, it was the Greeks who first thought of legal concepts systematically. Aristotle interpreted life as meaning not mere living, but living well. If good life is the aim of man's life, then its pursuit and achievement involves the fulfillment of certain conditions of social life, which are termed as 'rights'. A 'right' in the legal sense may be defined as an advantage or benefit conferred upon a person by a rule of law. They are necessary for the adequate development of one's personality and environment. Viewed negatively, rights are those opportunities, the absence of which deprives man of something essential. Rights are also being considered as a special advantage that one gains on account of one's status, as a human being, a woman, a minority, a child, or as a citizen. The evolution and development of right to health and public health at the domestic and international levels is the story of a voyage from natural right to human right, and further from human right to fundamental right and now getting recognition as justiciable and implementable rights at least in the limited extent of a country's available resources.

FROM NATURAL RIGHT TO HUMAN RIGHT

The concept of human rights is as old as the doctrine of 'natural rights' founded on natural law and which considers nature as the provider of certain rights that have a universal, rational, eternal and immutable character. Human rights were adopted only in the present century from the expression previously known as 'natural rights' or 'rights of man'. According to this ancient theory, rights being rationally deducible from man's nature, have their universal application, irrespective of the difference of place, time and environment. Based on the above notion of rights, the Stoics of ancient Greece upheld the right to equality as given to mankind by nature. This school of thought also held the view that human conduct should be judged according to and brought into harmony with the law of nature. Polybius and Cicero, the Roman thinkers, also emphasized on the existence of law of nature to which laws of State must conform .

The Medieval period spreading from the 13th century till the Treaty of Westphalia (1648), and with the advent of the period of Renaissance and the fall of feudalism, certain basic changes occurred in the beliefs and practices of society. People increasingly felt the idea of human rights as a general social need. The said belief reached its climax in 1215 A.D. with the Declaration of Magna Carta and the doctrine of natural rights thereby passed into the realm of practical reality when King John, an absolute monarch, was made to acknowledge that there were certain rights of the subjects which could not be violated even by a Sovereign in whom all powers were legally vested.

Natural Law postulation was further strengthened by Saint Thomas Aquinas (1224-1274) who advocated that natural law was the part of God's perfect law which could be divined

through the application of human reason. Part of his early natural law philosophy advocated that all people-whatever their status- were subjected to the authority of God. From this, it was possible to state that all human beings were endowed with a unique individual identity which was separate from the State. This facet of natural law doctrine sowed the seeds of the natural rights idea that each person constituted an autonomous individual the people's natural rights would be preserved. The legislature was thus limited by natural law, and a law made by legislature contrary to the law of nature or violative of the natural rights of the individual was invalid. However, Locke's philosophy of social contract was full of contradictions and ultimately, it was Rousseau who gave kinetic impetus to the doctrine by emphasizing that the sole justification of the State, which derives its authority from the people, was to guarantee the natural rights of man, of freedom and equality. These were 'natural' rights in as much as they inhered in man in the 'state of nature'. Rousseau observed:

"Man is born free and everywhere he is in chains".

PETITION OF RIGHTS AND THE BILL OF RIGHTS

The events like the Petition of Rights and the Bill of Rights testified the increasing popular view that "all human beings are endowed with certain eternal and inalienable rights and they could never be renounced even when humankind contracted to enter the civil society". This was a progressive vision of rights and it blossomed and took the real wings as natural rights in the 17th and 18th centuries.

THEORY OF SOCIAL CONTRACT

The doctrine of natural rights received further impetus at the hands of the great protagonist of the theory of social contract, particularly Locke and Rousseau, who sought to trace the genesis of political society and government in an agreement into which individuals entered to from a collective society to ensure their general interest and objects, but at the same time without interfering with their 'natural rights' which already belonged to them as human beings. Locke's theory was that, in the original state of nature, man was governed by the law of nature, but for the sake of better safety he joined in a political society by means of a 'social contract' for the mutual preservation of life, liberty and property. The government so set up by a contract was naturally one of limited powers and was bound to the community by the guarantee that

LEGALIST THOUGHTS ON RIGHTS

It is striking that this concept of natural rights, as binding on many political authority, crept into the thoughts of legalist like Blackstone whose writing in 1765, made a distinction between absolute and relative rights of persons. By absolute rights of individuals, Blackstone meant "those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature; and which every man is entitled to enjoy, whether out of society or in it". These are to be distinguished from relative rights which, according to him, are incidental to individuals only as members of society. He advocated that it is the duty of the political society to protect these absolute rights and, therefore, the State or any authority therein cannot interfere with or encroach upon these natural rights except in so far as it is essential for the free maintenance or proper enjoyment of such rights as members of collective society. By this version, he stretched the doctrine of natural rights from the realm of political philosophy into the realm of jurisprudence.

VIRGINIA BILL OF RIGHTS

The Virginia Bill of Rights drafted by George Manson and adopted in State Constitution of Virginia in 1776 was the first declaration of rights in a written Constitution "as the basis and foundation of government". The edifice of the doctrine of natural rights is to be found in the Preamble of the said Declaration which states:

> "All men are by nature equally free and independent and have certain inherent natural rights of which when they enter society, they cannot by any contract deprive or divest their posterity."

With this, the concept of inalienable natural rights of man found an entry into the world of constitutionalism.

INALIENABLE RIGHTS AND THE DECLARATION OF AMERICAN INDEPENDENCE

The Drafters of the US Constitution, influenced by Mason's Virginia Declaration, included the protection of certain minimum rights. The Declaration of American Independence, drafted by Jefferson in 1776, stated:

> "We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness".

Though it was not part of the written Constitution, it asserted "certain inalienable rights", as against any government in power, adding that "to secure these rights governments are instituted among men, deriving their just powers from consent of the governed.

However, the Americans did not stop at reciting these rights in an ornamental preamble to the Constitution, but adopted them as part of their Constitution to serve as the legal limitation on the powers of each of the organs set up by the Constitution and to make it enforceable by the Courts to invalidate legislative and the executive despotism. Judicial review thus became an inseparable concomitant of the Fundamental Rights.

FRENCH DECLARATION OF THE RIGHTS OF MAN AND THE CITIZENS

Inspired by the American Declaration of independence, the French National Assembly in 1789 formulated the Declaration of the Rights of Man and the Citizens. According to the Declaration, true happiness is to be found in individual liberty which is the product of 'natural, inalienable and sacred rights of man'. Thus, the Declaration states that certain individual rights are protected in the arms of the State.

The philosophy underlying the doctrine of inalienable rights, regarded as superior to the civil rights, is best explained by Thomas Paine, a contemporary political thinker as :

"….all men are born equal and with equal natural rights."

Whatever be the theoretical or doctrinal debates over the English, American and French Revolutions and approaches, it is clear that each, in its own way, contributed towards development of forms of liberal democracy in which certain rights were regarded as paramount in protecting individuals from the State's inbuilt tendency to authoritarianism. What was significant about protected rights was that those were predominantly "freedoms from" rather than "rights to".

19TH CENTUARY SCHOOLS OF THOUGHTS

In modern parlance, natural inalienable rights would be called civil and political rights, since they dealt primarily with individual's relationship with the organs of the State. In the nineteenth century under the influence of German Idealism of Hegel that "State is a march of God on earth" and the rising European nationalism together with Marxian school of thought, an offshoot of Hegelian thought and dialectical approach, did not reject individual rights altogether, but maintained that right derived from whatsoever source belong to the community or the whole society and not only to individuals.

The idealistic school of thought propounded by Kant not only presented the philosophical views on rights, but also explained the nature, practice and objective of the rights from a moral perspective and concluded that morality is the force for both the individual and the society. According to him, rights are nothing but a moral expression of individual actions, and the recognition by the society towards the right is essentially a moral action and all laws are essentially to be moral in legislation to protect and uphold the freedom of the individual and to him freedom is not only moral but also universal to be exercised by all individuals.

20TH CENTUARY PHILOSOPHY- TOWARDS ARTICULATION OF HUMAN RIGHTS

In the early 20th century, The Great Economic Depression of the early 1930 struck the first blow to the lofty philosophy of individualism. The social

reality projected that beneath the lofty idealism of laissez faire philosophy laid hidden the most ugly aspect of Capitalism. In the words of Julius Stone:

> "The fallacy of supposing that a workman, living from hand to month on daily labour in the same way as a great commercial or industrial corporation resents restrictions on its free bargaining is now well recognized".

The fact is that the working class was as much a product of industrial revolution as the fundamental rights. The economic depression revealed that though the ideology of Laissez Faire triumphed, its end-product has divided society, between privileged and underdogs. The Capitalism which once fought against the vested interest of feudalism itself acquired vested interests. President Roosevelt stated: "one third of our population, the overwhelming of which is in industry and agriculture is ill-nourished, ill-cad and ill-housed.

The State of affairs that followed led to the feeling that laissez faire works out hardships and prejudice when men are not equal. No democratic State can tolerate this ignoring state of affairs where the weak were continually driven to wall. A feeling generated that if fundamental rights were to have any meaning to the millions, their content must change. If rights were considered as conditions necessary for the fulfillment of life, then the working class too, should have these rights guaranteed to them. Consequent developments saw the emergence of new species of rights known as "social and economic rights", in which the right to health and public health are included. However, a trend to include those rights as part of Bill of Rights started only in post-world war era. In the Weimer Republican Constitution and the Constitution of USSR, these rights were recognized as fundamental rights . In modern Constitutions of many Sates these rights in some form or the other, are also recognized.

The history of almost entire first half of twentieth century is characterized by the prevalence of colonial rule in large parts of the world and the rise of authoritarian governments in many counties. It also witnessed the establishment of fascist, barbarous and aggressive regimes in some countries and the rise of national liberation movements in the colonies and of movements of democracy and social progress in other countries. The twentieth century also saw the two most devastating wars in the human history and by the time when the Second World War ended in 1945, it made economic insecurity intense and this led to the conceptualization and articulation of human rights.

HOHFELD'S RIGHT-DUTY RELATION-JURISPRUDENTIAL FOUNDATION OF SOCIO-ECONOMIC RIGHTS

Hohfeld, the American jurist in 1913 modified Salmond's scheme of rights and worked out a table of jural relations with incisive logic . He proceeded on the principle of jural correlatives. According to him, every right in the strict sense implies the existence of a correlative duty . He established that jural correlative of right is duty.

He asserted that right involves the presence of duty . He used 'claim' as a substitute for 'right' and defined 'claim' as a sign that some person ought to behave in a certain way. According to him, 'duty' is a prescriptive pattern of behaviour. He also advocated that conduct is regulated by the imposition of duties. Hohfeld uses right to mean privilege, power and immunity. Of the four classes of rights, rights correlative to duties are the most important as it constitute the principal subject matter of law, while others are merely accessory. Rights have been defined from moral and legal angles by other jurists as well.

The importance of Hohfeldian analysis of rights is that it is the most practical theory applicable to social and economic rights such as the right to health and public health. It provides the jurisprudential basis for the enforceability of such rights. Conferment of right to the subjects means a corresponding duty on the State to effectuate the exercise of the right, which in the case of right to health and public health means taking preventive and curative measures by the State. Consequently, State may need to refrain from conduct injurious to the enjoyment of physical and mental health and in other instances, it means that the State may have to take action by preventing pollution, monitoring and controlling emissions, etc. to give realization to the right.

It is a well-accepted principle of human rights that economic, social and cultural rights are as important as civil and political rights and that both are indivisible and interdependent. There are situations when breach of the right to work under healthy conditions may infringe upon the right to life. It is for this reason that economic, social and cultural rights are described as positive rights. They are said to be positive rights, because they require an active role on the part of States. It is furthermore for the reason that satisfaction of the economic social and cultural rights is guarantee for the enjoyment of civil and political rights. In respect of positive rights, there is a prevailing minority view that they are justiciable and implementable. But the majority view is that the rights must be achieved progressively.

From this brief historical exposition, it is apparent that the notion of human rights has made a transition from protection of individual from state absolutism to the creation of social and economic conditions calculated to allow the individual to develop to the maximum of his or her potential. It is certainly true that some rights are more difficult to secure than others, and those that are impossible to secure cannot be truly called rights. At the same time, it is equally true that some rights seem to be more important than others. Right to health and public health is one such category of right which is more important than others .

FROM HUMAN RIGHT TO FUNDAMENTAL RIGHT

The right to life is the most fundamental of all the rights and it is the very core of humanity. It is therefore being considered as the sanctum sanctorum of human rights. It is the right from which all other rights stem. Life means the state of being alive as a human being. It also means the qualities, events and experiences of human existence.

Aristotle while explaining the origin and end of State observed that State came into being for fulfillment of bare needs of men and continues in existence for the sake of good life. Hobbes justified man's natural right to life by asserting that nobody wants to die a violent death, or to suffer an injury. The desire to stay alive is man's paramount wish, and the one that demands from other their most unfailing respect. Hobbes's 'social contract' formulation strengthened the concept of right to life in a politically organized society i.e. State. In fact, Hobbes's Leviathan came into being due to this contract whereby State undertakes to protect the right of the people.

Locke also recognized the right to life and emphasized on its protection by State itself. Locke's theory was that, in the original state of nature, man was governed by the law of nature, but for the sake of better safety he joined in a political society by means of a 'social contract' for the mutual preservation of life, liberty and property. The distinct contribution of Locke to the philosophy of fundamental rights was that he asserted that both government and society exist to preserve the individual's rights and indefensibility of such rights is a limitation on the authority of both Equally important was that Locke also acknowledged that "life, liberty and estate" of one person can be limited only to make effective the equally valid claims of another person to the same right. Thus, he recognized restrictions on the enjoyment of fundamental rights.

In slight difference, Rousseau, another architect of social contract, also glorified natural rights, but at the same time maintained that there is distinction between the rights of the citizens and of the sovereign and also with regard to the duties the citizens have to discharge as subjects. Emphasizing on the role of the State, he justified the existence of the State for protecting the rights of the subjects, the most important of which being the right to life. Right to life does not connote mere animal existence of continued drudgery through life or can there be any reason why practice of violent extinguishment of life alone should be brought within its purview. It is the heart of all fundamental rights and has received expanded meaning from time to time at national and international levels.

RIGHT TO HEALTH AND PUBLIC HEALTH- EVOLUTION FROM INTERNATIONAL INSTRUMENTS

Right to health and public health has gained significant strength from international documents which now forms part of the customary international law. The United Nations Declaration,

1942 put on record that complete victory over the enemies is essential to defend life, liberty and independence and to preserve human rights and justice in their own land as well as in other land. The then big three which included United Sates, Soviet Union and Great Britain endorsed the above Declaration in their Conference of March 3, 1943. This was followed by the Philadelphia Declaration of the International Labour Organization's 26th session, which lay down as hereunder:

> "All human beings, irrespective of trade, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity of economic security and equal opportunity."

The Dumbarton Oaks Conference of 1944 among the four Big Powers led to the first tentative draft of a new world organization. At Yalta Conference of 1945, the Great Powers issued a declaration of liberated Europe where principles of Atlantic Charter and Declaration of United Nations were affirmed.

It was after all these developments that on April 25, 1945 the San Francisco Conference of the Untied Nations was convened and it gave birth to the Charter of United Nations which reaffirmed faith in fundamental human rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standard of life in larger freedom.

During the nineteenth and twentieth centuries, the concept of natural rights was transformed into the idea of human rights. This change reflected an expansion of the scope and range of rights to include within its ambit two claims, namely, negative claims which limit the power of the government to protect people's rights against its power and positive claims which are intended to enhance the power of the government to do something for a person to enable him in some way. Thus, the late twentieth century idea of human rights, which incorporates both the positive and negative types, means that "certain things ought not to be done to any human being and certain other things ought to be done for every human being".

Right to health has emerged primarily from economic dislocations of industrial revolution, which inspired many philosophers, including Karl Marx, to conclude that human beings have the right to economic security. However, notions of positive right to health had its origin in the sanitary revolution of the nineteenth century when public health reformers, troubled by economic dislocations of industrial revolution and empowered with scientific advances such as germ theory of disease, pressed for State-sponsored public health reforms. World War-II and the establishment of the U.N. are watershed events in the evolution of modern corpus of international human rights law and the current international human rights system. In due course of time, the international treaties of the U.N. became the major source of right to health.

Within the framework of United Nations, the Universal Declaration of Human Rights embraces both civil and political rights and economic, social and cultural rights. Obviously health also finds a place in the Universal Declaration of Human Rights, 1948 which reads:

> "Everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".

A different facet of the right to health finds a place in Article 25(1) of the Universal Declaration, which states:

> "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, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

Article 25(2) of the Universal Declaration emphasizes on the protection of motherhood and childhood by declaring that motherhood and childhood are entitled to special care and

assistance. All children whether born in and out of wedlock, shall enjoy the same social protection.

It is interesting to note that Article 25 of Universal Declaration of Human Rights recognizes that persons entitled to rights should have sufficiency of necessary means for the right to life, liberty and security as explicitly recognized in Article 3. However, the Declaration does not make holders of rights alone responsible for the quality of life, since it explicitly recognizes in Article 22 the right to social security, thereby constituting a responsibility vis-à-vis the society of which the holder of rights is a member.

The Preamble to the Constitution of World Health Organization, which was drafted more or less during the same time as that of the Universal Declaration states that enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political, economic or social condition. It is probably because of the difficulty of reaching sufficient consensus on the specific concept of right to health that the declaration has tacked it in a more diffused manner. However, adoption of the International Covenant on Economic, Social and Cultural Rights, 1966 rendered obsolete the debate on cause and consequences of the absence of the formal inclusion of right to health in the UDHR.

Article 12 of the ICESCR forms the international base for the emergence of the right to health. It recognized explicitly the right of everyone to enjoy the highest attainable standards of physical and mental health. Article 12(1) of ICESCR reads:

> "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."

It also enumerates four steps to be followed by the State so that everyone can realize the right to health. Firstly, it states that States must act to enhance the welfare of children in general, such as reduction in still birth rate and infant mortality and health development of the child. Secondly, it states that States must take measures to improve environment and industrial hygiene. Thirdly, it obligates the State to prevent and treat epidemic, endemic, occupational and other diseases. Lastly, it calls upon the State to strive to optimize health service, assuring to all medical service and medical attention in the event of sickness. Thus, a multi-faceted approach to health is carved out in the covenant. Similarly, the Charter on Environmental Rights and Obligations proclaims that every one has the right to an environment adequate for the general health and wellbeing. As a result of the above international approach, right to health is now seen as a means of attaining full development of the right to life and integrity of human person, a means of recognizing right of each individual to what the community owes him, and a means of creating duties under State responsibility to contribute to the satisfaction of the individual aspirations of citizens.

With this, the application of human rights in the realm of environmental jurisprudence gathered momentum and legal obligations owed by States to individuals were also recognised. A close scrutiny of the measures that the States has to undertake in the field of health necessitates considerable financial resources. However, States cannot easily escape from this basic social responsibility for the reason that human rights treaties are of a law-making character as opposed to contracting treaty, they purport to give fuller effectiveness to their guarantee and hence it is essential that wide ranging and socially evolving matters affecting health be encompassed within Article 12. In the General Comment No. 14, the Committee on Economic Social and Cultural Rights has enunciated that States Parties obligations enumerated in Article 12(2) are illustrative and non-exhaustive examples.

The theoretical division between civil and political rights on the one hand and economic social and cultural rights on the other have obviously an impact on the nature of right to health. "Social rights" or basic entitlements refer to those rights that protect the basic necessities of life or rights that provide for the foundation of an adequate quality of life. It may be pointed out that in contrast to ICCPR, the ICESCR is not immediately binding and it is subordinated to the principle of progressive realization. Article 2(1) of ICESCR reads:

> "Each State party to the present covenant undertakes to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources with a view of

achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures".

Thus, it is clear that treaty provisions acquire full realization of right only progressively to the extent of its available resources. Viewed from the above angle, it can be stated that realization of the right to health depends upon the resources of the State. This in turn would act as a shield and justification for the State to evade responsibilities in ensuring right to health, as the language used in the Article is a favorable source of interpretation for the States slow in responding to people's health problems. However, it has been cautioned by the Committee on Economic, Social and Cultural Rights that realization of right to health overtime or progressively should not be misinterpreted as depriving the obligation of all meaningful content. On the other hand, the phrase must be read in the light of the overall objectives and the raison d' entire of the Covenant, which is to establish clear obligation on the State Parties for the full realization of the right.

ICESCR has other inherent weaknesses as well, traceable with reference to the nature of the language used. While ICCPR provisions are formulated in an affirmative and unconditional way such as "everyone shall have the right" ICESCR provisions state only that "State parties recognize or undertake to ensure". The terms like 'recognise' 'undertake to ensure' were chosen deliberately to lessen the operative force of the provisions and to confer on States broader level of discretion.

Yet again, another important deficiency of ICESCR is that as compared to general clause in Article 2 of ICCPR, there is no explicit reference to judicial or other forms of remedy. Article 2(3) of ICCPR reads:

"Each State Party to the present Covenant undertakes, (a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judiciary, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted".

There is no individual or inter-State complaint mechanism as with the operative clause under the ICCPR and its First Optional Protocol. The State parties to the ICESCR are only required to submit reports to the committee on economic, social and cultural rights on any national legislative and other measures taken to give fuller effect to the right guaranteed in ICESCR. Thus, the net effect of the language of the ICESCR leads to the conclusion that right to health falls within socio-economic rights. The realization of the same depends upon the resources of the State and that there is no explicit reference to judicial or other forms of remedy.

The Convention on the Rights of the Child assure in Article 24(1) that States parties to the covenant recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for treatment of illness and rehabilitation of health. The Convention also requires the State parties to strive to ensure that no child is deprived of his or her right of access to such health care services. The African Charter on Human and Peoples' Rights declares in Article 16 that every individual shall have the right to enjoy the best attainable state of physical and mental health. Article 16(2) also assures that State parties shall take necessary measures to protect health of their people and to ensure that they receive medical attention when they are sick. Vienna Declaration and Programme of Action of 1993 is another international legal instrument that lays focus on issues relating to health.

A breakthrough in the pursuit of human right to health emerged with the Alma Ata Declaration of 1978, which declared as follows:

"The Conference strongly reaffirms that health, is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, is a fundamental human right and that the attainment of the highest possible level of health is a most

> important world wide social goal whose realization requires the action of many other social and economic sectors in addition to the health sector".

Closely on its heels, in May, 1981 at the 34th World Health Assembly, 156 member States gathered in Geneva endorsed the statistics to impel the world towards the goal of health for all by the year 2000. On the aforesaid occasion, Mrs. Indira Gandhi representing India in her speech opined;

> "Life is not mere living but living in health. The health of the individual, as of nations is of primary concern to us all. Health is not absence of illness but a glowing vitality, a feeling of wholeness with a capacity for continuous intellectual and spiritual growth…"

She underlined the need for primary health care to be within the reach of all people, in terms of distance as well as money and for health to go to homes instead of larger member of people gravitating towards centralized hospitals. She also stated that a country's progress is generally judged in terms of its GNP. But surely the health of the people is also a significant yardstick. That is why we must stress the need for a health revolution in developing countries, not only to wipe out disease and make available specialized treatment, but what is equally essential is to provide basic health.

Thus, it may be seen that the Declaration not only advocated universal coverage of basic health services, but also assures that all people could have a standard of living conditions conducive to health. But mere declarations would not bring result, unless accompanied by public participation, as strong popular participation is needed to choose greater equity in meeting health needs.

The Additional Protocol of the American Convention on Human Rights in the Area of Economic Social and Cultural Rights uses the precise phrase right to health. Article 10 which is titled 'right to health' reads:

> "….everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical mental and social wellbeing in order to ensure the exercise of the right to health."

Article 10(2) assures that in order to ensure the exercise of right to health, the States parties agree to recognize health as a public good. The above Article also narrates certain measures to be adopted to ensure the right to health. Similar language is also contained in the American Declaration of the Rights and Duties of Man. Article XI of the above Declaration reads:

> "Every person has the right to the prevention of his health through sanitary and social measures relating to food, clothing, housing and medical care to the extent permitted by public and community resources".

In the international sphere, there are also legal instruments, which assure the right to health of juveniles, shipwrecked persons and prisoners. Declarations, guidelines, conventions codified by UNO are being implemented by the member states in their own countries through the medium of national laws.

The study and analysis of the above documents reveal that human right in relation to health is anchored in a number of international conventions, the most elaborate being in Article 12 of ICESCR. The result of these endeavours is that it has fairly laid the foundation for building right to health in the category of economic, social and cultural rights.

On a scrutiny of international conventions one can identify two essential components of the right to health, i.e. the right to health care, and the right to underlying health conditions. Right to health care embraces right to health services in relation to disease prevention, health promotion, therapeutic services and rehabilitation, while right to underlying health conditions can be regarded as those encompassing health issues such as clean air, water, adequate sanitation, sufficient access to nutritious food, environmental health, occupational health, access to health related information and harmful traditional practices. Taking together both these aspects, health basically entails four essential elements, namely, availability, accessibility, acceptability and quality of health facilities. It is thus clear that State has certain specific obligations to fulfill in reference to the right to health which are in the nature of obligations to respect, protect and fulfill.

The obligation to respect accords with the traditional conceptualization of civil and political rights, suggesting that States should abstain from interfering directly or indirectly with the enjoyment of right to health. It also enjoins to abstain from unlawfully polluting air, water and soil for instance through industrial waste from State owned facilities, from testing or using nuclear, biological or chemical weapons releasing substances harmful to human health and from impeding access to health services as a punitive measure during armed conflict.

The obligation to protect means that States are required to take action to prevent third parties from interfering with the Article 12 guarantee. This includes a responsibility to ensure that harmful or traditional practices do not impinge on the healthy development of women. The obligation to fulfill requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to realize fully the right to health. The obligation consists of three specific elements, namely, the obligation to adopt positive measures capable of assuring individuals and communities to enjoy fully the right to health; the obligation to provide a specific right guaranteed in the ICESCR; and the obligation to promote, calling on States to undertake action that create, maintain and restore the health of citizens. Such obligations also find a place in the national laws dealing with health. Therefore, it could be said that in the mater of environmental protection, International Law in the form of binding customary rules has also expanded and come to be perceived as a dynamic human artefact which changes and may be consciously developed over time.

TACKLING VIOLATIONS OF RIGHT TO HEALTH-ROLE OF EUROPEAN HUMAN RIGHTS BODIES

International jurisprudence reveals that claims on violation of civil and political rights with respect to health issues in general and the impact of pollution and other forms of environmental damage to human health are being successfully fought. Such an approach is discernible from the decision of the European Human Rights Court in Lopez-Ostra, wherein the Court held the view that severe environmental pollution may affect individuals' well-being and prevent them enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Apart from the principle laid down, the approach of the Court in the above case is significant for the reason that it kept the gate opened for the applicants to approach the Court directly, without relegating them to exhaust the administrative remedies to challenge the operation of the plant under the relevant environmental protection laws. Such a stand was adopted by the Court considering that environmental poisoning in any from is a grave public health hazard involving violation of basic human rights.

The approach of the Court in Lopez-Ostra was again followed in Anna Maria Guerra and 39 others against Italy. In this case, applicants complained of pollution resulting from operation of the chemical factory 'ENICHEM Agricoltura', situated near the town of Manfredonia. There was potential risk of accidents at the plant and the applicants alleged that there was no regulation from the part of public authorities. They asserted their right under Article 10 of the European Convention on Human Rights and contended that by contending that the government violated the guarantee by failing to perform its duties to inform the public of the risks and the measures to be taken in case of a major accident. The Grand Chamber of the European Court of Human Rights which finally heard the matter, though concluded that there was no violation of the right under Article 10 involved, yet unanimously found that the case constituted violation of Article 8, the right to family, home and private life. The Court reiterated the position exposed in Lopez Ostra and held that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life .

The European Human Rights Court has taken the view that right to a judicial remedy prescribed by Article 6 extends to compensation for pollution, though Article 6 does not encompass a right to judicial review of legislative enactments. Such activist course of interpretation is seen adopted in Zimmerman and Steiner v.Switzerland, wherein the grievance related to noise and air pollution from a nearby airport.

Yet another significant contribution made by the European Court of Human Rights in the realm

of environmental issues involving violation of human rights is that it has legitimized environmental restrictions on the use of private property. This trend is seen projected in Pine Valley Developments Limited and Others v. Ireland, wherein the Court located violation of Article 14 taken in conjunction with the right to peaceful enjoyment of possessions. The Court held that preventing construction for the further development of agriculture for maintaining a green belt for preservation of air quality must be regarded as a proper way if not the only way of achieving that aim. The case thus demonstrates how environmental and air quality concerns are brought within the human rights spectrum. Life means qualitative life, which is possible only in an environment of quality. Where, on account of human intervention, the quality of air and the environment are threatened or affected, Court should adopt suitable approaches to safeguard and enforce right to life in public interest, which in a limited fashion is seen reflected in the decisions of the European Court of Human Rights concerning environmental issues.

It is also striking that the absences of a supervisory mechanism to monitor the guarantee of right to health have been tackled in Europe to an extent by individuals and NGOs by relying on the complaint system of civil and political right treaties. At the same time, supervisory bodies such as European Court of Human Rights and United Nations Human Rights Commission have started to uphold the health related claims on the basis of civil and political rights. As part of the above strategy, European Court of Human Rights has stressed that the expressions right to life and health cannot be interpreted in an isolated manner, but rather requires the States to assume positive obligations for adopting steps to curb infant mortality, increase life expectancy, eliminate epidemics and to improve the quality of life.

RIGHT TO HEALTHY AND BALANCED ENVIRONMENT

The right to health is closely related to and dependent upon the realization of other human rights, such as right to human dignity, life, access to information, etc. These and other rights and freedoms address integral components of the Right to Health. In drafting Article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the Preamble to the Constitution of WHO, which conceptualizes health as "a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity". However, the reference in Article 12.1 of the Covenant to "the highest attainable standards of physical and mental health" is not confined to the Right to Health care. On the contrary, the drafting history and the express wording of Article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food, nutrition, housing, clean air, access to safe and potable water and adequate sanitation, safe and healthy environment.

It is the innate and cherished desire of everyone to live in a healthy environment, which is a basic human right or necessity. Healthy environment is a nature's gift. International law recognizes a human right to decent, viable or healthy environment. Right to healthy and balanced environment is part of the third generation of human rights and is also called as solidarity rights. Air is essential for living things. In 1968 the UN General Assembly passed a Resolution identifying the relationship between the quality of human environment and the enjoyment of basic rights. This was followed by the landmark Stockholm Declaration in June 1972 to which India was a party, and which is called 'The Magna Carta of Human Environment', which stated that "both aspects of man's environment, the natural and man-made are essential to the well-being and to the enjoyment of basic rights even the right to life itself", and that man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well being…". It is submitted that Stockholm Declaration has the tacit support of many State Governments and it is therefore suggested that the principles contained in the Declaration constitute customary International Law. Just like Stockholm and Rio Declarations, the Hague Declaration has also emphasized on protection of the right to life as the paramount duty of all States through out the world .

The African Charter provides that "All peoples have the right to a general satisfactory environment

favourable to their development" . But the term 'satisfactory environment' is vague and varies from people to people. The right to environment is unique, because it has the characteristics of civil and political rights in so far as it requires states to refrain from activities which are harmful to the environment and has also the features of economic, social and cultural rights in that it requires States to adopt measures to promote conservation and improvement of the environment.

Though the concept of a healthy environment has been frequently discussed in international fora, linkage between a healthy environment and human rights is quite recent. The Suggestion to link the same was made by Reuce Cassim, when he stated that human rights protection should be extended to include "the right to a healthful and decent environment, i.e. freedom from pollution and the corresponding right to pure air. The connection between a healthy environment and human right is logical as a polluted environment infringes upon the enjoyment of fundamental rights such as the right to life and the right to enjoyment of physical and mental health.

Polluted environment affects a large potion of the human community than infringement of other fundamental rights. It was only in 1988 after toxic waste dumping in Africa was discovered for the first time that environmental matters became the real concern to African States. One commentator has described the dumping of the industrial world's waste on African soil as a re-echoing of "What Europe has always thought of Africa: A Wasteland. And the People who live there waste beings". In 1988 the OAU adopted the 'African Convention on the Ban on the Import of All Forms of Hazardous Waste into Africa and the Control of Transboundary Movements of such Wastes Generated in Africa'.

The World Commission on Environment and Development (WCED) acknowledged that every human being has the right to life and to a decent life and basing on this premise evolved the principle of sustainable development. However, the Commission did not clarify whether these are individual rights or collective rights.

The inter-dependence between health and environment was stressed again in 1990 by the UN General Assembly which declared that "all individuals are entitled to live in an environment adequate for their health and well-being". The United Nations Commission on Human Rights also adopted a Resolution in 1990, entitled "Human Rights and the Environment", which again reaffirmed the relationship between preservation of environment and the promotion of human rights. Eventually, in 1992, the Rio Declaration related the rights issue to the broader issue of sustainable development. This is expressed in Principle 1 of the Rio Declaration and it stated that: "human beings are at the centre of concern for sustainable development. They are entitled to healthy and productive life in harmony with nature". International legal framework on climate change has also linked environment and human rights by regarding it as mutually compatible and powerfully reinforcing each other.

INDIAN JUDICIAL APPROACH

In early 1980, the Indian judicial system witnessed emergence of "jurisprudence of masses", which altered the litigation landscape in India. The above mechanism was greatly influenced by the public interest litigation movements in the US. The movement was called as Social Action Litigation in its application in India by some experts. The Supreme Court thereby opened a path of processual justice, in order to reap the benefits of substantive environmental entitlements without enslaving itself to the procedural compulsions. It has also opened upstairs for affirmative action and it may not be an exaggeration to say that the active period of the Indian judiciary is overwhelmingly focused in rendering environmental justice. The historic decision of the Supreme Court in Maneka Gandhi's case triggered a new liberal approach in widening the meaning and content of right to life under Article 21 of the Constitution. As a result, it has now come to be recognized that Article 21 is not only negative, but has even a positive content. In Kharak Singh v. State of U.P., Subha Rao, J. quoted with approval the observations of Field, J. in Munn v. Illinois that "life means something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed".

While evolving new remedies when the traditional statutory remedies failed, the Court has pro-actively and vigorously taken up the cause of social justice and has gone to the extent of

articulating newer social rights such as right to health. The crowning glory of Vincent Panikulangara decision was that health was seen by the Court as part and parcel of life. The activist attitude shown by the court in Consumer Education Research Centre case should be exalted, but at the very same time a question is often posed, did the Court overemphasize right to health as a right of the specific group?. Instead of mere declaration of the right to health as part of the fundamental right under Article 21, the Court could have passed a general order fixing responsibility on the State and its agencies like the local bodies who are in charge of health to take measures necessary to protect the health of the general public. The above course finds support on the reasoning that if health is made a fundamental right, everyone should get the benefit of that right. Although the judgment imposed an obligation up on the State to protect the health of workers, these observations could not have been effectively implemented according to letter and spirit. Despite all its flaws, it has to be admitted that by recognizing right to health as a fundamental right and by issuing suitable directions to the authorities for discharging their duties, the Court had definitely played a decisive role in sketching the contours of the right to health. Judiciary acknowledged that a vibrant constitutional synthesis exists between social justice and individual freedom and in that process, it elevated right to health to the status of fundamental right. In the process, it has articulated access to public health also as part of Article 21. For other reasons also, it is the duty of national courts to verify that violations of human rights recognized by customary international law are not committed by the executive.

The expanded meaning of right to life is wholly justified, for without health of a person being protected and his well being looked after, it would be impossible for him to enjoy other fundamental rights in a positive manner. Thus, the Supreme Court provided a meaningful and just interpretation to the concept of right to life and had referred to the duties of a welfare state. It is worth noticing that international environmental principles in this regard have also gone a long way in sparking the environmental enthusiasm of the Courts and spreading the waves of environmental protection along the length and breadth of India.

JURISPRUDENTIAL PARADIGM FOR JUDICIAL ACTIVISM IN PUBLIC HEALTH

The jurisprudential paradigm for judicial activism and supremacy as a legal proposition is to be located in Dworkin's theory of "constructive interpretation' of legal practice. Dworkin summarizes his theory in this way:

> "Judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by tying to find the best justification they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract".

Thus, according to Dworkin, the moral and political justifications for rules are the principles of political mortality rather than the rules themselves . Supremacists adhere to Dworkin's theory of legal reasoning on the principle that:

"….the legal distribution of public power consists ultimately in a dynamic settlement. …. In the end, it is not a matter of what is, but of what ought to be. The journey to find it is a search for principle, not the unfolding of a rule book".

If Dworkin's account of legal reasoning is correct, judges are under a duty to give legal effect to persuasive political and moral theory. The above approach is seen discernible in the decisions of the Court relating to air quality.

CLEAN AIR AS PART OF RIGHT TO HEALTH AND PUBLIC HEALTH

Health is a fundamental human right indispensable for the exercise of other human rights. Formerly, "health' was defined negatively to mean absence of illness. Radical change occurred with the establishment of WHO which recognized that every human being is entitled to the enjoyment of the highest attainable standards of health conducive to live a life in dignity. This was

followed by other international conventions which also accorded similar 'right status' to health. It, therefore, includes certain components which are legally enforceable. It is now been realized that the right to health can also be pursued through numerous complementary approaches, such as formulation of health policies, or the implementation of health programmes developed by the World Health Organization or the adoption of specific legal instruments.

In the wake of deteriorating air quality, the requirement of the time warrants different cross-sections of the society to voice their concern on the issue at different national and International forums. Some of the major players involved in the process are elected representatives, bureaucrats, technocrats, NGOs and the judiciary. Elected representatives are only concerned about developmental projects, and they exert pressure on bureaucrats as well as on public. Technocrats who strive for air quality protection and Pollution Control Board authorities who act in accordance with letter and spirit of law are branded as anti-development functionaries. In respect of NGOs all cannot be styled as protectors of air quality. There may be some genuine NGOs committed to the cause, but this is not true in respect of all NGOs. Under the present system of regulation, there is no measure to ensure their accountability.

Industries indulge in polluting the air quality by considering air as if their common property. This is also a case of human right violation and an immature and imbalanced human mind is responsible for this. This attitude can be changed only by formulating policies for industries, effective monitoring and mechanism for punishing defaulters. Unfortunately, even international standards have not provided any tangible measures to combat the situation. There is little incentive for complying with international standards, when non-compliance is perceived as better serving national interests. Recently, the US Supreme Court has rendered a trendsetting judgment in Massachusetts v.EPA widening the ambit of the Clean Air Act by holding that Carbon dioxide emissions, largely a by-product of energy production and use, constitutes an air pollutant for the purposes of the Act. The trend now continuing is to bring every air pollutant within the ambit of regulatory control.

For realization of rights, needless to say, public awareness is a must. In the industrially advanced countries, NGOs and public reached a level of awareness, whereby they purchase only green products, boycott polluters. However, in India the response of NGOs and public in arresting the menace of air pollution is not positive and hence such high level of awareness should be implanted in our soil also. The principle of sustainable development cannot be regarded as an unworkable phenomenon and its needs require to be addressed cautiously. Industries should be given incentives and concessions for taking methods to discontinue the production and usage of hazardous or toxic substances, reducing discharges and emissions into the atmosphere and for increasing efficiencies of conversion of raw materials and energy. They should be encouraged to use internationally proven technology with the aid of international funds like Global Environmental Fund. Mechanisms need to be evolved for development of such technologies and for their dissemination at fair prices.

Research and development can play a crucial role in protection of air quality. For this, researchers, policy makers, industrialists and NGOs should come under a common roof.

The awareness regarding health and environment inculcated by the Rio-Declaration should be used to place health at the centre of development and for sustainable development. For this education should be used as an instrument to change the rules relating to the game of life. Educated persons develop physically, economically, mentally, emotionally, morally and socially. Therefore, such persons can map their world, their environment and live a more meaningful and qualitative life.

In the attempt to preserve the quality of air, apart from the jurisprudential values, we should also follow the preaching of Indian culture, rooted on panchabhuta which also includes air. The mantras in Upanishads, Holy Scriptures, Vedas and Vedic dharma should be practiced in lives to make living environment clean and pure, to allow peace and prosperity to prevail over mankind. Their lies the reason all the more for protecting the quality of air, make the planet worth living for all the times and generations to come.

CONCLUSION

A cursory examination of right to health and public health reveals that it has both positive and negative dimensions. Negative aspects include the obligation of States to prevent any action inimical to health and welfare. Similarly, States are also obliged to refrain from withholding information vital to the health and well-being of the population. This can be termed as forming part of civil and political rights and hence, calls upon the State not to evade the fulfillment of the above obligation. The international documents also bring into limelight that right to health is a composite right which means right to highest attainable standard of physical and mental health, human right to equal access to adequate healthcare and health related services, human right to access to safe drinking water and sanitation, human right to a safe and healthy environment, human right to safe and healthy workplace, human right of the child to an appropriate environment for physical and mental development, etc. The vagueness as to the remedial aspects and the ambiguity as far as the obligation imposed on the State reflected in the decisions are the main drawbacks of assertion of the right to health. However, the judiciary has succeeded in projecting that there is right to health, though its endeavours have not conferred a right in its true fundamental sense. In fact, the voyage from Stockholm to the Johannesburg Summit has led to the recognition that human beings are entitled to healthy and productive life in harmony with nature.

With the right to health treated as fundamental right at least in limited sense, it raises the issue of the role of the State in enforcing right to health. The then emerging question is this: Is it limited to providing an environment congenial to public health or making facilities for the same? Is there any obligation for the State to protect public health beyond the extent of its resources? The indication, thus, is that the availability of resources is sometimes a ground but need not be always so. It is not easy to demarcate areas to which resources could be a defense and areas to which it is not a ground. More money on health inevitably means less for education, food, etc. In the absence of large scale international aid or of rapid domestic economic growth, the government's hands are tied and little can be expected of it in response to its obligations under the Covenants. One cannot expect a Government to simply command the resources that would guarantee each citizen an adequate standard of living.

Just because right to health lacks a fixed content, to deprive to it the status of 'right' no longer hold good. However, the dilemma projected by the issue continued for some time with nations contradicting each other, giving weight to their national problems. The prevailing view is that State should undertake to fulfill the essential obligations relating to right to health at least to the extent its resources permit.

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