

# ANDHRA LEGAL DECISIONS

2000 (4)

JOURNAL

ALD

## ARTICLE 21 AND RIGHT TO POLLUTION FREE ENVIRONMENT : A HUMAN RIGHT APPROACH

By

—Dr. SYED MASWOOD, M.A., LL.M., Ph.D., PGDHR,

Principal, Dr. Ambedkar Law College,  
Tirupati, Andhra Pradesh

There are world-wide expectations concerning the quality of life and the dignity of humankind and to effectively safeguard environmental rights. Every man has a right to be guaranteed a pure healthy and decent environment. So the pressing need to protect and promote the environment emerged the right to pollution free environment as new human rights law.

What status does this right to pollution free environment enjoy in the hierarchy of human rights? Has it acquired the character of *jus cogens*. [A pre emptory norm of general international law is a norm accepted and recognised by the States and this norm as a whole from which no derogation is permitted. This can be modified only by subsequent norm of general International Law having the same character.]

### Nature Of Right To Healthy Environment

The right of the individual to healthy environment is an emerging human right. This right evolves around three major aspects of human rights. It is a merger between traditional human rights norms and it is rapidly expanding in the arena of International Law. This merger seeks to achieve the goal of improvement in the quality of life on the Planet Earth. This right also provides remedial measures

to the injured individuals and sovereign States, on the Polluter Pays Principle [Kuldip Singh, J. in *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 at P.2720, and *Indian Council for Enviro legal Action v. Union of India*, AIR 1996 SCW 1069.] The *jus cogens* concept is closely related to the legal norm of social justice. So environmental legal right constitute the norms of *jus cogens*. Any law must be developed in such a way to meet the needs of mankind.

### Solidarity Right

The right to pollution free environment forms a part of the third corpus of human rights that is emerging simultaneously expanding. [Alston, *Conjuring up New Human Rights: A proposal for Quality Control*, 78 *American journal of International Law* 607 (1984)]. The third generation of human rights are rights ERGA OMNES [Rights ERGA OMENS are universal rights of such an importance that all States have legal interest in their protection] and therefore create corresponding duties ERGA OMENS of States towards international community to safeguard these rights. Failure to observe such duties constitutes violation of ERGA OMENS duties. [Duties AERGA OMENS are duties of a State towards international as a whole.]

Right to development and right to peace were the first to emerge as third generation human rights. The emergence of the third generation human rights is based on the philosophy that these rights must be protected if the mankind is to survive on this planet. Environmental pollution is a deadly monster and when it becomes a threat to the survival of life on the planet, the right to safe and decent environment emerged. Other solidarity rights which emerged include right to an adequate food supply, right to the benefits from common heritage of mankind, humanitarian assistance and so on.

Another view is that the solidarity rights are evolving from traditional human rights especially those declared by the Universal Declaration of Human Rights [1948, *First Universal Charter containing 30 Articles*] and the United Nations Human Rights Covenants. [*International Covenant on Civil and Political Rights, 1966; and the Covenant on Economic Social and Cultural Rights, 1966*] In other words, the solidarity rights have their roots in the traditional human rights contained in the Universal Declaration of Human Rights. The jurists who support this view maintain that air pollution, marine pollution nuclear contamination, deforestation, erosion of biodiversity, and extinction of wildlife threatens the survival of life on the planet, Earth. The right to pollution free environment is, therefore rooted in the traditional human right to life.

#### The Right To Life

Right to life is guaranteed in human rights jurisprudence. Right to life is guaranteed by customary International Law, the UDHR and the International Covenant on Civil and Political Rights. The ICCPR proclaims that every human being has the inherent right to life which is *jus cogens* and no derogation by any State Party is

permissible. Right to life has been termed to be nonderogable and pre-emptory right. It has a higher status within the hierarchy of human rights norms. The scope of right to life has expanded to include quality of life, including the right to food, medical care, education and pure and decent environment. The right to living is evolving from the right to life. Thus, environmental protection becomes mandatory to the quality of life on the planet.

The right to pollution free environment is a part of right to life, and these two cannot be separated, because the intrinsic bonds between these two are very strong. It is an undeniable fact that contaminated environment will kill human life. Thus, the right to pollution free environment underlies the right to life, which is meaningless in the absence of pure, decent and healthy life supporting ecosystem, which sustains life.

#### Merger

Human Rights jurisprudence witnesses the merger of solidarity rights and the traditional human rights. [Ramachandran, B., *The Right to Life in International Law, 1985*.] This merger happens particularly in case of right to life, because the status of right to life in the hierarchy of human rights as a pre-emptory norms. And hence, it is not appropriate to classify human rights into three cycles: one on economic, social and cultural rights, second on civil and political rights, and the third on solidarity rights. The remedy is to merge all these three and to expand the competence of Human Rights Committee and to give it the monitoring authority over economic, social, and cultural rights, as well as solidarity rights.

#### Right To Life : Right To Pollution Free Environment

The High Courts and the Supreme Court of India have read the right to wholesome environment as part of right

to life guaranteed in Article 21 of the Constitution of India. Article 21 enunciates that no person shall be deprived of his life or personal liberty except according to procedure established by law. The slow poisoning by the polluted atmosphere caused by environmental pollution amounts to violation of Article 21 of the Constitution. In fact, the right to life guaranteed in Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. Moreover, environmental degradation has disastrous impact on the right to livelihood which is a part of the right to life.

In *Chhetriya Pardusham Mukti Sangharsh Samiti v. State of Uttar Pradesh*, AIR 1990 SC 2060, the Supreme Court held that:

“Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Article 21 of the Constitution. Anything which endangers or impairs by conduct of anybody either in violation or derogation of laws, that quality of life or living by people is entitled to be taken recourse of Article 32 [AIR 1991 SC 420] of the Constitution.”

In *Subhash Kumar v. State of Bihar*, AIR 1993 All. 57, the Supreme Court held that the Constitution under Article 21 includes the right of enjoyment of pollution free water and air for the full enjoyment of life. The Supreme Court clarifies that if any thing endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 for removing the pollution of water or air which may be detrimental to the quality of life.

In similar words the Allahabad High Court held right to life as a fundamental right under Article 21 of the Constitution which includes the right of enjoyment of pollution free water and air for full enjoyment

of life. It is further held that if anything endangers or impairs that quality of life in derogation of laws, a citizen has a right to have recourse to Article 32 of the Constitution for removing the pollution of water, air, which may be detrimental to the quality life.

The Orissa High Court in *Kholamuhana Primary Fishermen Co-operative Society v. State of Orissa*, AIR 1994 Ori. 191, has held that right to life includes right of enjoyment of pollution free atmosphere. This case involves the pollution of Chilka lake and massive degradation of its ecosystem. Chilka is a dream land for poets and creative artists and provides livelihood to about one and half lakh of people - both fishermen and non-fishermen - living in and around Chilka lake. The lake also attracts 132 species of migrating birds from distant places like Siberia and has been an attraction for tourists. The petitioners alleged that the Chilka fishery lease policy of the Government favours non-fishermen and has resulted in sub-letting, illegal encroachment and mafiaraj in Chilka lake. They further alleged that the lease policy of the Government involves massive adoption of extensive and intensive fishery for prawn culture which has resulted in the massive degradation of the eco-system of Chilka. The Orissa High Court held that Article 21 requires the maintenance of pollution free environment, enforcement of which would be a Constitutional duty of the Court. It was held that the lease policy of the Government is aimed at yielding revenue and does not take note of great harm to the ecology to be caused by massive adoption of extensive and intensive prawn culture. The Court observed :

“Prawn dollar like petro-dollar became so much dear that everything else was forgotten. This should not have happened. Revenue cannot be earned by sacrificing larger interest of the society”.

The Court gave directions against the lease policy of the Government, and restored

its pruning, trimming and dressing, rights to the traditional non-fishermen and to subserve public interest and also for maintenance of pollution free environment.

In *Indian Council for Enviro-legal Action v. Union of India*, AIR 1996 SC 1446, the Supreme Court has implemented right to wholesome environment as a part of the right to life enshrined in Article 21 of the Constitution.

A Public Interest litigation has been initiated under Article 32 of the Constitution on behalf of villagers and involves invasion of their right to life because of pollution caused by private chemical companies manufacturing hazardous and inherently dangerous chemicals like Oleum and H acid. [*A concentrated form of sulfuric acid highly toxic in nature.*] H acid is meant for export exclusively and its manufacture gives rise to enormous quantities of highly toxic effluents in particular iron based and gypsum based sludge-which if not properly treated, pose grave threat to mother Earth. These chemical companies have been allowing toxic untreated waste waters to flow out freely. The untreated toxic sludge was also thrown by the chemical companies in the open. The toxic substances percolated deep into the bowels of the Earth polluting the aquifers and the sub-terranean supply of water. The water in the wells and streams turned dark and dirty rendering it unfit for human consumption to the cattle and for land irrigation purposes. The soil became polluted rendering it unfit for cultivation, the major occupation of the villagers. This resulted in disease, death and disaster in the village and the surrounding areas.

The Supreme Court has passed directions to the Union of India, Government of Rajasthan, and Rajasthan Pollution Control Board to compel them to perform their statutory duties. [*Duties under The Water (Prevention and Control of Pollution)*

*Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and The Environment Protection Act, 1986.*] Their failure to carry out their statutory duties affect the right to life of the residents of their village in Rajasthan. The Court found its duty to intervene if the inaction of these authorities resulted in jeopardising the rights of the citizens. The Supreme Court found that the respondent chemical companies were floating the provisions of law and the orders of the authorities which resulted in the infringement of the right to life of the villagers.

The Court held:

“If an industry is established without obtaining the requisite permission and clearances and if the industry is continued to be run in blatant disregard of law to the detriment of life and liberty of citizens living in the vicinity, this Court has the power to intervene and protect the fundamental right to life and liberty of the citizens of the country.”

Bhopal Gas Disaster case, *Charan Lal Sahu v. Union of India*, 1990 (1) SCC 687, is yet another living example of dangerous consequences of industrial gas pollution. The worst ever industrial tragedy took place just after mid night on December 3, 1984. Nearly 40 tons of toxic methylisocyanate (MIC) gas escaped into the atmosphere and caused the death of 3,500 people who lived nearby and injured nearly 2,00,000 people. The Court ordered the Union Carbides to pay huge compensation to the victims.

The Supreme Court held that the right to life and liberty included pollution free environment guaranteed under Article 21. The Fundamental Duties under Articles 48-A and 51-A(g) were also referred to in this decision. Similar view was taken by the Supreme Court in *Sriram Gas leakage case*. [*M.C. Mehta v. Union of India*, AIR 1987 SC 965.]



Preventive measures were ordered by the Supreme Court in *Bangalore Medical Trust v. B.S. Muddappa*, (1991) 4 SCC 54, in which an open space, in Bangalore City, which was reserved for a public park was allotted to a private person to construct a hospital. The residents of this area challenged the allotment on the ground that it was contrary to the law. [*Environment (Protection) Act, 1986*.] It was held that a park is a necessity and not a mere amenity and for maintaining ecological balance in urban areas open space and park is a necessity.

In *Vellore Citizens Welfare Forum v. Union of India*, 1996 (5) SCC 647 at P.658 and 660, AIR 1996 SC 2715 at P.2720 water pollution was caused by the tannery industries in streams and canals through its chemical effluents. The Supreme Court referred to the concept of 'Sustainable Development' and 'Polluter Pays' principle and held that right to healthy environment is a part and parcel of right to life guaranteed under fundamental rights of the Constitution.

In a similar way of the Supreme Court in its judgment *Chameli Singh v. State of U.P.*, 1996 (2) SCC 549 at Para 4, held that Article 21 includes right to food, water, decent environment, medical care shelter and education.

#### Duty to protect environment

The Forty Second Amendment in the Constitution of India, 1976 has introduced Articles 48-A and 51-A(g) which form Directive Principles of State Policy and the Fundamental Duties respectively. Directive Principles guides the Government whereas Fundamental Duties are social obligations.

Article 48-A proclaims that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. The Directive

Principles possess the legal status of being complementary to Fundamental Rights and impose an obligation on the Government, including Courts, to protect the environment. [*T. Damodar Rao and v. The Special Officer, Municipal Corporation of Hyderabad*, AIR 1987 AP 171.]

Article 51-A(g) imposes a duty on every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. Preservation of environment and keeping the ecological balance unaffected is a task which every citizen must undertake as a social obligation. This provision of fundamental duty flows from the World Charter for Nature. [*Adopted by the United Nations General Assembly on 28th October, 1982*.] This Charter recognises the rights of the individuals and non-Governmental entities by providing that all persons shall have access to means of redress when their environment has suffered damage or degradation. The neglect and failure to abide by Articles 48-A and 51-A(g) of the Constitution is nothing short of betrayal of the fundamental law of the State.

Reflecting these views the Allahabad High Court held, in a case, *D.D. Vyas v. Ghaziabad Development Authority*, AIR 1993 All 57, that Article 48A of the Constitution enjoins upon the State to endeavour protect and improve the environment of the country. In this case the petitioner moved a writ petition against the decision of the Urban Development Authority, Ghaziabad, converting the Abu Park into residential plots. Referring Article 48-A, the Court held that it was the duty of the respondents to develop Abu Park as an attractive public park to improve the environment and to enable the general public to benefit from it.

Hence, the right to healthy, pollution free environment is a third generation human

right and is an integral part of right to life guaranteed under covenant of 1966. [*International Covenant on Civil and Political Rights 1966*] International Jurisprudence recognises the right to healthy environment as so fundamental basic and central that no degradation from it is permissible. This makes it obligatory for the States to develop national laws to protect the balance of ecology and environment.

### Suggestions

The challenges of environmental pollution only are met by the adoption of appropriate legislative, administrative and judicial measures. Some of the suggestions, need to be incorporated in the Constitution of India and other related statutes are:

1. *Article 21*: besides the protection of life and liberty, protection of quality environment should be incorporated.
2. *Article 38* : State's commitment to strive to promote welfare of the people by securing social order, in addition to this "by securing quality of life of citizens by guaranteeing environmental order" be incorporated.
3. *Article 43-A*: an additional clause "participation of public in environmental development programme" needs to be added.
4. *Article 47*: similar to commitment to improve public health "State should be charged with an obligation to raise the standards of environment" need to be added.
5. Under Water and Air Acts, the present Boards should be made autonomous with powers to implement their own planning and programmes.
6. Prescriptive easement right to pollute air and water, should be eliminated from the various statute books.
7. Specialised environmental Courts be set up consisting scientific and technical expertise group to facilitate the process of settlement of environmental disputes.
8. 'Environment Protection Fund', agency be created to combat with natural calamities, diminished biodiversity, depleted fisheries, deforestation, growing slums and growing human sufferings.
9. An action plan should be made to promote 'sustainable development' and management of natural and physical resources, so that future generations will be able to reap the benefit.
10. Limitations be imposed statutorily for the use of all sources of radiation like on gaseous, and radioactive pollutants, explosion of nuclear weapons.
11. To bring awareness consciousness and to educate the rural masses; NGOs and Media who have to effectively play their role.
12. Migrate the people from thickly populated areas *i.e.*, from urban areas to rural areas.
13. A scheme must be prepared to develop the rural based ecosystem.
14. To find out device for reutilisation or best possible utilisation of industrial waste and effluents.
15. Environment to be treated as a part of social science and to be included in syllabus as one of the disciplines at secondary, collegiate and university level.

After incorporating the right to healthy environment in Article 21, right to life, there would be an urgent need to introduce the other suggestions as preventive and curative measures in environmental policy.

"If you cannot achieve justice in totality, you can at least minimise injustice."