

ARTICLE-23

All citizens have the right to an environment which is safe (not unsafe?) and not harmful to human health.

The nature of environmental concern is in essence a twofold one: natural resources should be used in a manner which takes cognizance of the country's limited and diminishing resource base as well as the needs of future generations. This is reflected on the globally accepted notions of 'sustainable utilization of resources', 'sustainable development' as well as with the global concern with biodiversity.

The second concern is that the degree of pollution generated in the course of pursuing legitimate economic, development and other human activities should be contained and limited to source as far as is practicably possible. The first aspect is essentially an encouragement of positive proactive action, while the second is negative in that it requires the mitigation of certain negative consequences of human activity.

A fundamental and traditional objection to translating any environmental values or principles into legally enforceable 'rights' is that these are third generation rights and like socio-economic rights should not for practical reasons be enforced by the judiciary. (See discussion on p11 'Social and Economic Guarantees'). In the same way that a court should not in the field of primary education get involved with the question whether such education should include computer training (see discussion on p13), it is not practicable for it to decide whether a squatter community's sewage disposal system is adequate or whether the endangered Cape Platanna frogs' habitat should be destroyed to provide housing.

A further resistance to incorporating environmental provisions is that it is argued that environmental rights will retard necessary economic growth and development both vital to ensure a secure future.

On the other hand environmental concerns fall squarely into the realm of 'polycentric disputes' (described at p12). Very often the issue is one requiring the public environmental interest or facts to be heard and taken into account rather than to prevent a particular development. Judges as we submit particularly well placed to decide competing balances of interest and this warrants inclusion of such clauses in a constitution.

A Fundamental Right. While acknowledging the general arguments against inclusion of environmental rights in a BOR, we submit that the second aspect referred to above, relating to pollution control, is nevertheless appropriate for inclusion as a fundamental right. While acknowledging these arguments, we submit that a fundamental right relating to pollution, the first aspect referred to above, can nevertheless be included as a fundamental right and meet the above resistances for reasons elaborated on below. Other environmental concerns, particularly those relating to resource use and conservation as well as certain other aspects related to pollution control and waste management are in our view more appropriately included as directive principles.

The inclusion of an environmental clause as a fundamental right is justified on the following grounds:

- the right is negatively phrased (like clause 30 of SALC). This implies that people are entitled to live in an environment which meets certain minimum standards rather

than guaranteeing a limitless and bountiful lifestyle. The former conforms with principles of human dignity while the latter is impractical;

- the right is clearly anthropocentric in that it does not protect natural objects per se (qua natural object?) but only insofar as these have utilitarian value. The granting of rights to natural objects has been mooted in some quarters (eg the 'Deep Ecology' Movement), but is not advocated here;

- the right as phrased is linked to human safety and health and not to cleanliness i.e the right to a 'clean environment', we prefer to link the right to the human condition, rather than the general environment as this provides it with a clearer standard (albeit a vague one) and circumvents the more difficult problem of determining what constitutes 'a clean environment' generally.

- finally, the general circumspection clause (art 1) would act as a brake to an open ended right to a 'healthy' environment as the courts could interpret certain types of environments to be appropriate in a 'free and open social democracy' thereby nullifying the floodgates argument.

Directive Principles. The directive principles we advocate fall into two groups: those relating to resource conservation and exploitation and those relating to pollution control. The former takes into account globally recognized norms such as the need for sustainable development and the maintenance of biodiversity. The latter includes generally accepted norms relating to pollution control and waste management such as treatment of waste at source, reduction, re-use and recycling of materials.

Directive Principles. (replace existing clause 11 with the following two clauses)

Article xx

The state shall ensure that natural resources are utilized in a manner which:

- benefits both present and future generations;
- promotes the ideal of sustainable development;
- maintains ecosystems and related ecological processes, in particular those important for food production, health and other aspects of human survival and sustainable development;
- maintains biological diversity by ensuring the survival of all species of fauna and flora, particularly those which are endemic or endangered;
- takes into account the environmental impact of such use preferably by a scientifically based method of environmental evaluation.
- the promulgation, maintenance and development of areas of cultural, historic and natural interest.

Article xx

The State should insofar as waste management and pollution control is concerned actively promote policies for:

- the treatment of waste at source;
- the reduction, re-use and recycling of waste;
- the promotion of clean technologies.