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CAPTRUST

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Codesa Secretariat
PO Box 307
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1600

20 February 1992

Dear Sirs

PROVISION FOR ENVIRONMENTAL AFFAIRS IN THE NEW CONSTITUTION

We refer to the recent Press notice inviting interest groups to make written submissions to Codesa.

The Cape Environmental Trust (Captrust) is a networking body for environmental organisations operating at the local (as distinct from national) level. At present 60 such organisations are registered with it.

We believe it is essential that appropriate provision for the conservation of South Africa's natural and man-made environment be made in the new Constitution. This belief is based upon the fact that conservation, far from being a matter merely of aesthetic or sectional concern, is in fact of vital socio-economic importance to all our peoples. We are fully aware of the great need for proper housing, education and health services and for full employment; but to satisfy these needs at the cost of a degraded environment would in our opinion be counter-productive. In this regard a copy is enclosed of our pamphlet: Why Conserve?

We suggest that the new Constitution should provide for the following:

1. A holistic approach to the environment, the natural and man-made components of which are closely interrelated and together constitute an interactive totality. It is unfortunate that many studies cover only the natural component (eg the recent report of the President's Council on an environmental management system). In fact our cities and towns, and their individual buildings, provide the immediate environment of more than half our total population and this ratio is rapidly increasing. The existing building-stock is a national asset of immense economic value, accumulated over a long period; it is also a social asset, representing values which, although in the past largely sectarian, can in the

future contribute to the heritage of all.

2. The participation of individuals and groups in decision-making on environmental issues by which they are affected. This may indicate the establishment of an ombudsman (as in the Namibian Constitution) or the according of locus standi to individuals (as in the Indian Constitution). Reference is made here to a paper by Mr Jan Glazewski, a copy of which is enclosed.

3. An environmental management system. Pressures for development, already considerable, will vastly increase in the future and it is essential that if a wide range of human needs is to be served, the requirements of conservation and development be reconciled. We believe that the proposal to the President's Council by Dr GT Fagan for an independent central agency represents the most favourable approach in that it lifts environmental affairs from the often divergent interests of the several government departments presently involved in various forms of environmental intervention; a holistic approach is impossible where decision-making is fragmented. A copy of Dr Fagan's diagram illustrating his proposal is enclosed.

4. Within the environmental management system, particular issues related to proposals for new developments should be subject to the 'Integrated Environmental Management' procedure, incorporating an Environmental Impact Assessment (EIA) in respect of all major or possibly contentious proposals.

In conclusion, we wish to express the view that environmental affairs should, as far as possible, be kept outside the sphere of party politics. Dr Fagan's proposal is relevant here. The desire, in some quarters, to politicise the environment is understandable in view of the fact that its benefits have not been equitably distributed in the past. Yet this inequity has itself been party-political in origin and demonstrates the danger of subjecting the environment to the trade-offs and other inducements frequently forming an aspect of party politics. The environment is fundamentally objective and common to all; if its management can be carried out at a disinterested level, this common interest can become a force for co-operation and unity.

Yours faithfully

Graeme Binckes
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WHY CONSERVE?

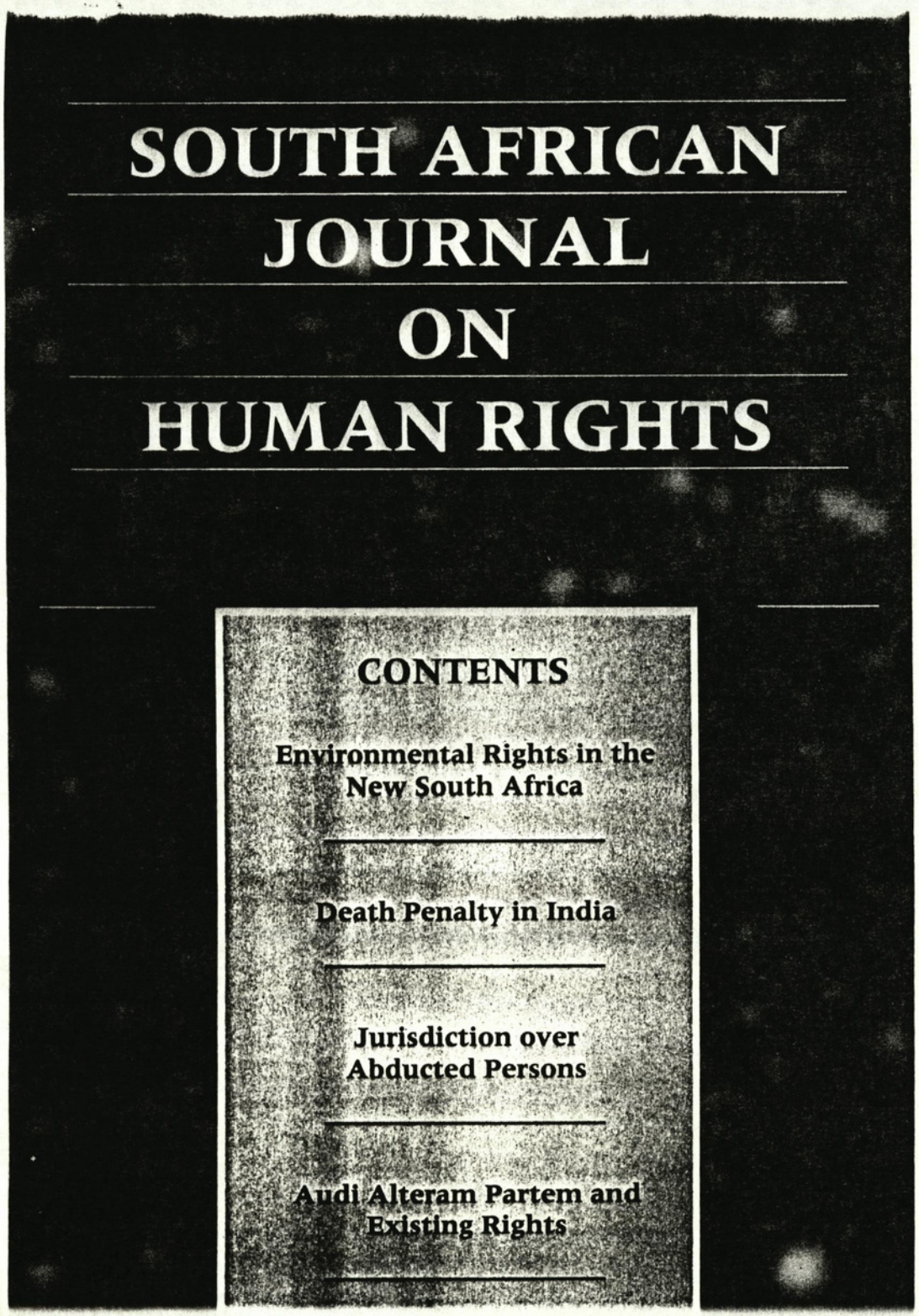
The word 'conservation' is used to describe actions aimed at sustaining the availability of the Earth's limited resources over a long period of time and, if possible, in perpetuity.

Every reasonable person attempts to conserve his or her physical and mental resources, including those of food, shelter, clothing, transport and energy. At the level of the community or nation, the existing building stock, the land under cultivation, transport systems and leisure facilities constitute an exceedingly valuable investment made over a long period. The profligate use of these and other resources is counter-productive, leading to their ultimate exhaustion and to the impoverishment of the erstwhile owners.

This impoverishment is not only financial. The richness of life is also affected by the extinction of animal and plant species and by the loss of significant buildings, forests, rivers, countryside and coastline. Mere lack of concern leads to the environment becoming less varied and therefore more monotonous and to the disruption of the sense of continuity which contributes to the individual's feelings of security and to the stability of communities.

Over a period of time a community impresses its culture on its physical surroundings. This impress may take the form of agriculture or of man-made entities derived from locally-available materials and techniques and includes the implements and accessories of daily life, extending to buildings,villages and towns. The unique character of a human settlement is derived from the balance found between these human interventions and the naturally-existing condition of the area concerned, its flora, fauna and topography; the total environment so created constitutes a 'cultural landscape' redolent of the culture of the community involved. Thus 'cultural conservation' is an essential of social development, leading to variety and continuity of the surroundings and to feelings of 'pride of place' on the part of the inhabitants. Developers who ignore this factor and attempt to make all places the same may well destroy the economic base, the motivation to live or work in an area or to visit it.

Thus we need to conserve for both economic and social reasons, so planning development that it is integrated with its existing natural and man-made context, protecting and improving the quality of life of individuals and communities and reinforcing the culture and character of human settlements.



THE ENVIRONMENT, HUMAN RIGHTS AND A NEW SOUTH AFRICAN CONSTITUTION

JAN GLAZEWSKI*

INTRODUCTION

Environmental problems were not in vogue in 1955 when the drafters of the Freedom Charter formulated many of the constitutional demands which underlie contemporary constitutional debate in South Africa. Three words — 'save the soil' — in a paragraph of the Charter dedicated to the redistribution of land in the country, accordingly reflect the close link which rural communities in particular had to the land and display an insight by the drafters into the ubiquitous, on-going and serious nature of environmental problems. They also provide a basis for an examination of the viability of incorporating environmental provisions in South Africa's anticipated new constitutional structure. The inclusion of these words is remarkable in the light of the fact that although the Charter is fundamentally a social charter, it is also a political document concerned with direct and immediate political aspirations of the majority of the country's people. At the time 'ecological and green' issues were not high on the political agenda although many people depended on working the land for their survival.

This article considers the question whether recent developments towards a new constitutional dispensation in the country ought to nurture the seed sown by the Freedom Charter by including environmental protection provisions in a new constitutional structure. It advocates such inclusion on the basis of a review of developments in international law towards general environmental law norms, an examination of the widening scope of human rights to include environmental considerations and a consideration of some municipal law systems which have incorporated environmental clauses into their constitutions. Persuasive jurisprudential arguments militating against such inclusion on the ground that environmental rights, while theoretically desirable, do not translate into legally enforceable norms, have to be considered. An examination of

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some municipal law systems, particularly India, reveals that constitutional environmental provisions can be utilized in an effective and constructive way. The structure of the Indian and the new Namibian constitution together with a number of recent environmental cases before the Indian Supreme Court, point the way towards the inclusion of environmental interests in a new South African constitutional dispensation. It is suggested that environmental considerations will be doomed unless a serious attempt is made to incorporate distinctive and judically enforceable environmental legal principles in a new constitutional dispensation.[1]

The media in general has devoted much time recently to describing the seriousness and nature of environmental problems and much literature has appeared in this regard. For the purposes of this article, the central environmental problem can be described as comprising three interrelated components.[2]

(a) *Resource conservation and management*. Here the fundamental idea is that renewable resources should be managed on a sustainable basis to ensure that our ecological base is maintained on an ongoing basis. The exploitation of non-renewable resources should take cognisance of the irreversibility of such activity or the notion of intergenerational equity.[3]

(b) *Land-use Planning*. Here the concern is to ensure that environmental and ecological criteria are incorporated into decisions affecting land-use, land development and land redistribution.

(c) *Pollution*. Recent times have seen all three constituent elements of the globe — air, land and water (including the marine environment) being affected by pollution. Here the concern is to ensure that the negative effects of pollution are borne by the producers and not by a sector of society on an inequitable basis. In economic terms, externalities should be minimised. The costs of polluting activities should as far as practicable be borne by the producer rather than be passed on to the community as a whole.

Contemporary global environmental problems have been well summarised in 'Our Common Future'.[4] Its legal follow-up entitled 'Environmental Protection and Sustainable Development' is referred to below.[5]

1 See, generally, D V Cowen 'Towards Distinctive Principles of South African Environmental Law' (1989) 52 *THRHR* 1 at 11.

2 M A Rabie and G Erasmus 'Environmental Law' Ch 4 in R F Fuggle and M A Rabie (eds) *Environmental Concerns in South Africa* (1983).

3 E B Weiss *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989).

4 The World Commission on Environment and Development *Our Common Future* (1987).

5 R Munro and J G Lammers *Environmental Protection and Sustainable Development: Experts Group on Environmental Law of the World Commission on Environment and Development* (1987).

Environmental Protection

International law developments are pertinent in the environmental field as international norms generally permeate and may influence municipal law systems.[6]

An historical development, albeit in the field of 'soft' international law, was the Stockholm Declaration on the Human Environment in 1972. The Declaration can be described as the 'environmental counterpart of the 1948 Universal Declaration of Human Rights'. The Declaration was adopted with acclamation by the 113 participating states. It comprises 26 environmental principles and was adopted by the United Nations Conference on the Human Environment. Principle 1 is relevant as it lays down a fundamental right in respect of the environment. It provides:

> 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment where equality permits a life of dignity and well-being. . . . Man . . . bears a solemn responsibility to protect and improve the environment for future generations'.

Apart from such 'soft' law, the fields of international customary law and international conventions have developed apace in the environmental field. International customary law principles emanate from the Trail Smelter Arbitration (*US v Canada* 1938 and 1941)[7] which concerned the question of state responsibility for transboundary pollution. The activities of a Canadian company involved in smelting lead and zinc resulted in offensive fumes drifting across the border into the United States of America. In applying international law principles to order the Canadian government to ensure the termination of production of the offensive gas, the international tribunal relied, inter alia, on the neighbour law principles — sic utere tuo ut alienum non laedas, which is well known in our South African law having Roman Law origins. It was applied with equal effect in the international sphere.

A host of international conventions has also been proliferating, either directly or indirectly, in the environmental field. The pollution phenomenon experienced particularly in first world states and eastern Europe has resulted in the development of a comprehensive set of international norms and conventions governing various forms of pollution, for example the Montreal Protocol on Substances that Deplete the Ozone Layer which South Africa ratified in 1990. Another category of international environmental conventions deals with resource conservation, for example the Convention on Trade in Endangered Species (CITES) concerning trade in wild animals and products derived from them. South Africa is a

6 See, generally, W P Gormley *Human Rights and the Environment: The need for international cooperation* (1976).

7 D J Harris *Cases and Materials on International Law* (3ed) (1983) 205.

party to about twenty of these international environmental conventions.[8]

Of more relevance here are those conventions which point to an all embracing norm appropriate to being incorporated in a national constitution or bill of rights rather than in a particular field of positive law.

In this regard jurists in the African continent have been active. In response to an initiative by President Mobuto Sese Seko of Zaire, a multi-national group of experts drafted the World Charter for Nature in 1975. It was sponsored by 24 'developing nations' and passed by the General Assembly of the United Nations Charter in 1982.[9] The aim of the Charter is enunciated in its preamble which states 'lasting benefits from nature depend on the maintenance of essential ecological processes and life support systems, and upon the diversity of all life forms which are jeopardised through excessive exploitation and habitat destruction by man'.

The World Conservation Strategy,[10] drawn up by the International Union for the Conservation of Nature, advocates a three-fold environmental goal:

(i) the maintenance of essential ecological processes and life-support systems;
(ii) the preservation of genetic diversity; and
(iii) the promotion of the sustainable utilization of species and ecosystems.[11]

The most recent major development in this sphere has been the publication by the Experts Group on Environmental Law[12] (referred to above) of a draft International Convention on Environmental Protection and Sustainable Development. Article 1 of this draft lays down the following as a fundamental human right: 'All human beings have a fundamental right to an environment adequate for their health and well being.'

International human rights law

The chief international law instruments regulating human rights generally, nine in number, can be categorised as follows:

8 For more examples, see, S Lyster *Wildlife Law* (1985).

9 Harold W Wood 'The United Nations World Charter for Nature: a developing nations' initiative to establish protections for the environment' (1985) 12 *Ecology Law Quarterly* 977.

10 International Union for the Conservation of Nature, World Conservation Strategy, Morges, Switzerland, 1980.

11 Article 1.

12 See Munro and Lammers op cit note 5.

Three global treaties:

1. The Charter of the United Nations.
2. The UN International Covenant on Civil and Political Rights.
3. The UN International Covenant on Economic, Social and Cultural Rights.

Four regional treaties:

1. European Convention for the Protection of Human Rights and Fundamental Freedoms.
2. European Social Charter.
3. American Convention on Human Rights.
4. African Charter on Human and Peoples' Rights.

Two declarations:

1. The Universal Declaration of Human Rights.
2. The American Declaration of the Rights and Duties of Man.

Only the African Charter of Human and Peoples' Rights (the Banjul Charter), adopted by the Organisation of African Unity in 1981 contains an environmental protection provision in its ranks. It provides: 'All peoples' shall have the right to a generally satisfactory environment favourable to their development'.[13]

The widening scope of human rights law

Human rights have been the subject of philosophical thought since the advent of civilisation, but were only articulated by legal systems generally after the American and French Revolutions. Since then the field of human rights law has been in a state of dynamic development.[14] Conventionally, jurists categorise rights into first, second and third generation rights, but this categorisation is by no means definitive as it can be argued that these divisions interrelate and are blurred in practice.

Classical first generation or 'blue' rights essentially cover the civil and political rights of individuals. Their aim is to secure the liberty of the citizen from arbitrary action by the state, and they include, for example, the right to equality, the right to life, the right to freedom of association. Since the American and French Revolutions, these have been included in many bills of rights and national constitutions.

Social, economic and cultural rights, also termed second generation or 'red' rights, in contrast, tend to require positive action by the state. They call on the state to redress social and economic injustices. Although their roots lie in the Russian Revolution, they find their classic articulation in

13 Article 24.

14 P Sieghart *The Lawful Rights of Mankind* (1985).

the Universal Declaration of Human Rights (1948).[15] These provisions include the right to work, the right to form trade unions, the right to food, clothing, housing, medical care, education and so on.

In the last twenty years or so, the ambit of human rights has been further expanded to include a third generation or what have been termed 'People's or Solidarity Rights'.[16] The essence of these rights is that they cannot be exercised by individuals as individuals but rather as group rights. Environmental rights fall neatly into this category, appropriately also termed 'green' rights, because often the essence of environmental problems is to impose the public environmental interest onto individual private rights. We are all too familiar with incidents promoted by a developer wishing to exercise his private development rights, but which clash with the public interest, eliciting much controversy and resistance. The Robberg Marina controversy, the displacement of people in northern Natal and the proposed dune mine at St Lucia are topical examples.

Pollution problems, similarly, are concerned with mitigating the harmful effects of offending substances which are diffused amongst the community as a whole but juxtaposed against the right of individual industrialists to carry on their legitimate activities.[17]

Apart from environmental rights, third generation rights include the right to development (advocated by the Senagalese jurist Keba M'Baye in 1972) and the right to peace. The juxtaposition of the right to development with environmental rights in this category illustrates the inextricable link between environment and development. Environmental protection does not seek to limit development as some would perceive it, but rather seeks to incorporate environmental criteria into development projects.

Municipal law systems

The question arises whether the above developments warrant the incorporation of environmental provisions in a national constitution or bill of rights. If so, certain technical legal problems associated with their practical application must be considered. There is a strong body of opinion in the juridical and political community which is opposed to the idea of second generation rights, let alone third generation rights, being articulated in a constitution or bill of rights.

15 Articles 23 to 28.

16 See, generally, J Crawford (ed) *The Rights of Peoples* (1988).

17 Albie Sachs in 'Towards a Bill of Rights in a Democratic South Africa' (1990) 6 *SAJHR* 1, refers to the right to clean air as a third generation right but it is respectfully submitted that the ambit of the environmental problem is wider than pollution.

From the political perspective some of these rights are too closely associated with the social or welfare state. Thus one reason why the USA withdrew from UNESCO in 1984 was UNESCO's Major Programme XIII for 'Peace, International Understanding, Human Rights and the Rights of Peoples'. The United States made no bones about its dislike for 'peoples' rights'.[18]

From a legal perspective, it has been argued that any value or norm can be transformed into the formula 'freedom of . . .' or 'freedom from. . .'.[19] This trend accordingly has the danger of departing from 'the morally compelling into the twilight world of utopian aspiration'.[20]

Prominent judges have voiced their opposition to the incorporation of such rights into a bill of rights or a constitution.[21] The general view is that if rights are not judicially enforceable they should not be included in a constitutional framework.

Nevertheless, many countries have included environmental provisions in their constitutions.[22] Weiss lists the environmental provisions in over thirty countries of the world which have included these in their constitutions.[23]

A general distinction can be made between three different emphases in these clauses, although some contain all three elements:

- Those clauses which confer an environmental human right. Examples are the Constitution of Spain which provides:

  'Everyone has the right to enjoy an environment suitable for the development of the person. . .'[24]

  and, the Constitution of Peru which provides:

  'Everyone has the right to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature'.[25]

- Secondly, other clauses which require the government to protect natural resources and the environment, either by declaring formal policies or passing specific legislation to this end. These impose a

18 Crawford op cit note 16 preface.

19 SA Law Commission Report (the Olivier Commission) *Group and Human Rights* Working Paper 25, Project 58, (1989) at 417.

20 Ibid at 418.

21 See, for instance, J Didcott 'Practical workings of a bill of rights' in J van der Westhuizen and H Viljoen (eds) *A Bill of Rights for South Africa* (1988) 56–7.

22 See, for example, S Patti 'Environmental Protection in Italy: the emerging concept of a right to a healthful environment' (1984) 24 *Natural Resources Journal* 535.

23 See Appendix B of Weiss op cit note 3.

24 Article 45.

25 Chapter 11, Art 123.

positive obligation on the state and typical examples are the Constitution of Ecuador which provides:

'Without prejudice to other rights . . . the state guarantees: . . . [t]he right to live in an environment free of contamination. It is the duty of the state to be vigilant so that this right should not be affected and to guard nature's preservation. The law will establish the restrictions to exercise certain rights or liberties so as to protect the environment. . .'.[26]

and the Constitution of Spain which provides:

'The public authorities shall concern themselves with the rational use of all natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity'.[27]

- A third set of clauses imposes a duty on the country's citizens to protect and conserve the natural environment. Examples here are the Constitution of Ethiopia which provides:

'Ethiopians have the duty to safeguard and care for socialist property. Ethiopians have the duty to protect and conserve nature and natural resources, especially to develop forests and to protect and care for soil and water resources',[28]

the Constitution of Poland which provides:

'Citizens of the Polish [People's] Republic shall have the right to benefit from the natural environment and it shall be their duty to protect it',[29]

and the Constitution of India which provides:

'Fundamental duties. It shall be the duty of every citizen of India . . . (g) to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures'.[30]

In 1988 the Brazilian Constitutional Assembly adopted a chapter on environmental protection.[31] It is comprehensive, covering all three of the above aspects and is reproduced here in full:

'Everybody has a right to an ecologically balanced environment as it is a good for common use by the people, and as it is essential to a healthy quality of life; the public powers have thus an obligation to defend it, and the collectivity to preserve it, for present and future generations.

Para 1 To guarantee the effective implementation of this article, it is the responsibility of the public powers to:

I. Preserve and restore the essential ecological processes and promote ecologically sound management of species and ecosystems;

II. Preserve the diversity and integrity of the genetic patrimony of the country and control activities in the field of genetic material research and manipulation;

III. Determine, in all units of the Federation, areas to be specially protected, together with their environmental components. Modifications or suppression of the protection of these areas may only be done by law, and any utilization of these areas which would compromise their integrity shall be prohibited;

IV. Submit the installation or construction of facilities which may cause significant degradation to the environment to an environmental impact assessment, which shall be prepared prior to their being initiated, and made fully available. (The siting of installations operating with nuclear reactors shall be decided by law);

V. Control the production, trade and use of techniques, processes and substances which may present a risk to life, to the quality of life, and to the environment;

VI. Promote environmental education at all teaching levels and promote the awareness of the public with regard to the preservation of the environment;

VII. Protect fauna and flora; prohibit by law actions that would put their ecological functions at risk, as well as activities that could lead to the extinction of species or expose animals to cruel treatments.

Para 2 Those exploiting minerals resources have an obligation to restore the environment thereby degraded in accordance with technical means determined by the competent public authorities and by law.

Para 3 Persons and institutions carrying out activities considered to be destructive of the environment, or behaving in such a manner, shall be liable to administrative and penal sanctions, in addition to their obligation to restore the damages caused.

Para 4 The Amazon Forest, the Atlantic Forest, the Serra do Mar, the Pantanal, and the Coastal Zone are National Patrimony and their utilization and the use of their natural resources will be carried out as defined by law, and in such a manner as to ensure the preservation of their environments.

Para 5 The lands which are necessary to the preservation of natural ecosystems whenever they belong to the state, cannot be put to other uses.'

Apart from these countries' constitutions, a number of state legislatures in the United States of America and Canada have passed similar provisions in state constitutions. For example, the constitution of the State of Michigan provides:

'The conservation and development of natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction'.[32]

Calls have been made in the United States for an amendment to the constitution to include environmental rights.[33] However, this has not yet come about probably because of the pluralistic nature of the American constitutional structure and autonomy enjoyed by individual states.

The practical effect of such clauses is now examined with particular reference to India where they have been utilized by that country's judicial system.

26 Title II, Art 19(2).

27 Article 45(2).

28 Part II, Art 55.

29 Article 71 (the name of the country was changed to the Republic of Poland in 1989).

30 Article 51A(g), inserted by the Constitution (42nd Amendment) Act 1976, s11 with effect from 3 January 1977.

31 See 'New Constitution: Chapter on Environment' (1988) 18 (4) *Environmental Policy and Law* 110.

32 Article 4, s 52.

33 See, for example, Lynton K Caldwell 'NEPA Revisited: A call for a Constitutional Amendment' (1989) 18(5) *Environmental Law Forum* 18.

THE INDIAN AND NAMIBIAN CONSTITUTIONS

The Indian Constitution, apart from containing a clause imposing a duty on Indian citizens to protect the environment,[34] also imposes a positive duty, albeit not in very strong terms, on the state to:

> 'Endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country'.[35]

The environmental clauses in the Indian Constitution are contained in a specific part of the Constitution entitled 'Directive Principles of State Policy'.[36] In this context, they are clearly set apart from that part of the Constitution devoted to fundamental rights.[37] The latter embodies the traditional civil and political or first generation rights, and reflects the philosophies contained in the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights, referred to above.

By way of contrast, the 'Directive Principles of State Policy' are devoted to economic and social rights or third generation rights. They may be identified with the International Covenant on Economic, Social and Cultural Rights.

The nature and legal consequences of this distinction needs to be considered as it raises fundamental questions about the nature of rights, particularly regarding group rights or third generation rights. Eminent jurisprudentialists have argued that public goods, in this context environmental public goods such as clear air, cannot be made the subject of individual rights.[38] The question arises whether they can be formulated as group rights. If so, how are such rights enforced? If they cannot be expressed as rights, are there other ways of ensuring the promotion of environmental values in a constitutional framework?

The incorporation of environmental clauses in many world constitutions appears to be an acknowledgement that some kind of group or communal right in public goods does exist. But, the nature of such a group right is not entirely clear.[39]

In the context of the Indian Constitution, Pathak points out that the fundamental rights contained in Part III are self-operating ones, that is to say they are rights which operate of themselves, and do not require any legislative or other initiative by the state to enable them to be exercised.[40]

34 See text to note 30.

35 Article 48A.

36 Part IV.

37 Part III.

38 N MacCormick *Legal Right and Social Democracy*(1982) 143.

39 See, generally, J Crawford op cit note 16.

40 R S Pathak 'Human Rights and the Development of Environmental Law in India' 1988 *Commonwealth Law Bulletin* 1171.

Their distinguishing factor is that 'they are human rights enforceable in a court of law'. In contrast the third generation type rights enumerated in Part IV of the Constitution are human rights 'which by their nature cannot be regarded as self-operating'. The resources required for realising them would be such as to necessitate the intervention and authority of the state and therefore the need for state legislation. He refers to these as 'Programme Rights' the implementation of which needs to be programmed according to the resources of the state, the programme itself being shaped by the policies and priorities set by the state. These two types of rights complement each other but may also conflict. Such conflict reflects the need to redress the imbalance resulting from the traditional emphasis on individual human rights, for example, rights in property at the expense of group rights.

The distinction in the Indian Constitution between Fundamental Rights and Directive Principles is reinforced by a clause which provides:

> 'The provisions contained in this Part [ie the Part dedicated to Directive Principles] shall not be enforceable by any court, but the principles then laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws'.[41]

In the environmental context this clause seems to attempt to emphasise that the state is responsible for furthering such interests. However, the Indian Supreme Court has relied on the environmental clauses to justify certain decisions in cases which have come before it. Some of these cases are outlined below. In this light it is difficult to comprehend what is meant by 'not enforceable by any court' because the courts have used these clauses at least as guiding principles.

The recently adopted constitution of Namibia, Africa's newest independent state, also contains environmental provisions which appear to follow the Indian model. The Namibian Constitution follows the Indian example by differentiating between 'Fundamental Rights' and 'Principles of State Policy' in different parts of the constitution[42] but does not contain a clause equivalent to the Indian one preventing enforceability. It provides:

> '*Promotion of the Welfare of the People*'
>
> The state shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: . . .
>
> (l) that the ecosystems, essential ecological processes and biological diversity of Namibia are maintained and living natural resources are utilized on a sustainable basis for the benefit of all Namibians, both present and future; in particular the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.'[43]

41 Article 37.

42 Chapters 2 and 11 respectively.

43 Article 95 (l).

Enforcement of these provisions is to some extent provided for in the powers of the Ombudsman (established under Chapter 10). Included in the functions of the Ombudsman is:

> 'the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia'.[44]

It is too early to predict what practical effect these clauses will have in the Namibian context but, as mentioned above, the environmental provisions in the Indian Constitution have been used creatively by that court and attention is now turned to these.

INDIAN CASES

The case of *Tellis v Bombay Municipal Corporation*[45] which came before the Indian Supreme Court in 1986, is a pertinent illustration of the role which third generation rights provided for in a constitution, can have in judicial proceedings. The petitioners were pavement and slum dwellers in the city of Bombay. They had been forcibly evicted and their pavement and slum dwellings had been demolished by the respondents, the Bombay Corporation. They relied on, inter alia, Art 21 of the Indian Constitution which provides a fundamental right that:

> 'No person shall be deprived of his life or personal liberty except according to the procedure established by law.'

The petitioners argued that their 'fundamental right to life' had been infringed and that the procedure established under the Act (the Municipal Corporation Act, 1988) which the Corporation had acted under, was unfair. They also pointed out that they chose to live there because it afforded them better work opportunities than elsewhere in the region.

The question arose whether the fundamental 'right to life' conferred by Art 21 included the 'right to livelihood'. In deciding that this was so, the court relied on certain directive principles in the Constitution. In particular it relied on an Article which provides that all citizens have the right to an adequate means of livelihood,[46] and a further Article which provides that the state shall make effective provision for securing the right to work 'within the limits of its economic capacity'.[47] The court used these directive principles to come to the petitioners' aid and was not constrained by the Article, referred to above, which provides that Directive Principles are not enforceable by any court.

44 Article 91(c).

45 1987 *Commonwealth Law Reports* (Constitutional and Administrative LawReports) 351.

46 Article 39.

47 Article 41.

The environmental Directive Principles of the Indian Constitution have also been invoked by the Indian Supreme Court in certain cases involving ecological issues.

In *Ambica Quarry Works v State of Gujarat*[48] the court was called upon to resolve a conflict between an individual petitioner's claim who applied to renew a quarrying lease under certain mineral legislation and a prohibition contained in the Forest (Conservation) Act, 1980 which prohibited quarrying operations in a 'reserved' forest. The Act was passed subsequent to the granting of the original lease. In coming to a decision favourable to the environment, the court took cognisance of the fact that ecological preservation and environmental protection represented a larger social interest. The court held that the law's obligation to society must outweigh the obligation to an individual.

In *M C Metha v The Union of India*[49] the court was called upon to enforce the provisions of the Water (Prevention and Control of Pollution) Act of 1974 as well as the Environment Protection Act of 1986. At issue was the pollution of the Ganges River by the uncontrolled and untreated effluent discharged by leather tanneries located on its banks. The petitioner, a social worker, was not a riparian owner but simply a person who was interested in protecting the lives of people using the water of the Ganges River.[50] The court took the far-reaching step of closing those tanneries which had ignored previous notices to take elementary steps for the treatment of industrial effluent. The court, relying on the environmental provisions in the constitution, held that 'closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people' (at 482).

In *Kinkri Devi v State of Himachal Pradesh*[51] the petitioners sought an order that a mining lease for the excavation of limestone granted by first respondent (the State of Himachal Pradesh) to third respondent be cancelled. The petitioners alleged that the mining activity posed a threat to adjoining lands, water resources, pastures, forests, wildlife, ecology and the environment generally. The court noted the need for industrial growth and development but held that this must be from the point of view 'of its impact on the ecology'.[52] The court ordered the respondents to file a report by a return day as to the environmental effects of the mining activity. In justifying its decision, the court held 'there is both a constitutional pointer to the state and a constitutional duty of the citizen not only to protect, but also to improve the environment and to preserve

48 Pathak op cit note 40 at 1177–8.

49 1987 (4) SCC 463.

50 Public interest litigants have been granted standing by the Indian Supreme Court, see, for example, *S P Gupta v Union of India* AIR 1982 SC 149.

51 AIR 1988 (Him Prad) 4 at 8.

52 At 6.

and safeguard the forests, the flora and fauna, the rivers and lakes and all other water resources of the country'.

These Indian cases are significant because they appear to recognise that cognisance must be taken of environmental and ecological factors in disputes before it. This is despite the clause quoted above stating that these provisions are 'not enforceable by any court'. It appears that while the courts may not have recognised an 'environmental right', they acknowledge that an environmental norm should influence decisions before it.

South Africa

The present South African constitution does not include any provisions relating to the environment or its protection. Calls for the incorporation of environmental norms into the South African legal system however have been made.[53] The draft Bill which preceded the current Environment Conservation Act (73 of 1989) contained a far-reaching section which was akin to an environmental bill of rights.[54] It provided:

'National Policy for Environmental Conservation.
Statement of principles.
This Act shall be interpreted and implemented so as to advance and uphold the following principles:

(a) Every inhabitant of the Republic of South Africa is entitled to live, work and relax in a safe, productive, healthy and aesthetically and culturally acceptable environment.
(b) Every human generation has a moral responsibility to act as trustee of its natural environment and its cultural heritage in the interests of succeeding generations.
(c) Every person or institution has an obligation to consider carefully all activities which may have an influence on the environment and to take all practicable measures to ensure the protection, maintenance and improvement of both the natural and the man-made environment.
(d) The preservation of natural systems and the processes is essential for the meaningful survival of all life on earth.
(e) Living natural resources are renewable and can be utilised indefinitely with discretion, while non-living natural resources are finite and their utilisation can only be extended by judicious use and maximal re-use.
(f) Co-ordinated and purposeful research is essential to gain and apply knowledge of all the facets of the environment and the interaction between man and environment, in order to reconcile provision for the reasonable needs of man with effective protection of the environment.
(g) Comprehensive and sustained tuition and interpretation and dissemination of information is essential for the establishment of rational utilisation of the environment.'

53 See, for instance, P D Glavovic 'Human Rights and Environmental Law: the case for a conservation bill of rights' (1988) 21 *CILSA* 52, and B van Niekerk 'An Ecological Norm in South Africa' (1975) 92 *SALJ* 78.

54 *GG* 11013 of 30 October 1987.

A further pertinent provision was a section of the Bill which provided:

'All other laws shall be interpreted and administered in accordance with the principles and policy contained in this Act.' [55]

Had this been incorporated into the final Act it would have had far-reaching implications from both a constitutional law and environmental concern point of view. The eventual Act incorporates a diluted version of the above in that it grants the Minister a discretionary power to declare a policy with respect to many of the matters enumerated above. Although the Council for the Environment has produced a well-formulated document entitled 'An Approach to a National Environmental Policy and Strategy for South Africa',[56] the Minister has not, to date, exercised his discretionary powers in this regard and declared a statutory policy as he is entitled to do under the Act.

In November 1990, the Constitutional Committee of the ANC released a working document entitled 'A Bill of Rights for a New South Africa'[57] which has been published for general debate and comment. Article 12 which deals with Environmental Rights provides:

'Article 12. Environmental Rights

1. The environment, including the land, the waters and the sky, are the common heritage of the people of South Africa and of all humanity.
2. All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.
3. In order to secure this right, the state, acting through appropriate agencies and organs shall conserve, protect and improve the environment, and in particular:
   (i) prevent and control pollution of the air and waters and degradation and erosion of the soil;
   (ii) have regard in local regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimising of harmful effects on the environment;
   (iii) promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability;
   (iv) ensure that long-term damage is not done to the environment by industrial or other forms of waste;
   (v) maintain, create and develop natural reserves, parks and recreational areas and classify and protect other sites and landscapes so as to ensure the preservation and protection of areas of outstanding cultural, historic and natural interest.
4. Legislation shall provide for co-operation between the state, non-governmental organisations, local communities and individuals in seeking to improve the environment and encourage ecologically sensible habits in daily life.

55 Section 3(3) of the Bill, *GG* 11013 of 30 October 1987.

56 Council for the Environment, October1989, Pretoria.

57 Reproduced in (1991) 7 *SAJHR* 110.

5. The law shall provide for appropriate penalties and reparation in the case of any direct and serious damage caused to the environment, and permit the interdiction by any interested person or by any agency established for the purpose of protecting the environment, of any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause irreparable damage to the environment.'

The inclusion of this Article in the working document is welcomed. It contains all three of the elements referred to above, namely an environmental human right, an obligation on the state to undertake positive environmental action and a duty on citizens to defend it. The latter also could have included a duty to protect and conserve the environment. The practical effect of these clauses will depend on the constitutional framework and institutional machinery which is created to implement its provisions.[58]

Conclusions

Developments in international law, the trend towards widening the parameters of human rights law and examples set by specific municipal law systems, in particular India, and more recently Namibia, all point the way for a new South African constitution to include environmental protection provisions in its ranks. Continuing environmental degradation against the background of escalating population numbers, urbanization, inevitable land redistribution and anticipated economic development necessitates the incorporation of environmental considerations into a future political and constitutional dispensation.[59]

From a constitutional law perspective, the challenge is to seek legal mechanisms to overcome valid jurisprudential arguments against the incorporation of third generation rights, including environmental rights in a new constitution. Sachs has pointed out that the majority of lawyers would argue that however useful legislative environmental duties might be these cannot be expressed as positive rights.[60] Other jurisprudentialists have pointed out that public goods, such as a healthy environment, are not capable of being the subject of individual rights. However, it can be argued that the traditional distinction between first and second generation rights is not clear-cut and often is blurred in reality.

It has been shown that mechanisms can be introduced into a new constitutional structure to overcome these legitimate reservations. The Indian example has shown that by making a distinction between fundamental rights and directive principles in a constitution, some of the obstacles are diffused. While obligations to protect the environment could be incorporated as directive principles, it is submitted that these would be greatly enhanced by including as a fundamental right, the right to a healthy environment. The *Tellis* case[61] demonstrates how a fundamental right can be elaborated on by a directive principle. In the environmental cases quoted, the directive principles have been used in conflicts before the supreme court to redress the imbalance between individual private rights on the one hand and public rights on the other. In this regard environmental problems invariably reflect the need to reconcile competing claims of an individual's fundamental right, for example to develop his property, with the public need for environmental protection. By incorporating environmental directives, a court is assisted in its task to determine the point of balance between individual rights and collective rights.

Constitutional environmental provisions could also be enhanced by other indirect means: the deformalisation of judicial structures and the possible introduction of an ombudsman and lands tribunal could each include an environmental component.[62] The classic administrative law problems handicapping environmental groups namely locus standi in judicio requirement, obtaining reasons for administrative decisions and the limitations of review proceedings could also be ameliorated by constitutional environmental provisions.[63] Simultaneously, cognisance should be taken of the fact that environmental considerations often do not marry easily into the adversarial legal system. Any constitutional environmental provisions should accordingly also take into account the Integrated Environmental Management procedure[64] which seeks to move away from the confrontational to an integrated form of environment management.

Before environmental clauses are incorporated into a constitution however, obstacles more general than legalities will have to be overcome. It has been pointed out that there is a fundamental difference in the environmental perceptions and attitudes of blacks and whites and that 'for the majority of black South Africans, whose lives and aspirations are dictated by the struggle for survival, environmental considerations are regarded with indifference or hostility'.[65]

Furthermore, environmental issues are inherently linked to the land question. Perhaps a more important challenge is to cultivate an

58 See, also, *What is a Constitution?* A discussion document prepared by the ANC Constitutional Committee, Centre for Development Studies, University of the Western Cape (1990).

59 See, for example, B Huntley, R Siegfried and C Sunter *South African Environment into the 21st Century* (1989).

60 Albie Sachs *Protecting Human Rights in a New South Africa* (1990) 139.

61 Supra note 45.

62 G Budlender 'The Environment and the People: Resolving Conflicts over Limited Resources', Paper delivered at the Conference on Human Rights, the Environment and a New Constitution, Lawyers for Human Rights, Macauvlei, May 1990.

63 All public interest litigants enjoy locus standi under the Indian Constitution; as regards review, the Namibian Constitution greatly widens the scope of review — see Art 18 of the Constitution.

64 *Integrated Environmental Management in South Africa* Council for the Environment, Pretoria, April 1989.

65 B Desai 'An Environmental Policy for the Pan Africanist Congress of Azania' Discussion document, Environmental Film Workshop, University of Witwatersrand, October 1990.

ecoculture where environmental issues are seen as a truly national concern.[66]

Lawyers, ecologists and environmentalists need to enter into a co-operative effort to list a set of all embracing, concrete principles which will regulate activities which may have an effect on the environment and encourage the wise use of the country's resources.[67] Some groundwork was laid in the draft bill which preceded the Environment Conservation Act. It provided a set of environmental principles to which all other laws had to adhere. These did not find their way into the final Act in this form. The ANC has incorporated environmental clauses in its draft constitution and this is welcomed.

It appears that international law developments, both in the environmental and human rights field, and the examples set by many country's constitutions, particularly India, as well as local developments, are being taken seriously. A new South African constitution will hopefully include such provisions for the benefit of all its people.

66 See, generally, Sachs op cit note 60.

67 SA Chamber of Business (SACOB) has released a 'Charter of Economic, Social and Political Rights in South Africa' *The Star* 18 May 1990.

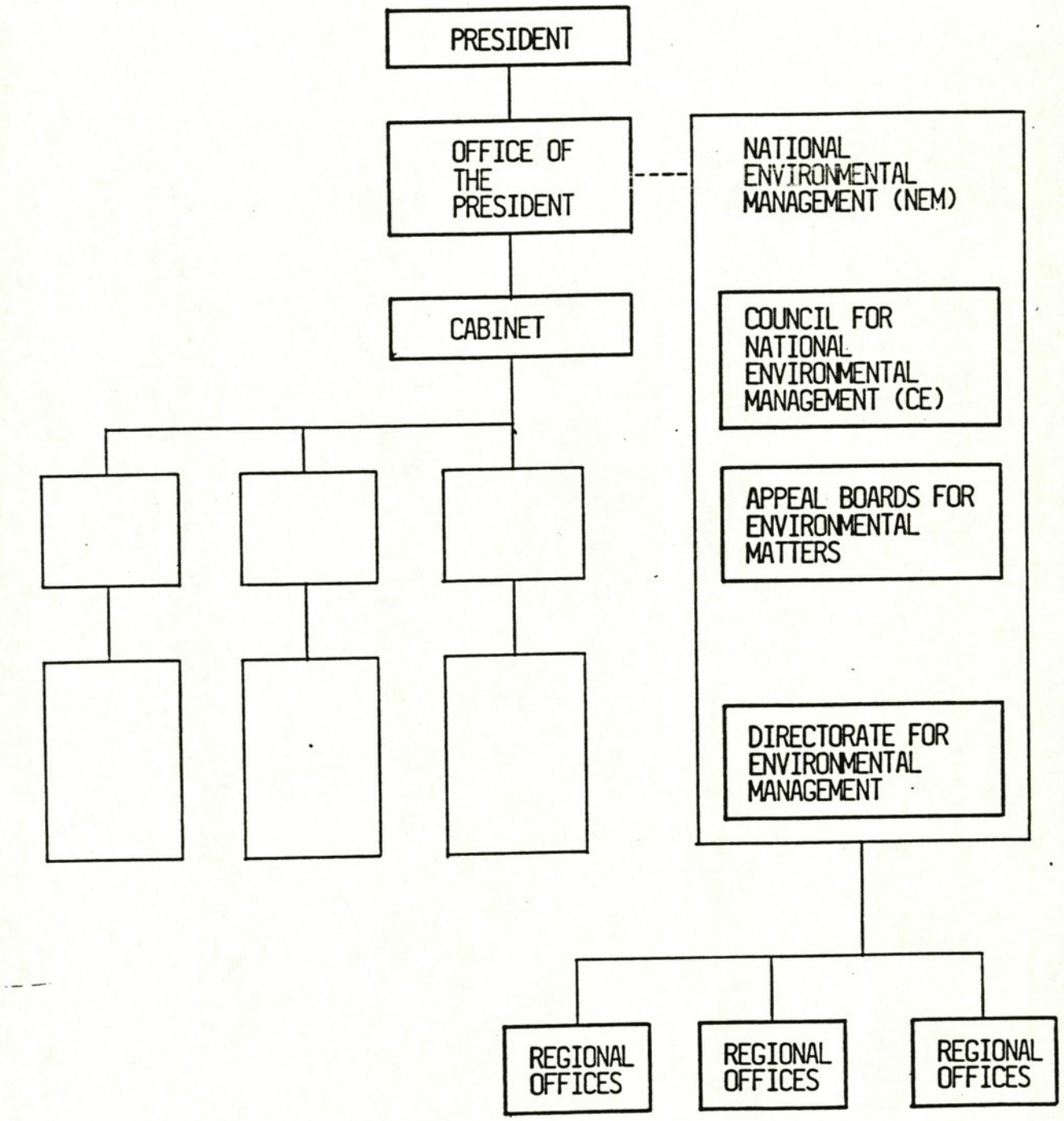

DIAGRAM 6: MODEL 2 INDEPENDENT CENTRAL AGENCY