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Technical Committee on
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Multi-Party Negotiating Forum
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16-09-1993

Dear Mrs Morgan

ENVIRONMENTAL PROVISIONS IN A NEW CONSTITUTION FOR SOUTH AFRICA

A copy of the document **Environment in the New South Africa** produced by the Council for the Environment was submitted to you on 25 March 1993. A further copy is attached for your convenience.

In that document my Council suggested the inclusion of both an environmental fundamental right and certain directive principles in the constitution and/or bill of rights. My Council is pleased to note that a recent draft proposal by the Technical Committee on Constitutional Issues does contain an environmental clause, namely:

"Every person shall have the right to an environment which is safe and not detrimental to his or her health or well-being".

However, the view of the Council for the Environment is that this is too narrow for environmental needs. The reference to 'safe' is also inappropriate as it implies a number of aspects which are not pertinent to the environment. The following wording is therefore proposed -

"Every person has the right to a sustainable environment which is also not detrimental to health or well-being and has the duty to protect it".

The Afrikaans translation should read as follows -

"Elke mens het die reg tot 'n volhoubare omgewing wat ook nie nadelig is vir gesondheid en welsyn nie en het die plig om dit te beskerm".

The term 'sustainable' is well established internationally in the context of environmental conservation and management (see documents of the International Union for the Conservation of Nature and the United Nations Environmental Programme) and is universally preferred.

Apart from this fundamental right we also reiterate here the directive principles which we believe should appear somewhere to underpin the environmental clause, namely:

The state and its citizens shall ensure that the land and natural resources are regulated and utilised 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 such as Integrated Environmental Management as developed by the Council for the Environment;
- * promotes the promulgation, maintenance and conservation of areas of cultural, historic and natural interest.

The state shall insofar as waste management and pollution control is concerned actively promote policies for:

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

Yours sincerely



P ROELF BOTHA
CHAIRMAN: COUNCIL FOR THE ENVIRONMENT

**ENVIRONMENT
IN THE NEW
SOUTH AFRICA**

**COUNCIL
FOR THE
ENVIRONMENT**



THE COUNCIL FOR THE ENVIRONMENT URGENTLY CALLS ON ALL THE PARTIES INVOLVED IN THE CONSTITUTIONAL NEGOTIATION PROCESS TO RECOGNISE THE IMPORTANCE OF A HEALTHY ENVIRONMENT, BOTH NATURAL AND BUILT, IN ANY CONSTITUTIONAL DISPENSATION AND TO HAVE THIS FIRMLY ENSHRINED IN OUR NEW CONSTITUTION AND BILL OF RIGHTS



COUNCIL FOR THE ENVIRONMENT

Dear political leader

You are now charged with the responsibility of being part of the negotiation process towards the new South Africa. The Council for the Environment believes that you will discharge this serious duty in a most responsible way. To assist you in performing this duty the Council submits this document to you as a reminder that there is one subject which can be ignored only to our detriment; that is the **ENVIRONMENT** and its care and wise management. We believe that the environmental considerations set out in this paper merit your very serious attention. We trust that you will accept them and introduce these environmental aspects as a high priority into the agenda. You will also find that a remarkable consensus already exists amongst all political groups on the need for effective environmental care in the new South Africa.

The document consists of two parts. The first part deals with the environmental considerations that need to be included in the agenda for the negotiation process and which need eventually to be reflected in a new constitution and bill of rights.

The second part answers the question: how should the environment be provided for in the new constitution? After dealing with some background on the issue, which shows that valuable groundwork has already been done, it makes firm recommendation in terms of environmental law.

This section includes extracts from the reports of the South African Law Commission, position papers and policies of various political groups in South Africa, existing constitutions elsewhere and the government's recent proposal for a Charter for Fundamental Rights.

Hopefully this document will contribute towards the inclusion of environmental considerations as an important part of the new dispensation, and in the formulation of a new constitution for South Africa.

March 1993

ENVIRONMENT IN THE NEW SOUTH AFRICA

On 2 February 1990 the State President, Mr F W de Klerk, launched the Republic of South Africa on a path of negotiation towards a constitutional dispensation for the new South Africa.

Since then much rhetoric and discussion focused on the question: how should the new political system look? Negotiations were broken off but are now being resumed. It seems that the debate will highlight the division of functions between first and second tier authorities; especially if a regional dispensation in some kind of federal model gains support.

Whatever the case, the Council for the Environment will not involve itself in the political debate, but has a firm belief that environmental considerations should receive a high priority in the negotiation process. Without it no political agreement can be successful and no new South Africa can be achieved. For this reason the Council for the Environment considers it essential to place the following environmental considerations on the agenda for negotiations for priority attention.

ENVIRONMENTAL CARE IS A NATIONAL RESPONSIBILITY OF THE STATE

It is the national responsibility of the state, as will be vested in any future government of the new South Africa, with the support of all its citizens, to protect all the resources in the natural and human environment, and to adequately manage them for sustained use by present and future generations of South Africans. In this way a new government will do its duty to contribute towards a safe, healthy and quality living environment for all.

ENVIRONMENTAL CARE MUST BE INCORPORATED AS A CENTRAL GOVERNMENT FUNCTION IN THE NEW CONSTITUTION

State responsibility for environmental management and its related functions must be accommodated constitutionally as a major central government responsibility first and foremost, irrespective of the degree of devolution and/or delegation that may be necessary or achievable in practice.

STRIKE A BALANCE BETWEEN NATIONAL ENVIRONMENTAL POLICY AND REGIONAL ENVIRONMENTAL EXECUTIVE FUNCTIONS

A balance should be sought between national policy and guidelines for developmental programmes and functional autonomy at regional level. Whatever model evolves, central government must realise that the sound management of the environment, both natural and built, is of vital importance and therefore requires overall policy guidelines, as well as monitoring and control, at national level, while allowing and creating regional and local government executive functions as far as this is advisable and attainable.

STRIKE A BALANCE BETWEEN ENVIRONMENT AND DEVELOPMENT

The government's environmental obligations involve a position of stewardship and ultimate responsibility for the compromises that need to be struck between environmental constraints and the need for economic growth and development. Government must acknowledge the maxim:

**"A PROSPEROUS ECONOMY CANNOT BE ACHIEVED
ON A BANKRUPT ENVIRONMENT"**

CENTRAL GOVERNMENT MUST BE A WATCHDOG

The protection of the environment in a future constitutional dispensation will require a watchdog to ensure that all regions implement a sound sustainable environmental management policy. Adequate safeguards must be entrenched at the highest level to ensure that South Africa achieves sustainable development. Policy formulation and a process of accountability must be the responsibility of central government while the management of certain functions are delegated to regional authorities.

ATTAIN EQUITABILITY IN ENVIRONMENTAL RESOURCE USE

The future government must ensure, through its environmental actions, that equitability from sustained resource use be attained through a fair distribution amongst individuals and groups comprising the South African society of both environmental costs and benefits.

CENTRAL GOVERNMENT IS RESPONSIBLE FOR INTERNATIONAL ENVIRONMENTAL LINKS AND OBLIGATIONS

The new South Africa will be part of global environmental action. It will need to shoulder its responsibility for the protection and management of the world's environmental commons: the oceans, air, water, climate and control of pollution and hazardous wastes. It is clearly a central government responsibility to be responsible for international treaties, protocols and conventions. The first step must be to assume responsibility, in co-operation with other Southern African states, for implementing international treaties and conventions which have environmental implications.

THE VAST MAJORITY OF SOUTH AFRICANS WILL LIVE IN THE BUILT ENVIRONMENT

It is of concern that the critical planning and management of the built environment, where 90% of the people will soon live and work and play, is being neglected in our constitutional negotiations. It may be of little consequence to reach consensus on a constitutional dispensation unless there is acknowledgement of the need to improve the quality of life in the built environment.

ECO-TOURISM WILL ONLY FLOURISH IN AN ATTRACTIVE ENVIRONMENT

Environmental care built into a future political dispensation will also ensure the sustained use of South Africa's resources to support a growing eco-tourism industry. When one looks at the foreign revenue generated by the tourist industry in the past years, and the projections in terms of foreign revenue and creation of employment opportunities, one realises what a major role-player this industry is in our national economy. 90% of visitors come to see our wildlife, scenery and cultural history. Future governments must therefore recognise that the management of our environment, both built and natural, is of the utmost importance for a flourishing eco-tourism industry, and thus for the prosperity of the country.

SOUND CRITERIA FOR REGIONAL DELIMITATION IS VITAL

A possible new regional dispensation for South Africa should be based upon regions delimited according to sound criteria applicable to the South African human and natural environment. Such criteria should include cultural, settlement, economic, historic, administrative, political, language and environmental considerations.

ENVIRONMENTAL CRITERIA ARE FUNDAMENTAL FOR DETERMINING REGIONAL BOUNDARIES

Environmental considerations suggest that regional delimitation should be based upon ecological principles. These include physiographic and fauna and flora characteristics; the living and non-living resource base; and the total natural system functioning as a unified ecosystem within watersheds and river basins. Human ecological systems are discernible as settlements on every scale of the built environment. Their spatial distribution in centralised or linear systems, especially as vast urban conglomerations, should be a fundamental environmental criterium in delimiting regions.

SOUTH AFRICA - A WORLD IN ONE COUNTRY

The Council for the Environment calls on all South Africans and its present and future leaders to accept responsibility for the sustained use and protection of South Africa's astonishing riches in its natural and human resources. The diversity of these resources has led to the phrase "South Africa - A World in One Country".

DIVERSITY: A WORLD IN ONE COUNTRY

- *Diversity of climate, topography and ecosystems.*
- *Over 20 300 species of flowering plants, 800 of birds, 243 of mammals, 84 of amphibians and 286 of reptiles.*
- *580 protected areas covering 72 million hectares.*
- *Tourism industry worth R3 150m, 35% forex.*
- *Diversity of peoples, languages and cultures.*

(South African Environments into the 21st Century Brian Huntley, Roy Siegfried and Clem Sunter, Tafelberg, 1989)

OUR ENVIRONMENTAL WEALTH UNIFIES

Many of these resources are unique and cannot be found anywhere else on earth. They contain the healing balm, the curative potion through which South Africa can make a new beginning. Herein lies the chance to build bridges of understanding, create jobs, earn foreign revenue, uplift society and fulfil expectations. Through our natural and cultural resources a mechanism is provided for conserving what is sacred, and for handing down a heritage that in the end will be one of which we can all be proud. We must realise the importance of developing a feeling amongst all our people of belonging to the same nation. What better way than to develop a respect for the environment and its protection and its wise use.

THE COUNCIL FOR THE ENVIRONMENT URGENTLY CALLS ON ALL THE PARTIES INVOLVED IN THE CONSTITUTIONAL NEGOTIATION PROCESS TO RECOGNISE THE IMPORTANCE OF A HEALTHY ENVIRONMENT, BOTH NATURAL AND BUILT, IN ANY CONSTITUTIONAL DISPENSATION AND TO HAVE THIS FIRMLY ENSHRINED IN OUR NEW CONSTITUTION AND BILL OF RIGHTS.

ENVIRONMENTAL PROVISIONS IN A NEW SOUTH AFRICAN CONSTITUTION

THE NATURE OF ENVIRONMENTAL CONCERNS AND THEIR TRANSLATION INTO CONSTITUTIONAL PROVISIONS

The nature of environmental concerns to be translated into constitutional norms are two-fold. The first is that natural resources be used in a manner which takes cognisance of the country's limited and diminishing resource base as well as the needs of future generations. This is reflected in the globally accepted notions of **sustainable utilisation 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 be contained and limited 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 detrimental consequences of human activity.

Environmental clauses should as a starting point take into account the above environmental concerns. In a legal context any suggested clauses should also take cognisance of three broad categories of environmental rights identified in an analysis of the constitutional environmental provisions of a number of other countries. These are:

- *clauses which confer an environmental human right,*
- *clauses which require government to protect natural resources and control pollution and*
- *clauses which impose obligations on the country's citizens to conserve and protect the environment*

However, before dealing with the legal question on how these concerns need to be incorporated in the constitution, it should be pointed out that there are a number of categories of human rights.

CATEGORIES OF HUMAN RIGHTS

It is generally customary to distinguish between three categories of human rights, usually referred to as three generations of human rights, which can be described as follows:

First generation rights

These are generally the traditional group of human rights which are essentially political, civil and procedural rights which focus on the individual. Typical examples are the right to life, property and freedom of movement. They have also been described as negative rights in that they require the state to desist from certain actions and also as 'liberty orientated rights'.

Second generation rights

These are social, economic and cultural rights and are also referred to as positive rights because they require the state to be proactive in specific areas. Examples here are the right to work, to education, to adequate food, clothing, housing and medical care.

Third generation rights

Although there is considerable uncertainty as to what is understood by third generation rights, it is generally accepted that they vest in a group rather than individuals. Included here are the right to peace and development and environmental rights. Environmental rights have been recognised as having the clearest content of third generation rights.

The debate in South Africa mainly concerns the question which rights

should be protected in a bill of rights and to what extent should these include second generation rights. The traditional resistance to including second generation rights in a bill of rights is that they are not enforceable, or in legal terms, not justiciable.

One way this problem has been confronted is to differentiate in a Bill of Rights between Fundamental Rights on the one hand and Directive Principles on the other. Thus for example, the Indian and Namibian constitutions include second and third generation rights (including environmental provisions) in a separate part of the constitution to that containing first generation (or fundamental) rights.

The term 'Bill of Rights' is used in different senses. It may refer to a separate document to the constitution which is normally broader in that it sets out the various institutions of government. However, the constitution can include within it a Bill of Rights as is the case of Namibia. It should also be borne in mind that in some contexts the term 'Bill of Rights' is used in a narrow sense to refer only to fundamental, justiciable rights but it is also used more broadly to include directive principles as well.

THE LEGAL QUESTION

Given these developments which point to the likelihood of environmental provisions indeed being included in a new constitution, the following questions arise:

- *what is the most desirable form and content of environmental clauses in a bill of rights?*
- *what other clauses in a constitution are likely to promote the cause of environmental conservation? and*
- *how should these be steered through the constitutional making channels to ensure that they find their way in an appropriate formula in a future bill of rights?*

This document focuses on the first two questions and does not deal with the third as this is a political undertaking and the responsibility of the negotiation forum and its participants.

It is therefore recommended that the environmental provisions be included in a new constitution in a two-fold manner: as a **FUNDAMENTAL RIGHT** and as **DIRECTIVE PRINCIPLES**.

More particularly, it is submitted that the environment can be included as a fundamental right. Other aspects can be incorporated as directive principles. In any event all three of the above elements should be included. The clauses proposed are as follows.

A FUNDAMENTAL RIGHT

A fundamental right environmental clause may be worded as follows:

All citizens have the right to a decent and pollution-free environment and fair and equitable access to the nation's resources.

It should be noted that:

- the right could be negatively phrased. This would imply 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 would be more difficult to enforce;
- the right is 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 is not linked to human safety and health. It may be considered preferable to link the right to the human condition, rather than the general environment as this would provide it with a clearer standard (albeit a vague one). However, the emphasis here is on the environment rather than human health.
- if the ultimate Bill of Rights includes a general circumspection clause this would act as a brake to an open ended right to a 'healthy' environment. The courts could interpret certain legislative provisions to be appropriate and others not. This would nullify the floodgates argument.

DIRECTIVE PRINCIPLES

The directive principles advocated fall into two groups: those relating to resource conservation and exploitation and those relating to pollution control. The former takes into account globally recognised 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. The following directive principles are accordingly suggested.

The state and its citizens shall ensure that the land and natural resources are regulated and utilised 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 such as Integrated Environmental Management (IEM) as developed by the Council for the Environment;
- promotes the promulgation, maintenance and development of areas of cultural, historic and natural interest.

The state shall 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.*

OTHER CONSTITUTIONAL CLAUSES RELEVANT TO THE ENVIRONMENT

Three general administrative law areas relevant to environmental concern can be identified here: the problem of **locus standi**, the question of access to information and the question of furnishing of reasons for administrative decisions concerning the environment.

Locus standi

The Law commission considered the question of locus standi thoroughly, albeit not in the context of environmental concern, and came to the

conclusion that locus standi in terms of which any interested individual may act on his own behalf or on behalf of a particular group or class of persons without having to prove actual injury should be recognised in the bill of rights. It thus recommends the following clause:

'Any individual, juristic person or association has the capacity on behalf of himself or herself or itself or any other individual or any group or class of persons to test, by virtue of the provisions of this Bill, the validity of any legislative, executive or administrative act by applying to the appropriate Division of the Supreme Court for a declaratory order, notwithstanding the fact that the applicant is able to prove only an indirect interest or indirect prejudice.'

It is submitted that the cause of environmental concern will be served by the inclusion of such a clause. Care should, however, be taken that the provision for locus standi not be abused to the detriment of real environmental issues.

Access to information

Many environmental cases are frustrated because of lack of access to critical information. In this regard the European community has recently promulgated a directive on the right of access to environmental information. A possible wording may be:

All men and women shall be entitled to all the information necessary to make effective use of their rights as citizens or consumers.

Such a clause would serve the environmental interest and should also be promoted in the constitutional negotiations.

Reasons for decisions

Another general area of administrative law which is of particular importance in the field of environmental concern is that of reasons for administrative decisions. In this regard the SALC Report recommends the inclusion of the following article:

'Rules of natural justice.'

Everyone has the right to have the rules of natural justice applied in administrative proceedings and actions in which, on the grounds of findings of fact and of law, the rights or legitimate expectations of an individual or a group are infringed or likely to be infringed, and in such cases every person having an interest in the matter has the right to be furnished on demand with the reasons for a decision.'

Again environmental interests will be well served by the inclusion of such a clause.

RECOMMENDATIONS

In summary, the main recommendations are:

THAT THE ENVIRONMENTAL PROVISIONS BE INCLUDED IN A CONSTITUTION BOTH IN THE FORM OF A FUNDAMENTAL RIGHT AND IN THE FORM OF DIRECTIVE PRINCIPLES. THESE SHOULD INCLUDE ALL THREE ELEMENTS OF ENVIRONMENTAL RIGHTS AND DUTIES PREVIOUSLY IDENTIFIED. THEIR ULTIMATE FORM AND CONTENT WILL, HOWEVER, BE DEPENDENT ON THE FINAL FORM THAT A NEW CONSTITUTION TAKES.

● AT OTHER RECOMMENDATIONS, MAINLY FALLING INTO THE REALM OF ADMINISTRATIVE LAW, BE ENCOURAGED AND PROMOTED FOR INCLUSION IN A NEW CONSTITUTION.

BIBLIOGRAPHY

1. South African Law Commission, Working Paper 25, Project 58, Group and Human Rights, August 1989, 491pp.
2. South African Law Commission, Interim Report, Project 58, Group and Human Rights, August 1991, 702pp.
3. P D Glavovic, Human Rights and Environmental Law: the case for a conservation bill of rights (1988) 21 CILSA 52.
4. Albie Sachs, Protecting Human Rights in a New South Africa (1990) 139.
5. J I Glazewski, The Environment, Human Rights and a New South African Constitution (1991) 7 (2) SAJHR 167-184.
6. M A Rabie, A Constitutional Right to Environmental Integrity: A German Perspective (1991) 7 (2) SAJHR 208-214.
7. H Corder et al, A Charter for Social Justice: a contribution to the South African Bill of Rights debate
8. B van Niekerk, An Ecological Norm in South Africa (1975) 92 SALJ 78.
9. E Brandl and H Bungert, Constitutional Entrenchment of Environmental Protection: a comparative analysis of experiences abroad 1992 (16) "The Harvard Environmental Law Review" 1
10. Government proposal, A Charter for Fundamental Rights February 2, 1993

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**RAAD VIR DIE OMGEWING
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Die reg dat redes vir besluite gegee moet word

'n Uitbreiding van die omvang van administratiefreg wat van besondere voordeel vir die omgewing sal wees, is om te vereis dat redes vir administratiewe besluite gegee moet word. In die verslag van die Suid-Afrikaanse Regskommissie word die volgende klousule aanbeveel:

Billikheidsreëls

Individue en groepe persone wie se regte en regmatige verwagtinge deur enige administratiewe verrigting of optrede aangetas mag word, is daarop geregtig dat die reëls van billikheid in so 'n administratiewe proses toegepas word en dat redes op aanvraag gegee word vir besluite wat geneem is.

Die insluiting van so 'n klousule sal eweneens die belang van die omgewing dien.

AANBEVELINGS

Opsommend is die belangrikste aanbevelings die volgende:

DAT BEPALINGS OOR DIE OMGEWING IN DIE GRONDWET VERVAT WORD, BEIDE AS BASIESE REGTE EN AS RIGTINGGEWENDE NORME. DIE BEPALINGS MOET AL DRIE DIE KOMPONENTE VAN OMGEWINGSREGTE EN VERPLIGTINGS WAT HIERBO GEMELD IS INSLUIT. DIE BEWOORDING DAARVAN EN DIE VORM WAT DIT SAL INNEEM SAL AFHANG VAN HOE DIE NUWE GRONDWET DAAR UITSIEN.

DAT DIE ANDER AANBEVELINGS TEN OPSIGTE VAN ADMINISTRATIEFREG OOK AANVAAR WORD VIR INSLUITING IN 'N NUWE GRONDWET.

BRONNELYS

1. Suid-Afrikaanse Regskommissie, Werksdokument 25, Projek 58, Group and Human Rights, Augustus 1989, 491 pp.
2. Suid-Afrikaanse Regskommissie, Interimverslag, Projek 58, Group and Human Rights, Augustus 1991, 702 pp.
3. P D Glavovic, Human Rights and Environmental Law: the case for a conservation bill of rights (1988) 21 CILSA 52.
4. Albie Sachs, Protecting Human Rights in a New South Africa (1990) 139.
5. J I Glazewski, The Environment, Human Rights and a New South African Constitution (1991) 7(2) SAJHR 167 - 184.
6. M A Rabie, A Constitutional Right to Environmental Integrity: A German Perspective (1991) 1(2) SAJHR 208 - 214.
7. H Corder et al, A Charter for Social Justice: A contribution to the South African Bill of Rights debate.
8. B van Niekerk, An Ecological Norm in South Africa (1975) 92 SALJ 78.
9. E Brandl en H Bungert, Constitutional Entrenchment of Environmental Protection: A comparative analysis of experiences abroad. "The Harvard Environmental Law Review" 1
10. Regeringsvoorstel, A Charter for Fundamental Rights, 2 February 1993.

wingsbestuur (GOB) wat deur die Raad vir die Omgewing ontwikkel is

- die identifisering, instandhouding en ontwikkeling van gebiede van kulturele, historiese en natuurlike waarde bevorder.

Aangaande afvalbestuur en besoedelingsbeheer sal die staat deur die bepaling van beleid daadwerklike steun gee aan

- *die verwerking van afval waar dit ontstaan*
- *die vermindering, hergebruik en hersiklering van afval*
- *die bevordering van skoon tegnologie*

ANDER KLOUSULES WAT OMGEWINGSBESKERMING BEVORDER

In die administratiefreg is daar drie gebiede wat vir die omgewing van besondere belang is. Hulle is die kwessie van **locus standi**, **die reg van toegang tot die feite waarop besluite baseer is** en **die reg om voorsien te word van redes vir administratiewe besluite**.

Locus standi

Die Regskommissie het die individu se reg op locus standi in breë verband eerder as net met verwysing na die belang van die omgewing deeglik oorweeg. Dit het tot die slotsom geraak dat die reg tot locus standi uitgebrei behoort te word sodat 'n belanghebbende individu in eie reg of namens 'n spesifieke groep of klas persone, kan verskyn sonder dat van hom vereis word om werklike nadeel te bewys. Hierdie reg behoort dan in die Handves van Menseregte erken te word. Dit word dus aanbeveel dat die volgende klousule by die handves ingesluit word:

"Enige individu, juridiese persoon of vereniging het ingevolge hierdie handves die reg om self of namens enige ander individu, groep of klas persone die geldigheid van enige wetgewende, uitvoerende of administratiewe handeling te toets deur by die toepaslike Afdeling van die Hooggeregshof aansoek te doen vir 'n verklarende bevel, al sou die applikant slegs 'n indirekte belang of nadeel kan bewys."

Daar word aan die hand gedoen dat omgewingsbelang deur so 'n klousule gedien sal word. Daar sal egter gewaak moet word teen die misbruik van die klousule wat daardeur werklik wesenlike omgewingsaangeleenthede kan benadeel.

Die reg van toegang tot inligting

Besluitneming oor omgewingsaangeleenthede word dikwels in die wiele gery omdat belangrike inligting daarvoor nie vryelik beskikbaar is nie. Om hierdie probleem die hoof te bied het die Europese gemeenskap onlangs 'n direkief aangekondig waarin die reg tot toegang tot inligting oor die omgewing vervat is. So 'n klousule kan moontlik soos volg bewoord word:

Almal sal geregtig wees op insae in die inligting wat benodig word om hulle regte as landsburgers en verbruikers doeltreffend uit te voer.

Dit is 'n verdere klousule wat die omgewingsbelang sal dien en die insluiting daarvan in 'n handves behoort dus tydens grondwetlike onderhandelinge bevorder te word.

Hierdie dokument konsentreer op die eerste twee vrae. Die derde vraag word nie behandel nie aangesien dit 'n politieke aangeleentheid en dus die verantwoordelikheid van die politiek onderhandelaars is. In beginsel word aanbeveel dat omgewingsvoorsiening in 'n nuwe grondwet tweeledig moet wees. Eerstens as 'n **FUNDAMENTELE REG** en tweedens as **RIGTINGGEWENDE NORME**. Omgewing moet dus as 'n fundamentele reg verskyn en ander aspekte as norme. In elk geval behoort al die elemente voorsien te word. Die volgende klousules word voorgestel.

'N FUNDAMENTELE REG

Die omgewingsklousule hiervoor kan soos volg lui:

Alle burgers is geregtig op 'n omgewing wat skoon en besoedelvry is en op 'n redelike en billike toegang en gebruik van die land se hulpbronne.

Daar moet op gelet word dat:

- hierdie reg wat positief gestel is, ook negatief omskryf kan word sonder om die betekenis daarvan te verander. Ingevolge hierdie bepaling is die mens geregtig om te leef in 'n omgewing wat aan sekere minimum standaarde voldoen sonder om 'n onbeperkte en oorvloedige lewenstyl, wat in elk geval moeilik afdwingbaar, is te waarborg. Deur hierdie basiese reg te verleen, word aan die beginsels van menswaardigheid voldoen;
- die reg antroposentries is. Natuurlike voorwerpe word slegs beskerm tot die mate wat dit vir die mens van waarde is. Die toekenning van regte aan natuurlike voorwerpe, soos wat die 'Deep Ecology'-beweging voorstaan, word nie aanbeveel nie;
- menslike veiligheid en gesondheid word nie deur hierdie regte beskerm nie. 'n Duideliker maatstaf kan moontlik geskep word deur die reg aan die mens s'n eerder as aan die omgewing se welsyn te koppel. Dit word egter

aanbeveel dat die klem hier op die omgewing eerder as op die mens geplaas word;

- die beskerming wat deur hierdie reg verleen word is wel wyd. 'n Algemene klousule in die Handves van Menseregte wat 'n beperkende uitleg magtig sal egter die misbruik van hierdie reg voorkom of temper.

RIGTINGGEWENDE NORME

Die rigtinggewende norme wat aanbeveel word kan in twee groepe verdeel word: dié wat betrekking het op die bewaring en gebruik van hulpbronne en dié wat betrekking het op die beheer van besoedeling. Eersgenoemde aanvaar norme wat wêreldwye steun geniet soos die vereiste vir volhoubare ontwikkeling en die handhawing van biodiversiteit. Laasgenoemde steun ook op algemeen aanvaarde norme vir die beheer van besoedeling en afvalbestuur soos vermindering van afvalstroom, hergebruik en hersiklring. Die volgende rigtinggewende norme word dus aanbeveel:

Die staat en sy burgers moet verseker dat grond en natuurlike hulpbronne gebruik word op 'n wyse wat:

- huidige sowel as toekomstige geslagte bevoordeel
- die ideaal van volhoubare ontwikkeling bevorder
- ekosistels en verwante ekologiese prosesse onderhou, in besonder waar dit nodig is vir voedselproduksie, gesondheid, menslike oorlewing en volhoubare ontwikkeling
- biologiese diversiteit verseker deur fauna en flora te beskerm, veral waar dit endemies of bedreig is
- die invloed op die omgewing inagneem deur die gebruik van wetenskaplike stelsels soos die prosesse van Geïntegreerde Omge

KATEGORIEË VAN MENSEREGTE

Dit is gebruikelik om tussen drie kategorieë, of soos dit gewoonlik genoem word, drie generasies van menseregte te onderskei. Hulle is die volgende:

Eerste generasie regte

Dit is gewoonlik die tradisionele menseregte. Dit is die politieke, siviele of prosedure regte wat die individu beskerm. Die reg tot bestaan, eiendom en vryheid van beweging is tipiese voorbeelde van hierdie regte. Aangesien van die staat vereis word om hom te weerhou van sekere optrede, is dit al as negatiewe regte of vryheid-georiënteerde regte beskryf.

Tweede generasie regte

Hierdeur word sosiale, ekonomiese en kulturele regte verleen. Aangesien hierdie regte van die staat vereis om pro-aktief te handel, is dit al as positiewe regte beskryf. Sulke regte sluit byvoorbeeld in die reg op werk, voeding, en die reg tot voldoende voedsel, klere, behuising en mediese sorg.

Derde generasie regte

Daar bestaan heelwat onsekerheid oor 'n presiese omskrywing van derde generasie regte. Dit word egter algemeen aanvaar dat die regte in 'n groep eerder as 'n individu vestig. Hierdie regte sluit in die regte tot vrede, vooruitgang en omgewingsregte. Dit word algemeen aanvaar dat duideliker hou reeds gegee is aan omgewingsregte as aan enige van die ander derde generasie regte.

Die debat in Suid-Afrika wentel om die vraag welke regte in 'n handves

van menseregte beskerm moet word en welke tweede generasie regte daarby hoort. Die tradisionele weerstand teen die insluiting van tweede en derde generasie regte in 'n handves van menseregte berus daarop dat dit moeilik afdwingbaar, of regstegnies gesien, moeilik beregbaar is.

Een manier waarop hierdie probleem aangespreek is, is om in 'n Handves van Menseregte te onderskei tussen Basiese Regte enersyds en Rigtinggewende Norme andersyds. Die Indiese en Namibiese grondwette het, byvoorbeeld, die tweede en derde generasie regte (wat omgewingsbepalings insluit) in 'n ander deel van die grondwet ingesluit as dié deel waarin die eerste generasie regte vervat is.

Die begrip "Handves van Menseregte" word op verskillende maniere gebruik. Soms is dit 'n dokument wat los staan van die grondwet. Dit is dan gewoonlik meer omvattend omdat dit bepalinge bevat wat van toepassing is op al die regeringsinstellings. Die Handves van Menseregte kan ook deel vorm van die grondwet soos in Namibië. Soms dra die woorde 'Handves van Menseregte' 'n beperkte betekenis waar dit slegs verwys na basiese, beregbare (eerste generasie) regte. Soms dra dit 'n wyer betekenis waar rigtinggewende norme ook ingesluit word.

DIE REGSVRAAGSTUK

Dit is waarskynlik dat omgewingsmaatreëls ook in die Handves van Menseregte van 'n nuwe grondwet ingesluit sal word. Hieruit ontstaan die volgende vrae:

- *Hoe moet die omgewingsklousules lui en in watter vorm moet dit vervat word in 'n handves van menseregte?*
- *Is daar ander klousules wat moontlik die beskerming van die omgewing kan bevorder wat in die grondwet vervat kan word? en*
- *hoe moet hierdie klousules deur die grondwetlike onderhandelingsproses geloods word om te verseker dat dit in 'n aanvaarbare vorm in 'n toekomstige handves van menseregte sal verskyn?*

DIE AARD VAN OMGEWINGSOORWEGINGS EN DIE INLYWING DAARVAN IN GRONDWETLIKE BEPALINGS

OMGEWINGSBEPALINGS IN 'N NUWE SUID-AFRIKAANSE GRONDWET

Die aard van omgewingsoorwegings wat in die grondwet vervat moet word is tweeledig. In die eerste plek moet die aanwending van natuurlike hulpbronne die land se beperkte en verminderende hulpbronbasis sowel as die behoeftes van toekomstige geslagte in ag neem. Hierdeur word erkenning verleen aan die internasionaalerkende beginsels van volhoubare gebruik van hulpbronne en volhoubare ontwikkeling sowel as die bewaring van biodiversiteit. In die tweede plek moet die besoedeling wat deur ekonomiese ontwikkeling en ander menslike aktiwiteite veroorsaak word, beperk word as dit nie gestuit kan word nie. Die eerste uitgangspunt moedig positiewe, skeppende optrede aan terwyl die tweede die nadelige gevolge van menslike aktiwiteite probeer voorkom of beperk.

Hierdie omgewingsbelange moet in die omgewingsklousules van die grondwet beslag kry. Die omgewingsklousules moet in wetsterme drie kategorieë van omgewingsregte omvat. Die kategorieë is onder meer ontleen aan omgewingsbepalings in die grondwette van etlike ander lande. Hulle is:

- *klousules wat omgewingsregte verleen;*
- *klousules wat van die staat vereis om natuurlike hulpbronne te beskerm en besoedeling te beheer; en*
- *klousules wat landsburgers verplig om die omgewing te bewaar en te beskerm.*

Voordat die regspraak oor die metode vir die insluiting van omgewingsbelang in die grondwet egter beantwoord word, is daar basiese kategorieë van menseregte wat eers aangestip moet word.

OMGEWINGSKRITERIA IS FUNDAMENTEEL TOT DIE VASSTELLING VAN STREEKSGRENSE

Omgewingsoorwegings vereis dat streeksafbakening op ekologiese beginsels gebaseer moet word. Dit sluit fisiografiese en fauna- en flora-eienskappe in, die lewende en nie-lewende hulpbronbasis en totale natuurlike stelsels soos in rivieropvanggebiede. Menslike ekologiese stelsels moet 'n fundamentele omgewingskriterium wees in die afbakening van streke. Dit is onderskeibaar as menslike vestiging op alle vlakke van die beboude omgewing. Hierdie ruimtelike verspreiding word gekenmerk deur gesentraliseerde of liniêre stelsels, veral as onderdele van groot stede en metropole.

SUID-AFRIKA - 'N WêRELD IN EEN LAND

Die Raad vir die Omgewing beroep hom op alle Suid-Afrikaners en sy huidige en toekomstige leiers om verantwoordelikheid te aanvaar vir die volhoubare gebruik en beskerming van Suid-Afrika se wonderlike rykdom van natuurlike en menslike hulpbronne. Dié diversiteit van hierdie hulpbronne word vervat in die slagspreuk "Suid-Afrika - 'n wêreld in een land".

DIVERSITEIT: 'N WêRELD IN EEN LAND

- *Diversiteit van klimaat, topografie en ekosistels.*
- *Meer as 20 300 spesies van blomplante, 800 van voëls, 243 van soogdiere, 84 van amfibieë en 286 van reptiele.*
- *580 beskermde gebiede op 72 miljoen hektaar.*
- *Toerismebedryf ter waarde van R3 150 m, 35% buitelandse valuta.*
- *Diversiteit van mense, tale en kulture.*

(South African Environments into the 21st Century Brian Huntley, Roy Siegfried en Clem Sunter. Tafelberg, 1989)

ONS OMGEWINGSRYKDOM VERENIG

Baie van ons hulpbronne is uniek en kan nêrens anders op aarde gevind word nie. Daarin is opgesluit die genesende balsem, die helende medisyne waardeur Suid-Afrika 'n nuwe begin kan maak. Dis 'n geleentheid om brûe van begrip te bou, werksgeleenthede te skep, buitelandse valuta te verdien, die gemeenskap op te hef en verwagtinge te bevredig. Ons natuurlike en kulturele hulpbronne is 'n middel om te bewaar wat onskendbaar is, en 'n gemeenskaplike erfenis daar te stel waarop ons almal trots kan wees. Ons moet besef hoe belangrik dit is om 'n gevoel onder ons mense te ontwikkel dat ons almal aan dieselfde nasie behoort. Daar is nie 'n beter wyse om dit te kry nie as om 'n respek vir die omgewing, sy bewaring en gebruik te ontwikkel.

DIE RAAD VIR DIE OMGEWING DOEN 'N ERNSTIGE BEROEP OP ALLE PARTYE WAT BY DIE GRONDWETLIKE ONDERHANDELINGS-PROSES BETROKKE IS OM DIE BELANGRIKHEID VAN 'N GESONDE OMGEWING, BEIDE IN DIE NATUURLIKE EN IN DIE BEBOUDE OMGEWING, IN ENIGE GRONDWETLIKE BEDELING TE ERKEN EN OM DIT IN ONS NUWE GRONDWET EN HANDVES VAN MENSEREGTE TE VERSKANS.

DIE SENTRALE REGERING MOET AS WAGHOND OPTREE

Nadat die beskerming van die omgewing in 'n toekomstige staatkundige bedeling verskans is, moet die staat die rol van waghond vervul en toesien dat die streke 'n gesonde volhoubare omgewingsbestuursbeleid implementeer. Voldoende beskermingsmaatreëls moet op die hoogste vlak ingestel word ten einde te verseker dat Suid-Afrika volhoubare ontwikkeling kan verwesenlik. Die verantwoordelikheid van die sentrale regering is beleidsformulering en die skep van 'n struktuur vir verslagdoening. Die bestuur van sekere omgewingsfunksies word aan streeksowerhede gedelegeer.

STREEF NA 'N REGVERDIGE VERDELING VAN OMGEWINGSHULPBRONNE

Die toekomstige regering moet deur sy omgewingsaksies verseker dat die gebruik van volhoubare hulpbronne regverdig versprei word tussen individue en groepe. Sodoende moet omgewingskoste en -voordele die hele Suid-Afrikaanse gemeenskap toekom.

DIE SENTRALE REGERING IS VERANTWOORDELIK VIR INTERNASIONALE OMGEWINGSKAKELING EN VERPLIGTINGE

Die nuwe Suid-Afrika sal deel wees van internasionale omgewingsoptrede. Die land sal sy verantwoordelikheid moet aanvaar vir die beskerming en bestuur van die wêreld se gemeenskaplike omgewings: die oseane, lug, water en die beheer van besoedeling en gevaarlike afval. Die sentrale regering is verantwoordelik vir internasionale ooreenkomste, protokols en konvensies. Die eerste stap tot samewerking is om volle gesamentlike verantwoordelikheid te aanvaar saam met die suidelike Afrikastate vir die toepassing van internasionale omgewingskonvensies.

DIE OORGROTE MEERDERHEID VAN SUID-AFRIKANERS SAL IN DIE BEBOUDE OMGEWING WOON

Dit is 'n bron van kommer dat die kritiese beplanning en bestuur van die beboede omgewing, waar 90% van die bevolking binnekort sal leef, werk en speel, in ons grondwetlike onderhandelings verwaarloos word. Konsensus oor 'n grondwetlike bedeling sal van min waarde wees sonder die basiese erkenning dat gewerk moet word aan oplossings vir die verbetering van mense se lewensgehalte in die beboede omgewing.

EKOTOERISME SAL SLEGS IN 'N NATUURSKOON OMGEWING FLOREER

Omgewingsorg wat in 'n toekomstige politieke bedeling ingebou word sal ook die volhoubare gebruik van Suid-Afrika se hulpbronne verseker en sodoende 'n groeiende ekotoerismebedryf ondersteun. Die buitelandse valuta wat gedurende die afgelope jare deur die toerismebedryf verdien is, die verwagte toenames en die skepping van werksgleenthede bring die besef hoe 'n belangrike rolspeler hierdie bedryf vir ons nasionale ekonomie sal word. 90% van die toeriste kom besigtig ons natuurlewe, natuurskoon en kultuurgeskiedenis. Toekomstige regerings moet dus besef dat die bestuur van beide die beboede en natuurlike omgewing van uiterste belang is vir 'n florerende ekotoerismebedryf en dus vir die welvaart van die land.

GESONDE KRITERIA VIR STREEKGRENSE IS UITERS BELANGRIK

'n Moontlike nuwe streeksbedeling vir Suid-Afrika moet gebaseer wees op streke wat ooreenkomstig gesonde kriteria afgebaken is soos van toepassing op die Suid-Afrikaanse mens- en natuurlike omgewing. Sulke kriteria moet kulturele, vestigings-, ekonomiese, historiese, administratiewe, politieke, taal- en omgewingsoorwegings insluit.

Op 2 Februarie 1990 het die Staatspresident, mnr F W de Klerk, die Republiek van Suid-Afrika op die pad van onderhandeling na 'n staatkundige bedeling vir die nuwe Suid-Afrika geplaas.

Sedertdien het die gesprek gewentel rondom die vraag: "hoe moet die nuwe staatkundige bedeling lyk"? Onderhandelings daaroor is onderbreek maar hervat nou weer. Dit lyk asof die debat die kwessie van verdeling van funksies tussen die eerste en tweede owerheidsvlakke sterk na vore gaan bring, veral indien 'n streeksdispensasie in een of ander federale model steun verwerf.

Hoe dit ookal sy, die Raad vir die Omgewing begewe hom nie in hierdie politieke debat nie, maar is vas oortuig van die noodsaak dat omgewingsoorwegings 'n baie hoë prioriteit in die agenda vir die onderhandelingsproses moet geniet. Daarsonder kan daar nie 'n suksesvolle nuwe Suid-Afrika wees nie. Daarom moet die volgende omgewingsoorwegings voorkeuraandag op die agenda vir die onderhandelings kry.

OMGEWINGSORG IS 'N NASIONALE VERANTWOORDELIKHEID VAN DIE STAAT

Die nasionale verantwoordelikheid van die staat soos dit in enige toekomstige regering van die nuwe Suid-Afrika gevestig sal wees, is om met die ondersteuning van al sy burgers, die omgewing en al sy hulpbronne in die natuurlike en mensgemaakte omgewings te beskerm en sinvol te bestuur vir volhoubare gebruik deur huidige en toekomstige geslagte van Suid-Afrikane. 'n Nuwe regering sal so sy plig doen om by te dra tot 'n veilige, gesonde en hoë kwaliteit leefomgewing vir almal.

OMGEWINGSORG MOET AS 'N SENTRALE REGERINGSFUNKSIE IN DIE NUWE GRONDWET VERSKYN

Staatsverantwoordelikheid vir omgewingsbestuur met sy verwante funksies moet eerstens grondwetlik vervat word as 'n belangrike sentrale regeringsfunksie ongeag die graad van devolusie en/of delegasie wat in die praktyk nodig of haalbaar is.

VERKRY 'N BALANS TUSSEN NASIONALE OMGEWINGSBELEID EN UITVOERENDE OMGEWINGSFUNKSIES OP DIE STREEKSVLAK

'n Ewewig moet gevind word tussen nasionale omgewingsbeleid en funksionele outonomie op streeksvlak. Watter model ookal ontwikkel word, moet die sentrale regering besef dat die gesonde bestuur van beide die natuurlike, sowel as die beboude omgewing, van uiterste belang is. Dit vereis oorhoofse beleidsriglyne sowel as monitering en beheer vanuit die nasionale vlak. Terselfdertyd skep dit streeks- en plaaslike regeringsuitvoerende funksies vir die omgewing in soverre dit raadsaam en haalbaar is.

STREWE NA EWEWIG TUSSEN OMGEWING EN ONTWIKKELING

Die regering se omgewingsverantwoordelikhede vereis rentmeesterskap en uiteindelijke verantwoordelikheid vir die kompromie wat aangegaan moet word tussen omgewingsbeperkings en die behoefte aan ekonomiese groei en ontwikkeling. Die regering moet erken dat:

"'N VOORUITSTREWENDE EKONOMIE KAN NIE OP 'N BANKROT OMGEWING GEBOU WORD NIE"

it sluit die verslae van die Suid-Afrikaanse Regskommissie (SAR),
andpunte en beleidstukke van verskeie politieke groeperings in Suid-
frika, grondwette van ander lande en die regering se jongste voorstelle
r 'n Handves vir Fundamentele Regte in.

ierdie dokument sal hopelik 'n bydrae maak tot die insluiting van die
ngewing as 'n belangrike faset van die nuwe bedeling en van 'n nuwe
ondwet vir Suid-Afrika.

laart 1993

OMGEWING IN DIE NUWE SUID-AFRIKA

**DIE RAAD VIR DIE OMGEWING DOEN
'N ERNSTIGE BEROEP OP ALLE
PARTYE WAT IN DIE GRONDWETLIKE
ONDERHANDELINGSPROSES
BETROKKE IS OM DIE
BELANGRIKHEID VAN 'N GESONDE
OMGEWING, BEIDE IN DIE
NATUURLIKE EN IN DIE BEBOUDE
OMGEWING, IN ENIGE
GRONDWETLIKE BEDELING TE ERKEN
EN OM DIT IN ONS NUWE
GRONDWET EN HANDVES VAN
MENSEREGTE VAS TE LÊ**



**RAAD VIR DIE
OMGEWING**

Geagte politieke leier

Die verantwoordelikheid om deel te hê aan die onderhandelingsproses oor die nuwe Suid-Afrika is nou aan u opgedra. Die Raad vir die Omgewing glo dat u hierdie dure plig op 'n baie verantwoordelike wyse sal uitvoer. Om u by te staan in die uitvoering van hierdie belangrike taak lê die Raad hierdie dokument aan u voor. Dit onderstreep dat daar een onderwerp is wat net tot almal se nadeel buite rekening gelaat kan word; dit is die OMGEWING; en die versorging en wyse bestuur daarvan. Ons glo dat die omgewingsoorwegings wat in hierdie dokument vervat is u ernstige aandag behoort te geniet. Ons vertrou dat u dit as belangrik sal beskou en hierdie omgewingsaspekte as 'n hoë prioriteit op die agenda sal plaas. U sal vind dat 'n redelike mate van konsensus tussen alle politieke partye reeds bestaan oor die noodsaak van doeltreffende omgewingsorg in die nuwe Suid-Afrika.

Die dokument bestaan uit twee dele. Die eerste deel handel oor die omgewingsoorwegings wat op die agenda vir die onderhandelingsproses geplaas moet word en wat uiteindelik in 'n nuwe grondwet en handves van menseregte vervat moet word.

Die tweede gedeelte beantwoord die vraag: hoe moet daar vir die omgewing in die nuwe grondwet voorsiening gemaak word? Duidelike aanbevelings word ingevolge omgewingsreg gemaak nadat die agtergrond oor die kwessie geskets is. Hieruit sal blyk dat waardevolle voorbereidingswerk reeds gedoen is.