Suggestions on Improving the ANC Environmental Rights

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Introduction

The long awaited worldwide environmental movement finally appears to have arrived. At one time, environmentalism seemed to be a fad that only rich nations and rich citizens could afford to promote. However, it is rapidly becoming clear that all citizens of the Earth are affected by today's environmental degradation: the greenhouse effect and global warming; ozone depletion; loss of species and their natural habitats; uncontrolled waste disposal; degradation of the human environment resulting in environmental diseases such as cancer. No matter how serious a nation's own problems may be, no nation can longer afford to ignore the overriding threat of a ruined natural and human environment.

This June, in Rio de Janeiro, the United Nations is holding its international Conference on Environment and Development - the "Earth Summit". Now that there are no further barriers on its road to democracy, South Africa will be able to participate in this summit. South Africa can finally join the global environmental movement as a full partner.

On the other hand, South Africa has always had the duty to safeguard its own environments, and has been seriously delinquent in this duty. And as this country moves away from the tyranny of minority rule it becomes obvious that the policies of Apartheid have only accelerated environmental degradation. When millions of people are deprived of equal access to natural resources and forced to live in poverty, the human environment suffers directly and preservation of the natural environment becomes a low priority. For example, a recent report prepared

for the Department Environmental Affairs by the CSIR found "that the policy of moving large numbers of people to the homelands . . . aggravated poverty and resulted in agricultural over-exploitation, and consequently, incalculable environmental damage."[1]

A corollary effect of Apartheid has been the remarkable incompetence in government handling of environmental matters themselves. "Environmental law" in South Africa is extremely fragmented, as well as largely ineffective in protecting the environment. Environmental law remedies that arise out of the common law are hindered by the common law's bias toward inviolable, individual property rights. Close cooperation between control agencies and the industries that are controlled hinders effective enforcement of environmental laws that do exist. Public participation in environmental matters is virtually non-existent, and information on environmental degradation is restricted.[2]

With the coming changes in South Africa there is an opportunity to remedy the inadequacies of present law through a permanent environmental right in a new Bill of Rights. Fortunately, the ANC proposed Bill of Rights for a New South Africa has included an extensive set of environmental rights. There is no doubt that these provisions will have a strong influence on any new constitution adopted by South Africans.

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[1] Building the Foundation for Sustainable Development in South Africa, as quoted in The Argus, "Apartheid era, environmental damage linked ", March 5, 1992.

[2] See generally, the President's Council's Report on a National Environmental Management System (PC 1/1991), pages 164-201.

In light of their importance, this paper will undertake an analysis of each environmental provision proposed in the ANC document. To facilitate this analysis, two other sets of recommended provisions will be compared with the ANC provisions: ANC Environmental Policy Representative for Cape Town Lynn Jackson's set of recommendations, and the South African Law Commission's environmental clause.

Lynn Jackson's Suggested Provisions

Lynn Jackson, co-ordinator for the Centre for Developmental Studies' Working Group on Environmental Issues, proffered a set of suggested environmental provisions to the ANC Constitutional Committee in September of 1990 entitled, Suggested Environmental Protection Provisions for a New South African Constitution and Related Matters ("Jackson's provisions") (see Appendix A). The paper set forth some thirteen suggested clauses; the ANC's Bill of Rights for a New South Africa has ten clauses in its Article 12 "Environmental Rights" section ("ANC provisions) (see Appendix B), and a few other environmentally related provisions in other areas of its suggested Bill of Rights. Some of the ANC clauses parallel Jackson's suggestions, while some phrasing is clearly different.

This section will compare, contrast, and critique the two versions. In light of the disclaimers in both of the subject documents, this section is intended to provoke thought. This author acknowledges that the ANC provisions are not in "final" form, and therefore are open to criticism and suggested changes.

I. Preamble

Jackson's 2.1:

"2.1 Preamble

Recognizing South Africa's unique and diverse natural heritage, wealth of natural resources and aesthetic beauty, as well as the need to maintain these for the benefit of present and future generations . . . "

ANC Article 12(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."

The ANC provision is not necessarily a preamble, as it is included in the body of Article 12 and thus part of the substantive Bill of Rights. Whether the ANC intends to include a preamble in its recommended constitutional provisions as a whole is not known.

There is reason for this paragraph to be included a preamble to any ANC-suggested constitution. Like a preamble, the ANC provision's Article 12(1) would serve as a statement of intent. Operating as such, the clause would be better understood in a constitutional preamble. The clause does not give force to any enforceable right, and therefore should not be within the Bill of Rights.

Although there is always the danger of abusive interpretations of such a statement of intent, Article 12(1) would more likely have a positive effect.

II. The Underlying Right

Jackson's 2.2:

"Fundamental Right

All citizens of South Africa have the right to an environment adequate for their health and well being."

ANC Article 12, section (2)

"All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it."

"Everyone" is a better alternative to "all men and women," if only for clarity's sake. "All men and women" also seems to exclude children. Jackson's "all citizens" may unnecessarily exclude resident aliens.

On the other hand, the ANC provision's "duty to defend" the environment is an angle not explored by Jackson's provisions. Such a duty can only further the environmental cause. Imposing this duty directly from the wording of the constitution may present problems of justiciability, but, at the very least, the duty offers a useful background for legislation imposing criminal and civil sanctions on environmental offenders.[3] It therefore would be more effective as a directive of state policy.

"Healthy and ecologically balanced" actually seems to be stronger phrasing than merely demanding an "adequate" environment. "Adequate" could improperly be used as a ceiling, inhibiting citizens from pursuing anything other than a merely adequate environment. An "adequate for health and well being" standard may change for the better with advances in science. However, "healthy" not only allows for advances with increased knowlege, but one can never be "healthy" enough on any given day. In this sense, "healthy" is a perpetually increasing standard, regardless of the passage of time.

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[3] There is an argument that including a non-justiciable clauses in a right that is for the most part self-executing detracts from the enforceability of the right. Regardless, the clause should remain for now for discussion purposes (if for no other reason).

"Ecologically balanced" is unduly technical for an underlying right in a Bill of Rights, and clutters what should be a clear, minimally-stated right. On the other hand, exclusion of the phrase may lead courts to take only human health into account when deciding environmental cases. However, as long as other environmental provisions in the constitution contain references to the natural environment, there is no danger of this narrow interpretation.

"Well being" has been excluded from the ANC provision. These words should be included somewhere in the environmental provisions if at all possible. "Well being" can imply material or spiritual well being. It leaves room for boosting morale through an improved aesthetic environment, regardless, for example, of the lack of any unhealthy pollution.

II. Jackson's Directives of State Policy

Jackson's 2.3:

> "Directive Principles of State Policy
> The State shall adopt policies with a view to:
> (i.) ensuring an equitable distribution of, and access to, natural resources, . . ."

This foresighted and crucial clause is repeated only under Article 11(1) of the ANC provisions:

> "Legislation on economic matters shall be guided by the principle of encouraging collaboration between the State and the private, co-operative and family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population."

Jackson's clause 2.3 sets out the basis for any hope of improving the environment of "third world" South Africa. This country (as with all "first world," consumer countries) desperately needs a national development policy. How can one expect the poor and overcrowded to deal with improving their environment without

access to the proper resources? The environmental movement will never get beyond the aspirations of wealthy suburbanites if the mass of impoverished South Africans can not afford to think past their next meal.[4]

In light of the serious necessity of such a provision, Article 11(1) should specifically refer to a resource policy. Additionally, reference should be made to equitable distribution of resources within Article 12, for example, under section (3). To leave out such a policy directive from the environmental article may prevent this most important tool from application to environmental, not just land and property, problems in South Africa.

Jackson's 2.3(ii):
> "limiting the exploitation of natural living resources to the level of optimum sustainable yield . . . "

ANC Article 12, section (3)(iii.):
> "promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability;"

"Optimum sustainable yield" addresses the solution directly, and thus is the better phrase than "rational use of natural resources." Although the essence of a constitution is to allow flexibility in its terms, the environmental provisions should not be the place for interpretation of "use of natural resources" to ensure maximum financial profits. This would seem to many to be the "rational use" of natural resources. "Optimum sustainable yield" does not present this problem; it mandates long-term

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[4] See generally, Going Green, "Victims or Villains?" by Barbara Klugman (Edited by J. Cock and E. Koch, Oxford University Press, 1991).

planning. It is difficult to envision an occasion when any foresighted South African would not want optimum sustainable yield.

Nevertheless, the ANC provision is safe as long as "rational use" is never taken out of the context of "safeguarding their capacity for renewal and ecological stability." While "limiting" seems a more active (and thus effective) method of controlling the exploitation of natural resources than "safeguarding" (which implies action after-the-fact), both provisions will probably achieve the same end.

(Note the awkward wording in the ANC clause: "safeguarding their capacity for . . . ecological stability." Natural resources do not have a capacity for ecological stability. Rather, it is argued here that they are an ingredient in ecological stability until they are exploited.)

Jackson's 2.3(iii):

> "promoting rational use of non-renewable resources such as to provide optimum benefit for both present and future generations . . ."

Again, although environmentalists may know what the term "rational use" means, the term has different meanings for different people.

To provide optimum benefit for the present generation will conflict with providing optimal benefit for future generations. Different wording may avoid such a conflict, such as "to provide the optimum benefit possible for present generations while ensuring optimum benefit for future generations."

Since there is no equivalent ANC provision to the above, perhaps "optimum sustainable yield" should be included in the

ANC's section (3.)(iii.). Moreover, the ANC provisions seem to ignore the difference between natural living resources (trees) and non-renewable resources (fossil fuels). Living resources are renewable and can be harvested on a sustainable basis. Non-renewable resources are by definition depleted with use, so that their rate of use must be determined by altogether different factors. It would be a mistake to ignore this distinction for the sake of compacting Jackson's language.

Jackson's 2.3(iv):

> "ensuring that the planning and implementation of development activities conforms with the principle of environmental sustainability and takes into account environmental impacts . . ."

ANC Article 12, section (3.)(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;"

Since apparently there is no environmental planning strategy practised in this country,[5] there must be positive language that specifically mandates accounting for environmental impacts. The ANC provision's language regarding "minimising of harmful effects" would seem to mandate this, although not as directly as Jackson's provision.

The ANC provision seems to have missed an opportunity to direct efforts towards improving the human environment. By only referring to the natural environment (the "balanced ecological and biological areas" reference), the ANC provisions would appear to allow poor planning of the human, urban, built, etc.

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[5] This fact was asserted to the author in a discussion with Cape Town city planners Amanda Young, Steve Solomon, Chris Warner, Guy Boddington, and Mervin Bregman on February 18, 1992.

environment as long as the surrounding natural environment were safeguarded. To be sure, the ANC provision could use a reference to this human environment in addition to the existing language. On the other hand, Jackson's "environmental sustainability" can include, for example, sustainability of the urban environment.

Note also that for economy's sake, the ANC provision's reference to "ecological and biological areas" could safely be compacted to read "ecosystems."

Jackson's 2.3(v):

> "ensuring the maintenance of ecosystems and ecological processes essential for the functioning of the biosphere . . ."

This is a good provision, especially in light of the fact that a State cannot "create" ecosystems, as the ANC provisions suggest. The ANC's section (3.)(ii.)'s use of "areas" is not inclusive enough. Nobody wants mere islands of ecologically stable land; a knew way of thinking is called for here. The whole of the environment and human beings' interaction with it should be included in this provision, as we now know that development and a balanced environment are not mutually exclusive goals.[6] Jackson's use of "biosphere" seems appropriately inclusive.

Jackson's 2.3(vi):

> "promoting the preservation of biological diversity by ensuring the survival and promoting the conservation of all species of flora and fauna . . ."

After calling for the "right to [an] . . . ecologically balanced environment", the ANC provisions fail to offer any

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[6] See generally, Nomsa Daniels, "Guardian of Eden", Africa Report (Vol. 36, No.5, Sep.- Oct., 1991) at p.15.

mandates to this end, save creation of some ecologically balanced "areas." Nor do the ANC provisions call for the preservation of species and habitats. Jackson's provision here is a necessary addition to the ANC's right in section (2.).[7]

Jackson's 2.3(vii):

> "establishing adequate environmental protection standards and environmental monitoring procedures . . ."

Where the rest of the Bill of Rights speaks in terms of ever-progressing efforts to improve the lot of South Africans, "adequate" again seems unduly passive. "Progressive" or "effective" would ensure application of an ever higher standard.

The ANC sections (3.)(i.) and (3.)(iv.) are the only analogous provisions:

> "prevent and control pollution of the air and waters and degradation and erosion of the soil;"
>
> "ensure that long-term damage is not done to the environment by industrial or other forms of waste;"

The mandate for legislation in this wording is not as effective as the language in Jackson's provision. Jackson's clause (vii) should be added at the end of one or both provisions.

Jackson's 2.3(viii):

> "the provision of necessary institutional structures to enforce such standards and procedures."

ANC Article 12, section (3):

> "In order to secure this right, the State, acting through appropriate agencies and organs shall conserve, protect and improve the environment . . . "

The ANC provision's "appropriate agencies" does not address the serious problem of fragmentation of responsibility over

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[7] The preservation of all species may be considered by many to be an extreme view. However, this author is in the business of promoting environmental concerns, and this paper is not intended as a compromise to promoting those ends.

environmental matters that South Africa suffers from today.[8] Many existing organs or agencies may be "appropriate," but too many agencies result in chaos. A single environmental agency avoids this chaos. The best way to include this would be to cut out "acting through appropriate agencies and organs", and to add Jackson's clause (viii) as one of the clauses under the ANC section (3.).

Jackson's 2.3(ix):

> "the provision of appropriate dispute resolution procedures for environmental matters."

This is another crucial clause that the ANC Constitutional Committee could come to regret it is not including. Jackson's above clause should be included as a directive, especially in place of section (5.) or within section (3.) (see below).

III. Jackson's Institutional Arrangements

If this Bill of Rights is going to widen locus standi in environmental matters, then there must be some other avenue besides the already overburdened court system. Opening the door for the creation of new forums for environmental disputes will serve as flood control for South African courts.

Jackson's recommendation of creating an environmental court is a sound one. However, it is submitted that such an alternative should not be labelled a "court of law". As the term "environment" is so broad, and as practically every human action has an impact on the environment, anyone could demand legal rights to be heard in an environmental "court", for any sort of

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[8] See President's Council's Report, 164-201

dispute. A better option would be some sort of environmental "tribunal", with a right to appeal its otherwise binding decisions to a regular court of law. Legislation would then control the criteria for granting review from such administrative bodies.

If provision is to be made in a constitution for an alternative environmental forum, it best be written in to a directives of state policy section, and using similar language to Jackson's 2.3(viii) and (ix).

IV. Jackson's Administrative Law Aspects

Jackson's 4.1 [Here, Jackson recommends allowing courts to consider the merits of administrative decisions. She suggests Article 18 of the Namibian constitution]:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

ANC Article 2(24):

> "Any person adversely affected by an administrative or executive act shall have the right to have the matter reviewed by an independent court or tribunal on the grounds of abuse of authority, going beyond the powers granted by law, bad faith, or such gross unreasonableness in relation to the procedure or the decision as to amount to manifest injustice."

Although the merits of and administrative decision are not considered on review in today's South Africa, this problem might best be left to legislation. The law needs to be able to function within a broad framework; once an unpopular avenue is closed, one runs the risk of closing other potentially effective avenues with it.

On the other hand, the existing standard for review of administrative decisions is entirely unsatisfactory; it would be a tragedy to leave it in place after a new constitution is put into force.

The ANC provision has been criticised as being in fact worse than the present administrative review standards.[9] It does appear that Article 2(24) mimics the present common law standard set out in Johannesburg Stock Exchange v. Witwatersrand Nigel Limited 1988 (3)SA132(A), with its procedural safeguards centred around abuse of authority, bad faith, manifest injustice and gross unreasonableness.

In his reply to this criticism, Professor Albie Sachs recognises that the removal of the word "gross" so that a "reasonableness" standard remained might be necessary.[10] He then suggests that the wide provision of rights in the whole ANC Bill of Rights would more than make up for any such deficiency in Article 2(24).

However, as long as the ANC provisions proffer a right to judicial review, "There can be no reason for a bill of rights which is designed to promote a democratic government to provide for such a parsimonious form of administrative review."[11] At the very least, the ANC provisions should adopt Professor Sach's concession, allowing for review on the merits of environmental

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[9] G. Marcus and D. Davis, "Judicial Review Under an ANC Government", SAJHR vol. 7, part 1 (1991) at 95-96.

[10] A. Sachs, "From the Violable to the Inviolable: A Soft-Nosed Reply to Hard-Nosed Criticism" SAJHR vol. 7, part 1 (1991) at 99.

[11] Marcus and Davis, 96.

(as well as other) administrative decisions.

Better still is Jackson's suggestion: it is more general in tone and thus more appropriate to a Bill of Rights or set of policy directives; "fairly and reasonably" ensures that the merits of a decision will be considered; reference to common and statutory law ensures that any decision would be legally correct; and reference to "proper Court or Tribunal" replaces similar references in the ANC Article 12(5) in encouraging (but not mandating) an environmental tribunal. On the other hand, "persons aggrieved" narrows locus standi and should be removed to allow wider access to review.[12]

A. Remedies

ANC Article 12(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."

There are many problems with this section. It does not provide for alternative remedies to sanctions and reparations. "Direct and serious damage" seems to be a dangerously low standard. Indirect damage should also be considered, and even

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[12] In its Investigation into the Courts' Powers of Review of Administrative Acts (p.107-110), the South African Law Commission suggests a bill setting out a list of grounds for review. This list was proposed as legislation and is too specific for a Bill of Rights. Still, each ground for review is valid and necessary. The present version of Article 2(24) would foreclose many of these grounds; but by merely allowing for review in the case of unreasonableness, or "where justice requires", subsequent legislation will imply from the clause the many specific grounds for review that may remain.

non-serious damage to the environment as a whole might be serious to the local environment and its surrounding community. Even reasonable threats to the environment should be challenged in some instances, and limiting challenges to cases of "irreparable harm" does not take into account reversible, but long-term harm (such as contamination through radiation).

The section unnecessarily limits judicial remedies to interdicts. Equitable and declaratory relief should not be preempted.

At best, some broader version of this section should be included in a policy directives section. It is too detailed and limiting to remain as a "right" in the Bill of Rights.

B. Locus Standi

Jackson's 4.2:

> "Any person, may with leave of the environmental court, institute, resist or participate in proceedings before that tribunal if such is in the public interest."

Changing the common law rule of locus standi through a constitutional provision is not appropriate; such a change should be implemented in legislation. In order to function properly as a "living document", flexible to the changing needs of the courts and society, specificities should be avoided. A section on directives of state policy should contain a provision encouraging the expansion of locus standi in environmental and other matters.

The ANC Article 12(5) "interested persons" may be necessary to give a court or tribunal some discretion in granting standing. At the same time, Jackson's phrase, "if such is in the public interest" also allows for such discretion. The ANC language

could be the better option, as long as fears of a strict interpretation of "interested person" are eased by including a list of examples of interested persons, e.g.: ". . . including but not limited to persons who . . ." Such a list guides a courts' discretion and prevents overly restrictive interpretations. Included in this list could be, inter alia, any private organisation established for the purpose of protecting the environment. Note also that the ANC provision does not allow for class action suits. Otherwise, "in the public interest" provides a good standard.

The use of the words "environmental court" were correctly excluded from the ANC version. Again, such specific language in a constitution can and will do more harm than good. If, an environmental court of law proves unworkable, a constitutional amendment would be necessary to allow alternatives to an environmental court of law.

C. Information

Jackson's 4.3:

> "Any interested party may request information and/or reasons for an administrative decision from relevant government departments and such shall be supplied within 30 days of such request."

The ANC Article 12 does not include any clauses with regard to the free flow of information in environmental matters. However, ANC Article 4(3) contains a general right:

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

Without such accessability to information, any environmental

provisions (for that matter, any environmental legislation) would be useless. The people can not act to stop environmental degradation when it is done in secret. However, Jackson's clause is too specific, and belongs in legislation rather than in a Bill of Rights. The ANC provision includes a general right to information that is entirely appropriate in a Bill of Rights and would be effective in allowing free-flow of information when citizens sue to enforce their environmental rights.

V. Remaining ANC Provision in Article 12

ANC Article 12, section (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."

This clause seems out of place as an actual "right." Do the drafters intend that South Africans have the "right" to co-operation between the state and local communities? If this is intended, its lack of enforceability detracts from the central environmental right in section (2.). Section (4.) belongs with directives of state policy.

Otherwise, this is a necessary and positive addition to Jackson's recommendations.

Overall Comments on the Structure of Article 12 and the South African Law Commission's Recommendations

The South African Law Commission's ("the Commission") Interim Report on Group and Human Rights provides an in-depth

analysis of the need for an environmental right in a new constitution. Although the Commission's actual recommended clause is inadequate in many ways, its recommendations and criticisms of the ANC Bill of Rights provide a useful tool in analyzing the structure of the ANC provisions.

I. The Law Commission's Right

> "Everyone has the right not to be exposed to an environment which is dangerous to human health or well-being or which is seriously detrimental thereto and has the right to the conservation and protection of such environment."

This would be a promising formulation of one were worried about justiciability of an environmental right, as judges would find the negative standards of the first clause easy to work with and enforce. However, such negative language is not necessary. It merely sets a minimum protection without encouraging expansion of the right, where the "right to a healthy environment" suggests a positive, progressive right.

Moreover, greater goals are sought through the environmental movement than merely avoiding danger. Although the clause goes on to include a right to conservation, this right could easily be narrowed in light of the preceding language. Additionally, "seriously detrimental" is an unnecessarily strong standard where simply "detrimental thereto" would be preferable.

For those legal scholars critical of the potential non-justiciability of the ANC right, a clause calling for the State to enforce the environmental right could be inserted following the language of section (2), or as a general provision affecting the Bill of Rights as a whole.

II. Directives of State Policy

The Commission effectively points out a fundamental problem with the formulation of the ANC provision's section (3) and directives of state policy in general:

> "How can the state be compelled to act positively? How can the court order the legislature to make laws, or the executive to carry out general law?"[13]

It is hard to imagine how a multi-party, democratic government "shall" do anything. Who will ensure that parliament passes the appropriate laws? The courts? Assuming the courts find the parliament delinquent in its constitutional duties, what then? It would be ridiculous to enforce an injunction on a government body that must debate each phrase in any given legislation in order to achieve consensus. On the other hand, court-mandated law would violate the separation of powers doctrine.

The Indian case precedents, where expressly unenforceable, environmental policy directives were used by Indian courts to rule in favour of the environment, provides persuasive authority for the use of state policy directives.[14] Despite numerous arguments opposed to the inclusion of an environmental right, Germany will soon add environmental policy directives to its constitution.[15] The recently created Namibian constitution includes an entire section on "Principles of State Policy."

Directives of state policy do not need to be directly

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[13] South African Law Commission Interim Report on Group and Human Rights (August, 1991) 576.

[14] See J. Glazewski, "The Environment, Human Rights, and a New South African Constitution" SAJHR vol. 7, part 2 (1991) 178-180

[15] A. Rabie "A Constitutional Right to Environmental Integrity: A German Perspective" SAJHR vol.7, part 2 (1991) 213

enforceable in order to be effective. At worst, directives provide a statement of intent to back up the underlying fundamental right. At best, they provide incentive for legislation and a standard for executive action. They facilitate construing ambiguous statutory language in favour of environmental concerns. Directives guide the State whenever it is in doubt.

The Commission, believing Article 12(3) to be a set of policy directives, clearly prefers a narrower approach to environmental rights. This is not appropriate where other provisions in the ANC Bill of Rights are accompanied by apparent state policy directives.[16]

The Commission does offer the following alternative:

> "It is envisaged that, instead of directive principles, the constitution could contain a general clause in which the legislature, the executive and the administration were called upon to promote and develop all the human rights referred to in the constitution. Such a clause would leave no doubt about the state's duties and could in fact be more effective than directive principles. The Commission has included such a principle in its proposed bill."[17]

Although this is a worthy proposal, the Commission mysteriously offers no explanation why such a formulation would be "more effective." In the absence of necessary assurances, this author would be more comfortable with the legal firepower behind the ANC's Article 12(3).

At the same time, it is apparent that the ANC Constitutional

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[16] Inclusio unius est exclusio alterius - if environmental directives are not included and other rights' directives are included, the environmental provision may be seen as deliberately limited and thus weaker in comparison to other rights.

[17] South African Law Commission, 579.

Commission did not intend section (3) to be mere "directives"; indeed, by virtue of their placement, they are intended as rights, equal in power to the fundamental right set out in section (2). There is no precedent for such language acting as absolute rights. The Indian precedent applied to express directives of state policy, and thus could be argued to be inapplicable to the ANC formulation here.

The danger in not relegating section (3) to policy directives is that as rights, they may well be unenforceable. If any language in Article 12 (or in the entire Bill of Rights, for that matter) is unenforceable, then the rest of the language of Article 12 is in danger of being weakened. Once the possibility exists that some of the Bill of Rights is not enforceable, a precedent is set for declaring other portions unenforceable.

A judge cannot be relied upon to weaken only some provisions while leaving other provisions strong. Not only would such a process be dangerously subjective, but a judge may decide that all of the provisions should be weakened to avoid just such a subjective determination.

Perhaps South Africa's first set of constitutional justices will be creative and sympathetic enough to "know" what the ANC drafters intended here: that if at all possible, section (3) should be enforced as rights; if not, it should not detract from the rest of Article 12 and should assume the benign role of state policy directives. However, this Bill of Rights should exist for centuries to come, if it is to be successful. Today's good feelings will not last forever, and today's young conservatives

could very well be tomorrow's narrow-minded judiciary. Judicial interpretation - judge made law - is always subject to change.[18]

Even if the ANC Constitutional Committee chooses to call section (3) " directives of state policy", such directives do not belong in a Bill of Rights. Directives are not "rights" as such, and therefore would detract from the underlying fundamental rights. Whether directives be inserted in the main body of the constitution, or in their own category within the constitution, there is no need to risk violence to the Bill of Rights when the directives can be more effective elsewhere.

This argument follows the ANC Constitutional Committee's wish that the language in the Bill of Rights be "immediately understandable."[19] The Bill of Rights should be in the simplest and most concise language. The directives of state policy and other constitutional provisions can be more technical, as they are the enforcement provisions of the incorporated human rights, not the rights themselves.

C. Criticisms by the Commission

The Commission directly and summarily criticizes the ANC provisions in its report.

First, they deplore Article 12(1) as a "utopian statement that does not belong in legislation."[20] This narrow minded criticism is deflected by including that provision in a

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[18] Witness the radical change of the United States Bill of Rights under way at the hands of a conservative court today: the progressive work of the liberal courts of the 1960s in civil and criminal rights is now being chipped away, decision by decision.

[19] Sachs "Reply", 99

[20] South African Law Commission, 580.

constitutional preamble.

The Commission then attacks the "directives" of section (3.). The only argument it makes that was not addressed above is that by listing various measures the State would use in carrying out environmental policy, the ANC risks foreclosing other options with an incomplete list. However, the Commission inexplicably does not take into account the language of section (3.): ". . . the State shall . . . conserve, protect, and improve the environment, and in particular : . . ." The latter three words notify the reader that the measures to follow are not exclusive. With this language, there is no danger of foreclosing other options.

Conclusion

The recommended changes are attached as Appendix C. Some aspects of the ANC provisions are an improvement over Jackson's and the Commission's provisions. However, there are both omissions and potentially harmful language in the ANC provisions that must be addressed if Article 12 is to be effective. Additionally, the drafters must reconsider the overall structure of the Bill of Rights and its environmental protections, particularly with regard to directives of state policy.

Admittedly, any environmental provisions in a Bill of Rights are an improvement. Yet South Africans should not stand for mere improvements, especially considering the failures of their government over the past forty years. Nor should they stand for a Bill of Rights that leaves itself vulnerable to judicial attack in years to come. This is an opportunity to propel South

Africa ahead of the rest of the world; this opportunity should not be missed.

APPENDIX A

SUGGESTED ENVIRONMENTAL PROTECTION PROVISIONS FOR A NEW SOUTH AFRICAN CONSTITUTION AND RELATED MATTERS

1. Introduction

The nature and scope of constitutional environmental protection provisions will inveitably depend on the ambit and character of the new South African constitution. As there is little knowledge of the constitution's eventual format, this submission is intended as a guideline for consideration by your committee.

A large number of countries have included such clauses in their respective constitutions. Namibia is the latest country to have done so. (Annexure A sets out that country's environmental clauses, Annexure B provides the relevant environmental clauses in no less than fifty-four other countries) .

2. Recommended Clauses

2.1 Preamble

Recognising South Africa's unique and diverse natural heritage, wealth of natural resources and aesthetic beauty, as well as the need to maintain these for the benefit of present and future generations...

2.2 Fundamental Right

All citizens of South Africa have the right to an environment adequate for their health and well being.

Motivation

2.2.1 While such a clause raises the question of justicability, it is pointed out that:

(i) it may be appropriate depending on the context of the types of rights included in the eventual Bill of Rights.

(ii) other countries, for example India, have fairly

open ended rights included as fundamental rights, for example 'the right to life' (article 21 of the Indian Constitition). See also the clauses referred to in countries listed in Annexure B.

(iii) there is a trend in the field of international human rights law to include such clauses in international environmental conventions. For example clause 24 of the African Charter on Human and People's Rights 'all peoples' shall have the right 'to a generally satisfactory environment'.

There is similar pressure to include second and third generation rights in national constitutions.

2.3 Directive Principles of State Policy

The State shall adopt policies with a view to:

(i) ensuring an equitable distribution of, and access to, natural resources,

(ii) limiting the exploitation of natural living resources to the level of optimum sustainable yield,

(iii) promoting rational use of non-renewable resources such as to provide optimum benefit for both present and future generations,

(iv) ensuring that the planning and implementation of development activities conforms with the principle of environmental sustainability and takes into account environmental impacts,

(v) ensuring the maintenance of ecosystems and ecological processes essential for the functioning of the biosphere,

(iv) promoting the preservation of biological diversity by ensuring the survival and promoting the conservation of all species of flora and fauna,

(vii) establishing adequate environmental protection standards and environmental monitoring procedures,

(viii) the provision of necessary institutional structures to enforce such standards and procedures.

(ix) the provision of appropriate dispute resolution procedures for environmental matters.

Motivation

1. The Indian Constitution provides a model in this regard. In 1976 it was amended to include the following environmental provisions in a chapter devoted to Directive Principles :

'The state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country' (Article 48A).

and

'It shall be the duty of every citizen of India ...
(g) to improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures' (Article 51A(g)).

These clauses have been used by the Indian Supreme Court, in particular environmental cases before them. For example in Kinkri Devi v State AIR 1988 Himachal Pradesh 4, the petitioners sought an order that the mining authorities refuse the renewal of a mining lease on the ground that the operation was causing extensive environmental damage to the detriment of nearby villagers. The court relied on the environmental provisions in the constitution in granting an interim order in terms of which the mining operation was to show what mitigatory measures could be imposed to alleviate the damage being done.

2. Typically environmental problems (for example pollution), fall into the public interest domain. An environmental protction clause would redress the present imbalance in favour of private common law rights, for example the common law ownership rights in property which include the right to use, abuse and destroy ones property; and private development and exploitation rights.

3. Institutional Arrangements

Clause (ix) above recommends that appropriate dispute resolution procedures be devleoped. It is recommended that this be in the nature of an environmental court. Such a tribunal would be entitled to hear environmental disputes. It would have powers of adjudication, investigation and recommendation. It would also set its own procedures and be presided by a person with both judicial and environmental knowledge. It would have all the functions and powers of a court of law, including the powers to make declaratory orders and to grant interim and final interdicts. It would provide an easily accessible, inexpensive and flexible forum for the settlement of environmental disputes. The functioning of the Industrial Court could serve as a model in this regard.

4. Administrative Law Aspects

It is recommended that the Constitution include clauses to alleviate certain general administrative law problems in South African law which are relevant to environmental law. This would include the following:

4.1 A clause to alleviate problems experienced in review proceedings where merits cannot be considered. Article 18 of the Namibian Constitution headed: 'Administrative Justice' is a guideline. It provides:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal'.

4.2 The relaxing of the of the *locus standi* requirement. This has been done in many countries including India where a petitioner may bring an action in the public interest. This has not resulted in a flood of environmental cases.

Recommended clause: *'Any person, may with leave of the environmental court, institute, resist or participate in proceedings before that tribunal if such is in the public interest'.*

4.3 A lack of access to information, usually in the possession of official bodies, which is relevant to environmental concern.

Recommended clause: *'Any interested party may request information and/or reasons for an administrative decision from relevant government departments and such shall be supplied within 30 days of such request'.*

5. Conclusion

The above is intended as a guideline. Further research can be undertaken and information can be supplied on request.

L Jackson
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APPENDIX B

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.

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.

1.

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APPENDIX C

APPENDIX C: RECOMMENDATIONS

Bracketed language is to be excluded; underlined language is to be added.

Article 12 (1): NO CHANGE. However, the section should be relocated into the preamble of the constitution, as it is not a proper "right" as such.

Article 12 (2):

[All men and women shall have] Everyone has the right to a healthy [and ecologically balanced] environment [and the duty to defend it].

A concise statement of the right, avoiding the overly technical language of "ecologically balanced"; this would be the only clause actually within the Bill of Rights.

Article 12(3):

[In order to secure this right,] The State shall actively promote and maintain the environmental right by, inter alia, adopting, policies aimed at the following: [, acting through appropriate agencies and organs shall conserve, protect and improve the environment, and in particular,]

Article 12(3) is unenforceable as a set of rights. It would be more effective as directives of state policy. (Please see pages 21-24 for argument.) This is the Namibian introduction to their policy directives, adopted here as an introduction to the directives of state policy with regard to the environmental right.

i. prevent and control pollution of the air and waters and degradation and erosion of the soil through, inter alia, establishing effective environmental protection standards and environmental monitoring procedures;

Adding Jackson's monitoring clause, as there is no similar

specification in the ANC provisions. (See p.12)

ii. have regard in local, regional, and national planning to the maintenance [or creation] of balanced [ecological and biological areas] ecosystems, [and] to the prevention or minimising of harmful effects on the environment, and to the principle of environmental sustainability;

No state can "create" biological areas. "Ecosystems" is provided to compact "ecological and biological areas". The last part comes from Jackson's provisions; it allows for the protection of the human environment.

iii. ensuring the maintenance of ecosystems and ecological processes essential for the functioning of the biosphere;

Jackson's clause is used to avoid the "islands" of balanced ecosystems effect, and implies a more holistic policy.

[iii] iv. promote the rational use of non-renewable [natural] resources so as to provide optimum benefit possible for present generations while ensuring optimum benefit for future generations [, safeguarding their capacity for renewal and ecological stability];

v. limiting the exploitation of natural living resources to the level of optimum sustainable yield;

This provides for the necessary distinction between renewable and non-renewable natural resources. Each type of resource requires a different policy. (See p. 9-10)

[iv.] vi. ensure that long-term damage is not done to the environment by industrial or other forms of waste through, inter alia, establishing effective environmental protection standards and environmental monitoring procedures;

Again, adding Jackson's monitoring clause.

[v.] vii. 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[.];

No change, except that it would be a directive.

viii. ensure the provision of necessary institutional structures necessary to enforce environmental monitoring procedures;

Inserting Jackson's 2.3(viii), to avoid the problem of replication of agencies handling environmental matters and to encourage a stronger, single institution at the same time. (See p.12-13)

ix. promote the preservation of biological diversity by ensuring the survival and promoting the conservation of all species of flora and fauna;

The necessary addition of Jackson's 2.3(iv); the ANC provisions do not call for preservation of species. (See p.11-12)

Environmental Tribunal

x. ensure the provision of appropriate dispute resolution forums for environmental matters;

The ANC provisions do not expressly call for separate forums for enviornmental disputes. This would be the tenth directive, allowing for an environmental tribunal without being overly specific. (See p.13)

Locus Standi

xi. provide for locus standi such that any person may institute, resist, or participate in environmental proceedings before an administrative, legal, or other tribunal if such is in the public interest;

The expansion of locus standi in environmental matters should be provided for in the directives. This is Jackson's suggestion minus the Environmental Court wording. Alternatively, the

limiting standard could be "interested persons." (See p. 17-18)

Resources

xii. ensure an equitable distribution of, and access to, natural resources;

Adopted from Jackson's 2.3(i), so that the crucial need for a resource policy is mentioned in the context of the environmental policy directives.

Article 12(4):

[Legislation shall] xii. 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.

No change; it is only recommended that this section be inserted as a directive, as it is unenforceable as a right.

Article 12(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.]

Drop the entire clause - it is too dangerous and restrictive.

Article 2(24):

The following options allow the ANC provision to improve on the existing common law review standard. Without such modifications, the ANC provision in fact worsens the standard for review, considering the poor common law standard would be constitutionally enshrined.

Alternative A:

Any person adversely affected by an administrative or executive act shall have the right to have the matter reviewed by an independent court or tribunal on the grounds of abuse of authority, going beyond powers granted by law, bad faith, or [such gross] unreasonableness [in relation to the procedure or the decision as to amount to a manifest injustice].

Alternative B:

Any person adversely affected by an administrative or executive act shall have the right to have the matter reviewed by an independent court or tribunal on the grounds of abuse of authority, going beyond powers granted by law, bad faith, [or] such gross unreasonableness in relation to the procedure or the decision as to amount to a manifest injustice, or in any other case where justice required.