

P
7 C 94
TE

HABITAT COUNCIL



HABITATRAAD

611 Buitenkloof Centre
8 Kloof Street
8001 GARDENS

Tel: (021) 24-9106 Fax: (021) 24-8773

Buitenkloofsentrum 611
Kloofstraat 8
8001 TUINE

FACSIMILE

TO FAX NO: 011-3972211
TO: Dr Theuns Eloff
Head of Administration
Multi Party Forum
FROM: Wouter van Warmelo
Executive Officer
REFERENCE: Hab/43/4/1
DATE: 25 August, 1993
NO OF PAGES: This page + 4

MESSAGE

Dear Theuns,

ENVIRONMENTAL RIGHTS PROPOSAL FOR THE NEW CONSTITUTION

With reference to a telephone message from your secretary last week, herewith an advance copy of the introductory pages 1 and 2, and our proposal pages 3 and 4, which have just come to hand.

The whole document, including comments on how our proposal was arrived at, and comments for and against our proposal, is being revised at present, and will take another week or two to finalise.

As soon as it is available (it could be in excess of 30 pages), I will send it up to Kempton Park.

A point worth emphasising, and as discussed in the introductory paragraphs, is that this proposal is the best synthesis flowing from the participation in one way or another of 128 NGOs involved in environmental matters. Although it does not reflect the views of the environmental NGO movement as a whole, it is nevertheless a well-thought out proposal.

I hope that it will be useful to the Technical Committee on Fundamental Rights during the Transition.

Once again, thanks for everything.

Warm Regards

Wouter

943

Patron Member:
Patronaatslid:
Nampak/Metal Box

Habitat Council - Cape Environmental Trust - Environmental Law Association of South Africa



INTRODUCTION

The proposals are a synthesis of a series of workshops held in Durban, Johannesburg and Cape Town during the week beginning 3 May 1993 under the auspices of the Habitat Council, with the assistance of the Environmental Law Association of South Africa and the Cape Environment Trust. A total of 65 participants, belonging to 46 non-government organisations, took part and a further 63 were invited but could not attend for various reasons. Participants provided individual expertise, and had not received a mandate from their organisations to represent them. Each of the workshops provided the opportunity for environmentally aware individuals to draw up consolidated proposals under the guidance of legal experts. Dissenting views were also recorded. A fourth workshop was conducted on 7 May 1993, during which legal experts under the guidance of "environmentalists" synthesised the various proposals emanating from the workshops.

A draft proposal was drawn up and circulated to the 128 organisations originally invited to participate. Wide ranging and often divergent comments were received which were taken into account in the drawing up of the final document.

This document comprises the final proposal.

Although this proposal does not reflect the views of the environmental NGO movement as a whole, it does reflect the results of extensive work by those NGOs which participated in the project.

The overall purpose was to provide the constitutional negotiating process which is currently underway at the Multi Party Forum with a motivation and suggested clauses for the inclusion of environmental provisions in a new constitution and/or bill of rights. There was a fairly wide divergency of opinion, partly because the nature of environmental concern is very broad. Nevertheless, we feel that this document fairly represents the synthesized views of those who participated.

GENERAL COMMENT

There was a strong feeling that environmental factors have such a vital role in shaping the new South Africa, that not only should a constitution contain a set of environmental principles, but also that the constitution and/or bill of rights itself should be subject to such principles. This idea emanates from the Draft Bill which preceded the current Environment Conservation Act (Act No 73 of 1989) which made all laws subject to the environmental provisions set out in the Draft Bill. The approach agreed on however should be that the inclusion of environmental provisions in that bill of rights would be the best way to achieve the general objective, which is to ensure a greater status for environmental concerns in the new South African dispensation.

There was much debate around the question as to how wide the environmental provisions should be and specifically on the definition of the environment. The former has relevance to the question whether environmental provisions should recognise that many South Africans do not have access to basic services and amenities such as clean running water, satisfactory energy sources, sewage services, food and shelter. The workshops acknowledged that constructing environmental rights in a narrow sense without cognisance of a right to these basic amenities would render environmental provisions meaningless. This document proceeds on the basis that other parts of the bill of rights will include provisions relating to these socio-economic rights such as a humanely adequate standard of food, clothing, shelter, education, basic medical care and decently remunerated employment. Although such a basic socio-economic right has not been included here, they are regarded as being a necessary pre-requisite and enjoying as much, if not more, importance than the environmental rights and related provisions advocated here.

Many commentators felt that "environment" needed to be defined, others felt similarly unhappy about a lack of specific mention of the built environment, or historical and cultural resources in certain contexts. We acknowledge these deficiencies but must point out that "environment" is extremely difficult to define. The problem was canvassed extensively in the working groups without an acceptable solution being found. Legal academics have researched the question and have failed to come up with a satisfactory definition. We have accordingly simply referred to "the environment" and only in a few contexts refer to the built or historical environment. We feel that specific legislation and the courts will develop the definition as the context demands.

This document also proceeds on the basis that a bill of rights will contain a general circumscription clause along the following lines: 'This Bill of Rights guarantees the rights and freedoms set out subject to such limits as can be demonstrably justified in a free and open social democracy' (Corder *et al* A Charter for Social Justice 1993). It also proceeds on the basis that a bill of rights will be able to operate both in a vertical and horizontal manner. By the former we mean that future legislation will be tested against the bill of rights and by the latter we assume that specific infringements of the bill of rights by the state or citizens can be the subject of legal challenge.

This documents proceeds on the assumption that a new constitutional dispensation will include both a constitution and a bill of rights. It also assumes that the latter will contain both fundamental rights and directive principles. We emphasise that this is an assumption and that the final result may be different. We have drafted the clauses however on the basis that they could be adapted to suit the final form and format of a new constitution and/or bill of rights.

**ENVIRONMENTAL RIGHTS AND DUTIES
IN A NEW CONSTITUTIONAL DISPENSATION
A PROPOSAL FROM A GROUP OF NON-GOVERNMENTAL ORGANISATIONS**

Preamble

RECOGNIZING that South Africa is a country with a rich and diverse heritage of natural, human and social resources

RECOGNIZING that a satisfactory balance must be sought between respect and care for the environment on the one hand and economic development on the other.

ACKNOWLEDGING that environmental degradation is a serious and ongoing phenomenon which has been exacerbated by historical policies

ENCOURAGING the development of the environment ethic, the holistic and integrated management of the nation's resources and a social structure which grants all fair and equitable access to resources,

ASPIRING to enable both present and future generations to enjoy a life of dignity and well being

HEREBY DECLARE the following as constitutional environmental provisions:

Fundamental right

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

OR

Every person has a right to an environment which supports health and well being and has the duty to protect it'.

Directive Principle 1 - Resource use and conservation

1.1 All persons, including the State, shall bear a responsibility to present and future generations in their utilization of the environment.

1.2 In order to secure this principle, any person, including the State, who is using the environment shall do so with reasonable regard for the need to:

- *develop resources on a sustainable basis*
- *maintain biological diversity*
- *protect ecosystems, ecological processes, special habitats including wilderness areas*
- *minimize ecological and environmental damage*
- *mainsain the historical, archaeological and cultural heritage.*

Directive Principle 2 - Pollution Control and Waste Management

2.1 All persons, including the State, shall strive to prevent, minimize and reduce pollution. Particular regard shall be paid to the principles of reducing waste at source, recycling and the 'polluters pays'.

2.2 Special measures shall be taken for the control of:
- toxic and hazardous substances.
- the transboundary movement of pollution and waste.

2.3 All persons whose activities impact on the environment adversely shall be obliged to make good such damage at their cost as far as is practicable.

Directive Principle 3 - Education

The State has the obligation to introduce and promote environmental education. This will include but, shall not be limited to, education on the sustainable use of natural resources and its implications and shall be aimed at encouraging responsible and cost effective consumption/utilization of resources.

Directive Principle 4 - Administrative Law

4.1 Every person shall have the right of access to a court of law or other appropriate forum in an environmental matter.

4.2 Every person shall have the right of access to any information reasonably necessary to further his or her environmental rights.

4.3 Every person shall have the right to be furnished with reasons for an administrative decision which affects his or her environmental interest.

4.4 The State shall take measures which promote public participation in decisions which affect the environment as far as is practicable.

Directive Principle 5 - Administration

5.1 The State shall establish an independent and accountable agency with the necessary powers to promote and secure the environmental provisions of this part and environmental rights generally.

5.2 The State shall actively promote the implementation of environmental assessment and environmental management procedures.