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TO: Convenor
Technical Committee
Fundamental Rights during the Transition
Multi Party Forum

FROM: Wouter van Warmelo
Executive Officer

REFERENCE: Hab/43/4/1

DATE: 13 September 1993

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MESSAGE

Dear Sir,

ENVIRONMENTAL RIGHTS PROPOSAL FOR THE NEW CONSTITUTION

I understand that final proposals for the draft Bill on Fundamental Rights during the Transition are being considered this week.

We would be most grateful if you could ensure that this document is tabled during the meetings of the Technical Committee on Fundamental Rights during the Transition.

Yours faithfully

WOUTER VAN WARMELO

Patron Member:
Patronaatlid:
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ENVIRONMENTAL RIGHTS IN THE NEW CONSTITUTION

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.

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 prerequisite 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.

Commentary was received from some quarters that the first draft as a whole was too anthropocentric and that rights of the environment *per se* were neglected. While this school of thought, ie that the environment should have rights has been supported by some legal philosophers, it has not found its way into any legal system to the best of our knowledge. We have sympathy for this view but feel it is not practical to lobby for it at this stage.

Many also felt that the draft emphasized rights and not enough attention was paid to environmental duties. We acknowledge this and have adjusted this second draft accordingly.

We have retained the division of a fundamental environmental right and directive principles from the first draft. We believe that the former should be in the form of a substantive right (and duty) while the latter is more in the nature of policy setting in the administrative sphere. No major problems appeared from the comments in this regard.

Many commentators did not seem aware that the directive principles are in the nature of policy guidelines and not substantive, self executing laws. In other words, the first draft should have emphasized that the inclusion of these clauses will oblige the State to pass specific legislation in this regard.

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.

*Compiled by W van Warmelo and J Glazewski
Cape Town
September 1993*

SECTION I**ENVIRONMENTAL RIGHTS AND DUTIES
IN A NEW CONSTITUTIONAL DISPENSATION****A PROPOSAL FROM A GROUP OF NON-GOVERNMENTAL ORGANISATIONS****Preamble (To the Constitution in general)**

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*
 - *maintain 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.*

SECTION II

EXPLANATORY NOTES

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:

Comment accompanying first draft proposal

There was a general consensus in the workshops that the special nature of the South African natural environment should be acknowledged. There was debate however as to the extent to which this should be widened to include man-made objects and acknowledgement of the different cultural diversity of the South African population. This question is related to the definition of environment referred to above. It was decided to take the wider approach in the preamble and the narrower one in the actual provisions.

There was also debate about whether apartheid should be specifically mentioned as contributing to environmental degradation. It was decided to adopt the wider wording 'historical policy' as other aspects, such as colonialism also contributed to environmental degradation and current socio-political circumstances

In general it was felt that the preamble should reflect a general environmental ethic which was reflected by delegates in different ways such as a need to adopt a frugal lifestyle, to depart from wasteful and consumptive practices and to respect the natural environment and nature's bounty.

Comment accommodating comments received on first draft proposal

At the suggestion of some commentators, the original preamble has been expanded to include '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' as it emphasizes that environmental groups are not necessarily opposed to economic development, but wish environmental factors to be taken cognizance of in such development.

Other commentators pointed out that:

- only constitutions as a whole have a preamble and felt it was not appropriate here. The intention is to have the constitution's preamble to include the environment. It is in this context that this preamble must be seen. We have added the above bracketed phrase to clarify this.
- There was opposition to the inclusion of 'has been exacerbated by historical policies'. We have retained this as there was a strong feeling in the group that apartheid has contributed to environmental problems. It also emphasizes that environmental concerns include the living conditions etc. of underprivileged sectors of the community and not only 'first world' environmental problems.
- There was also some opposition to the mentioning of social resources in the first line. We have retained it however as it emphasizes that certain resources are important to certain communities.

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.

Comment accompanying first draft proposal

It was decided to simply refer to environment and not try to elaborate on elements of the environment for the reasons mentioned above.

There was much debate about the use of the words 'health' and 'well being' and other possibilities such as 'not dangerous' and 'safe'. It was decided that the courts will be able to give a wide interpretation of the phrase 'health and well being' to include matters ranging from physical health to spiritual aspects such as the need to protect wilderness areas. It was also felt that the word 'healthy' is more appropriate than 'not dangerous' or 'safe'.

There was much debate around the question whether the fundamental right should be phrased in positive or negative phraseology. If it is negatively phrased it is more in the nature of an orthodox fundamental right because it enshrines the right to a certain minimum standard and does not grant a right of an indeterminate extent. On the other hand, positive phraseology implants more clearly the general feeling of the workshops. It may be that the best option will depend on the context of the final bill of rights.

It should be borne in mind that the words 'health' and 'well-being' will be interpreted by the courts and will be subject to the general subscription clause mentioned above.

Comment accommodating comments received on first draft proposal

Many sectors commented on the need to emphasize not only rights but also duties. This is a constructive and welcome suggestion as it emphasizes that a satisfactory environment is not something that is acquired from the state but that each and every person can and should make a contribution in this regard. We have considered the phrase '... and the duty to defend it' (which appears in the ANC draft), but feel that it is too narrow - we feel that a duty 'to protect' the environment expresses these suggestions better. We have accordingly added '... and the duty to protect it' to both original options.

DIRECTIVE PRINCIPLES

General comment accompanying first draft proposal

There was much debate as to how the directive principles should be categorized. In general it is possible to approach this from trying to classify environmental problems into certain logical groupings and then to apply certain principles to each category. On the other hand one would group environmental principles and see if they fell into a logical classification system. The former approach was adopted.

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.*

Comment accompanying first draft proposal

The word 'environment' in 1.1 includes renewable and non-renewable resources as well as the land, soil, ecosystems, the coast, wetlands and a number of environmental components. For this reason we have decided to confine the principle simply to the word 'environment' but the suggestion was made to include the bracketed 'built and natural'.

There was some debate about whether a separate and special clause should be devoted to land use in view of the historical dispossession of land which has taken place in the country. It was acknowledged that this factor should be taken into account but assumed that it will be done elsewhere in the bill of rights.

- 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*
- *maintain the historical, archaeological and cultural heritage.*

Comment accommodating comments received on first draft proposal

The introduction to the clause has been strengthened to replace the previous 'The State and people shall have regard to...' with a more forceful obligation. This was in response to commentary that the previous phrase was too weak and that duties, not only right, should be emphasized.

We have also widened the man-made environment to include not only the historical heritage but also the archaeological and cultural heritage.

Some comment was received on the difficulties of sustainability. We have not elaborated on this however.

- 1.3 *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.*

Comment accommodating comments received on first draft proposal

We have moved the previous clause 4.3 dealing with restoration of environmental damage here as clause 1.3 as it was pointed out it is not appropriate to administrative law.

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'.*

Comment accompanying first draft proposal

It was felt that both the preventative and precautionary principle which were raised in the workshops are included in the terms 'prevention and control'. For the same reason it was felt that it was not necessary to specify different forms of pollution for example air, soil, water, noise and so on, as this was implicit in the general term 'pollution'.

It should be pointed out that the imposition of a duty does not imply that all pollution is rendered illegal and it is acknowledged that all human activity entails some form of pollution. This clause could be widened to stipulate that the control includes 'cradle to grave' control of polluting substances.

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

Comment accommodating comments received on first draft proposal

The first part has been rephrased to read more clearly.

As regards the second part, commentary was received that the original clause went too far and not far enough. Some felt that a prohibition should be included banning the importation of toxic waste altogether along the line of the Namibian Constitution, while others question why it was necessary to include the second sub clause at all in view of the first sub-clause. We have left the clause as it is because many countries of the world have special measures for this type of waste. We have not included a clause banning importation altogether as this is a policy which is implicit in the clause as a whole which a government could pass into legislation. We have expanded the clause to include a reference to the transboundary movement of waste.

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.

Comment accompanying first draft proposal

There was a strong feeling in the workshops that environmental education was vital. This includes not only formal education by residents including environmental aspects in school syllabi, but also to the whole spectrum of South African society, ranging from corporate executives to rural peasantry.

Comment accommodating comments received on first draft proposal

This clause has been elaborated on slightly to take into account various comments. One suggestion was to replace 'consumption' with utilization of resources. We have left both for the drafters to consider. In general most were supportive of this clause and in principle in agreement with it.

Directive Principle 4 - Administrative Law

Comments accompanying first draft proposal

A constitution and/or bill of rights is only as good as the power to enforce it. To this end the group felt that rights should be enforced by all legal persons, that is natural, corporate, institutions, organizations and groups.

All people should have access to such courts and there should be no hindrance, financial or otherwise, to such access.

Concerned parties and litigants should have reasonable access to information. The duty to provide reasons for decisions affecting the environment should be mandatory.

Public participation in environmental decision making should be an enshrined principle. It was noted that a fundamental basis exists in this regard in the *audi alterem partem* doctrine. It should be adapted and utilized in the environmental cause. The EIA/IEM procedure is a step in this regard.

The constitution should enshrine a general principle that there be compulsory rehabilitation by impactors at their own expense.

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

Comment accommodating comments received on first draft proposal

Strong resistance to any softening of the *locus standi* requirement was expressed from some quarters. We have however retained it in view of its importance to developing environmental law. The original clause has been split as it was rightly pointed out that it contained very different administrative principles.

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

Comment accommodating comments received on first draft proposal

This clause has been separated from 4.1. Some argument was made that sensitive commercial information may have to be protected. We have accordingly included the word 'reasonably' to precede necessary.

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

Comment accommodating comments received on first draft proposal

We have retained this clause despite some opposition and have made it more general.

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

Comment accommodating comments received on first draft proposal

We have added a clause regarding public participation as it was pointed out that the first draft referred to its importance in the commentary but not in the draft provisions.

Note accommodating comments received on first draft proposal

A commentator pointed out that clauses 4.1 to 4.3 are of a general administrative law nature and not of a peculiar environmental nature and felt it had no place here. We feel that they are vital for the development of environmental law and have retained them to emphasize their importance from an environmental point of view. Should they appear in the overall Bill of Rights, well and good.

Directive Principle 5 - Administration

Comment accompanying first draft proposal

There was a general recognition of a need to improve environmental administration at two levels, namely in government and in the private sector. As regards the government sector there was a strong feeling that a new constitution should include the establishment of a strong, independent environmental protection agency which would enjoy greater status than that enjoyed by ordinary government departments.

It was also acknowledged that there is a general need for a body to channel environmental concerns and which would take up issues and act as a watchdog in this regard. Different options were mooted, for example an ombudsman and environmental court and an environmental tribunal. There was also great emphasis on public participation in decisions affecting the environment.

In general it was felt that there was an urgent need for an effective, accountable, independent and powerful institutional body which would monitor and act as an environmental guardian.

- 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.*

Comment accommodating comments received on first draft proposal

There was some opposition to such an agency but we have retained it in view of the majority of NGO's which felt there is such a need. The clause has been re-cast in simpler terms and to include some of the comments made.

- [5.2 Deleted from first draft proposal]

Comment accommodating comments received on first draft proposal

We have deleted this clause as it is felt that it is subsumed under clause 4 above and because legal representation and funding will be dealt with in the Bill of Rights generally.

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

Comment accommodating comments received on first draft proposal

This is a new clause which we have included as it was suggested that the first draft did not emphasize EIAs/IEM sufficiently.

CONCLUSION

The above clauses can be modified and adapted to meet the requirements and character of a new constitution.