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G Budlender

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THE ENVIRONMENT AND THE PEOPLE: RESOLVING CONFLICTS OVER LIMITED RESOURCES

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Environment - Budlender paper Environmental Tribunal

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Over the past few years, the environment has become a 'motherhood and apple pie' issue in South Africa - no-one can oppose it. Conferences are held, laws are passed, officials are employed, voluntary organisations agitate, and the level of awareness seems to rise. Yet in the midst of this, both our own observations and the experts tell us that the quality of the environment is deteriorating.

The reason for this is not difficult to find. Decisions on environmental issues involve making choices between competing policy preferences (is it preferable to develop a mine and thereby generate employment and wealth, or to protect a valuable environmental resource?), and choices about competing claims to limited resources (is this land to be occupied or to be set aside for conservation purposes?).

The purpose of this paper is to raise some questions about how these choices can and should be made. I should say at the outset what will no doubt become very obvious during the course of this presentation: I have no claim to any expertise whatsoever on environmental questions. What I have to say will be based on my experience in related fields, and particularly in land struggles in both urban and rural areas.

We have to recognise at the outset that the environmental question can not be divorced from the land question. This gives it a potentially explosive character. The history of our country has at its core a history of dispossession by conquest, by trickery, by laws and by forced removal. Large areas of our country are contested terrain. The demand for land is at the heart of the struggle for freedom in South Africa. Any environmental policy or action which does not fully take account of this, is certain to fail.

A second fundamental premise must surely be the recognition that, as was stated in the World Conservation Strategy (WCS II) in 1988,

> 'Conservation has always been integral to the survival of indigenous people. Without renewable resources to harvest, they lose both livelihood and way of life. Traditional cultures have developed management systems to assure sustainable yields of renewable resources from their environment.' [1]

To say this is not to adopt romantic notions about the nature of rural life. The small amount of land available to Africans has placed great pressure on limited pieces of land, and the impact of poverty and population increases has undoubtedly taken its toll. The point is not that the state, having intervened massively in the past, should now adopt a hands-off position. Appropriate state intervention for development is essential. The point is simply that where they have been permitted to do so, the people on the ground have over generations developed systems of managing and sustaining limited resources. Any future planning must be developed from this base of practical expertise.

A third factor is one of the ironies of our history: because substantial parts of the country, taken by the means I have listed above, have been degraded by urban and industrial development, it is often the small areas still occupied by black South Africans which become the focus of conservation efforts. AFRA have argued this as follows:

> 'It is therefore the 'African' areas of South Africa - the homelands - which have been the main focus of conservation. These remote, rural areas offer the greatest chance of success for nature conservation because the natural environment has not been as drastically transformed as in the urban-industrial regions. Furthermore, the people in the homelands are the poorest, the least-educated and the most politically unrepresented class in South African society. Consequently the political and financial costs of conservation projects in the homelands are less than they would be in the white-dominated industrial and agricultural regions.'[2]

For myself, I would want to qualify the first part of that statement. Large areas of the 'homelands' have been transformed into wastelands by the processes of apartheid. However, it is true that many of the major conservation disputes have been about those few pieces of land still in the hands of the dispossessed: think, for example, of the Pilanesberg, Richtersveld and Maputaland controversies.

This is more than a debating point. It is relevant to people's perceptions of the nature of environmental efforts. As long as there is substantial land hunger, any environmental and conservation efforts which may impinge on people's relationship with their land are likely to be met with the greatest reserve and suspicion.

At the heart of it all, as I have suggested above, are inevitable policy conflicts and conflicts over scarce resources. The critical question, I think, is how and by whom these conflicts are to be resolved.

The traditional model is a bureaucratic one: decisions are made by a government Department of the Environment, acting more or less in concert with other government departments. A statute and regulations determine broad powers and the parameters of policy, and the decisions are made by the executive.

The fundamental problems with this model are access and accountability. The processes classically take place behind closed doors. The people affected may or may not be 'consulted', with more or less effectiveness - but this is usually the end of their involvement. What they have told one official is relayed to another official, all the way along a chain of command until it reaches the decision-maker. By then it has been interpreted and re-interpreted by any number of people, each of whom may have put his or her own 'spin' on the report. By the time they reach the decision-maker, the views of those affected are likely to have been greatly diluted, and may also have been distorted.

The people affected can try to exercise more direct influence by lobbying. They can run press campaigns, interview officials and ministers, and bring pressure to bear on relevant political actors. The problem with this process is that it is often very difficult to find out who is actually going to make the decision, and what factors will carry weight.

I found my own experience with the related issue of the settlement at Weiler's Farm very revealing in this regard. Weiler's Farm was an informal settlement of about 10 000 people, on peri-urban land owned by the Transvaal Provincial Administration. A decision was about to be made as to whether the land would be developed as a permanent residential area. The community was fairly well organised, and was determined to remain on the land. We had long meetings to discuss what steps should be taken to press the claims of the Community for the declaration of a permanent area. A fundamental problem was that we truly did not know who was the real decision-maker. The statutory power to declare a development area in terms of the Black Communities Development Act vested in the Minister of Constitutional Development and Planning.[3] We doubted whether he would really make the decision. The Transvaal Provincial Administration was a more likely actor - but was it the Administrator himself, one of the two relevant Members of the Executive Committee (and if so, which one?), or senior officials (and if so, which ones?). The Joint Management Centre was clearly a very active player - but how did one reach this invisible body, and where was the locus of power within it? And what about the local (white) Members of Parliament? Each of these players, of course, had a different constituency and different concerns, so knowing who was the decision-maker was relevant not only to whom we tried to reach, but also to how we did it.

In the end, we did not succeed in identifying the real target for our efforts, which were very dispersed as a result. In the end, an unfavourable decision was made. To this day, we do not know where it was made.

In the environmental field, the potential decision-makers are likely to be even more dispersed. Unless one can identify where the decision will be made, and what factors will be most relevant, attempts to influence the decision are very difficult indeed.

It is possible to try to judicialise the bureaucratic process by creating space for judicial intervention, thereby giving some access through the court system. There is a variety of techniques for achieving this.

For example, the law can require the Minister to give reasons for a decision, as has been suggested by the Law Commission in its Working Paper on the courts' powers of review of administrative acts.[4] That makes future decisions more predictable, and creates some space for the possibility of judicial review. One can go further and provide, as the Working Paper also recommends, that a court may review an administrative decision on the grounds that the decision was unfair or unreasonable. One can follow the route followed in India and now in Namibia, by providing in the constitution that the state shall follow certain policies with regard to the environment. Although these principles are not positively justiciable, they give the court criteria which it can use for judging the constitutionality of legislation, for interpreting legislation, and testing the validity of administrative acts.[5] The strongest variant of this model is the creation of a specialised Environmental Court within the regular court hierarchy. This has been suggested by the Supreme Court of India, along with a proposal that the specialist court should consist of a professional judge and two scientific experts.[6]

This route, too, has its problems. For a start, our courts generally deal with disputes of right rather than disputes of interest, to borrow a distinction from the field of industrial relations. If you put them in a situation where there are competing legal rights, which raise a dispute about the relative social value of those rights, they are likely to find themselves in difficulty. There are often multiple parties, and multiple competing interests - probably nowhere more than in the environmental field. As Long Fuller has written, lawyers do not engage very successfully in what he calls 'polycentric' tasks.[7]

Another way of expressing this is to say that the courts are uncomfortable when they have to deal with policy issues. It must immediately be said that the courts deal with policy issues far more frequently than they are usually willing to acknowledge.[8] However, the courts are uncomfortable in that role when the policy issue raises issues of substantial public interest. In addition, they are not well equipped to deal with those issues, particularly in a changing society. Further, there must be real questions as to whether the courts are a suitable institution to decide what are really disputes about conflicting priorities in the use of the society's resources. Of course they will from time to time become involved in these sorts of issues, and have to do the best they can. But to place them at centre stage does seem inappropriate.

There are other problems, too. Court procedures are so technical that parties cannot effectively represent themselves, and access to the courts is expensive. The courts may not themselves have the technical expertise to deal with environmental issues,[9] and as a result the ability of the respective lawyers in presenting their clients' cases may become a totally dominant factor in determining how the case is decided. These are not in themselves

fundamental problems, and there are ways of dealing with them. A more fundamental problem is that the nature of the disputes is often likely to be such that they cannot be resolved on a once-and-for-all basis. They are likely to be determined in stages - whether a particular development is appropriate may depend on whether the developer takes particular steps, and does so effectively. In other words, some ongoing judicial supervision may be necessary. The courts in the USA have sometimes undertaken this role, particularly in desegregation cases, and the Supreme Court of India has also done so. It is not a role with which our courts are familiar.

A third option is the creation of a specialised **tribunal** to deal with environmental disputes. The membership of the tribunal could include people with legal and scientific training, and also people with some form of political accountability. It could be less white-dominated than the courts. It could have open public hearings, and relatively informal procedures which would open up access to lay people. [10] It would have to operate within statutorily determined policy guidelines, which would set out the various factors which ought to be taken into account. The constitution could provide overarching policy directives which would guide the tribunal.

Once this had been done, one could introduce judicial protection against arbitrariness. The proceedings of the tribunal would be subject to judicial review like those of other administrative bodies. Administrative law reforms such as those advocated by the Law Commission, for example, would further open up the process and promote open decision-making. People affected by decisions would know whom they had to approach to influence the decision, and what the criteria were.

CONCLUSION

The thrust of this paper is that environmental disputes can have a major effect on people's lives. The questions which these disputes raise are highly political - not in the party-political sense, but in the more fundamental sense that they deal with the allocation of the society's resources - in Laswell's famous phrase, they are about who gets what, when and how.

That being the case, it is essential that the decision-making process should be sensitive to the history and needs of the people affected, open and accessible. I have suggested that the usual bureaucratic model, which greater or lesser judicial supervision, is not really suitable. An Environmental Tribunal is one way of dealing with conflicts over how the society's resources are to be used, protected and improved.

Geoff Budlender
17 May 1990

FOOTNOTES

1. **Quoted in Association for Rural Advancement (AFRA) Maputaland: Conservation and Removals (1990) p 6.**

2. **AFRA op cit p 36.**

3. **Sec 33, Act 4 of 1984.**

4. South African Law Commission Working Paper 15: Investigation into the Courts' Powers of Review of Administrative Acts (1986).

5. For a recent example of the latter see Kinkri Devi v State of Himachal Pradesh AIR 1988 Himachal Pradesh 4 (summarised in Commonwealth Law Bulletin Vol 15 no 1 at pp 103-4. In that case, the Supreme Court of India stated that it would have no alternative but to intervene by issuing orders for the closure of mines the operation of which proved to be hazardous, and for the total prohibition of the granting or renewal of mining leases until the Government evolved a long-term plan based on scientific study, to regulate the exploitation of minerals without detriment to the environment, the ecology, the natural wealth and resources and the local population.

6. Mehta, MC and Another v Union of India and others Supreme Court of India,17 February 1986 (Writ Petition [Civil] No 12739 of 1985), reported in Commonwealth Law Bulletin Vol 13 no 2 pp 449-451.

7. See Dennis Davis in Civil Rights League A South African Bill of Rights (1988) p 16.

8. On this subject see M M Corbett 'Aspects of the Role of Policy in the Evolution of our Common Law' South African Law Journal Vol 104 part 1 p 52.

9. A meeting in 1986 of the Chief Justices and Judges of the English-Speaking African countries, held in Delhi, noted that environmental issues require on the part of Judges greater information and greater understanding of technical aspects of the environment which was not an easy task. A suggested remedy was strategies for the selection of information such as the appointment of Commissions of Experts and involving 'non-political social action groups'. See Commonwealth Law Bulletin Vol 13 no 1 p 282-3.

10. In saying this, I have not lost sight of the tendency of lawyers to make supposedly informal procedures highly technical. The Industrial Court was intended to be an administrative tribunal which was less formal than the courts, and to open up access to lay people. However, it was not long before the lawyers (with the able assistance of members of the Court) had made the procedures much more technical than those followed in the courts. Perhaps those drafting a statute creating an environmental tribunal could learn from this experience.

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